

GROUP 2

PARTICIPATION OF THE PUBLIC AND VICTIMS FOR MORE EFFECTIVE ADMINISTRATION IN PROSECUTION AND THE JUDICIARY

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I. INTRODUCTION

Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered; as is provided in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/35 (1985)). Unfortunately however, victims of crime have received insufficient attention from the criminal justice system. Although in recent years considerable progress has been made to improve the situation of victims, many shortcomings and problems still remain. This means that victims still suffer physical and financial impact, psychological injury and, in some cases, secondary victimization from the criminal procedure. In order to realize more effective administration in prosecution and the judiciary, it is important to encourage victims to cooperate with the criminal

justice system by releasing them from victimization.

In addition, public participation, mainly as witnesses, is also indispensable for the same object. This matter is also likely to be neglected because witnesses are regarded not as the object to consider, but as a 'means to an end' in the criminal procedure.

The main subject of this group is the 'Participation of the Public and Victims for More Effective Administration in Prosecution and the Judiciary', which is accompanied with the undermentioned 3 sub-topics:

- (1) Measures for securing testimony (e.g witness protection).
- (2) Redress for victims through criminal justice procedures.
- (3) Measures for protection of the rights and interests of victims.

We know that there are a lot of issues of concern with our main theme, an example of which is the jury system, but we will not discuss such issues. The focus is on the said 3 sub-topics because, as officers engaged in law enforcement, we believe that we should address our attention to the issues that can be resolved in practice, and the 3 sub-topics are commonly shared among us. We are going to discuss our main subject according to these topics, under which the problems and current situation of each country, and our suggestion, will be discussed.

II. MEASURES FOR SECURING TESTIMONY

A. Problems

Among most of the group participants, it is well recognized that witnesses are sometimes exposed to threats by defendants or members of the gangster groups and as a result, are likely to be reticent to answer questions by the prosecutor or change their statement in court. If witnesses are afraid that defendants or their associates might harm them, they will hesitate to attend court and will avoid statements against the defendant in court, at which the defendants and their associates (in spectators seats) may be present (some participants named this situation of witnesses as "hostile"). As the public or victims as witnesses cannot effectively participate in the criminal proceeding, the pursuit of truth shall fall into a fatal blunder. The group discussed how we are to cope with this problem of threats and reticent witnesses.

It is certain that the reticence of witnesses can be caused by other reasons, such as victims of sexual offenses not wanting to disclose their experience (we will mention this problem later). However, the main and major reason for witness reticence to assist the prosecution

authority, even if arising from other causes, cannot be separated from the problem of the threat to witnesses.

B. Current Situations and Present Countermeasures

As each participant presented the countermeasures implemented in their respective countries, we have discussed the merits and demerits of each system in practice, with recommendations. We came to recognize that multiple countermeasures are compatible in specific countries and, if selected and applied properly, to a variety of situations. The brief summary of the current situations and countermeasures adopted at present are given below.

1. Witness Securing Program

In Colombia and the USA, there are highly developed countermeasures for securing witness protection in order to prevent threats against witnesses. This concept brought us a great model for desirable countermeasures. It includes control over information on witnesses and concrete protection measures. This system can include providing witnesses with bodyguards, changing their name, identifying them by a number throughout the trial, providing them with a budget for moving to safety areas or to a foreign country, and so on. In a case where witness examination is conducted, linking a witness in another room to the courtroom via video camera is one measure. This program can be applied from the early phase of investigation and continue to the end of the danger to the witness. These concrete protection measures are selected and adopted depending on such elements as the phase of the case, seriousness of the threat, the nature of a witness and so on, or by the judgement of the Attorney-General.

Also in Egypt, special permission for carrying firearms and insurance arranged by the government is available for

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witnesses likely to be threatened. Such programs are effective and invaluable to these countries, in spite of their enormous costs, where the power of gangster groups is so strong that witnesses are likely to expose themselves to serious harm by opposing the groups. It is a matter of course that these programs should be implemented without any unfair influence on testimony from the investigation authority.

2. Devices in the Examination of Witnesses

In countries such as Indonesia and Japan, which have their legislative origin in the Continent, written statements of witnesses made by the investigating authority can be examined under specific conditions, i.e. as evidence in the trial (if the prosecutor submits it, the defense counsel consents to it and the judge makes an affirmative decision). In such cases, it is not necessary to summon a witness to the court in Japan. Unfortunately the accused and the defense counsel are likely to refuse consent for the written statement because they contend the guilt of the accused.

Witness examination through TV cameras is suggested in order to relieve witnesses of pressure from defendants and spectators, although it has not been implemented in any countries of the group. This measure may well be recommended and adopted, especially where the defendants or the spectators scare the witness extremely, because this can exempt them from confrontation with the defendants or spectators, while still granting an open trial and the right of cross-examination.

In Japan, judges are authorized to exclude the defendant from the courtroom during witness examination when their presence would interrupt the witness from

giving a full statement. Indonesian Judges have similar powers too. Although there is a collision between the victim's rights and the defendant's right to attend the court, such powers can be justified under specific conditions and are adaptable to other countries.

3. Keeping the Defendant in Custody

In such countries as India and Japan, there is a legal mechanism that the accused, who are suspected of destroying evidence or threatening witnesses into changing their statements, may be kept in custody and refused bail during the trial. In some cases, persons (except for the defense counsel) are prohibited from interviewing the defendant, even in a detention house. This can contribute greatly to security for witnesses, as it makes it impossible for the accused to threaten the witnesses by themselves. However, some participants objected to this idea in terms of the defendant's human rights. Therefore, adoption of this idea seems to depend on the nationality and situation of each country, though it is an effective countermeasure for securing witnesses.

4. The Sanction Against Threat

A threat or unlawful force to a witness composes another crime, such as intimidation of a witness, and is punishable by another criminal procedure in some countries. However this provision seems insufficient as a measure to annihilate such activity in the case of specific organized gangster groups, because members of the group are likely to threaten witnesses regardless of this provision.

There is sanction in the sentencing against defendants who threaten witnesses in their case. If such conduct is proved in the trial of the case, the sentence for the accused will be increased by 25% in Colombia. Similar treatment is reportedly

implemented in Egypt. Where an attempt to control witness' testimony is impossible, a defendant, knowing that such an attempt would result in longer sentencing, will give up on such unlawful conduct. This sanction against the defendant can be effective in preventing threats committed by defendants to some extent.

In Japan, a judge may have a specific spectator excluded from the courtroom when his/her presence would interrupt the witness' statement. Implementation of this countermeasure requires adjustment between the authority and the dignity of the court, and the human rights of the threatener, because s/he shall be subject to such disposition by a relatively simplified procedure. Whether judges can be endowed with such power depends on the status of the court in each country.

C. Suggestions

Effort should be made to enhance the protection of witnesses during the entire criminal judicial process. Introduction of comprehensive witness protection programs would be useful for the fight against organized crime.

D. Additional Problems or Points

1. Allowance of Witnesses

(a) *Problems and Situations of Countries*

Although in many countries daily allowances and traffic fees for witnesses are supposed to be provided, in more than few countries they are not provided in practice because of the deficit budgets of governments. In Egypt, no allowances are supposed to be paid to witnesses.

(b) *Suggestions*

It is desirable that:

- (i) Adequate daily allowances and traffic fees be paid to a witness who attends the court and

testifies.

- (ii) If necessary, accommodation fees be paid or accommodation facilities be available.

2. Document as Corroborative Evidence

(a) *Problem*

Besides oral evidence, documentary evidence is necessary in cases for proof, such as medical reports and other expert reports. In cases of misappropriation or criminal breach of trust, documentary evidence plays a great role. It is also possible that a witness' testimony is not admissible or credible without such kinds of documents. Unless these documents are preserved and protected, it is difficult to prove the case. There may be cases where the offender may try to damage or destroy the documents. Whether this issue should be an item of this sub-topic was doubted by some participants because it is not relevant to our main theme. However this issue was decided as a topic of our discussion by the majority in whose countries the loss of documents is a serious problem.

(b) *Current Situation of Each Country*

In Japan, the documents which are not yet submitted to the court are kept in the prosecutor's office, where a scientific way of preserving documents is available. They are inputted into the computers. In India, the court takes these records into the custody. The documents are submitted by the prosecution and are produced only during the trial. In China, evidence involving state secrets shall be kept confidential. Seized articles and documents are properly kept and sealed. Judicial functionaries take measures for the protection of the documents in Colombia. In many developing

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countries, documents submitted to the court by the prosecution authority are sometimes lost or altered without the consent of the related parties.

(c) *Suggestion*

Criminal records, especially evidence including documents, should be kept adequately safe, and if tampering is found, the officer in charge of keeping the documents should be blamed for this fault. Documents should be protected at all costs. Scientific devices may be adopted for the same ends.

III. MONETARY REDRESS FOR VICTIMS THROUGH CRIMINAL PROCEDURE

A. Problem

Victims suffer damages from crime such as loss of their property, bodily injury, death and mental suffering. In addition, victims have to pay for medical bills, moving fees and so on. When an offender kills a victim, the bereaved have to hold a funeral which might cost dearly. Such damages or cost should not be left unaddressed. Therefore offenders should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, and reimbursement of expenses incurred as a result of the victimization.

Firstly, victims of crime can bring a civil action against the offenders in civil court for monetary payment as compensation, in order to recover the damage of the crime. Unfortunately however, victims sometimes cannot get any or sufficient amounts of money with civil action, because it has some defects in relieving victims of crime, that is:

- (i) Victims sometimes cannot identify or find the offender.

- (ii) Victims sometimes find difficulty in collecting enough evidence to sustain civil actions.
- (iii) Offenders often lack enough funds to make up for the victim's damage, even if victims win in civil action.
- (iv) Hiring a lawyer for civil action costs much in comparison with the amount of gain that the victim may get, so that victims sometimes cannot or do not want to bring actions.
- (v) In case of payment of fine, this might be an obstacle to compensation for victims.

Regarding stolen property, every country has a system in which articles belonging to victims, seized as evidence by the investigation authority and submitted to the court, shall be returned to the owner as soon as possible. If the articles is lost or not found, victims have no choice other than to get monetary redress for the damage.

In addition, from a historical point of view, criminal procedure for punishment and civil procedure for monetary redress were not separated in pre-modernized society. Therefore each country has developed a respective system to realize monetary redress through criminal procedures, other than civil action in civil court (the systems adopted are countries are attached in table 1).

B. Current Situation and Countermeasures at Present

Here we will illustrate state compensation, restitution orders, and civil action in criminal procedure, with the experience of practice in each country.

1. State Compensation

State compensation means indemnification provided by the state, police authority or Attorney-General outside and independent of judicial

procedures. With state compensation, victims can obtain some monetary redress from the government or state. State compensation does not require the apprehension and conviction of the offender to provide financial relief to the victims.

State compensation can provide victims with financial relief, even though the offenders do not have enough money to make restitution. In general, compensation for victims of crime is paid mainly to the victims of violent crimes. Property loss is typically not covered, with the exception of eye glasses, hearing aids and other medical devices. Adoption or implementation of state compensation is likely to depend on the financial situation of the government.

In Japan, state compensation was introduced in 1980 according to the enactment of the Crime Victim Benefits Payment Act (Law of State Compensation for the Victims of Crime). The types of crime or damages to which this system is applicable are death or serious disability that are incurred by intentional conduct. This includes 2 types of payment, that is:

- (i) Payment for the bereaved of victims who were killed.
- (ii) Payment for victims who suffered serious disability.

In 1997, payment from this system amounted to 635 million yen for 259 bereaved or victims. It is possible that victims who received damage by the conduct of their relatives, those who are responsible for the cause of the crime or those who have got official payment, such as compensation for industrial accidents, may be suspended from payment of all or a part of the compensation.

In India, the state of Tamil Nadu commenced the Victim Assistance Fund in

1995. The scheme is run by state police and is applicable only in the said state. State compensation requires national funding sources and mechanisms. There are two primary sources: funding from fees or charges that offenders pay, and funding from General-Revenue appropriations from the legislature. In the United States, at the federal level, fines and penalties are levied against federal criminal offenders and these monies are deposited into the "crime victims fund", which is used to help states support their victim compensation programs.

2. Restitution Orders

Restitution order means an order by the criminal court, on its own initiative and discretion, that the offender should compensate their victim's damages. Restitution should be used to provide a way of offsetting some of the harm done to the victim, and also to provide a socially constructive way for the offender to be held accountable, while offering maximum opportunity for rehabilitation. Restitution attempts to establish a relationship between the victim and the offender in an effort to raise the offender's sense of responsibility to the victim.

Restitution to the victim of a criminal injury can be effective as a punitive measure, as well as a financial remedy. If used as a punishment, restitution must come from the offender's own resources and it must be part of the criminal court sentence, in that it is tied to the disposition of the case.

Assessment of victim loss is a complex process, so some device is required to have restitution in the criminal procedure to function effectively. In Colombia, both civil action in criminal procedure and restitution orders are adopted and enacted. The court can consider and order both punishment of the accused and payment

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from the accused to the victims. In restitution orders the court is authorized to decide from which property the defendants should raise money for restitution, in order to guarantee fulfillment of the restitution order. For this purpose, the public prosecutor seizes enough property of the defendant for this payment, after the arrest.

In India, restitution orders, that is court authorized orders for offenders to pay to victims, was introduced in 1974. This system has been regarded as a substitution for fines in India, that is; payment of compensation is at the discretion of the court and is subject to no specific criterion. The priority of restitution over fine is at the discretion of the court and restitution orders cannot be realized by compulsory execution. The defendants shall be subject to detention in a workhouse if they fail to fulfill their payment. In practice, the cases in which restitution orders have been entered are very few because the public prosecutor is indifferent to the monetary redress of victims and does not ask for it in court.

3. Civil Action in Criminal Procedure

Civil action in criminal procedure is another countermeasure to realize monetary redress in criminal procedures, where victims can participate in the criminal procedure, seeking monetary redress as a party. Many jurisdictions allow the consideration of civil claims in criminal proceedings. This combination of civil and criminal proceedings has several benefits for the victim and the jurisdiction, ranging from procedural economy to the fact that responsibility for the collection of evidence and the presentation of the issues, to a large extent, lies with the authorities.

In China, civil action in criminal procedure was introduced recently as Incidental Civil Actions, where victims who

have suffered material loss as a result of the defendant's criminal act have the right to file an Incidental Civil Action during the course of the criminal proceeding. An Incidental Civil Action is heard together with the criminal case. Only for the purpose of preventing excessive delay in the trial of the criminal case may the same judicial organization, after completing the trial of the criminal case, continue to hear the Incidental Civil Action. A party to an Incidental Civil Action may file an appeal against that part of a judgment or an order of first instance made by a local People's Court, at any level, that deals with the Incidental Civil Action. In practice, a considerable part of victims' injury cases or the bereaved of murder cases have tried this procedure when the People's Procuratorate decided to prosecute the defendants. Victims are likely to get insufficient remedy because the defendant is lacking enough money.

In Egypt, civil action in criminal procedure is also adopted. As the decision of the criminal court is binding on that of the civil court, victims are supposed to make use of this system when cases have been prosecuted. In Indonesia, the court is authorized to decide the civil suit for compensation with the criminal case, at the request of victims. If the injured party seeks joinder of their claim with the criminal case, the district court concerned shall consider its competence to adjudicate the said claim, the veracity of the basis of the claim, and the order requiring reimbursement of costs expended by the injured party. Except where the district court declare its incompetence to adjudicate a claim, or a claim is declared to be unacceptable, the judgment shall only set forth stipulation on the order requiring reimbursement of costs expended by the injured party. Where there is a joinder of a civil suit and a criminal case, then the said joinder shall continue at the stage of

examination on appeal in and of itself. Where no appeal is lodged with respect to the criminal case, then a request for an appeal regarding a judgment on compensation shall not be allowed. As in most criminal cases in practice, when the offender/defendant has no budget for fulfillment of the compensation, the victims may use the civil court to get compensation, as the judge of the civil court can seize the property of the offender and enforce its decision on the offender to pay the victims.

In Germany, civil action in criminal procedure has not worked sufficiently after it was introduced as "Ancillary Proceedings" in 1987. Although this system has a lot of merits for victims or the bereaved, ancillary proceedings were used in only less than 1% of all judgments delivered in 1997. Judges, public prosecutors and legal professionals have been reluctant to use the proceedings and the victims were also unfamiliar with this type of proceedings. The assumed reasons for this are the strict separation between criminal and civil law, and the mental distinction between punishment and reparations. It is claimed that a considerable amount of additional work can stem from the proceedings, and the procedural delays resulting from the taking of additional evidence are considerable.

C. Suggestions

We should continue with our efforts to find how the criminal procedure can best contribute to ensuring the monetary recovery of victims of crime. State compensation could be one of the possible solutions, especially in case the offenders are not caught or they do not have enough money. It is also worth considering the feasibility of encouraging criminal courts to be able to order the defendant to compensate the victim's damage, and establishing a system in which the victim can participate as a party concerned in the

criminal procedure, and propose compensation for damage.

In some countries this kind of system was introduced, but even in those countries, the judges and prosecutors were not interested in the system; or even if such orders in that system were issued by the judge, the defendant did not have the monetary power nor intention to compensate for the damage. For such instances, a possible alternative is the system of the UK, where if the judge does not order the defendant to compensate the damage, the reason should be disclosed by the judge. In the system of Colombia, the public prosecutor may seize the property of the accused, which can be appropriated for payment to the victims, in order to prevent the accused trying to avoid the enforcement of compensation and conceal their property.

IV. MEASURES FOR THE PROTECTION OF THE RIGHTS AND INTERESTS OF VICTIMS

As the status or standing of victims in criminal procedures has been reviewed recently, we discussed some issues which can be argued relating to our general theme. We will explain each problem, the current situation of each country and suggestions to each issue according to the flow of prosecution and trial procedure. We also mention the issue of how to cope with the dissatisfaction of victims with sentencing.

A. Notification System for Victims

1. Problem

Information is the minimum requirement to protect the rights and interests of victims, because victims cannot take any adequate action to participate in the criminal procedure, exercise their legal rights or apply for special treatment without knowing basic information such as

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on the proceeding or disposition of cases, and the existence of and application procedure for their rights and special treatment.

2. Situation of Each Country and Present Countermeasures

(a) *China*

The court, receiving inquiries about prosecution of the case from victims, shall answer and notify persons after the prosecution. On the other hand, the People's Procuratorate cannot explain the case to the victim before the phase of prosecution. However if the case is privately prosecuted, victims are naturally notified of information regarding the case, as a party to the case.

(b) *Colombia*

Victims have the right to receive documents, in which the outcome and disposition of the case is shown, within 12 days when they inquire about these matters in writing to the public prosecutor.

(c) *Egypt and India*

In Egypt and India, any special rights or treatment regarding the notification system are not available to the victims. Victims shall get relevant information when they bring private prosecution by themselves in both countries.

(d) *Indonesia*

Although a victim may ask for information regarding the case from the public prosecutor or the court, it is not mandatory to correspond and answer this inquiry.

(e) *Japan*

Some kinds of pamphlets and brochures which explain the outline of the criminal judicial procedure,

and the rights and positions of victims are prepared and available at the police office and the public prosecutor's office. The public prosecutor's office implemented a notification program where the prosecutor in charge of a case, with application of the victim, shall inform the victim of the disposition of the case, of the court in charge of the case, the trial dates and so on.

3. Suggestions

In order for the victim to be able to make necessary proposals or requests to the investigating authorities and the court, it is necessary to provide adequate information on the flow and outcome of the criminal proceeding. However providing information to the victim may result in violating the privacy of third parties concerned with the case, or the secrecy of investigating information. Therefore, it is desirable to provide information to the victim by striking a balance between the necessity of providing information, protection of the privacy of third parties, and the secrecy of investigating information.

Specifically, if there is a request from the victim, we should provide the victim with information on the disposition of the case, trial court, trial date and outcome of the trial. Another method explaining the flow of the criminal proceeding, such as pamphlets or brochures explaining judicial procedures and the rights and positions of victims, are also useful to victims.

B. Initiative or Participation of Victims in Criminal Prosecution

1. Problems

Victims sometimes feel dissatisfied with the decision of non-prosecution by the public prosecutor. However, generally victims are not provided with the right of participation regarding the decision to

prosecute an offender. The need for victims to check non-prosecution might be strong where prosecution is monopolized by the public prosecutor and is discretionary.

2. Current Situation of Each Country

(a) *China*

While the public prosecution agency exercises the power to prosecute in terms of the state, society and the victim, the victim by himself/herself may bring a charge and request the judicial body to investigate criminal responsibility by right.

(b) *Colombia*

The public prosecutor has the authority to decide on the prosecution of cases. This decision is not discretionary but mandatory when the evidence is sufficient. Special countermeasures for abuse of prosecution power are not available.

(c) *Egypt*

Prosecution of the case is decided at the discretion of the public prosecutor. On the other hand, there is a system of private prosecution where a victim, who is not satisfied with the decision of non-prosecution, may bring criminal action against an offender by himself/herself. In spite of its significance for victim participation, private prosecution in Egypt does not serve victims substantially, for victims can scarcely win in private prosecution.

(d) *India*

Most of the criminal cases in India are investigated by the police and prosecution, and are also filed by them. However, the victim's right to prosecute an offender is provided under Sec. 200 of the Code of Criminal Procedure, 1973. The victims in certain cases get legal

assistance from the state to prosecute the offender. The victims can engage lawyers for prosecution at their own convenience. So far as legal assistance is concerned, victims can either receive counseling or lawyers engaged to assist the victims.

(e) *Indonesia*

The public prosecutor decides the prosecution of a case at his/her discretion. There is no system to check or control this discretionary decision. Sometimes victims use mass-media to pressure the Attorney-General into re-investigation and re-examination of non-prosecution decisions.

(f) *Japan*

Prosecution of a case depends on the discretionary decision of the public prosecutor, even though the evidence is sufficient to support the case. On the other hand, the Inquest of Prosecution in each jurisdiction of the district court, which is composed of 11 ordinary people, have authority to check a decision of non-prosecution by a public prosecutor, and provide an opportunity to correct his/her decision. It also serves the function of letting a victim present his/her complaint. In addition to this, there is a system where a person, who has made a complaint or accusation of a specific crime, and is not satisfied with the public prosecutor's non-prosecution decision, may apply to the court to order the case to be tried. If the application is granted by the court, then a practicing lawyer is appointed by the court to exercise the functions of the public prosecutor.

3. Suggestions

Under the countries where private prosecution is in practice, victims naturally

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should be able to bring criminal action against the offender in spite of a prosecutor's non-prosecution decision. It is desirable to check the reasons why the private prosecution system does not work effectively and improve it to realize victim's rights or interests.

Under the countries where private prosecution is not in practice, it is necessary to study/establish the system and to provide victims with an opportunity to be involved in the decision of prosecution or non-prosecution, or the indictment process, by being interviewed by the public prosecutor and having a say in the content and degree of damage, and the punishment of the offender. It is worth considering that victims should have an opportunity to file a complaint and request review of the non-prosecution if they are dissatisfied with the decision of the public prosecutors.

C. The Right to Attend the Trial

1. Problem

Victims sometimes can not attend the trial date, even though they want to, because of non-notification of the trial date, capacity of spectator's seats, place of the court and so on. The situation of victims attending the trial is as follows. First, victims are summoned and testify as witnesses at the trial. Secondly, victims attend the trial as a party of the case under the private prosecution system. Thirdly, victims attend the trial as spectators. What matters mainly is the third- standing as spectators- because sometimes there are obstacles to victim's hearing the proceeding of the case, although they are interested.

2. Current Situation of Each Country

In China, victims have the right to attend the court and are granted special seats beside a public prosecutor in the courtroom, and will be notified of the trial date by the court. In Colombia, victims have the right to attend court and testify.

We will mention this right later under an independent item. Egypt and India also adopt the private prosecution system. In this, the victim who brings criminal action against the accused is naturally authorized to be notified of the trial date and attend the court as a party.

In Indonesia and Japan, victims have no special standing to attend the trial other than as spectators. In Indonesia, special seats are provided for victims to hear the trial as spectators, after their witness examination. In Japan, special allocation of spectator's seat is sometimes provided for victims at the discretion of the court.

In the United States, in the Oklahoma bomb case, the case was transferred to another court far from the residence of the victims. Also the number of victims was too large to accommodate in the spectator's seats of the court. The court allowed victims to watch the trial by relay-broadcast in special seats set in a gymnasium located in a residential area near the crime scene.

3. Suggestions

Regarding the right of victims to attend and hear the trial, it is worth considering special treatment for victims in some situations to guarantee their opportunity of attendance or hearing, besides the general right to hear the public trial.

D. Secondary Victimization Through Witness Examinations

1. Problem

Victims have difficulty in testifying in the courtroom in front of a defendant or spectators in cases of sexual crime, child abuse and organized gangster groups. We focused on victims of sexual crime here. Victims of sexual crime want to avoid witness statements in the trial because they think it is scandalous or shameful. In addition, victims are often afraid of the

defendant.

It is generally assumed that the gap between the actual number of sexual crimes committed and those reported is great, and the latter does not reflect the reality of the situation because female victims hesitate to report such crimes. Victims are sometimes cross-examined severely or humiliated by the defense counsel, suffering additional hurt.

2. Situations of Each Country

(a) *China*

In China, examination of witnesses shall be subject to closed trial in the case of sexual crime. This is not discretionary but mandatory.

(b) *Colombia*

Colombia has the Total Witness Security Program which is also applicable to the examination of victims as witnesses in sexual offenses. Under this system, victims of sexual offenses can be examined in a way where their privacy is not invaded, because the victims are exempt from witness examination in front of the defendant, and written statements of the victims can be used as evidence with the medical reports. A detailed explanation of this system was already mentioned earlier.

(c) *Egypt*

In Egypt, the victims of sexual crime are examined as witnesses under open trial before spectators.

(d) *India*

Sec. 327 of the Code of Criminal Procedure 1973, provides for trial *in camera* for any classes of cases deemed fit by the magistrate/judge. In addition, in all rape cases the trial is held only *in camera*. This would not only be in keeping with respect

for the victim of the crime, and in tune with the legislative intent, but is also likely to improve the quality of the evidence of a female witness because she would not be so hesitant or bashful to depose frankly, as she may be in an open court under the gaze of the public.

(e) *Indonesia*

In Indonesia, the victims of sexual offenses can be examined as witnesses *in camera*, which means a closed trial without spectators, except for relatives of the offenders and victims. Needless to say, the applicability of this system is limited to the victims of sexual offenses, but this can also contribute to securing the privacy of victims generally.

(f) *Japan*

In Japan, examination of a witness may be held outside of the trial date, under restricted conditions, without spectators. This doesn't mean denial of an open trial, but it substitutes written statements of the said examination for direct witness statement as the evidence of the case. This can be very useful in securing witnesses' privacy, as this makes it possible to keep the identification of a witness secret and, at the same time, allow a defendant and their counsel the right to cross-examine.

3. Suggestions

Devices to relieve the mental suffering experienced by victims of sexual offenses through witness examination, balanced with the right of defendants to cross-examine, the right of spectators and an open trial, is desirable. Examples of such devices are as follows:

- (i) video-linked witness examination systems.

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- (ii) witness examination in a witness box sheltered from the defendant and spectators.
- (iii) keeping the name, address and place of work of a victim (as a witness) secret during the course of the trial.
- (iv) closed trial *in camera* without spectators, scope of which should be limited to specific cases such as rape or sexual crime, in order to save any further embarrassment of victims.

E. Mental Care and Support for Victims

1. Problem

Victims sometimes want to avoid testimony as witnesses at court, even if there is no concrete danger or risk of humiliation. Victims also sometimes feel uneasy and isolated in testifying as a witness, especially when it is the first time for them, because victims do not understand the criminal procedure and the course of examination. Victims sometimes do not have access to free legal counsel to instruct them on their rights, and as a result, they may not enjoy their rights or interests.

2. Situation of Each Country

China, Colombia, Egypt, India and Indonesia have no special volunteer organizations to serve for the mental care of victims. All countries of the group, including Japan, have no special systems to support victims to attend and testify at court. However it may be noted that:

- (i) There are a private and volunteer organizations which collect money and allocate aid to victims in Egypt. They do not provide counselling or support services.
- (ii) Some volunteer groups in Japan are working in the field of the mental care of victims and have started activities which are limited to victim assistance (not extended to witness assistance).
- (iii) Some kinds of leaflets or brochures

explaining criminal procedure and witness examination are available for victims at police stations and public prosecutor's offices in Japan.

3. Suggestions

Criminal justice agencies concerned with the criminal judicial procedure, including police officers, public prosecutors and judges, should recognize the mental impact or suffering that victims of crimes receive. It is worth considering establishing a system of orientation to the criminal procedure, escort to the court, or counselling support by government authorities or non-government organizations, and training to have officers recognize victim problems.

F. Punishment - Giving Victims a Say About Sentencing

1. Problem

Punishment by the court may not be commensurate with the crime committed, and the victims may not be satisfied with the punishment given to the offender. But we do not conclude that heavier punishment is desirable, as punishment itself does not provide redress to the victims.

Victim's feelings or victim's damage cannot be neglected in the disposition of cases because they are deeply concerned with the cases, even if they are not a party to the trial. Therefore the involvement of victims in decision-making regarding the sentencing of the offenders can be an issue, as they sometimes have no chance to give their opinion or state their damages. Generally, such involvement is referred to as "Victim Impact Statements" or "Victim Statements of Opinion".

2. Situations

In an increasing number of jurisdictions, where the victim does not have the right to prosecute, the victim is allowed to

provide information through a victim impact statement or victim statement of opinion. With victim impact statements, the victims fill out a form in which they indicate what impact the offence has had, what property was lost or damaged, what other financial losses resulted and how the event has disrupted their life. It provides the victims with an opportunity to inform the court of how the offence has affected them physically, mentally, and otherwise. In some jurisdictions, victims are given the right to allocution, i.e. the right to deliver in person a statement on the impact that the offence has had on them. In Colombia, victims have right to attend the trial and present their opinion about the crime. In Egypt, the court often allows victims to appear in trial and explain to prosecutors or judges their point of view, even when they are not going to be called or summoned as witnesses, although it is not endowed as the right of victims. The court may take their opinions into consideration in the punishment of the offender. In Japan, victims are allowed to present the damage that they have suffered from the crime and their feelings in written statements given before the investigating officer, or as a witness statement at the trial, if the court decides to do so.

3. Suggestions

Victims should be allowed to have their views and concerns presented and considered at appropriate stages of proceedings where their interests are affected. This should be done without unfair prejudice to the accused and must be consistent with the relevant national criminal justice system.

In deciding the sentence of the defendant, some elements presented by the victims could be considered, such as the content and degree of the damage, the effect on the victim, and the punishment of the offender. It is therefore desirable to

consider the establishment of a system in which the victim will have a say in the criminal trial, for example, such as the Victim Impact Statements of the USA.

G. Victim Involvement in Decision-making on Appeals

1. Problem

Victims are sometimes not satisfied with the sentencing of the courts, but usually whether to appeal or not depends on the judgement of the prosecutor.

2. Current Situation of Each Country

(a) *China, Egypt and India*

China, Egypt and India have the system of private prosecution, but the status of the victims who have privately prosecuted the case are different. In Egypt, public prosecutors have the right to appeal the court decision if the prosecutor who prosecuted the case is not satisfied with the decision of the court. Victims can not appeal even in the case of private prosecution. In India, victims who have brought private prosecution can appeal. In China, in a case of public prosecution, if the victim does not agree with a judgement made at the first instance of the Local People's Court, s/he has the right to request the people's procuratorate at the same level to propose a counter-appeal, but has no right to lodge on appeal to the people's court at a higher level.

(b) *Colombia, Indonesia and Japan*

In Colombia, Indonesia and Japan, only the public prosecutor, defendants and defence counsels have the right to appeal against the court decision or sentencing. Usually they don't ask the victims for their opinion on deciding whether to appeal.

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3. Suggestions

It is worth considering giving the victims an opportunity to have their say on the decision-making re appeals, to promote victims participation. Usually victims are not asked their opinion by authorities when deciding whether to appeal.

H. Privacy Invasion by the Press

1. Problem

Mass-media sometimes reveals the privacy of victims. The press sometimes reports details of the case or the privacy of victims; and information that the victims do not want to disclose will be made open to the public. As a result, such victims are obliged to suffer another victimization. Mass-media are able to get information about the victims' privacy as a spectator at the court trial.

2. Situation of Each Country

(a) *China, Egypt and Japan*

The Courts of China, Egypt and Japan are authorized to prohibit broadcasting of the trial. We can say that the mental suffering of the victims of sexual crime deriving from the broadcasting of witness examination is diminished to some extent.

(b) *India*

There is no provision for broadcasting the trial in India. However, the press may, with the permission of the court, publish a brief summary of the case without any invasion of the privacy of the victim, in other words, the privacy of the victim is protected.

(c) *Indonesia*

In Indonesia, the court has the power to restrict the press broadcast of a trial, but sometimes allow it to do so. Regarding the trial of sexual crime, privacy invasion does not occur as witness examination can be held

under closed trial.

3. Suggestions

Generally, the privacy of victims should be taken into account all through the criminal judicial procedure. Especially in sexual crimes, the necessity of securing the privacy of victims in order to prevent victimization through witness examination should be recognized. It is desirable to take into account the freedom of the press and balance it with the privacy of the victims.

V. CONCLUSION

Participation of the public and victims in the criminal justice procedure is of vital importance to the fair and effective administration of criminal justice. Without the active contribution of the public and victims, the criminal justice system is unable to fulfill its entrusted mission. In this context, we note with pleasure that growing attention has been given to this issue, not only at the national level, but also in the international forum. Nevertheless, we recognize that there is still a long way for us to go.

Various relevant issues at the stages of prosecution and trial have been identified, and extensive discussion was made during our debate. However, these are in no way exhaustive. There are a lot of other important issues to be studied in order to meet the challenges we are facing.

Moreover, the suggestions contained in the present report have not necessarily been implemented, even in the participant's respective countries. We recognize that it is essential for criminal justice personnel to increase their awareness of the importance of the public and victims' participation, for reaching our goal.

At the same time, the group fully understands and respects the systems

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prevailing in different countries. The political, social and economic conditions of some countries may not be conducive to the implementation of some of the measures proposed above. The intention of the group is to make contributions to further current efforts to promote understanding on this issue.

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Table 1

REDRESS FOR VICTIMS THROUGH CRIMINAL PROCEDURE

COUNTRY	SYSTEM	Mediation program; out-of-court payment from offender to victim	Indemnification outside & independent of judicial system	Order to pay by the judge, upon initiative and discretion of judicial system	Victim as civil party in criminal procedure	Civil action by victim in civil case	Return of property belonging to the victim
CANADA		Yes	Yes	Yes	No	Yes	Yes
CHINA		Yes	No	No	Yes	Yes	Yes
COLOMBIA		Yes	Yes	Yes	Yes	Yes	Yes
EGYPT		No	No	No	Yes	Yes	Yes
FIJI		Yes	Yes	Yes	Yes	Yes	Yes
GAMBIA		Yes	No	Yes	No	Yes	Yes
HONG KONG		No	No	Yes	No	Yes	Yes
INDIA		No	No	Yes	No	Yes	Yes
INDONESIA		No	No	No	Yes	Yes	Yes
JAPAN		No	Yes	No	No	Yes	Yes
KENYA		Yes	No	Yes	No	Yes	Yes
MALAYSIA		Yes	No	Yes	Yes	Yes	Yes
PAKISTAN		Yes	Yes *	Yes	No	Yes	Yes
PAPUA NEW GUINEA		Yes	Yes	Yes	Yes	Yes	Yes
PHILLIPINES		Yes	Yes	Yes	Yes	Yes	Yes
REPUBLIC OF KOREA		Yes	Yes	Yes	No	Yes	Yes
SEYCHELLES		Yes	No	Yes	No	Yes	Yes
THAILAND		Yes	No	Yes	No	Yes	Yes

* Sometimes the government provides financial assistance to victims of certain offences or acts, like terrorism, from relief funds. This is a discretionary power of the government. Victims cannot claim this as a matter of right.

Note: If the country has the system, "Yes" is written. If the country does not have the system, "No" is written.