



The Voiceless Victim: A critical analysis of the impact of enhanced victim participation in the criminal justice process

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Abstract

In contrast to many European jurisdictions, the victim of an alleged crime in England, Wales and Northern Ireland is denied any form of meaningful participation at the trial stage of the criminal justice process. This is by reason of the unyielding structure of the Anglo-American adversarial system, which facilitates a dispute between two parties only - the prosecution, acting on behalf of the collective public interest and the defence. In recent years, however, the victims' movement has gained momentum as advocates of victims' rights have been engaged in an impassioned campaign to enhance the participatory rights of victims in the criminal justice process. Fervent arguments have been articulated pertaining to the value of various forms of victim input. This paper cogitates some of these arguments and critically evaluates how enhanced victim participation in the criminal justice process has the potential to undercut the integrity of the Anglo- American adversarial system; a system with objective adjudication at its core.

Introduction

In light of the conceptualisation of crime as an offence against the state, the structure of the criminal justice system in England, Wales and Northern Ireland enables a conflict between the state, representing the public interest and the suspect. Accordingly, once a victim enters the criminal justice process their role shifts to that of a peripheral witness while the state becomes the theoretical 'surrogate victim.'¹ Thus, decisions may be taken by the prosecution to circumvent trial, to accept guilty pleas on relatively minor charges or to drop the charges irrespective of the views or interests of the victim.² At the trial stage of the criminal justice process, victims have no inherent "right to be heard" or to present a narrative account of the alleged offence that transpired.³ They are therefore deprived of any form of proactive participation in the criminal trial.⁴ In recent years, victims within this jurisdiction have enjoyed enhanced service rights through improved court facilities, better access to information, and entitlements to compensation.⁵ However, as Erez remarks, victims covet more than the 'pity and politeness' that non-enforceable service rights offer.⁶ What they desire are enhanced procedural rights so as to obtain the opportunity to have their say in court in their own way.⁷ However,

¹ Deborah Kelly and Edna Erez, 'Victim Participation in the Criminal Justice System', in Robert Davies, Arthur Lurgio, Wesley G. Skogan (eds), *Victims of Crime* (2nd Ed, Sage Publications Inc., California 1997) 232.

² Andrew Sanders and Imogen Jones, 'Victims in Court', Sandra Walklate (ed) *Handbook of Victims and Victimology* (1st, Willan Publishing, Oxon 2007) 283.

³ Jonathon Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, (Hart Publishing, Portland Oregon 2008) 116.

⁴ Doak (n3) 116.

⁵ Jonathon Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' [2005] *Journal of Law and Society* 294, 294;

The services provided are outlined in Part 7 of the Code of Practice for Victims of Crime Northern Ireland

<http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/c-o-p-for-victims-of-crime-sept-2012.pdf> and in The Code of Practice for Victims of Crime in England and Wales at pages 2 and 3

<http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/c-o-p-for-victims-of-crime-sept-2012.pdf> accessed 30th December 2014.

⁶ Kelly and Erez (n1) 233.

⁷ Judith Herman, 'Justice from the Victim's Perspective' [2005] 11 *Violence Against Women* 571, 573.

bestowing the victim with a greater voice in the criminal justice process is a problematic ideal due to the rigid structure of the Anglo-American adversarial system, which is based upon the nonpartisan adjudication of the guilt or innocence of the suspect.⁸

This paper will engage in a critical discussion of the status of the victim in the criminal justice process so as to assess whether or not providing the victim with a more radical voice in this process would dilute the integrity of the adversarial system. The first section will outline the foundation of the adversarial system. The following sections will critically evaluate the arguments advanced in favour and against providing the victim with a greater voice in the criminal justice process as part of the prosecution, through a victim's advocate and at sentencing. Finally, the impact of victim-centred developments in the criminal justice process at an international level will be examined. By critically analysing both sides of the argument, this paper will proceed to the conclusion that providing victims with a greater voice in the criminal justice process imperils undermining the objectivity of the trier of fact and the public prosecutor, thus attenuating the integrity of the adversarial system.

I. The Adversarial System

At the core of the adversarial system is the trial, which is controlled by the prosecution and the defence and characterised by its antagonistic and hostile atmosphere.⁹ Fletcher appositely compares the adversarial trial to a 'seesaw' noting that the system is functioned by two lawyers whose control alternates at various stages of the criminal trial; 'sometimes one is flying high, sometimes the other.'¹⁰ There is a heavy burden placed on the parties in the adversarial system to produce evidence to substantiate their own case and to pierce the arguments of the opposition.¹¹ Thus Landsman describes the operation of the adversarial trial as being heavily contingent upon 'a sharp clash of proofs ... in a highly structured and forensic setting.'¹² The defence and prosecution present their arguments before an impartial judge or jury. The trier of fact therefore remains an objective observer in order to reach a fair and unbiased decision that is in the public interest. This ensures the protection of the due process rights of the suspect. As the adversarial system is a well-established, rigid, bifurcated structure, the consensus in the literature is that it would take extensive reform to amend the system in order to facilitate providing a greater voice to a third party.¹³

II. A Balancing Act?

Proponents of victims' rights argue that the criminal justice system should reflect a balance of rights between the victim and the suspect.¹⁴ They contend that prosecutorial discretion should be modified so as to allow the interests of the victim to come to the fore at the trial, as the rights of the defendant currently take centre stage in the present adversarial criminal justice system.¹⁵ Thus campaigners of victim-centred reform are currently engaged in an uphill battle, fighting for a realignment of the structural and normative parameters of the criminal justice system to include the private interests of the victim along with the interests of the public.¹⁶ These arguments emanate from the victims' movement, which surfaced in the 1970s as a result of extensive criticism of the way in

⁸ Doak (n5) 296.

⁹ *Ibid* 297.

¹⁰ George Fletcher, *With Justice for Some*, (Addison-Wesley Publishing Company, United States of America 1995) 189, 195.

¹¹ Doak (n5) 297.

¹² Stephen Landsman, *Readings on Adversarial Justice: The American approach to adjudication* (West Publishing Company, Minnesota 1988) 2.

¹³ Doak (n3) 150.

¹⁴ Ian Edwards, 'An Ambiguous Participant' [2004] *British Journal of Criminology* 967, 968.

¹⁵ Doak (n5) 316.

¹⁶ Jonathon Doak, Ralph Henham and Barry Mitchell, 'Victims and the sentencing process: developing participatory rights?' [2009] *Legal Studies*, 651, 651.

which the criminal justice system uses victims to obtain a statement, prove a point and then relegate them to a subordinate role as a witness.¹⁷ Arguably, one way in which the interests of the victim could become prominent in the criminal justice process is to provide victims with a voice to freely recount the alleged crime at the adversarial trial through the prosecutorial process.

Victims' rights advocates assert that authorising the victim to testify in his/her own words at trial would ensure that the court is cognizant of all the facts of the case and not solely the information specified by the victim in response to questions posed by the prosecution.¹⁸ Doak contends that a victim's right of allocution should therefore serve to abet the adjudicator in the fact-finding process by ensuring that supplementary information is made available to the trier of fact from a party directly involved in the alleged offence- not just from the prosecution and the suspect.¹⁹ In that respect, Doak further asserts that this argument is grounded in 'logic'.²⁰ Moreover, supporters of enhanced victim participation in the criminal justice process argue that providing the trier of fact with ancillary information about the alleged offence leads to a formulation of more accurate decisions concerning the fate of the suspect.²¹ Accordingly, permitting the victim to testify in this manner at the adversarial trial, can work in favour of the public interest in that it can positively substantiate the fact-finding process.²² Indeed, although the adversarial system deems cross-examination as the most effective mechanism to obtain the truth, Doak intimates that the structures, rules and advocacy tactics that direct the adversarial system habitually result in a blurring of the facts of the case.²³ Arguably, by having a more comprehensive picture of the crime, the court is thereby in a more effective position to sentence the offender, strengthening the outcome of the adversarial trial.²⁴

Conversely however, it is well established within the adversarial system in England, Wales and Northern Ireland that the prosecutor acts as the representative of the interests of the public and not as an agent representing the private interests of a third party.²⁵ As public prosecutions must be fair and objective, it is contended that giving the victim a greater voice at trial through testifying would impair the objectivity of the adversarial system. Indeed, it is questionable as to whether it would be fair and just for the defendant, if the court were to accept the subjective interests of the victim to prevail through the prosecution over the interests of the general public. Doak notes that the subjective input of the victim could potentially impede with the objective pursuit of justice, which is at the core of the adversarial system.²⁶

In support of this argument Edwards reasons that one cannot defend the granting of increased participation rights to victims purely because these rights are granted to defendants.²⁷ It is contended by Edwards that certain procedural rights enjoyed by the defendant may be inapposite to victims.²⁸ He argues that the defendant's right to legal representation is premised upon the fact that the defendant must receive a fair trial, without being 'subjected to the unrestrained power and resources of the state'.²⁹ Edwards argues that according a voice to the victim as opposed to the state based on the hypothesis that it is imperative to strike a balance between the rights enjoyed by the victim and the defendant cannot be validated, as the victim is not in a position of inequality in relation

¹⁷ Jo-Anne Wemmers, 'Where do they belong? Giving Victims a place in the criminal justice process' [2009] Criminal Law Forum 395, 398. Part 5 of the Code of Practice for Victims of Crime Northern Ireland notes that victims only have to give evidence if this is necessary to prove the case (n5); Herman (n7) 581.

¹⁸ Doak (n3) 135.

¹⁹ Jonathan Doak 'Victims' Rights and the Adversarial Trial: The impact of Shifting Parameters (Thesis Ph.D. Faculty of Legal, Social & Educational Studies, Queens University Belfast 2004) 48.

²⁰ *Ibid.*

²¹ Hoyle & Zedner, 'Victims, Victimization and Criminal Justice' in Maguire et al (eds), *The Oxford Handbook of Criminology* (2007, Oxford University Press), 412.

²² Doak (n19) 48.

²³ Doak (n5) 298.

²⁴ Doak et al (n16) 653.

²⁵ The Code of Crown Prosecutors http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf accessed 30th December 2012.

²⁶ Doak (n3) 118.

²⁷ Edwards (n14) 972.

²⁸ *Ibid.*

²⁹ *Ibid.*

to the state.³⁰ Moreover, the possibility of injustice is not the same for the victim as it is for the defendant.³¹ Fundamentally, the possibility of victim participation as part of the prosecution has been extensively criticised due to concerns that it would enable subjective and ultimately prejudicial submissions to be made by the victim on matters concerning the collective public interest, which is predominantly of state concern.³²

III. The Victim's Advocate

Secondly, those in favour of providing the victim with a greater voice in the criminal justice process contend that auxiliary prosecution, through a specific victim lawyer ought to be available for the victim.³³ The predominant fear however, pertaining to the introduction of a victim prosecutor, in addition to the public prosecutor, is that this practice would violate the due process rights of the defendant. Kirchengast fervently disregards this argument asserting that an auxiliary prosecutor would present the victims' submissions in a factual and objective manner, having consulted the public prosecutor and defence counsel, like any other submission that would be expected from a registered lawyer at court.³⁴

In support of this argument, it is imperative to highlight that some adversarial systems have, in recent years, introduced measures permitting the introduction of a victim's lawyer to work in conjunction with the public prosecutor at trial. The Swedish criminal justice system, for example, permits this process.³⁵ Corresponding with judicial practice in England, Wales and Northern Ireland, the prosecutor presents the case against the defence and before an objective arbitrator. Kirchengast contends that the operation of the auxiliary victim prosecutor system in Sweden is illustrative of a process that is congruent with the adversarial system, as it does not jeopardize the integrity of the public prosecution.³⁶ Additionally, certain countries with purely adversarial systems have introduced legislative reform to confer the victim with an enhanced voice through a victim representative, albeit to a lesser extent than the system in Sweden.

The Republic of Ireland, for example, has introduced legislation to enable separate legal representation for complainants in rape and serious sexual assault cases.³⁷ The victims' counsel may intercede in the trial when the defence wishes to introduce sexual history evidence.³⁸ Moreover, in the United States a number of states have adopted amendments to their constitutions to facilitate the victim advocate system.³⁹ However, it is imperative to note that the scope of the Irish legislative provisions is constricted.⁴⁰ The victim's representative cannot participate in the trial itself due to the bipartite structure of the adversarial system. The lawyer can only object to overly belligerent cross-examination of the victim where the defence wishes to introduce sexual history evidence.

These practices in Sweden, Ireland and the USA depict how an adversarial system can adapt to enable a specific victim prosecutor to work in harmony with the public prosecutor without impeding the veracity of the adversarial system. It is therefore contended that providing the victim with a greater

³⁰ *Ibid.*

³¹ Doak (n5) 316.

³² Tyrone Kirchengast, 'Victim Lawyers, Victim Advocates, And the Adversarial Criminal Trial', [2013] 16 New Crim K Rev 568, 570.

³³ Kirchengast (n32) 571.

³⁴ *Ibid* 591.

³⁵ Christian Diesen, 'Therapeutic Jurisprudence and the Victim of Crime' [2011] Progression in forensic psychiatry: About boundaries 579, 579; Kirchengast (n32) 571. The trial process in Sweden is an integrated one. The pre-trial phase is inquisitorial, while the trial phase is adversarial.

³⁶ Kirchengast (n32) 573.

³⁷ Section 4A(1) of the Criminal Law (Rape) Act 1981, as inserted by s. 34, Sex Offenders Act 2001.

³⁸ *Ibid.*

³⁹ The states Wisconsin, West Virginia and New Hampshire for example allow complainants' representatives to make representations when questions governing the admissibility of sexual history evidence are being considered in court.

⁴⁰ Doak (n5) 296.

voice through a victim lawyer should be viewed as an additional mechanism to pave the way to justice and thus ought to be supported.⁴¹

Despite the eloquence of this argument, it has faced criticism from commentators who note that the notion of auxiliary prosecution is profoundly alien to the adversarial tradition.⁴² Opponents of this conception premise their argument on the basis that the adversarial system is fundamentally founded on a contest between the prosecution and the defence, and that the introduction of a party representing the interests of the victim would undermine the principle of equality of arms, subverting the integrity of the adversarial system.⁴³ This view is based on the supposition that victim's interests will harmonize with those of the prosecution, leaving the defendant to face what Karmen describes as a 'double onslaught'.⁴⁴ Moreover, the weight of Kirchengast's aforementioned argument that the victim's representative would present the victim's case in an objective manner is questionable as the entire purpose of the victim advocate scheme is to represent the subjective interests of the victim. It is therefore asserted that to provide the victim with a greater voice in the criminal justice process through the medium of an auxiliary representative would be to infringe the defendant's right to a fair trial, undermining the integrity of the adversarial system.⁴⁵

IV. Sentencing and the Vengeful Victim

In terms of giving the victim a greater voice at sentencing, it is imperative to allude to the contentious victim impact statements. The 1996 England and Wales Victims Charter announced the establishment of experimental Victim Personal Statement schemes, which would be taken in addition to a witness statement. The scheme was implemented in October 2001 and its purpose is to highlight the medical, psychological, financial and emotional harm caused by the crime.⁴⁶ It is presented to the court after the guilt of the offender is determined but before the sentencing process ensues. Only facts are sought through this statement, thus the victim is not provided with a medium to express his or her views on the impending sentence of the offender.⁴⁷ This scheme differentiates from the American victim personal statement system whereby victims are permitted to assert in the statement their opinions concerning the length or type of sentence to be conferred, which is then taken into consideration by the court. Moreover, the United States Supreme Court in *Payne v Tennessee* (1991) ruled that the opinion of the victim could serve to assist the court in deciding for or against the death penalty.⁴⁸ Significantly, recent empirical research revealed that the influence of the victim's opinion in capital punishment cases significantly increased the chance of the defendant receiving a death sentence.⁴⁹ Additionally, in the common law jurisdiction of New Zealand the Victims' Rights Act 2002 permits victims to influence sentencing.⁵⁰ In light of these schemes in New Zealand and America, the victim impact scheme in England, Wales and Northern Ireland has been heavily criticized as providing victims with a limited means to participate in the criminal justice process.

In light of the assumption that certain victims of crime would seek retribution against their offender through the criminal justice process, the participatory rights of the victim at sentencing are

⁴¹Kirchengast (n32) 590.

⁴²Doak *et al* (n16) 654.

⁴³Lorraine Wolhuter, Neil Olley and others, *Victimology: Victimization and Victims' Rights* (Routledge Cavendish, London 2009) 196.

⁴⁴Wolhuter *et al* (n43) 196.

⁴⁵*Ibid.*

⁴⁶Victim Personal Statements: A guide for police officers, investigators and criminal justice practitioners, <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/victims-and-witnesses/working-with-witnesses/vps-guide-cjs-practitioners.pdf> accessed 30th December 2012.

⁴⁷Practice Direction VPS [21001] 4 ALL ER 640.

⁴⁸*Payne v Tennessee* 501 U.S. 808, 827 [1991]

⁴⁹Ray Paternoster and Jerome Deise 'A heavy thumb on the scale: The effect of Victim Impact Evidence on Capital Decision Making,' [2011] 49(1) *Criminology* <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.2010.00220.x/abstract> accessed 6th January 2014.

⁵⁰Section 21AA of the New Zealand Victims' Rights Act 2002.

restricted.⁵¹ Accordingly, it has been contended that if revenge is the victim's priority, it is not negligible to state that they are likely to seize an opportunity at the sentencing stage of the trial to demand severe consequences for their offender. This argument is supported by Herman's research concerning the victim's perspective of justice.⁵² Following 22 in-depth interviews, Herman found that the vast majority of the victims interviewed regarded justice as being administered when their offenders were exposed and disgraced.⁵³ Alternatively, victims may desire a lenient sentence for the offender due to a multiplicity of priorities.⁵⁴ For example, in a domestic violence case, procuring treatment for the offender may be the dominant concern of the abused, rather than a harsh custodial sentence.⁵⁵ Thus providing the victim with a greater voice in the criminal justice process through the victim impact statements has been criticized as potentially opening the door for arbitrariness in the adversarial system, should the subjective contribution of the victim be permitted to affect sentencing decisions.⁵⁶

Commentators have argued that to give a victim a voice in this manner, permitting them to have a hand in dictating the outcome of sentencing could introduce a novel and 'unpredictable variable into the penalty equation' which would jeopardise the principles of certainty and objectivity which lie at the heart of the adversarial system.⁵⁷ Abramovsky argues that the use of the victim impact statement at sentencing may result in a judge being influenced by the words of an 'eloquent' victim, thus imposing a higher sentence on one defendant, while another defendant, having committed a crime against a 'destitute', less persuasive victim could obtain a lighter sentence.⁵⁸ This argument prevailed in the Court of Appeal case of *R v Nunn* where, Judge LJ acknowledged that allowing victims' opinions to influence sentencing would lead to 'cases with identical features [being dealt with] in widely differing ways, leading to unfair disparity.'⁵⁹ Thus there is concern as to whether giving the victim a voice to influence decision-making through the personal statement would intercede with the independent, unbiased decision-making power of the trier of fact. The intrinsic complexities of human nature and human desires could therefore lead to uncertainty in decision making, subverting the integrity of the adversarial trial.

Conversely however, it is imperative to note that supporters of enhanced victim participation contend that this argument is based on nothing more than an assumption about what victims seek through the criminal justice process.⁶⁰ Whilst it would be credulous to believe that all victims would not seek revenge against the offender through sentencing, research suggests that the majority of victims do not desire retaliation in the aftermath of the offence. For example, in a study conducted by Campbell, Devlin *et al* to evaluate the Northern Ireland youth conferencing service, the research found that the majority of victims did not attend the youth conferencing to seek revenge or express anger towards the offender. Rather 79% of victims stated that they had participated in the conference in order to help the young offender.⁶¹ Moreover, in an evaluation of the victim statement projects Hoyle *et al* found that victims did not encourage vindictiveness in sentencing or exaggerate what the

⁵¹ Andrew Karmen, *Crime Victims: An Introduction to Victimology* (5th ed Thomson Wadsworth, California 2004) 151; Doak (n3) 152.

⁵² Herman (n7).

⁵³ *Ibid* 587.

⁵⁴ Karmen (n51) 151.

⁵⁵ *Ibid*.

⁵⁶ Wemmers (n17) 399.

⁵⁷ Doak (n3) 152.

⁵⁸ Abraham Abramovsky 'Victim impact statements: Adversely impacting upon 'Judicial Fairness' [1992] 8 (1), *Journal of Civil Rights and Economic Development*

http://scholarship.law.stjohns.edu/jcred/vol8/iss1/2/?utm_source=scholarship.law.stjohns.edu%2Fjcred%2Fvol8%2Fiss1%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages accessed 29th December 2014.

⁵⁹ *R v Nunn* [1996] 2 Cr App R(S) 136, at 140. (Emphasis added)

⁶⁰ Doak *et al* (n16) 655.

⁶¹ Catriona Campbell, Roisin Devlin *et al*, 'Evaluation of the Northern Ireland Youth Conference Service', (Northern Ireland Office Statistical and Research Series: Report No.12, 2005)

<https://www.restorativejustice.org.uk/sites/default/files/resources/files/Evaluation%20of%20the%20Northern%20Ireland%20Youth%20Conference%20Service.pdf> accessed 4th January 2015.

offender deserved, rather they tended to 'understate ... the impact of offences.'⁶² Thus there is strong evidence to refute the assumption that all victims would unduly punish their offender if given a voice at sentencing.

Whilst this is a cogent argument, other justifications for repudiating giving the victim a voice at sentencing subsist. It is for example, not inconceivable that people may lie when reporting alleged crimes to the police. Sanders alludes to the example of a shop owner who has burned down their own premises in order to be compensated by their insurance policies.⁶³ It is therefore contended that a system in which victims were permitted to influence the custodial sentence of the alleged offender would be as indefensible as one which ceremonially chastened them.⁶⁴ In essence, what is argued is that in an adversarial system the court cannot give credence to the sentiments of the victim, whether they are founded on vengeance or forgiveness as to do so would be to weaken the principles of proportionality and objectivity in sentencing thereby impacting the integrity of the adversarial system.⁶⁵

V. Trends on the International Platform

Doak *et al* argue that there is a broader recognition internationally that trial justice must facilitate enhanced victim participation and can no longer sideline victims due to the exigencies of the adversarial system.⁶⁶ The International Criminal Court (ICC) has adopted measures to empower victim participation in the trial. Article 68 of the Rome Statute provides that where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented at appropriate stages of the proceedings, by the legal representatives of the victims, in accordance with the Rules of Procedure and Evidence.⁶⁷ These views must be presented in a manner that is not prejudicial to the rights of the accused and a fair and impartial trial.⁶⁸ It is contended that providing the victim with the *locus standi* to participate in the trial at the International Criminal Court exemplifies how it is possible to offer the victim a greater voice in the criminal justice process without violating the rights of the suspect in a court setting that implements adversarial procedures.⁶⁹ Conversely however, it must be acknowledged that it may be exceedingly confident to assert that the implementation of these norms at the international level will transfigure the role of the victim at a domestic level.⁷⁰

The influence of international developments is limited by the deeply rooted structure of the adversarial system in this jurisdiction, which is, as noted, firmly centred upon a contest between two parties, the state and the accused.⁷¹ Moreover, it is contended that the victim-focused developments of the ICC are not symptomatic of all court practices at an international level. For example, victims testifying at the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) are not permitted to testify in their own words unlike the ICC procedures. Resembling the adversarial system in England, Wales and Northern Ireland, victims are solely permitted to testify as a witness. Mekijan has remarked that the victim's limited participatory rights at the ICTY and the ICTR stem from the fear that the input of the victim could result in undue delay in the trial process, thereby

⁶² Carolyn Hoyle et al, 'Evaluation of the One Stop Shop and Victim Pilot Statement Projects', (A report for the Home Office Research Development and Statistics Directorate 1998)

<http://tna.europarchive.org/20080727010344/homeoffice.gov.uk/rds/pdfs/occ-one.pdf> accessed 30th December 2014

⁶³ Andrew Sanders and Others, *Criminal Justice*, (4th edn, Oxford University Press, Oxford 2010) 43.

⁶⁴ Sanders (n63) 43.

⁶⁵ Wolhuter *et al* (n43) 197.

⁶⁶ Jonathon Doak, 'The Victim and the criminal process: an analysis of recent trends in regional and international tribunals' [2003] 23 *Legal Studies* 1, 9; Doak (n3) 138.

⁶⁷ Article 68(3), Rome Statute of the International Criminal Court UN Doc. A/CONF. 183/9 of 1998. Article 68 concerns the protection of victims and witness and their participation in the proceedings.

⁶⁸ *Ibid.*

⁶⁹ Doak (n3) 137, 138, 150. The ICC regime is based on something of a hybrid between adversarial and inquisitorial models according to Doak.

⁷⁰ Doak (n3) 244.

⁷¹ *Ibid* 245.

jeopardizing the fair trial rights of the accused to be tried expeditiously.⁷² Indeed, this argument could also be applied to justify the refusal to provide the victim with a voice in the criminal justice process at a domestic level, as to do otherwise could result in exceedingly lengthy trials, impacting upon the fair trial rights of the defendant.

Conclusion

In the last decade, progress has been made in England, Wales and Northern Ireland to empower and help victims within the reach of the criminal justice process.⁷³ The court experience has been made easier for them through entitlements to various service rights. Moreover, in light of the establishment of the Victim's Commissioner, Baroness Helen Newlove, a passionate advocate for victims' rights, it is probable that further improvements for victims of crime involved in the criminal justice process will be introduced.⁷⁴ However, in light of the aforementioned analysis, victims' advocate groups assert that there is yet a long way to go before victims are truly recognized as an important party to the alleged crime, along with the suspect and thus entitled to a voice within the criminal justice process. It is manifest, however, that in order to accommodate enhanced participatory and procedural rights for victims, profound modification of the structural and normative parameters of the adversarial criminal justice system is required. Accordingly, the challenge facing governments is to find a compromise whereby the victim's voice can be heard and is easily distinguishable within the framework of the adversarial system, whilst simultaneously safeguarding the defendant's due process rights. As Van Ness has asserted, perhaps the predominant question concerning victim participation is not how to circumvent the conflict of rights between the accused and the defendant but rather how to manage the parties interests effectively, so that as many conflicting interests as possible can be recognised by the criminal justice system.⁷⁵

Nevertheless, despite the potent arguments mooted in favour of enhanced victim participatory rights, it is currently unfeasible to bestow the victim with a greater voice in the criminal justice process within the prevailing parameters of the adversarial framework. This is due to the fact that the fundamental aims of the system are the unprejudiced adjudication of guilt and the protection of the due process rights of the defendant. To conclude with the words of the U.S Supreme Court in *Shepherd v Maxwell*, bestowing the victim with greater participatory rights in the criminal justice process risks undermining the integrity of the adversarial system as, a criminal defendant is entitled to 'a public tribunal free of prejudice, passion, [and] excitement.'⁷⁶

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⁷² Gerard Mekjian and Mathew Varughese, 'Hearing the Victim's voice: analysis of victims' advocate participation in the trial proceedings of the ICC' 17 Pace International Law Review 1, 14. The rules of procedure of both ad hoc Tribunals have been based predominantly on the adversarial system.

⁷³ In addition to improved service rights, victims of crime in England and Wales now have the right to review a CPS decision not to bring charges or to terminate all proceedings under the Victims' Right to Review Scheme http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/ accessed 5th January 2015.

⁷⁴ The Victims Commissioner was created by sub section 48 of the Domestic Violence, Crime and Victims Act 2004. The Commissioner for Victims and Witnesses: Report for the Secretary of State for Justice 2013-2014 outlines the Commissioners plans for 2014-2015 <http://www.justice.gov.uk/downloads/about/victims-commissioner/victims-commissioner-annual-report-2013-14.pdf> accessed 30th December 2014.

⁷⁵ Daniel Van Ness, 'A reply to Andrew Ashworth' [1993] 4 Criminal Law Forum 301, 304 as cited by Doak (n5) 215.

⁷⁶ *Sheppard v. Maxwell*, 384 U.S. 333, 350 [1966]