



MJU-27(2006) 13
(English only / anglais seulement)

27th CONFERENCE OF EUROPEAN MINISTERS OF JUSTICE

Yerevan (12-13 October 2006)

**VICTIMS:
PLACE, RIGHTS AND ASSISTANCE**

Report presented by the Ministry of Justice of

PORTUGAL

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Victim's situation is one of the most important discussions of contemporary societies. We are dealing with the necessary double dimension of the State's response to the violation of individual rights and interests. In one hand we have the punishment of the aggressor and in the other we have the guarantee of the victim's protection, care, assistance and compensation.

The in force Portuguese Criminal Procedure Code, approved in 1987, has suffered, from a comparative point of view, influences from other European Union member States with which Portugal has a wide common juridical and cultural heritage. The national legislator has also inspired himself in the democratic law principles and in the Council of Europe's extensive tradition of protecting and promoting human rights, namely through the juridical and procedural approach of the victim's status.

From the procedural point of view, the victim – meaning the offended whose interests the law specially intends to protect with the incrimination – is not a part and does not have a role in the proceeding except if he or she chooses to become an active part according to the article 68 of the Criminal Procedure Code (CPC). The *assistant* (active victim) has, in the procedure, the status of collaborator with the Public Prosecutor's Office and is always represented by a lawyer. The *assistant* participates in the judicial inquiry and in the subsequent phase, offering evidence and requiring the needed diligences; deduces an accusation independent from the Public Prosecutor's Office accusation and, in those cases in which the proceeding depends of the victims accusation, deduces the accusation even if the Public Prosecutor's Office doesn't do so. The *assistant* may also deduce the civil request for compensation in the criminal procedure, according to articles 72 and 73 (CPC).

In those cases in which the aggressor's identity is unknown or when by any other reason he cannot be accused or convicted, the victim may require the State's assistance. This assistance, however, is limited to the patrimonial damages resulting from serious physical injuries and the damage must have caused a considerable disturbance to the insured's level of life. This compensation mechanism based on an idea of «**social solidarity**» and not in a «State's liability» theory is foreseen in the law regarding the legal status of the victims of violent crimes, recently altered for the fourth time in consequence of the transposition to the internal law of the Council's Directive 2004/80/EC, of 29 April, regarding the compensation of crime victims. This law, following the international binding instruments to which Portugal is attached, namely from the Council of Europe and the European Union, materializes the article 129 of the Criminal Code which foresees a «social insurance» in order to assure the compensation of the injured when the aggressor hasn't the possibility of doing it. There's also a Violent Crime's Victims Assistance Commission, on the direct dependence of the Minister of Justice, composed by a Magistrate, a Lawyer and a Ministry of Justice's high level official. This commission promotes all the useful diligences to instruct the beginning of the judicial compensation request proposed by the violent crimes victims against the State. It also gives opinions about the right to compensation and about the amount of the compensation itself.

In the other hand, the witness protection law foresees a series of means in order protect victims and witnesses, namely the use of videoconference to testify, image hiding and voice distortion, in order to render impossible the identification of the person. This law intends to protect physical or psychic integrity, freedom or goods of considerably high value, that are put in danger due to the fundamental contribution of someone to the procedure. Also in this area, but out of the scope of collaboration with justice, it is foreseen the creation of special victims support units with qualified

personnel within police stations as well as in hospitals. Specific mechanisms related to differentiated crimes are foreseen too, namely regarding domestic violence to which is foreseen a public housing network for the victims.

Meanwhile, in 7 September 2006, a Law Proposal was approved by the Council of Ministers proceeding to the fifteenth alteration of the Criminal Procedure Code. This change intends to deepen, in the context of the development of the Constitutional Law itself, the fundamental rights, freedoms and guarantees of the citizens – crime victims or aggressor, real or potential ones. The changes intend to deeply conciliate victims' protection and proceeding's effectiveness with the defence guarantees assured by the Democratic State. To protect witnesses and victims it is also foreseen the possibility of a deposition for the future judicial inquiry («declarations for future memory»), specially in crimes against sexual freedom and self determination of minors as well as in trafficking in human beings.

Portugal has also tried to find new ways of deciding conflicts as well as new ways of supporting and protecting **victims in a wide concept**, including both the offended and the injured. Two initiatives may be appointed in this context: **criminal mediation** and, in the civil law framework, the new Law Proposal on the **State's and other public legal persons civil liability based on non contractual relationships**.

In this point, it is important to stand out the positive experiences of mediation performed in the Family Mediation Office of Lisbon (*Gabinete de Mediação Familiar de Lisboa*) and, above all, the mediation carried out by the Courts of Peace (*Julgados de Paz*). In the sequence of the above-mentioned success, the Ministry of Justice has launched a criminal mediation experimental project. The discussion of this project occurred in last March and is now a Law proposal. The initiative is framed in an European policy of promoting the peaceful settlement of disputes also in the criminal area, foreseen, namely, in the Framework-Decision 2001/220/JHA of the Council, regarding the status of the victim in the penal procedure, and in the Council of Europe's Recommendation R (99) of 15 September 1999.

Today, in Portugal, there are 12 Courts of Peace where about 30% of the disputes are settled through mediation, foregoing a trial by the Judge of Peace. Taking advantage of this good experience, the introduction of the mediation in the criminal procedure, through an informal and flexible model of settling disputes intends to bring closer the offender and the victim. The development of criminal mediation is closely connected to the promotion of victim's rights and intends to lead to a situation where victims, delinquents and the society jointly repair the damages through an alternative solution that foresees an agreement. This agreement in one hand allows repairing the damages caused and on the other contributes to the **re-establishment of social peace**.

However, it becomes necessary to ponder the problems that this way of settling disputes may raise, namely foreseeing that mediation doesn't always lead to the aimed situation. The confront between victim and aggressor implies an increased risk once it may put in danger the victim's integrity if it doesn't result as expected. In these cases it is important to foresee efficient protecting measures to be set together with the mediation process – a system eventually similar to the one foreseen for the witness protection.

In the framework of the Public entities liability policies, and following a logic of protection and support to the injured ones – considering in this cases the ones injured by acts of authorities and public entities – Portugal has decided to create a new system of non contractual civil liability of public legal persons including, namely, the non contractual

liability of the State and other public entities, for damages caused in the exercise of legislative, judicial and administrative duties. The new law, yet as a law proposal, tries to finally respond to the need of adapting the legal system of liability of public entities to the Portuguese Constitution. So, it improves the liability for the exercise of administrative powers; establishes, for the first time in Portugal, a system of liability for the exercise of judicial duties; and also introduces an innovator liability system for the exercise of political and legislative powers. Not to be forgotten is the option of widely establishing the obligation for the State and other public legal persons to compensate the ones to which are imposed duties or are caused special and out of normal damages, not limited to the exercise of the administrative function. It is a question of accomplishing the imperatives of the State of Law, assuring the protection of the ones injured by the public entities acting and, at the same time, promoting quality and responsibility in the exercise of public powers. In this context, it stands out the option of establishing a general system of liability for illicit defaults (omissions) in the exercise of political and legislative powers.

In this proposal stands out the recognition of rights to those injured by the State and other public legal person for illicit acts not based in a specific contractual relation. This liability goes further and reaches the omissions. This means that, for example, whenever a judicial decision is delayed and therefore someone is injured, the State has to respond for that. It is a clear recognition of the individual rights towards political, judicial and administrative power. It also a question of considering a wider concept of victim including here also the one who has suffered with an act or omission committed by the public power.

So, Portugal has been walking through the path that leads to the protection and recognition of the harmed one, comprising here both the victim *stricto sensu* as well as the injured. The recognition and protection of victims have a wide scope in the Portuguese legal framework. It is based not only in the principle of guilt but is moving also to a situation of «**social solidarity**». The compensation attributed by the State, in those cases in which the aggressor cannot do it, is clearly funded in social solidarity principles and also in the purpose of promoting and protecting victims' rights. Now, in what concerns the protection of the injured, **the proposal of imposing the obligation of the state to indemnify for acts or omissions that harm the citizens is a reflex of a policy that intends to strength the rights of the citizens towards the State**, preventing, namely, the double victimisation that may, for instance, occur in those cases of judicial delays.

Considering all, Portugal has to give its complements to the Council of Europe for promoting the debate on this subject so present in the international framework and to which all democratic States should pay especial attention. The contribution to the prevention and repression of situations that raise victimisation and violation of the rights and legitimate interests of the citizens must be a priority in the agendas and a clear bet should be made on the reintegration of the aggressor and the re-socialization of the victim leading to social peace.

