

CRIMINAL JUSTICE SYSTEMS and VICTIMIZATION

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Victimization Generally

For over 30 years I have observed throughout the world the victimization of citizens and legal entities by deficient criminal justice systems.

Criminal justice systems in both their creation and application are the product of human beings. As such, they are inherently subject to error and deficiency as to both formulation and application; and this even in the hands of the most well-meaning. Worse yet, when the human propensity for corruption in abuse of power is added to the mix, systemic deficiency increases in its inevitability and victimization of both citizens and legal entities results. No person or entity is exempt.¹ My professional experience worldwide only confirms this reality.

Individuals and entities impacted by crime seek in good faith the representation of local lawyers. Such reliance is inevitable and unavoidable. Usually there is no other option. However, there is more to the equation.

Legal protection in criminal justice matters presumes (1) local lawyer proficiency as to local criminal law and procedure, as well as (2) the functionality of the local criminal justice system in dealing with crime and protecting citizens and legal entities alike. The latter consideration, of course, dictates the viability of the former.

To the extent the particular criminal justice system lacks functionality in social protection, the local lawyer—however intelligent and adept—is necessarily the *product* of that system. To the extent that system is deficient, the local lawyer will necessarily be a "deficient" piece of that system and its associated inability to protect citizens and entities.² As a product of the system, it is difficult—if not impossible—for the functionary to see the system as anything but effective. "Defective" is simply not an issue. Even if problems related to a deficiency are recognized by the

¹ These same principles apply to potential victimization in terms of civil law and procedure, but that endeavor is for someone else.

² It is important to note that, without exception, such has been my experience with criminal justice functionaries of defective systems generally throughout the world. They are part and parcel of the defective systems that produce them and, as such and though well-meaning, only perpetuate the systemic deficiencies. This reality is pronounced most ironically by the common practice of hiring of local functionaries to identify defects and associated reform efforts. It is like asking the architect to point out all the structural flaws in the building he or she designed, and to do so without reference to any other design methodology; or a person to question the adequacy of their own language, when they speak no other.

functionary, the particular defect as the cause—much less the solution to the defect—remains hidden absent the benefit of a comparative law context. Even if the defect cause were to be recognized, the same absence of comparative law context prevents recognition of the solution; and even if it did, cultural loyalty precludes meaningful change.³ At best, administrative or perhaps legislative lip service is paid, but without the required comparative law knowledge or conviction necessary for true remedy achievement; both preempted by the same cultural biases.

This being said, a general explanation of comparative law is helpful. First, criminal justice systems everywhere, regardless of historical or cultural context, consist of two fundamental components. One is "criminal law"—the official and formal pronouncement of proscribed behavior; of crimes. With some cultural variation, systems for the most part define crimes in much the same way, whether it be homicide, embezzlement, or some other crime. Consideration of the subtle variation in crime formulation is interesting, but not particularly cogent when it comes to understanding systemic victimization. That abuse has less to do with what crime is involved in the victimization and more to do with *how* the particular crime is handled or processed—or not handled or processed. It is "criminal procedure" and not crimes that provides fertile legal ground for the victimization of the very people and entities it is otherwise meant to protect.

Secondly, though I obviously have not addressed every criminal justice system in every country of the world, I am familiar with a good many. What I have found is that most fit into two categories: the inquisitorial system of Continental European or Iberian legacy; and the accusatory system of Germanic and English legacy. Historic Iberian and English colonization largely explains the world legal/cultural geographics.⁴

During the last 100 years or so, a great legal/social shift or migration has occurred as inquisitorial systems seek to adopt what they admit as the superior accusatory form, particularly as it applies to modern crime. The motive for the shift is absolutely valid, as universal principles qualify the accusatory form as vastly superior to the inquisitorial. Moreover, the two are polar opposites in concept and application, which explains why the inquisitorial attainment of the accusatory is illusory. The inquisitorial usurpers—well-meaning but steeped in tradition—retain the fundamental, defective nature of the inquisitorial form while attempting to graft upon it accusatory features. These so-called "mixed systems" erroneously and unsuccessfully seek the best of two antithetical worlds; and it is that same inquisitorial culture bias that prevents an understanding of the accusatory and the abandonment of the inquisitory that is required to attain it. The result is the perpetuation of an historically defective system that victimizes more than it protects.

It necessarily follows from this that protection from systemic deficiency within this comparative law context requires knowledge and related action beyond mere local lawyer hiring. Again, as part of the "broken" system, they do not see the "broken."⁵ Indeed, absent such

³ As a prominent Latin American law school dean once told me: "You are right. Reform is needed, but this is what I know and I cannot abandon it." Similarly, a functionary in the West Indies reproached me with: "The system might not work, but it is ours!"

⁴ Of course, there are criminal justice systems that do not fit into either category. I saw this first hand with my exposure to tribal justice in Afghanistan. Nonetheless, the same universal principles used to measure the functionality of the two predominant systems apply with equal force to any system.

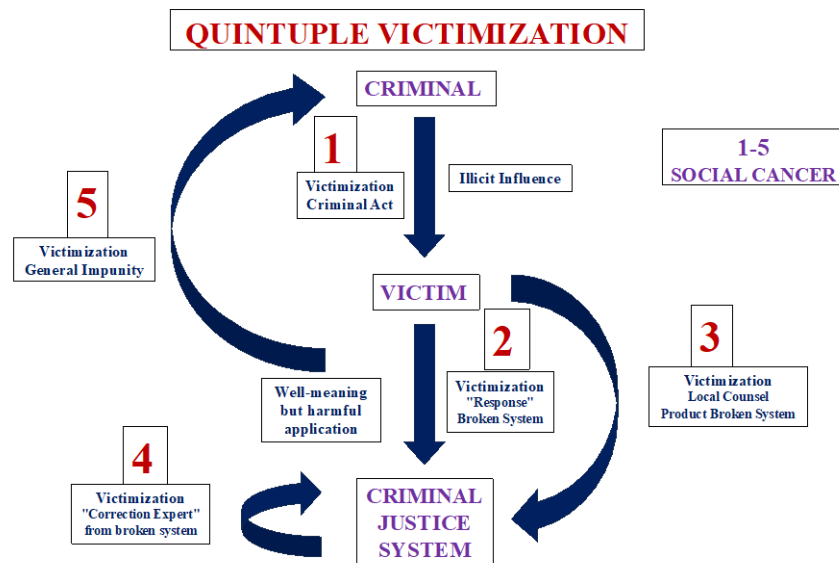
⁵ I wish I had a dime for every time a local lawyer said, "Well, that's just how it is here;" with no hint of "defect."

knowledge enlargement and associated action, Due Process becomes nothing more than a platitude; with local lawyer tasking a serendipitous "crapshoot" at best and a futile gesture in succumbing to victimization at worst. Due Process accommodates neither.

Given such, it is incumbent on system functionaries to achieve this increased knowledge of their own system local in measuring their proficiency in proper representation within the context of that knowledge. In order to truly fulfill the mandate, system functionaries should ideally undergo a change of paradigm.

The absolute need for such knowledge attainment was emphasized years ago during a formal dinner engagement with the then Attorney General of Venezuela and associated officials of that country and the United States. After listening to some of my thoughts regarding their criminal justice system, the Attorney General exclaimed: "He knows our system better than we do!" The same experience has been repeated in different ways in different countries throughout the world.

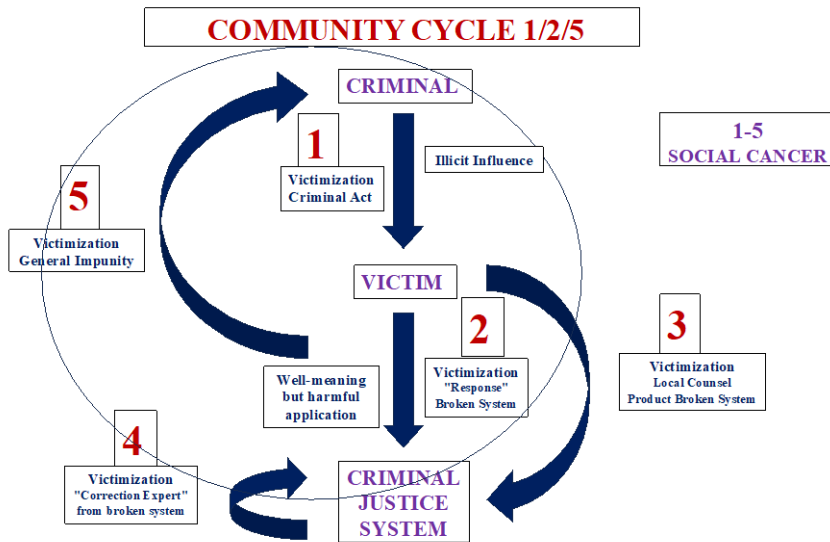
The criminal justice system victimization phenomenon can be illustrated by the following series of diagrams:



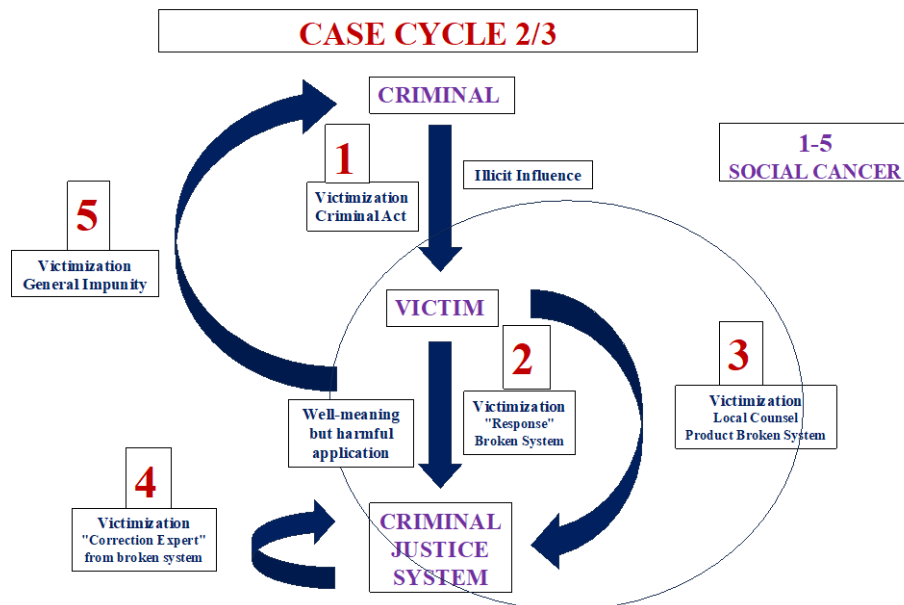
The phenomenon involves five distinct victimizations of the person or entity: (1) the victimization of the person or entity resulting from the initial criminal act; (2) the victimization perpetrated by the defective criminal justice system in either not responding or responding to the crime; (3) the victimization represented by the defense attorney as a product of the broken system; (4) the victimization in supposed correction when the system recognizes defects, but turns to lawyers from the broken system to provide a "fix;" and (5) the victimization found in the overall social impunity that results, including the emboldening of the criminal element.

This victimization involves three distinct cycles: (1) the community cycle; (2) the case cycle; and (3) the correction cycle. The community cycle (victimizations 1, 2, and 5) explains

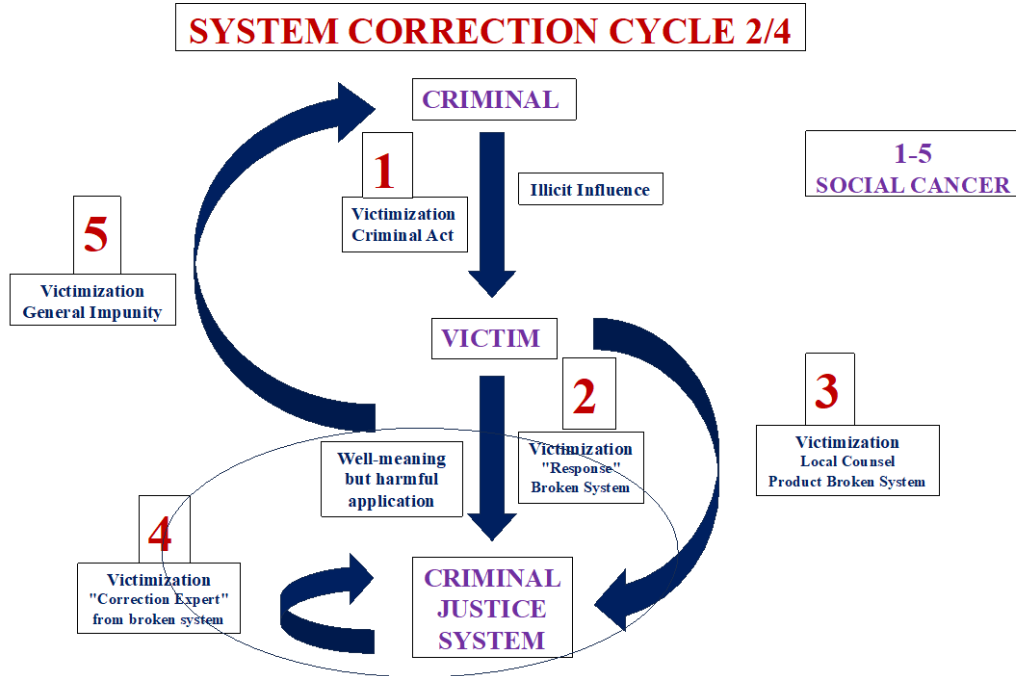
overall social impunity and what it is like to live in a "bad neighborhood" as each victimization leads to the others.



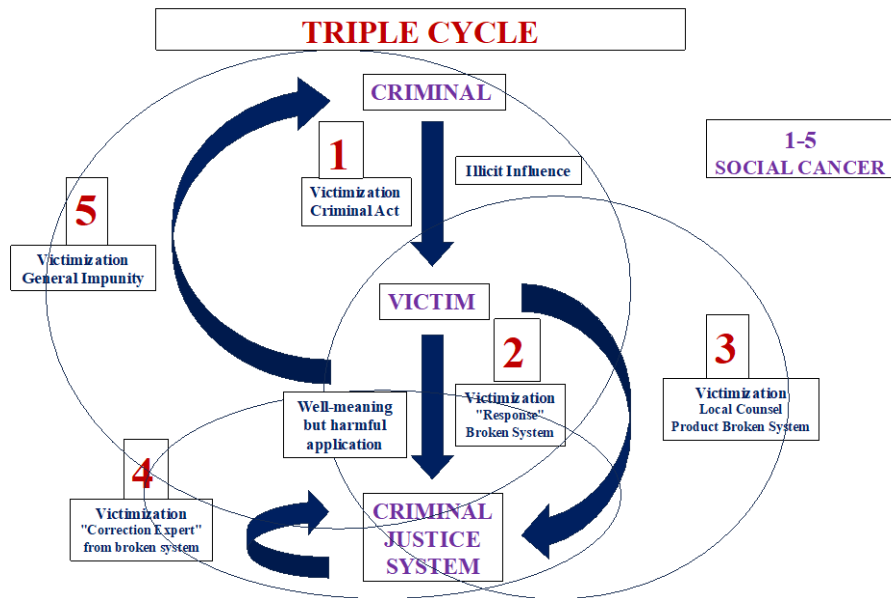
The case cycle (victimizations 2 and 3) explains the individual examples of crime victimization by the defective system and the defense lawyer as a product of that defective system as each promotes the other.



The system correction cycle (victimizations 2 and 4) explains the inevitability of the other two cycles as the system condemns itself to deficiency in false correction.



The result is Due Process flaunted in favor of feigned Justice.



This reality has been manifest to me time and time again as I work in countries around the world. I enjoy interacting with citizens generally, including asking the question: "Is there justice in your country?" The answer and explanation are always the same: "No. The system usually doesn't respond, and when it does it is done poorly." I ask the same question of the criminal justice functionaries, the answer to which is also always the same: "Yes, because we have a criminal justice system."

Discrete, Protective Intervention

The thorough understanding of, and discrete intervention as to, each criminal justice system in such a way as to at least confront specific victimization events suggests 13 considerations or applications. Although some could be effectively realized in chronological order, circumstances rather than chronology should dictate both individual applicability and timing.

1. Orientation

An initial orientation of system leadership and personnel otherwise might be considered in determining the applicability of the information contained herein by offering perceptions without not foisting correction on anyone.

2. General Assessment

Assuming applicability and with the statement of perceived problem and case examples as points of reference, a general assessment can be made of those countries, regions, or areas that most exhibit the victimization. As indicated, accusatory criminal justice systems do better than inquisitorial mixed systems in avoiding victimization, with any systemic variation from those two forms being subject to the same assessment. It would be a question of identifying those of greatest need and focus efforts accordingly.

3. Survey

A survey questionnaire of over 350 questions is available in promoting a preliminary determination of the nature of the particular criminal justice system and the extent of its victimization. Established local lawyer ties can be used to either respond to the questionnaire directly or help gain access to system authorities otherwise knowledgeable and amenable to such an inquiry, such as police departments and prosecutor offices.

The survey questions are founded on universal principles by which a criminal justice system can be definitively measured in terms of its functionality—its strengths and weaknesses. The questions have been crafted in such a way as to elicit the pertinent information required in determining the nature of the particular system. Additional practical benefits of the survey include a revelatory glimpse at how the operators view and interpret their own system. The identification of this paradigm is fundamental in assessing how the system can be strengthened and corrected in avoidance of systemic victimization. Moreover, it gives functionaries an eye-opening indication of where the system stands in terms of efficiency, efficacy, and fairness. This is a vital first step in knowing the system at least as well as its operators in avoidance of victimization.

4. Criminal Procedure Code Evaluation

With the survey as a backdrop, the particular criminal procedure code can be evaluated article by article by means of the same universal principles utilized in generating the survey questionnaire. The code evaluation puts flesh on the survey bones. It explains precisely the how and why of the deficiencies revealed in the survey and constitutes a vital additional step in knowing the system at least as well as its operators in avoidance of victimization.

5. System Practice Evaluation

An in-person evaluation of the country's actual criminal justice system practice in its interpretation and application of the particular criminal procedure code is recommended, as founded in the same universal principles utilized in the survey and code evaluation. This is important given the fact that functionary application can vary from the code mandate.

6. Manual

A comprehensive Manual comprising the survey, the code evaluation, and the first-hand system diagnostic is prepared. The Manual effectively identifies areas of actual or potential systemic victimization, together with the strategies involved in addressing the same. It constitutes the training manual for criminal justice system personnel, supplemented by PPT presentations that track and complement the Manual.

The following books are also recommended in doctrinal support of the Manual and PPT presentations:

English

Comparative Law and Criminal Procedure—Measuring Up; Kim R. Lindquist; United States; 2024. This book, in effect, bridges the Author's experience between the criminal justice systems of the Western Hemisphere with those of the Eastern Hemisphere. Moreover, it contains new developments in measuring the probative strength of cases and facts.

Spanish

La Meta Ilusoria del Sistema Mixto como Acusatorio: Fenómeno del Pasado y del Presente; Kim R. Lindquist, Ediciones Jurídicas Andrés Morales, Bogotá, Colombia, 2016. *The Illusory Goal of the Mixed System as Accusatory: Phenomenon of the Past and Present*. This work speaks in detail about six Latin American countries with mixed systems (Guatemala, Colombia, Mexico, Honduras, Panama and El Salvador), and their basic deficiencies, to which any other system can relate.

7. Training

Training of system functionaries is important and is a question of what and to what extent. System functionaries would be oriented and trained by means of actual casework, classroom instruction, seminars, webinars, and any other feasible means. At the end of the day, these people are the key to countering the victimization.

8. Establishing Relationships with Local Counsel

The most qualified local counsel should be identified, trained in specialization, and the relationship nurtured as to the reality of their criminal justice system and related cases. Fewer are better in order to achieve the specialized education level in practical application. Lesser known or less tested attorneys should only be entertained if the particular case and circumstances allow.

9. Establishing Relationships with System Functionaries

Establishing viable and lasting relationships with local police, prosecutor, defense attorney, judge, and administrative functionaries is vital. The more they perceive sincere and enlightened caring the more they will be willing to respond.

10. Doing the Work with Them

Real cases are a valuable way to begin and sustain system functionary partnerships in showing how things might be done differently. This approach can include doing as much of the work with—and even for—them as they will allow in establishing or promoting the relationship. Functionaries are frequently pleased to have someone's help, while still getting the credit. Moreover, key aspects of system reform can be offered up to those willing to try something new or at least to make points with superiors. They can be shown what they have and what they don't have in making their professional lives easier. They can be tactfully helped to make decisions and take action instead of avoiding the same.

11. Alternative Case Resolution

Due to the inherent defects associated with inquisitory/mixed criminal justice systems and the case congestion that inevitably results, most of these systems have devised a number of case resolution options, together with procedural alternatives. However, such options or alternatives tend to be plagued with the same bureaucracy as the system generally, prompting functionaries to avoid them. Careful guidance in that regard can frequently result in effective utilization of those alternatives in avoidance of case neglect or abandonment.

12. Private Criminal Action

Many criminal justice systems allow private as well as public or common prosecution. Although private prosecutions are often restricted to lesser crimes, they can be strategically effective nonetheless. Many prosecutors welcome the same in caseload reduction. At the same time, two potential obstacles exist. First, there are few local lawyers who feel capable of taking on

a private prosecution. They are not trained nor do they have experience in prosecution.⁶ However, with knowledgeable hand-holding by Church lawyers equipped to guide them, abuse through inaction can be avoided. The second challenge relates to President Nelson's desire to avoid the Church as a criminal complainant. This legitimate restriction can and has been overcome by initiating the proceedings in the name of a private citizen otherwise involved.

13. Civil Proceedings Combined with Criminal

Many criminal justice systems allow simultaneous civil litigation in the same criminal case. This can be an effective alternative to criminal litigation where the facts allow, with local lawyers less reluctant to take on civil litigation than they would private prosecution. There also might be more comfort in the Church being named as a civil party rather than criminal complainant.

Conclusion

Admittedly, criminal justice system victimization cannot be conquered in its entirety; nor need the Church get into the legal reform business. However, much more can be done to soften its very real blow with specific protective intervention in conformity with the Due Process mandate, thereby influencing reform to the extent of such victimization.

⁶ I once asked a local attorney from a prominent firm to consider assuming a private prosecution as to a significant case. His response: "I wouldn't know how to do it." My response: "I will help you." His response: "I just can't." This observation is less criticism than it is a red flag regarding the necessary but difficult pursuit of this remedy.