University of Strathclyde

School of Law

I, Victim: The creation of the 'victim' in Scots Criminal Law

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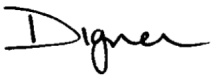
This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the aware of a degree.

Signed: 

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Abstract

This thesis sets out to answer the question: what is the victim as a legal construct in Scots law? This thesis demonstrates that the victim as a legal concept is protean and has changed over time, shaped and reshaped by external factors, to meet the needs of the legal system and times into which it is introduced. This thesis proposes that a new concept of the victim has been created in Scots law and will examine the socio-political factors which gave rise to this new legal phenomenon. It will then examine how international legal mechanisms enabled this new concept of the victim to permeate the centre of the Scottish criminal justice system. Finally, it will propose how this new legal construct of the victim might be understood as compatible with the framework of the current legal system, and without having to abandon the fundamental pillars of that system or creating a paradox within the system itself.

Through exploring its central question, this thesis addresses three key themes: First, the relationship between the victim and the state, and specifically the impact the changing relationship between these two parties has on our understanding of the victim and the criminal justice system. Second, the impact of victim creation on our criminal justice discourse, specifically how differing attitudes of the legal function of the victim, can lead to incoherent discourse and conceptual paradox within the system itself. Thirdly, the role of a rights-based model in conceptualising the victim in Scots law, specifically the rights of recognition, access and participation and how this might offer the solution to a unifying construct of the victim.

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Most importantly, I would like to thank my wife, Lori. The path of the law twists and turns, and at times has left me completely lost but, that this research led me directly to you proves to me that it is shaped by the hand of providence.

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Introduction: The elusive constant

'Victim': From the Latin victima, meaning 'a living creature sacrificed to a higher power'.[1]

This research journey began at the end of a long day in Court working as a public prosecutor: I was chastised by the presiding Sheriff during proceedings for making reference to the 'victim' in my submissions. The chastisement was quickly forgotten, but a question lingered, and then consumed me: If the victim is not what I thought it was, what is it? What is the victim in Scots criminal law? This should not be a difficult question for an experienced Principal Procurator Fiscal Depute with over a decade's experience within the Scottish criminal justice system. I have, after all, had the terrible privilege of citing *complainers*, examining in chief *harmed parties*, cross-examining *the innocent*, re-examining *survivors*, leading medical evidence of *injured parties,* and I have sat down and explained difficult truths to the *tertiary*; those too often neglected *tangential victims*. Yet a coherent legal construction of what the 'victim' is in Scots law eluded me: It was both a criminal justice reality and a legal fiction. The natural place for me as a practitioner to look first for guidance was in the jurisprudence of the High Court; what construction did the Court give 'the victim' in Scots criminal law?

In the long history of the High Court of Justiciary the Court has opined and adjudicated at length on almost every matter concerning the criminal law in Scotland and its composition, and yet for the centuries of judgements little ink has been devoted to the function and status in law of the victim. In the 2012 appeal case of *Hogan v. HM Advocate* (a fairly routine appeal case and rather banal to most except perhaps Mr. Hogan) the High Court breaks this jurisprudential silence. The Court was asked to adjudicate upon two grounds of appeal: The misapplication of the *Moorov Doctrine*[2] and a misdirection by the presiding Sheriff on the accused's failure to give evidence, imperilling the presumption of innocence.[3] In the final paragraph the Court offers an afterword, a rare *obiter dictum* on the Sheriff's reference to "victims":

> *"The use of "victims" was, of course, inappropriate"*[4].

[1] Oxford English Dictionary, Online, available here: http://www.oed.com
[2] see generally *Moorov v. HM Advocate* 1930 JC 68
[3] [2012] HCJAC 12, pp17-33
[4] *ibid*, pp34

Neither ground of appeal related to the victim either directly or indirectly, yet so threatening did the Court deem even the utterance of the term to the presumption of innocence, it felt compelled to make it clear the term was taboo. Scottish criminal law has developed to a point at which even the mere utterance of the word 'victim' within criminal proceedings invokes a *pavlovian* response of censure and an immediate retreat into a legally conservative safe space, invoking as justification the great traditions of the Scottish criminal law. A line (it seemed) had been drawn.

A year later in the case of *Wishart v. HM Advocate*[5], the Court was asked to adjudicate upon an appeal, the sole ground of which – citing *Hogan* as its principle and only authority – was that the Sheriff in using the term victim in his direction to the jury, betrayed a prejudice so incompatible with the best traditions of Scots criminal law that he perpetrated a miscarriage of justice.

The High Court, although refusing the appeal on the grounds that it did not amount to a miscarriage of justice decided to further elaborate on their opinion put forward in *Hogan*:

"[W]e would remark that while we are conscious of a seemingly increasing, indiscriminate and often inappropriate use of the term "victim" in the media and elsewhere, the word "victim" nonetheless still unquestionably conveys that the person to whom it is applied has, as a matter of fact, suffered both the injury, insult or disadvantage relevant to the particular context and that such was caused by the acting's of the person or persons responsible in question….in the context of criminal proceedings it will generally be the case that until guilt is admitted or proved it will not appropriate to refer to a complainer as being a "victim"."[6]

The Court makes clear in *Wishart* that the premature use of the term victim in criminal law is problematic as it creates a presumption which challenges the fundamental purpose of the trial process itself: First, to establish if a crime has been committed and secondly, whether it was the accused who committed said crime.[7] The Court does not, however, confine itself to the parameters of the facts of the appeal nor its use in Court, and

[5] [2013] HCJAC 168
[6] ibid, pp7
[7] ibid

makes a general point about the modern usage of the term 'victim' in the wider criminal justice community. The Court in *Wishart* refers to the use of the term victim in media and "*elsewhere*" (by which I would suggest it is taking subtle aim at the use of the term in criminal justice discourse) as "*increasing*", "*indiscriminate*" and "*often inappropriate*".[8] The Court here appears to be implying that there was emerging a wider socio-political construct of victim, that its increasing presence with in the criminal legal process is posing a threat to the fundamental traditions of the Scottish criminal law. Thus, we see beginning to emerge the potential for an existential crisis within Scots criminal law in which this socio-political construct of victim collides with fundamental legal principles. The Court is drawing a distinction (which it clearly suggests ought to exist) between the victim as a reality within criminal justice discourse (what victims need, the victim's experience etc.,) and as a legal fiction within the legal process, namely that the victim whilst existing cannot actually exist until after conviction, lest the presumption of innocence be imperilled.

If the Court's recent jurisprudence on uttering the term victim in criminal procedure displays an attitude of disapproval, its jurisprudence upon the idea of a victim participating in procedure can arguably be described, on occasion, as openly hostile. In *HM Advocate v. McKenzie*[9], the Court was asked to adjudicate upon the Sheriff's decision to seek the views of the victim in order to better determine sentence. *McKenzie* was a case in which a male plead guilty to the attempted rape and attempted murder of a woman in her home. Whilst the accused plead guilty at a trial diet, Counsel for the accused offered the following mitigation: The accused had no previous record of offending, no history of violence, no history of disorder or any history of disagreement of any sort with the victim.[10] The accused could offer no explanation for the crime, and through the relevant social work report offered only that he had had some kind of '*out of body experience*'.[11] The Judge sought a specialist psychiatric report which reported the accused as suffering from no mental health difficulties.[12] The judge thereafter still felt he could not properly sentence without knowing the views of the victim, suggesting that "*it would be of great assistance to me if I were to be told the victims' views in relation to the possible exercise of a degree of leniency towards the offender*".[13]

[8] ibid
[9] 1990 JC 62
[10] ibid, p64
[11] ibid, p65
[12] ibid
[13] ibid, p66

The Crown was ordered by the Sheriff to facilitate the views of the victim, though the Sheriff seems somewhat unsure of this procedure himself stating: "*I think the Crown must undertake this on behalf of the Court…I appreciate this is highly unusual*".[14] The Court was clear, however, that the Crown was to seek the views of the victim but not compel them: "*[I]t is entirely up to the lady herself whether she chooses to assist*".[15] The Crown raised an appeal against this course of action. The Court upheld the Crown's appeal and made four fundamental points regarding a victims' procedural input:

1. That the Sheriff must make decisions of sentencing based on all the information before him or her, but that "*the victims' views or feelings were, in many cases, of no significance whatever*".[16]
2. That even if pertinent, the victims' views could not be relied upon as it is "*highly doubtful whether the victim would be able…to bring a balanced judgement to bear*".[17]
3. That in refusing the victim participation at this stage the Court is sparing the victim the "*burden*" of potential "*vilification*" by the accused or the community should their opinion be repeated.[18]
4. That should an opinion be given, it would be open to challenge and therefore cross-examination, and the victim must be spared this.
5. Confirming the argument of the Solicitor General, the Court held that in being asked her views on sentencing, the victim would be required to undertake a task that fell out with her "*expertise*".[19]

The rationale of the appeal Court in *McKenzie* was not new thinking but rooted in the traditions of Scots law, an Enlightenment paternalism of the 19th century, namely: a system of criminal justice led by the state and centred around the relationship between the state and the accused. The victim is conceived as a vulnerable non-participant (other than by providing evidence) who requires to be shielded from the process. The focus for the process is the accused, and the victim should be protected from participating in any fashion for their own

[14] ibid, p65
[15] ibid
[16] ibid, p62
[17] ibid
[18] ibid, p67
[19] ibid, p70

(and the greater public) good, and to consider otherwise would be "*to put upon victims a burden which hitherto society, for very good reasons, has not placed upon them.*"[20]

In the subsequent decades since McKenzie, the Court's approach to the victim has been tempered by the jurisprudence, Regulations and Directives of the EU and the international and trans-national ideal of the victim. [21] In the more recent decision of *RR v. HM Advocate*[22], the Court adopts an altogether different (timelier) approach from that taken in *McKenzie*. The appeal was to the *Nobile Officium* of the Court of Session by a victim who the Crown had failed to notify of the existence of an application under s275 of the Criminal Procedure (Scotland) Act 1995, of the defence intention to lead evidence of prior sexual history at trial.[23] The victim successfully argued that her right to participation (enshrined domestically in s1(3)(d) of the Victims and Witnesses Act 2014) had been infringed by the Crown's failure to notify her of the application and to obtain her views upon it.[24] The Court of Session ruled that the Crown had a duty when such an application is made, to seek the view of the victim and place them before the Court (even if the Crown disagrees with the victims position), though the Court chose to limit the scope of the pursuers argument from participation rights to *access rights*.[25]

Thus, the jurisprudence demonstrates a conflict and what I would suggest is an existential crisis at the heart of our criminal law today. *Hogan* and *Wishart* are re-statements of what is often considered a traditional legal approach towards the victim[26]: Both keen to empathise with the plight of the victim but ultimately advocating for a passive role of the victim in the process. *RR*, by contrast, not only recognises the victim but creates a limited participatory role for the victim within Scots criminal law. This role has the potential to

[20] ibid, p67
[21] See generally chapter 3
[22] 2021 HCJAC 21
[23] Section 275 of the Criminal Procedure (Scotland) Act 1995 is the provision which allows parties in a criminal trial to apply to the Court for an exemption to the rules prohibiting the leading sexual history or behaviours (other than those that make up the subject matter of the charge) of the complainer contained in section 274 of the said act.
[24] ibid at 22, para 14
[25] ibid at 22, para 52
[26] The traditional legal approach to the victim is that the victim is 'just another witness'. They cannot, as a bespoke entity, exist within the system until such time as conviction takes place otherwise the fundamental principle of Scottish justice, innocent until proven guilty, is entirely undermined. The traditional approach to the system is that the major participants in criminal proceedings are the state and the accused. The enlightenment ideals were focussed on the fairness of the process towards the accused when coming up against the reach and resources of the state.

challenge fundamental principles such as the *presumption of innocence* and converts the issue to mere access rather than fully conceptualised participation. A jurisprudential analysis of the victim lays bare the conflict at the centre of our criminal justice discourse, highlights the challenges of how we discuss the victim in our criminal justice system and reinforces the need to answer the same question that has plagued me: What is the victim in Scots criminal law?

Methodology

This thesis examines the legal construct of victim through various lenses: It has already begun by adopting one such lens to demonstrate that a jurisprudential examination of the issue of legally defining the victim, far from providing clear definition, raises more questions and not the answer to what the victim *is* in Scots law. By introducing the victim through a jurisprudential analysis, already we see emerging what the Scottish criminal legal system suggests the victim 'ought' to be, or, what the system needs the victim to be in order to maintain certain fundamental principles of Scots law, but takes us few steps closer to ascertaining what the victim *is* as a coherent legal construct.

In addition to highlighting the central question of this thesis, it also gives rise to identifying three key sub-themes that are addressed throughout each stage of this thesis: the relationship between the victim and the state, and the impact this evolving relationship has on forming the legal construct of the victim. The impact victim creation has on the criminal justice discourse in Scots criminal law, and how that discourse begins to impact and frame criminal justice reform. The necessity of a rights-based model to help shape, what is otherwise a protean concept that attracts a strong emotional response.

In the first chapter this thesis adopts a historical lens, a historical analysis of the legal construct of the victim, orientating the legal concept in its Scottish legal historical context. This thesis, whilst adopting a comparative approach with the past, does not seek to transplant the historical concept of the victim from the past to the present, or suggest a return to an earlier concept, rather it uses the historical lens to examine how the function of the victim has not been static, the legal construct of the victim has the ability to change and evolve over time, to meet changing legal and societal environments. The historical analysis examines the primary and secondary historical sources for reference to the victim as a legal concept and its

function within the Scottish legal system and also orientates these functions of the victim within the relevant legal context of their times.

In the second chapter this thesis adopts a socio-political analysis of the victim, examining the victims' creation as a social concept and the pursuit of victim' rights as a socio-political movement. Through examination of the policy documents, primary legislation and extensive academic literature on the victim I demonstrate how a new concept of the victim was created, and whilst articulated as a harmed party within the criminal legal system with a plethora of wants and needs, absent a rights-based infrastructure, this concept of the victim could not yet enter the Scottish criminal justice system in any coherent or meaningful manner.

In the third chapter, this thesis examines the concept of the victim as an international and trans-national legal construct, and analyses how the international mechanisms that formed around this victim provided a conduit through which a new concept of the victim could overcome the enlightenment paradigm of criminal justice – state and accused person – and not only enter our domestic criminal legal system in Scotland, but become the "*symbolic heart of modern legality*" within that system.[27] This chapter examines the international treaties, jurisprudence of international Courts, significant policy documents and academic literature to propose that it was through this international framework that a rights-based model of the victim was articulated and through the international legal mechanism the victim could percolate into the domestic legal system in Scotland. This analysis, whilst adopting elements of comparative analysis, does not go so far as to adopt a comparative legal approach. This thesis proposes that the concept of the victim created in the domestic legal system, whilst rights based and assisted into being by the international legal mechanisms, rejects that the Scottish construct of victim is an international transplant; rather it proposes that it is a unique legal construct to Scots criminal law.

In chapter four this thesis examines how a new concept of the victim in Scots criminal law, born out of the victims' movement, made possible by the historical fluidity of the function of the victim in Scots criminal law and integrated through the international legal

[27] Sarat, Austin '*Vengeance, Victims and the Identities of Law*', Austin, Journal of Social and Legal Studies, Vol. 6, 1997, 163, p164

mechanisms was capable of forming a new concept within the Scottish criminal legal system. Through examination of the primary sources, legislation and public policy documentation this chapter demonstrates how the victim inhabits the centre space within the criminal justice system and the challenges that this creation poses to the traditions of Scots criminal law. In this thesis I argue that whilst public advocacy, policy-making and even legislating regarding the victim has been exponential over the past two decades, it lacks coherence, legal certainty and clarity. I argue that the theoretical dissonance over the victim has created a conceptual lacuna in the centre of the criminal justice theory and practice, which has resulted in the victim both existing and not existing.

Finally in chapter five I propose how we might overcome the theoretical dissonance surrounding the victim in Scots law, and put forward a normative analysis about what the victim *is* in Scots law: triangulating all the lenses used in chapters one to four, I put forward a new construct of the victim in Scots law and argue in favour of a rights based model: a recognised legal party with access and participatory rights at the centre of the Scottish criminal legal system. Furthermore, this thesis argues that whilst this new construct of the victim may very well challenge some of the foundations of Scots criminal law, it may even pose a challenge to some of our closely held criminal justice beliefs, these larger issues cannot be resolved by the jurisprudential approach deployed thus far of platitudes of empathy and a retreat to the safe ground of Scottish legal tradition, otherwise "*it neither reflects the state of criminal justice nor is able to engage with a contemporary sense of crisis*".[28] This thesis begins the difficult task of recognising the victim and their rights. This analysis acknowledges the challenge this new concept of the victim poses to the enlightenment paradigm of adversarial justice (state vs. accused) but puts forward a proposal as to how this new concept of the victim may be integrated and recognised within the Scottish criminal system and its traditions. Finally, this thesis makes recommendations for further research that could be conducted to empirically prove that a new concept of the victim has been created in Scots criminal law, and what the victim *is* within the legal system today.

[28] Farmer, Lindsay, '*Criminal Law, Tradition and Legal Order*', 1997, Cambridge University Press, Chapter 1, p7

Chapter 1: A Historical Perspective

1.1 "The Golden Age of the Victim"[29]

In tracing the arc of the victim in Scots law it would be quite simple to begin in the late 18th Century with the Baron Hume and assume that since this source is so often the bedrock for Scottish legal tradition that one need not go any further back into the dark barbarism of the Scottish legal past. To begin with Hume is, however, to begin at the present and assume that the legal function of the victim has never changed. However, in Scots criminal law the 'dark ages', far from being an obscure and unknowable legal past, is "*embarrassingly rich*" in sources.[30] It is here, before the Scottish Enlightenment, before the Scottish renaissance and before the rise of the strict infrastructure of our modern legal system, that we find a very different legal concept of victim.

Medieval criminal law in Scotland was a confluence of old Scots and Norman laws, assizes of Kings and common law practice and procedure adopted from England, such that it would be "*doubtful "whether a man who had crossed the Tweed felt that he had passed the land of one law to the land of another.*"[31] Like the range of its sources, the scope of the criminal law was wide and like the Romans before, the lines between delictual harms and criminal harms were ill defined.[32] The *Regiam Majestatem*[33] - a compilation and incomplete manuscript of Scot-Norman laws from the mid 13th Century whose authorship and origin "*lie in primeval doubt [as]…[t]he cobwebs have closed over"* – provides an insight (albeit one that should be traversed with caution) into the medieval workings of Scots criminal law.[34] Jurisdiction within medieval Scotland had the beginnings of shape, and although the extent to which it was rigidly complied with is less obvious, it is nevertheless interesting for the light it sheds on the medieval conception of legal victim.

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[29] Schaffer, Stephen, '*The Victim and His Criminal: A Study in Functional Responsibility*', New York, Random House, 1968, p7
[30] Cooper of Culross, LJG, 'Criminal Law', in '*An Introduction to Scottish Legal History*', Edinburgh, The Stair Society, Robert Cunningham & Sons Ltd., 1958, p13
[31] Smith, Irvine, and MacDonald, Ian, 'Criminal Law', in '*An Introduction to Scottish Legal History*', Edinburgh, The Stair Society, Robert Cunningham & Sons Ltd., 1958, p280
[32] Walker, David, '*A Legal History of Scotland: Volume I*', Edinburgh, W. Green & Son Ltd, 1988, p305
[33] Skene, Sir John, '*Regiam Majestatum and Quoniam Attachiamenta*', translated by Rt. Hon. Lord Cooper, Edinburgh, The Stair Society, J. Skinner & Co., Ltd., 1947
[34] Neilson, Geo. '*The Study of Early Law*', 3 Juridical Rev. 12, 1891, p17

According to the *Regiam* there are two distinct jurisdictions within medieval Scots criminal law: That of the Crown and Justiciar (judicial officer) and that of the Sheriffs of Counties and Burghs. The *Regiam* further indicates that to the Crown's jurisdiction, in the tradition of Rome, is allocated the crimes of *laesae Majestatis* (treason and sedition against the King), and these crimes should be dealt with by the King's Court or Parliament. Thereafter the *Regiam* also identifies other Pleas of the Crown or crimes which should pertain to be adjudicated by the King's Court: Hiding a treasure trove, breach of the king's peace, homicide, robbery, rape, wilful fire-raising, murder and falsehoods.[35] An exception is made for theft and homicide in the event there is a private accuser. In such a case the Sheriff's Court has jurisdiction as the prosecutor is the *accusor*.[36] Therefore, significant within the medieval construct of criminal jurisdiction is the victim and their decision to raise issue (adopting prosecutorial responsibility), as this could be highly determinative of the jurisdiction. It was, however, competent for the Crown to seize jurisdiction should a private prosecution *fail* to proceed.[37] This state of affairs was addressed by the modern Court in its discussion of the role of the victim. As LJ General Cooper highlights, this jurisdictional infrastructure was largely an "*on paper*" exercise; the reality of medieval Scotland was that it was likely followed more in the exception than the rule.[38] However when considering the *intended* place of the victim within Scottish jurisprudence, it stands as a valuable insight that the victim was historically given locus in determining jurisdiction.

Furthermore, primarily due to the absence of any centralised prosecutorial infrastructure in the early medieval period: To the accuser went the prosecution. Victims of crime within the medieval period maintained, to a large extent, control of their own story and conflict by retaining the role of accuser.

It is important to note, however, that during the medieval period the methods of trial to which an accused could be subjected were numerous, with varying degrees of *actual* involvement of the victim: Compurgation (purge by oath), Ordeal (the infamous dunking of the witch), Trial by Combat and azzize (a process resembling the jury trial, a judgement of peers).[39] Furthermore should the accuser lose their trial, whether that was through not being

[35] ibid at 33, Book I, Ch I, pp59-60
[36] ibid
[37] ibid at 33, Book IV, Ch 28, p272
[38] ibid at 30, p13
[39] ibid at 32, pp283-294

believed or – in the case of trial by combat – through physical loss, they would fall to the King's mercy and benevolence; they really did own 'their' trial[40] The *Regiam* would even seem to indicate that there existed a '*boy that cried wolf provision*': An accuser found guilty of perjury would be barred from being an accuser in the future as they were "*unworthy of credit*".[41] Therefore, though the majority of the criminal prosecutions were accuser driven this could prove calamitous for them in their capacity as accuser.

Central to the early medieval concept of criminal law was the idea that Schaffer refers to as the '*ancient institution of victim restoration*'.[42] The medieval form of restoration could be draconian (such as the loss of the convict's life, usually by hanging), or it could be pecuniary. The *Regiam* for example provides the appropriate recompense for various forms of physical harm: "*By the law of Scotland, for the life of a man 180 cows. For a foot, one mark. For a tooth 12 pence.*"[43] Often however, in practice it was to a more biblical restoration and rebalancing of the power dynamic within their community that the average victim would turn. It was to the barbarism of blood vengeance, 'an eye for an eye', that the medieval victim would most often turn. Schaffer argues that "*blood-revenge was aimed at the restoration of the balance of power*"[44], and with the rise of commodities, the pound of flesh was replaced with a pound of coinage. It is this level of accuser-autonomy in deciding **if** the case was pursued, and the potential for a restorative outcome, that leads Schaffer to argue that the early medieval period, prior to the rise of the state, was the victims' "*golden age*".[45] It is an alluring premise, however given the pitfalls of being a medieval accuser, in addition to the likelihood that the infrastructure would not have been accessible to the average victim, one is more inclined to conclude that the medieval period was in reality, more accurately a gelded than gilded era for the victim. Importantly for present purposes, what can be observed from the early medieval period of Scots criminal law is a vastly different conceptual role for the Scottish victim: An entity that is as more than a mere mechanism, but rather is an active participant in a complex and dangerous system, and someone worthy of legal thought, recognition, legislation and restoration.

[40] ibid at 32, p281
[41] ibid at 33, Book IV, Ch 29, p273
[42] ibid at 29, p8
[43] ibid at 33, Book IV, Chapter 40
[44] ibid at 29, pp10-11
[45] ibid at 29, p7

What emerges from this period is a primitive version of the two-track approach to restitution in criminal harms: One public and the other private. As shall be seen, it was an overuse and prevalence of private vengeance that dominated the later medieval criminal law and forced the state to abandon its laissez-fair approach to criminal justice in favour of a more interventionist approach, in order to maintain the peace and quell blood-feud.

1.2 Forging 'The Crown'

By the late medieval period Scotland was a turbulent legal landscape, in which the void left in peacekeeping and social order by the adolescence of the monarch was heavily felt by the populace at large. Law and justice were generally a matter for private individuals, and thus gave rise to a period of lawlessness and clan justice during which matters were primarily resolved through blood-vengeance.[46] During this tumultuous period the accused would very quickly find himself (or his kin) the victim. Justice in this period was a constant back and forth of violence that strived incessantly for restoration but only really resulted in a single constant: Bloodshed. It was from this background, more as a matter of pragmatism than any legal principle or reform agenda, that a requirement for greater state intervention emerged and the role of the individual victim began to decline. Justice would become synonymous with peace and "*[t]he Crown was left more powerful than ever before because that was the price men were prepared to pay for greater peace*"; autonomy over the justice process and increased state control was the cost of 'bloodless' resolution to harm.[47]

When, in the 16th Century, the Crown finally decided to act to stem the *bloodfeud*, it was constrained by the strong prevalence of private rights and the tradition of individualism within the law, that is, the rights of both the accused *and* the victim were paramount. The state's solution was to adopt the framework already largely in place and open to both parties, namely private arbitration.[48] The state created a form of ultimatum system, whereby the Crown would give the parties an opportunity to arbitrate their own dispute – the preference was clearly still for bi-lateral negotiation – failing which the Crown would step in and appoint its own arbiters. The focus of the state, such as it was, was more courtly than court. This process of the King as "*oversman*" was eventually enshrined in statute by the Parliament

[46] ibid at 30, p37
[47] Brown, Keith, '*Bloodfeud in Scotland'*, Edinburgh, John Donald Publishers Ltd, 1986, p259
[48] ibid, p239

of Scotland when in 1579 the office of King's Advocate (now Lord Advocate) was created, establishing a legal mechanism for pursuit by the state.[49] The creation of the Lord Advocate was not the only reform the state undertook during this period to stem the violence, but certainly in terms of laying the foundations of an alternative mechanism for the pursuit of criminal wrongs - from victim-lead to state-lead - the creation of the office of Lord Advocate was of pivotal historical moment.[50] In the 16th Century, a further sense of criminal law establishment began to take hold by the revival of that "*auncient and lovable order*" the King's Justiciar. The Justiciar and their Deputes were a travelling circuit of judges tasked with hearing criminal matters and - though ultimately failing due to inefficiency, bias and regular Privy Council interference - what we begin to see by the end of the 16th century is a hint of an impending criminal legal profession.[51] The legal presence and autonomy of the victim within the criminal justice process began to wane, as the legal representatives of the state began to exert themselves.

In Scotland, by the 17th century the travelling Justiciar had been abolished in favour of the High Court of Justiciary and in place were the foundations of the modern criminal law establishment: Lord Advocate as public prosecutor, permanent Courts, and - contrary to the trend across Europe - it was common for an accused person to have defence counsel to support their cause and rights.[52] The rise of defence counsel, moved the criminal justice process further towards a bi-lateral process we are familiar with today.[53] The impact upon the victim of this emergence of a class of defence advocate was less remarkable for its direct impact – that would come later - than as a foreshadowing of what was to come: The beginning of centuries of focus on the rights of the accused and a jurisprudential eclipse of the victim.[54] The stronger the Crown's role became in prosecuting – and private prosecutions were still the norm, though public prosecutions were becoming more common - the easier it was for the profession of defence advocate to re-form the trial narrative towards the

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[49] *"[T]hat either in their own names or by the **king's advocates** upon their information raise criminal letters and summon assizes from the far parts of this realm…]",* Act of the Parliament of Scotland (APS), 1579 available here: https://www.rps.ac.uk/trans/1579/10/31

[50] Irvine Smith identifies four other heads of reform during this period which contributed: (1) Ad hoc legislation directed at particular violent districts (for example enabling Landlords of violent tenants right of action, (2) reform of the criminal Courts, (3) criminal procedure reform and (4) creation of the Justices of the Peace, see *ibid* at 31, p37-40

[51] ibid at 31, p39

[52] Wasser, Michael, '*Defence Counsel in Early Modern Scotland: A Study Based on the High Court of the Justiciary*', 26 J. Legal Hist. 183 2005, p183

[53] ibid, p188

[54] ibid, p201

accused's right to a fair trial and fair process; the accused being disadvantaged by the overwhelming power and resources of the state. The more the Crown was forged into the mechanism of prosecution and the more the victims' conflict became the Crowns, the easier to re-focus the arguments on the rights of the accused and not on the rights of the individual allegedly harmed. Both sides of a criminal conflict were slowly becoming the purview of professionals and as Nils Christie points out, the professionalisation of conflict is one of the principal forms of depriving the victim of their conflict.[55]

The relegation of the victim as equal party in favour of the two-party process of accused and state was not completed during the 16th or 17th centuries, but it had begun to aggressively take root. The state demonstrated that to keep the peace, intervention in criminal wrongs was necessary and as the state's intervention increased, the victims' role decreased, and the focus became the rights of an accused. A sense of state paternalism had emerged in the criminal law: Peacekeeping rather than punishment was the overall aim of the state during the medieval period, but the means by which it pursued this goal laid the foundations for state-lead pursuit of criminal harms: "*Private justice continued to operate for some time, but was gradually eroded…by the growing belief that justice did not deal in compromise, only in right and wrong*"[56]. The era of professional justice in Scotland had begun.

1.3 Of Professional and Structural Thieves[57]

Christie argues that the theft of conflict from the victim to the state occurs for both "*honourable* and "*dishonourable*" reasons.[58] The honourable justification being the requirement of the state to reduce conflict generally and to protect the victim. The dishonourable is the profiteering from conflict, the ability to see the value in the conflicts of others and through professionalising resolution to justify a career, and for Christie "*[l]awyers are particularly good*" at the latter.[59] Therefore, if Christie is correct, the Institutional Writers are the epitome of the professional thief – Famed practitioners, who through their works compiling and profiling Scots law, established the norms, precedents and practices that set

[55] Christie, Nils, '*Conflict as Property*', 1 The British Journal of Criminology 17, 1977, p4
[56] ibid at 47, p260
[57] ibid at 55, p3-5
[58] ibid, p3
[59] ibid, p4

the function (and justification for that function) of the victim that has survived for centuries and endures today.

The early Institutional Writers – MacKenzie and Stair – jurists very much of their time (17th century) reinforce the position of the victim established in the 16th and 17th centuries: Namely, an active participant in a dual system of criminal prosecution. Crimes, according to MacKenzie, are still divided between public crimes (*vindicata publica*) and private crimes (*vindicata privata*), most notably of the former treason and the latter what we would today recognise as delicts.[60] The emphasis, in cases of private crimes or delicts, being that the individual should seek criminal letters and raise an action, or private prosecution. The victim is still very much the active pursuer in the legal process. It is not until we arrive at Hume in late 18th - early 19th century that we begin to see the full effects of the impact of the Enlightenment thinking on the transition of the victim. In the works of Hume – himself a renowned practitioner - we find a changed criminal practice landscape, which in his works Hume infuses with an intellectual framework, cementing for centuries a specific view of the victim.

During the Scottish Enlightenment, jurists' conceptions of crime and the nature of criminal activity were heavily influenced by continental European writers such as Beccaria and Lombroso. The Enlightenment principles refocussed criminal law in Scotland from a tri-lateral process between accused, victim and state to a bi-lateral process between state and accused, in which the rights of the accused and the measured response of the state become of central importance. Beccaria – often considered the '*father of modern criminal law*' - identified three broad categories of crime: Crimes of lèse-majesté, crimes against the individual and crimes against the community.[61] In crimes of lèse-majesté (the most common being treason) the identifiable victim is the state personified – namely the relevant targeted empowered individual, whether that is the monarch or one of their representatives. In crimes against the community (such as breaching the peace) the crime is perpetrated against a *group of individuals* who make up a section of the community. The third category contains those crimes directed towards a particular individual, and in which it would be natural to give the individual victim their place (and their conflict). What one sees in Beccaria's explanation of

[60] Mackenzie, *Institutions of the Law of Scotland* (1694), Vol. II. Book IV. 263
[61] Beccaria, '*On Crimes and Punishments*' in Bellamy, Richard (Ed.) '*On Crimes and Punishments and Other Writings*', Cambridge, Cambridge University Press, 1995, First Edition, p24-25

this category of crime, however, is the individual being defined first and foremost as "*citizen*", and so the crime against the individual actually becomes a 'crime against the citizen'. This is not juristic pedantry: In clothing the individual in the guise of citizen for the purposes of crimes against the individual, Beccaria recasts crimes against the individual as de facto crimes against the state, relegating the victim merely to the object of the crime. This de-humanising of the victim by one of the age's leading writers on criminal theory is emblematic of the era's attitude towards the victim, namely a paternalistic approach in which the individual victim is taken under the protection of the state.

Kirchengast suggests that classical criminologists such as Beccaria directly contributed to the placing of conflict out-with the private sphere of the individual, stealing their conflict, by creating pathologies and attributing criminal action to social wrongs, which in turn enabled the state to justify itself as "*expressly qualified as the institution [for] combating crime*."[62] If, as Kirchengast suggests, the Scottish Enlightenment created the intellectual atmosphere for the prosecutorial power of the victim to be subsumed by the state, what acted as the conduit? If the theorists such as Beccaria provided the blueprint, who conducted the heist?

The works of the Baron Hume are considered a bedrock of Scots law, in particular he is the Institutional Writer most associated and celebrated within Scots criminal law. In his 1819 Commentaries Hume sets out comprehensively who has title to prosecute in Scots law: "*[O]ur law has confined this important privilege to two descriptions of character, the party injured by the offence, and his Majesty's Advocate, who prosecutes for the public interest*".[63] Within this chapter on title to prosecute Hume very clearly sets out that, provided interest can be demonstrated, the individual harmed (the victim) has equal right to prosecute as the public advocate, and that the powers available to the public advocate are equally available to the "*private accuser*" on cause shown.[64] It could be argued, with the dual right of prosecution still in place, that Hume does not relegate the victim from being an equal party in criminal justice, but in fact preserves this right. In the preamble to his chapter on prosecutorial title, however, Hume states of private prosecution: "*[N]ow-a-days [it is] far from being a frequent sort of process, (which is one symptom of the more vigorous and wholesome administration*

[62] Kirchenghast, Tyrone, '*The Victim in Criminal Law and Justice*', Palgrave MacMillan, 2006, p13
[63] Hume, '*Commentaries on the Law of Scotland, respecting crime*', Vol II., Book II., Edinburgh, 1819, p115
[64] ibid, p115-134

of the laws in our times)"[65]. Hume is associating the private prosecution with the past, as archaic, and identifying the public prosecution as best practice in a society which favours legal order. Hume treats the private prosecution – and inherently I suggest within that the participation rights of the victim – as belonging to a quaint antiquity, and with a 'tip of the hat' sends it back to obscurity before discussing the state's right to prosecute.

In fact, Hume's hostility towards the active participation of victims within the criminal justice process may have begun to manifest in his earliest works. In his 1797 *Commentaries*, Hume introduces two fundamental arguments for the exclusion of the victim from participation: First, that the prosecution is rightly the burden of the state and second, that the State is the only party which can act independently thus ensuring fairness. Within these two arguments I suggest we see the lessons of history and the influence and ideals of the Enlightenment being brought to the fore in Scots law.

The first argument - here called the '*Shillings argument*' - is a paternalistic argument that it is the state's duty to prosecute crime and the victim should not have the expense or concern of prosecuting a wrong inflicted upon them:

"[I]t is impossible to deny the high and extensive benefits which attend it [the role of the public prosecutor], in maintaining the police of the country, and securing the prosecution of every criminal whose case requires it, without any trouble, or a shilling even of expense, to the party injured."[66]

This rationale for dispossessing the victim of their conflict is that the state is better suited to prosecuting social ills, even those perpetrated against an individual. Within this argument the state is seeking to aid the victim and shield them from a burden they should not have to carry, having been subjected to an alleged ordeal by an accused. The difficulty with this argument is that it does not offer any compromise or safeguards for the individual once the state has usurped the conflict. It is binary. It removes not only the burden of leading a prosecution, but also any options once the state prosecution is taken up. Furthermore, it invariably begins the process whereby a perception of the victim is of an individual in need

[65] ibid
[66] Hume, '*Commentaries on the Law of Scotland, respecting the Description and Punishment of Crimes*' (1797), Vol. I, Book I, xivii

of protection. This paternalistic attitude towards the harmed party continues into Hume's later works, in which he refers to the "*unfortunate victim*"[67], "*miserable victims*"[68] and "*unhappy victims*"[69]. When referring to the victim Hume adopts the language of paternalism indicative of Beccaria, and although the victims of the crime he is describing may very well be unfortunate, miserable and unhappy, in attaching this language to describe them within a legal text he is also reducing them to a by-product of crime, rather than an interested party worthy and perhaps willing and capable of participation or input. In creating the presumption in favour of ceding the prosecutorial power to the state, the victim is spared the expense of prosecution, but at the cost of any say in their own conflict.

The second argument propagated by Hume for the state being the appropriate party to prosecute criminal matters is that the victim cannot exercise the prosecutorial function independently or without bias: *"[T]he prosecutor is most effectually removed from the contagion of that popular prejudice".*[70] If the '*shillings argument*' can be placed within the ambit of good intentions leading to poor outcomes, or to use Christie's phrase it is an "*honourable reason*" for disempowering the victim, the same cannot be said of this secondary argument. Of the two arguments introduced by Hume, this has proven to be the most challenging to the victim and their participatory rights because it fundamentally disqualifies them from participating even in a concurrent manner with the prosecutorial process. It essentially creates a personal bar for victims, not through something they have done, but because of inherently who they are, namely, the person harmed. It renders the victims' participatory rights the antithesis of a fair trial, and forever equates the concept of 'victim' with challenging the presumption of innocence.

Hume's second argument suggests the state's usurpation of the conflict is appropriate because the state is the only party – of the three – that can fairly present the conflict against the accused. In this manner, for me as a prosecutor, it gives rise to one of the most interesting and perplexing legal fictions existing in criminal law today: In usurping the conflict of the victim and presenting it, the prosecutor must not demonstrate a bias towards the victims' conflict. The prosecutor must be both assessor, editor and advocate of the victims' narrative.

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[67] Hume, '*Commentaries on the Law of Scotland, respecting crime*', Vol I., Book III., Edinburgh, 1819, p254
[68] Hume, '*Commentaries on the Law of Scotland, respecting crime*', Vol I., Book IV., Edinburgh, 1819, p579
[69] ibid, p581
[70] ibid at 64

What emerges from Hume's work is the Enlightenment paradigm of the criminal trial and criminal justice: The state pursuit of wrongdoing on behalf of the individual harmed in the public interest, with fairness to the accused being of paramount import. Hume shrouded the victim in an emotive framework and relegated it to a passive function. Whilst the Enlightenment fostered the rights of the accused against the state, it begat an age when the victim fell into obscurity as a legal function of justice: The dark age of the victim had begun.

1.4 Reflections on History

The historical transition of the victim through victim-led justice, to victim-led prosecution, to present-day public (or professional) prosecution is not unique to Scotland but rather a common trend within many legal systems. As communities centralise, as the needs of the community materialise, they begin to take precedence over the needs of the individual – there is a necessity in societies for a form of utilitarianism - this evolution, according to Schaffer, is mirrored within the legal system itself.[71] The transition, however is not always consistent; it can oscillate as Klerman argues it did in England, whereby the legal system can return to victim-led prosecution and back again.[72] Therefore the usurpation of the state of the victims conflict (and prosecutorial function) cannot be said to be linear: a constant nor, more importantly, can it be said to be irreversible. It is therefore more accurate to describe the process as a functional shift: The *function* of the victim can (and has) changed over time and restoration of legal function back towards the victim can (and has) taken place before. It is this elasticity in the function of the victim that makes it both unique within the criminal justice process and more elusive to define or capture.

Views, nevertheless, differ: Schaffer charts the history of the victim in criminal law as a slow, irreversible development towards disempowerment and theft of conflict by the state usurping the prosecutorial function. Kirchengast suggests a different perspective: Rather than the history of the victim within a legal system being one of empowerment towards inevitable disempowerment, when the victims' genealogy is traced and broken down into its constituent periods, what is seen is the victims' central role – often through "*divesting*" its conflict – in

[71] ibid at 29, p15
[72] Klerman, Daniel, '*Settlement and the decline of Private Prosecution in Thirteenth Century England*', American Society for Legal History Law and History Review, 2001, Vol. 19 No.1, p5-8

shaping the criminal justice system around it.[73] According to the Kirchengast the victim has "*engag[ed] in a series of epochs or periods of rule, contributing to the formation…and development of modern criminal legal institutions away from the victim.*"[74]

Kirchengast suggests, through his 'divesting theory' that the victim is an "*agent of inherent legal power*" through which the presumption of state power can be challenged.[75] Thereafter, he addresses the inevitable question: Did the victim shape the system or has the system shaped the victim?[76] Ultimately, Kirchengast concludes the power dynamic lies with the victim and the "*transfer of victim power*".[77] I would suggest the relationship is better characterised as a symbiosis, in which each party performs the *function* required of it by the times and reflecting the desired criminal justice system of the period. The victims' '*inherent power'* comes from the versatility of its function within the criminal justice system. As has been demonstrated, in the past the victims' function shifted, and the system stabilised to meet that new function; or the system changed, and the victims' function stabilised to meet the demands of the new system. There therefore exists a logical paradigm of criminal justice: There are three fundamental parties to any criminal trial - the State, the Accused and the Victim. When the function of one is changed the equilibrium of the system is also changed.

In tracing the origins of the victim in Scots law one observes the victim as a functioning part or active participant in the criminal justice system is not new: 'The Victim' is not an original product of the human rights era or any single progressive movement. Therefore, to assign the victim a period of origin as its 'true origin' and therefore its function during that period as its 'true function' could only ever be to engage in a form of jurisprudential originalism: To adopt a legal foundation which favours the comfort of certainty at the expense of the reality of the victims' functional robustness over changing times. The concept of the victim as a legal entity has existed in varying degrees throughout the history of our criminal law. The victims' function is of course malleable, it has the ability to evolve and transform: The victim in Scots law has experienced periods of prevalence, as well as periods of concurrence with the state, as well as its most recent period of dormancy. The importance of the victims' historical narrative is that it highlights first, that it is a

[73] ibid at 62, p6
[74] ibid, p3
[75] ibid, p4
[76] ibid, p12-13
[77] ibid, p14

permanently important legal entity, second, that it is functionally capable of change (and dramatic change) and third, and most importantly – that when the function of the victim changes the legal system in which it exists also changes, sometimes fundamentally, though most often incrementally. Thus, if we are (as I suggest) in an era in which a new construct of the victim has emerged - and there is taking place a functional *restitution* back towards a victim, defined and possessing rights – it must logically follow that the legal system too must change to accommodate this new victim, as it has done in the past.

Furthermore, one can begin to understand why those who have benefited from the most recent traditional model of the legal system may be reluctant to embrace a new concept of the 'victim' or 'victims' rights': It is not simply a case of the state defending against a dangerous pro-victim policy, a one off, born out of a progressive era of human rights. The legal establishment is defending against a process of functional restitution that changes its supremacy over the manner and mode of the prosecution of crime: It is defending the Hume-based, Enlightenment conception of the criminal trial itself. The legal establishment is instinctively wary of a restitution of power towards a legal entity that history has demonstrated is capable of causing radical systemic change. The debate about what the victim *is and ought to be* within our criminal justice system is therefore (unhelpfully) often mis-characterised as a debate about the nature of the criminal justice system itself.

Through examination of the function of the victim prior to the Enlightenment conception of it in Scots law, the modern conflict becomes better contextualised, and the impact of the new creation of the 'victim', and the full potential of its impact on Scottish criminal law, becomes better framed. The victim was not historically 'just another witness' nor "*merely the injured party*"[78]. That was simply the function required of it at a time when the systems focus was accused-centric. The Enlightenment conception of the trial and the passive victim function have stood for over two centuries in Scots' law, but it is now being challenged by a vastly different concept of the victim, a new bespoke party, one which claims legal status and progressive legal rights.

In this chapter I have demonstrated that the victims' function is not static in Scottish legal history, it has the capacity and indeed the elasticity to change function. This is an

[78] ibid at 29, p19

essential first step in answering the key question of this thesis, because it directly challenges the post-enlightenment argument that the victim has to have a prescribed function of 'just another witness', it unshackles the victim from its specific passive role within Scottish criminal proceedings and demonstrates that reform to create a new concept of the victim is not only entirely possible but has previously taken place. Furthermore, it demonstrates that historically the victim and the state have had an evolving relationship within Scots criminal law, that too is not static, each having a period of dormancy and ascendency, with their function over prosecuting the harm inflicted changing over time. The historical lens displays a victim that was recognised by the system of criminal proceedings, had access to those proceedings and indeed, at times in Scottish history, had participatory rights in those proceedings. The tripartite right based structure of the victim (as I shall explore in chapter 3) far from being a human rights based model, is present, and indeed is inherent, within the historical functions of the victim in Scots law. Finally, in examining the victim as a historical legal concept, critically what we find is that with the coming of the enlightenment what is shut down is the discourse regarding the function of the victim. The victim as a live issue in criminal proceedings gives way to a different conversation which dominates Scots criminal law from the 18th century onwards: the state and the rights of the accused. In chapter 2 this thesis will explore how that discourse began to change and, incrementally, how a new rights-based concept of the victim asserted itself in Scots law.

Chapter 2: The Victims Movement

"The study of the victims of crime is now buoyant"[79]

2.1 [Re -]Introducing the victim

In February 2018, Dr Marsha Scott, a former Chief Executive of Women's Aid – a third sector group that campaigns on behalf of and supports the victims of domestic abuse - gave her comment on the introduction of a new bespoke law to specifically protect the victims of domestic abuse by ensuring that those who perpetrated psychological and emotional abuse on their partners could be prosecuted.[80] Dr Scott stated that it shall be the first step towards

[79] Rock, Paul, '*On Becoming a Victim*', in Hoyle, Carolyn and Richard, Young (eds.), '*New Visions of Crime Victims*', Hart Publishing, Oxford, 2002, p1
[80] Domestic Abuse (Scotland) Bill 2017

creating laws which enable "*victimless prosecution*".[81] Explicit in Dr Scott's comments is the ultimate expression of the '*victims' movement'*: Its desire to empower the victim by shielding them from the criminal trial process; to give victims more say but less exposure.

The victims' movement has undoubtedly placed the victim at the centre of modern criminal justice discourse in Scotland, to the extent that criminologists attribute the movement as causing a "*rebirth*", "*return*", "*revival*", "*rediscovery*" of the victim.[82] The success of the victims' movement is such that there is now a branch of academia specialising in criminal law from the victims' perspective: Victimology. [83] The saturation of the victim within criminal justice discourse is such that it is difficult to raise any issue or undertake any discussion of criminal legal process without reference to the victim of the crime. The victims' movement has come to define the victim dialogue within our criminal justice system and created the environment for the victim to takes its place at the "*heart of modern legality*".[84] Yet the desire to give victims more say but less exposure forms, as shall be discussed later in this chapter, one of the great paradoxes of the victims' movement. Dr Scott's comments are not unique nor are they on the fringe of the criminal justice debate today: the former Lord Justice General Carloway (then Scotland's most senior judge) stated only two months later that the "*ultimate goal*" was for complainers of rape not to attend Court but for evidence in rape trials to be pre-recorded.[85] This is an interesting statement which combines a pro-movement sentiment towards the victim, but which still stops short of referring to them as victims, preferring instead the more traditional (misnomer) 'complainers'.

For in stark contrast between the aspirations of the third sector and the furtherance of their conception of the victim is the position of parts of the legal establishment – in particular, the criminal defence bar. When one juxtaposes the position of those favouring the victim movement's conception of the victim and that of professionals who favour the more traditional conception, the discord becomes stark. In a late 2017 article in the Scottish Legal News written by Thomas Ross KC, the divide on the appropriate conception of the function

[81] '*New Domestic Abuse Law 'could change Scotland"* BBC News Website, 1st February 2018, available here: http://www.bbc.co.uk/news/uk-scotland-42890990
[82] see Doak, Jonathan, '*Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*', Hart Publishing, Oxford, 2008, p7; Schaffer (1968), ibid at 29, p31 and Rock (2002) ibid at 79, p5
[83] Koffman, Laurence, '*Crime Surveys and Victims of Crime*', University of Wales Press, Cardiff, 1996, p16
[84] Sarat, Austin, '*Vengeance, Victims and the Identities of Law*', 6 Social and Legal Studies 163 (1997), p164
[85] '*Rape Victims 'should not attend Court' says Scotland's top judge*', BBC News Website, 1st May 2018, available here: https://www.bbc.co.uk/news/uk-scotland-43879455

of the victim is set out. [86] The tone of the article alone is emblematic of the extent to which the debate has become vitriolic between the competing conceptions of the victim in Scots criminal law. In the article Ross KC sets out the divide between, on the one hand, the Crown and the victims' movement's victim, and on the other hand, the view of other legal institutions which favour a traditional conception of the victim. Ross KC alleges that the Crown itself has fallen "*victim*" to the movement's misconception of the victim as *status* at trial and that as an institution the Crown is furthering (if not the key institution enhancing) this misconception of the victim, and in so doing, is undermining the fundamental principles of the criminal trial. An interesting point made in this article is that it was prompted by the Lord Advocate signing a memorandum of understanding with Rape Crisis Scotland pledging that the Crown will go further in ensuring the views of victims of sexual assault will be heard and that services are better tailored to meet their needs.[87] In essence, the Lord Advocate was promoting a model of criminal proceedings that includes access rights for victims. In McKenzie v. HM Advocate, the Crowns' attitude that '[*t]he view of the victimis not a matter which the judge should have regard to. It is in the strictest terms, irrelevant'*, would seem to be long relegated to the (recent) legal past. [88]

This chapter explores the socio-political factors that provided the space for a new construct of the victim to emerge within Scots criminal law. Criminal justice reform does not take place in a vacuum: momentum is required to capture political interest. This chapter explores the creation of that momentum by examining the social phenomenon, such as the rise of feminist thought in contributing to an increased focus on female victims in the criminal justice system and the rise of third sector victim groups, which contributed and converged into a movement that made the victim a political focus, and force. Through this movement the victim became a consumer for criminal justice services and ultimately a consumer of policymaking. Paul Rock, suggests that this trend towards victim consumerism, which he dates between the 1980's and 1990's, is the beginning of the larger transformation process.[89] This process had the advantage of being the momentum for victim reform, but it also contained the disadvantage of placing that reform in a direct collision course with the

[86] see Scottish Legal News website, published 22 December 2017, http://www.scottishlegal.com/2017/12/22/crown-office-victims-misunderstanding/
[87] see Crown Office and Procurator Fiscal website, published 20 December 2017, http://www.copfs.gov.uk/media-site-news-from-copfs/1638-improving-criminal-justice-experience-for-sexual-crime-victims
[88] ibid at 9, p67
[89] Rock, Paul, 'Constructing Victims' Rights', Oxford University Press, 2004, chapter 4, pg 212

existing apparatus of the Scottish legal system: *"The boundaries of the victim's role and identity were closely patrolled by lawyers, judges, and those responsible for mounting trials mindful of the precarious equilibrium of the criminal hearing"*.[90] It set the stage for a discordant discourse and the focus for victim reform became about the political ends and not the legal means.

2.2 Victim Movement(s)

A precise origin of the victims' movement is as difficult to trace as a working definition and unifying ideology of the movement itself. Referral to a victims' movement is as much a convenience as it is a misnomer: Despite its tremendous impact upon our current criminal justice discourse, it has no infrastructure in and of itself, nor an established ideological focus. It is not a homogenous group of activists working towards a set goal of victims' rights. The reality is victims' rights groups present a "*diversity that cannot be competently analysed on a macro level*".[91] The difficulty for any such movement is that victims do not exist as a homogenous group in themselves, and activism is for victims, not by them.[92] Therefore, when one attempts to characterise and track the foundations of this nebulous movement, often it is like trying to grasp fog. The victims' movement can really only be charted through particular social developments and the emergence and mobilisation of particular grassroots organisations in furtherance of a *particular* victim interest.[93] In this manner, the victims' movement is more readily understood by most criminologists as a period, during which the rights of the victim have been championed by diverse groups, in even more diverse ways, within the background of greater socio-political circumstances on both a state and global scale.[94] Criminologists have attempted to identify overarching occurrences which define the victims' movement: Shapland identifies what she considers the central elements that make up the victims' movement as "*victim aid and assistance, victim experience…state compensation and reparation*".[95] These four "*strands of the victim movement*" according to Shapland gave rise to the current model of the victim adopted by the international frameworks, namely the

[90] Ibid at 213
[91] ibid at 62, p160
[92] Sanders, Andrew, '*Victim Participation in an Exclusionary Criminal Justice System*' in Hoyle, Carolyn and Young, Richard (Eds.), 'New Visions of Crime Victims', Hart Publishing, Oxford, 2002, p198
[93] ibid at 62, p159
[94] Goodey, Jo '*Victims' and Victimology: Research, Policy and Practice*', Pearson Longman, 2005, p101
[95] Willmore, Jon, Shapland, Joanna and Duff, Peter, '*Victims in the Criminal Justice System'*, Gowar Publishing, 1985, p2

UN and Council of Europe. Kirchengast adopts a broader approach than Shapland in his assessment of the victims' movement, suggesting that the factors that contributed to that movement were the introduction of compensation programs, rise of victimology, rise of feminism, public awareness of crime, growth of victim consumerism and lobby groups, and the rise of individualism.[96] Goodey shortlists the core elements of the victims' movement as rising crime rates, the rise of feminism and a public desire for a tougher stance on crime.[97] Doak similarly places emphasis on the post-war focus on citizen responsibility and rise of the welfare state, introduction of victim compensation, rise of victim voluntary organisations, "*the consumer-based consideration of the victim*" and the introduction of "*victim services*".[98] Dijk, condenses the trends constituting the victims movement into three waves: State Compensation, Victim Support Schemes and Institutionalisation of Support.[99] Within the broad criminological analysis one can see the diversity of factors that contributed to the victims' movement but also what begins to emerge are certain consistencies. Within those consistencies, I suggest there are three overarching elements that can be used as analytical lenses (of my own creation) to aid our understanding of the victims' movement: social introspection, social action and academic awareness. It is through the lens of these three essential elements of the victims' movement that we can begin to see the conditions in which a new victim construct could emerge in Scotland.

2.3 Social Introspection: An element of concern

Criminologists often associate the beginnings of the victims' movement with what is perceived as its first material success: The creation of criminal injuries compensation schemes.[100] To do so would be to ignore and undervalue the social undercurrents, the *volksgeist* that enabled such services and support mechanisms to emerge and once again attach to the movement a cohesion that in reality does not exist. Within the post-war social introspection of society, one finds political ideology which acted as an incubator for the victims' movement and which underpins the new conception of the victim, namely what Dijk

[96]Ibid at 62, p161-176
[97] Ibid at 94, p102
[98] Doak, Jonathan, 'Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties', Hart Publishing, Oxford, 2008, p7-19
[99] Dijk, Jan Van, '*Ideological Trends Within the Victims' Movement: An International Perspective*' in Maguire, Mike & Pointing, John (eds) '*Victims of Crime: A New Deal?*', Open University Press, Milton Keynes, 1988, p181-184
[100] For example, see Newburn, Tim '*Crime and Criminal Justice Policy*', 2nd Edition, Pearson Longman, 2003, p226

classes as a "*care ideology*". This ideology, inherent within the ideals of the welfare state and a rejection of laissez fair society, propounds that communities should come together to protect the most vulnerable within that society. Within the criminal justice context that would require "*emphasis [being] placed on providing for victims rather than on the criminal nature of the offence.*"[101] The emphasis on social support for the most vulnerable is hardly a post-war phenomenon, one can see an early form of this in the Liberal reforms of the early 20th century.[102] It was not until the post-war (WWII) era, however, that this sense of community was combined with an reinvigorated role for citizenship, and by the 20th century citizenship had moved beyond civil rights, past political rights and was focussed on social rights and therefore a form of "*social citizenship*".[103] It is not suggested that the "*care ideology*" in and of itself transformed the social fabric towards the protection and the promotion of the victims of crime, however as Doak suggests it did create the "*climate of emerging social rights*" in which loosely associated groups emerged to campaign for the rights of the victims.[104]

The "*care ideology"* provides an important insight into the concept of the victim that the victims' movement represents. If your conception of the victim emerges from the "*backcloth of predominately consensual welfarism*" it must logically follow that the principles of *welfarism* shape your understanding and in-turn imprint upon your concept of victim.[105] Therefore, a consistent theme which can be found within conceptions of the victim borne out by the victims' movement is a focus on vulnerability, a victim whose status requires that the community – and laterally we can assume this means the state – must protect them. According to this concept of the victim, the victim is something that requires state intervention, state resources and state protection. Across the victims' movement, like the state in the 19th century, there is adopted a form of paternalism to justify a welfare approach to the victim.

Reliance upon a paternalistic argument however, poses a more significant difficulty for proponents of this new concept of the victim than it does for the traditionalist conception:

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[101] ibid at 99, p178
[102] see Children and Young Persons Act 1908, Old Age Pensions Act 1908 and the Probation Act 1907
[103] See Marshall T.H., 'The Right to Welfare and Other Essays', Heinmann, London, 1981 as cited by Walklate, Sandra, '*The Victims' Lobby*' in Ryan, Mick, Savage, Stephen P., and Wall, David S., (eds.), '*Policy Networks in Criminal Justice*', Palgrave, Basingstoke, 2001, p202
[104] ibid at 98, p8
[105] Walklate, Sandra, '*The Victims' Lobby*' in Ryan, Mick, Savage, Stephen P., and Wall, David S., (eds.), '*Policy Networks in Criminal Justice*', Palgrave, Basingstoke, 2001, p203

How can one reconcile the desire to empower the victim by campaigning to spare them the process and have their story further filtered by the state, by third parties and other entities? Is it not paradoxical to desire to give the victim a greater voice on the one hand, and on the other hand suggest they must be shielded from having to use said voice? The repercussions of this go beyond a mere criminological definition and characterisation of victims. For if, as Walklate suggests, there was a gap or space within the criminal justice discourse and that space has been occupied by a construct of the victim whose roots are within the victims movement, one can hardly blame the Courts or the prosecutors for continuing a paternalistic view towards the victim: Namely vulnerable, helpless individuals who require the state to decide for them as to how best to deal with and dispense with their conflict. What emerges are two divergent views of the victim (empowered and vulnerable), both relying upon a form of paternalism to justify their arguments. Furthermore, as in all campaigns in which *welfarism* is championed, the benefits to the individual are counterbalanced by the social prejudices of claiming that benefit. In equating the movement with a sense of citizenship, one equates those whom the movement seek to help, whether fairly or unfairly, with the social identity of being a 'burden' imposed upon the community. This "*welfare model*" of the victim inevitably invites tension as it blends a strictly criminal justice entity with the more broad needs of the welfare state.[106] Specifically, identifying the victim and their rights as a form of welfarism immediately puts its claim to resources in competition with other parties or entities vying for a share of the criminal justice budget and criminal justice policy priorities. This environment for victim reform meant that the discourse on the function of the victim was relocated from the legal to the political arena.

2.4 Social Activism: Fry's Legacy

The *geist* established, what about the *volk*? Generally accepted as one of the earliest campaigners of (if not entirely for) the victims' movement is Margery Fry.[107] Fry, a penal reformer and magistrate, is widely remembered for her 1951 book '*Arms of the Law'*, in which she championed penal reform and more importantly a form of victim compensation. Fry's motivation was not one borne out of concern for the victim, however, but rather for the concept of justice: The idea that "*restitution and reconciliation was preferable and more*

[106] See generally Dignan, James, '*Understanding Victims and Restorative Justice*', Open University Press, Berkshire, 2005, p 41

[107] see Doak, ibid at 98, p8; Walklate, ibid at 105, p204; Kirchengast ibid at 62, p162; Newburn, ibid at 100, p226

constructive than the more punitive…criminal justice system."[108] Fry's campaign was never realised in her lifetime. It was not until 1964 that the British government established a national criminal injuries compensation scheme, regulated by a newly formed Criminal Injuries Compensation Board (now the Criminal Injuries Compensation Authority or C.I.C.A), based in Scotland.[109] Fry's conception of victim compensation was rooted in the "*care ideology*" and *welfarism*: The compensation would not come from the offender, but from the state and therefore functioned as a form of insurance policy indemnifying the victim against the states failure to prevent crime.[110] As with all forms of insurance, however, there was (and remains) certain criteria in order to enable one to claim this insurance. For the purpose of this discussion, the two most important criteria being that the victim must be the "*direct victim*", and blameless.[111]

In the victim compensation scheme the victims' movement had one of its earliest victories towards meeting the needs of victims. Although, arguably the victim compensation scheme once again reinforced a paternalistic approach towards the victims of crime; the idea being that far from having constructive involvement, victims are merely required to be a mechanism of justice, and if they do their part in bringing about states justice, they may be rewarded. Should however, the victim in any way dither or inhibit the functioning of that justice, their reward is forfeit.[112]

Rock goes further and suggests that far from the victim compensation scheme furthering the campaign for the victim, it may indeed have been constructed to quell it: "*[C]ompensation was designed precisely to prevent coalescence [of victims' groups]*".[113] In this regard I suggest Rock goes too far. It is arguable whether the victim compensation scheme was *designed* to prevent victim group momentum, however, what the compensation scheme did was further a conception of the victim that still holds sway today and which is arguably detrimental to victims. The victim through the lens of the compensation scheme is presented to the community once more as a status that is vulnerable, a status that requires the

[108] ibid at 100, p226.
[109] see: https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority as established by the *Criminal Injuries Compensation Act 1995*
[110] ibid at 94, p141
[111] see '*Criminal Injuries Compensation Scheme 2012*', Ministry of Justice publication, UK Government Website, published 27 November 2012, pp 4 and 25, available: https://www.gov.uk/government/publications/criminal-injuries-compensation-scheme-2012
[112] ibid, pp22 and 23
[113] cited by Newburn ibid at 100, p228

state to usurp the conflict from the victim and then to provide for the victim. In this conception, usurpation at a small price. Furthermore, as Newburn identifies, the compensation scheme also created a "*schizophrenic creature*", a conception of the victim that seeks retribution through compensation but who is so vulnerable that the only manner in which retribution can be achieved is through state handout.[114]

From this context there emerges for the first time, a victim identity - The victim begins to gather a status laced with characteristics. Through the compensation authority the victim, as stated, is identified with vulnerability, but also with motive, and that motive is pecuniary. If, upon the *successful* conviction of a criminal complaint the state shall pay you compensation, this arguably places a price tag and incentive on conflict, suffering, and harm. As a prosecutor, I have sat through many a cross-examination in which the motives of the victim in reporting the crime are questioned, and the victim is presented to the trier of fact as having an economic incentive at the heart of their complaint. Fry's unintentional legacy, though noble in intent, has been to foster a conception of the victim that moves the victim away from a function of justice and places emphasis on the victims' characteristics and motives.

The "*second wave*" of social activism took place alongside a second movement: The rise of women's liberation and the feminist movement which, quite appropriately, placed a tremendous spotlight on the support needs of female victims.[115] The feminist movement identified that female victims required infrastructure to meet their needs and bespoke support requirements. In particular, grassroots feminist movements focussed on victims of domestic abuse and sexual violence. In 1972 the first Women's Refuge opened in England, followed in 1976 with the first Rape Crisis Centre in London.[116] In Scotland, the first Rape Crisis Centre opened in Glasgow in 1976 and in Edinburgh in 1978. These Centres facilitated support mechanisms for women who had been the victim of domestic violence and sexual assault, and were initially only possible due to voluntary contributions and small grants.[117] Women's Aid was also established in 1974 under the name 'National Women's Aid Federation', with

[114] ibid
[115] ibid at 99, p182
[116] ibid at 105, p206
[117] see Rape Crisis Scotland website, available: https://www.rapecrisisscotland.org.uk/about-our-story-so-far/

the various chapters working independently (as they still do), ensuring that all support is local and each is rooted in the local community.[118]
In the early years the activism generated by the feminist movement was not focussed on obtaining legal solutions, or lobbying government on behalf of the needs of female victims of crime, but rather in creating civil society solutions to the absence of support infrastructure for female victims. Though not lobbying the government directly, however, what the feminist movement did was give the victims' movement a wider and effective public platform, and "*raised the consciousness of the state to the potential benefit of private organisations catering for the legitimate needs of abused women*".[119]

The feminist movement provided the victims' movement with another material success in which the goal was specifically to aid victims rather than address the offender or justice imbalance. As such, it moved the victim a step away from the top-down approach of welfarism inherent within the compensation authorities. Absent however within the early feminist movement's approach to its activism on behalf the victim was an ideological foundation of what the victim was; rather, the feminist movement infused the victim with its own feminist ideology. For example, in an attempt to empower the female victim of rape, the victim of rape became the 'survivor' of rape. Therefore, within this ideological void, the victim took on an identity; the victim became a "*social artefact*" whose characteristics became defined by the offence.

In approaching the victim from a particular vector – in this case feminism – and creating their own bespoke concept of the victim, the feminist movement contributed to the victim as a "social artefact"; an 'identity'.[120] Today we refer to 'domestic victims', 'survivors', 'stalking victims, 'sectarian victims', 'race victims'…etc.: Each identity of victim has its own civil society infrastructure in Scotland and each has been the subject of political opportunism at one point or another. [121] The feminist movement has championed the female victim of crime, implemented grassroots organisations that have met the needs of women across Scotland and provided an unparalleled platform for female victims of crime.

[118] see Women's Aid website, available: https://www.womensaid.org.uk/about-us/history/
[119] ibid at 62, p166
[120] ibid at 79, p14
[121] see '*Abused Men in Scotland*' website available: http://www.abusedmeninscotland.org; '*Shakti Women's Aid*' website available: http://shaktiedinburgh.co.uk and '*Action Against Stalking*' website available: http://www.actionagainststalking.org/about-stalking-charity.html

As a constituent part, and significant element of the victims' movement however, the feminist movement has also contributed to the victim being defined as an identity, orientating the discourse of the concept of 'victim' (understandably for its aims) within the political sphere.

In 1974 a step towards cohesion across the victims' movement took place in the creation of a '*victim support scheme'* in England.[122] This scheme was the culmination of several years of gestation in Bristol amongst voluntary groups attempting to better understand the victim. As Rock states "*Something important happened in those deliberations…They were listening to the victims…And what they heard were voices crying about pain and neglect.*"[123] Victim support offered a much broader platform in the victims' movement's campaign on behalf of victims and took a step towards beginning to understand what victims needed rather than what they ought to, or were thought to, need. In 1988, Victim Support Scotland was created, extending the progress made in England and Wales. In its earliest conception, however, Victim Support was a continuation of the welfare approach begun by Fry, in that it focussed upon support needs of victims, attending to their emotional needs and offering more pastoral care, than a platform and organisation for pursuing victims' rights.[124] Although Victim Support offered a new 'androgynous victim*'* to counter balance the bespoke conception of the victim created by the feminist movement, the predominant conception of the victim being forwarded was still what the victim ought to need rather than victim entitlement: It was needs based, not rights based.[125] Furthermore, in focussing on support needs of victims, Victim Support reinforced the general conception of the victim as a status, a vulnerable entity still wholly dependent upon the state or private organisations, but requiring bespoke treatment.

Victim Support was a significant actor in the transition of the victims' movement from grassroots social activism to government policy. Within a decade Victim Support had obtained significant government funding, through which it was to offer victim services within communities.[126] This community based approach to the victim was an extension of the Thatcherite ideology that the era of top-down welfarism and state dependency was at an end:

[122] see Victim Support website available: https://www.victimsupport.org.uk/more-us/about-us/history
[123] Rock, Paul, '*Helping Victims of Crime*', Clarendon Press, Oxford, 1990, p102
[124] ibid at 98, p9
[125] ibid at 105, p207
[126] Ibid

Victim Support was a provider and the victim was now a consumer.[127] There are of course limitations to the conception of the victim as a consumer: As Doak highlights, victims are stuck within the criminal justice system, they have no free- market choice and are limited to the services with which they are provided.[128] What is clear, however, is that the victim had become a part of the criminal justice discourse *and* an emerging political asset. As Walklate describes, a symbiotic relationship had developed between state and victim, born and buoyed by "*political expediency*".[129]

Thus, by the late 1980's the victims' movement was now at the heart of government policy, and still is, lobbying on behalf of a unified victim construct: the victim was being recognised (and framed) as a criminal justice consumer by the Government. The victims' movement, in many respects, represents the external aspect of victim creation, victimology would explore the internal needs of a new victim construct.

2.5 Victimology: What do victims want?

Victimological research identifies factors which the victim cares about and extrapolates needs-based recommendations for governments to consider through activist bodies such as Victim Support. In this section I adopt a narrower definition of victimology, useful here to make my general observation about academia's influence on creating a space for a new construct of the victim to be created, without opening unnecessarily to the complex nuances and debates as to what the study of victimology is or is not. Victimologists would suggest this is the true voice of the victim, because it is asking victims what they want rather than assuming what they need. The inherent difficulty in this empirical approach is that what develops is not necessarily what victims individually want within the context of their own case, experience and story, but on *average* of what victims want. It creates the 'average victim' upon which to base reform. Furthermore, empirical methodological practice lends itself to categorising and sub-categorising the data: therefore statistics emerge on the victims of sexual assault, racial harassment, vandalism and suggest bespoke reform based on this sub-groups experience and needs. This has two direct consequences: First, governments implement bespoke legislation towards particular forms of victim and in so doing, perpetuate

[127] Ibid at 105, p208
[128] ibid at 98, p10
[129] ibid at 105, p216

a form of victim hierarchy and ensure a piecemeal and fragmented approach to reform. Second, legal reform becomes about addressing the emotional and psychological needs of victims, thus contributing once more to the perception of the victim as a weak and vulnerable entity in need of third party and state paternalism but with little regard with what this construct of the victim will mean for the legal system as a whole. Victimology has justified the placing of a social construction of the victim at the heart of government reform and therefore at the heart of our criminal justice discourse: '*Victim by status'* ensures that the approach to the victim is not comprehensive, consistent and general: prioritising individual wants at the expense of systemic cohesion. Therefore, we began to see the emergence of bespoke aggravations and crimes to cater to subgroups of victims in Scots law: victims of hate crime[130], victims of sexual offences[131], victims of stalking[132] and domestic abuse[133] and also the introduction of measures to protect the vulnerable.[134] What emerges, though once more noble in intent, is a fragmented conception of the victim and the subsequent unintended consequence of victim hierarchy; this plays neatly into the dangerous idea of an ideal victim.

Even placing victimology within the confines of the victims' movement is somewhat controversial as victimologists regard their study of victims as a science; a well thought out discourse on the victim based upon examination of empirical data. In contrast, victim advocacy is seen by many within the discipline as an emotional and impassioned societal response to the plight of the victim.[135]

Shapland characterises the failings of the victims' movement – and thus the rationale for informed [scientific] victimology – as being rooted in: "*the whole edifice of the 'victim movement'…[being]…built according to other people's ideas of what victims' want or should want…without any particular consideration of their own wishes*" and therefore the purpose of victimology is to discover what victims *actually* want, based upon an examination of their actual experience of crime and the criminal justice system.[136]

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[130] *Criminal Consolidation (Scotland) Act 1995* s50A
[131] *Sexual Offences (Scotland) Act 2009*
[132] *Criminal Justice and Licensing (Scotland) Act 2010,* s39
[133] *Domestic Abuse (Scotland) Act 2011, section 1;* D*omestic Abuse (Scotland) Bill 2018, section 1*
[134] *Vulnerable Witnesses (Scotland) Act 2004*, as it introduces s271-271M in the *Criminal Procedure (Scotland) Act 1995*
[135] ibid at 94, p95
[136] ibid at 95, p2

Shapland goes further and accuses fellow academics like Dijk with his "*victimagogic path*" – of which "*care ideology*" is one – with replacing the true needs of the victim with general theories and ideology, cloaking the victim in social theory.[137] This assessment of social theorists like Dijk who attempt to create a theoretical foundation for what is essentially a nebulous and abstract movement seems not entirely fair. Dijk, though proud of his affiliation with the victims' movement, merely suggests that victimology without a theoretical foundation is unwise and leads to sporadic results and outcomes. Therefore, until a better theoretical framework is established one should be wary of "*applied victimology*"; just as one should be wary of always giving the victim everything they want.[138]

Fattah goes further and suggests that the pursuit of what the victim actually wants should not be considered a form of science upon which rational reform be based because it lacks objectivity: "*Victimological research conducted by victim lobbyists is as objective as research carried out by the gun lobby in the U.S.*".[139] Reform purely on the needs and wants of the victim – which I would suggest is predominant today – is hazardous when the legal function of the victim is not taken into account, as it leads to the introduction of reforms and practices which are incompatible with our criminal justice traditions and principles, such as the presumption of innocence. The suggestion that we should not take victims' views, needs and wants into account at all when undertaking a reform process is extreme, and would lead to reform that does not reflect reality. Likewise, a reform agenda based only on the needs of the victim would negate the needs of the legal system itself to be coherent in its principles and foundations.

On reflection, the fragmentation within victimology mirrors the fragmented evolution of the victims' movement itself. The victims' movement has its roots in the post-war welfarism of the 1940's, as does victimology. The victims' movement began to take form as a focus by Margery Fry upon penal reform and offender management. Victimology emerged as an attempt to explain crime and the offender through the prism of the victim.[140] Neither is

[137] ibid; for Dijk's theory of "*vicitmagogic ideologies*" see ibid at 99, p178-180
[138] ibid 99, p177
[139] Fattah, Ezzat A., '*Victims and Victimology: The Facts and the Rhetoric*', International Review of Victimology, 1989, Vol. 1 43, p60
[140] Two of victimology's founding scholars, von Hentig and Mendelsohn, attempted to construct criminological theories based upon why the victim was likely to be a victim and addressing the "*penal couple*" of the victim and the offender. Today their research would spark outrage, as at its most basic they lay a theoretical foundation and academic rationale for victim shaming, suggesting that youth, old age and gender form the basis of

wholly satisfactory in providing an explanation for the emergence of a new construct of the victim, what they do is provide evidence of an emerging space into which a new victim construct could be created.

Victimology and victim activism have had a profound effect and lasting impact upon government reform. These historical and fundamental similarities, I suggest, are more than mere coincidence or social fluke: The emergence of victim social activism and academic discipline during the same period and evolving in a similar pattern is because they are part of the same moment (if not movements). Victimology is the academic branch of the wider process of victim reconstruction. Importantly, victimology provided a means towards legitimacy for the victims' movement and crucially a means of justifying funding: Even during the 1980's and early 1990's when most social spending on programmes was being reduced by the Conservative government, Victim Support – through governmental interest generated by Home Office-funded victimological reports – obtained increased funding for its community-based programmes. Part of this was ideological, but the rest was due to this new 'science' of victims telling the government what victims wanted.[141] Victims' funding – unlike offender funding and Legal Aid – has survived both conservative and liberal government agendas and in fact flourished during both, demonstrating that the victim is an enduring consumer regardless of political ideology: An ideal consumer. In 2016-17, Victim Support Scotland – an "*independent*" charity – received 89.9% of its funding from the Scottish Government. [142] Through that funding it offered victim services in the community, specialist training in dealing with victims to criminal justice professionals, and provided its own professionals to the government to advise on government agenda and victim-orientated legal reform.

Victimology provided the academic *bone fides* to an activist model and made it politically valuable, but it did not provide a normative framework through which a conception of the victim as a bespoke party could enter (or even communicate with) the Scottish legal system. More broadly, the victims' movement, through social introspection,

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victimisation. See Williams, Brian '*The Development of the Discipline*' in Chong, Hannah Goodman and Williams, Brian (eds.) 'Victims and Victimisation: A Reader', Open University Press, 2009, p1

[141] Walklate, S., and Mawby, R.I., '*Critical Victimology: International Perspectives*', Sage Publications, London, 1994, p80

[142] '*Victim Support Scotland Annual Report 2016-17*', published April 2017, available: https://victimsupport.scot/info-hub/annual-report-2016-17/

social activism and victimology, created a well-intentioned but "*conceptual[ly] void…social artefact*" at the periphery of the Scottish criminal justice system.[143]

This chapter demonstrates the victims' movement was key to changing the discourse on the victim within Scottish criminal justice and re-introducing the victim as a constituent part of criminal proceedings worthy of debate and reform. The victim's movement, whilst not articulating the victim in a rights based model did, through its advocacy, seek to promote victims' rights that (as I shall argue in chapter 4) could be materialised and categorised as recognition, access and participatory in nature. Whilst a socio-political examination of the victim does not tell us what the legal concept of the victim is in Scots law, it does assist to frame what civil society thought it ought to be, the influence that civil society had on Scottish Government policy towards the function of the victim, and provides the context and environment in which victim reform in Scots law would develop. Crucially, it shows that absent a legal normative framework, and regardless of good intent, a new social concept of the victim could not be integrated into the legal system. In chapter 3 I explore the emergence of a normative framework that would offer the vehicle through which a new concept of the victim could emerge in Scots criminal law and materialise victims' rights in a system hostile to change.

Chapter 3: The Victim as an International and Transnational Legal Entity

"[I]nternational developments have percolated domestic legal orders, acting as a catalyst for reform."[144]

The human rights movement and the victims' right movement, whilst similar in origin, were different and it would not be correct to conflate the two movements. In many ways the human rights movement further codified at a macro level many of enlightenment ideals that created an accused-centric approach to criminal justice with a focus on such rights as the right to a fair trial and presumption of innocence. The human rights movement also had a broader purpose and scope than reforming criminal justice. That stated, the human rights movement gave birth to key international institutions that developed the victim as a rights-based legal entity, with standing in criminal justice proceedings. It also gave rise to infrastructure – UN Declaration, European Convention on Human Rights, jurisprudence of the European Court of

[143] ibid at 79, p13-14
[144] ibid at 98, p29

Human Rights and EU Regulation and Directive – that would act as a conduit through which certain standards of justice, specifically regarding the victim, would be mandated. It was through this infrastructure that I argue a new rights based concept of the victim was able to evolve from a peripheral social theory to substantive legal reform in Scots law.

3.1 The 'Percolation Paradigm'

The victims' movement created a social consciousness, an incubator for a new concept of the victim to not only emerge but thrive, and ensured that this conception was politically relevant for the first time, placing the victim at the heart of our criminal justice discourse. The inherent difficulty thereafter, now that the victim was a criminal justice priority, was how policymakers could integrate this conception of the victim into a criminal legal system not seemingly designed for it. As discussed in chapter 1, the Scottish criminal legal system still holds fast to a "*nostalgic and romantic vision of…[the]…law*" rooted in (and faithful to) Enlightenment ideals.[145] Overcoming those traditions and their inherent presumption against reform, has proven a significant difficulty for successive devolved governments. The social conception of the victim and their rights pose a direct challenge to the Enlightenment model of criminal justice, held since the 19th century, that the victim ought not to "have any conceptual role to play in the modern criminal justice system other than to act as a witness to the facts".[146] This, I suggest created a critical juncture for the Scottish criminal justice system and the evolution of the victim within Scots criminal law: Scottish policymakers could have looked inwards to inform their integration policy and strategy, aligning systemic reform and victim reform. Instead, they looked to the international community, they looked outwards to a movement that was increasingly coming to dominate the criminal justice discourse: The human rights movement.

The victims' movement and the human rights movement share a similar origin: Both emerged from a post-world war social welfare and community consciousness. These movements by their reforming nature share an *insurgent perception* - the idea that they are a liberal ideal attempting to penetrate and reform their respective conservative infrastructures of the old-world order. The human rights movement and the victims' movement on a

[145] Farmer, Lindsay, '*Criminal Law, Tradition and Legal Order*', 1997, Cambridge University Press, Chapter 6, p186
[146] ibid at 98, p7

theoretical level make appropriate bedfellows: The victims' movement represents a victim agenda focussed on individualism and rights-based progress against a paternalistic state. The human right's movement has, since its emergence, also sought a more liberal approach to justice aimed at limiting the role of the state and protecting the individual from potential excesses of state justice. That said, the human rights apparatus was initially focused upon protecting the individual accused over empowering the individual harmed. Yet despite this initial disconnect, through international instruments and experimentation in international and transnational legal forums, the victims' movement and the human rights movement converged to generate a "*proliferation of standards and norms…a consensus of best practice*" towards the victims of crime. [147]

In 2002 Paul Roberts, writing on the comparative method in the age of the European Convention on Human Rights (hereafter ECHR) and international Courts and tribunals, stated:

> *"It would…be an elementary and potentially harmful mistake to infer that comparative scholarship is, and should remain, the exclusive preserve of academics…the nice, neat tripartite division between 'domestic', 'foreign' and 'international law' can no longer safely be relied on".*[148]

The distillation of the victim into Scots law perhaps best personifies this sentiment by Paul Roberts. As this chapter examines, the victim as a legal construct, has demonstrated a robust capacity to transcend these old legal divisions. Scottish criminal justice policymakers have evidently embraced a comparative approach to victim policy and reform and used it to legitimise a new construct of the victim into the domestic legal system. The international development of the victim as a criminal justice legal entity (perhaps one of the few examples of '*pure victim creation*') is therefore fundamental to our understanding of the recent emergence of the victim as a force in domestic criminal justice. First, the development of the victim as a legal rights-based entity and its progress through the international mechanisms bring to the fore some of the jurisprudential difficulties when this empowered victim with full enforceable rights is tested against the traditional concepts of justice and adversarial trial

[147] ibid at 98, p28
[148] Roberts, Paul, '*On Method: The Ascent of Comparative Criminal Justice*', Oxford Journal of Legal Studies 3, 2002, p560-561

system. Second it indicates how a social conception of the victim, when clothed in a normative framework, was able to permeate a legal infrastructure, providing insight as to how this would take place in our domestic criminal justice system and ultimately significantly impact upon the Scottish criminal trial.

In this chapter I shall evaluate the '*percolation process*': the legal journey of a normative creation of the victim and the inception of the victim as a legal entity into Scots criminal law. First, I shall address the victim at the conceptual stage within the international community, suggesting that it was fostered, shaped and tested by the human rights era mechanisms into an international legal actor within international and transnational criminal justice. Secondly, I shall examine the European Convention on Human Rights as a conduit for transmission of a rights-based model of the victim from macro-conception to micro-inception, acting as a framework for policymakers to introduce a new concept of the victim into Scots law.

3.2 Creating a victim: The Basics

In 1985 the United Nations developed, the '*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'* (hereafter *Basic Principles*).[149] For the first time there was a working definition and normative description of the victim: *"'Victims" means persons who, individually or collectively, have suffered harm…through acts or omissions that are in violation of criminal laws".*[150] Definitions encourage identification and support of individuals within the respective charter states, of which the UK is one. For the first time within a normative framework, the designation of a person harmed through alleged criminal conduct as a 'victim' would be independent to the identity of the accused: a victim was a victim of what they perceived they went through regardless of an accused person being arrested or even prosecuted[151]. A fully normative approach to the victims of crime would be impossible without a working description or definition of the 'victim', and yet it is perhaps the most controversial element of a normative approach to the victim, because to define is to label and in criminal justice a label is often everything.

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[149] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* available here: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse

[150] ibid, Article. 1

[151] ibid, Article. 2

The labelling of a person as a 'victim' raises serious issues of fairness and communication, as it does in all instances of labelling within criminal law.[152] First and foremost, the label raises issues of fairness to the offender, it's very utterance arguably creates a presumption of guilt, where only a presumption of innocence should exist - if you are a victim then you are the victim of *something*. It could be said to encourage the label of 'victim' is to encourage an infringement of the very fundamental rights the European Convention on Human Rights was established to protect.[153] Secondly it raises issues of fairness to the victim: The status of victim creates a set of *hohfeldian correlatives* of rights and duties, which whilst the rights may be welcomed by the individual – the right to be recognised, the right to participation etc. – the corresponding duties may very well be unwelcome.[154] The duty of a victim to give evidence, for example, often results in the loss of control over their level of involvement. Once they participate they are all in; there is no selective participation in Scots law. Therefore, once defined as a 'victim', they are subject to all the burdens inherent in that role, burdens that they may not have known about and burdens which they may not, on reflection, wish to undertake.

In communicative terms the designation of 'victim' has important impact upon how the person shall be perceived by the actors within the system and the public at large, what Chalmers and Leverick deem the "*symbolic function*".[155] The designation of a person as a victim has an inevitable psychological impact on the individual and the community as to how they shall be perceived. This concern is evidenced by the existence of a legislative prohibition on naming victims of particular crimes such as sexual offences.[156] There is a fear amongst victims of sexual offences that the term victim may imply that they are somehow a vulnerable entity, a concern that I suggest has been fostered by the new conception of the victim and as evidenced by the historical justification for the state's usurpation. In March 2018, in a rare example of a victim voluntarily forgoing their right to anonymity, Katie Johnston opted not to have special protective measures to protect her anonymity in Court,

[152] see generally: Chalmers, James, and Leverick, James, 'Fair Labelling in Criminal Law', 71 Mod. L. Rev. 217, 2008
[153] European Convention on Human Rights, Article 6(2)
[154] Hohfeldian "*jural correlatives"* see Hohfeld, Wesley Newcomb, *'Some Fundamental Legal Conceptions As Applied In Judicial Reasoning'*, Yale Law Journal, Vol. 23, 1913, p30
[155] ibid at 152, p226
[156] See: s1(1) of the Sexual Offences (Amendment) Act 1992, prohibits the publication of the names of victims of sexual offences

wishing to view the man accused of raping her. Further, post-trial and conviction she waived her right of anonymity as a victim of a sexual offence in order to tell her story and encourage other '*survivors'* of sexual offences to come forward. In a telling comment from a BBC interview she stated that part of her reasoning for abandoning anonymity and special measures was that she "*didn't want to be viewed as some sort of victim*".[157] Therefore, just as labelling an accused as a "rapist" or "thief" has a significant impact upon an accused and how they are viewed both within and out with the criminal justice system, the label of victim has significant consequences for the person harmed by the crime and how they too shall be perceived. Crucially for the criminal legal system, labelling as a 'victim' also has a significant impact upon how the individual is perceived and treated by the prosecutor, the defence agent and also the judge: It impacts both the manner in which they are treated and the weight of their views and evidence throughout the trial.[158]

Whether issues of the fairness of labelling weighed upon the committee when drafting the *Basic Principles* is unclear, but what is clear is the intention to state what a victim is, and what they are entitled to in law, and why. The preparatory meeting of experts on the drafting committee provides the overarching rationale for victim creation. The Secretary-General's report from the eighth session of the Committee indicates the rationale for what would eventually become the *Basic Principles* and at the forefront of that rationale was the desire to see that the victims of crime were compensated. [159] The committee extrapolates the principles of tort into the criminal law sphere: *"Under the principle of tort law obtaining in most of the countries of the world, those who commit illegal or wrongful acts must indemnify the parties whom they injure thereby"*.[160] It is clear that at the end of the criminal law process, the committee believed, a recognition through recompense was important, and the individual deserving of that compensation was the victim. Therefore, to enable compensation to take place the victim must be designated as a legal entity within the criminal law, in order to "*provide for those who have been harmed a modicum of justice and redress"*.[161] Inherent in

[157] BBC Scotland News Website, published 16 March 2016, available: http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-43416741

[158] The recognition of the victim by the other criminal justice actors, and the impact that recognition has on developing the victim as a legal construct, requires greater exploration and forms part of my recommendations for further study, see Chapter 5.3 below.

[159] Report of the Secretary-General, Guidelines for Measures on Behalf of Victims of Crime and abuse of Power, Committee on Crime Prevention and Control, Eight Session, Vienna, 21st-30th March 1984, E/AC.57/1984/14, available: https://digitallibrary.un.org/record/72994?v=pdf

[160] ibid, pp10

[161] ibid, pp9

this first 'victim' rationale within the *basic principles* is already what I would suggest is a misconception regarding the victim, namely their predisposition towards a pecuniary outcome. Like the first victim activists, the human rights movement appears to adopt a compensation-based rationale for identifying the victim as a bespoke party. This rationale mirrors that of Nils Christie who argued only a number of years earlier, that conflict should be treated like a tort; the parties designated and identified, and therefore empowered within the process and the victim should be an equal party to the accused. Only through the prism of this tort approach can the victim be fully an equal party. There is of course a danger in over-correlating the desired legal outcome with justification as to legal status of party, especially when comparing the civil and criminal jurisdiction. Within the civil sphere it makes perfect sense to equate outcome with the status of victim as party, as one enters as a party specifically for a pecuniary outcome, the two are intrinsically intertwined. However, in criminal proceedings this would negate a significant number of victims who report crimes for a plethora of different reasons, including: moral justice, vindication, reducing recidivism, being heard, and even catharsis.[162] That stated, what emerges from the labelling of the victim within the *Basic Principles* is a wrong step in the right direction: A call for states to '*protect the invisible victim and return them to a state of activity*'[163] by bringing them into the light of criminal justice discourse and providing a normative definition as the party harmed.

The definition of victim thus established, the *Basic Principles* thereafter move on to the next stage of clothing the victim in a normative framework: Stipulating (and thereby creating) the rights the status bestows. Broadly it establishes two categories of victims' rights: Right of *access* and the right of *fair treatment*. The *Basic Principles* define access rights as "*entitle[ment] to access the mechanisms of justice and to prompt redress*"[164]. The right to access within the *Basic Principles* goes beyond simple access or standard access, which is the right to have access to the Court process in order to redress the harm you received. The right to access includes "*continuing access"* throughout the criminal trial process.[165]

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[162] For an interesting empirical snapshot of victims views on outcome within a criminal justice sphere see: Scottish Sentencing Council Report, '*Exploring views on sentencing for domestic abuse in Scotland*', August 2024, available here: https://www.scottishsentencingcouncil.org.uk/media/ysffguhw/20240812-views-on-sentencing-domestic-abuse.pdf ; see also Shapland, Joanna, Robinson, Gwen and Sorsby, Angela, '*Restorative Justice in Practice: Evaluating what works for victims and offenders*', Routledge, 2011, Ch. 8.
[163] ibid at 55, p7
[164] ibid at 149, Article 4
[165] ibid at 149, Article 6(b)

Establishing access rights are the next essential step in constructing a normative foundation for the victim, as they are gateway rights – those rights which enable and make possible the creation of positive rights of participation for victims within the criminal trial. Whereas the accused's rights in common law systems stem from a negative rights approach, ('what the state must not do'), the *Basic Principles* adopt a positive rights approach found in human rights mechanisms or 'what the state must do' to ensure these access rights for the victim. The decision to use a positive rights model would continue and become invaluable when victims' rights were taken up by the European human rights mechanisms. This approach, according to Keir Starmer, demonstrates the central "*importance of human rights law in shaping the development*" of victims' rights.[166] Opposition to the positive rights approach, particularly at the domestic level, is that it is contrary to democratic sovereignty, the creation and imposition of the victim and their rights undermines the negative freedoms model, established over centuries, ensuring an accused's right to a fair trial. However, as Sandra Fredman indicates: "*human rights and particularly positive human rights duties are essential to achieve participation*" and so act as a catalyst for individual participation and the strengthening of the rule of law; access rights promote participation.[167] The decision to favour the positive rights approach, though essential for creating a normative construct of the victim under international law, would place at the core of this construct of the victim a foundation that in many ways is anathematic to the traditions of Scots criminal law.

The second category of victim rights established within the *Basic Principles* was the victims' right to fairness, a requirement that the state regulate how victims are treated whilst exercising their access rights. A right to fairness, equal to the accused and the public, is essential to establishing the victim as an empowered legal entity because it acknowledges the victim is an equal party to the process along with the state and the accused. Fairness within the Basic Principles is defined as the victims' right to compassion and the protection of their dignity within the criminal justice process.[168] The right to fairness for the victim (including the right to assistance[169] and transparency[170]) within the criminal justice process is

[166] Starmer, Keir, 'Human rights, victims and the prosecution of crime in the 21st Century', Criminal Law Review, 777-787 2014, p777
[167] Fredman, Sandra, 'Human Rights Transformed: Positive Rights and Positive Duties', Oxford University Press, 2008, p32
[168] ibid at 149, Article 4
[169] ibid at 149, Article 6(c)
[170] ibid at 149, Article 5 and 6(a)

controversial because it challenges the traditional paradigm of the criminal justice system being about the state and the accused: The accused's right to a fair trial and the state's duty to ensure that a fair trial takes place. This traditional paradigm of fairness, famously outlined by Lord Bingham, indicates that "*it must be recognised that, fairness means fairness to both sides, not just one…a trial is not fair if the procedural dice are loaded in favour of one side or the other*". The Basic Principles amend this paradigm so that fairness now means fairness to all **three** sides.[171]

The connection of fairness with the victim within the *Basic Principles* is conceptually important because traditionally fairness was not a term associated with the victim: "*in criminal cases, justice is associated with the interests of the victim; fairness with the interests of the defendant*".[172] Justice was the right of the individual, fairness the right to be judged equally in comparison to others. Fletcher argues that the central success of the international instruments, such as the *Basic Principles*, was in the reversing of the priority of these two principles, justice and fairness, that "*a reversal of the priorities between justice and fairness…is unprecedented in the history of criminal law*".[173] Looked at in a different way however, I would suggest the success was not in the reversal, but in the equal provision of fairness and justice to the victim and the accused - both were now arguably entitled to access within the criminal justice process and to be treated fairly whilst claiming this right. Fletcher goes on to assert that the *Rome Statute of the International Criminal Court* (hereafter *Rome Statute*) was the "*one exception*" to a general ignorance of the status of the victim or victims' rights amongst the international human rights instruments.[174][175] However, as I have demonstrated, the *Basic Principles* almost 15 years prior to the *Rome Statute* came into force, provided the first definition of the victim and their rights within an international instrument. The process of creating a rights-based construct of the victim began with the *Basic Principles*. The *Rome Statute* and the other international tribunals would continue to foster that construct and test it within a procedural framework. It would become very quickly apparent that the "*easy [procedural] assumption of victimhood camouflages a number of very difficult conceptual issues*".[176]

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[171] Bingham, Tom, '*The Rule of Law'*, Penguin Books, 2010, p90
[172] Fletcher, George P, 'Justice and Fairness in the Protection of Crime Victims', Lewis and Clark Law Review, 2005, Vol. 9(3), 547-557, p548
[173] ibid, p554
[174] *Rome Statute of the International Criminal Court*, A/CONF.183/9, 17th July 1998
[175] ibid at 172, p551
[176] ibid at 172, p549

3.3 International Criminal Law: Exploring the victim as a legal construct

The international criminal legal systems have been an innovator for different methods of developing a rights-based approach to the victim. These international systems of criminal law, through their attempts at integrating the victim into their procedure, have provided insight into how the victim might become more than simply 'just another witness'. The two forms of international trial process – tribunal and Court – have developed in interesting and divergent ways: The ICC preferring a more *expansionist approach*, and the International Tribunals favouring a more *protectionist approach*. These approaches are essential as they are the first attempts to integrate the victim into a legal system and would provide working models for victim integration elsewhere. The protectionist model of victim integration, favoured by the Tribunal system, is a model that forms a compromise between complete integration – aggressive participation rights - and no integration at all. The protectionist model adopted by the Tribunal system provides victims with recognition, and with access rights, but stops short of participation rights, and as such protects the more traditional model of criminal justice. The victim within this model is still very much limited to participation as a witness with additional rights of access.[177] Therefore, within the terms of the treaty establishing the *International Tribunal for the Former Yugoslavia* (hereafter ICTY)[178], there is a requirement for the protection of victims and witnesses primarily through procedural safeguards to enable them to provide evidence safely, a common access right.[179] The exact same provisions and recognition can be found within the Statute of the International Criminal Tribunal for Rwanda.[180] Access rights at the Tribunals promote protection of the victims' dignity, and safeguards to enable them to give their evidence. The paramount consideration, however, is still the accused's right to a fair trial and therefore the protectionist model of the Tribunals retains and preserves the traditional Enlightenment model of trial.

That stated, within the body of the Tribunal Statutes, there begins to emerge an indication that the status of the victim is developing and for the first time we find that the

[177] Cryer, Robert (Edit), 'An Introduction to International Criminal Law and Procedure', Cambridge University Press, 2008, Ch. 17.3.4, p 361
[178] *Statute of the International Criminal Tribunal For the Former Yugoslavia*, 1991 (as amended), available here: https://www.icty.org/en/documents/statute-tribunal
[179] ibid, Article 22
[180] *Statute of the International Criminal Tribunal For Rwanda*, 2010, available here: https://unictr.irmct.org/en/documents/statute-and-creation

right of an accused person to a fair trial is no longer an unconditional right: "*In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute."*[181] For the first time the right of the accused to a fair trial, the cornerstone of the Enlightenment theory of justice, has been made subject to the rights of the victim. The *Rome Statute* would aggressively take up this evolving status of the victim and the International Criminal Court (hereafter ICC), and the drafters of the *Rome Statute,* would take the next significant conceptual step in victim integration of the international construct of a rights-based model of victim: An expansionist model.

"*[C]hildren, women and men have been victims*"… From the preamble of the *Rome Statute* the drafters made it clear that the development of the International Criminal Court as a system of law would be "*mindful*" of the existence and plight of the victim. [182] Fletcher states that the purpose of this, and the raison d'être for the *Rome Statute,* was to "*vindicate the interests of the victim*".[183]In this regard I think he goes too far. Whilst the Court would undertake an expansionist model of victim integration, introducing participation rights into its procedure, the Court is not a victims' Court. It is still a Court of criminal law prosecuting in the global public interest. The ICC drafters left the working definition of the victim to be established by the rules and procedures of the Court, demonstrating pragmatism towards victim integration even within an expansionist approach. In Rule 85 we find "'*Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*".[184] This definition of the victim mirrors the definition within the *Basic Principles* and confirms the prevalence of the victim as a new international criminal rights-based construct, rather than as ad hoc creation by the various Courts and tribunals.

The integration of the concept of the victim into a legal system gives rise to significant conceptual difficulties, what Anni Pues refers to as the "*paradox of two opposing presumptions*"[185] or what I have designated: *'victims Paradox*'. The 'victims' paradox' is the most commonly quoted objection to the integration of the victim and it arises in relation to

[181] ibid at 178, Article 21
[182] ibid at 174, preamble
[183] ibid at 172, p551
[184] ICC, Rules of Procedure and Evidence, Rule 85(a)
[185] Pues, Anni, '*A Victims' Right to a Fair Trial at the International Criminal Court?*', Journal of International Criminal Justice, 2015, Vol. 13(5), 951-972, p957

one of the cornerstones of criminal law - the presumption of innocence. In introducing the victim at the pre-trial and trial stage one immediately creates a presumption of victimhood, and within this presumption resides the paradox: How can the accused be presumed innocent if there pre-exists a victim? The role of the prosecutor, on behalf of the state, is to prove two fundamental elements: That a crime took place and that it was the accused who did it (or what is often deemed the prosecutors burden of proof).[186] Opponents to victim integration suggest it is incompatible with the presumption of innocence as it presupposes that the victim was the victim of *something* and therefore that a crime took place.[187] The theoretical solution to the 'victim paradox' I suggest, is to treat victim as a legal fiction, thus enabling it to be treated as both true and yet unproven at the same time. According to opponents of integration, however, the status of the victim is not so damaging to the presumption of innocence or fair trial, as the rights claimed by that status.

The rights attached to each victim whilst engaging in the ICC system are contained within Article 68 of the *Rome Statute*. Article 68 §1,2,4,5 and 6 enumerate those rights already common to the Tribunal system and drawn from the *Basic Principles,* namely access rights: The right to special measures whilst providing evidence, the right of outside agencies to make recommendations for the protection of victims whilst giving evidence, and general rules of victim safety. The ICC access rights provisions make clear that any safety considerations must be considered and exercised so as not to be *"prejudicial or inconsistent with the rights of the accused and a fair and impartial trial".*[188] The accused's right to a fair trial is still considered a paramount consideration. Salvadore Zappala argues that when interpreting access rights, judges should make clear that "*process principles and fair trial rights must have primacy over any other competing interest…[since]…they represent the fundamental bedrock of modern criminal procedural law*"[189]. Zappala further argues that the only manner in which one can measure the quality of criminal justice is the '*fair trial model*'[190]. What is interesting about Zappala's critique and conceptual approach, however, is that he argues that **only** the accused has the right to a fair trial. The concept of a fair trial, according to Zappala, is particular only to the accused and should not be a public interest

[186] It is also enshrined in the Rome Statute, ibid at 174, Article 66(2)
[187] Zappala, Salvadore, 'The Rights of Victims v. the Rights of the Accused: Reflections on Article 68(3)' Journal of International Criminal Justice, 2010, Vol, 8, 137-164, p146
[188] ibid at 174, Article 68 (1) and (5)
[189] bid at 187, p143
[190] ibid at 187, p143-144

consideration: "*[f]airness is not a broad 'one size fits all' notion.*"[191] Within the ICC jurisprudence however, we begin to see emerging a strong argument in favour of an extension of the right to a fair trial to the whole of the proceedings, and to all parties involved: The accused, the state and (for the first time), the victim.

The ICC jurisprudence begins to explore the argument that 'fair trial' extends beyond the accused to the overall proceedings, and therefore forms part of the public interest argument. The accumulation of legal decisions on the role of the victim is yet another important integrative step in the entrenchment of the victim as legal rights based legal entity. In the pre-trial decision of the ICC in the case against *Bosco Ntaganda,* for example, we see the argument made that the "'*fair trial" guarantees shall apply throughout the proceedings not only to the defence, but in respect to all the parties and participants, including the victims".*[192] Pues proposes that when we talk of fairness within the criminal justice process what we are actually discussing are two concepts: First, a general component and second, a specific right of the defendant.[193] The former relates to the general requirement of fairness across the criminal justice process, the latter refers to a specific right of the accused at trial.

In her analysis Pues builds upon a general concept of fairness between actors within an international legal setting as espoused by the International Court of Justice (ICJ), namely fairness as equilibrium between the parties.[194] Pues develops this concept of fairness and draws a distinction between a system in which the parties are state vs. state, as found at the ICJ, and when it is the state vs. the individual. In the latter, fairness must be with the party in the weaker position, and the burdens always with the state. This model of fairness as a dichotomous theory, is easily applicable to the protectionist model of victims' rights, in which rights are limited to status and access rights. The complexity arises when the victim (as enabled by Article 68(3)) becomes a party in their own right to the trial process. The more integrated into the system the victim becomes, as a party, the greater their entitlement to equal status and rights proportionate to that role.

[191] ibid at 187, p149
[192] *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 (Victim Observations) (14th April 2015), pp 26
[193] ibid at 185, p956
[194] ibid at 185, p956

Article 68(3) requires that when the personal interests of a victim are affected, the Court will enable the views of the victim to be presented – either in person or through legal representation - and be fully considered by the Court. In effect the *Rome Statute* enables the victim the right to be a party to proceedings. For Zappala, allowing victims to participate in the criminal justice process is a response to the "*primordial needs of human beings*" and he roots participation in the traditions of the trial process. [195] The critique of victim participation is taken up by Pues, who suggests that it is causing failings in the ICC system, both practically and conceptually. In practice the victims' right to participation is not unconditional, and the time and expense involved in considering victims' views is "*clogging the system*". [196] Victims who wish to participate must demonstrate an interest in relation to each procedural element of a case prior to their views and concerns being considered. There is no set legal test for victims' interests and it is therefore considered on a case-by-case basis, which gives rise to concerns regarding the ad-hoc nature to decisions and the rise in likelihood of inconsistencies. The difficulty with an ad hoc approach to a participatory right is that it has the potential to relegate the victims' '*right of participation*' to a '*privilege'* that may be granted or withheld by the Court under certain circumstances. It provides an opportunity for the rights of the victim to be denied in the interest of overall fairness – a particularly ambiguous test.[197]

Within the ICC framework one observes victim integration at its most progressive and expansionist. The victims' rights extend to trial participation, including calling their own witnesses. This opens the victims' role to accusations that they are potentially acting and "*behave[ing] like a second team of prosecutors*".[198] The victim acting as a second prosecutor, or the prosecutor acting like a victims' lawyer, is a frequent criticism of victim integration and victims' rights and shall be an argument that I return to in Part II. In legislating for a victims' right of participation, the ICC has gone further to accommodate the victim than any other international or domestic institution and provides policymakers with the most expansionist approach on the spectrum of integrative approaches. That stated, as Pues highlights, it is difficult to directly compare the ICC to domestic institutions due to the *sui generis* procedural system it has developed.[199] At the ICC, due to the nature of the offences,

[195] ibid at 187, p158
[196] ibid at 185, p954
[197] ibid at 185, p967
[198] ibid at 185, p967
[199] ibid at 185, p954

the state (or a branch of it) is usually the party being prosecuted and the victim is rarely an individual but an identifiable group or race. Furthermore, in almost all cases at the ICC the harm caused is rarely a fact at issue e.g. that people died or were displaced. The issue at trial is normally a highly technical justification or explanation of the harm inflicted. Thus it is perhaps easier to assign the label of victim at an earlier stage, the systemic focus being one more of culpability in that victimisation and not whether they are in fact victims at all. A direct comparative approach with the ICC on victim integration and the jurisprudential difficulties of the victim as a construct is not without its dangers, as Mark Findlay suggests, "*the evolution of international criminal institutions and procedures appears expedient rather than experimental, rationalised rather than rational*".[200] Nonetheless it offers not only lessons in establishing a framework for integration of the victim, but also the potential dangers of victim integration to the concepts of fairness and right to a fair trial. From the victims' cradle of the United Nations *Basic principles*, to its progressive development through the International systems of criminal law, the role of the victim has become an established status within international criminal justice. However, it was not until the victim as an international construct progressed into a European rights-based legal entity through the European Human Rights framework, that it would find a conduit through which it could influence domestic criminal reform in Scots law.

3.4 ECHR: The Victim Conduit

The European Convention on Human Rights (ECHR) mentions victims twice: First is in Article 3 §5, in relation to the rights of accused who are wrongfully arrested or detained and the second is Article 34, the right to individual applications.[201] Neither provides the victim with status or access rights, and there is certainly no mention of participation rights. How, therefore, can one claim that the ECHR is the conduit (a normative framework) through which a new construct of the victim was incepted into Scots criminal law?

The absence of a definition or reference to the victim of crime or victims' rights in the articles of the ECHR is perhaps not surprising, given the background and purpose of its creation. The ECHR reflects the post-WWII need to enforce the enlightenment ideals of

[200] Findlay, Mark, '*Internationalised Criminal Trial and Access to Justice*', International Criminal Law Review, 2, 2002, p241
[201] European Convention on Human Rights, Article 3 and 34

individual civil liberties against the excesses of the state. The ECHR focus in relation to the criminal trial is on the right to justice and due process, which had been so grossly violated that century. It mostly falls silent on issues of wider social fairness, *welfarism* and those roots which fostered the victims' movement. For some the ECHR ensures that human rights discourse becomes stalled within the terms of its articles, "*petrified in a legalistic paradigm*" and fails to evolve past its original mandate to cater for wider social rights. [202] However, the ECHR has the ability to exceed the parameters of its articles and expand the reach of its writ. Through the two different European mechanisms – jurisprudence of the European Court of Human Rights (hereafter ECtHR) and the European Directive – the ECHR has been able to expand its remit and foster the rights-based approach to the victim. Through adopting victims' rights as human rights and the "*domestication of international human rights norms*" the European mechanisms were able to be utilised to integrate the victim into the Scottish legal system. [203] Its jurisprudence created a culture of rights that became more than a mere *"declaration of moral principles and pious aspirations"*.[204] EU Directives provided policymakers with a mechanism, a normative framework, to overcome the impasse caused by the Enlightenment legal system and translate the social conception of the victim into the domestic legal entity. The ECHR became a conduit through which bodies of rights could evolve and prosper in the formerly inhabitable terrain of the Scottish criminal law.

3.5 Victim Integration: The Jurisprudential Model

The jurisprudence of the European Court of Human Rights (ECtHR) has been essential in establishing the status of the victim and victims' rights, and a key source of inception of the victim into the UK more generally. It was "*only when international human rights law developed the notion of victims' rights, did the traditional model begin to break down, or even come under any pressure to change*"[205]. Through challenging the common law traditional focus on civil liberties and the negative freedoms approach, the victim began to emerge as an entity in their own right within the domestic criminal legal system. The ECtHR adopted the international framework for rights creation and developed three core victims'

[202] Koskenniemi, Martti, '*The Effects of Rights on Political Culture*', in Alston, P, '*The EU and Human Rights*', Oxford University Press, First Edition, 1999, p99
[203] Mertus, Julie A., *'Human Rights Matters: local Politics and National Human Rights Institutions'*, Stanford University Press, First Edition, 2009 Chapter 1, '*Operationalizing Human Rights at the Local Level*', p1
[204] Statement of Sir David Maxwell-Fyfe**,** quoted in: Mowbray, Alastair, *'Cases, Materials and Commentary on The European Convention On Human Rights'*, Oxford University Press, Third Edition, 2012, p5
[205] ibid at 166, p786

rights: First is the right of recognition or status right, this is the right to be acknowledged as the victim of a crime by the state. Second is the right to services or access rights, those rights entrenching fairness to the victim within the criminal justice process. Third, procedural rights or right to participation, in which the victim has the right to actively take part within the criminal trial.[206]

Recognition of the victim and their rights as an accepted legal construct within the European criminal justice system and their right to be recognised can clearly be seen as early as the mid-1980's within the case of *X and Y v. The Netherlands*[207]. This case involved the rape of a 16-year-old girl with significant mental health issues, and the Dutch Courts found that her father was not entitled to make a criminal complaint on her behalf. The girl was unable to do so herself due to her disabilities. The girl's father raised an Article 8 action, claiming the Dutch government had violated his right to family life by not enabling him access to a criminal action. The Dutch government claimed that since civil remedies were open to the applicant, there was no requirement for the government to entertain criminal proceedings and view the family as victims of criminal harm.[208] The applicant made the argument that the civil process would be unsuitable due to the costly nature of proceedings and the lack of safeguards for his daughter, and therefore that they had the right to access criminal justice.[209] The Court ruled that "*the protection afforded by the civil law in the case of wrongdoing of the kind inflicted…is insufficient…Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions*".[210] This case is an essential beginning because it found that when a criminal harm is alleged, albeit of a particular seriousness in this case, there is an inherent right to access criminal proceedings. It *de facto* established that the girl was entitled to be *identified* as the victim of a criminal act and have access to redress the harm through criminal justice proceedings. It created a positive obligation on states to *identify* victims of crime, and act upon that status so established.

KU v. Finland[211] was a case in which a child was targeted via email by a sexual predator. The father of the boy demanded the police retrieve from the Internet provider the

[206] Leverick, Fiona, 'What Has the ECHR Done for Victims? A United Kingdom Perspective', International Review of Victimology, 2004, Vol. 11, p178
[207] Application 8978/80 (Judgement) (26 March 1985)
[208] ibid, pp25
[209] Ibid, pp25
[210] ibid, pp27
[211] *Application 2872/02 (Judgement) (2 December 2008)*

name of the individual and the provider refused. The Finnish Courts upheld this decision on privacy grounds.[212] The ECtHR found, *"It is plain that both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require availability of a remedy enabling the actual offender to be identified and brought to justice."*[213] The Court in *KU* once again recognised the victims of crime and their right of access to the criminal justice process. Of significance within this case is the triumph of victims' rights, an implied right, over the right to privacy, a stated right. Osman v. United Kingdom marked a milestone for victim recognition within the United Kingdom.[214] In Osman, the state failed to protect a family from the criminal acts of an obsessed teacher despite numerous reports by the family to state authorities, resulting in a fatal shooting. The ECtHR found the state's failure to act gave rise to the victims' right to seek recompense for that failure.[215] The state was required to acknowledge the victim of a crime and provide access to remedy. Accordingly, the state has a positive duty to identify potential victims and must afford them a duty, a right to protection from serious harm.[216] The 'Osman Warning' now provided by police when they have knowledge a person may be in danger, is a constant reminder of the state's positive, pre-criminal proceedings obligation towards victims.[217] The jurisprudence of the ECtHR mandated the recognition by domestic authorities of certain potential victims of crime. States were required, through the binding nature of the jurisprudence of the ECtHR, to interpret domestic law to acknowledge and consider the victim for the first time and the domestic Courts would not only be empowered but required to enforce this recognition. The ECtHR did not, however, stop at victim recognition, it went further and acknowledged victims' access rights and participatory rights.

The creation of access rights is essential to the adoption of the victim as a legal entity and the gateway right enabling implementation of more progressive victims' rights. Access rights or service rights were adopted by the ECtHR much like they had been by the international bodies. Access rights are perhaps easiest to implement at the pre-trial stage, as this presents the least challenge to the Enlightenment principles of justice. Access rights at

[212] Finland has one of the most progressive laws regarding freedom of speech, and the result of this is their indecent images laws are weak.
[213] Ibid at 211, pp47
[214] Application 87/1997/871/1083 (Judgement) (28 October 1998)
[215] ibid, pp153
[216] ibid at 166, p780
[217] The decision in Osman (and the Courts approach to victims) was confirmed in *Van Colle v. The United Kingdom*, Application 7678/09 (Judgement) (13 November 2012)

the pre-trial stage recognised by the jurisprudence of the ECtHR include the right to transparency, for example the right of information and the right to receive information regarding prosecutorial decision-making, and the right to investigation. The ECtHR has considered extensively the pre-trial right of the victim to an investigation: In *Jordan v. The United Kingdom* the ECtHR found that if a criminal complaint has been made, in this case a father claimed his son had been fatally shot by police officers during a car chase, the state has an obligation to investigate.[218] This implied right to a criminal investigation was created under the states' duty to protect the right to life within the terms Article 2. [219] Out of this negative right for the state not to interfere with the individual's right to life, the ECtHR developed a positive right to criminal investigation and a victims' right to access criminal justice. Furthermore, the victim was not only entitled to an investigation but to a certain standard of investigation, namely, an effective, expedient, independent investigation capable of leading to a determination of the existence of a crime and the perpetrator.[220]

The second access right recognised by the jurisprudence of the ECtHR is that the victim is entitled to transparency during the investigation process.[221] At the heart of the right to transparency in the investigation is the victims' right to information at the investigation or pre-trial stage. The importance of this right is dramatically highlighted within the *Osman* case in which the failure to provide the victim of harassment with all the important information ended fatally. Furthermore, within the *Osman* case the right of access to information was extended to the right of access to information about prosecutorial decision-making. The Court ruled that the unarmed killing of a son "*cried out for explanation*" to the father, but the applicant was "*not informed of why the shooting [was not]…meriting of a prosecution*".[222] The right of access to information regarding the prosecutorial decision was upheld in *Finucane v. United Kingdom.*[223] Finucane is part of a cumulative jurisprudence of the Court perhaps most easily described as the '*Belfast Cases*'.[224] They revolve around the family of victims murdered in Belfast being denied an explanation by the prosecution authority for not

[218] Application 24746/94 (Judgement) (4 May 2001)
[219] ibid, pp105
[220] ibid, pp106-109
[221] ibid, pp109, what the ECtHR refers to as "*public scrutiny*"
[222] ibid at 218, pp124
[223] *Application* 29178/95 (Judgement) (1 July 2003), pp82-83
[224] *Hugh Jordan v. United Kingdom* Application 24736/94 (Judgement) (4 May 2001); *McKerr v. United Kingdom,* Application 28883/95 (Judgement) (4 May 2001); *Kelly and Others v. United Kingdom*, Application 30054/96 (Judgement) (4 May 2001) and *Shanaghan v. United Kingdom*, Application 37715/97 (Judgement) (4 May 2001)

pursuing a prosecution. Within this body of law the ECtHR interpreted into the ECHR Article 2 the victims' right to information, in these cases a tertiary victim in the form of the victims' next of kin: "*the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her own legitimate interest*".[225] Access enables a transparency in the criminal proceedings which itself creates credibility. Absence of access to information or explanation regarding prosecutorial decision making at the pre-trial stage damages the criminal justice process. The victim and their rights were becoming further equated with fair process.

The progressive approach of the ECtHR towards the rights of the victim and their right of access did not end at pre-trial. The jurisprudence also extends access rights beyond the pre-trial stages into the trial-proper stage. The jurisprudence makes it clear that victims have a right to access the trial in a manner compatible with maintaining their dignity and security of person - both physically and psychologically. Primarily this involves the victims' ability to provide their evidence in Court in a manner that does not re-victimise them. In many jurisdictions that includes the right to give evidence utilising special measures to protect their dignity. The ECtHR in *Doorson v. The Netherlands*, found that such special measures were the right of the victim and not incompatible with the rights of the accused, although the interest of a fair trial must always be considered and a balance struck between assisting the victim to provide their evidence safely and the accused's right to a fair trial. [226] States, according to *Doorson,* have a general obligation to organise their trial procedure to ensure that victims' access rights are not "*unjustifiably imperiled*".[227] The ECtHR has not yet had a case to specially address the victims' right to preservation of dignity during cross-examination as a manifestation of their access rights, and the impact of this upon the right to a fair trial. Certainly, in Scotland the Courts have taken a keen interest in this particular right of access, as was demonstrated by the Lord Justice Clerk's opinion in the case of *Duncan Willaim Begg v. HM Advocate*: *"[I]t is doubtful whether the ubiquitous informed bystander would have regarded the conduct of this trial as affording due respect for this complainer's rights*". [228] One can see in this statement a concern that justice *to victims* must now not only be done but be seen to be done by the public at large.

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[225] ibid at 218, pp109
[226] *Doorson v. The Netherlands*, Application 20524/92 (Judgement) (26 March 1996), pp70
[227] ibid
[228] *Duncan William Begg v. Her Majesty's Advocate*, [2015] HCJAC 69, pp39

The third rail of victims' rights are procedural rights: Those rights that enable the victim to participate and assert influence over the criminal justice process. The most prominent and controversial of these procedural rights is the right to challenge a prosecutorial decision. The ability of the victim to question the prosecutor's decisions creates a tension within the criminal justice system as Doak indicates: "[*T]he interests of the victim as a private individual sit very uneasily alongside the notion of a fair and objective system of public prosecutions*" and decisions based on the opinion of the victim create serious issues of fairness and legitimacy.[229] As has been demonstrated, the ECtHR jurisprudence interpreted a victims' right to *access* the prosecutor's decision. The jurisprudence goes on to show that access rights are often the gateway right to participation rights; once access to the reasoning of a decision has been made, the logical next evolution of that right, is the right to challenge that decision.

Article 13 of the ECHR guarantees an individual's right to an effective remedy to any violation of rights under the charter. In the case of *Aydin v. Turkey* the Court examined this right to effective remedy and established that within that explicit right existed the victims' right to challenge the decisions of the prosecutor during the evidence gathering and assessment stages, when those decisions interfered with the possibility of an effective remedy. [230] In the *Aydin* case this involved the prosecutor's decision not to fully investigate all avenues of evidence and collate appropriate witnesses at the direction of the victim.[231] The Court found that the prosecutor's failure to seek supportive witnesses breached Article 2. Arguably, what the ECtHR is establishing in the case of *Aydin* is an inroad to a victims' right to have an influence on prosecutorial decision making, albeit when there is an inherent failure. This places the victim potentially in direct contest with the public interest. Leverick suggests that this reasoning by the ECtHR raises significant concerns regarding those categories of cases in which a sufficiency of evidence exists, but the prosecutor decides in the public interest not to raise the case, over the objections of the victim.[232]

[229] ibid at 98, p118
[230] Aydin v. Turkey, Application 57/1996/676/866, Judgement, 25 September 1997
[231] ibid, pp 103-109
[232] ibid at 206, p190

In *A v. United Kingdom,* the Court found that the state has a positive obligation under Article 2 to deter the commission of offences by limiting the scope of a defence available to an accused. [233] In this case the defence of reasonable chastisement to the crime of assault on a child was deemed too wide a defence, in that it failed to protect children from degrading treatment. The availability of reasonable chastisement as a defence denied the victim fair treatment in any criminal proceedings. Leverick suggests that the extension of this ruling is that failure to prosecute situations in which there is a technical sufficiency of evidence, could amount to the state failing in their duty to deter the commission of offences. Once again, the ECtHR is placing the victim at the centre of the prosecutorial decision-making process and entitling them to weighty consideration. The ruling in the case of *A*, arguably allows for the scenario in which the public interest is at odds with the victims' interest: It creates a tension between the normative function of the prosecutor and the integrated rights of the victim.[234] There is a danger that the public interest becomes subsumed by the victims' interest, enabling the supremacy of victims' rights within the traditional criminal justice paradigm. The prosecutor's decision from that point on would lack independence and legitimacy. It could create a *de facto* right of the victim to a prosecution, effectively, a right to a trial. The difficulty with this argument is that is assumes the presence of a passive prosecutor, unable or unwilling to robustly and legitimately challenge the victims' claim to a trial.

Private prosecution, in which the prosecution is raised and led by the victim, is perhaps the closest model providing for a wholly victim-centric justice model and providing the victim with full autonomy within a criminal justice setting. The ECtHR could have embraced (and perhaps expanded) this ultimate participatory right-based model of the victim and their function. If it had done so, it would have clearly set the ECtHR on an expansionist footing. Interestingly, the decline in focus on private prosecutions (on one view) evidences the increased role an empowered victim came to be playing within the pre-existing criminal justice infrastructures at the international and transnational levels. In *Helmers v. Sweden* the Court found that the Article 6 right to a fair trial did not contain, implicitly or explicitly, the right of a victim to raise a private prosecution.[235] In the Council of Europe Committee of Ministers recommendation of 1985 '*On the Position of the Victim In the Framework of Criminal Law and Procedure*', the view was expressed that in respect of the rights of the

[233] Application 100/1997/884/1096 (Judgement) (23 September 1998)
[234] ibid at 98, p118
[235] Application 11826/85 (Judgement) (29 October 1991) pp29

victim as they pertain to prosecutorial decision making the "*victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings"*.[236] Mujuzi argues that since 1985 the victims right to a private prosecution has been gradually mentioned less, and in fact in the most recent Directive 2012/29/EU there was no mention of private prosecution made at all.[237] I suggest one explanation for the decline in discussion of private prosecution at the international and transnational level is the increased presence of the victim, as a recognised and participating legal entity within these criminal justice institutions.

The jurisprudence of the ECtHR has been an active, creative and expansive mechanism through which a rights-based model of the victim has trickled down into domestic legal systems. The jurisprudence of the ECtHR has fostered a new construct of the victim and created and contributed to a rights based model capable of being incepted into domestic legal systems, including: status rights, access rights and procedural rights. The Court has been an important mechanism through which a new rights-based model of the victim has been institutionalised and percolated down into domestic criminal law. The Court as a conduit however does have limitations: First, as can been seen the ECtHR sides more closely with the protectionist model of victim integration and refuses to go as far as the ICC did in reading procedural rights into the ECHR. Secondly, the ECtHR is a mechanism for enforcing the ECHR, perhaps the greatest example of promoting and protecting civil liberties. Its focus is the broad preservation of fundamental human rights against the excesses of the state and not a bespoke vehicle for victims' rights. Therefore, although victims' rights can be read into the decisions of the ECtHR, they must be viewed through the prism of the state's responsibilities to the victim. This foundation, like Hume, rationalises that the victim is an entity that needs state protection, and their rights should constantly be measured against the state. It invokes once more the idea of the vulnerable and weak victim, dependant on the state - a paternalistic model of victim assistance. Whilst undoubtedly the greatest achievement of this jurisprudential approach to victim integration is that it requires domestic legal institutions to consider the needs of the victim within the criminal legal system and domestic criminal justice decision making, it endears the victim to said system by cloaking it in comfortable and

[236] Council of Europe, Committee of Minister, Recommendation No. R (85) 11, 28 June 1985, pp7
[237] Mujuzi, Jamil Ddamulira, '*Victim Participation in the Criminal Justice System in the European Union through Private Prosecutions: Issues Emerging from the Jurisprudence of the European Court of Human Rights*', European Journal of Crime, Criminal Law and Criminal Justice, 2016, Vol. 24, 107-134, p109

familiar Enlightenment ideals. In the parlance of Hume, it encourages the system to 'spend more shillings'. Finally, the case law approach to integration, by its very nature, creates significant risk of inconsistency.[238] As Leverick indicates, this model does not offer a comprehensive framework for victim integration nor victims' rights, but instead has had but "*the most minimal impact on the rights of the vast majority of victims.*"[239] Whilst it has done much for recognition and access, this approach is "*a long way though from establishing procedural rights*".[240] Clearly what was required was a more direct approach.

3.6 Integrating the victim: A Direct[ive] Approach

In 2001 the European Council issued its Framework Decision for the '*Standing of Victims in Criminal Trials'*. [241] This framework is in response to cross-border victimisation within Europe and an attempt to standardise the rights of the victim across all member states. [242] The Framework offered, for the first time, a "*hard-law instrument*" for the recognition and quasi-codification of victims' rights at the international level.[243] The Framework recognised the bespoke status of the victim within the criminal justice process and in this regard it followed the example of the *UN Basic Principles*.[244] Crucially, it addressed the requirement to dispense with ad hoc rights of the victim presented by the case law model, and provided that the needs of the victim should be "*addressed in a comprehensive and coordinated manner*".[245] Within its articles the Framework defines the victim and sets out the access rights of the victim, enumerating the right to recognition, information and trial protection.[246] Noticeably absent from the 2001 Framework however, is the victims' right to participation and a comprehensive approach to that category of rights. Article 2 of the Framework does provide for states to introduce that option, entitling victims to a "*real and appropriate role in its criminal legal system*" but absent specification, this would enable states to simply assign that appropriate role as *just another witness*. [247]

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[238] ibid at 206, p186-188
[239] ibid at 206, p195
[240] ibid at 206, p179
[241] Council Framework Decision, '*On the Stranding of Victims in Criminal Proceedings*', 2001/220/JHA, 15 March 2001
[242] Groenhuijsen, M.S., Pemberton, A., '*The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?*', European Journal of Crime, Criminal Law and Criminal Justice, 2009, Vol. 17, p 44
[243] ibid, p43
[244] ibid at 242, Article 1
[245] ibid at 242, preamble pp5
[246] ibid at 242, Articles 1, 2, 4 and 8
[247] ibid at 242, Article 2

The Framework's quasi-codified approach was a significant step in moving the victim from a socio-political ideal towards affixing the victim to a normative foundation. The Framework resulted in many countries improving the rights of the victim. In Scotland, as shall be discussed further in chapter four, the Scottish Government published its response to the Framework and outlined the reforms it had implemented and initiatives it would take to comply with the terms of the Framework.[248] The European instruments were informing the Scottish Government's victims' policy and putting it front and centre of the criminal justice agenda. The Scottish Government had now been presented with a normative framework upon which it could base reform that would enable victims not only to be a consideration of criminal justice policy but integrate the victim into the Scots criminal trial process. (should there be a line space after this paragraph?)

The focus of the reforms under the Framework were transparency and trial safety, which though progressive for the domestic Scottish system, did not move the victim much further on from the traditional role of "*reporting the crime…[and being] limited to giving evidence as a witness*", however it did make these acts more tenable [249] The Government's response to the Framework, as shall be seen, was rather lacklustre in itself, which could be interpreted to demonstrate the ineffectiveness of European Frameworks. However, I suggest that the limited response was less to do with the Framework than the size of the challenge posed by the domestic institutions and their own traditions and norms. The integration of the victim in Scots law would not be a revolution, but a "*gradual but steady development of victim emancipation within the criminal justice system*".[250] Furthermore, it would take time to reconcile the normative mechanism with the social conception of the victim. The success of the Framework, however, was to offer an example of how the victim *could* be set within a normative framework.

Directive 2012/29[251] is the culmination of placing the victim within a normative setting and most critically it made the recognition of the victim and implementation of

[248] 'Victims in the Scottish Criminal justice System: The EU Framework Decision On the Standing of Victims in Criminal Procedure', Scottish Executive Publication, Edinburgh, 2002
[249] Leverick, Fiona, '*Plea and Confession Bargaining in Scotland*', Report to the XVIIth International Congress of Comparative Law, July 2006 EJCL, p3
[250] ibid at 243, p59
[251] Council Directive 2012/29/EU

victims' rights compulsory: The victim would no longer be an optional legal consideration. The Directive adopts a comprehensive approach, building on the 2001 Framework and progressively expanding its rights framework, incorporating procedural rights or participation rights. Articles 2-9 and 18-24 introduce once again the *Basic Principles* and the Framework Rights, namely recognition of the victim and the access rights. The Directive brings the nebulous conception of the victim created by the Basic Principles together with the limited Framework Rights and introduces into its terms procedural rights within the confines of a binding legal document. The Directive adopts, for the first time within the European mechanisms, an expansionist approach to victim integration: In Articles 10-17, the Directive outlines participatory rights of the victim. The most controversial of the rights enumerated are: Article 10 which requires states to provide victims with a right to be heard during criminal proceedings, and Article 11 which provides for victims the right to review the decision of the prosecutor. Therefore, the Directive mandates the trifecta of normative elements to the victim: recognition, access and participation.

Upon first reading the European Directive one could be forgiven for thinking that the issue of the victim was settled, all that was left was to recognise the victim and implement the rights required by the Directive. The difficulty was (and is) that Directives by their nature do not regulate implementation. Therefore, though the Directive instructs that the victim be recognised, provided with rights of access, transparency and participation it does not regulate how these instructions should be implemented or more importantly received. States are left to their own devices as to the scope of implementation, which enables a lingering timidity in enforcing participation rights on states. As shall be seen in chapter 4, the state implementation procedures enabled Scotland to roll-back and temper some of the progressive nature of the Directive when it comes to the victims' right to participate. Notwithstanding this significant limitation, the Directive has garnered firm opposition. Klip criticises the Directive for its failure to mention the interests of the victim alongside that of the rights of the accused, particularly the articles relating to trial participation and protections. Klip argues that the major failing of the international instruments is in bringing the rights of the accused into line with the victims' rights; according to Klip this does not foster a harmony of concept.[252] Klip further states that the directive "*demonstrates a certain victim-bias*", which given its goal

[252] Klip, André, 'On Victims' Rights and its Impact on the Rights of the Accused', European Journal of Crime Criminal Law and Criminal Justice, 2015, 177-189, p177

would seem obvious, and given its forum, it was unlikely to adopt the Enlightenment approach of considering the accused's rights as paramount.[253]

The Enlightenment-based rights of the accused and the rights of due process have held firm in the practice of law and the academic literature for centuries, whilst victims have been largely neglected and subsumed by the role of the state: "*The victim has lost the case to the state…[it's]…the Crown that comes into the spotlight, not the victim*"[254]. Klip argues that the need for victims' rights is too often regarded as "*self-evident*", he claims there is no rationale provided, other than policy, for the creation of victims' rights.[255] Equating victims' rights with the self-evident nature of human rights is perhaps unsurprising given the use of the human rights mechanisms to enable a rights' based model of legal victim to enter the domestic legal system. However, the historical ambulation of the victim's function in Scots criminal law (as explored in chapter 1) is evidence that there is also a historical rationale for the existence of the victim and their rights in Scots law and to that end I suggest that Klip is incorrect that only policy rationalises the victim. The victim is one of three unique parties to the criminal trial, and as such requires (and is entitled to) the legal rights that befit the relevant function. If the function of the victim is changing – and that very much is a policy consideration – then the new concept of the victim as an empowered party to the criminal trial process requires a series of rights – and duties.

The purpose of victims' rights is a paradigm shift of justice that has long been defined by an entrenched criminal justice tradition in favour of the state and the accused. Klip perhaps can be forgiven for mistakenly claiming that policy is the only justification for the victim, because as shall be seen in chapter four, it was the policymakers influenced by the victims' movement and enabled by this human rights mechanism that enabled a new construct of the victim to enter Scots law. Through the Directive, policymakers finally had a normative basis though which to create (and which in fact required) integration of a new conception of the victims of crime in Scots law. The EU Directive 2012/29, as demonstrated in cases such as *RR v. HM Advocate*[256], acted as the conduit, the missing link, through which

[253] ibid, p187
[254] ibid at 55, p3-7
[255] ibid at 253, p187
[256] Ibid at 22

policy could become legal reality, and the victim could move from the periphery of a socio-political movement to the centre of the criminal justice process.

This chapter demonstrates that the international and transnational legal infrastructure, whilst not creating the concept of the victim in Scots law, provided a legal conduit through which a new concept of the victim – whilst seemingly incompatible with certain traditional elements of the Scottish criminal process – could inhabit a central space within the domestic Scottish criminal justice system. A key factor in that development was creating a rights-based model of the victim, specifically three clear essential rights to any construct of victim: the right of recognition, right of access and right of participation. This chapter demonstrates that the discourse surrounding the victim moved to a more legalistic discourse of rights and duties, much more amenable for criminal justice reform. It placed on the state obligations towards the victims of crime, which would enable the old equilibrium of state and accused to now entertain the presence of a third party in criminal justice – the victim. In the next chapter I explore how a new concept of the victim materialised in Scots law, through this conduit.

Chapter 4: A Scottish Victim

4.1 The first (mis) step on the road to victim creation

In 2001 the Scottish Government, in response to the EU Directive, published its 'Scottish Strategy for Victims', in which the Government set out its strategy for victims to "*assume a central space in the criminal justice system*".[257] The strategy placed in print a very clear admission by the state that within the Scottish criminal legal system the victims' function had been replaced by the Crown, and that this has (unintentionally) left victims feeling 'dispossessed'.[258] The proposal put forward three core strategies (or 'pillars'), largely mirroring the requirements of EU Directive 2012/29, to remedy this issue. The first pillar proposed providing victims with practical and emotional support as they journey through the criminal justice system.[259] This proposal, rooted in welfarist ideology, promoted the need for a public awareness campaign and also a commitment to commission research into 'victim issues'.[260] The second pillar is the beginning of a victims right to access in Scotland. It

[257] 'Scottish Strategy for Victims', Scottish Executive Publication, published 2001, p1
[258] ibid, p5
[259] ibid
[260] ibid at 258, p2 and also see generally Chapter 2.

stipulates that the Government will 'encourage' and work with criminal justice partners such as the Crown Office and Procurator Fiscal Service (hereafter COPFS) and Police Scotland to enable processes whereby victims of crime can remain updated regarding the progress and outcomes of their case.[261] Finally, the third (and most challenging) pillar is the beginning of the victims' right to participate within the criminal justice process. The Scottish Government sets out a key goal to 'explore' opportunities to enable victims to participate within the criminal justice process and have their views known and represented within proceedings.[262]

The Scottish Government's reforms to make the criminal justice system victim-centric were not a devolved government policy sought in isolation. In fact, as has been demonstrated, many of the components were mandated by EU Directive, and more broadly the reform formed part of a larger Labour UK Government policy and a larger European human rights movement.[263] The creation of the victim in Scotland, however, struck a particular policy chord, and this reform has survived changes of government, our exit from the European Union, whilst sustaining a significant pace in Scotland: *Scottish Government Response to the EU Framework Decision On the Standing of Victims in Criminal Procedure* (2002); *Vital Voices: Helping Vulnerable Witnesses Give Evidence* (2003); Victim and Witnesses (Sc) Act 2014; *Victims' Code for Scotland* (2018); Vulnerable Witnesses (Criminal Evidence) (Sc) Act 2019; Scottish Government's Victims Taskforce (established 2019) and the Victims, Witnesses and Justice Reform (Scotland) Bill 2023, are but a few of the Scottish victim creation programmes and statutes. I suggest this is an illustration of how whilst the EU Directive provided the legal mechanism for victim creation, the drive for a new concept of the victim found fertile ground in Scotland.

The 2001 Scottish Strategy is critical in my opinion to understanding victim creation in Scots law because it offered a blueprint for creation (recognition, access rights and participatory rights). Importantly, it also contained the first (and prevailing) issue with creating a new concept of the victim in Scots law, namely that it fails to establish from the beginning what this new construction of the victim *is* in Scots criminal law. The strategy

[261] ibid at 258, p4
[262] ibid at 258, p5
[263] The Labour Westminster Government, had similarly implemented a criminal justice programme aimed at placing the victim at the centre of the criminal justice process, see the Home office programme 'Justice for All', 2003, Home Office Publication, available here: https://brdo.com.ua/wp-content/uploads/2016/01/Justice-for-All-WPUK.pdf

glosses over the inherent theoretical incompatibly of recognising a victim with rights of access and participation, and the potential difficulties such a creation raises to the traditions of the Scots criminal law, namely: The function of the Crown, the traditional function of the complainer, and the presumption of innocence. Instead, it simply expects the system to absorb the reform and offers what in my view, becomes the archetypal response to this challenge: 'We recognise the victim, their plight, and their rights, but we of course stress the virtues of "*our legal tradition*" and the "*pride*" held for that most honourable and fair system of justice' without ever addressing the crucial theoretical contradictions. [264]In this chapter, having orientated the victim in its social, political, historical and jurisprudential space, I shall examine exactly what kind of victim we have created and offer my proposal of how we can begin to accept this victim whilst at the same time respecting our legal traditions, those great undercurrents of our legal past that form the foundation of our criminal justice system.

4.2 First Pillar: Recognising the Victim

The immediate difficulty with recognising the victim within our criminal justice system is the legal baggage that accompanies the term 'victim' as a status and label. As the Court noted in *Hogan v. HM Advocate*, the use of the term within the social sphere has been "*increasing, indiscriminate and often inappropriate"*.[265] The term (it may be argued, such as it was in *Hogan*) creates a certain presumption in the mind of the receiver that *something* has occurred to the recipient that makes them a victim. That something being the criminal act committed upon them. Therefore, to label a person a victim is to pre-determine that a criminal act has been committed and has been committed against that individual(s), which makes a presumption of innocence problematic. That stated, I would suggest the Scottish Government embarked on a policy of recognising the victim from 2001 onwards and they used a combination of soft and hard recognition techniques. Soft recognition was to continue to recognise the victim indirectly within their criminal justice policy programmes and legislation, for example Vital Voices, making it easier for those most vulnerable of witnesses to provide their evidence in Court. This campaign ultimately led to the introduction of the *Vulnerable Witnesses (Sc) Act 2004*, placing into the statute books measures specifically

[264] ibid at 258, p5. We see it again in the '*Review of Victim care in the Justice Sector in Scotland*', Lesley Thomson QC, COPFS Publication, pg. 4, when the (then) Solicitor General placed the context of her victim review in the following terms "*The context in Scotland is important: an adversarial system with a proud tradition of justice*"
[265] ibid at 3, p6

designed to make it easier for those most vulnerable witnesses to provide evidence.[266] Soft recognition allowed for the implementation of reform, without having to directly engage in the complicated issues that surround the term 'victim'.

Increasingly the Scottish Government adopted (what I would suggest is) a hard recognition approach, that is a programme of policy and legislation that directly addresses not only the needs of victims but recognises it as a bespoke status, and crucially not just at the conclusion of a successful trial process. 2014 saw the introduction of the Victims and Witnesses (Scotland) Act 2014 (hereafter 2014 Act). The 2014 Act specifically identified 'victim *or* witnesses', thus separating the victim and the witness as two distinct legal entities and clothed the victim in various access and participatory rights. The 2014 Act does not simply recognise the legal construct of the victim at the post-conviction stage – for example, section 23 strengthens victims' right to provide impact statements and section 27 provides a right to be notified when offenders shall be released – it also recognises the victim at the investigation, pre-trial and trial stages of a criminal case.

The complicated interaction between recognising the victim as a label and the victim as a status can be observed in the most recent reform Bill from the Scottish Government, the Victims, Witnesses and Justice (Reform) Bill 2023.[267] The Bill introduces a new Victims and Witnesses Commissioner, to advocate on behalf of, and maintain criminal justice standards for, the victims and witnesses of crime. The Commissioner post builds on a series of initiatives to ensure the quality of services specifically for the victims of crime.[268] Those services (as I shall set out below) are essentially duties for various criminal justice actors that correspond to bespoke access and participatory rights of the victim. Whilst the Bill outlines many measures that enhance the legal status of the victim, (for example section 64 creates the right of Independent Legal Representation in cases involving application to lead prior sexual history under s275 of the Criminal Procedure (Sc) Act 1995), section 64 meanwhile attempts to maintain the label status quo, by reverting to 'complainer', and to complicate matters

[266] Vital Voices: Helping Vulnerable Witnesses Give Evidence, Scottish Executive publication, 2003
[267] Victims, Witnesses and Justice Reform (Sc) Bill 2023, draft bill available here: https://www.parliament.scot/bills-and-laws/bills/s6/victims-witnesses-and-justice-reform-scotland-bill
[268] Initiatives such as the two phased reports by HM Inspectorate of Prosecution in Scotland, 'Victims in the Criminal Justice System Phase 1' and 'Phase II'; '*Review of Victim Care in the Justice Sector in Scotland*'; and the introduction of the Victims' Code for Scotland, 2018

more, the Bill also introduces the concept of 'alleged victim'.[269] Thus the Bill attempts to both recognise the victims' right without recognising the victim.

In Scots criminal law there has developed a dichotomy of recognition *by label* and recognition *by status*. The *label* of victim traditionally did not reflect a function or imbue the possessor of such a title with rights, it was more akin to a honorific or specifying a class of witness when the case had reached a specific stage i.e. finding of guilt. The status of victim, by contrast, imbues the possessor with rights and functional responsibility by dint of their status as the victim. The transition in Scots law of the victim from label to status has been problematic: The difficulty has been compounded as the divide between the victim as a simple label and as an empowered status has begun to break down. Even the label 'victim' is no longer relegated to socio-political policy, as we have seen, it can be found amongst the other common terms for the victim within professional rules, legislation and even within the professional vernacular (hence the cases of *Hogan* and *Wishart*).[270] The victim has been recognised in Scots criminal law as a new bespoke legal entity both in status and as a label, this has resulted in a new uncomfortable reality for some traditionalist of Scots criminal law, however the present approach of attempting to both recognise this new legal construct and ignore it when it becomes inconvenient to said traditions has resulted in a theoretical paradox in which the victim both exists and does not exist – it is Schrödinger's victim. This becomes increasingly apparent when one examines the bespoke rights now possessed by victims in Scots criminal law.

4.3 Second Pillar: Access Rights

The victims right of access in Scots criminal law consists of two core rights: The first is the right to access information regarding how the criminal justice system works and their case, and the second is the right to access support, to better enable them to navigate their way through the criminal justice process. Both of these rights are highly developed in Scots law, and because they do not often challenge the fundamental traditions of Scots law, they rarely prove controversial. A victims' right of access to information is now contained within primary legislation, namely s1(3)(a) of the Victims and Witnesses (Sc) Act 2014, and a victims' right to access support is contained within s1(3)(c) of the same 2014 Act. These

[269] ibid at 268, section 63, when discussing the right to victim anonymity
[270] ibid at 3 and 5, respectively

sections place a duty on several criminal justice institutions (including the Lord Advocate, Scottish Minister, Scottish Court Service, Chief Constable of Police Service of Scotland) to recognise the victims right to access. Access rights are a gateway right to participation and enable the victim to access the material information necessary to make informed decisions about their case and when to exercise participation rights, such as the right to review prosecutorial decision-making.

The Victims Code for Scotland, legislated for under section 3B of the 2014 Act, mandates a victims' right to *"obtain information about what is happening in the investigation or proceedings, where it is appropriate and relevant"*.[271] COPFS, in obtempering their duty under the Victims Code, have created a two-tier system for access to information: A pro-active provision of information and a passive access to information. COPFS created the Victim Information Agency, an internal branch of COPFS, dedicated to ensuring (some) victims are kept updated regarding the progress of their case. In order to qualify for this service, the victim must meet certain prescribed criteria. They must be under the age of 18 or over the age of 60 or a victim of domestic abuse or sexual crime, hate crime or stalking or a victim of serious offending (Sheriff and Jury level offending) or next of kin in a death enquiry or assessed as needing additional support at the discretion of the prosecutor.[272] Any victim falling out with that criteria must contact COPFS of their own initiative and they can be provided with information regarding their case, and whilst the quality and ease of access may be an issue of contention, the right to information regarding their case is now embedded into the criminal justice process and subject to continuous development to increase victim satisfaction.[273]

The victims right to support began prior to the 2014 Act, and in many ways prior to the EU Directive itself. The right evolved out of the principles of the victims' movement to support those going through the criminal justice process either through direct legal measures – for example the use of special measures to enable vulnerable individuals to give their

[271] Victims and Witnesses (Scotland) Act 2014
[272] Criteria for VIA contact available here: https://www.copfs.gov.uk/services/victim-services/victim-information-and-advice-via-service/
[273] Quality of the information/communication provided to victims is a theme which HM Inspectorate of Prosecution returns time and again, see for example: HM Inspectorate of Prosecution's reports*: 'Prosecution of domestic abuse cases at Sheriff Summary level', 2024, p64; 'Inspection of COPFS practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995'*, 2022, p39; *'Thematic review of the investigation and prosecution of sheriff solemn cases'*, 2019, pg41; '*Thematic report on the Victims' Right to Review and complaints handling and feedback follow-up report', 2018, p26*

evidence in a safe manner[274] – or support mechanisms, often offered by third sector groups such as Victim Support Scotland or Rape Crisis Scotland. These measures have evolved exponentially over the past two decades through primary legislation, for example the Vulnerable Witnesses (Sc) Act 2004 or the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, and through the exponential increase in third sector support groups available across the Scottish Criminal Justice system.[275] The 2014 Act and Victims Code placed a duty on criminal justice institutions, specifically Police Scotland, to ensure that victims are aware of these support agencies and the level of support available to them from the initial investigation stages, as they make their way through the criminal justice process.[276]

The enforceability of these access rights has been upheld by the Court in recent jurisprudence. The Court in *RR v. HM Advocate*[277] made the issue about access rights (as opposed to participatory rights) and mandated that in cases involving s275 applications by the defence to lead evidence of prior sexual history, the victim must be informed of the existence of such an application and their views obtained on said application. *RR* is an important case as it highlights the Courts preference to align more closely a concept of participation with access, than with a standalone concept of participation. Access rights are in many ways a gateway right to participation and enable the victim the material information necessary to make informed decisions about their case and when to exercise participation rights, such as the right to review prosecutorial decision-making. That stated, and as the Court demonstrates in *RR*, what is meant by participation is not always clear cut - the gate is not always open!

4.4 Third pillar, Third Sector, Third Rail

Participatory rights were the next crucial stage in the creation of the victim in Scots criminal law. They are the realisation of the victims right to be recognised, to have access to all the information necessary to make informed decisions and finally, through participatory rights, to have those decisions realised within the criminal justice process whether that is at the investigatory, pre-trial, trial or post-trial stages. The victim, empowered with the right to participate, can no longer be said to be 'just another witness', they are a unique legal entity

[274] See for example s271 of the Criminal Procedure (Sc) Act 1995
[275] For example: *Victims Support Scotland, Rape Crisis Scotland, Scottish Women's Aid, Action Against Stalking, Children 1st, Moira Anderson Foundation, Abused Men in Scotland etc.*
[276] s3D, Victims and Witnesses (Sc) Act 2004
[277] ibid at 22, pp52

within the criminal justice process. Of the three 'core' rights or pillars, participatory rights are the most challenging to the retention of a traditional model of justice that has existed in Scots law since the Enlightenment: Courts and the accused.

Victim participation rights in Scots law are in two broad categories: Direct participatory rights and indirect (or proxy) participatory rights. The victims right to participate is enumerated in section 1(3)(d) of the 2014 Act: "*in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings".* One must concede that unlike access rights, the victims' right to participate is not unqualified; it is qualified to the extent that it would be "*appropriate*" to permit the participation. Perhaps the clearest example of the ability to exercise participatory rights is the 'Victims Right to Review'.

A *Victims Right to Review* (VRR) was established in section 4 of the 2014 Act, which stipulated that the Lord Advocate must publish rules for the right to request a review of a prosecutorial decision not to prosecute an accused person. In 2015, the then Lord Advocate published his rules on when a victim can seek a review of a prosecutorial decision to not raise or to discontinue proceedings against an accused person.[278] The Lord Advocates Right to Review is important not just as evidence of the creation of a participatory right, but also of the victims' right.to be recognised:

> *A victim of a crime reported to us by the Police or other specialist reporting agency can apply for a review of a decision by us not to prosecute or to stop a prosecution.*
>
> *A victim is defined as someone who has suffered harm, including physical, mental or emotional harm or economic loss directly caused by a criminal offence. This includes family members of a person whose death was directly caused by a criminal offence, and who have suffered harm as a result of that person's death.*[279]

The rules explicitly define the victim for the purpose of the right to review as well as outlining the parameters under which the victim may seek a review. The VRR is the perhaps the strongest example of direct participatory rights that can be exercised by the victim in the criminal justice process, in this case reviewing the exercise of prosecutorial discretion. Furthermore, it is a strong example of how victims participatory rights in the system need not

[278] Lord Advocate's rules: Review of a decision not to prosecute, 1st June 2015
[279] ibid, part 3

be met with suspicion or hostility by another criminal justice actor: A review of the VRR process in May 2018 by HM Inspectorate of Prosecution found that 91% of applications were examined and a review conducted entirely independently, thoroughly and to the highest standard, with the reviewers (independent prosecutors to those that made the initial decision) being robust and overturning decisions where necessary.[280]

Direct participatory rights of victims continue to be developed in Scots criminal law, all be it cautiously, with the latest development being the right to Independent Legal Representation (ILR) being proposed in the Victims, Witnesses and Justice Reform (Scotland) Bill 2023. The Bill retreats to the safer misnomer of 'complainer' and limits this participation to legal representation when a defence application is submitted under s275 of the Criminal Procedure (Scotland) Act 1995, however the reform to provide victims with legal representation has begun and (in my view) represents the first step towards a march to greater participation rights through legal representation.[281] Within the official responses to the bill, key criminal justice stakeholders have already invited the Scottish Government to be bolder in their introduction of ILR:

> *"RCS [Rape Crisis Scotland] call to extend the right to legal representation for complainers of rape and sexual violence… The provisions for ILR in the bill do not go far enough to protect the rights of complainers. There should be a right to independent legal advice (ILA) throughout proceedings within the criminal justice system."*[282]

Rape Crisis Scotland, a key victims' rights advocacy group, argues in favour of representation throughout the criminal justice process. Interestingly, even groups traditionally more hostile to victims' rights-based reform, are also in favour of this specific proposal, arguing that a better-informed victim is a positive step forward, all be it with certain procedural considerations to prevent adverse impacts on the accused, for example to prevent ILR causing unnecessary delays.[283]

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[280] HM Inspectorate of Prosecution, '*Thematic report on the Victims' Right to Review and complaints handling and feedback follow-up report'*, May 2018
[281] S64, Victims, Witnesses and Justice Reform (Sc) Bill 2023
[282] Rape Crisis Scotland response to the Victims, Witnesses and Justice Reform (Sc) Bill 2023. Available here: https://yourviews.parliament.scot/justice/victims-witnesses-justice-reform-bill/consultation/view_respondent?_b_index=120&uuId=791414501
[283] See for example the response by the Faculty of Advocates Criminal Bar Association, available here: https://yourviews.parliament.scot/justice/victims-witnesses-justice-reform-bill/consultation/view_respondent?_b_index=240&uuId=70855816

The generally positive response to greater victim participation should not, however, be overstated. The Courts through their jurisprudence have been reluctant to acknowledge (and at times entirely hostile towards) an expansive right of the victim as a legal party to proceedings. In *RR*, the Court clearly demonstrates its reluctance to adopt an expansionist approach to section 1(3)(d) of the 2014 Act, the victims right to participate, absent further direct legislation. As the Lord Justice General states: "*So far as becoming a party to the criminal proceedings is concerned, the starting point is the domestic rules. The current system does not provide for victims to become direct participants*".[284] Furthermore, in *Scottish Criminal Case Review Commission v. Swire*, the Court made explicit that *"[t]he Scottish criminal justice system does not, at present, allow victims or relatives of victims to be direct participants in criminal proceedings".*[285] Finally, in *Porch v. Dunn*, the Court goes a little further, clarifying its position:

> *"The fact that the proceedings were intimated to the complainer does not make her a party… The complainer was unable to identify any authority to suggest that the Scottish practice that victims do not directly participate in criminal proceedings was other than Convention compatible. It should be remembered that the fact that a victim has no right to participate directly in the criminal process does not mean that there is no method by which information from the victim, or views of a complainer on a matter such as bail conditions, may be conveyed to the Court. As already noted, it is commonplace for information about a complainer's views relating to bail conditions to be placed before the Court, and the Crown has developed a policy designed to achieve that.*

This position from of Court outlined above, in my view, is problematic for two reasons. First, the victim does directly contribute in a criminal process. VRR is a legitimate review process that takes place routinely within the criminal justice system. Second, indirect participation is still participation; simply because an accused person is represented through the intermediary of their solicitor does not in any way detract from their right to participate in their own defence. There is certainly a fair question regarding the quality and scale of the right to participate, but the victim has a statutory right to participate when it is appropriate to do so, and in certain circumstances that right includes direct participation, and increasingly (should

[284] ibid at 22, para 44
[285] 2015 HCJAC 76, para 20

the current trend continue) that participation is going to include by way of legal representation.

The direct participatory rights of victims in Scots law have been supported (and in many ways propelled) by what I would term indirect (or proxy) participatory rights. These are a set of victims' rights that enable the victim to influence and inform the criminal justice processes, rules, procedures and even the law itself. In 2010 the Scottish Sentencing Council was established by the Criminal Justice and Licensing (Scotland) Act 2010. The Sentencing Council was established to promote consistency in sentencing, inform sentencing policy and promote awareness of sentencing policy and practice.[286] Critically, a legally mandated member of the Council must "*have knowledge of the issues faced by victims of crime",* in what has become more commonly termed the 'victim expert' seat on the Council.[287] In 2018, there met for the first time a new Victim Task Force (VTF) in Scotland, it's purpose is to *"co-ordinate and drive action to improve the experiences of victims and witnesses within the criminal justice system, whilst ensuring a fair justice system for those accused of crime."*[288] The VTF is jointly chaired by the Lord Advocate and the Scottish Government Cabinet Secretary for Justice, however most crucially, its membership includes not only significant victims' rights groups but a victim representative themselves.[289] Finally, most recently, the creation within the aforementioned Victims, Witnesses and Justice Reform (Scotland) Bill 2023, Part 1, of a new public office of Victims and Witnesses Commissioner. The purpose of the Commissioner is to "*promote and support the rights and interests of victims and witnesses*" and act as a public advocate and focal point for victims' rights in Scotland.[290] This new public office will wield significant influence within our criminal justice system, and whilst reforms thus far have placed the victim at the heart of our criminal justice system, the Commissioner shall act as an anchor to keep the victim firmly seated.

Through recognition, access and participation, the victim has taken root in Scots criminal law, and today is a recognised legal entity with bespoke rights and active participation in our system of criminal law and criminal justice. The victim in Scots law is thus established as a legal phenomenon, orientated in our jurisprudence, legal history, socio-political discourse and

[286] s2 of the Criminal Justice and Licensing (Scotland) Act 2010
[287] Schedule 4, para 1 of the Criminal Justice and Licensing (Scotland) Act 2010
[288] Victim Task Force, *Terms of Reference*, 12 December 2018, available here: https://www.gov.scot/publications/victims-taskforce-minutes-december-2018/
[289] ibid
[290] S2(1) of the Victims, Witnesses and Justice Reform (Sc) Bill 2023 as introduced

manifested through a legal framework provided by the European Union, and brought into our domestic legal system.[291] I submit that this legal phenomenon, a new legal construct of the victim, has been created in Scots law. It is a recognised legal entity empowered by rights of access and participation, imposing duties on other criminal justice actors, championed by a powerful third sector and a pro-victim public policy that is slowly reversing the 18th and 19th century trends of divestment of power from the victim to the state.

In this chapter I have answered the principal question of this thesis: what is the victim in Scots law. The victim in Scots law is a bespoke legal party, a rights-based legal entity that is recognised by the system and its institutions, with rights of access and participatory rights (albeit in their infancy) the defining features of this legal construct. No longer is the victim a protean concept, but a clear legal construct. The process whereby this new concept of the victim came to exist in Scots law is a congruence of historical, socio-political, jurisprudential and international factors and this thesis has orientated the victim in its historical, social, political and legal context. The final challenge to the existence of this new concept of the victim in Scots law directly relates to two of the sub-themes in this thesis: the victims' relationship with the state, and the criminal justice discourse between the institutions and the victim. In the final chapter I offer a proposition as to how the victim can be understood within the Scottish criminal justice system without abandoning fundamental principles and in so doing harmonise the discourse within Scottish criminal justice, and begin to talk about the victim (as it is) rather than talk at each other about different concepts of what the victim (as we wish it to be).

Chapter 5: A new 'Victim' in Practice

5.1 The Victim: A Proposition

The victim in Scots law is a legal phenomenon, it exists and is a recognisable legal party to criminal proceedings at the investigatory, pre-trial, trial, and post-trial stages. There is, I suggest, an irresistible logic in this proposition. As discussed in chapter 4, at the investigation stage the victim has a statutory right, once recognised as a victim by Police Scotland, to access victim services.[292] The victim, so recognised by the criteria set out in the Lord

[291] Christie, Nils, '*The Ideal Victim*', in Duggan, Marion (ed), '*Revisiting the "Ideal Victim": Developments in Critical Victimology'*, Policy Press Scholarship, 29018, p11
[292] Victims and Witnesses (Sc) Act 2014, s3D

Advocates Rules on Victims Right to Review (VRR), has a right to review the prosecutorial decision not to raise criminal proceedings or to discontinue criminal proceedings.[293] The victim has a right throughout criminal proceedings to information regarding their case.[294] The victims of sexual offending will soon be entitled to independent legal representation (ILR) in the event of an application by the defence to lead sexual history of the victim at trial.[295] The victims of certain offending have a right to make 'victims' statements' in the event of a guilty plea or finding of guilt.[296] The victim has a right to be notified of the release of an offender from their period of imprisonment.[297]

Although this makes clear that the victim and their rights are recognised at some points in the criminal justice process, formal (and possibly conceptual) gaps remain. Clearly it would be incoherent that the victim can exist at the investigation stage, no longer exist at the pre-trial stage, exist again when an opportunity to review arises, then having successfully reviewed their case cease to exist once more, then when a s275 application is lodged exist briefly, only to not exist, then exist once more to submit a victim statement and exercise their right under the victim notification scheme. How then to coherently conceptualise these appearances and disappearances of the victim through the criminal justice process?

In the first instance I would adopt the ethos of Nils Christie's proposition in his 1977 seminal work 'Conflicts as Property,' that conflict (that is to say the alleged harm inflicted) can be considered as property, a commodity initially within the possession of the victim prior to the point of reporting to the Police.[298] I would adopt the proposition to the extent that the victim in some way must be said to have autonomy over their harm, though I would not seek to develop the idea of harm as property too far, lest the commodification of that harm distract from, or in some way minimise, the bespoke nature of 'harm' in a criminal context. It is however, a useful legal fiction to consider harm as a tangible *thing* and the victim as rightful owner of that *thing*.

[293] ibid at 279
[294] Victims and Witnesses (Scotland) Act 2014, s6
[295] In my opinion a safe presumption given the overall favourability of this provision within the Victims, Witnesses and Justice Reform (Sc) Bill 2023, across criminal justice stakeholders
[296] Criminal Justice (Sc) Act 2003, s14
[297] Victim Notification Scheme (VNS) under Victims and Witnesses (Sc) Act 2014, s27
[298] ibid at 55

Christie goes on to argue that the state 'steals the conflict', making reference to legal professionals as "*structural thieves*", subjecting the victims' story to "*professional manipulation*" [299]. I do not agree with this further line of reasoning. I would argue that at the point of reporting, the victim divests themselves of possession of their conflict and hands over possession to the state for legal testing, with a view to obtaining some form of redress: Help, punishment, deterrent, catharsis, compensation etc. Unlike Kirchengast however, I do not form the view that this is a 'power' divestment. In my view, the victim retains their power, their status, their rights and their autonomy: In other words the victim does not cease to exist in Scots law, it continues to exist throughout criminal proceedings.[300] The state when handling the victims' conflict has certain parameters and standards in which it *must* operate in a just and fair society (including the presumption of innocence, right to a fair trial etc). The state also is placed under certain duties relating to the victim and their conflict. The victim does not cease to be a victim at the point of reporting, they continue in that status and by virtue of that status retain certain rights over their conflict, both access and participatory, that crystalise when certain conditions are met.

When conceptualising the victim as a legal construct and attempting to fashion a legal fiction that is honest to the legal system it inhabits, I find the analogy of floating charges useful. Floating charges were introduced into Scots law in 1961 by the Companies (Floating Charge) (Scotland) Act 1961. A floating charge is a form of security interest over an asset provided to a lender by a debtor. Critically, for the purpose of my analogy, the debtor's use of the asset is unhindered, and the lender's rights in the property only crystalise when certain legal conditions arise. In simple terms: the right 'floats' over the asset until such time as conditions permit crystallisation and the right is recognised. The right exists from the point at which it is created, however its presence is only felt within the legal system when the required sequence of legal events takes place. Analogously, victim status and the corresponding rights are granted in law to the victim (by virtue of their legal status) at the point of divestment of possession of their conflict and remain over the conflict throughout the criminal justice process, crystallising only when certain conditions are met (for example when a s275 application is lodged by the defence). It is when their rights crystalise that the victim becomes most visible, but that is not to say these moments *materialise* the victim as a legal entity – they were always there.

[299] ibid at 55, p5
[300] ibid at 62, p14

The history of the Floating Charge in Scots law also mirrors in many respects the history of the Victim, and in so doing provides an important historical comparison. In 1951 Lord President Coooper, quoting Lord Dunedin, in the case of Carse v. Coppin stated clearly that Floating Charges "*are to us "absolutely unmeaning*"".[301] Yet, when one tracks the history of this form of security interest, we see its shape and form as far back as the *Regiam Majestatem* and perhaps further.[302] Critically, reform came in 1961 (in large part) when common law denial of the existence of floating charges in Scots law became incompatible with the reality of the legal system of the time. Interestingly, as Macpherson identifies: "[the] *introduction of the floating charge into Scots law would perhaps have been smoother and ultimately less problematic had the starting point for each issue been how the floating charge could be integrated into Scots law*".[303] The history of the floating charge in Scots law demonstrates that denial, post-facto rationalisation and a failure to look to our legal past to orientate a new construct leads to systemic compatibility issues going forward.[304] As demonstrated in chapter 1, the Victim (in many different functional guises) is present throughout the history of Scots criminal law. Yet, as demonstrated in chapter 1, the Courts were (and still are) unwilling to recognise the victim as a legal construct. That common law position, by processes explored in chapters 2 and 3, has become detached from the legal reality of today. The victim, as demonstrated in chapter 4, exists. Incumbent on the legal community now is how to best understand this new legal construct in a compatible manner, and I would recommend that the floating charge offers an (all be it imperfect) theoretical avenue.

The victim is an agent with inherent power within the criminal justice system, both soft power and hard power. The hard power emanates from their enumerated rights, which itself stems from the trans-national normative framework, and which is based on the human rights model. Their soft power emanates from the victims' movement and the powerful

[301] John Greig Carse v. George Campbell Coppen and Another, *1951 SC 233 at 242, Lord President Cooper quoting Lord Dunedin,* The Ballachulish Slate Quarries Co. v. Bruce and Others, *(1908) 16 S. L. T. 48 at 51.*
[302] For an excellent discussion on the history of floating charges in Scots law see: MacPherson, Alistair, J.D., '*The 'Pre-History' of Floating Charges in Scots Law'*, in Hardman, Jonathan & Macpherson, Alisdair, D.J., (Eds), '*Floating Charges in Scotland: New Perspectives and Current Issues*', Edinburgh University Press, 2022, Chapter 1
[303] MacPherson, Alistair, J.D., '*The Genesis of the Scottish Floating Charge'*, in Hardman, Jonathan & Macpherson, Alisdair, D.J., (Eds), '*Floating Charges in Scotland: New Perspectives and Current Issues*', Edinburgh University Press, 2022, Chapter 3, p155
[304] ibid, p155-156

victim civil society, which the individual victim can (and frequently do) mobilise against the criminal justice system. For example, when Rape Crisis Scotland writes to the Lord Advocate about an individual case, it is unlikely to be admitted that this will change the decision-making in that case, but in practice it will change the level of scrutiny that the case receives and the attention that the individual victim is paid during the life of their case.

Use of the label of 'victim' for this empowered party, invested with victims' rights, may seem at first blush, problematic. However, if we consider the original description of the victim or *victima*, as a '*living being sacrificed to a higher power',* then in my view it becomes entirely appropriate: The victim is a party that sacrifices possession of their conflict, their harm, to the state for testing and redress.

The idea that the use of this term undermines the presumption of innocence is found wanting under scrutiny. As the Court in its jurisprudence concedes, the term is being used 'increasingly and *indiscriminately'* throughout society, policy, legislation and even by the judiciary, and our system of criminal justice has not been deemed unfair, illegitimate or any less supportive of an accused persons liberties and rights because of it.[305] The Court in *Wishart* states that whilst the label 'victim' is better avoided, if used in conjunction with phraseology that makes clear the judge's impartiality (for example 'alleged offences'), then the use of 'victim' does not amount to a demonstration of partiality and certainly does not amount to a miscarriage of justice.[306] It's mere utterance within the trial setting (even by a judge), does not amount to a miscarriage of justice, a proposition now tested twice.[307] Where I demure from the High Court, is that 'victim' is a term "better avoided", far from it, it is time we call the legal entity what it is: Victim.[308]

I propose that a new construct of the victim has been created in Scots law. This thesis has demonstrated that the victim is a legal phenomenon, orientated in our history, socio-political policymaking, and our legislation. The victim is a fact, it exists, and it has undertaken a functional shift to become an empowered party with the right to be recognised within our criminal justice system and with bespoke rights of access and participation. Whilst we can continue to debate what rights the victim ought to have, I agree with some of the

[305] ibid at 5
[306] ibid at 5, para8
[307] ibid at 3 and 5
[308] ibid at 5, para 8

criticism that some reforms empowering the victim in areas have gone too far. We can no longer continue to claim the rights of the victim exist independent of a coherent legal concept of the victim itself. Nor may we hide behind legal tradition. The victim is a part of our legal past, present, and in its new construction very much part of our legal future. It is time to recognise it and to develop our criminal justice discourse, policy, and legal reform around victims in a coherent manner: let the debate continue, but let the discussions be informed discussions, and rooted in a meaningful understanding of the victim and their function within Scots law.

5.2 Journey's End?

This thesis began as a Ph.D. journey, and whilst this is not the destination I envisaged when I set out, it is a destination of my choosing; but it is not the end of the potential avenues of research on this new concept of victim in Scots law.[309] The purpose of this thesis was to explore the proposition that a new legal concept of the victim has been created in Scots law and to orientate that new construction of the victim in its historical, socio-political, and legal context. In this thesis I have shown that the victim is a recognised legal entity, a party participant that has undertaken a deliberate functional shift within our criminal legal system, caused by the congruence of socio-political factors, and realised through a EU normative framework that has enabled the victim to percolate to the very centre of our criminal justice system and discourse. It is a recognised party participant from the point that the victim reports (or there is reported) a conflict to Police Scotland. The victim divests themselves of possession of their conflict, however the victim retains certain (and growing numbers of) enumerated rights of access and participation over their conflict. Those rights crystalise when certain conditions are met during criminal justice process and proceedings. Those rights create duties on other legal actors within the criminal justice process and are enforceable in the Courts.

The next stage of this research would be to test this proposition in practice, by examining how this new concept of the victim actually is operationalised in practice: how it interacts and is considered by actors within the Scottish criminal justice system itself, namely public

[309] After considerable deliberation about my career and personal preferences I decided to exit with an MPhil rather than complete the PhD journey.

prosecutors. In the next section I set out some key recommendations I would make for further research on the victim in Scots law.

5.3 Recommendations for Further Study

In further research, (which I had initially intended would be the next stage in my PhD), I would build upon the premise put forward by Michael Lipsky in his seminal work, that public prosecutors are "*street level bureaucrats*", who do not simply implement public policy, but through their implementation and decision-making, in effect make public policy; that they are '*street level policymakers*'.[310] Public prosecutors are the arm of the state and branch of the criminal justice system that considers and interacts, with the victims of crime the most. Prosecutors are also the legal entity to whom the victim entrusts their harm. The public prosecutor is the ideal lens through which to examine the concept of the victim in practice and test whether the proposition put forward in this thesis holds true to the reality of the system.

If I were to pursue this research, I would conduct a qualitative examination of the victim and their rights within the Scottish criminal legal system. Specifically, I would examine how Procurator Fiscal Deputes, the public prosecutors in Scotland, at key points of prosecutorial decision-making, consider and interpret the legal construct of the victim and their rights. In order to facilitate this data gathering, I would conduct empirical research, gathering ethnographic data from observing the Procurator Fiscal Depute at four key stages of prosecutorial decision-making:

- Initial Case Marking
- Victims' Right to Review
- Pre-trial preparation of a case
- Criminal Trial

Each of these four stages in the life of criminal proceedings marks a critical point when the prosecutor ought to consider the victim and their rights in exercising their prosecutorial decision-making. How they consider the victim in these moments, I suggest, would provide invaluable evidence as to what the victim actually *is* in Scots law.

[310] Lipsky, Michael, '*Street Level Bureaucracy: Dilemmas of the Individual in Public Service*', Russell Sage Foundation, 1983, p13

The ethnographic data would be gathered through two key methods: Observation in the moment and semi-structured follow-up interviews. I would conduct observations in both a cosmopolitan jurisdiction (e.g. Glasgow or Edinburgh) and more rural jurisdiction (e.g. Paisley or Ayr or Oban) which would provide data on whether the perceptions of the Procurator Fiscal Deputes regarding the victim, vary across the country, providing a robust analysis. Ideally, I would hope to observe the same cases/victims considered through each of the four stages, offering a consistent data model.

In order to examine the ethnographic data against my proposition, I would build upon the methodology adopted by Hawk and Dabney in their examination of how police officers consider homicide cases and specifically how considerations of victim can impact how they investigate their cases.[311] Specifically, I would apply the theoretical framework pioneered by Erving Goffman and expertly employed by Hawk and Dabney, namely using frame analysis as a heuristic tool to examine the thought processes of prosecutors as they consider the victim in each of the four situations.[312] The use of Goffman's frames provides an excellent structure for examining (what would be) extensive data on the cognitive processes of the prosecutor at various stages of a criminal case, thus further illuminating the true nature of the victim in Scots criminal law.

Finally, through triangulating the theoretical evidence put forward in this thesis, the qualitative examination through the gathering of ethnographic data, and the use of Goffman's frames to examine said data, I would be able to examine the practical/empirical evidence for my proposition that a new construct of the victim has been created in Scots criminal law, has permeated to the centre of the Scottish criminal justice system and is a new key party to criminal proceedings. It would also be hoped that this data would provide invaluable insight into how the state and the victim interact in practice and how actors within the criminal justice system discuss (if they discuss at all) the victim and their rights, providing key insights into the discourse surrounding the victim in Scots criminal law.

[311] Hawk, Shila R., and Dabney, Dean A., '*Are All Cases Treated Equal?: Using Goffman's Frame Analysis To Understand How Homicide Detectives Orient To Their Work*', British Journal of Criminology, 2014, p1129
[312] For Goffman's frame analysis see more generally: Goffman, Erving, '*Frame Analysis: An Essay On the Organization of Experience*', Northeastern University Press, 1974

5.4 An Afterword

The victim, whilst elusive, challenging and often enigmatic within our criminal legal system - very much *is*.

Scots criminal law is at the frontier of victims' rights and victim-centric criminal justice reform, and it has the capacity to redefine for the better how we understand the victim, their function in the criminal legal system and how we might conduct criminal proceedings from a new victim-centric approach, including trauma informed practices and restorative justice options. That stated, however, any discourse or reform cannot be coherent and will be severely limited, until we first accept and comprehend that the victim *is* part of our criminal proceedings. The victim cannot continue to be a living sacrifice to the 'higher power' of legal tradition.

Reference List

Articles

Ashworth, Andrew, '*Punishment and Compensation: Victims, Offenders and the State*', Oxford Journal of legal Studies, Vol 6, No 1, 1987
Bandes, Susan, '*Empathy, Narrative and Victim Impact Statements*', The University of Chicago Law Review, Vol, 63, No. 2, 1996
Brown, Josie and Jones, Dan, '*The relationship between victims and prosecutors: defending victims' rights? A CPS Response*', Criminal Law Review, Criminal Law Review, 212, 2010
Chalmers, James, Duff, Peter and Leverick, Fiona, '*Victim Impact Statement: Can work, do work (for those who bother to make them)*', Criminal Law Review, 360, 2007
Chalmers, James, and Leverick, James, '*Fair Labelling in Criminal Law*', 71 Mod. L. Rev. 217, 2008
Christie, Nils, '*Conflict as Property*', 1 The British Journal of Criminology Vol. 17, No 1, 1977
Callander, Isla, 'The Challenge of "Best Evidence" in Rape Trials: The Victims and Witnesses (Scotland) Act 2014, Edinburgh Law Review, 279 Vol. 18, 2014
Dijk, Jan Van, '*Free the Victim: A Critique of The Western Conception of Victimhood*', International Review of Victimology. Vol 16., 2009
Doak, Jonathan, Henham, Ralph and Mitchell, Barry, '*Victims and the sentencing process: developing participation rights?*', Legal Studies 651 No. 4, Vol. 29, 2009
Edwards, Ian, '*An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*', The British Journal of Criminology, Vol. 44, No. 6, 2004
Ellison, Louise, '*Domestic Violence without Victim Participation*', The Modern Law Review, Vol. 65, No. 6, 2002
Erez, Edna, '*Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice*', Criminal Law Review, 545, 1999
Fattah, Ezzat A., '*Victims and Victimology: The Facts and the Rhetoric*', International Review of Victimology, 1989, Vol. 1 43
Fenwick, Helen, 'Procedural '*Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process*', The Modern Law Review, Vol. 60, No 3, 1997
Findlay, Mark, '*Internationalised Criminal Trial and Access to Justice*', International Criminal Law Review, 2, 2002
Fletcher, George P, 'Justice and Fairness in the Protection of Crime Victims', Lewis and Clark Law Review, 2005, Vol. 9(3), 547-557
Hall, Matthew, '*The relationship between victims and prosecutors: defending victims' rights?*', Criminal Law Review, 31, 2010
Hawk, Shila R., and Dabney, Dean A., '*Are All Cases Treated Equal? Using Goffman's Frame Analysis To Understand How Homicide Detectives Orient To Their Work*', British Journal of Criminology, 2014
Hohfeld, Wesley Newcomb, *'Some Fundamental Legal Conceptions As Applied In Judicial Reasoning'*, Yale Law Journal, Vol. 23, 1913
Herman, Judith, Lewis, '*Justice from the Victims' Perspective*', Violence Against Women. Vol 11, No. 5, 2005
Jackson, John D., '*Justice for All: Putting Victims at the Heart of Criminal Justice*', Journal of Law and Society, 2 Vol. 30, June 2003
Keedy, Edwin R,. '*Criminal Procedure in Scotland*', Journal of Criminal Law and Criminology, 5 Vol. 3, 1913

Klerman, Daniel, '*Settlement and the decline of Private Prosecution in Thirteenth Century England*', American Society for Legal History Law and History Review, 2001, Vol. 19 No.1
Klip, André, 'On Victims' Rights and its Impact on the Rights of the Accused', European Journal of Crime Criminal Law and Criminal Justice, 2015
McDonald, William F., '*Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*', American Criminal Law Review, 649, 1987
Merwe, Annette, and Skelton, Ann, '*Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis*', Oxford Journal of Legal Studies, Vol. 35, No. 2, 2015
Mujuzi, Jamil Ddamulira, '*Victim Participation in the Criminal Justice System in the European Union through Private Prosecutions: Issues Emerging from the Jurisprudence of the European Court of Human Rights*', European Journal of Crime, Criminal Law and Criminal Justice, 2016, Vol. 24, page?
Neilson, Geo. '*The Study of Early Law*', 3 Jurid. Rev. 12, 1891
Pues, Anni, '*A Victims' Right to a Fair Trial at the International Criminal Court: Reflections on Article 68(3)'*, Journal of International Criminal Justice, Vol. 13, No 5, 2015
Raitt, Fiona, '*Independent Legal Representation for Complainers in Sexual Offence Trials*', Research Report for Rape Crisis Scotland, Published in-house by Rape Crisis Scotland, 2010
Raitt, Fiona, E., '*Disclosure of Records and Privacy Rights in Rape Cases', The Edinburgh Law Review*, Vol 15, No 1, 2011, page?
Roberts, Paul, '*On Method: The Ascent of Comparative Criminal Justice*', Oxford Journal of Legal Studies 3, 2002, page?
Sarat, Austin '*Vengeance, Victims and the Identities of Law*', Austin, Journal of Social and Legal Studies, Vol. 6, 1997, 163
Starmer, Keir, 'Human rights, victims and the prosecution of crime in the 21st Century', Criminal Law Review, 777-787 2014
Wasser, Michael, '*Defence Counsel in Early Modern Scotland: A Study Based on the High Court of the Justiciary*', 26 J. Legal Hist. 183 2005
Welling, Sarah N., '*Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*', 30 Arizona Law Review 85, 1988
Yaroshefsky, Ellen, 'B*alancing Victims' Rights and Vigorous Advocacy for the Defendant*', Annual Survey of American Law, 135, 1989
Zappala, Salvatore, '*The Rights of the Victim v. the Rights of the Accused*', 8 Journal of International Criminal Justice. 137, 2010

Books

Alston, P, '*The EU and Human Rights*', Oxford University Press, First Edition, 1999
Ashworth, Andrew & Redmayne, Mike (eds), '*The Criminal Process*', Oxford University Press, Fourth Edition, 2010
Bellamy, Richard (Ed.) '*On Crimes and Punishments and Other Writings*', Cambridge, Cambridge University Press, 1995, First Edition
Brown, Keith, '*Bloodfeud in Scotland'*, Edinburgh, John Donald Publishers Ltd, 1986
Chong, Hannah Goodman and Williams, Brian (eds.) 'Victims and Victimisation: A Reader', Open University Press, 2009
Cooper of Culross, LJC, 'Criminal Law', in '*An Introduction to Scottish Legal History*', Edinburgh, The Stair Society, Robert Cunningham & Sons Ltd., 1958
Croall, Hazel, Monney, Gerry and Munro, Mary (eds), '*Crime, Justice and Society in Scotland*', Routledge, London, 2016

Cryer, Robert (Edit), 'An Introduction to International Criminal Law and Procedure', Cambridge University Press, 2008
Dempsey, Michelle Madden,'Prosecuting Domestic Violence: A Philosophical Analysis, Oxford University Press, 2009
Dignan, James, '*Understanding Victims and Restorative Justice*', Open University Press, Berkshire, 2005
Doak, Jonathan, '*Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*', Hart Publishing, Oxford, 2008
Duff, Antony, Farmer, Lindsay, Marshall, Sandra and Tadros, Victor (eds), '*The Trial on Trial: Truth and Due Process*' Vol. 1, Hart Publsihing, 2004
Duggan, Marion (ed), '*Revisiting the "Ideal Victim": Developments in Critical Victimology'*, Policy Press Scholarship, 2018
Farmer, Lindsay, '*Criminal Law, Tradition and Legal Order*', 1997, Cambridge University Press, Year
Fredman, Sandra, 'Human Rights Transformed: Positive Rights and Positive Duties', Oxford University Press, 2008
Goffman, Erving, '*Frame Analysis: An Essay On the Organization of Experience*', Northeastern University Press, 1974
Goodey, Jo '*Victims' and Victimology: Research, Policy and Practice*', Pearson Longman, 2005
Grix, Jonathan, 'The Foundations of Research', Palgrave Macmillan, 2nd Edition, 2010
Hardman, Jonathan & Macpherson, Alisdair, D.J., (Eds), '*Floating Charges in Scotland: New Perspectives and Current Issues*', Edinburgh University Press, 2022
Hawkins, Keith (ed), 'The Uses of Discretion', Oxford University Press, 2001
Hoyle, Carolyn and Richard, Young (eds.), '*New Visions of Crime Victims*', Hart Publishing, Oxford, 2002
Hume, '*Commentaries on the Law of Scotland, respecting crime*', Vol II., Book II., Edinburgh, 1819
Hume, '*Commentaries on the Law of Scotland, respecting crime*', Vol I., Book III., Edinburgh, 1819
Hume, '*Commentaries on the Law of Scotland, respecting crime*', Vol I., Book IV., Edinburgh, 1819
Kirchenghast, Tyrone, '*The Victim in Criminal Law and Justice*', Palgrave MacMillan, 2006
Kirchenghast, Tyrone, '*Victims, and the Criminal Trial*', Palgrave Macmillan, 2016
Koffman, Laurence, '*Crime Surveys and Victims of Crime*', University of Wales Press, Cardiff, 1996
Is this a journal? Leverick, Fiona, 'What Has the ECHR Done for Victims? A United Kingdom Perspective', International Review of Victimology, 2004
Lipsky, Michael, '*Street Level Bureaucracy: Dilemmas of the Individual in Public Service*', Russell Sage Foundation, 1983
Mackenzie, *Institutions of the Law of Scotland* (1694), Vol. II. Book IV. 263
Mackenzie, *Institutions of the Law of Scotland* (1694), Vol. II. Book IV. 263
Maguire, Mike & Pointing, John (eds) '*Victims of Crime: A New Deal?*', Open University Press, Milton Keynes, 1988
Mertus, Julie A., *'Human Rights Matters: local Politics and National Human Rights Institutions'*, Stanford University Press, First Edition, 2009
Moody, Susan R, & Tombs, Jaqueline, *'Prosecution in the Public Interest'*, Scottish Academic Press, Edinburgh, 1982
Mowbray, Alastair, *'Cases, Materials and Commentary on The European Convention On Human Rights'*, Oxford University Press, Third Edition, 2012

Newburn, Tim '*Crime and Criminal Justice Policy*', 2nd Edition, Pearson Longman, 2003
Rock, Paul, 'Constructing Victims' Rights', Oxford University Press, 2004
Rock, Paul, '*Helping Victims of Crime*', Clarendon Press, Oxford, 1990
Rosen, Lawrence, Law as Culture: An Invitation, Princeton University Press, 1974
Ryan, Mick, Savage, Stephen P., and Wall, David S., (eds.), '*Policy Networks in Criminal Justice*', Palgrave, Basingstoke, 2001
Schaffer, Stephen, '*The Victim and His Criminal: A Study in Functional Responsibility*', New York, Random House, 1968
Shapland, Joanna, Robinson, Gwen and Sorsby, Angela, '*Restorative Justice in Practice: Evaluating what works for victims and offenders*', Routledge, 2011
Skene, Sir John, '*Regiam Majestatum and Quoniam Attachiamenta*', translated by Rt. Hon. Lord Cooper, Edinburgh, The Stair Society, J. Skinner & Co., Ltd., 1947
Spalek, Basia,*'Crime Victims: Theory, Practice and Policy'*, Palgrave Macmillan, 2006
Walker, David, '*A Legal History of Scotland: Volume I*', Edinburgh, W. Green & Son Ltd, 1988
Walklate, S., and Mawby, R.I., '*Critical Victimology: International Perspectives*', Sage Publications, London, 1994
Willmore, Jon, Shapland, Joanna and Duff, Peter, '*Victims in the Criminal Justice System'*, Gowar Publishing, 1985
Zacka, Bernardo, 'When The State Meets the Street: Public Service and Amoral Agency', The Belknap Press of Harvard University Press, 2017
Zappala, Salvadore, 'The Rights of Victims v. the Rights of the Accused' Journal of International Criminal Justice, 2010, Vol, 8, 137-164

Cases

Scottish

Duncan William Begg v. Her Majesty's Advocate, [2015] HCJAC 69
Hogan v. HM Advocate [2012] HCJAC 12
HM Advocate v. McKenzie 1990 JC 62
Moorov v. HM Advocate 1930 JC 68
RR v. HM Advocate 2021 HCJAC 21
Wishart v. HM Advocate [2013] HCJAC 168

ECHR

A v. The United Kingdom, Application 100/1997/884/1096, Judgement, 23 September 1998
Aydin v. Turkey, Application 57/1996/676/866, Judgement, 25 September 1997
Doorson v. The Netherlands, Application 20524/92, Judgement, 26 March 1996
Finucane v. United Kingdom, Application 29178/95, 1 July 2003
Helmers v. Sweden, Application 11826/85, Judgement, 29 October 1991
Hugh Jordan v. United Kingdom, Application 24736/94, Judgement, 4 May 2001
Jordan v. The United Kingdom, Application 24746/94, Judgement, 4 May 2001
Kelly and Others v. United Kingdom, Application 30054/96, Judgement, 4 May 2001
KU v. Finland, Application 2872/02, Judgement, 2 December 2008
McKerr v. United Kingdom, Application 28883/95, Judgement, 4 May 2001
Osman v. United Kingdom, Application 87/1997/871/1083, Judgement, 28 October 1998
Shanaghan v. United Kingdom, Application 37715/97, Judgement, 4 May 2001
Van Colle v. The United Kingdom, Application 7678/09, Judgement, 13 November 2012
X and Y v. The Netherlands, Application 8978/80, Judgement, 26 March 1985

ICC

The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, 14th April 2015
The Prosecutor v. Ntaganda, ICC-01/04-02/06-T-ENG ET WT, 14th February 2014

ICJ
Tunisia v. Libyan Arab Jamahiriya, ICJ, Report, 1982

Legislation

Children and Young Persons Act 1908
Companies (Floating Charges) (Scotland) Act 1961
Criminal Injuries Compensation Act 1995
Criminal Justice (Scotland) Act 2003
Criminal Justice and Licensing (Scotland) Act 2010
Criminal Law Consolidation (Scotland) Act 1995
Criminal Procedure (Scotland) Act 1995
Domestic Abuse (Scotland) Act 2011
Domestic Abuse (Scotland) Act 2018
Old Age Pensions Act 1908
Probation Act 1907
Victims, Witnesses and Justice Reform (Scotland) Bill 2023
Victims and Witnesses (Scotland) Act 2014
Vulnerable Witnesses (Scotland) Act 2004
Sexual Offences (Amendment) Act 1992
Sexual Offences (Scotland) Act 2009

Websites

Abused Men in Scotland
www.abusedmeninscotland.org

Action Against Stalking
https://www.actionagainststalking.org

BBC News
www.bbc.co.uk/news

Crown Office and Procurator Fiscal Service
https://www.copfs.gov.uk

European Court of Human Rights
https://hudoc.echr.coe.int

International Criminal Court
https://www.icc-cpi.int

International Criminal Tribunal for the former Yugoslavia

https://www.icty.org

International Criminal Tribunal Rwanda
https://unictr.irmct.org

National Records of Scotland
https://www.nrscotland.gov.uk

Oxford English Dictionary:
https://www.oed.com

Scottish Parliament
https://www.parliament.scot/bills-and-laws/bills

Scottish Sentencing Council
www.scottishsentencingcouncil.org.uk

Scottish Women's Aid
https://womensaid.scot

Shakti Women's Aid
https://shaktiedinburgh.co.uk

Rape Crisis Scotland
https://www.rapecrisisscotland.org.uk

Records of the Parliament of Scotland to 1707
https://www.rps.ac.uk

Victim Support Scotland
https://victimsupport.scot