

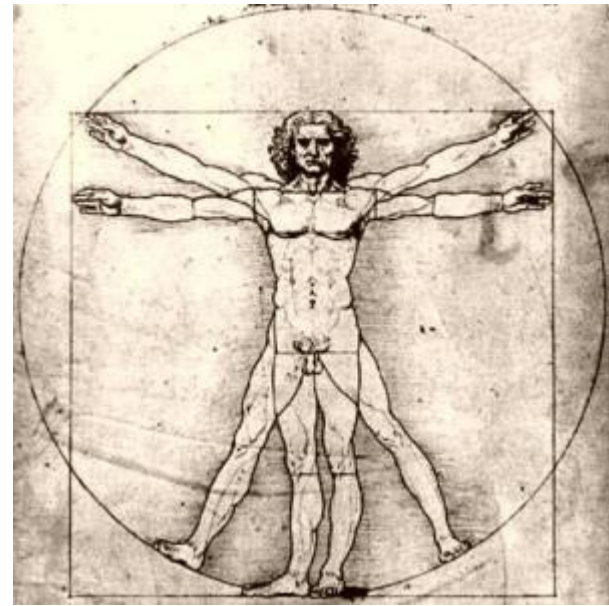
“The Re-emergence of the Victim in the Irish Criminal Justice

Roundtable on Victims' Rights
University of Limerick
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The Modern Model

- * 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



- * '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



Adversarialism

- * ‘a **contest morphology**’ that included oral presentation of evidence, lawyer led questioning, cross-examination by counsel, relative ‘judicial passivity’ during the guilt determining phase of the trial, and informational sources secured by both the prosecution and defence became **deeply ingrained** throughout the twentieth century as the appropriate means of resolving criminal disputes



The Public Interest

- * 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.

State/Accused Model of Justice

- * The **singularity of relations** which ensued in the nineteenth and twentieth centuries meant that most relevant facts and phenomena were interpreted through a narrow **State-accused lens**.
- * The **operational self-enclosure** inherent within this logic of action confined the victim to a peripheral role, one which **did not permit or endorse personal claims** over the conflict.
- * A state-accused logic of action mediated **all validity claims** in respect of the conflict.
- * Criminal wrongdoing became a rationalised domain of action, measured in part **by its capacity to filter out non-objective truth claims**. Victims who participated in the modern inculpatory process did so as legal subjects, with little or no powers to make decisions about outcomes.

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).**



Conscious Raising.

- * The systemic abuse that occurred in **the archipelago of institutions** that existed in post-Independence Ireland – and the harrowing accounts of the **‘endemic’** of deaths, beatings, assaults, molestations, rapes, neglect and ritual humiliations – firmly placed experiences of victimhood on the public agenda. It was aggravated by the **horrors of brutal clerical abuses** in parishes in different parts of the country.
- * The **flood of delayed sexual offence cases** coming before the courts from the mid-1990s onwards cast further light on institutions and clerics, but also on the **dark dimensions of abuse perpetrated on children by family members, neighbours, teachers and so on**. The horrific and tragic details of this maelstrom of abuse details – and the existential despair that it gave rise to - has forced Irish society to confront widespread experiences of victimhood.
- * Events of the kind were also covered by **a media industry** that was becoming more specialised and instantaneous. It was also increasingly adept at individualising the experiences of victimhood through focused analysis and imagery.
- * Aside from conscious raising, these insights have also contributed to the development of a **healthy scepticism of institutions of power**, and any uncritical deference to such power. This has been aided no doubt by repeated findings of corrupt practices in political and executive circles.

Crime Rates

- * The noble dream of winning the war on crime
- * A new emphasis on **pragmatism** was espoused, one which was agnostic as regards the social or psychological causes of deviancy.
- * Instrumental reasoning of this kind **accepts the normality of crime** and seeks strategies and practices to prevent or displace it. The victim is much more central and visible under such a framework of understanding. Moreover, and in managing an incident, effective service provision to a victim provides relatively quick, attractive and measurable outputs from criminal justice agencies, at least when compared with more long-term and contingent results such as convictions or successful rehabilitative outcomes.

Law as a Steerer of Re-integration

- * People DPP v JT (1988) 3 Frewen 141
- * ‘the foundation stone of a victim’s charter’ in Ireland
- * An emerging ‘rights revolution’



Juridification as a steerer of reintegration

- * The long shadow cast by monomaniac State-accused conceptions of fairness.
- * *Casey v DPP, Ireland and the AG* [2015] IEHC 824 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** [2011] 2 ILRM 461, 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.**”

New Directive and Bills

- * Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the Victims Directive).
- * Though the Convention does not explicitly refer to victims of crime, the jurisprudence of the Court has placed obligations on member states to criminalise wrongdoing, to take preventive operational measures, to protect society from potential dangers, to provide appropriate civil remedies, to investigate and give reasons, and to adequately protect victims and witnesses at various stages in the criminal process.



Civil participation

- * M.N. v. S.M. [2005] 4 I.R. 461 at 472
- * Statute of Limitations
- * Walsh v Byrne [2015] IEHC 414
- * The defendants sought and were granted a preliminary ruling that the Gardaí cannot, in the absence of mala fides, be held liable in damages for the performance of their investigative and prosecutorial functions
- * This was justified on the basis that domestic tort jurisprudence is capable of being tested against the Convention, particularly having regard to whether or not a rule establishing absolute immunity for public authorities is proportionate.



Consequences

- * Victims of crime who are again being recognised as a **'community of identity'**. This reshapes the construction and presentation of intersubjective criminal conflict, not least because pluralism of this kind generates competing interests, priorities and validity claims in the decision making process.
- * Momentum of this kind makes it more difficult to rely exclusively on tradition and previously settled conventions of practice. The criminal process is thus slowly moving from a **monomaniac culture of rights** to **cultures of rights** that reflect 'multiple identities' (Rose 2008: 178) which are deserving of concern and respect.

Exclusion or Inclusion

Inclusion

- * '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).



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The dangers

- * Accustomed to the binary logic of State/accused relations (we cannot have three in the relationship)
- * What must be guarded against in the juridical accommodation of victims is any constructive interpretation of process fairness which unites the public interest with victims and against those accused of crime. Bifurcation of this kind presents arguments in Manichean terms
- * In harder cases, where competing rights may be at issue, more reflexive consideration will be required, which will focus on the principles and justifications underpinning the rights at stake, and where parties will be encouraged to 'frame and test hypotheses about what these rights are' (Dworkin 2005: 338) and what weightings should attach

Conclusion

- * Synthesising sometimes competing rights and principles in ways that will ensure just and fair decisions will be a challenge. It will require an on-going constructive interpretation of fresh cases that come before the courts. Such interpretation demands both fidelity to existing legal precedents as well as an acceptance of the innovative possibilities of law and rights given their evaluative aspects and potential for alteration through rules of change.
- * In harder cases, where competing rights may be at issue, more reflexive consideration will be required, which will focus on the principles and justifications underpinning the rights at stake, and where parties will be encouraged to ‘frame and test hypotheses about what these rights are’ (Dworkin 2005: 338) and what weightings should attach