



Third Study Commission
Criminal law and procedure

Meeting in Liechtenstein, October 8-10, 1984

Conclusions

THE PROTECTION OF THE RIGHTS OF VICTIMS

On the basis of the written reports of the representatives of the Judiciary of Australia, Austria, Belgium, Denmark, the Federal Republic of Germany, Finland, France, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Morocco, the Netherlands, Norway, Portugal, Senegal, Sweden, Switzerland, Tunisia and the United Kingdom, of the verbal report of the representative of Israel and on the basis of the general report from the chairman, F. Screvens, the third study commission of the IAJ reached the following conclusions on the subject of the protection of the rights of victims.

1. In the majority of the member countries the victim of a penal offence can turn to a penal court as well as to a civil court to try to obtain compensation for the damages he suffered from the offence. The damage which may be claimed includes both material losses and moral damage in most of the countries (although not all the reports gave an explicit opinion on this point).

2. In case of a penal procedure, the victim can take his civil action to the court and join the penal procedure. In the majority of the countries the prosecuting authority, generally the public ministry, has the exclusive right to start the prosecution and the damaged party has no right at all in this respect. In some countries, the damaged party can start the penal procedure to enable himself to exercise his rights to civil action.

In this case however the damaged party usually has to deposit, before any prosecution can start, an amount of money which equals the estimated cost of the procedure.

Although in most countries the victim has no influence on the decision to start the penal procedure, he can usually put forward his claim for damages in the penal procedure in a quite simple way, such as by making clear his intention to join the procedure, followed by a claim for damage. Very often the victim may join the penal procedure at the very end of the court session of the first instance.

In Portugal and the United Kingdom the penal courts have the right (and in Portugal even the obligation) to order the accused who has been found guilty of a penal offence, to pay damages and interest even when a claim has not been filed by the victim.

Generally speaking, the rules of the penal procedure have, in principle, to be applied.

When intervention by the victim is allowed, he will have to prove his damage and he will have to show the court that the damage has been caused by the offence.

The victim has the right to legal assistance. In the majority of the countries this assistance will be paid for by the state, when the financial position of the victim should require this. The victim may in some countries also confer a power of attorney to another representative. In certain countries, such as Denmark and Norway, legal assistance is free in case of certain penal offence such as sexual violence.

In the Nordic countries it is compulsory for the public prosecutor to represent the victim during the trial. His assistance is free. Only when the civil action is very complicated or when the public prosecutor is of the opinion that there are not sufficient grounds for a civil action this obligation no longer exists.

3. The civil action to obtain damages caused by a penal offence may always be taken to a civil court.

In Japan, Ireland and Israel the claim can exclusively be put forward in a civil court. The victim can however make use of the results of the criminal investigation to make it easier for him to prove his case.

In the majority of the countries whose legislations have been inspired by Roman law the civil courts have to wait for the irrevocable result of the penal procedure and the penal verdict constitutes a *res iudicata* in the civil procedure. In a number of countries these rules do not exist.

4. The civil action to obtain damage which was caused by a penal offence can normally be started within a certain period of time. This period of time normally is counted either from the day on which the offence was committed, or from the moment when the last action was taken to start the penal procedure, or from the moment the victim got knowledge of the damage, or from the moment on which the victim could have collected the necessary evidence. This period of time is almost always long enough to enable a vigilant victim to start the civil action in time.

5. The representatives of the countries whose legal system contains both ways to put forward the claim for damage, expressed as their opinion that the penal way normally provides the more advantageous way for the victim, because it is faster, the rules of evidence are more lenient and the procedural rules are less strict.

The civil action however seems the more promising way to some countries when the case is complicated.

Moreover in certain countries this way is the only way by which the victim is allowed to claim his entire damage (e.g. in the Netherlands and the United Kingdom).

6. In several of the member states it is possible to obtain provisional measures from the court to secure the future execution of the verdict and especially to prevent the author from making himself insolvent. This involves both normal provisional measures, such as a conservatory seizure, particularly in Belgium, Italy and Sweden and a summary judgment by the president of the court, for example in France and Luxembourg.

Penal sanctions are foreseen, notably in Belgium, France and Luxembourg for a person who arranges his own insolvency to avoid the payment of compensation.

7. The order to pay damages can generally be suspended until the decision in the case under judgment becomes final.

In many legislations, however, the judge has the power to grant the provisional execution of the civil conviction or the victim may ask for the provisional execution by way of a summary judgment, such as in France.

8. The indemnification by public bodies of victims of offences or at least of certain offences has been set up in many countries, especially during the last ten years. It can be found in the legal systems of Australia, Austria, Denmark, Finland, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Sweden and the United Kingdom.

The public funds, in principle, do not become available to the victim unless the author is insolvent or unknown.

The offences which make such interventions possible are, in most countries, offences against human beings or offences caused by violence which have caused considerable damage. Physical damage is always taken into consideration; damage of property and moral damage sometimes. In most countries the less important damages are explicitly excluded; in certain cases, the law fixes the maximum amount of compensation.

Normally the public body which has paid the indemnification is subrogated in the rights of the victim against the author when the latter is identified or becomes solvent again.

9. There are also possibilities for indemnification by official bodies in the private sector as in cases of damage caused by motor vehicles which have not been properly insured.

Thus in the majority of the countries a general Fund has to intervene to pay the damage resulting from physical injuries when the civil responsibility is not covered by an insurance or when the fact has been established that the accident has been caused by an unidentified motor vehicle.

10. The measures to protect the rights of victims should not be restricted to procedural rules which enable them to protect their rights and have them legally enforced.

There also ought to be provisions for help which can be given at the moment when they become the victim of a grave offence. This help should not only be financial or medical support. It should also be mental and practical help to support the victim in his efforts to return to a more balanced situation.

It was also considered important that the police and the public ministry should pay more attention and render better assistance to the victim. But as defending the rights of the victim is normally not the task of the public ministry, it was considered useful to underline that the judiciary should take care that victims could fully secure their rights.

The British report mentions that in case there is a verdict imposing a fine as well as the obligation to pay damages and interest, the latter two have to be paid first. In France a bureau for victims has been created in the ministry of justice which has to coordinate the actions to be taken for the defense of the victim. Offices have also been set up in most of the court buildings to receive visitors who are victims of offences and, in cooperation with the municipalities, associations which provide assistance for victims.

In the majority of the countries, bar associations have arranged for free consultations.

11. In the penal field, it seems appropriate to examine new ways to enlarge indemnification by way of a further and more effective integration in the criminal policy system.

Certainly the indemnification, at least partly, of the victims is accepted as an extenuating circumstance.

But there are other ways to be examined:

- a. In a C.S.O. program the indemnification of the victim could provide the basis for depenalisation in certain cases.
- b. The direct effect of indemnification on the penal sanction constitutes another possibility. In this sense the Austrian penal code considers that the active repentance shown by the complete indemnification of the victim before any prosecution may provide a legal exemption in case of certain offences against property.
- c. To pay all damages to the victim can be a necessary condition for the offender to obtain the possibility of a procedure without a verdict, as is foreseen by the current legislation in Belgium.
- d. To pay all damages may have influence on the choice of sanction by the judge. When indemnification alone is not enough to provide an alternative to imprisonment it may constitute one of the conditions for certain alternatives such as probation.
- e. It may also be envisaged that indemnification or a planned indemnification could have influence on the length of the prison sentence, whether it be on the length of the sentence given in the verdict or on the execution of the sentence.

These questions should be examined under the principle of fairness which should be the basis of criminal policy and the main guide when the sanction is chosen, independent of the financial situation of the offender.

It is, as a matter of fact, often possible and desirable to ask an effort from the offender, to prove his good intentions, to repair (at least part of) the damage caused by him. This aspect of the problem should be taken into consideration in the phase of prosecution, when the judgment is to be given as well as during the execution.