European Network of Councils for the Judiciary (ENCJ)

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As delivered

VICTIM SUPPORT EUROPE

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Speech by Lord Justice John Thomas
President of the ENCJ

Introduction

It is an enormous pleasure and privilege to be able to deliver an address to your assembly this year. Last year at Lisbon a huge amount of preparatory work was done to prepare for the next five year programme on justice and home affairs. It is therefore very pleasing that the Stockholm Programme published in December of last year set out the strategy to improve legislation and practical support measures for the protection of victims, to improve the implementation of existing instruments and to examine the opportunity to make a comprehensive instrument for the protection of victims; we all owe a particular debt of gratitude to Monika Olsson and her team at the Swedish Ministry of Justice. The Action Plan to implement it (published by the Commission on 20 April 2010) sets out a timetable of next year for the production of a proposal for a comprehensive instrument for victims and the implementation of practical measures including the proposal for the European Protection Order.

This is a remarkable achievement on which you all, under the leadership of Jaap Smit, deserve real congratulations.

The rights of the accused and the rights of the victim

There is, in my view, an important parallel in the development of victims' rights and procedural rights for defendants. The need for the latter is now clear. It is

difficult to see how there can be further real progress towards a common area for justice in the area of criminal justice unless common procedural rights are created for those accused of crime. As a matter of practical reality it is, I think, now appreciated that the courts of one Member State will not readily return a person arrested in that State to another Member State for trial in that State, unless there is confidence that the accused will be accorded basic procedural rights in the state to which he is to be sent. These include, for example, the right to interpretation, legal assistance and the provision of information. The development of rights under the European Convention on Human Rights operates *ex post facto* and takes many years of incremental case law that then had to be applied*;* what is needed is law that operates *ex ante.* Case by case decision is not the best way of bringing about a uniform set of procedural standards, as it cannot as easily take into account the various interests (including those of the Finance Ministry and of victims) that have to be brought into the balance. As there is the political will to proceed to create the common area for justice in criminal justice and a strong lobby group from defence lawyers to ensure that the rights of defendants are accorded proper attention, I have little doubt but that there will be progress in that area in accordance with the Road Map, the Stockholm programme and the Action Plan, despite fiscal restraint. I very much hope that victims' organisations will engage in this process; in the UK, the law of criminal procedure is drafted by a committee which represents all the interests involved, including victims.

However, the need for common rights to be accorded to victims across the European Union, in my view, needs constant advocacy, despite the Stockholm Programme and Action Plan, as there are not as many factors that seem to make its necessity so clear.

First it is not so obvious why common standards for victims are required across the European Union. Whereas common defence rights are needed to make the common area for justice work in criminal justice for the reasons I have given, it is less easy to see why common rights for victims are needed. In my view, the need is clear for there will be little public support for a

common area for justice unless the public have confidence in that common area for justice. Essential to that confidence is the visibility of criminal justice systems as providing not only minimum standards for the accused but proper treatment for victims.

The second reason why victims' rights needs strong advocacy is that there is much less of a tradition of protection. There is, for example, nothing as powerful as the European Convention on Human Rights or the constitutional guarantees in Member States which focus on the rights of the accused. The protection of the victim is not visible.

Third whereas a failure to accord a defendant his rights or a consequent miscarriage of justice resulting from a wrongful conviction often arouses public indignation (no doubt conditioned by a long liberal tradition of the perceiving Edmond Dantès in Dumas' Count of Monte Cristo or Leonora in Beethoven's Fidelio as righting the injustice of wronged accusations rather than as victims). We are not so conditioned to poor treatment of victims. Many shrug their shoulders and say, "It's just one of those things".

Fourth the lobby group for the rights of the accused is very strong; rights accorded to victims are seen as weakening the rights of the accused. For example, if the victim is too frightened to come to court and that fear can be shown to be genuine, is it always just that the right to confrontation should trump the right of the victim to put his case and ask the court to rule on it even though he cannot prove the fear was brought about by the defendant?

Thus although there is the very significant achievement in the Stockholm Programme and the Action Plan, the support of the Commissioner, Mrs Reding, in wishing to see the rights of victims given a common status across the European Union, it would not be right to ignore the formidable challenges ahead, despite the remarkable achievements of Victim Support Europe over the past decade.

In my view, if we are to move (and this is a political decision) to a common area for justice, the rights accorded to victims must be developed in tandem with the development of the accused's procedural rights. Without that in tandem development, there will not be the necessary public confidence to make the development of the common area for justice sustainable in the long term.

What therefore is the way ahead?

Cost effectiveness

I warmly welcome the work being done by the Commission, not only in reviewing the 2001 Framework Decision but in looking at the broader aspects.

However it cannot, in present circumstances, be realistic to look at measures that will impose significant costs on the State. Just as it appears to be inevitable that the expenditure of the State on legal assistance to those accused of crime will not increase and may well decrease in some States, I do not think it realistic to expect significant sums to be available to improve the protection of victims.

First, the provision of adequate compensation for the victims of crime is an important common right; however the level of compensation is a political matter and it would not be appropriate for me to comment on it further.

Second, there is the provision of State supported aid to victims. As research has shown, and in particular the extremely valuable research by the Portuguese Association for Victim Support on behalf of Victim Support Europe, there is a wide variation in provision. I would very much hope, though again this is a political matter, that there will be an equalisation of standards and by that I mean that there is equalisation upwards. But again I would foresee difficulties in anything that requires significant expenditure by those who do not at present spend much.

However, there is a third area where I believe a great deal can be done. Although it could not be claimed that it will be at nil cost, it should be at very low cost. That is to transform the culture and processes of the criminal justice system so that the system is one that is not seen to centre on the needs of the State and the needs of the accused, but also on the needs of the victim. This aspect, which I understand will form an important part of the Commission's work, is one where it is clear that the greatest gain can be achieved at the least cost.

The revision of the Framework Document

I look forward to listening over the coming two days to the debate over the development of a new legal instrument. I have commented on the issues in relation to the current Framework before and do not wish to add anything at present, save to say that there are real advantages in clarifying its language.

However, as a judge I do think it necessary always to add a note of caution about the ability of law to change behaviour. There are a number of reasons for my caution.

First, and most obvious, the grant of a right to a victim is not self-enforcing. If an accused is denied a right, such as a right to a lawyer, the proceedings against him may fail. The State will therefore see that rights are actually accorded to the accused as, if rights are not accorded, the accused will have a ready remedy by seeking to avoid trial and punishment for the wrong he is alleged to have committed. If, on the other hand, a victim is not, in accordance with his rights, given information about the way in which proceedings are being brought, the last thing the victim will want is for the proceedings to be discontinued. The only effective remedy the victim has is to complain or to bring proceedings for the enforcement of that right. The difficulties are obvious.

Second, whereas the rights of the accused can normally be succinctly stated and developed in procedural codes, the rights of victims are not so simply stated and may, if enshrined only in statements of "hard law", be of little use

because they have no self-enforcing mechanism. Thus it may often be better for the rights of victims to be specified in “soft law”, that is to say in guidance to authorities in the justice system as to how to treat victims and training to ensure that what is set out is applied in practice.

This, in turn, provides a real difficulty in assessing the effectiveness of translation of any European instruments into practice in a Member State. Some Member States which may have very little hard law in fact accord very good treatment to victims, whereas other States that may appear to have good hard law accord poor treatment to victims. There is, as I think the research of the Portuguese Association for Victim Support has shown, no real substitute for careful and detailed analysis of what is happening on the ground in each State.

The Commission is, at present, commissioning an impact assessment. Evidence based policy is essential, but it is a task of formidable complexity in the area of victims. It will be interesting to see the results. A detailed and thorough study takes time. For example, a member of our House of Lords, very experienced in criminal justice, was asked to review the treatment of one class of victim (rape victims) in the England and Wales (one of the three jurisdictions in the UK). This took 5 months. The task facing the impact assessment is formidable; the timescale is short. There are at least 27 different jurisdictions. The reviewer is not familiar with criminal justice; most who are not familiar with the criminal justice system do not understand its complexity. For example, those whose experience is in relation to the hospitals or health find it difficult to understand that, unlike in the health service, where there is the shared objective of healing patients, the participants in the criminal justice system, though they may each profess to wishing to see justice done, do not share a common objective in practice in any particular case. I wish the assessment well. We must give it every support. I would, however, observe that it would be very surprising if a properly conducted assessment did not show the significant variations and problems disclosed by the report of the Portuguese Association for Victim Support. It would also be, without doubt, a very superficial assessment which

did not show the huge benefits that could be obtained for progress to a common area for justice by improving the position for victims.

I hope that everyone will give the Commission its strongest support in the endeavour in which it is engaged in its review and any redrafting of an instrument to embody the common provisions.

Whilst this necessarily complex work is being undertaken, it is vital that we should build upon the work that has been so far done in three particular respects – continuing to learn from each other, analysing what it is which is wanted and bringing about cultural change.

Learning from each other

One of the most inspiring aspects of work in the criminal justice system is the spirit of innovation and the passion for justice that many bring to it - the passion for righting injustice to be found in organisations such as Amnesty International and the passion for helping victims to be found in Victim Support Organisations.

Those who have championed prison reform and those who have fought for the rights of the accused are well known. Much less well known is the work that has been done to develop innovative ways of helping and assisting the victims. May I take one example from my own country – the development of the intermediary?

There is no doubt that a child or vulnerable person who faces the prospect of being questioned either by the prosecutor or by the defence in the exercise of the right to confrontation finds this a formidable exercise. Where a victim is young or has learning or other difficulties, it is not often easy for the prosecutor, judge or defence lawyer to adapt their approach to asking questions to take account of the impediments and difficulties suffered by the witness. Over the past few years, we have been developing the role of a person we call “an intermediary”, a person specially trained to assist the witness in understanding questions without in any way impeding the quest for

the truth that the questioning of a witness invariably seeks to establish. I could give many more examples – for example in rape cases, in our jurisdiction we have taken steps to ensure that only specially trained doctors, used not only to examining victims but also to giving evidence in a court, are the doctors who see rape victims and not the ordinary doctor the police might call upon to deal with a huge variety of matters.

It seems to me that what we must do is to continue to exchange such innovations and see whether in each of our systems they can help. For it is the exchange of innovative good practice, proceeding in parallel with legislative development, that will, I think, make a very great difference.

Analysing what is wanted

The second significant step that we should be taking is to focus on the outcome which is wanted. We have to bear in mind that the legal systems of the Member States are very different and it is the outcome that matters. It is therefore, I think, better to approach the issue by analysis of the result that is to be achieved rather than the means of achieving it. Can I give an illustration?

The question has been posed as to whether the new Instrument should provide the right of private prosecution or the right to participate in criminal proceedings as a *partie civile*. The right to private prosecution for a country such as my own would cause no problem in theory, but private prosecutions have formidable practical problems, particularly expense, and can cause other problems, such as in the field of international relations. On the other hand, for my own country the creation of the right to be a *partie civile* would require a major overhaul of our criminal procedural system. But both of those proposals are merely means to an end. The ends to be achieved are, it appears, (1) the desire to see justice done in a particular case and (2) the right to obtain compensation. If those two ends are isolated as the objectives, then it is easier to see the means of achieving them without a wholesale change in each country's criminal procedural system. Taking the right to bring a private prosecution a stage further in the example, the outcome can surely

be better achieved by ensuring that the victim is kept informed about the progress of the investigation and prosecution and has the right to the review of any decision not to proceed?

As was observed earlier this morning, legal systems are deeply conservative and attempting to effect a major change to procedure when the objective can be achieved in another and simpler way is not the way to make progress.

Cultural change

The third significant step that we must take is to press ahead with cultural change as I outlined at last year's conference. There are many ways in which this can be done but at its heart, as I have said, is ensuring that all of the participants in the criminal justice system have the victim as much in mind as the defendant. Let me give you an example of a practice that requires a very simple change of culture. In the UK, there are some prosecution authorities which, when they decide not to proceed with a prosecution of a rape victim, do not see the victim in person, but send the victim notification of the decision by letter. How much better if the victim was seen and the decision explained and questions answered in person. It is a change that would not cost anything, but would show that the position of the victim was central to the work of the prosecutor.

To try and bring about such a change of culture, earlier this year the European Network of Councils for the Judiciary set up a small expert group to see if we could develop some practical guidance. At first sight many think our criminal justice systems are too diverse to permit a uniform approach. It is thought by many in my country that our "adversarial" system is completely different to the "inquisitorial" system of much of continental Europe.

However many ignore the fact that it is integral to every system in Europe that the defence must be entitled to challenge and confront those who bring the case against the accused. Similarly in some countries the investigation is in the hands of the police, in others it is under the superintendence of a *juge*

d'instruction or of a public prosecutor. In some systems the prosecution does not take charge of the case until quite late in the proceedings. However, do not think it an over-simplification to say that if one looks at the functionality of our criminal justice systems, there is the function of investigation, there is the function of prosecution, there is the function of adjudication and there is the function of the appellate court.

It seemed to us that by seeking to place some guidance as to how to treat victims on each of the functions as opposed to the legal persona, we should be able to achieve a good deal of common ground as to the way in which victims should be treated. For example, during the investigative stage, the victims should be informed about the steps in the investigation and proceedings which may follow; planned that way it does not matter whether the investigation is in the charge of the police or the prosecutor. We believe that in this way it is possible to set out some very basic principles, not of hard law or even soft law but of good practice which each of those responsible, be they policemen, prosecutors or judges should as a matter of professional standards be expected to follow. We hope that by developing such guidance and encouraging its adoption in Member States, in parallel with the development of a Directive on victims, we can begin to see in the period leading up to the adoption of such a Directive a real and substantial change in the position of victims.