

Victims' and defendants' rights: can they be reconciled?

This briefing paper analyses the idea that, within the criminal justice system, victims' and defendants' rights are mutually incompatible. It concludes that current criminal justice policy, by focusing on the idea of 'rebalancing' the system in favour of the victim, may have created false expectations for victims, their families and the wider community. At the same time, some important protections for defendants have been eroded – but without these changes necessarily delivering real improvements for victims.

The material in this briefing is drawn from ten papers, written by academic experts, practitioners and policy makers, that have been published as a book by the Legal Action Group (LAG)¹.

Key lessons

- There is general agreement that victims' needs are not presently being met. Along with being treated with more understanding and respect, victims could benefit from having a legal right to better information about their case and better protection from unwanted publicity.
- Recent changes to the rights of defendants, such as allowing evidence of previous misconduct, and changes to the 'hearsay' and 'double jeopardy' rules, have not necessarily enhanced victims' rights.
- The need to avoid wrongful convictions means that the defendant must remain at the centre of criminal proceedings.
- There should be more opportunities for victim participation in the trial process.
- Neither the interests of victims, nor those of society as a whole, are served by reducing the rights of defendants in the hope of making it easier to convict them.

rethink

“ It does not serve the interests of victims or the wider community for an innocent person to be convicted while the true offender remains undetected... ”

The original versions of these papers were presented at a series of four seminars in the summer of 2003, organised by LAG to promote a dialogue between stakeholders in the criminal justice system and other interested parties as part of its project, Reconciling Rights in Criminal Justice, funded by Rethinking Crime & Punishment.

What is the function of the criminal justice system?

One way of understanding the criminal justice system is by looking at the purpose of criminal proceedings. Many would agree that their main aim is the conviction and appropriate punishment of the guilty and the acquittal of the innocent, with a secondary aim of ensuring that as little pain as possible is caused to everyone concerned in carrying out the main aim². From this perspective, it follows that the defendant must remain at the centre of criminal proceedings and that the wrongful conviction of the innocent is one of the main risks that the system must avoid.

This may be seen to differ from the way in which the Government has presented its vision of the criminal justice system. The Government has suggested that the system aims to reduce crime and the fear of crime and to dispense justice fairly and efficiently, promoting confidence in the rule of law. The Government has also committed itself to 'redressing the balance' between victims' and defendants' rights, on the basis that criminal justice has been unfairly weighted towards defendants for too long. This briefing paper looks at the conflicts and tensions within this position and questions whether it is helpful or appropriate to set the rights of defendants against those of victims.

Why do defendants need 'rights'?

There are strong reasons why the defendant needs to remain at the centre of criminal proceedings. After all, it is he or she whose alleged conduct is under scrutiny by the court, and who is facing the possibility of punishment – including, in some cases, the loss

of liberty. Because conviction can carry such serious consequences, most commentators agree that it is more important to avoid the wrongful conviction of the innocent than the wrongful acquittal of the guilty. In any case, it does not serve the interests of victims or the wider community for an innocent person to be convicted while the true offender remains undetected, possibly to reoffend.

The need to avoid wrongful convictions requires the criminal justice system to assume that the accused is innocent until found guilty, and to insist that the burden of proving his or her guilt falls on the prosecution – which, after all, has all the resources of the state at its disposal³. For similar reasons, the prosecution has to satisfy a higher standard of proof than a claimant in the civil courts; the guilt of the accused must be established 'beyond reasonable doubt' rather than on the balance of probabilities. Essentially, the rights of the defence are – or should be – framed round the assumption that the defendant is innocent. This principle is reflected in Article 6 (2) of the European Convention on Human Rights, which states:

'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

Recent changes to the rights of defendants

Since its election in 1997, the Labour government has made criminal justice one of its key areas of domestic policy. There have been unprecedented levels of activity in this field; the Government has created over 360 new criminal offences and launched numerous initiatives relating to crime, criminal processes and public order.

One such initiative is 'Narrowing the Justice Gap', launched in 2002, which set an ambitious target for reducing by around 20 per cent the gap between the number of recorded offences and those that result in a conviction. There are concerns about this project assessing the performance of the criminal justice system on the basis of hard targets, measured without reference to the quality of the additional convictions. There is a risk that this 'scorecard' approach could

“ Government pronouncements in support of the bill saw these measures as necessary to ‘rebalance rights’ in favour of victims. ”

introduce perverse incentives for the law enforcement and prosecution agencies to increase the conviction rate of suspects standing trial, rather than developing more effective – but probably more expensive – methods of policing to increase the rate of crime detection.

Arguably, managerial pressures of this type underpin many recent changes that compromise protections for defendants – including those placed on the statute book by the Criminal Justice Act 2003. The changes introduced by this Act include:

- Lifting restrictions on allowing evidence of previous misconduct, resulting in such evidence being admitted routinely, even when it is not relevant to the offence in question. This ignores research demonstrating that both juries and magistrates are unduly prejudiced by knowledge of previous convictions. Some commentators fear that this evidence will be used to prop up weak cases, and that the police will have a strong incentive to round up ‘the usual suspects’ rather than conducting a proper investigation.
- Requiring the defence to give more detailed advance disclosure of its case than previously required – including revealing its legal arguments. The defence must also produce an advance list of the names and addresses of its witnesses. The defence can be penalised for non-compliance with these requirements by having ‘adverse inferences’ drawn from an incomplete defence statement.
- Changes in the ‘hearsay’ rule of evidence. Hearsay evidence consists of an oral or written statement made out of court, which is presented to the court in an attempt to prove that the matter stated is true. The rule against hearsay evidence developed because such statements can be unreliable, especially as the maker of the statement is not available to be cross examined. In their original form, the proposed changes would have allowed the admission of most hearsay evidence. The clauses were modified as a result of strong opposition during their passage through parliament, but they will still allow for the

admission of hearsay evidence in a wide range of circumstances.

- Relaxing the so-called ‘double jeopardy’ rule, which has traditionally existed to protect someone who has been acquitted from being tried again for the same offence. As amended, the rule will permit an acquitted person to be retried (for certain serious offences) if compelling new evidence is available, provided that the Court of Appeal gives permission for the case to be re-opened. The fact that new evidence must be viewed by the Court of Appeal as ‘compelling’ casts doubt on whether the jury would be willing to acquit at a retrial.
- Allowing the prosecution to make an application to the court for a trial on indictment to take place without a jury – either because of the complexity of the case (certain fraud offences only), or because of a perceived danger of jury tampering.
- Amendments to the Police and Criminal Evidence Act 1984 that increase from 24 hours to 36 hours the period that a suspect can be held in police custody in relation to an arrestable offence, and which reduce the protection available to suspects in police detention.⁴

Government pronouncements in support of the bill saw these measures as necessary to ‘rebalance rights’ in favour of victims. Whether these changes have actually had the effect of enhancing victims’ rights is open to question, however:

What do we mean by ‘victims’ rights?’

There is an important distinction between ‘procedural rights’ for victims – that is, rights in relation to the trial process itself; and ‘service rights’, such as the right to be kept informed about the progress of cases and decisions made, the right to counselling and other types of support. While service rights generally have little effect on the position of defendants, these often require additional resources to be effective. On the other hand, procedural rights – which may cost little to implement – have the potential to undermine the rights of defendants.

“ ..there are a number of options for improving the experience of victims of crime, enhancing the protections they are given without undermining the position of defendants. ”

Another important question is the extent to which the position of victims has been affected by the Human Rights Act 1998, which incorporated the European Convention on Human Rights into domestic law. It can be argued that victims are at the centre of human rights thinking, because human rights law is based on a set of values that seeks to root out abuse of power from whatever source⁵. Caselaw has extended the interpretation of the Convention to show that the state has a positive obligation to provide adequate protection from violations of Convention rights for vulnerable victims and potential victims of serious crime. This includes a requirement, in appropriate cases, to balance the interests of the defence against those of witnesses or victims who are called on to give evidence. However, the Convention does not go so far as to provide victims in general with express rights in relation to the trial process.

What rights do victims already have?

The needs of victims within the criminal justice system have not wholly been neglected, particularly with regard to 'service' rights. Partly in response to effective lobbying by victims' groups, the following facilities and measures have been put in place:

- A national telephone helpline, and court-based support services provided through Victim Support
- For many criminal offences, the opportunity to provide a victim personal statement to the court⁶
- For serious sexual or violent crimes for which the offender is serving at least 12 months' imprisonment, the right to be consulted and notified about the release of the offender
- Special measures for vulnerable witnesses (including victims) when giving evidence in court – such as facilities to give evidence by video link⁷
- A Victims' Charter, which gives guidance on the way in which victims of crime can expect to be treated by the criminal justice system

- In some cases, the opportunity of making a claim for compensation to the Criminal Injuries Compensation Authority
- A possibility (not a right) to press for a compensation order against the offender, as part of the court's sentence (the court is obliged to consider whether or not to make a compensation order at the sentencing stage of every case).
- The right to apply to the High Court for judicial review to challenge a decision of the prosecution not to pursue a case
- The residual – and little used – option of pursuing a private prosecution, in the event that a prosecution by the state does not proceed.

In addition, under the Domestic Violence and Victims of Crime Act, there will be a code of practice for victims, which – unlike the Victims' Charter – will be binding. Failure to abide by the code will give victims the right to make a complaint to the Parliamentary Ombudsman. The Act also establishes a Commissioner for Victims, who will have an advisory role in relation to policies that affect victims of crime.

Could victims be given additional rights?

There is general agreement that victims' needs are not at present being properly met. Victims have gained no actual advantage from the recent reductions in defendants' rights. On the other hand, there are a number of options for improving the experience of victims of crime, enhancing the protections they are given without undermining the position of defendants.

- Victims need to be treated with greater understanding and respect at all stages of 'their' case – by the police, the CPS, by the court and by prosecution and defence lawyers.
- Victims would benefit from having an enforceable, legal right to be kept informed by the CPS about the progress of 'their' case; they should also be given information to help them understand the trial process and the basis on which a decision on sentencing is likely to be made.

“ Neither the interests of victims, nor those of society as a whole, are served by reducing the rights of defendants to make it easier to convict them. ”

- Victims and witnesses could be better protected against unwanted media publicity during the trial process, including in relation to assertions made about them during pleas in mitigation by the defence.
- Opportunities for victim participation in the trial process could be explored, perhaps giving victims more dialogue with prosecution lawyers and access to relevant documents⁸.
- Compensation under the Criminal Injuries Compensation Authority should be made less restrictive⁹.

Conclusion

Neither the interests of victims, nor those of society as a whole, are served by reducing the rights of defendants to make it easier to convict them.

Protections for defendants exist for good reasons: no one benefits from a person being found guilty of an offence that he or she did not commit. In appealing to victims' rights to justify its criminal justice policies, the Government masks real tensions between victims and defendants.

The underlying problem may be that current Government thinking on criminal justice policy is driven largely by managerial priorities instead of being underpinned by a shared public understanding of what is meant by 'justice'. The current vogue for assessing performance by setting easily measured targets is also highly problematic: 'What counts is what works – but what works is that which can be counted'¹⁰. Maintaining high standards of justice must be seen as part of the wider public good. Pitching the rights of victims against those of defendants could serve to undermine these standards. It is in everyone's interest that these apparently competing rights should be reconciled.

Rethinking Crime & Punishment supported *Reconcilable Rights: analysing the tensions between victims and defendants*, but the findings presented here are those of the authors and not necessarily those of the Esmée Fairbairn Foundation.

Notes

¹ *Reconcilable Rights: analysing the tension between victims and defendants*, edited by Ed Cape; Legal Action Group, 2004.

² See 'Criminal procedure: the rights of the victim, versus the rights of the defendant' by J R Spencer QC, in *Reconcilable Rights*.

³ It is for this reason that the defendant has traditionally had the right to remain silent both before and during the trial – a right that has now been substantially diminished by the Criminal Justice and Public Order Act 1994.

⁴ When the arrest provisions of the Serious Organised Crime and Police Act 2005 come into force, the determining factor regarding maximum length of detention will be the mode of trial category of the offense for which the person has been arrested and not whether it is an arrestable offence: i.e. the concept of arrestable offence is abolished.

⁵ See Francesca Klug: 'Human rights and victims' in *Reconcilable Rights*.

⁶ Experts disagree on the efficacy of victim personal statements. See the differing views of Edna Erez and Andrew Sanders in *Reconcilable Rights*.

⁷ These measures are not available for vulnerable defendants, however – a situation which is arguably inconsistent with the fair trial principles under Article 6 of the European Convention on Human Rights

⁸ A number of the authors in *Reconcilable Rights* suggest that the ways in which a number of European inquisitorial jurisdictions enable much greater participation by victims might be adapted for a UK context. See, for example, the chapters by Sandra Walklate, Andrew Sanders and Barbara Hudson.

Rethinking Crime & Punishment (RCP) is a three year strategic grantmaking initiative funded by the Esmée Fairbairn Foundation. RCP aims to raise the level of public debate about the use of prison and alternative forms of punishment.

Esmée Fairbairn Foundation
11 Park Place
London
SW1A 1LP

Tel 020 7297 4700
Fax 020 7297 4701

info@rethinking.org.uk
www.rethinking.org.uk

