

Литература

1. Уголовный кодекс Российской Федерации от 13.06.1996.[электронный ресурс]. – Режим доступа: <http://www.consultant.ru/popular/ukrf/>
2. Пионтковский А.А. Смертная казнь в Европе. – Казань: Изд-во Императорского Университета, 1908. – С. 3.

Анотація

Сундуров Ф.Р. “Інші заходи кримінально-правового характеру” у системі заходів відповідальності за КК Російської Федерації. – Стаття.

Інші заходи кримінально-правового характеру носять по відношенню до покарання альтернативний або доповнює характер. Найбільш істотною відмінністю інших заходів кримінально-правового характеру від покарання є те, що вони позбавлені каральної спрямованості. Недостатньо послідовна систематизація і регламентація в КК РФ цілей інших заходів кримінально-правового характеру породжують труднощі в їх застосуванні, створюють колізії між умовним засудженням і примусовими заходами виховного впливу, а також відстрочкою відбування покарання.

Ключові слова: заходи кримінально-правового характеру.

Summary

Sundurov F.R. “Other measures of criminal and legal character” in the system of responsibility measures under the Criminal Code of Russian Federation. – Article.

Other measures of criminal-legal character have alternative or supplements character in contrast to punishment. The most essential difference of other measures is that they are deprived from the retaliatory orientation. Insufficiently consecutive ordering and regulation of the purposes of other measures of criminal-legal character generate difficulties at them application, create collisions between conditional condemnation and measures of compulsion of educational influence and also a delay of departure of punishment in the criminal code of Russian Federation.

Key words: measures of criminal-legal character.

УДК 343.121.4(436):343.988

Maria Eder-Rieder

PROTECTION OF THE VICTIMS OF CRIME IN THE AUSTRIAN CRIMINAL PROCEEDING

I. Development of Victim Rights

During the last 25 years the position of victims of crimes and their support and rights in the criminal proceeding has been discussed profoundly on international and national level.

1) International and European Level

On the International and European level the central documents are the “UN-Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (1985) and the Recommendation of the Committee of Ministers of the Council of Europe about the Position of victims in criminal proceedings of the 28th July 1985 (R 85 11). The European Union set into force the Council Framework Decision

of the 15th March 2001 on the standing of victims in criminal proceedings (2002/220/JHA, ABl Nr L 82/1), which contains minimum standards on the protection of the victims of crimes. In this framework four main aspects of the rights of victims are laid down: The participation in trial, the rights of victims and their relatives, protection and restoration¹.

According to the Council Directives of the 16th October for compensation of victims of criminal acts (KOM 20002 562 2002/0247 CNS) minimum standards for an adequate compensation of damages should be provided by the national law and the access to restoration should be made more easy.

These European standards should be implemented in the national law systems to improve the situation of crime victims and to standardize their status in Europe.

2) The development in Austria

In Austria the position and protection of victims of a crime has been developed and improved constantly during the last 25 years. The different aspect of this improvement is shown in many amendments to the Criminal Code (StGB) and Criminal Procedure Code (StPO). The aim was to ameliorate the position of the crime victims and support them in the criminal proceeding. Particularly the most vulnerable victims of sexual abuse or abuse of power harmed with traumatic experiences and post-traumatic symptoms have sensitized the general public and academic teaching, politics and legislation. Their protection and support was demanded highly and caused new reforms of the Criminal Code and Criminal Procedure Code (BGBl 1987/605, 1993/526, BGBl I 1997/105, I 1998/153, 2004/19, I 2007/93 and I 2009/52) that have step by step enlarged the right of protection and participation in pre-trial and trial and the possibility of restoration of damages in the criminal proceeding. The implementation of the penal mediation system (“Diversion”) in pre-trial stage (BGBl I 1999/55) in particularly the “extra-judicial settlement” (“Außergerichtlicher Tatausgleich”) offers furthermore a stronger participation for the crime victims and the possibility for compensation (§§ 198 ff StPO)².

Apart from penal law the “Protection of Victims of Abuse of Power” (1. and 2. Gewaltschutzgesetz”, BGBl 1996/759 and BGBl I 2009/40) provides a preventive safeguard in cause of abuse of power in the family. In that case the police or a judge may demand from the violator to stay off the victim for some time³. Further the possibility of a better compensation including material and immaterial damages was put in the Private Code (§ 1328 ABGB).

In the new Penal Procedure Code (BGBl I 2004/19) which was set in force on 1st January 2008, the victims’ rights are even more improved. The victim who was until then considered only as a witness or private participant has now the status of party of the process. The new code stipulates in chapture 4 (§§ 65 ff StPO) the – defined – victim and all his/her rights. Because of their importance some of the new rights were implemented in advance in the (old) Penal Procedure Code (§ 47a Abs 2, 3 and 4 StPO, BGBl I 2005/119) and set into force 1st January 2006. These

¹ Eder-Rieder (2005a), 15; Löschnig-Gspandl (2004), 161.

² Eder-Rieder (2005a), 41 ff.

³ Eder-Rieder (1998), 127 ff und (2005a) 20 ff.

are for instance enlarged rights for information about procedural steps and all the rights in process like restoration, assistance or possibility of translation free of charge. Victims of abuse of power and sexual abuse have to be informed even about the defendants release from custody as quick as possible. Traumatized victims like victims of abuse of power or sexual integrity and relatives of killed persons have the right for psychosocial and juridical assistance in process, which is practised by “Victims Support Organisations” and the “White Ring”¹.

II. Rights of victims in the criminal proceedings in Austria

1) The definition of the victim

According to the EU-Framework Decision Art 1 a “victim shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State”.

According to the new § 65 Z 1 StPO a victim means

a) “every person, who could have suffered harm caused by an intentional criminal act concerning the abuse of power or threat or abuse of sexual integrity”

b) “husband or wife, partner of life, relatives in direct line of descent, brother or sister of a person, whose dead could have been caused by a criminal act, or other relatives who have been witness of the act”.

c) “every other person, who has suffered harm caused by the criminal act or could have been damaged in his/her protected goods“.

This definition of a victim is wider than that foreseen by the EU-Framework which does not include an attempted act even if harm is suffered, the protection for a future criminal act or the indirect results of a criminal act².

2) Victim and his/her rights

Basically the victim of a criminal offence has economical, social, psychological, physical damages. The “primary damages“ are direct or indirect results of the crime (injuries, losses, costs...). The “secondary damages“ are a result of the reaction of the society because of the victimization: for instance the pressure of the police, the prosecutor, the counsel of the defense and his strategies, degrading or offending questions during the trial, accusation (assignment of guilty) and lack of interest in the case are the main reasons.

The main cause is that the criminal proceeding is orientated to the defendant and his rights. For that every support of the victim stands in contradiction to other principles of the procedure. Above all the personal protection of the victim, which includes to avoid the confrontation with the defendant stands in contradiction to the “fair and due process clause“ and the right to ask questions pursuant to Art 6 Abs 3 lit d EMRK (European Convention on Human Rights) and the search of the truth. For instance: If the only victim as a witness does not give testimony this can “in dubio pro reo“ lead to dismissal of the case or a non guilty verdict.

To summarize the victim of a crime needs to have following rights:

- The right to be accepted as a victim,

¹ Jesionek (2006), 17.

² Löschnig-Gspandl (2004), 164.

- The right of protection of further attacks especially of the same perpetrator,
- The right to avoid the secondary victimization, which includes to be treated with respect and dignity by administrative or juridical bodies (police, prosecution or judges),
- The right of juridical and psychosocial assistance during the criminal process,
- The right of full compensation of material and immaterial damages.

3) Protection of the victim

The Criminal Procedure Code offers different kinds of protection to avoid the so called “secondary victimization“, to safeguard their personality and to assist the victim during the whole trial. Essential rights¹ in this field are the information of criminal victims or witnesses about their rights, the protection of personality and undesirable publicity which includes restrictions of information to third persons or restrictions of intimate questions or the exclusion of the public during trial.

a) The “separate questioning“ of a victim and/or witness in the pre-trial stage

A most important possibility to avoid a secondary victimization is the “separate questioning of “victim/witnesses“ during the pre-trial stage. It is used mainly in cases of sexual abuse and in cases in which the victim or witness is under 14 years. In the latter case this separate questioning will take place in different rooms with use of video. In case this “separate questioning“ in the pre-trial proceeding has taken place the victim of the sexual abuse has the right to renounce the statement in the trial (§ 156 Abs 1 Z 2 StPO)². The testimony can be read out or the video will be presented instead.

b) Help by psychological and juridical assistance

A new amendment to the Criminal Procedure Code 2005 (BGBl I 2005/119) which was set into force on the 1st January 2006 foresees the highly demanded juridical – by attorney – and psychological attendants in trial paid by funds of the state. In particularly private institutions like “White Ring” provides assistance and ensures the victims’ rights³.

c) Rights to apply against breach of law

In case the “subjective rights” of the victim were neglected or have been breached by police, prosecutor or judge the law allows special remedies against it (§§ 106, 87 StPO)⁴.

4) The compensation of damages in criminal proceeding

The victim wants a quick and uncomplicated restoration or compensation of the damages done to him and a moral acceptance of the damage. Therefore compensation primarily by the defendant, secondarily by the state is claimed.

¹ Eder-Rieder (2005a), 49 ff.

² Jesionek (2004), 261.

³ Jesionek (2006), 17 und (2004) 258; Eder-Rieder (2005a), 63, 65, 106; Eder-Rieder (2008), JSt 2008, 115.

⁴ Eder-Rieder (2008), JSt 2008, 116.

a) Compensation during the pre-trial stage

The compensation of damages given by the defendant can lead to the dismissal of the case by the prosecutor (§§ 190 ff StPO) in pre-trial stage. The new penal mediation concept (“Diversion”) with the possibility of special ordered compensation or restoration and “extra-judicial settlement“ gives the prosecutor another opportunity to dismiss the case“ (BGBl 1999/55, in force on the 1st January 2000). This system is highly accepted in Austria. More than 50% of the reports of minor criminal offences are solved in that way in the pre-trial stage.

b) Private claims within the criminal proceeding

The Criminal Procedure Code foresees the possibility for the victim to become a “private participant“ (§ 65 Z 2 StPO) and put a civil action in a criminal process (§§ 365 ff StPO). He has different rights and has to prove the existence of a claim in tort under the civil law and demand compensations: as for instance damages for pecuniary loss, moral damages, compensation for personal injury, costs of medical treatment, damages for pain and suffering, for death (funeral expenses), loss of maintenance and so on.

The criminal court decisions concerning civil claims can be: In case of an acquittal the civil claim of a private participant has to be referred to the civil courts. In the case of conviction the criminal court generally has to decide about the civil claim in addition to the sentence: in an easy case, the judge may sustain the claim, but in a case where more additional investigations are needed to permit a reliable decision for compensation the judge may refer the private participant to the civil courts. The criminal judge is never allowed to dismiss the suit.

The advantage of a civil claim in criminal process is that evidences are looked for by the court on its own expenses. The evidences found can be useful – if needed - in the civil law suit. The disadvantage is, if the civil claim is not clear and additional investigation in the trial are demanded the private participant is referred to the civil court and has to put a civil action on his own expenses.

If the public prosecutor rejects or withdraws from a prosecution, the private participant may bring the proceedings in his place and on his own expenses. This procedure is called “subsidiary charge” and is because of the financial risks very rare.

Generally private participants do not have to pay process costs, but the expenses for the own attorney and journey, whereas the procedure costs of a subsidiary charge has to be paid by the private party. The juridical assistance will be a new help for the private participant.

c) Claims of damages according to the Civil Law

As a financial compensation for sexual offences pursuant to § 1328 of the Civil Code (ABGB) the claim of material and immaterial damage of victims of sexual violence is possible. This combines for instance injuries, a pregnancy, but also the costs for therapeutical and medical treatments or the loss of income because of pregnancy and covers primary and secondary damages (e.g. an attempted suicide). If bodily injury and deprivation of personal liberty have occurred too, these are also

included in a global sum. Depending on the case from 4.360,50 € up to €54.504, 63 as far have been granted¹.

Was a relative the victim of an offence or a crime (manslaughter, murder, a result of a car accident) and this close relative (mother, daughter, sister...) died, the fact of his/her death (the grief) was not compensated according to jurisdiction. That means not the grief only the funeral costs were compensated. Through an alteration of jurisdiction right now the grief of close relatives is compensated, if the offender committed the act intentionally or in culpable negligence².

5) Compensation by the state pursuant to the Crime Victims Compensation Act 1972 (VOG)

According to this act the Federal Republic provides assistance to the victim by way of “prepayment“ of his claim for compensation. Conditions are that the victim has “suffered physical injury or impairment of health as a result of an intentional – not negligence – unlawful act which is a criminal offence punishable with more than six months imprisonment, and he has either incurred expenses for medical treatment or suffered a reduction in his working capacity. The Federal Social Agency is paying only if the Local Health Insurance will not cover the costs and has the right of recourse from the insurance carrier.

As for a sexual offence cause: the reimbursement of the cost of psychiatric therapy is now granted. This possibility becomes more and more known, because police and judicial persons are strongly requested to inform the victim about these possibilities³.

6) Advance Payment under § 373a StPO

§ 373a StPO grants a victim under certain rather strict conditions, the right to make a claim against the Federal Republic. The Federal Republic may grant advance payments of compensation on the following very restricted and therefore criticised circumstances⁴, which are: The offender has been convicted; the claimant (private participant) has been adjudged by a final court decision, to be entitled to compensation for death, person injury or damage to property; the payment of the offender will be frustrated by the execution of the penal sentence.

III. Future Aspects of Crime Victims Protection

The support of victims is more and more demanded. Above all the victim has been given a complete new status of party apart from the private participation. The victim has full protection of the law, which includes full information of the process and his/her rights, assistance and control in an early stage of proceedings. All victims can participate in trial or in pre-trial stage, have the right to question the defendant and put legal remedy against acts of the police or prosecutor in pre-trial stage and have the right of appeal against the sentence of private damages. Public and non governmental institutions, like Victim Support Groups or the “White Ring” offer

¹ Eder-Rieder (2002), 577 and (2005a), 84-86.

² Eder-Rieder (2005a), 78 ff

³ Eder-Rieder (2005a), 89 ff

⁴ Eder-Rieder (1998), 126 and (2005a), 102 mwN; Jesionek (2004), 265.

special services to assist in trial. With this legislative steps Austria has fulfilled the demands of the EU-Framework in a large and better way and offers a much higher status for victims of a crime.

Bibliography

1. Eder-Rieder, Maria A. (1998), *Der Opferschutz. Schutz und Hilfe für Opfer einer Straftat in Österreich*, Springer, Wien-New York.
2. Eder-Rieder, Maria A. (2002), *Behandlung des minderjährigen Opfers eines sexuellen Missbrauchs im Strafprozess und Befriedigung seines Schmerzensgeldanspruches*, in: Dölling/Erb (Hrsg.) *Festschrift für Karl Heinz Gössel zum 70. Geburtstag*, C. F. Müller, 565ff.
3. Eder-Rieder, Maria A. (2005a), *Opferrecht*, Neuer Wissenschaftlicher Verlag, Wien Graz Eder-Rieder, Maria A. (2005b), *Juristische Aspekte des sexuellen Missbrauchs an Kindern in Österreich*, in: Amann G./Wipplinger R. (Hrsg.), *Sexueller Missbrauch. Überblick zu Forschung, Beratung und Therapie. Ein Handbuch*, 3. Auflage, 935 ff.
4. Eder-Rieder, Maria A. (2008), *Die Stellung des Opfers im neuen Strafverfahren*, JSt 2008, 113 ff.
5. Jesionek, Udo (2004), *Das Verbrechenopfer im künftigen österreichischen Strafprozessrecht*, in: Grafl/Medigovic (Hrsg) *Festschrift für Manfred Burgstaller zum 65. Geburtstag*, Wien, Graz, 253 ff.
6. Jesionek, Udo (2006), *Das Opfer im Strafverfahren*, Salzburger Nachrichten 24.Jänner 2006, 17.
7. Löschnig-Gspandl Marianne (2004), *Das Recht des Opfers auf Wiedergutmachung*, in: *Viktimologie und Opferrechte*, Schriftenreihe der Weisser Ring Forschungsgesellschaft, Band 1, Innsbruck 2004, 157 ff.

Анотація

Марія Едер-Рідер. Захист жертв злочинів у Австрійському кримінальному процесі. – Стаття.

Новий кримінальний процесуальний кодекс Австрії (набув чинності 1 січня 2008 року) дає жертві злочину зовсім новий статус сторони окремо від особистої участі. Жертва одержує повний захист правом, яка включає всю інформацію про процес сприяння й контроль на ранній стадії виробництва. Усі жертви можуть брати участь у судовому розгляді й попередньому слуханні справи, мають право ставити запитання підсудному, можуть застосовувати засіб правового захисту проти актів поліції або прокурора на попередньому слуханні справи й мають право на апеляцію на вирок про особисті збитки й навіть недійсність апеляції проти виправдання в особливих випадках. Кодекс передбачає представництво в суді й правову допомогу безкоштовно. По справах про сексуальні злочини можлива психологічна і юридична допомога й “м’який допит”. Суспільні й неурядові організації, такі як Групи підтримки жертв, надають спеціальні послуги по допомозі в судовому розгляді.

Ключові слова: жертва злочину.

Summary

Maria Eder-Rieder. Protection of victims of crime in the Austrian criminal procedure – Article.

The new Criminal Procedure Code in Austria (set into force 1st January 2008) gives the victim of crime a complete new status of party apart from the private participation. The victim has full protection of the law, which includes full information of the process and his/her rights, assistance and control in an early stage of proceedings. All victims can participate in trial or in pre-trial stage, have the right to question the defendant, can put legal remedy against acts of the police or prosecutor in pre-trial stage and have the right of appeal against the sentence of private damages and even the nullity appeal against acquittal in special cases. The Code allows a legal representation and legal aid even without payment. In sexual offence cases a psychosocial and juridical assistance and a “gentle questioning” is possible. Public and non governmental institutions, like Victim Support Groups, offer special services to assist in trial.

Key words: victim of crime.