

Finding Voice for Victims of Crime in the Adversarial Criminal Justice System

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Abstract— Adversarial criminal justice system is designed to accommodate only two parties, the prosecution and the defendant, in the combative atmosphere of its trial process. The victim has no right of audience other than as witness for the prosecution. The involvement of victims as active participants in the exclusionary adversarial criminal justice system continue to attract debates among scholars. Whereas some favour the involvement because of its cathartic value for victims others oppose it on ground of the dislocation this might bring to the system and the threat to the defendants' rights. Although, there have been significant victim reforms in some advanced jurisdictions creating some forms of rights for the victim, the rights remain unenforceable internally of the criminal justice process but externally of it through some administrative mechanisms. This paper reviews the position of some of the scholars on the foregoing, the various models of the system that have been constructed by scholars to accommodate victims and the emerging rights for victims. The position of this paper is that for the rights so far created for victims of crime to be truly beneficial, the so-called rights should be enforceable internally of the system with the necessary safeguards for the existing rights of offenders.

Keywords- Adversarial criminal justice system; victims of crime; model; participation; rights; enforcement

I. INTRODUCTION

Adversarial criminal justice system accommodates only two parties, the state and the offender who engage each other in the combative atmosphere of a formal courtroom. In this model of criminal procedure, every offender had to be processed according to a written law. It is an offence for any community members to assume a judicial position to try a criminal offence.¹ Crime is viewed under this model as a breach of certain normative values of society as a whole and consequently, such infractions can only be redressed in the interest of the entire society rather than in the interest of an individual or a group of individuals who are the direct victims of such infraction. In particular, the accused is sentenced to a term of

¹ This was the position in the Nigerian case, *Garba v University of Maiduguri* [1986] 1 NSCC 245; [1986] 2 SC 128.

imprisonment without any compensation to the victim (Ibidapo-Obe, 2005, p. 122). As a general proposition it can be said that the guiding principle under the adversarial model of criminal justice is the punishment of the offender (ibid).

However, in many places the pendulum is swinging back towards redress for victims of crime (Beloof, 1999, p. 289). Whereas some jurisdictions² have made tremendous progress in this direction by implementing several victim-oriented policies, others³ still hold tenaciously to the traditional model. Although victims do not yet have the *locus standi* to complain to a court that any of their so-called rights has been infringed by an agency of criminal justice in these jurisdiction, studies have shown that the victims now feel their injuries are recognised by the system to a certain extent, even though much of the progress may be symbolic (Booth et al, 2011, p. 390).

This paper does a review of substantial literature on the involvement of victims of crime in the adversarial criminal justice before bringing out the gap in literature by pointing out some areas of concern.

II. LITERATURE REVIEW

In the context of this paper the review will focus on the adversarial criminal justice system, the significance of victims in the system and the emerging rights of victims of crime. The review will be done in four segments: role of victims in the adversarial criminal justice system; model of victim participation; emerging rights for victims of crime; and gap in literature/area of concern.

² Such as England and Wales, the United States of America, Australia, New Zealand, The Netherlands, Scotland, the Republic of Ireland and South Africa, most of which represent key centres for victim reform upon which other jurisdictions have based their own policy agendas (Hall, 2010, 6).

³ Such as Nigeria and most African countries.

A. *The role of victims in the adversarial criminal justice system*

In the broader context, Sanders argues that victims of crime were not reckoned with in the criminal justice system for many years except for their evidence in court (Sanders, 2002, p. 200). In the same vein, Dignan *et al* state that decisions to prosecute and sentence under the retributive system of criminal justice are based on 'official assessment of what the "public interest" demands' (Dignan *et al*, 1996, p. 155). Other than their occasional relevance as prosecution witnesses, victims are treated as strangers at the trial of the offenders for the injuries they have caused them (Wright, 1996, p. 23). Criminal justice parades dual faces, the first of which regulates the speed of the process by 'applying safeguards such as "due process" to make sure the innocent are not punished', while the other hastens the process by 'pushing against those safeguards so that they do not enable the guilty to escape' (*ibid*). It seems that Wright's view of criminal justice is informed by Professor Herbert Packer's two models, that is, the Crime Control Model and the Due Process Model (Packer, 1968, p. 153). Though these provide the platform upon which several other models have evolved, neither of them places any significance on the victim as a focus of the criminal justice system. This point will be discussed further below.

As against the foregoing, Williams argues that as much as victims' initiatives are desired in the criminal justice system, the changes must not conflict with the rights of the defendant. Without this safeguard the inclusion of victims' participation in the criminal justice system may be counter-productive (Williams, 2005, p. 91).

In the modern adversarial criminal justice system victims are liable to be subjected to secondary victimisation in the hands of defence lawyers during cross-examination. This is said to be due to 'the systemic structures and values of adversarial system' that demands that witnesses are treated in a particular way (Doak, 2008, p. 63). Sanders *et al* share this view and accordingly reason that such hostile treatment of the victims is not unconnected with the fact that they are not regarded as parties to a criminal charge (Sanders *et al*, 2011, p. 284). In the same way, Doak advocates victims' participation at the trial process as this will boost the legitimacy of the criminal process (Doak, 2008, p. 135).

McCarthy joins Doak when he argues that redress for the victim of a crime will enhance the credibility of the system in that victims will be assured of the recognition of the injuries they have suffered as a result of the acts or omissions of the offenders (McCarthy, 2012, p. 366). Indeed, it has been argued that the victims' level of satisfaction is greatly determined by the level of participation a jurisdiction accords them (Kelly *et al*, 1997, p. 239; Erez, 2000, p. 177). In the same way, Reeves *et al* recommend certain responsibilities which may be grouped under compensation, protection, services, information, and

responsibility to be undertaken by the state to ensure the full participation of victims in its criminal justice process (Reeve *et al*, 2000 pp. 129-130).

The net effects of the foregoing is the emergence of several conflicting and reconcilable models of victim participation in the criminal justice process.

B. *Models of victim participation*

Herbert Packer made the most successful attempt to construct models of the criminal process. He calls his two models the 'Due Process Model' and the 'Crime Control Model' (Packer, 1968, p. 153). The success of these models set the standard for decades for scholars to build on (Roach, 1999, pp. 12-13). The conflicting nature of the two models is the source of the adversarial notion of the criminal justice process, in that, as much as the Crime Control Model tries to de-emphasise the adversarial aspect of the process, the Due Process Model tries to make it the core of it (Packer, 1968, p. 157). According to Roach:

The essence of each of the Packer's two models is captured by an evocative metaphor. The criminal process in the crime-control model resembles a high speed assembly-line conveyor belt" ... operated by the police and prosecutors. The end product of the assembly-line is the guilty plea. In contrast, the due-process model is an "obstacle course..." in which defence lawyers argue before judges that the prosecution should be rejected because the accused's rights have been violated. The assembly-line of the crime-control model is primarily concerned with efficiency, while the due-process model is concerned with fairness to the accused and "quality control" (Roach, 1999, p. 13).

When Packer came up with his two models of criminal justice in 1968 he did not contemplate that victims should have a say in the criminal justice process (Beloof, 1999, p. 203; Roach, 1999, p. 19; Sanders, 2002, p. 203). Packer believed that the kind of model we need is one that explicitly describes the priorities of the criminal process. Thus, he asserted that although it will take more than one of these normative models, it will not take more than the two models he designed (Beloof, 1999, p. 290; Griffiths, 1970, p. 361).

While Packer's assertion might have been true at the time, it is no longer so, because the contents of his two models are insufficient to accommodate victims' participation (Beloof, 1999, p. 290; Sebba, 1982, p. 231). To put it in another way, Packer's view of criminal justice does not begin to exhaust the possibilities of a third model (Griffiths, 1970, p. 362). According to Beloof, for there to be a useful victim model there would need to be 'a consensus in law that the value underlying the victims' roles are genuine and significant' (Beloof, 1999, p. 291). He accordingly advocates a third model, which he terms the "Victim Participation Model" which is required as

complement rather than replacement for Packer's two models (ibid) as a reflection of this shift in the paradigm of the criminal procedure. He goes further to signpost the three models by using them to explain the key features of the criminal justice system.

However, Sanders observes that just as Packer presents two irreconcilable norms, so does Beloof's 'three model' approach to understanding criminal justice in that:

What Beloof gives us is, essentially, a list of features of the criminal justice system – actual and desirable. When some of those features conflict with others he gives us no basis for understanding how some are prioritised over others, nor how prioritisation *should* take place. Beloof takes an analytical model that sets out to illuminate irreconcilable value conflicts and adds to it a further set of irreconcilable elements (Sanders, 2002, p. 206).

Sanders concludes that although Beloof's three model approach is 'descriptively accurate' it is 'analytically untidy' (ibid). He argues for example, that in a system that requires consultation with the victim on whether to prosecute, the three models proposed by Beloof fail to state whose view is superior in the event of conflict between the position held by the victim and that held by the prosecutor (ibid).

Griffiths considers Packer's two models as only one model which he terms "the Battle Model" despite the fact that Packer presents them as diametrically opposed. To him,

Packer consistently portrays the criminal process as a struggle – a stylized war – between two contending forces whose interests are implacably hostile: the Individual (particularly, the accused individual) and the State. His two models are nothing more than alternative derivations from the conception of profound and irreconcilable disharmony of interest (Griffiths, 1970, p. 367).

Instead, Griffiths proposed what he terms the "Family Model" (ibid, p. 371). The family model does not see the offender as an enemy like Packer's "Battle Model"; instead, it sees him as a person whose conduct is reprehensible but ought not to be condemned (ibid, pp. 371-376).

Sebba objects to Griffiths' Family Model, saying that, quite apart from the fact that Griffiths does not provide detailed insight into the operation of the model, it does not feature the victim as a significant factor in the criminal justice system (Sebba, 1982, p. 234). However, he acknowledges that despite the inherent inadequacies in the model it is nevertheless consistent with his social defence-welfare model to be discussed in the next paragraph because, according to him, both his social defence movement and Griffiths' welfare philosophy regard the offender as a person who has breached the norms of the

society rather than as an enemy of the society (ibid, pp. 234-235).

In order to overcome the limitations in Packer's two models, Sebba proposes two models of his own, an "adversary-retribution" model and a "social defence-welfare" model (ibid, p. 231). The first model advocates the victim's participation at the trial and sentencing stages of the criminal justice process. This model upholds the basic structure of the common law trial wherein there will be the usual confrontation between the offender and the victim, while at the same time there will be a determination of sentence which would be proportionate to the crime committed, in which case the injury suffered by the victim will be an important consideration (ibid). The "social defence-welfare" model on the other hand, advocates a critical and mediating role for the state between the parties, where the state strives to control threats to the society by means of either incapacitation or rehabilitation of the offender while at the same time it caters for the needs of the victims so that the victim-offender confrontation is substantially removed (ibid, pp. 231-232).

Cavadino *et al* (Cavadino et al, 1997) write that the 'restorative justice' movement which favours the making of reparation by offenders to their victims and the 'just deserts' movement which advocates proportionality between the seriousness of the offence and the severity of the punishment, are the two most significant recent trends in criminal justice (ibid, p. 233). They are of the view that the aim of the criminal justice system should be to advance victim satisfaction and empowerment (ibid, p. 237), within the parameters of proportionality as a limiting factor, in order to also safeguard the rights of the accused (ibid, pp. 246-248). Although they acknowledge that there is a divergence of opinion on whether the twin principles of reparation and just deserts are compatible, they believe that the two principles are 'each defensible if propounded in modest and limited form. In such a form they are not only compatible but complementary and should each have its place in any justifiable system of punishment' (ibid). In order to achieve this, the modern criminal justice system should be designed in a way that it accommodates more of reparation than just desert (ibid).

Cavadino *et al* accordingly set up five models as a typology of the relationship between victim-oriented responses to crime and the traditional retributive principle of criminal justice. These are: (1) the conventional model, (2) the victim allocation model, (3) the welfare model, (4) the strictly proportional composite model, and (5) the integrative restorative justice model (ibid, p. 234). The 'conventional' model encapsulates the elements of the present criminal justice system which de-emphasises the significance of the victim and emphasises punishment of offenders. The 'victim allocation' model recognises the offenders' 'just deserts' but gives more recognition to the voice of victims in the determination of the form that those 'just deserts' should take (ibid, p. 235). The 'welfare'

model advocates the provision of welfare services for victims outside the boundaries of the criminal justice system (ibid). In respect of the last two models, that is, the 'strictly proportional composite' model⁴ and the 'integrative restorative justice' model⁵ Cavadino *et al* state that although they are not found in practice they intend to use them to examine to what extent the two rival principles of retributive and reparative/restorative justice are compatible (Cavadino *et al*, 1997 p. 235). It should be noted that the previous three models clearly explain the context within which victim-oriented responses to crime do occur Dignan *et al*, 1996, p. 154).⁶

Ashworth agrees with Cavadino *et al*'s preferred 'integrative restorative justice' model to the extent that the victim's right of participation is restricted to the issue of the quantum of compensation or the degree of reparation to expect from the offender, while the interest of the general public is to be the determinant factor in respect of the other components of sentencing (Ashworth, 2000, pp. 197-198). Their position not only promotes victim participation in the adversarial criminal justice system but also safeguards the interests of the offenders and those of the wider community (ibid, p. 198). However, Sanders sees a certain lack of confidence exhibited by Cavadino *et al* in the victim-rights approach they advocate 'within the context of a (yet-to-be-created) restorative justice based system' even though they advocate the supremacy of the state in cases of conflict between the victim and the prosecutor over decisions to prosecute and quantum of punishment (Sanders, 2002, p. 205).

Roach identifies two new models of victims' rights, punitive and non-punitive. While the punitive model relies on criminal sanction, the non-punitive model stresses crime prevention and restorative justice (Roach, 1999, p. 28). He concludes that the non-punitive model is a true alternative to the punitive model of criminal justice because its crime control strategy is not dependent on punishment but rather uses the concepts of restorative justice and crime prevention to reconcile the interests of offenders, victims and their communities (ibid, p. 37). Sanders however doubts if due process rights for the defendants would be respected in such a system (Sanders, 2002, p. 205).

I stand in-between Sebba's "adversary-retribution" model and Cavadino *et al* 'integrative restorative justice' model. This is because, while we advocate victim

participation in the criminal justice we must not lose sight of the rights of the offender and the overall justice of the case to all the affected parties, the victim, the offender and the society. While Sebba's model supports victim's participation at both the trial and sentencing stages of the criminal justice process with the focus on proportionality of punishment and consideration for the injury suffered by the victim, Cavadino *et al*'s model restricts victim participation in the criminal justice process to the issue of the quantum of compensation or the degree of reparation to expect from the offender, while the interest of the general public is to be the determinant factor in respect of the other components of sentencing (Ashworth, 2000, pp. 197-198). However, I will slightly modify Cavadino *et al*'s model to accommodate the interest of the victim in the determination of sentence even though, the ultimate decision will be left for the sentencing judge who, notwithstanding victim's suggestion, is not to pass a sentence above what is prescribed for a particular offence.

However, one thing which is common to all the proposed models is the generalisation of the concept of victims' participation in the criminal justice process. Although Sanders appears to favour restorative justice and some inquisitorial elements for victim participation in the criminal justice system in his conclusion (Sanders, 2002, p. 222), he fails to demonstrate how either or both concepts resolve the issue he earlier noted while critiquing Belooof's model. As he states in that context:

What we need is an approach with more explanatory power, one that can better explain *why* the criminal justice system has developed a range of apparently victim-based measures which complement existing features of the system yet which largely fail to achieve their stated purposes (Sanders, 2002, p. 206).

C. Emerging rights for victims of crime

There have been substantial disagreements among scholars as to what rights should be given to victims of crime in the adversarial criminal justice system. In this context Ashworth draws a working distinction between the rights of victims to services and procedural rights in the criminal process to set up his arguments against the use of victim impact statements in sentencing (Ashworth, 1993, p. 499). According to him, the rights of victims to services may include a right to call upon emotional and practical support in the period following the offence, a right to be kept informed and to be treated with respect and sympathy by law enforcement agents during the investigation process, a right to be treated with respect and understanding before and during court proceedings, and a right to compensation for victims of criminal violence. His procedural rights for the victims include rights to be consulted on the decision whether or not to prosecute, on the bail-custody decision, on acceptance of a plea, on sentence, and on parole release (ibid).

⁴ This model relates to the degree of punishment to impose on offenders which strictly must be commensurate to the degree of crime committed or injury caused. This model considers offenders' reparation to their victims as unfair prejudice.

⁵ This is the process of integrating restorative justice model into the existing criminal justice process. Reparation or restorative justice seeks to redress victims suffering through such measures as financial compensation, restitution, symbolic tributes, and apologies.

⁶ The authors clearly state here the objective of their next paper which is now being considered, i.e. (Cavadino *et al*, 1997).

Elsewhere, he argues that victim participation should be limited to matters of interest to the victim rather than matters of public interest (Ashworth, 2000, p. 200). However, the formalistic distinction between service and procedural rights made by Ashworth fails to recognise the interconnection between the two (Sanders et al, 2010, p. 741). Besides, Ashworth presents no approach to resolving the conflicts he identifies between the rights of the defendant and those of the victim, which in consequence premises his position on a zero sum game whereby affording rights to victims inevitably translates to a restriction of the defendants' rights (Hall, 2010, p. 142).

Hall is then of the view that the ground for asking for the procedural rights should not solely be based on "the wishes" of the victims but much more on the critical objectives and the sole purpose of the criminal process as a legal and social institution (Hall, 'The relationship between victims and prosecutors...', 2010, p. 34). Therefore, Hall recently proposes a triangular model of victim-centeredness for the modern adversarial criminal justice. The three planks on which Hall's model stands are practical centrality, narrative centrality and cultural centrality (Hall, 2012, p. 191). The practical centrality means that the criminal justice should be systematically organised bearing in mind the practical concerns of the victims. The practical centrality will include standard service rights such as the right to information which may be accorded through booklets, help desk, signposting etc., and physical facilities such as provisions of waiting rooms, seating and cafeteria etc. The cultural centrality relates to changes in the occupational cultures of criminal justice practitioners and staff which Hall believes might affect the practical changes advocated for victim-centred trials unless these occupational cultures are changed. The narrative centrality states that a victim-centred trial is that which would allow room for freer construction of victims' narratives. It will therefore address the practice of interruption, compelling victims to give evidence in an unfamiliar and unnatural manner such as pre-recorded evidence and curtailing victim's narratives through closed questions or even open-ended question framed in a way to elicit narrow answers etc. (ibid, p. 203). He therefore advocates that victims' rights should be enforceable within the system and this can be done by giving party status to victims so that whatever grievances they have concerning their rights could be dealt with immediately during trials by the bench as opposed to external, lengthy and bureaucratic complaint mechanism put in place in England and Wales for victims to air their grievances (ibid, p. 210).

D. Areas of concern

It will be clear from the foregoing that victims' rights have received much recognition in recent years. However, concerns about the enforceability of those rights still remain unresolved. In reviewing the issue from a theoretical perspective, Hall had earlier expressed concerns that despite the emergence of victims' rights and policy

recognition of those rights none of the theories canvassed by scholars directly address how the rights of the victims can be enforced in any given jurisdiction (Hall, 2010, p. 142). Although, he later came up with a triangular model of victim-centeredness for the modern adversarial criminal justice whereby victim rights can be enforced internally of the criminal justice system (Hall, 'The relationship between victims and prosecutors...', 2010, pp. 191, 210), the practicality of this remains unclear in a system where victim does not have party status as the offender.

It will also be clear that the foregoing scholars have identified critical areas of attention for victims in the criminal justice system. Several modes of treatment for the victims of crime have been proposed and criticised. What is common to most of the modes however, is that they do not recognise the peculiarities of certain situations and circumstances which may differ from one society to another due to the interplay of several variables which include education, economy, cultural and religious values of the people.

It is also of serious concern in spite of the several rights that are now available to victims of crime in many national and international instruments, victims remain strangers in the adversarial criminal justice. They cannot assert any of the rights internally of the system as the offenders.

III. CONCLUSION

The adversarial criminal justice process has thus come under intense criticisms in recent times. This is because many see it as a process which has for too long shut its doors to one of the important parties to criminal disputes, and one which creates, cares and protects the rights of the assailant in utter disregard for the rights of the assailed. Victims' confidence and participation in the modern adversarial criminal justice wanes by the day. The rights created for victims in the system are tangential as they are presently constituted. In consequence of this, victims continue to be at the mercies of the criminal justice providers who dictate the scope of their rights and the much that the victims could get from them. For the rights to be meaningful and beneficial, they should be enforceable internally of the criminal justice system like the rights of the offenders.

ACKNOWLEDGEMENT

I sincerely thank my research supervisors at the school, Dr John Stannard and Dr Dug Cubie for going through the literature review in draft.

REFERENCES

- [1] Ashworth A, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Crawford A and Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice: International debates*, (Ashgate, Dartmouth 2000)
- [2] Ashworth A, 'Victim Impact Statement and Sentencing' (1993) 7 Crim L R 498
- [3] Beloof D E, 'The Third Model of Criminal Process: The Victim Participation model' (1999) 2 Utah Law Review 289
- [4] Booth T and Carrington K, 'A Comparative Analysis of the Victim Policies across the Anglo-Speaking World' in Walklate S (ed), *Handbook of Victims and Victimology* (Routledge, London 2011)
- [5] Cavadino M and Dignan J, 'Reparation, Retribution and Rights' (1997) 4 International Review of Victimology 233-253
- [6] Dignan J and Cavadino M, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from A Victim's Perspective' (1996) 4 International Review of Victimology 158-182
- [7] Doak J, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008)
- [8] Erez E, 'Integrating a Victim Perspective in Criminal Justice Through Impact Statements' in Crawford A and Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice: International debates*, (Ashgate, Dartmouth 2000)
- [9] Griffiths J, 'Ideology in Criminal Procedure or A Third "Model" of the Criminal Process' (1970) 79 Yale Law Journal 359
- [10] Hall M, *Victims and Policy Making: A Comparative Perspective* (William Publishing, Abingdon 2010)
- [11] Hall M, 'The relationship between victims and prosecutors: defending victims' rights?' [2010]1 Crm LR 31
- [12] Hall M, *Victims of Crime: Policy and Practice in criminal justice* (Routledge, London 2012)
- [13] Ibidapo-Obe A, *A Synthesis of African Law* (Concept Publications Limited, Lagos 2005)
- [14] Kelly D P and Erez E, 'Victim Participation in the Criminal Justice system' in Davis R C, Lurigio A J and Skogan W G (eds), *Victims of Crime* (2nd edn Sage Publications 1997)
- [15] McCarthy C, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?' (2012) 10 Journal of International Criminal Justice 351-372
- [16] Packer H L, *The Limits of the criminal sanction* (Stanford University Press, Stanford California 1968)
- [17] Reeves H and Mulley K, 'The New Status of Victims in the UK: Opportunities and Threats' in Crawford A and Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice: International debates* (Ashgate, Dartmouth 2000)
- [18] Roach K, *Due Process and Victims' Rights: The New law and Politics of Criminal Justice*, (University of Toronto Press 1999)
- [19] Sanders A, 'Victim Participation in an Exclusionary Criminal Justice' in Hoyle C and Young R (eds), *New Vision of Crime Victim* (Hart Publishing 2002)
- [20] Sanders A and Jones I, 'The Victim in Court' in Walklate S (ed), *Handbook of Victims and Victimology* (Routledge, London 2011)
- [21] Sanders A, Young R and Burton M, *Criminal Justice* (4th edn Oxford, Oxford 2010)
- [22] Sebba L, 'The Victim's Role in the Penal Process: A Theoretical Orientation' (1982) 30 Am J Comp L 217
- [23] Williams B, *Victims of Crime and Community Justice* (Jessica Kingsley Publishers 2005)
- [24] Wright M, *Justice for Victims and Offenders* (2nd edn Waterside Press, Winchester 1996)

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