The Victim and the Justice System: from key personal stakeholder, to institutional outcast, to returnee?


Professor Shane Kilcommins
Introduction

* Conceptual analysis
* The shift from an intensely local, unstructured and victim precipitated arrangement
* to a structured, adversarial, state monopolised event
* To a more accommodating justice system
* Irruptive points
* What is the purpose of this approach?
‘Exculpatory Model of Justice’

- ‘paradigm of prosecution’
- As Bentham (1830: 427) disapprovingly noted: “The law gives to the party injured, or rather to every prosecutor, a partial power of pardon... in giving him the choice of the kind of action he will commence... The lot of the offender depends not on the gravity of his offence but on... the injured party... The judge is a puppet in the hands of any prosecutor.”
- Formal prosecution - the exception; negotiation and informal sanction the norm. Major courts - no monopoly over sanctions
- Victims’ energy
Local Knowledge

- local knowledge about the character of the accused – juries/character witnesses
- ‘keen knowledge of the good and rotten apples in their barrel’
- “It might be hard to say to a man, that his life should be valued at a particular rate, depending upon local or temporary expediency. But this was the very reasoning upon which the law was founded”
‘Accused Speaks’ Trials

- The determination of guilt
- ‘This model, operating in a world in which professional policing and prosecution and an elaborate law of evidence had yet to be developed, worked on the basis of lay evaluation of normative, character based - rather than subjective or psychological - evidence and assumptions about the individual defendant’
- The accused as a testimonial resource
As Hawkins observed in Pleas of the Crown in 1721:

* Every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer... It requires no manner of skill to make a plain and honest defence...; the simplicity, the innocence, the artless and ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own... Whereas on the other side, the very speech, gesture and countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth; which probably would not so well be discovered from the artificial defense of other speaking for them (as quoted in Langbein 1983: 123).
Irish Exceptionalism

**Intimidation:** victim’s task was, in many instances, at worst ‘perilous and at best extremely difficult’.

An Irish Magistrate in 1815 informed Sir Robert Peel of the problem in the following terms: “I applied to many farmers of approved loyalty and endeavoured to persuade them to enter into associations - the universal answer was, ‘we dare not, ... we should certainly be put to death if we associated as you advise us’.

‘You have been acquitted by a Limerick jury, and you may now leave the dock without any other stain upon your character’.

‘Now trial by jury is an institution utterly unfitted to a country where the majority are prejudiced against the law. The effect must ultimately be to paralyse the government and to ensure impunity’
A new technique of criminal and penal semiotics was required (Industrial Revolution)

Urbanisation

Cesare Beccaria’s text in 1764, *On Crimes and Punishment*,

Ascriptive status of individuals

‘criminalising abstraction’
Badly Regulated Economy of Power

- old system of law enforcement was not working in a more urbanised and industrial setting.
- victims were seen as vengeful... ‘resulting in the shameful perversion of the criminal trial for private ends’.
- New methods of law enforcement: transition from ‘sovereignty to government’
- ‘Lawyersiation’ of the criminal process
Peel, for example, had argued in 1826: “[I]f we were legislating de novo... I for one should not hesitate to relieve private individuals from the charge of prosecution in the case of criminal offences... I would have a public prosecutor acting in each case upon principal, and not on the heated and vindictive feelings of the individual sufferer, on which we mainly rely at present for the due execution of justice... and I would by the appointment of a public prosecutor guard against malicious or frivolous prosecutions on the one hand, and on the other, I would ensure prosecution in cases in which justice might require it.
‘rout the personal from the courtroom’

* move from an intense local ‘kind of morality play’ to a more structured affair
* move from a series of expressive semipersonal confrontations... to a more restrained, rule governed, predictable, depersonalised process
* The focus came increasingly to bear on the prosecution case
* Monopolisation of prosecutorial and investigative functions by the state
* Individual experiences subsumed in the will of the people and the public interest
* Victim displaced – State/accused
* Rules of evidence/accused rights
institutionalise the politics of pain and disturbing events within an ‘iron cage’.

‘Bureaucracy develops the more perfectly, the more it is “dehumanized, the more completely it succeeds in eliminating from official business love, hatred, all purely personal, irrational, and emotional elements”’ (1978 repr: 975).

The functional and impersonal imperatives of a modern criminal justice apparatus did not require the establishment of ‘contextual’ relations with either the accused or the victim.

Instead it was increasingly organised around a constitutional state and the ‘institutionalised fiction’ of the ‘public sphere as the central principle of its organisation’ (Habermas, 2010: 125), both of which helped to promote the sense of ‘civilized association’ and an ‘objectivated’ (Habermas 2004: 148) criminal process.
In creating this ‘buffer zone between system and person [by establishing a] zone of indifference’ (Habermas, 2006: 308) between the lived ontological experiences of the crime conflict and its effective administration, new imperatives could be foregrounded, particularly those that emphasised procedure, the ideological neutrality and rationality of the process, and its objectivated nature.
The Axis of individualisation – letting the ‘personal’ back in?

- knowledgeable form of regulation’
- The question is no longer simply: Has this act been established and is it punishable? But also: what is this act?... To what level or to what field of reality does it belong?... It is no longer simply: who committed it? But: how can we assign the causal process that produced it? ... It is no longer simply: What law punishes this offence? But: what would be the most appropriate measure to take? How do we see the future development of the offender?
The Return of the Victim

- Victimology
- Mass victimisation surveys
- The women’s movement
- Church sexual abuse and institutional abuse
- Rising Crime Rates
- Europe
- Juridification of new forms of inclusion
- Backlash against Warren Court
The Ryan Report, established to inquire into child abuse in institutions of the State from 1936 onwards, for example, noted in 2009 that:

‘[c]hildren with a learning disability, physical and sensory impairments and children who had no known family contact were especially vulnerable in institutional settings. They described being powerless against adults who abused them, especially when those adults were in positions of authority and trust. Impaired mobility and communication deficits made it impossible to inform others of their abuse or to resist it. Children who were unable to hear, see, speak, move or adequately express themselves were at a complete disadvantage in environments that did not recognise or facilitate their right to be heard’ (2009).
An Example of Inclusion in Ireland

- The rule which provided the spouse of an accused was not competent to give evidence for the prosecution in a case, except in the case of rape or violence perpetrated on that spouse (R v. Lapworth [1931] 1 KB 117).
- People DPP v JT (1988) 3 Frewen 141
- ‘the foundation stone of a victim’s charter’ in Ireland
Increasing Accommodation and Participation

- live television links in the courtroom
- the admission of video-recordings, depositions and out of court statements
- eye witness identification
- competency of witnesses to testify at trial
- Changes in corroboration rules
- doctrine of recent complaint
- the absence of resistance by a victim in a rape case does not equate with consent;
- tighter restrictions that offer victims better protection against unnecessary and distressing information being raised about their sexual histories;
- separate legal representation for sexual offence complainants where an application is made to admit previous sexual history;
- the abolition of the marital exemption in relation to rape;
- court accompaniment in sexual offence cases;
- greater protection of the identity of victims and witnesses in criminal cases;
- the introduction of measures to restrict unjustified imputations at trial against the character of a deceased or incapacitated victim or witness;
- the creation of a statutory offence of intimidation of witnesses or their families;
- the ability of the DPP to appeal unduly lenient sentences;
- the right to return of property to be used as evidence;
- and provisions for the payment of compensation to victims through a statutory scheme introduced under section 6 of the Criminal Justice
Justice As Accommodation

- The long shadow cast by monomaniac State-accused conceptions of fairness.
- **Casey v DPP, Ireland and the AG**, where Humphreys J. noted that ‘the criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime’
- Increasingly considerations of process fairness include the victim as a relevant determinant within its paradigm of reference.
- **DPP v Gerald McNeill**, where Denham J noted in the context of a sexual abuse prosecution: “Facing into these types of prosecutions, which were becoming more common, the courts sought to achieve a fair trial with justice for all concerned. Those concerned include the people of Ireland for whom the prosecution is brought, the accused who has the fundamental right of a fair trial, and the victims.”
Victim Impact statements – individualising the victim

* Many respondents would have liked the opportunity to make a statement.

* Provides a ‘sense of closure’ (Bernice)

* ‘Absolutely positive… The judge did read what I had wanted to… (Valerie)

* It was massively liberating for myself and my wife… Telling it as it is… telling the truth of the reality of what went on… It was probably the biggest part of the road to recovery’ (Gerry)

* Our fellow stood then and said: “one of my clients, the victim’s sister, wants to give a victim impact statement”… I noticed one of the prison wardens throwing his eyes up to heaven as if to say: “I’m going to be here for another five minutes.”… He looked totally bored. (Catherine)
New Directive and Bills

* Criminal Justice (Victims of Crime) Bill 2015
* Criminal Law (Sexual Offences) Bill 2015
Civil participation

- Statute of Limitations
- Walsh v Byrne [2015] IEHC 414
The then Minister for Justice, Padraig Flynn, (Dail Debates, Vol. 423, Col, 1554, October 15, 1992):

“I believe that it is extremely important that ..I am in tune with how the public have been affected by and view the crime problem. For this reason since coming into office I have adopted as far as possible an open door policy in terms of listening to and responding to the community's concern about and attitudes to crime. I have availed of various opportunities to involve myself in forums of public debate on crime-related issues. In March of this year I appeared on the “Late Late Show” which was devoted to the crime problem, so that I could hear at first hand people’s experiences of and attitudes to crime...I am, therefore, very much aware of the public attitude to crime and while I appreciate that there may indeed be a value in more academically based and structured surveys, my priority at present is to use all available resources on more practical and effective measures to prevent and detect crime.”
In the Laura Kelly case, the complainant, who has Down Syndrome, alleged that she was sexually assaulted at a 21st birthday party. The family claimed that shortly after Ms Kelly was put to bed, a family member entered the bedroom and saw a man in bed with her. It was alleged that Ms Kelly had most of her clothes removed and that the man was naked from the waist down. However, at trial, Ms Kelly, who had ‘a mental age of four’, was deemed incompetent to testify and the case was dismissed. Ms Kelly’s mother stated:

She [Laura] was brought into this room in the Central Criminal Court and asked questions about numbers and colours and days of the week which had no relevance in Laura’s mind. She knew that she had to go into a courtroom and tell a story so the bad man would be taken away. "It was ridiculous. There is no one trained in Ireland to deal with someone similar to Laura, from the Gardaí up to the top judge in Ireland and the barristers and solicitors” (McEnroe, 30 March, 2010).
Continued problems

- Information provision
- Under reporting
- Adversarialism
- Harassment and intimidation by the process
- Attrition rates
- The lack of private areas in courts
- Difficulties with procedural rules and legal definitions (Bacik et al. 1998);
- Delays in the system (Hanly et al. 2009);
- Participation;
- The lack of information on the progress of criminal prosecutions;
- And inadequate support services.
- The lack of recognition of vulnerable witnesses
‘I was almost a nuisance to them and I wanted to be a nuisance...The more he wasn’t ringing me back the angrier I was getting...I think definitely that the victim should be treated with more respect. We really felt that we got absolutely no respect from them whatsoever...’ (Harriet)
‘victim discourse in Ireland has achieved the status of being both unchallenged and unchallengeable’ (McCullagh 2014)

‘the sanctified persona of the suffering victim has become a valued commodity in the circuits of media and political exchange’ (Garland 2001).
The dangers

- Accustomed to the binary logic of State/accused relations (we cannot have three in the relationship)
- Objective facts v ‘the moral authority of grief’
- R v Nunn [1996] 2 Cr App R (s) 136
- ‘the opinions of the victim... about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victims is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate’
We should be wary of the possibility of political or media manipulation, or the depiction of the criminal justice system as a ‘zero-sum game’ where gains for victims must be at the expense of those accused of crime.

That said, we should also be mindful that victim ideology is not just the manifestation of a sinister state or the product of media-exaggerated alarm about law and order.

Instead its recent emergence must be seen much more as a response to a previous scandalous neglect, as a justified attempt to correct an imbalance in which the victim was constituted as a ‘silent abstraction, a background figure whose individuality hardly registered’

Victims are, in part, recapturing the ‘crime conflict’.