

Report of the Third Study Commission 2017

This year, the Third Study Commission, which is focused on Criminal Law, continued the study of “The Sentencing of Criminal Offenders,” a broad topic which we began in Mexico City in 2016.

In order to facilitate our studies and discussions, a questionnaire was prepared and distributed to the IAJ/UIM member organizations. The questionnaire asked for information on procedures and practices in the member countries on the role of the victim in criminal prosecutions, the issue of restitution to victims and the settlement of criminal prosecutions through plea bargaining.

31 responses were received. Those countries responding were: Armenia, Australia, Belgium, Bulgaria, Canada, Chile, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Moldova, Netherlands, Norway, Poland, Portugal, Serbia, Spain, Sweden, Switzerland, Taiwan (ROC), United Kingdom, United States of America and Uruguay.

During our meetings, we learned the similarities and differences between the countries represented.

Initially, we examined the various considerations which the judge must take into account in crafting a sanction for a person guilty of embezzlement. Working from a fictional fact pattern, the delegates disclosed what sanction would be applied in their own country. We then changed the fact pattern slightly in order to reveal what facts were useful and relevant, and what facts did not need to be taken into consideration by the judge. We discussed whether sympathy should play a role in criminal sentencing, and the philosophical difference between sympathy and humanity. We agreed that while sympathy had no role in a court of law, the judge should not lose a sense of humanity when imposing a criminal sanction. In a general sense, we found that the sanction appropriate to the fictional embezzlement case was not markedly different

among the countries represented at the Third Study Commission, despite the differing legal systems and laws.

We then studied the role of the victim in a criminal case: whether the victim is simply a witness or an actual party to the prosecution in the role of a “private prosecutor,” and whether the victim can have an attorney who assists or conducts the criminal case. All agreed that the rights of the victim must always be protected.

We also examined restitution, and whether the award of such restitution should be in the criminal case, or in a separate civil case.

We next studied a fictional case involving possession of a number of firearms by a person with previous criminal convictions for violent offenses. The range of penalties in the various countries was larger than expected, provoking interesting points of view.

We went on to discuss the settlement of criminal cases through plea bargaining. This is a process which is not universal. It is contrary to the legal tradition of many countries. Nevertheless, plea bargaining can serve useful purposes in conserving valuable judicial resources, reducing clogged dockets, and allowing the parties to work out solutions without a full-blown trial. It is very important, however, that input from the victim be considered, and that judicial approval be required in order to assure a just result.

Last, we studied a fictional case involving 37 burglaries by a member of a gang in which significant losses were sustained by victims and significant damages were inflicted by the burglars. The sanction for was not markedly disparate except for one common-law country.

Our discussions were fulsome and comprehensive. Every delegate participated.

Certain general conclusions emerged from our work.

The imposition of a sanction in a criminal case is difficult and important work. The victims of crime cannot be ignored. Criminal cases may be settled through plea bargaining in some countries, but judicial oversight is essential.

All the delegates to the Third Study Commission concluded that, in the process of discussing these matters and comparing systems and practices, they learned things that will make them better judges.

At the conclusion of the substantive part of our work, it was the unanimous agreement of those assembled that the Third Study Commission should, in 2018, study the treatment of witnesses in court, including children, protected witnesses and sexually abused victims. Next year, three of our delegates will each present brief papers on this subject, and then discussion will follow.

We will also study the conduct of trials generally in the courts of the countries represented.

If time permits, we will study mandatory sanctions, as well as mandatory minimum sanctions, which are obligatory for the judge to apply.

Respectfully Submitted,

For the Third Study Commission

Charles R. Simpson III, President

At Santiago de Chile, this 16th day of November, 2017