

The adoption of Criminal Injury Compensation

Chronology

1954	Margery Fry puts forward issue of compensation/restitution.
April 1958	Death of Fry
Feb 1959	White Paper 'Penal Practice in a Changing Society' (cnmd. 645)
1959	Private member's bill by Reg Prentice
1960	Private member's bill by Carol Johnson
June 1961	Report of the Working Party on Compensation for Victims of Crimes of Violence presented to HoC (cmnd 1406)
June 1962	RAB paper to cabinet
November 1962	Report by 'Justice' published. Conservative Party report
Dec 1962	Lords debate Decision to use an <i>ex gratia</i> scheme NZ Act
Nov 1963	Detailed drafts shown to Chief Constables
Feb 1964	White Paper (cmnd 2323)
June 1964	CICB appointed

The adoption of Criminal Injury Compensation

The development of the Criminal Injuries Compensation Board marks a key moment in the history of the response of the British state to violence.

For the first time, the state was taking a position that the physical injuries caused by law-breakers were its problem. Not only are the people who commit acts of illegitimate force being punished, but the other side of the transaction is also being dealt with: the victims of these acts are being compensated. This is a significant development: by 1988 the scheme was receiving over 40,000 applications and paying out over £50,000,000 annually.¹

Background:

Long-term change in attitudes towards interpersonal violence

- Assault becomes a criminal matter

Police can't arrest for assault if they don't actually see it happening.

- C20th UK a violent society with a non-violent image

'Kicking your wife to death', baton charges in Guildford on a Friday night, domestic violence unacknowledged.

- 1950s: failure of New Jerusalem to arrive as promised

Crime, especially violence, appeared in fact to be increasing.

Relevant theorists

- Weber

Max Weber's famous definition of the state was of the institution that claims a monopoly of the exercise of legitimate force. In fact, this widely-accepted definition, has gained something in translation, as Pieter Spierenberg has pointed out, the monopoly is relative not absolute.

'the term 'monopoly of violence', commonly used in English, is actually misleading, First, the monopoly is always relative . . . Second, following Weber, Elias spoke of a *Gewaltmonopol*; the German word *Gewalt* originally connoted something like 'ability to rule'²

The state is the institution that asserts a monopoly of the use of legitimate force within a geographical area. The long-term trend in this assertion is for the state to claim jurisdiction over more and more

- Elias

Elias - the diffusion of sensibility and the progressive diminution in the tolerance of the mass of humanity for the suffering of themselves and others. Like the value of stocks and shares, it can go down as well as up: there's nothing inherent about it, merely an observation.

- Foucault

Foucault - the progressive extension of the power of the state defines the modern age. There's a process of liberal governmentality that means that power becomes more all-pervasive, but often less obvious, since it is embedded into structures and assumptions of 'common sense' or first principles. As Matt put it yesterday, the walls come down, but surveillance increases. As Michel himself put it: 'Prison continues, on those who are entrusted to it, a work begun

¹ T. Newburn *The settlement of claims at the Criminal Injuries Compensation Board* (London HMSO 1989)..

² P. Spierenburg 'Violence and the civilising process: does it work?' in *Crime Histoire & Societies* 2001 Vol. 5 No. 2, 87-105, p. 98.

elsewhere, which the whole of society pursues on each individual through innumerable mechanisms of discipline'³

Three key contextual movements

- Humanitarianism and the ongoing debate about 'softness'

1770s onwards, humanitarian, often evangelical prison reformers; Beccarianisation of punishment system, and the advance of rehabilitation as a function of punishment. Around this process the perennial voice of respectable fears [Pearson] against this; always couched in terms of ongoing discovery of phenomena and of change. The liberals are accused of mollycoddling and thus removing the exemplary function from the criminal justice system which would otherwise allow it to function as a moral beacon.

- Growth of the welfare state

1870s onwards, the growth and development of the welfare state, and the progressive extension of state-backed insurance against misfortune. 1948: extension of legal aid concedes the principle that the poor can sue. National Insurance (Industrial Injuries) Act 1946. Government assuming more universal responsibility.

- Incremental elimination of the right of effective self-defence

1840s onwards, the progressive attempts by the state, starting from the judiciary and moving outwards, to de-legitimise interpersonal violence as a means of solving disputes. The concomitant right to self-defence was eroded until by the 1950s it was very weak indeed: no legitimate reason to carry weapons. By 1937 Home Office guidance on legitimate use of firearms was that: 'as a rule applications to possess firearms for house and personal protection should be discouraged on the grounds that firearms cannot be regarded as suitable means of protection and may be a source of danger.' By 1964 it was 'hardly ever necessary': five years later it was 'never necessary'⁴ The 1954 Prevention of Crimes Act penalised the carrying of weapons for self defence.⁵

'Methodology' of this paper

- Attitudes > *public sphere* > *policy* > implementation > attitudes

Generally - attempting to understand the process of policy formation, how changes in public attitudes feed through to debates, and thus to policy, and then how policy is implemented, and in turn changes or fails to change individual attitudes. Each of these processes is not automatic, and each is also problematic to research.

- Accounting for the history

My concern here is as a historian, not as a lawyer or as a political scientist. Or as any kind of theorist, as my one-sentence distortions of Weber, Elias and Foucault have probably reminded you. I would contend that if there is a general rule you can rely on, it's that contingent circumstances generally make a difference to outcomes. So be suspicious of general rules.

And it's work in progress, so bear with me, and tell me what I've missed.

Milestones in the public debate on the adoption of CIC:

- The initial push from the prison reformers

³ Michel Foucault *Discipline and Punish: The Birth of the Prison* [Tr. Alan Sheridan] (Penguin, Harmondsworth, 1979) , pp. 302-303.

⁴ J L Malcolm *Guns and Violence: the English experience* (Harvard UP Cambridge Mass, 2002), p. 171.

⁵ Malcolm, p. 179.

The idea that the criminal should compensate the victim direct was originated by the liberal reformers. William Tallack, secretary of the Howard Association in the late nineteenth century, spoke in favour of reparation by the offender to the victim at international congresses, and wrote a paper on the subject Reparation to the Injured and the rights of the victims of crime to compensation for the international prison congress in Brussels in 1900.⁶

Fry takes it up in 1950s. Great and good. Master of Somerville College, Oxford, Quaker. Distant relative of namesake Elizabeth.

1957 lecture in Nottingham ‘What about the victim?’ Fry said “I think it’s about time something was done about the victim.”⁷ One the tributes printed by the Times pointed out that ‘Margery Fry did much to answer those critics of penal reform who so readily suggest that care for the prisoner involves no thought for his victim.’⁸ Hartley Shawcross wrote that she was motivated by two things: concern for the victim, and ‘because she realised . . . that the absence of any provision for compensation to the victim tended to accentuate the public’s desire for vengeance against the criminal, and so stood in the way of a more efficient system of punishment.’

- Fry dies: government responds

1958, group of supporters go ahead with plan. Public letter from Justice, the lawyer’s organisation. Cross party support, signed by Hartley Shawcross. Suggested a model financed through the National Insurance scheme, with rates based on it. Thus this was actually a state compensation scheme, not one of individual restitution.

Get it onto the government agenda.

1959 White Paper includes the setting up of a working party on the issue, taking Fry’s plan as a starting point.⁹ It then goes through a number of departmental committees and working parties.

- ‘Civil society’ discusses the issues

June 1959, Townswomen’s guild.¹⁰ Nov 1959 Reg Prentice Private members bill., Nov 1960 Carol Johnson Private members bill.¹¹

Report of HO working party June 1961.

AMC considers it in 1962.¹²

Introduction to the ‘Justice’ report by Hartley Shawcross:

‘But the twentieth century has seen many departures from traditional attitudes and an increasing acceptance of the view that that it is the responsibility of the State or the community as such to concern itself with the welfare of the individual and that the individual has corresponding rights against the State and need no longer rely on the Poor Law to save him from complete destitution. State education, industrial injury and health payments, the National Health Service and so forth are matters now taken for granted. No great philosophical revolution is therefore required for an acceptance of the simple principle, that the innocent victim of violent crime should be entitled to compensation from the State for his personal injuries.’¹³

⁶ Wertheimer, Lea & Co.: London, [1899.]; L Blom-Cooper <http://www.tannerlectures.utah.edu/lectures/Blom-Cooper88.pdf> April 12th 2003.

⁷ Obituary notes, Times April 25th 1958 p. 13.

⁸ ‘Miss Margery Fry’ by ‘FD’ Times, April 30th 1958.

⁹ Time ‘Penal Reform Inquiries’ Feb 3 1959.

¹⁰ Times June 5th 1959.

¹¹ Times Nov 25 1960.

¹² AMC archives, minutes for 1962, p. 10.

¹³ ‘A report by justice. Compensation for victims of crimes of violence (1962)

- Feedback from New Zealand and the example of ‘other countries’

Advancing the issue in the Commons, in Hector Hughes MP claimed that ‘Britain lagged behind other civilised countries in the way’ a completely untrue claim: no other country had a system of state compensation.¹⁴ Some extracted compensation from prisoners, and were listed by supporters in the Lords debate on the topic.¹⁵ ‘Justice’ used the example of legislation in NZ, based largely on their report, to urge its adoption in the autumn of 1963. Internationalism in penology gave legitimacy, because penology was justified as a working out of certain universal humanitarian norms.

The internal policy debate and the problem of governmental responsibility:

Described as industrial insurance

Another part of the welfare state. The problem was that many potential victims did not contribute, and thus it would damage the demarcation of National Insurance as a contributory benefit.

Described as the right to sue under Common Law

Although the 1948 legal aid act appeared to universalise the right to sue for damages, the victim of a crime of violence could not sue a prisoner who was unable to earn money, and might just have been landed with a heavy fine. Common Law influenced the level at which damages were set: at standard common law levels but with a ceiling from loss of earnings at twice average wages.

Described as a palliative for disarmament

This was advanced by the Treasury as one of the reasons for the scheme: although the Treasury was trying to block it. They wrote: “the public generally are prohibited from carrying weapons to protect themselves.” The Justice report in 1962 held that the individual was not normally allowed to carry any weapon which could be used to defend himself against violent attacks. Liability should depend ... upon the extent to which the citizen is allowed to safeguard himself against violence.¹⁶

The drift to ex gratia payments

This solution was initially proposed by Lord Denning, who said, as you’d expect: ‘The Government themselves should provide a fund, maybe supported by charitable bodies, too, which can be allotted *ex gratia* for those deserving cases by sympathetic administrators, without all the paraphernalia to entitlement, rights at law, and tribunals’.¹⁷ The Home Office come to this solution quite late in the policy-making process. There seemed to be two reasons:

Lord Chancellor’s dept and Treasury think that this is the only way to avoid lumbering the state with the responsibility for safeguarding the person of the citizen, and the prospect that other the state will be landed in the future with other calls to cover of losses in the case of no-fault damage or loss. A general obligation is open-ended.

The second reason is that if the payment is non-statutory then it doesn’t require legislation, and thus can be introduced through a departmental scheme rather than with an Act. This commends itself to a government with a packed Parliamentary programme to legislate. Not until 1988 does an Act to make it statutory get passed: the 1964 scheme was represented as an

¹⁴ Times Fri May 16th 1958.

¹⁵ Chorley to Lords p. 285.

¹⁶ ‘A report by justice. Compensation for victims of crimes of violence’, p. 6.

¹⁷ Denning to Lords p. 272.

experiment more than anything else. It was quickly integrated into the court system: despite the statement in the white paper that there would be no appeal

Squaring the circle of responsibility

Overall, there was no clear and consistent theoretical underpinning for the scheme: it was demand-led, rather than driven by the desire to apply any general rules. The formula that was fastened on to by various inter-departmental committees invoked the nebulous idea of community to justify the scheme: the 1964 White Paper emphasised that “the Government do not accept that the State is liable for injuries caused to people by the acts of others”, but that “the public does, however, feel a sense of responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community”.

‘State’ - relatively clear cut, although subject to different definition eg centre/local, separation of powers between courts, police, and administration.

‘public’ - a limited category, see the 1960 RC on police.

‘community’ - an ill-defined category.

When the Home Office reviewed the scheme in 1974, they had fastened on the welfare state as the context in which the scheme was explained. The review’s preamble explicitly compared the scheme to the workings of the welfare state, and its attempt to produce a risk-free society: ‘The risk of disabling illness or accident is common to us all. Loss of occupation or accident will nearly always lead to a drop in the victim’s standard of living... Most developed countries have social security systems.’¹⁸ Thus they rejected ‘government responsibility’ and explained it instead as a manifestation of ‘social solidarity or the desire to express public sympathy for the victims of crime.’

Wider conclusions:

Attitudes to crime

- A consensus about [some] violent crime

All the participants in both the public and the government debates appeared to agree that violent crime was different from and worse than non-violent crime.

- ‘Claim to the monopoly’ still less than total

This is therefore an extension of the claim to monopolise legitimate force. But not total and still significantly hedged around in the domestic arena. Payment to members of the same household was banned ostensibly because it might be a payment that would benefit the perpetrator: but in the case of children it was acknowledged that a legal mechanism existed in the shape of payments into court, which could make sure that money was reserved for individuals.

From draft of 1964 white paper (2323): ‘The number of crimes of violence reported to the police is known; many of these, however, are not the brutal assaults on strangers that should certainly lead to compensation, but arise out of brawls or family disputes, where the “victim” may have been as much to blame as the aggressor.’¹⁹

¹⁸ *Review of the Criminal Injuries Compensation Scheme : report of an interdepartmental working party*, HMSO 1978, p. 2.

¹⁹ 2323 p. 4

sexual offences will be scrutinised with particular care 'in order to determine whether there was any responsibility, either because of provocation or otherwise, on the part of the victim'²⁰

In 1978 a working party recommended that it be extended to cover domestic violence: 'Violence within the family has become the focus of considerable public concern in the past few years and it is evident that numbers of women and children in particular suffer injuries which would entitle them to compensation' save that it is prohibited.'²¹

Victim campaigns

- Projection of the reformers' fears, or desire for restitution?

From 1959 White Paper on Penal Practice:

"The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasises the reformative aspects of punishment. Indeed in the public mind the interests of the offender may not infrequently seem to be placed before those of his victim. This is certainly not the correct emphasis..."

When they issued their report in 1963, Justice stressed this pre-emptive aspect in the covering press release, even though it was not given much space in the report itself. 'Victims disabled by criminal violence have little or no redress under the present laws governing compensation. The growing public realisation of this is probably stimulating a desire for revenge, encouraging a demand for the restoration of flogging, and in other ways hampering the development of a penal policy designed to prevent violence and reduce the volume of crime in general.'²² Fry thought so.

- Not yet institutionalised, but making policy

Although there were no victim support groups, even the most liberal policy-makers were very keen to take the supposed interests of the victim into account. To an extent this pushes back the genesis of the victim lobby to

- 'Fabian state' nationalises compensation

All through the debate, the positive virtues of compensation direct from criminal to victim were emphasised by all the participants. But in practice, the state was not willing to compromise on its ability to incapacitate the offender, which had the inevitable result that he was unable to compensate the victim. The 1964 report on Prisoners' employment did not mention compensation as even one of its future hypothetical aims when it discussed the level of prisoners.²³ Thus rather than a restorative relationship between criminal and victim being created, what resulted was another relationship centred on the state, this one about compensation.

²⁰ 2323 p. 6

²¹ *Review of the Criminal Injuries Compensation Scheme : report of an interdepartmental working party*, HMSO 1978, p. 32

²² Oct 31st 1962. Press statement for Justice report, issued on Friday Nov 2. Notes for editors.

²³ 'The Organisation of Work for Prisoners' HMSO 1964, p. 10