

DEVELOPMENT OF CRIME VICTIM PROTECTION IN MAINLAND CHINA AND ITS IMPACT IN CRIMINAL LAW

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Abstract: This paper offers a comparative analysis of protection for crime victims and its impact in criminal law. The paper includes four parts. First, an introduction of right and protection for victims in mainland China's criminal justice, and two ways of protection of victims in practice. Second, an attempt to compare compensation for victims in different countries, so as to provide reference for China's victim protection system. Third, a focus on victim reparation in mainland China. Finally, a discussion on the impact of victim protection in criminal law. The paper hopes this discussion can help us to seek common grounds and leave aside differences and bring advancement in the protection of victims.

Key words: Victims of Crime; Victim Protection; Victim Compensation; Victim Reparation.

I. Victim Protection in Mainland China's Criminal Justice: Legal Texts and Practice

A. The Image of Victims in Legal Texts

Since 1979, China's criminal procedure codes have been adopted and amended 3 times. They are *Criminal Procedure Law* in 1979, 1996, 2012 and 2018. These laws clearly stipulate victims' status and rights in the criminal proceedings. Legislators have paid much attention on the protection for victims by amending these laws.

In the 1979 *Criminal Procedure Law*, victims are general participants in criminal proceedings and they can't make complaints independently. In other words, victims are not litigants. Their main litigious rights include: (1) reporting and accusing criminal suspects, (2) requesting the case which is not filed by public security be reconsidered, (3) bringing an incidental civil action, (4) presenting a petition with respect to the people's procuratorate's decision of not prosecution of the case, (5) participating in a court's trial, its investigation and debates, (6) appealing with respect to an incidental civil action in criminal conviction. In fact, since the victim does not have a litigant status in court, the rights of victims are far from that of the defendants. For example, victims have no rights for withdrawal, questioning witnesses, identifying evidence or appeal. To some degree, victims are largely only playing a role of assisting prosecution.

The above mentioned assistance role has been significantly revised in the 1996 *Criminal Procedure Law*, in which victims become litigants. Their litigious rights are added to the law, including but not limited to: (1) the rights of reporting, accusing criminal offense and requesting a reconsideration of rejected cases; (2) asking judicial personnel who have conflict of interests to withdraw from participation in the case; (3) entrusting agent (4) making an appeal against the people's procuratorate's decision of not initiating a prosecution, or instituting a prosecution directly in a court (5) instituting a prosecution directly when a public security authority or a people's procuratorate decides not to subject the defendant to criminal liability.; (6) questioning defendants and participating in debates in court trial; (7) applying for complementary evaluation and re-evaluation of expert conclusions as evidence; (8) protesting against court judgements; (9) making an appeal against an judgement and ruling that have been in effect; (10) filing an incidental civil action. At that time some scholars were arguing against these recovery of victim's rights, concerning that this would lead to the loss of rights for criminal suspects and thus the failure of established criminal justice process. However, majority of legislators and scholars believed that the rights for victims and defendants should not be considered as opposite to each other; they tend to think that both interests of victims and defendants should not be ignored in criminal procedure.

In the 2012 *Criminal Procedure Law*, victim's litigious status is continued to be recognized. Some amendments on their litigious rights were made and these include: (1) Protecting victims' personal safety when they testify; (2) Clarifying that in the case of victim's death and loss of ability, their legal representatives and near relatives have the rights of filing an incidental civil action; (3) Strengthening the rights of victims and their agent ad litem's opinions in investigation and prosecution stage. Stating that their opinion should be obtained and recorded by people's procuratorate.

The newly amended Criminal Procedure Law in 2018 also emphasizes the protection of victim's rights in criminal procedure especially in some special procedures including: (1) Hearing the opinions of the victim and the victim's litigation representative on specific issues and record their opinions and keep them in file if the criminal suspect admits guilt and accepts punishment when the case is being examined by a people's procuratorate; (2) The fast-track sentencing procedure shall not be applied if the defendant fails to reach a mediation or settlement agreement with the victim or his or her legal representative on restitution in an incidental civil action and other matters.

B. Protection of Victim's Rights in Practice

Although legislation has provided victims with the status of litigants and relatively strong rights, in practice, whether victims' status and rights are realized is another matter. In fact, there are many difficulties in initiating a criminal proceeding, solving a crime, making an effective judgement and enforcing the compensation. All of these factors have contributed to the difficulty of realization of the rights for victims. Particularly, the mode "state-offender" has been a major constraint on victims' rights, for this mode ignores victims' rights. Despite these difficulties, two ways of protecting victims' rights have been developed and practiced in China. One is criminal mediation or settlement. The other is state judicial reparation or relief.

Criminal mediation is the process in which criminal defendants or criminal suspects, victims, and their relatives get together to reach an agreement when defendant apologize for his offences and willing to make up the harm that he causes, victim is willing to forgive, and that the state decide not to prosecute or give out lighter punishments. There are four elements in the criminal mediation (1) Three parties are mediators, victims and defendants. (2) Both parties are voluntary to communicate and negotiate. (3) Victims forgive criminals and criminals take the criminal responsibility. (4) Mediation is recognized by judicial agencies and affects the determination of guilt and penalty.

Since 2006, taking the local circumstances into consideration, judicial agencies have been promoting criminal mediation, which is expected to better solving conflicts and relieving litigation resources exhaustion. Most people consider mediation has recognized and protected victims. In criminal mediation, victims' forgiveness is essential, for it is a prerequisite and determinant of criminals' conviction and penalty. This reflects that the mode of "state-offenders-victims" is effective. So the *Amended Criminal Procedure Law* in 2012 adds mediation into proceedings in public prosecution cases. Mediation is limited to minor personal injuries, property crimes and negligent crimes. Judicial agencies may give no criminal sanction or only punish offenders leniently if they think

the mediation is voluntary and legal. The criminal mediation is a breakthrough in China from “state-offender” to “state-offender-victim” mode, where victims are given important legal status.

The second way is reparation. Reparation refers to the payment that the state gives to victims when restitution is not fully paid. Sometimes crimes and criminals can't be identified; Criminals can't afford the restitution; People don't buy commercial insurance, and so on. So victims need reparation. A good development in China is that reparation from the government has gradually been institutionalized and standardized. In 2004, Zibo People's Court in Shandong province first initiated victims' reparation program. From 2009 to 2014, at the Central government level, reparation guidance had been issued. In 2009, eight committees and ministries including Committee of Political and Legislative Affairs, Supreme People's Court jointly issued “Opinions on Reparation for Criminal Victims”. In 2014, six committees and ministries issued “Opinions on Establishing and Improving State Judicial Reparation”. According to this opinion, the supreme people's court and the supreme people's procuratorate issued their respective detailed rules for implementing judicial reparation in July 2016. Before 2014, this system was called “reparation for criminal victims”, which was equal to compensation for victims in the world. Then it was renamed “state judicial reparation”. (The differences between the two reparations will be discussed in the third part.) Whatever it is named and how it expands, the purpose of both reparations is not to change the conventional “state-offender” mode, although it is of great significance to the protection of victims.

Therefore, the major differences between criminal mediation and state judicial reparation is that despite both protect victims' rights, they are different in the purposes and effects. The former focuses on reforming criminal justice system and tradition, while the latter focuses on complementing traditional criminal justice and doesn't deny state-offender mode. So the former is more difficult to implement in practice than the latter.

II. The Reference of Victim Compensation System: Types and Characteristics

Compensation is a system in which the state gives payment to miserable victims when criminals and other related parties are unable to retribute. Compensation is the core of victim protection system in various countries. Before introducing China's victim compensation system, the paper tries to classify the victim compensation systems of various countries, so as to provide reference for China's system selection.

Based on the interpretation of laws, the paper divides the compensation for victims of crimes in different countries into the following three types.

A. Subrogation

Subrogation is a concept in many civil law jurisdictions, which largely means that, when a person is obliged to another person, if an interested third party, such as a surety, performs such obligation to the obligee directly, the obligee's right passes to such third party by the operation of the law. As a result, this third party succeeds the right of the obligee and is entitled to claim against the obligor. This idea is borrowed and used in compensation. When victims can't get restitution from offenders, the state plays the role of the third party. It pays compensation to victims and subrogates victims to claim a debt from the offenders. In other words, the state is a legal guarantor of such kind of crime tort obligation, for the offender can't retribute for the harm caused. The doctrinal basis of subrogation is a theory of civil law on the subrogation of guarantee and debt. "By maintaining a system of responsibility insurance and social safety, both the guarantor and borrower compensate for the harm and relieve the pressure on tort act."¹

A most typical example of subrogation mode is the legislation of compensation for victims in Taiwan and Japan. One of the reasons for this legislation in Japan is that "more and more offenders can't afford the compensation and pay for the harm they have caused due to their civil tort act."² So the legislation aims at "complementing what liability of tort can't do."³ Likely, Taiwan legislation focuses that "compensation for victims is to complement deficiency of civil tort act and it is a special measure taken by the government to take care of its citizens."⁴ Based on this legislative idea, practitioners (legal affairs department and administrative department) don't define this payment as a social compensation. ⁵ Theorists think "compensation for victims is to complement the payment that

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- 1 WANG Zejiang, *Civil Law Doctrines and Cases Studies*. (2nd Edition) Peking University Press. 2009, P. 129 (王澤鑑：《民法學說與判例研究》(第二冊)，北京大學出版社2009年版，第129頁)。
 - 2 Miyazawa, K., Taguchi, M. & Takahashi, N., *Study on Victims of Crime*. Seibundoh Publishing Co., Ltd., 2000, P.88 (In Japanese) ([日]宮澤浩一、田口守一、高橋則夫：《犯罪被害者の研究》，成文堂2000年版，第88頁)
 - 3 Minoru, O. & Saito, M. (1982). *Restitution for Victims of Crime*. Yuhikaku Publishing Co., Ltd. 1982, p.37 (In Japanese) ([日]大谷實、齊藤正治：《犯罪被害給付制度》，有斐閣1982年版，第37頁)。
 - 4 Published by Taiwan Legal Affairs Department : *Research Compiling on Legal Affairs Department's Correction and Improvement of Current Criminal Policies*, 1999, P. 356 (台灣地區法務部門編印：《“法務部”檢討暨改進當前刑事政策研究小組研究資料彙編》，1999年，第356頁)。
 - 5 GUO Mingzheng, "Victim Protection Act--The Rite of Passage of Post-Civil-Law/Social Law Era in Taiwan," *Chengchi Law Review*. No.60, 1998 (郭明政：“犯罪被害人保護法——後民法與社會法法律時期的成熟標杆”，載《政大法律評論》1998年第60期)。

civil compensation can't make.”⁶

To sum up, subrogation has the following characteristics. First, it aims at complementing harm caused by offenders and the upper limit of the amount of payment is victims' loss. Second, victims' degree of fault is judged and amount of payment is reduced proportionately to the degree of victim's fault when the payment is decided. Third, the reparation responsibility is usually taken by judicial agencies, for the mode is based on the theory of civil law and the victim's act is usually judged by the judicial agency. Fourth, when victims get reparation, they entitle the state to request compensation from offenders.

B. Ex Gratia Payment

The Ex Gratia payment is based on the assumption that the victims enjoyed the state compensation as a privilege rather than a right. From the perspective of government, the compensation is paid not due to liability or obligation.

Ex gratia payment developed in 1960s due to attention on victims and its political role. The government had to respond to the necessity of victims' compensation. It should provide victims of crime with common interests and extra interests. In other words, the compensation is regarded as a symbol that stands for sympathy with victims of violent crimes and provides victims with significant material interests.⁷ So the state payment is an act based on individual discretion and not universal. It is made out of kindness and grace.

The most typical ex gratia payment can be seen in common law jurisdiction like U.K and U.S. Take U.K. criminal injuries compensation as an example, it was managed by a Criminal Injuries Compensation Board which was made up of people nominated by Ministry of Home Affairs and was a semi-official agency. Payments were given ex gratia. When criminal injuries compensation was adopted as an act in 1964, the government didn't recognize any legal obligation or liability for victims.⁸ In this sense, criminal injuries compensation symbolically indicated the government's determination and attitudes in making compensation for injuries and to re-establish the social order.

Ex gratia payment has following characteristics. First, the amount of the payment is voluntary and not measured by victims' real loss. Compensation is directly related with cost. For example, compensation in U.K. and U.S. is tariff-

6 CHUNG Bingzheng, "The Compensatory Provisions of 'Criminal Victims Protection Act' and its Cases Analysis". Taipei University Law Review. No.52, 2003. (鍾秉正：“《犯罪被害人保護法》之補償規定及其實務分析”，載《台北大學法學論叢》2003年第52期)

7 Duff, P., "The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner." Oxford Journal of Legal Studies, 1998, p. 107.

8 Dignan, J. Understanding victims and restorative justice. McGraw-Hill Education (UK), 2004, p.45.

based. Second, whether victims can request the compensation depends more on notification and support from responding agencies, for obtaining compensation is not a common right for victims. Third, the subjects of compensation are “innocent victims”, whose merit and life style are examined. Fourth, compensation is often offered to victims of violent crimes.

C. Social Compensation

Social compensation is a social measure which is used to protect and compensate for damages caused by specific reasons. Different from *ex gratia* payment, social compensation provides victims with restitution rights through legislation. It is the state and society’s obligation and liability. Different from subrogation, social compensation is not made in the interest of debt subrogation in civil law, it is made by society after the fact of a special accident. In subrogation, state’s compensation is regarded as an indirect liability; and in social compensation, state’s compensation is regarded as a direct liability. It is based on the theory of social security by which the well-being of a society is created by all of the members and thus the state has an obligation to provide the vulnerable and disadvantaged victims with necessities.

Germany has epitomized social compensation. Legislation of compensation for victims of crime was adopted in 1975 and as a special law of *Sozial Gesetz Buch* (SGB). It is applicable to general rules and administrative procedures in chapter 10. According to Clause 1 and 2 of Article 5 in SGB, victims and their surviving dependants can apply for: (1) measures that keep, improve and recover their health and working abilities; (2) appropriate economic support. The right to application for compensation has a constitutional basis, that is, principles of rule of law and social state originating from Article 20 and 28 in *German Fundamental Law*.⁹

Social compensation has the following characteristics. First, it is stipulated explicitly that victims of crime have the right of applying for compensation. On the other side, the state has an obligation and liability for compensation. Second, social compensation, social insurance, social facilitation and reparation are three systems in social security law. The aim is to strengthen social cohesion and well being of the weak. Third, social security agencies rather than judicial agencies take the responsibility of compensation. Fourth, the sum of payment is binary, with or without. Fifth, the payment is offered in form of pension rather than a lump sum. Victims who suffer from injuries or disability or immediate relatives of dead victims can get compensation regularly to support themselves.

Obviously, the above three types have similarities in their operational

9 Maurer H., *Pandect of Administrative Law*, trans. by GAO Jianwei, Law Press, 2000, P.760 ([德] 毛雷爾：《行政法學總論》，高家偉譯，法律出版社2000年版，第760頁)。

mechanism and specific system. The criteria here is if a country is liable for compensation and what form the country's liability takes.

III. Victim Reparation in Mainland China: Comparison and Choice

Generally speaking, China is at a transitional period from a situation of “big government, small society” to “small government, big society”. No matter in legislation or in practice, the situation is still that government dominates and process is top-down. So when protecting victims and making related policies, state's interests and social stability are weighed and considered. These can be seen in the change of China's reparation for victims.

In a broad sense, victims' reparation refers to any protection for victims made by the state. The government and society provide victims with material, psychological counseling, medical and litigation assistance. It is broader than victims' compensation. In a narrow sense, victims' reparation refers to the state's material compensation for criminal victims. It is equal to victims' compensation. To some extent, China's victims' reparation is in a narrow sense-- compensation.

As mentioned above, the reparation in China includes two kinds: reparation for criminal victims and state judicial reparation. The differences between two types of reparation are described in the table.

Documents Differences	《Opinions on reparation for victims》	《Opinions on judicial reparation》
Types of crimes	Serious violent crimes, also applicable to negligent crimes	No specific crimes, applicable to civil tort such as traffic accidents and support
Types of injuries	Serious injuries, disabilities and death	Serious injuries, disabilities, death and serious damage to property
Initiating procedure	Victims' application and responding agency's duty	Victims' application
Subrogation	State's right	No stipulation for subrogation
Victims' fault	If victims have faults or not and what faults they have	Victims have serious faults.
Obligation of explaining why reparation is not offered	No explicit stipulation	Notify in time and explain clearly

It can be seen from the table that criminal victims' reparation in China is a typical subrogation, which is similar to that in Taiwan and Japan. In contrast, state judicial reparation is similar to *ex gratia* payment in U.K. and U.S. which is out of benevolence and goodwill; this type of reparation's subjects are not just limited to criminal victims. Accusers who can't get support or accusers in civil tort cases are also included. It focuses on victims' living difficulties rather than the types of crime. This means, when protecting victims and making related policies, state's interests and social stability are weighed and considered as more important. Either in subrogation or *ex gratia* payment, the state doesn't accept any direct liability. Both types of reparations deny a corresponding relationship between state's obligations and victims' rights. So victims' rights can't be legalized or constitutionalized, which is not beneficial to victims' rights and protection.

Therefore, the paper supports the idea that the social compensation should be carried out in China. State compensation should be defined as a social well-beings. State has an obligation to offer payment under specific occasions. This obligation is clearly stipulated in the Chinese Constitution (Article 33, Clause 3 and Article 45, Clause 1). Social compensation is helpful to victims' protection, for rights for victims have been legalized and thus agencies at different levels will not investigate victims' merit too harshly thus avoid the re-victimization.

IV. The Impact of Victim Protection in Criminal Law: Challenges and Prospects

In recent years, the research on the protection of crime victims not only has the above important influence on the amendment of criminal procedure law, but also has made a certain impact in criminal law, which can be seen in the following aspects:

A. Recognition of Victim's Right of Self-Determination Affects the Scope of Private Prosecution in Criminal Law

The primary mission of criminal law is to punish crimes. Most of the time, the power of punishment belongs to the state authority. However, for some special crimes which only infringe personal interests, the decision-making of prosecution belongs to the victim. This does not mean that state authority neglects to protect victim's rights. On the contrary, it is a way to respect victim's autonomy of will. From this point of view, the range of private prosecution and its concrete contents reflect the distribution of punitive power between the state and the private. Nowadays in China, Criminal Law stipulates that insult,

slander, using force to interfere in others' freedom of marriage, mistreatment and embezzlement are crimes to be prosecuted only if a complaint is filed. In fact, the ranges of crimes which infringe personal interests are far more than these in criminal law. For example, there exists a wide range of private prosecution in German Criminal Code. Crimes such as burglary, violation of the privacy of the spoken word, violation of private secrets, theft from relatives or persons living in the same home, and criminal damage can only be prosecuted upon request. For China, expanding the range of private prosecution through judicial proceedings can help to realize more accurate and personalized protections for victims.

B. Victim's Special Relationship with the Offender Constitutes Aggravation or Mitigation Factors in Some Crimes, and Even Affects the Establishment of the Crimes

Though Article 4 of Criminal Law in China emphasizes that everyone who commits crime is equal in the application of the law, it is no denial that the relationship between victim and offender may affect the establishment of certain crimes. Taking larceny as an example, there is no special provision about stealing from family members in Chinese Criminal Law, only relevant judicial interpretation. In contrast, as mentioned above, theft from relatives is included in the range of private prosecution in German Criminal Code. Similarly, French Criminal Code also stipulates that no prosecution may be initiated where a theft is committed by a person to the prejudice of his or her ascendant or his or her descendant, or to the prejudice of a spouse. Furthermore, Article 132-80 of French Criminal Code stipulates that in the cases respectively provided by law or regulation, the penalties for felonies, misdemeanors or contraventions are aggravated where the offense is committed by the spouse, cohabiting partner or partner linked to the victim by a civil solidarity pact. It shows that special relationship is considered as an aggravated factor in sentencing, because under this circumstance, the crime may cause greater mental or physical harms to the victim. In this way, criminal law treats special relationship between victim and offender as aggravated factor in order to strengthen protection for victims.

C. The Victim's Consent Can Stop the Crime from Being Established

Many crimes such as rape are established under the violation of victim's will. For these crimes, victim's consent may lead to the non-establishment of the crime. Under Anglo-American law system, victim's consent may affect the judgment of offender's mens rea. For most crimes, it requires that the offender knows exactly the victim disagree or may disagree with the criminal act. However, for rape or other serious sex crimes, mens rea of the offender can just be negligent of the will of victims. For some other crimes, such as

injury, victim's consent is a kind of justification, thus offender's conduct can be legal in this circumstance. In American Model Penal Code, in order to justify criminal conducts, the consent to bodily injury should fulfill several limited conditions. Similarly, Article 228 of German Criminal Code stipulates that whosoever causes bodily harm with the consent of the victim shall be deemed to act lawfully unless the act violates public policy. This provision fully respects victim's right of self-determination.

D. Victim's Fault Can Affect the Results of Sentencing

Recently, the studies on victim's self-involvement in risk and victim's self-responsibility focus on whether the need for victim's protection should be reduced with victim's fault. One view is that in certain circumstances, victim's fault can affect the determination of criminal conduct's illegality or affect the attribution for offender. In American Model Penal Code, Article 7 stipulates the authority of court in sentencing, which includes the criteria of withholding sentence of imprisonment and for placing defendant on probation. One of the criteria is that victim's conduct induced or facilitated commission of crimes. However, it does not mean that criminal law has declined the protection for victims when victim is partially in fault. It is a way to remind that the victim needs to pay more attention to protect him/herself; this would lead to more effective victimization prevention. Meanwhile, by identifying victim's fault, sentencing would be more accurate.

E. The Restitution Agreement between the Offender and the Victim Can Lessen the Sentencing

Criminal justice practice in China always treats restitution for victim as a reflection of offender's penitence attitude. However, Article 61 of Chinese Criminal Law just mentioned that the sentence shall be imposed on the basis of the facts of the crime, the nature and circumstances of the crime, and the degree of harm to society, in accordance with the relevant stipulations of this law. It shows that restitution for victims is not a legal basis for sentencing in China. Different from this provision, Article 46a of German Criminal Code clearly identifies that the offender-victim mediation or offender's volunteered restitution for victims can mitigate the sentence or even order a discharge. Moreover, Article 131-8-1 of French Criminal Code stipulates that the penalty of "punishment- restitution" can be a substitute for imprisonment or fines. This penalty means that convicts own an obligation to retribute victim's loss within the time and according to the procedures prescribed by the court. Thus, in order to mitigate the sentence for offender, both German and French criminal laws encourage the offender to make efforts to achieve restitution agreements with

victim's forgiveness. It is also a reflection of enhancement for victim's protection with more respect for his/her free will in criminal justice.

In sum, the studies of victimology, especially the study of victim protection have had certain influence in criminal law. Compared with other countries' legislation, victim's protection in criminal law is still being developed in mainland China. Studies in victimization show that we need to further respect victim's right of self-determination and to further strengthen the protection for victims in Chinese Criminal Law.

Conclusion

To sum up, there are two ways of realizing justice and rights for victims in China. Victims' status in criminal procedure law has been improved and litigious rights have been enhanced over the different revisions of the criminal procedural law. So in criminal justice proceedings, both defendants and victims are protected. In judicial practice, although many legislative rights are difficult to realize, criminal mediation applicable to minor crimes has been developed. It is similar to restorative justice. To some degree, the "state-offender-victim" litigious pattern has been adopted.

For the serious personal crimes, China has borrowed most countries' ideas-compensation for criminal victims. Notably, reparation for criminal victims in China, which is similar to compensation for victims in other countries, has gradually evolved into "judicial reparation". It is not only covers the cases of serious personal crimes, but also covers the non-criminal cases. The expansion of reparation has functions of compensating for damage, maintaining social stability and protecting rights for victims. Regarding the role of judicial reparation, I personally think that the social compensation should be carried out in China, state's obligation for victims should be made clear so that victims' rights for protection is fully ensured.

The research on the protection of crime victims not only has the influence on the amendment of criminal procedure law, but also has made a certain impact in criminal law. We need to further respect victim's right and to further strengthen the protection for victims in Chinese Criminal Law.