



Third Study Commission  
Criminal law and procedure

Meeting in Valle de Bravo, 31 October - 4 November 2004

Conclusions

RESTORATIVE JUSTICE AND THE POSITION OF THE VICTIM IN CRIMINAL LAW

The subject for this year was Restorative Justice and the Position of the Victim in Criminal Law.

Written reports were submitted by Austria, Belgium, Brazil, Canada, Cote d'Ivoire, Denmark, England and Wales, Estonia, Germany, Hungary, Iceland, Ireland, Israel, Italy, Japan, Lichtenstein, Lithuania, Norway, Luxembourg, Portugal, Scotland, Slovenia, Sweden, Spain, Taiwan, Tunisia and the United States of America.

Delegates from the following countries attended and contributed to our discussions: Australia, Austria, Belgium, Brazil, Canada, Denmark, England & Wales, Estonia, France, Germany, Greece, Holland, Hungary, Iceland, Ireland, Israel, Italy, Ivory Coast, Liechtenstein, Lithuania, Luxembourg, Mali, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Togo, Tunisia, Uruguay and the United States of America.

In his speech at the opening ceremony, the President of Mexico mentioned the theme chosen this year for the work of Third Study Commission and underlined the importance of the interests of the victim within the criminal legal system. The Commission focused on three main areas. Firstly financial compensation for victims of crime, secondly alternatives to imprisonment which require positive action by the criminal to make amends for his offending, and thirdly, the participation of victims in criminal proceedings.

Compensation. In almost all countries, the criminal courts can order compensation to a victim for financial losses although the Commission recognized that many criminals have little income and few assets to pay the sums ordered. Exceptionally, in Estonia, a proportion of prison earnings can be used for compensation. In Cote d'Ivoire, someone who does not pay compensation ordered can be imprisoned. In Spain, those who do not pay compensation are less well treated in prison. Most but not all countries have a state fund to underwrite compensation although the sums payable are usually limited to compensation for personal injury rather than economic loss, and the amounts are often capped. In Portugal 1% of costs go into such a fund. In other countries, for example Sweden and the United States, a criminal must pay a fixed sum of money, \$50 or \$100, whatever his sentence, towards a fund to compensate victims. The Commission noted that in most countries, it is expected that a victim's financial losses will be met by private insurance schemes.

Alternatives to imprisonment. Almost all countries (but not Cote d'Ivoire) allow courts to order as an alternative to imprisonment, unpaid work for the community. In some countries, the consent of the offender is required; in others, not. Although the rules of such schemes differ in detail, the broad outlines are very similar with the number of hours which can be ordered lying between about 40 and 400. If a defendant does not perform the work, a sentence of imprisonment may be substituted. By this unpaid work, an offender can make a positive contribution to his community and in this broad way make compensation for his wrongdoing. But the Commission also noted with interest some innovative

schemes which exist to allow an offender and his victim to meet in the presence of a trained mediator with a view to reaching an agreement and avoiding a criminal case. Where these meetings are successful, there are benefits to both sides. A victim may be reassured to know that the criminal is not a monster but an ordinary human being and by being required to face his victim, to apologize, and to understand the harm he has done, a criminal may be influenced to change his ways. Such restorative justice schemes are being piloted in Scotland and early indications show encouraging results in reducing rates of re-offending, particularly in the case of young offenders. The Commission agreed however, that such schemes would not usually be appropriate for really serious crime where deterrent custodial sentences are required to protect society. The Commission also agreed that a victim must not feel under pressure to enter into such a scheme, and that the success of such initiatives depends not only upon the full consent of the parties but the skill of the mediator.

The Victim's role in the Criminal Process. It may not always be clear until the end of the case who is a victim. And victims may include not only individuals who suffer harm or loss, but members of their families and even corporations. Many continental systems allow a complainant, that is to say, someone who alleges that he has suffered harm, to become a civil party in the criminal trial. As such, he may have the right to appear in person, to see all the documents, to be represented by an advocate, and to play an important role in the trial, even to the extent as in Portugal, of becoming an assistant to the prosecution with a right of appeal on fact and in law. Usually the focus of the civil party is the matter of compensation but in some countries, the civil party may also express arguments as to a criminal's sentence. In common law systems, there are fewer clearly defined rights for a victim. He or she will not have separate legal representation and cannot take part in the trial except as an ordinary witness. However, as a result of political pressure and public opinion, the interests of the victim are being more fully considered. In some common law countries, a victim may now submit a written "Impact Statement" to the court, or as in Canada, the judge may hear oral evidence from the victim before passing sentence. In England and Wales, as a matter of good practice, the views of victims are considered before a decision is made to withdraw a criminal case and are told of the outcome. A victim may also ask that a prisoner who is about to be released on licence from prison should not live near the victim or make any contact as a condition of his release. Such conditions must be necessary and proportionate.

To protect witnesses from the ordeal of appearing in court and giving evidence, many countries now permit the use of screens or video-linking for witnesses who are vulnerable. Many countries take steps to keep children out of the court-room and to protect them from questioning by advocates. In Iceland, for example, child witnesses in sex cases go to a special "Children's House" where their evidence is taken in a careful and sympathetic way, with expert help for the children.

Our Commission concluded that a heavy burden always rests upon the trial judge to ensure that whilst a defendant has a fair trial, the requirements of justice extend to all parties and the judge must be ever vigilant to see that witnesses and victims are treated in a considerate way.

The subject for discussion next year will be: Criminal Sentencing.

The Commission will look further at Restorative Justice and will consider Mandatory Sentences and Sentencing Guidelines which may appear to fetter judicial discretion

Valle de Bravo, November 3<sup>rd</sup>, 2004