

GROUP 3

ACTIVE PARTICIPATION OF VICTIMS OF CRIME IN THE CRIMINAL JUSTICE PROCESS

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I. INTRODUCTION

The Group agreed to conduct its discussion in accordance with the following agenda:

A. Participation of Victims of Crime in the Investigation Stage

The right to complaint of the victim of crime

B. Participation of Victims of Crime in the Prosecution

1. Private prosecution
2. System/measures of objection to non-prosecution and dismissal of the case

C. Participation of Victims of Crime in the Trial Stage

1. Attendance at the trial
2. Victim impact statement and victim impact evidence
3. Participation of victims of crime in a criminal trial as a party (*Nebenklage*)
4. Recovery of loss/damage through the criminal justice process
 - (i) Compensation order, reparation order
 - (ii) Reconciliation in the criminal proceedings
 - (iv) Ancillary (Adhesion) proceedings (*Constitution de partie civil*)
5. Victim involvement in the decision whether or not to appeal

II. PARTICIPATION OF VICTIMS OF CRIME IN THE INVESTIGATION STAGE

The group decided to discuss this topic from the following perspective: how victims' views are incorporated into major decisions in the investigation stage.

The members wholly agreed that it is important to give victims an opportunity to express their views and concerns so that they will not feel marginalized. The victim should be given an appropriate status in the criminal justice process because he/she is the person who suffered the most in the event that become grounds to initiate the proceedings.

Group members indicated that in their respective countries victims have the right to make a formal complaint to the investigating authorities following the commission of an offence.

In Guyana, for example, the right to make a complaint is guaranteed by law, and victims' views are requested in deciding whether to charge the suspect or whether to pursue the investigation. The police have

a duty to inquire from the victim as to how he/she wants the case to be dealt with, and the request will be noted and followed. This can only be done in the case of minor violations commonly referred to as “misdemeanours”.

In this regard, the Japanese members of the group introduced a Japanese practice which is called a “Caution by Police”. According to the Code of Criminal Procedures, criminal cases investigated by the police must be referred to prosecutors except certain minor offences designated by prosecutors (of course, recidivists or criminal organization members are excluded from this procedure). In other words, the police are allowed to not refer certain misdemeanour cases to prosecutors, when a caution by the police is deemed enough. In practice, the police must hear a victim’s opinion before taking this measure of disposition. In so far as the victim consents to this disposition, the police must process the case according to this procedure. In this sense, victims’ views are considered as very important in taking this disposition.

Likewise in Botswana, the police can withdraw a case at the request of the victim in the case of a minor violation where the victim and the offender are relatives and the further processing of the matter as a criminal case may break the family ties.

In Indonesia, investigating authorities do not obtain victims’ opinions in deciding whether to carry out the investigation or charge the offender. This is because the interest of the state/public has precedence over the interest of the individual victim. The main role of the victim is limited to giving evidence as a witness. The group recognized situations where the right to complaint of victims should be stipulated in the legislation to safeguard their rights.

It was also said that the categories of offences in which victims are allowed to withdraw their complaints should be clearly specified in the legislation for uniformity and accountability purposes. It will also assist in preventing abuse of discretion by investigators.

The other point raised was the right of the victim to information regarding the development of the case. The reason why victims lodge their complaints is because they want the offender to be called to account for his/her criminal acts. It is therefore of paramount importance that victims are provided with information relating to what has been done or is being done with regard to the information they gave to the investigator.

Group members indicated that, in practice, investigators have a duty to provide victims with the basic information about the progress of the case, paying special attention to the risk of abuse of the information by the victim. There was a consensus of the group that it is advisable that the right of victims to information be guaranteed through legislation or internal policies or directives. This information is a prerequisite to securing active participation of victims in the investigation process.

III. PARTICIPATION OF VICTIMS OF CRIME IN PROSECUTION

A. Private Prosecution/systems & Measures of Objection to Non-prosecution and Dismissal of the Case

It is important that victims should be treated with compassion and respect for their dignity and be supported in their efforts to participate in the criminal justice process in conformity with the United Nations Declaration, Articles 4 and 6 (b).

Private prosecution is one of the measures that allow victim participation in the court proceedings when the prosecuting authorities decline to prosecute. In addition, if there are systems/measures of objection to non-prosecution and dismissal of the case, victims can express their views, especially an objection to such decisions. This is why the group discussed both of these matters together.

At first the group examined systems of their respective countries. It became evident that each country has a unique way of addressing this issue.

In Albania, victims of minor crimes play a vital role in the prosecution process. The decision to initiate criminal proceedings rests entirely on the injured party. The injured party has the right to file a case before the court and prosecute by him/herself without having to file a complaint to the police or the prosecution division. This procedure is taken under the concept of private prosecution and is only available to victims of minor offences as outlined in the Code of Criminal Procedure of Albania. With regard to serious offences, the

responsibility of prosecution remains with the State throughout the prosecution. If the State decides not to prosecute and the victim is not satisfied with the decision, the victim can appeal to the court.

In Indonesia and the Maldives, victim participation in the prosecution process is limited to giving evidence in the court as a witness. The responsibility of criminal prosecution lies with the State through the prosecuting authorities. This is because it is assumed that the prosecution is conducted in the public interest (including the victim's interest). The victim of crime therefore cannot personally make an objection to non-prosecution or dismissal of the case. Even in practice, the prosecutor does not obtain the views of the victim in making a decision on the case. A comment was made to the effect that it is sometimes hard to balance the public interest with that of the victim. Participants from these two countries, however, suggested that some measures for objection to non-prosecution and dismissal of the case are appropriate to give the victim the right to voice his/her views in the prosecution process.

In Japan, when the prosecuting authorities decide not to prosecute and the victim feels that the decision is inappropriate or unjust, he/she has the right to submit an objection to the Committee for the Inquest of Prosecution for review of the decision of non-prosecution. This is an independent committee that comprises of eleven members selected from the general public in order to reflect the various opinions of the general public on the exercise of the prosecution power. The Committee will review the non-prosecution decision and if it is of the opinion that the decision was unjust, it will issue a decision requesting the prosecution and send it to the prosecuting authorities for reconsideration. If the prosecution still decides not to prosecute, the matter will be closed. Though the decision by the Committee does not have a legally binding effect, the prosecution makes it a rule to respect the decision and conduct a serious and comprehensive review by more experienced prosecutors under the strict oversight of the managerial prosecutors.

Mr. Ozeki (Japan) expressed the view that the Committee's decisions might have more impact if they were legally binding in order to reflect the general public's view more directly. The Law that enables the Committees decisions to bind under certain circumstances was passed by the Diet quite recently, and will come into force in the near future.

In addition, as for certain types of offences committed by government officers, such as offences concerning the abuse of authority or violence by a public servant, victims have another way of instituting criminal action through a quasi-prosecution procedure in Japan. In this procedure, victims can directly apply to the District Court for a prosecution and a trial, if dissatisfied with a non-prosecution decision by public prosecutors.

The situation of Guyana is similar to that of Botswana. If the prosecuting authorities decline to prosecute but the victim has a peculiar interest in the issue of the trial, the victim has the right to file a private prosecution by him/herself at his/her own expense. Participants from these countries, however, expressed a concern over the cost and the low success rate of private prosecutions. In the case of Guyana, the success rate is 2%. Professor Sakata suggested it was important to look into the real reason for the low success rate and reconsider whether this method is adequate to give victims the right to participation.

The low success rate is attributed to the following:

- High costs of litigation
- Lack of investigation facilities and capabilities on the part of the injured party
- Lack of evidence

Mr. Watts (Guyana) suggested that it would be of great assistance to the injured party if there was a legal mechanism to oblige the police/prosecuting authorities to provide the basic information of the case to the victim. Mr. Ozeki (Japan) said that the notion of private prosecution seems good but in reality it seems to have serious problems due to the above reasons.

In Cambodia, a victim who is not satisfied with the decision of non-prosecution can lodge a complaint to the Commissioner of the National Police. If the victim is still not satisfied with the Commissioner's decision, he/she can appeal to the Interior Ministry. From the Interior Ministry the case can go to the Government, the National Assembly, Senate and the last appellate office is the Office of the King. In the second option, the police can send the case to the court. If the victim is not satisfied, he/she can appeal to the Group Law

(which consists of seven members). From the Group Law, the case can go to the National Assembly, the Senate and finally to the King.

In conclusion the group made the following comments:

- It is important to have an independent and impartial body to review decisions of non-prosecution.
- Some group members said that private prosecution should be limited to minor offences, as in the case of Albania, and the prosecution of serious offences should be the exclusive matter of the state. In their opinion, the State has a duty to protect and defend the public in law enforcement.
- The system of private prosecution is open to abuse by victims who may file a prosecution just to seek revenge even if there is insufficient evidence to secure a conviction.
- In Guyana there is a mechanism to guard against the abuse of private prosecution by victims. The Director of Public Prosecutions can intervene at any stage before the sentence and stop, continue or redirect charges.
- Members who supported private prosecution said it is a good mechanism for protecting victims and preventing secondary abuse by the criminal justice process since it is impossible for the prosecution to come to the right conclusion at all times.
- Where a private prosecution is used, there should be a legal mechanism to oblige the investigating authorities to provide the injured party with the basic information relating to the matter.

The group had a particular interest in the mechanism of private accessory prosecution discussed by the visiting expert, Dr. Loffelmann, which is an exclusive German criminal procedure. According to him, this is the most relevant procedure in enabling the active participation of the victim in criminal proceedings. This mechanism gives the victim extensive possibilities for influencing decisions in the prosecution process through measures such as exercising the right to ask questions, the right to apply for evidence to be taken and the right to make statements.

The victim's views and concerns in this procedure are well incorporated in the prosecution process from the initial stage as the victim is a co-prosecutor. The victim is also given legal advice by the prosecutor and an attorney may be assigned to assist upon request. Dr. Loffelmann, however, explained that one demerit of this procedure is that the trial can be long and costly for the State because of the complicated nature of the procedure.

IV. PARTICIPATION OF VICTIMS OF CRIME IN THE TRIAL STAGE

A. Attendance at Trial

The group agreed that it is important that judicial and administrative mechanisms are improved to facilitate the victim's participation in court proceedings.

It became evident that in most of the participants' countries (Indonesia, Albania, Guyana, Botswana) victims' attendance at the court is mainly for the purpose of giving evidence as a witness. The witness may also observe the trial after he/she has testified. In Japan, the Law on Measures to Protect Victims of Crime in relation to Criminal Proceedings, enacted in May 12, 2000, obliges judges to take measures to ensure that the victim and/or his/her family are given a chance to observe the court proceedings.

According to the Criminal Code of Maldives, victims play a greater role in the court proceedings. In murder cases, for example, the judge has no authority to come to a decision without first consulting the victim with regard to how the victim wants the offender to be punished.

In accordance with the Penal Code of Maldives (*qisas*), anyone who kills another must be killed as well. When the victims' family decides to forgive the offender, he/she must give compensation (*dhiyah*) to the victim's family. However, forgiveness of the offender by the family does not mean that the offender is free. The offender will still be punished, although the punishment will be reduced. As a result, the attendance of the family in the court proceedings in murder cases is a must.

B. Victim Impact Statement and Victim Impact Evidence

In order to share the basic concept of the Victim Impact Statement (VIS), the group referred to 'Black's Law Dictionary' which explains the VIS as a written or oral statement that describes the harm or loss suffered by the victim of crime. The VIS is intended to give victims of crime a voice in the criminal justice

system. It also allows victims to participate in the sentencing of the offender by allowing them to explain to the court, in their own words, how the crime has affected them.

In Japan, victims of crime, including their bereaved family members, have the right to express their views on the criminal penalty in the criminal justice proceedings through the use of a VIS. The VIS provides the victim with the opportunity to address the court prior to sentencing. According to Mr. Ozeki (Japan), the VIS is not a part of the evidence, and therefore should not include the description of the crime or how the crime occurred and cannot be used for fact finding. It is only used for the purpose of sentencing when the accused is found guilty by the court. Some characteristics of the VIS are the following:

- The victim has the right to request the court to give him/her an opportunity to make a statement even if he/she is not summoned as a witness.
- Since the VIS is not a part of the evidence, the victim need not be exposed to cross-examination (especially inquisitive questioning normally by the defence counsel).

In other countries (Albania, Indonesia, Botswana) victims are allowed to participate by giving indirect input through the prosecutor. In Indonesia, for example, after the victim has given his/her testimony, the prosecutor or judge will ask the victim how he/she feels and whether he/she wishes to forgive the offender. Victims will normally ask for a higher or lower sentence, although this is not binding on the court.

In Albania, the prosecutor reads out in the court the victims' statement and expresses the victim's feelings as a result of the crime prior to conviction and sentencing. Likewise, in Botswana, when the prosecutor makes closing arguments, i.e., summarizing the case before judgment, he/she would normally discuss any economic losses, physical or psychological injuries or major life changes that the victim has experienced as a result of the crime. The prosecutor will further request the court to impose a particular type of sentence though, as in the case of Indonesia, this statement may be well considered by the court but is not binding on the court's decision.

In a way, the systems of Albania, Indonesia and Botswana have a similar function to the VIS or victim impact evidence except that the evidence is given indirectly.

The group had an opportunity to learn about the significance of the VIS from the viewpoint of a judge (Mr. Maruyama of Japan) who has presided over several cases involving the VIS. Mr. Maruyama pointed out that the VIS allows the judge to understand and feel the victims' pain and anguish from the perspective of the victim. In Mr. Watts' (Guyana) view, victims, through the VIS, can influence the sentencing decision and this could relieve suffering and aid the victims' recovery from the crime. However, some participants do not think the introduction of the VIS is necessary since the victim has an opportunity to testify as a witness.

C. Recovery of Loss or Damage through the Criminal Justice Process

1. Compensation Order/Reparation Order

The group agreed that victimization can have a profound effect on the feelings of the victim. In certain crimes, direct financial losses are incurred. But even if there is no material damage, victims of crime may be frightened, confused, or upset in the aftermath of the crime. Compensation, therefore, serves to repair the material and immaterial damages that a victim of crime has suffered and may help to restore the dignity and self-esteem of the victim.

Group members were asked to share their country's methods of recovery of loss in their criminal justice system. In the Maldives, victims have the right to compensation and reparation. In murder cases, as Mr. Abdullah mentioned, the family of the victim has the right to get compensation "*dhiyah*". The amount of compensation is 100,000.00 Rufiyaa, equivalent to the price of 100 camels. In other cases, compensation is also available.

In Albania and Cambodia, victims also have the right to compensation, although it varies in amount depending on the extent of the damages caused by the crimes. Mr. Sothy (Cambodia) pointed out that the victim and offender are given a chance by the court to agree on the amount of compensation. If they fail to reach an agreement, the amount will be decided by the court.

In Botswana, after the accused has been convicted for a criminal offence, the victim, through the

prosecutor, has to make a formal application for compensation. The prosecutor must remind the victim of his/her right to apply for compensation. When the victim comes to the witness box, the prosecutor has a duty to lead him/her in a brief examination for compensation. The court will then assess the application and either award the compensation forthwith as part of the sentence or refer the victim to a civil court. In Indonesia, it is the duty of the court to award compensation as part of the sentence.

Professor Ikeda suggested that it is important for group members to discuss methods of enforcement of a compensation order, for example, what will happen if the offender fails to pay or has no money. In Guyana, a suspended sentence is given and will cause the offender to be imprisoned if he/she fails to compensate. In Botswana, failure to honour a compensation order will result in the offender's property being confiscated and sold at a public auction to recover the money. Mr. Yudi (Indonesia) said that, in his opinion, the State should pay compensation when the offender cannot afford it. In the Maldives a compensation order must be paid by the offender in the civil court. If the offender fails to pay, he/she will be imprisoned.

Mr. Yudi (Indonesia) pointed out that in his country, confiscation of property can be enforced before the sentence. In relation to this, the visiting expert Dr. David advised members to look into issues such as the presumption of innocence before proven guilty and the prohibition of self-incrimination by the suspect.

The following are the possible methods for the determination of the amount of compensation

- (i) The compensation amount is determined by the fundamental law such as *Shariah*.
- (ii) The judge has a broad discretion over the determination of the compensation amount and will be able to freely determine the compensation.
- (iii) The amount of the compensation requested by the victim will be basically used as a guide.
- (iv) The amount of compensation is determined by meticulous examination of the evidence.

2. Reconciliation

In Japan, the Law concerning Measures Accompanying Criminal Proceedings to Protect Victims of Crime was approved in 2000. This law established a system of reconciliation in criminal proceedings. When the victim and the defendant reach a settlement of a civil dispute related to the criminal case between them, they can request the criminal court to add the agreement to the trial record. The inclusion in the criminal trial record has the same effect as a judicial reconciliation i.e., the victim can follow the procedure of forcible execution without a civil law suit for damages.

In Botswana, the court may, upon application by the victim, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for assault or any other offence of a personal or private nature on terms of payment of compensation. This is normally done when the parties are agreeable and the offence is not of an aggravated nature. It is the duty of the court not to close the proceedings for a sufficient length of time to confirm that the terms of settlement have been carried out. If the accused fails to carry out the terms, the case will proceed. In this way reconciliation empowers victims to participate in decisions that affect them.

3. Non-Prosecution/Diversion

In Japan, the prosecutor sometimes decides not to prosecute if the offender and victim agree on compensation. In theory, this procedure is not limited to particular offences but the prosecutor will consider issues such as:

- The gravity of the offence
- Public interest, etc.

4. Arbitration

Under Botswana Customary Law, the victim and the offender upon agreement can opt for a non-court dispute resolution known as arbitration facilitated by a Headman. The role of the Headmen of arbitration is to act as a mediator to support the healing process of the victim by offering a safe and controlled setting for the victim to meet and speak with the offender on a strictly voluntary basis. The arbitration serves as an opportunity for the victim to explain to the offender (in his/her own words) how the crime has affected his/her life. The offender is made to reflect upon the injustice he/she has caused and take responsibility for his/her behaviour.

Mr. Yudi (Indonesia) felt that we should not place too much emphasis on the interests of the victim because prosecution has other significance, such as the public interest and general deterrence of crimes.

Ms. Mathumo (Botswana) agreed that this procedure has both advantages and disadvantages and went on to discuss what she thought were the advantages of the arbitration as follows. She also mentioned that the arbitration should be voluntary and only applicable to minor offences.

- Arbitration provides a means to avoid prolonged legal proceedings and the associated costs and delays.
- The victim is not treated as a mere witness but has an opportunity to express his/her feelings.
- The offender is made to reflect on what he/she has done and accept responsibility by engaging in constructive actions. This might have a rehabilitative value.
- The offender is less stigmatized.
- The victim obtains financial and emotional restitution quickly. This may aid the victims' recovery from the crime.
- Community involvement in the solution of conflicts may have a positive deterrent impact.

Ms. Mathumo further said that there is a need for research into this method to determine its impact on the parties and a need for continuous training for arbitrators to fulfil their obligations effectively.

Professor Ikeda pointed out that these procedures are quite flexible but there may be a problem of arbitrariness. She further advised the group to consider the issues of fairness and social interest.

The group agreed on the following as disadvantages of these procedures:

- Arbitrariness
- Arbitrator may exercise undue pressure on the parties
- The procedure may not be in the public interest
- Fairness
- Lack of deterrent effect on society as the procedure is not conducted in public.

The group considered the source of funding. Where will the government get money to pay compensation to the victims? Some suggestions were made as follows:

- (i) establishing a government fund
- (ii) paying compensation from court fines

- It was noted that the government may have technical difficulties in deciding who the victim is and what amount to pay. 'Victim' is defined in a broad sense in the United Nations Declaration.

5. Ancillary (Adhesion) Proceedings (Constitution de Partie Civil)

In this procedure, the civil law damage compensation claims by the victim is asserted in the context of the criminal proceeding. The advantages and disadvantages of this procedure were described as follows:

Advantages

- Swift attainment of compensation for the victim
- Avoidance of contradictory judgment
- Timely establishment of legal peace
- Principle of procedural economy

Disadvantages

- Lengthy and complex trial
- Loss of right to appeal (in some countries)

Professor Noguchi said that one fundamental problem of this procedure could be that the high standard of proof (beyond reasonable doubt) and strict evidential rules applicable in criminal cases are also used in the civil matter. He however said that this will depend on the system of each country.

Mr Ozeki said that even if there are not ancillary proceedings, it is important to speed up civil litigation for swift reparation of damage. In this regard, he also stated that it is significant that we have necessary

measures for victims to use criminal trial records as evidence in civil litigation.

This procedure is not available in the participants' countries except Albania. Due to the absence of country examples, it was difficult for the group to discuss the procedure in detail and reach a conclusion.

D. Victim Involvement in the Decision Whether or Not to Appeal

In Indonesia, Maldives, Albania, Botswana and Cambodia the victim's right to appeal is exercised through the prosecutor. In countries where there is private prosecution, victims are accorded the opportunity to instruct their counsel to appeal on their behalf.

Professor Noguchi suggested ways in which the victim can be involved in the decision whether or not to appeal; for example, even if the victim does not have an independent right to appeal, his/her views can be heard by the prosecutor in deciding whether or not to appeal the decision.

In Mr. Yudi's (Indonesia) opinion the victim should be involved in the decision whether or not to appeal.

V. CONCLUSIONS AND RECOMMENDATIONS

The group agreed on the significance of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The group believes that Member States should endeavour to implement the Declaration as much as possible, based on each country's situation, culture and the justice system.

With this perspective in mind, the group came to the following conclusions and recommendations:

1. Victims should be given an opportunity to express their views and concerns, and those should be considered carefully by relevant agencies throughout the criminal justice process.
2. In the investigation stage, victims should be given an opportunity to express their views and concerns by making a complaint.
3. Victims should be entitled to access to basic information on the progress of the case in every stage of the judicial process.
4. Victims should be treated with compassion and respect for their dignity, and should be supported in their efforts to participate in the criminal justice process.
5. In a jurisdiction where the basic method of prosecution is public prosecution, it is important to have an independent and impartial body to review decisions of non-prosecution in order to ensure fair prosecution.
6. Private prosecution might be one of the options when the State decides not to prosecute. However, measures should be in place to guard against the abuse of private prosecution.
7. It is important that the judicial system of a country has appropriate judicial and administrative mechanisms to facilitate the victim's participation in the court proceedings.
8. Victims of crime suffer the most as a result of crime. It is of the utmost importance to give them an opportunity to express their pain and feelings in the form of a Victim Impact Statement (VIS) and Victim Impact Evidence (VIE).
9. With respect to compensation and restitution for victims, it is important that victims receive a swift restoration for damage inflicted by the offender through the criminal justice process.
10. Victims' views, amongst other factors, should be considered by the prosecutor in determining whether to appeal.