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I wish to submit the thesis detailed above for examination in conformity with the regulations for the degree given above. I declare that the thesis embodies the results of my own research or advanced studies and that it has been composed by myself. Where appropriate, I have made acknowledgement to the work of others.

Signature: Date:

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination, which has led to the award of a degree.

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I would like to dedicate this thesis to the loving memory of my Mum, Vera Murchie.

CONTENTS

ABSTRACT

There are continual calls from victims' rights campaigners for greater victim participation in criminal justice proceedings. This thesis examines this call. In order to appraise greater victim participation, it is imperative that we understand what is meant by the terms 'victim' and 'participation'. Without this understanding we would be unable to determine accurately whether or not greater victim participation would benefit criminal justice.

Further, any question of increasing victim participation must be assessed according to the aims of criminal justice. As such, this thesis begins by discussing the aims of criminal justice; fairness, truth-finding and catharsis. By understanding the aims of criminal justice, this thesis can evaluate the purported benefits of greater victim participation.

Using the analysis and knowledge gained from the previous chapters, this thesis concludes that greater levels of procedural victim participation will not alone benefit criminal justice. Giving victims greater levels of procedural participation; giving them a voice or more control of the process for example, without ensuring that the basic service rights of victims are working effectively would not be beneficial. For victim participation to function effectively, all levels of participation must work together ensuring that at all times victims are supported, educated and informed about the criminal justice process. A shift in

focus, away from advocating greater procedural rights for victims and instead ensuring the process as a whole is effective will be more beneficial to criminal justice and the parties involved.

INTRODUCTION

Over the last two decades, there has been a strong consensus among victims' rights campaigners, politicians, the media and the general public that criminal justice has neglected victims. The victim has become the 'forgotten man' of criminal justice.[1] Due to this movement, policy makers and politicians have actively sought to 'reform' the position, 'balance the rights' of victims with those of offenders and place victims 'at the heart of criminal justice'.

This thesis explores the metaphor of 'rebalancing the rights of victims' and considers whether greater victim participation would benefit criminal justice.[2] Despite what is stated above, 're-balancing the rights' of victims with those of offenders may appear fair, it is not as simple as that. The difficulty is that reforming victim participation in this manner by trying to argue for a 'rebalance' of rights is not a practical option. Offenders and victims are two very distinct and different parties to criminal justice. The offender has his freedom at stake. An argument based on the notion of giving victims and offenders rights which are in balance with one another does not recognise the different roles each party plays. In turn, if the roles of each party are not correctly understood, and rights are simply created to allow for a balance to be achieved, this would not be beneficial for criminal justice. However, during the peak of the victim rights

[1] Jo-Anne Wemmers 'Where do they Belong? Giving Victims a Place in the Criminal Justice Process' Criminal Law Forum (2009) 395, 395

[2] Ian Edwards 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' Criminal Law Review (2002) September 689, 968

movement, victims felt empowered by the promise of change. Although some reforms have been made and improvements to the treatment and participation of victims in criminal justice, many victims feel that the reforms have not gone far enough and the changes made are a shadow of the changes once promised.

Creating reforms in reaction to campaigns without full consideration of the circumstances causes problems and often promises are not kept or fulfilled. This thesis aims to assess the reality of greater victim participation in criminal justice. Rather than simply determining that there is an imbalance between victims and offenders and, consequently, that victims deserve and must have more rights, this thesis will determine whether greater victim participation will benefit criminal justice based on whether the aims of justice are better achieved. Before this thesis can answer the question posed, there are preliminary discussions which are required.

The first discussion looks at what is meant by the victim. It is the view of this thesis that often reforms and campaigns focus on the 'ideal' scenario when putting forward their position. The problem with only considering the 'ideal' scenario is that too many other scenarios exist and failure to consider them will not result in an accurate assessment. However, the complexity of victimology creates problems and there is a pragmatic need for simplicity. Consequently, although this thesis does highlight the problem of solely focusing on the 'ideal victim', it too uses the concept of the 'ideal victim' but endeavours to illustrate

the shortfalls of doing so where evident.[3] Secondly, this thesis will discuss what is meant by 'participation'. Finally, the aims of criminal justice will be considered. In making any assessment, this thesis must have something to measure the benefit against. If greater victim participation will benefit the aims of criminal justice then it will be considered a benefit. Once this thesis has considered the aims of criminal justice, has discussed 'victim' and 'participation' and analysed the different types and levels of such, this thesis will aim to evaluate whether greater levels of victim participation will benefit criminal justice. This is not a simple question to answer and this thesis does not aim to provide one simple, clear cut answer; rather it seeks to illustrate and highlight potential complexities. Further, this thesis aims to put forward, where possible, reasoning as to the benefits and drawbacks of victim participation in criminal justice and come to a conclusion as to the current state of victim participation in criminal justice.

Structure

This thesis is divided into four chapters; Who is the 'Victim'? Victim Participation, The Aims of Criminal Justice and An Assessment of Participation. Due to the complexity of the question posed, this thesis must understand the extent of each issue fully before conducting discussions to answer the question. The first chapter considers the theories on 'Who is the Victim?' The concept of victimology is discussed and the different approaches therein. This thesis

[3] Nils Christie, 'The Ideal Victim' in Ezzat Fattah (eds), *From Crime Policy to Victim Policy* (MacMillan London 1986)

highlights theorists' and campaigners' common focus on the 'ideal victim' and the restrictions thus created. The second chapter assesses Victim Participation. An evaluation of the different levels of participation using Arnstein's[4] ladder of participation along with Ashworth's[5] distinction between service rights and procedural rights, which illustrates the varying levels of participation. This thesis then considers Victim Impact Statements (VISs) which are a method of participation. It is noted that this is not the only method of victim participation; however, it is the most prominent. Further, the limitations of VIS schemes illustrate the limitations of procedural victim participation. The third chapter introduces a brief discussion of 'The Aims of Criminal Justice'. This is necessary for this thesis in order to provide a base for making an assessment as to potential benefit. It is the view of this thesis that if greater victim participation is to amount to a benefit, then it will result in the aims of criminal justice being better achieved. The final chapter makes 'An Assessment of Participation' taking into account the preliminary discussions of this thesis. In considering the different theories of participation, 'who is the victim' and the aims of criminal justice, it is concluded that the VIS schemes provide a platform for victim participation that could be of benefit to criminal justice. However, in order for VIS schemes to be of actual benefit, they must work in conjunction with the service rights of victims. Criminal justice systems must assess victim participation from the very start of the criminal justice procedure. Focusing

[4] Sherry Arnstein 'A Ladder of Citizen Participation' Journal of the American Institute of Planners (1969) 24(4) 216

[5] Andrew Ashworth 'Responsibilities, Rights and Restorative Justice' British Journal of Criminology (2002) 42(3) 578

solely on whether greater procedural rights will be of benefit without first determining whether the service rights of victims are performing and achieving their aims will fall short in improving criminal justice for victims. Creating procedural rights for victims without ensuring that the supporting rights are functioning effectively will not provide a stable and beneficial platform for greater victim participatory rights. In turn, if criminal justice systems do introduce greater procedural rights without determining whether the service rights are effective, victims could be left disheartened and let down by criminal justice. Victims will not have had the support, information and education required to ensure they fully understand the role and function of VIS and any other form of greater procedural rights. However, if criminal justice systems ensure that all levels and rights of participation for victims are working effectively, victims will be fully aware of the role and function of VIS and will have received adequate support and information up to this point in the process to better understand criminal justice. This will in turn lead to a more beneficial criminal justice system for all parties involved.

CHAPTER ONE: WHO IS THE VICTIM?

The Victim

In recent years, victims have become a significant focus of criminal justice. Criminologists, policy-makers, researchers, organisations and lobbying groups have shown an interest in and developed a focus on victim-related issues which can be seen in the growing number of publications, media attention and political agendas. Yet victims' being classed as 'participants in criminal justice' has not been the case for many years. In fact, prior to this recent trend, victims were regarded as "the forgotten man"[6] or as the fairy tale "Cinderella of the criminal law"[7].

However, the elision of a victim's voice in criminal justice has been transformed through the new thinking of Victimology. "Victimology consists of the scientific study of 'victims'."[8] This definition seems relatively simple. However, a widely discussed question is what types of victims should be included within the discipline of victimology. The scope of Victimology has altered over time. Prior to the 1950s, victimology was conceived as a very broad field.[9] However, by the 1950s, the focus had changed to crime victims and their role in criminal justice

[6] Joanna M Shapland and Jon Willmore and Peter Duff , *Victims in the Criminal Justice System* (Gower 1985 United Kingdom) 1

[7] Rob Mawby and Sandra Walklate, *Critical Victimology: International Perspectives* (SAGE 1994 London) 58

[8] Sam Garkawe, 'Revisiting the Scope of Victimology – How Broad a Discipline Should it Be?' International Review of Victimology (2004) 11 275, 275

[9] Garkawe illustrates the point in reference to Robert Elias's work in 1986. Elias in this writing defines victimization as oppression, a lack of human rights and a criminal attack. He believes that victimization includes more than victims of crime.

systems. This focus was strengthened during the 1950s, 1960s and 1970s with further writings by criminologists and the ensuing support and assistance, if there is, as it sounds, a relationship between this work and the support provided to victims of crime.[10] Furthermore,

> "since the agreement of the UN General Assembly to the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power, debate on the issue seemed to have subsided. The title of the Declaration suggests that a consensus emerged that victimology should only include victims of crime and victims of abuse of power, each of these terms having specific definitions as found in the Declaration."[11]

However, Sam Garkawe's study into whether there should be this limitation or not concludes that there is "no strong justifiable reason to limit the scope of the discipline, although for practical reasons it will often be necessary for particular research projects."[12] In essence, Victimology is a complex area, with, in theory, no limitations on the scope of the victim. However, for the purposes of this thesis and simplicity, Victimology will be defined hereafter as the study of the victims of crime and the psychological effect of their experience.

[10] The focus of victimology moved to primarily concern victims of crime following the writings of criminologists such as Von Hentig, Mendelsohn and Schafer who became the early pioneers of victimology.
[11] Garkawe (n 8) 275
[12] Garkawe (n 8) 275

As with many theories, there are subdivisions of this theory with different academics, and theorists, in the field taking distinctly different approaches. Within the Victimology perspective, there is a distinction between positivist, radical and critical Victimology.[13] Each of these strands provides a different approach to determining who the victim is.

A Victim of crime means "a person who has suffered direct, or threatened, physical, emotional or pecuniary harm as a result of a commission of a crime."[14] However, a victim of crime can be portrayed in various ways; the underdog; the weak, passive victim; the survivor seen as a symbol of strength; groups seen to be victims, for example hate crime victims. Due to the varying dimensions of the victim, there are still many unanswered questions and difficulties in finding patterns that would easily classify victims, because virtually anyone can become a victim.[15]

Nevertheless, there are ideological views as to who a victim is and what they should be. Christie[16] describes the notion of the 'ideal victim', that is, a person who is easily given the status of being a victim. Ideal victims are represented as innocent, vulnerable and deserving of help, sympathy and attention. The media play a particularly strong role in encouraging this image of the ideal victim

[13] It is also understood that there are other subdivisions of victimology, notably feminist victimology, but due to the restrictions of this thesis, these will not be discussed.
[14] Ursula Smartt, *Criminal Justice* (SAGE 2006 London) 6
[15] Jim Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2004 England)
[16] Nils Christie, 'The Ideal Victim' in Ezzat Fattah (eds), *From Crime Policy to Victim Policy* (MacMillan London 1986) 18

through their representation of certain victims depending on the victim's story and the media's selectiveness.[17] Furthermore, victims' rights campaigners will often deploy the image of an ideal victim to illustrate, if not persuade of, the importance of victims' rights in criminal justice.[18] This is due to the effect that using a non-ideal type victim in their campaign could have. Some victims have other characteristics, past discrepancies or actions, that the public, politicians and media rarely attribute to or associate with victims.[19]

Positivist Victimology

"Within positivist victimology, the victim is either given by the criminal law, or given by the self-evident nature of their suffering."[20] Positivist victimology categorises known, seen and common crimes. It is this strand of victimology which is used most by politicians to measure crime and the effects of crime. It is the most commonly used strand of victimology as it is the one most used by political governments and the media and their influence over the members of society controls much of what is known, believed and thought about criminal justice.

[17] Pamela Davies and Peter Francis and Chris Greer, *Victims, Crime and Society (*SAGE 2007 London) 20-49
[18] Dignan (n15) 17
[19] Adam Crawford and Jo Goodey, *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000 Brookfield Vermont) 124
Eamonn Carrabine, *Criminology: A Sociological Introduction (*2nd edn Routledge 2009 New York) 116
[20] Sandra Walklate, 'Who is the Victim of Crime? Paying Homage to the Work of Richard Quinney' Crime Media Culture (2012) 8(2) 173, 174

Positivist victimology underpins the methodological approach to the *International Criminal Victimization Survey*.[21] This survey measures 'normal', 'known' crimes, common to the ears of the everyday person. This, along with positivist victimology, fails to identify the more 'hidden' victims of crime, who are not seen by the public eye and whose victimisationhappens behind 'closed doors'; for example, victims of domestic violence, victims of child abuse and victims of corporate crimes.

Radical Victimology

The second strand of victimology is radical victimology. "This victimology brings to the table a much wider appreciation of the concept of victim and the definition makes visible categories of victims hidden from view within positivism."[22] The radical theory of victimology allows for a much wider interpretation of 'the victim' to be considered. It uncovers much of the complexity of this area, which under positivist victimology has remained untouched.

Radical victimology explores the permutations of "who is the victim" and allows us to identify not only the 'ideal', obvious victim but also identifies the victims who are less apparent. "Indeed, this version of victimology permits even those least likely to carry the label 'victim' (soldiers)[23] to be identified."[24]

[21] Walklate (n20) 174
[22] Walklate (n20) 175
[23] Although not included in the quote, a further example of this could be offenders.
[24] Walklate (n20) 175

However, radical victimology fails to consider the 'victim' out with the confines of the law. The radical approach widens the focus of the 'victim' from the positivist approach only focusing on the victims of 'seen' crimes to the victims of 'hidden' crimes. Yet, it does so by assessing victims as being victims of crimes as defined by the law.

Critical Victimology

The critical strand of victimology examines the process that creates 'victims'. It assesses the way crimes are created, which in turn allows for victims to be created. It examines not just the 'victim' of the crimes we already know, both seen and hidden, but also the process of criminalisation by which behaviours and individuals are transformed into crime and criminals.

> "Consequently, critical victimology asks questions about the term 'victim' itself, and the circumstances in which it is applied. It does this by focusing attention on the underlying structural processes that lead to the manifestation of victimisation."[25]

Taking the strands of victimology above, if we were to ask the general public to define 'the victim', assuming that the commonly held perspective of the victim accords with the positivist theory of victimology, the victim would be the victim of the crime already established by criminalisation. If we were to alter this to

[25] Walklate (n15) 176

consider the radical theory of victimology then they recognise both visible and 'invisible' victims. This would be a far wider interpretation of the victim, but would still remain confined to the crimes established by criminalisation. If we were to consider critical theory, they would look to assess the underlying structural processes of victimisation in order to determine the victim of each individual circumstance.

Cultural Notion of Victimology

There are other dimensions to the assessment of the victim out with the complexities of the study of victimology which we must also consider. This is the cultural notion of the victim. Public attitudes are influential in defining the victim. In particular, the media has a strong influence. If they want to portray someone as the victim, they do so in a manner that encourages us to empathise with that person and feel that we can relate to them. This again, is linked to the positivist theory of victimology but also to social constructionism. Social constructionism is a theory of knowledge in sociology that examines the development of jointly constructed understandings of the world.[26] It assumes that understanding, significance and meaning are developed not separately within the individual, but in coordination with other human beings. What becomes reality is therefore said to be socially constructed. What we can see and relate to allows us to better understand someone's pain, their suffering and

[26] The work of Peter L Berger and Thomas Luckmann in their book titled, 'The Social Construction of Reality' introduced the term social construction into the social sciences and created the notion of social constructionism refered to above.

helps us to empathise with them. Of greater interest, is the belief that by placing us side by side with the victim,

> "we are encouraged to feel what they feel. Indeed, media, political and professional invocations of the victim are all intended to move us: to court our compassion. Policies that are intended to give the victim a voice in the criminal justice process, such as impact statements and restorative justice conferences, reflect a similar intent."[27]

The Direct Victim

These theoretical constructs of the victim can be categorised into two distinct types: the direct and the indirect victim. Positivist and radical theorists refer to the 'direct' victim. It is the victim who we can see, the one we can easily identify and identify with. This is understandably the easiest 'type' of victim for our criminal justice process to consider.

The Indirect Victim

The indirect victim is not the most obvious victim. It is not the victim we will automatically identify. This will notably be the victim which critical victimology may identify. It is the soldier, he who has been a victim of witnessing some of the most horrifying acts, but who may have also committed some of the most horrifying crimes in order to survive. The indirect victim is not the most obvious

[27] Walklate (n20) 178

victim. It is not the victim we will automatically identify. It is the victims of crimes who are not the direct victim, who have not been wronged against, but are witness to and hurt by it. To illustrate this 'type' of victim, it would be the pedestrian on the street who witnesses the direct victim being killed. Or on a less imaginative scale, it is the shopkeeper, the barman, who is victim to the crime which takes place on their premises.

So Who is Our 'Victim'?

This chapter has discussed the distinct theories contained within the field of victimology. Furthermore, the influence of the media and social constructionism also play an important role in creating victims. However, this thesis requires selecting a 'type' of victim to place at the focus of the discussion. From the discussion above, it is clear to see the complexities within victimology and defining the victim. However, although it is vital to understand and reflect on these complexities, there is a pragmatic need for simplicity. As such, for the purposes of this thesis, and to enable the most effective analysis given the restrictions of time and length, focus will be placed on the 'ideal victim'. As detailed, there are limitations with focusing on the 'ideal victim' especially when considering reforms which could have consequential effects on other stakeholders in criminal justice. Although the focus will be on the 'ideal victim' this thesis will highlight and illustrate the limitations of this when and where applicable.

CHAPTER TWO: WHAT IS MEANT BY VICTIM PARTICIPATION?

Victim Participation

"In recent years, the phenomenon of 'victims rights' has been catapulted to the forefront of policymaking on both domestic and international platforms."[28] As such, academic and political interest in victims of crime continues to grow. Governments around the world have carried out reforms to provide services, rights and compensation to victims and, while the nature and substance of these reforms and initiatives have varied from country to country, there has been a clear trend in criminal justice and social policy towards improving the position of those hurt by crime[29]. Since the victims' rights movements, victims' rights campaigners, politicians and the media have focused the debate on the notion of 'balancing' the rights of victims with the rights of offenders. The problem this phrase has caused is that it is not, and should not be, a simple question of 'balancing' the rights of the parties. It is a manipulative metaphor used by campaigners, politicians and the media to suggest that they are looking to solve

[28] Jonathan Doak *Victims' Rights, Human Rights and Criminal Justice, Reconceiving the Role of Third Parties* (Hart 2008 London) 1

[29] In Great Britain, the Queen in her speech on 27th May 2015 stated that "Measures will be brought forward to increase the rights of victims of crime." Further, there have been several documents published by the Great British Parliament focusing on victim's rights, such as "Getting it right for victims and witnesses: the Government response." All of these commitments that are being made by the British Government state that an increase in the services and support provided to victims of crime is essential. Furthermore, in Canada, the Canadian Victims Bill of Rights was enacted by section 2 of chapter 13 of the Statutes of Canada and subsequently came into force on 23rd July 2015. Again, this bill of rights grants victims the right to information (sections 6-8), protection (sections 9-13) and participation (sections 14-15).

the issues of victim dissatisfaction through the modification of criminal justice systems and processes. It provides a powerful rhetoric with limited scope for rebuttal. "The rhetorical force of the metaphor makes it hard to refute the argument that defendants have a series of rights, so why shouldn't victims?"[30] The problem with this notion of 'balancing' is that it is not as straightforward as giving victims the same rights as offenders. For one, it is the offender who is on trial and not the victim. There are rights which are enshrined in European Union Law in respect of offenders and the same do not apply for victims.[31] Although, from the statements above, it could be argued that this thesis has highlighted the need for a 'rebalance' of the rights between victims and offenders, it also, of significance, illustrates how their respective 'roles' in and relationships to criminal justice are at times diametrically opposed. As such, and as Ashworth notes, the language of balance as,

> "a rhetorical device of which one must be extremely wary...At worst, it is a substitute for argument: 'achieving a balance' is put forward as if it were self-evidently a worthy and respectable good. Of course, the criminal process is often the scene of conflicting aims and interests. Of course, we would want the criminal process to be well balanced. But the difficulty is that many of those who employ this terminology fail to stipulate exactly what is being balanced, what factors and interests are to be included or excluded, what weight is being assigned to particular

[30] Ian Edwards 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' Criminal Law Review (2002) September 689, 968

[31] For instance the right to remain innocent until proven guilty.

> values and interests....where this occurs...it amounts to either self-delusion or intellectual dishonesty."[32]

This thesis agrees with Ashworth's view that to simply decide that, as offenders have a certain right, victims must also have it, is absurd and an inappropriate way of reforming criminal justice. Rights which defendants have may not apply in any way to victims and it would be futile to simply grant victims certain rights for the sole purpose of 'balancing'. Instead, we should, and must, research and discuss further the concept of participation in more detail and what it means and how it could, or should, be incorporated into criminal justice for victims.

We will first discuss the difficulties in simply defining participation. Participation encompasses varying levels and comes in many forms and it is imperative that we understand each of these. We must also consider the European influence on the conceptualisation of victims and the impact this has on criminal justice. Finally, we will consider the methods of victim participation, which are currently in place in criminal justice and the complexities and varieties of these methods. Participation is not a distinct process, therefore having a clear understanding of what it actually means is vital before determining whether greater victim participation will be of benefit to criminal justice.

[32] Andrew Ashworth 'Criminal Justice and the Criminal Process' British Journal of Criminology (1998) 28(2) 111

Defining Participation

> "The discourse of the victim's movement is dominated by appeals to participation and to rights. Yet, with the breadth of situations in which participation is employed as a rhetorical device, there is danger that, in using the term and in vaunting its appeal, we fail to capture its real significance."[33]

Defining participation is not easy. In ordinary, everyday usage, it means taking part in something or sharing in something. However, when we consider what is meant by participation in respect of victims, we realise that it actually has a far wider range of meanings.

> "This routine - even banal observation - has important implications. Participation has neither a single form, nor a single rationale. To participate may involve being in control, having a say, being listened to, or being treated with dignity and respect - all aspirations of those within the victim movement; but it may also mean providing information whether one wants to or not."[34]

Edwards, in his article, 'The place of victims' preferences in the sentencing of 'their' offenders', illustrates the varying degrees of participation through discussions of Sherry Arnstein's ladder of citizen participation. Arnstein

[33] Edwards (n30) 972-973
[34] Edwards (n30) 973

developed her ladder of participation in 1971 and included eight rungs. As Edwards notes, "her typology is highly subjective and, by her own admission, 'designed to be provocative' (it was intended to illustrate what she perceived as a significant hiatus between real empowerment and the maintenance of the status quo in power relations)."[35]

The eight levels of participation on Arnstein's ladder are as follows; at the bottom, manipulation, followed by therapy, informing, consulting, placation, partnership, delegated power and at the top citizen control. The lowest two rungs of Arnstein's ladder represent forms of 'non-participation'. Arnstein uses the example of citizens being placed on advisory committees for the purpose of educating them.[36] The next three rungs of the ladder, informing, consulting and placation are token participation forms. At this level, citizens would be informed and consulted about decisions. Jonathan Doak also considers the rights of victims in his book 'Victims' Rights, Human Rights and Criminal Justice, Reconceiving the Role of Third Parties'[37] and comments that many of the earlier measures introduced by the state,

> "such as compensation and practical support, were less contentious and were aimed at addressing the unment needs of victims...These measures generally refrained from conferring any new legal rights upon victims,

[35] Edwards (n30) 973
[36] Sherry Arnstein 'A Ladder of Citizen Participation' Journal of the American Institute of Planners (1969) 24(4) 216, 221
[37] Doak (n28)

> and (despite the lack of any legal status), these earlier needs-based reforms have been frequently described as 'social rights' or 'service rights'."[38]

At the highest levels on the ladder, partnership, delegated power and citizen control. "With the commencement of the Human Rights Act 1998, it is increasingly appearent that, in addition to accessing certain services, victims ought to be entitled to certain substanstive or procedural rights."[39]Arnstein draws a significant contrast between "real power to affect the outcome of a process and participation that she characterises as merely 'empty ritual' (by which she means participation, which ostensibly promotes involvement, but, in reality, serves only to bolster the legitimacy of the facilitating body or institution.)"[40] The benefit to this thesis of highlighting Arnstein's ladder of participation is that it illustrates the varying degrees and levels of participation. Further, as Arnstein notes, "the ladder juxtaposes powerless citizens with the powerful in order to highlight the fundamental divisions between them." [41] Arnstein, when developing the ladder was considering citizen participation in society, but for the purposes of this thesis, we can apply the eight stages to victim participation in criminal justice.

[38] Doak (n28) 12
[39] Doak (n28) 12
[40] Edwards (n30) 974
[41] Arnstein (n36) 218

Furthermore, both Jonathan Doak[42] and Andrew Ashworth[43] have produced notions for categorising participation of victims in criminal justice process. Ashworth differentiates between victim's rights through the terms 'service rights' and 'procedural rights'.[44] Doak discusses four rights which victims have; the right to protection, participation, justice and reparation.[45] Considering the concepts put forward by these three academics in the field, illustrates the complexity of what is being discussed. It is the argument of this thesis that in order to fully understand participation, consideration must be made to all of the constructs mentioned. Simply categorising victims rights into service rights and procedural rights is limiting and could prove difficult for rights which fall between the two categories or do not fit at all. Inevitably there will be spectrums for each of these. Indeed, Arnstein admits that,

> "another caution about the eight separate rungs on the ladder: In the real world of people and programs, there might be 150 rungs with less sharp and 'pure' distinctions among them. Furthermore, some of the characteristics used to illustrate each of the eight types might be applicable to other rungs."[46]

How then do you class them? Further, categorising the rights of victims into broad categories such as protection, reparation, justice and participation as

[42] Doak (n28)
[43] Ashworth (n32)
[44] Ashworth (n32)
[45] Doak (n28)
[46] Arnstein (n36) 218

Doak does is insufficient. It should be noted at this point, that this thesis does not claim to create a method for categorising and discussing victim participation. However, it does claim to illustrate and highlight the complexity of victim participation and the need to combine the different forms, levels and rights and ensure that each one is considered. Broad claims for more procedural rights for victims are useless. They provide no clear structure for how rights should be formed. They are empty promises, used by society to appease campaigners but not thought through sufficiently to resolve any of the real underlying issues.

In order to form some basis for discussion of victim participation, there is a need to create or adopt a certain categorisation of participation. It is too broad to not be simplified. However, and in knowledge of the contradiction to what is stated above, this thesis must decide on a categorisation for further discussion to be of any value. As such, reference will now be made to the broad right to participation, which contains within it Arnstein's eight levels and Ashworth's distinction between service and procedural rights.

Before discussing the varying levels and methods of participation further, we must consider the influence of the European Union on participation and the effects that this has on criminal justice.

The European Union Influence on Participation

Until the adoption of the Treaty of Maastricht, which created a so-called Third Pillar, relating to cooperation between Member States in the area of justice and home affairs, the EU was simply an international organization aimed at economic cooperation. However, the Treaty of Maastricht introduced European influence in the area of criminal justice. Consequently, any decision made by the European Union in respect of criminal justice would now become binding on Member States. In 2001, the EU adopted the 'Council Framework Decision on the Standing of Victims in Criminal Proceedings.' The main objective of this new instrument was to ensure victims were treated with dignity and provided with support and information during criminal justice procedures. As Marc Groenhuijsen notes;

> "The rules and practices as regards the main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed."[47]

[47] Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' International Review of Victimology (2014) 20(1) 31, 35

As a monitoring mechanism the EU relied on self-reporting of any progress made. At the assigned date, "none of the members had submitted the required report to the European Commission in Brussels."[48] In 2004, a report by the Commission concluded that none of the Member States had fully complied with its legally binding obligations. Five years later it was concluded in the Commissions next report that "The implementation of the Framework Decision (was) not satisfactory."[49]

The European Union (EU) has taken further steps to strengthen victims' rights. The Directive 2012/29/EU establishes minimum standards on the rights, support and protection of victims of crime and ensures that persons who have fallen victim of crime are appropriately supported in each Member State. The EU Member States must implement the provisions of the Directive into their national laws by 16th November 2015. Although the Directive does not create any required level of participation, which would equate to the higher rungs on Arnstein's ladder, it does confirm a basic level of rights which every victim in the EU should have. Chapter two of the Directive relates to the provision of information and support. These confirm the basic service rights for victims. Chapter three of the Directive is entitled 'Participation in Criminal Proceedings', however the level of participation given is minimal. It states that victims have *a 'right to be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and*

[48] Groenhuijsen (n47) 36
[49] Groenhuijsen (n47) 36

maturity.' Again, there remains scepticism as to whether the Member States will adopt this Directive by the time required or whether the EU will experience the same level of apathy as before.

It seems important at this point to note that although it may seem that Member States are simply refusing to enhance victims' rights, the scale of this kind of reform is immense.

> "When the international community determines that the victim 'is the forgotten party in the criminal justice system' much more is at stake. The entire system needs to be changed. All of the traditional routines should all of a sudden be considered obsolete. That is asking a lot from every state party involved."[50]

Furthermore, at times laws are created as a knee-jerk reaction to media influences, campaigns and do little but over legislate and render a procedure useless. For example, the EU may enforce minimum standards, but what is most important is whether, in the view of victims, those minimum standards go far enough, not far enough, or will be of any real benefit to criminal justice.

[50] Groenhuijsen (n47) 33-34

The Lower Levels of Participation: A Right to Services

At the lower levels of the ladder are the service rights which have been 'granted' to victims. These include, for example, the right to information, the right to understand and be understood, and the right to counselling, the right to support and the right to protection, for example being given a segregated waiting area from the accused. Further, victims should be informed by the police if the defendant is found, charged, cautioned, on bail. It would be hoped that victims would be informed of pre-trial hearings, the trial date itself. Subsequently, if the defendant is sentenced, it would be of benefit to the victims to be informed of the defendant's release date,[51] if they will be applying for early release and any conditions which may be in place. It would also be of benefit to victims to be informed, or made aware of persons who are able to assist them in understanding the criminal justice process, such as the concept of plea bargaining, why the charge given was chosen or specifically the exact function of the VIS.

These low level service rights seem obvious and if they were not present in criminal justice, it would undoubtedly be seen as unfair. Such rights do not conflict with any of the offenders' rights and are simply basic considerations and respect which should be shown to victims, rather than 'rights' as such.

[51] In some criminal justice systems there are rules in place stating that this is supposed to happen but often the reality is that they are not informed.

> "The rights of victims should chiefly be to receive support, proper services, and (where the offender is unable to pay) state compensation for violent crimes. There are arguments for going further, so as to achieve some measure of victim participation: this would require the provision of better and fuller information to victims, and the objective would be to enable some genuine participation in the process of disposal without giving [victims] the power to influence decisions that are not appropriately theirs."[52]

Furthermore, Irvin Waller considers that there are inalienable rights for victims of crime. Waller states that, "These are not rocket science. They are obvious inalienable rights that victims of crime would expect, although not necessarily what law enforcement, prosecutors, judges, or other government agencies are providing yet."[53] Waller identifies eight inalienable rights and include the right to be protected from the accused, the right to participation and representation, the right to effective policies to reduce victimization and the right to implementation not just rhetoric.[54] Waller's eight inalienable rights resemble Ashworth's service rights and from this, it is the view of this thesis that service rights should not be compromised and are a requirement. Compare this to the higher levels of participation, which will be discussed, and the complexity of increased participation is apparent.

[52] Andrew Ashworth 'Responsibilities, Rights and Restorative Justice' British Journal of Criminology (2002) 42(3) 578, 588
[53] Irvin Waller, *Rebalancing Justice Rights for Victims of Crime* (Rowman & Littlefield Publishers Inc 2011 United Kingdom) 36
[54] Waller (n53) 36

Higher Levels of Participation: A Right to be Involved

Higher levels of participation change the role of the victim from a spectator to an active participator. As Ashworth notes, "of a different nature are procedural rights for victims in the criminal process – such as rights to be consulted on the decision whether or not to prosecute, on the bail-custody decision, on the acceptance of a plea, on sentence and on parole release."[55] In recent years, the most prominent and highly publicised method for integrating victim input in criminal justice has been through Victim Impact Statements (VIS's). An evaluation of VIS's will now follow to highlight the issues at the heart of victim inclusion in criminal justice. It is noted that the discussion will focus solely on the pros and cons of VIS's. Further, it is noted that in so doing, the scope for criticism is far greater. However, there is a pragmatic need for simplicity to allow a clear focus of the discussion. In addition, the issues and challenges discussed about VIS's are transferable to discussions about other methods of procedural victim participation.

Victim Impact Statements

Victim Impact Statements (VIS's) have been operating since the 1980s in common-law jurisdictions including Scotland[56], the Republic of Ireland[57],

[55] Andrew Ashworth 'Victim Impact Statements and Sentencing' Criminal Law Review (1993) July 498, 499

[56] Chalmers J and Duff P and Leverick F, 'Victim Impact Statements Can Work, Do Work (for Those Who Bother to Make Them)' Criminal Law review (2007) May 360 - VIS were introduced in Scotland in November 2003

[57] Criminal Justice Act 1993, s5

Canada [58], Australia [59] and New Zealand [60]. "Most commentators and practitioners view the provision of victim impact information as important and generally consider victim input on the harm they suffered a step toward improving criminal justice procedures and goals." [61] Since VIS's were introduced, two models of the VIS have developed. The *communication* model of VIS's allows victims to provide statements as a means of communicating with the other parties in the criminal justice process as to the effect the crime has had on them. The second model, defined as the *impact* model is based upon the idea that the VIS provides victims with the opportunity to influence the sentence given to an offender. Erez and Roberts have also noted that,

> "These models also relate (although do not map directly on to) another analytic dichotomy: *punitive* versus *restorative.* The impact perspective on the VIS exemplifies what Ken Roach has described as the 'punitive model' of victims rights...In contrast, the 'non-punitive model' or restorative model of victim rights promotes the interests of the victim from a restorative justice perspective."[62]

[58] Canadian Criminal Code, s722
[59] Criminal Law (Sentencing) Act 1989, s7
[60] Victim of Offences Act 1987, s8
[61] Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice', Criminal Law Review (1999) July 545, 547
[62] Edna Erez and Julian Roberts, 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' International Review of Victimology (2004) 10 223, 225

Pros and Cons of VIS's

VIS's have been a catalyst for procedural rights for victims. Although there may be other methods of victim participation, the pros and cons of VIS's can be transferred and applied to the pros and cons of higher level victim participation in criminal justice generally. As such, we will now discuss and highlight the complexities and varying opinions of the VIS to illustrate the difficulties of victim participation in criminal justice.

There are concerns about the possible negative effects that the VIS could have on criminal justice proceedings; namely that they could negatively affect the defendants' rights to a fair trial by causing prejudices to take place.

> "Although participation of victims is not per se in conflict with the presumption of innocence, there is at least one aspect of victim participation which creates a potential prejudice: the mere fact of victim participation entails an underlying presumption that the events (the crimes) are considered to have occurred in given circumstances and that certain people were the victims."[63]

Furthermore, there has been great concern over the actual purpose of the VIS and many are now concerned that it has falsely raised victim's expectations

[63] Zappala Salvatore, The Rights of Victims v the rights of the Accused, Journal of International Criminal Justice 8 (2010), 137 - 164

when they think of the influence they could potentially have during a criminal trial.

"While participatory rights are certainly emerging, there is still some uncertainty as to the precise role victims ought to play in criminal proceedings. Commentators remain divided as to whether victims should be able to have an input into key decision-making processes concerning prosecution, plea bargaining, or sentencing. If it is accepted that victims ought to have some sort of role, then the nature of that role still needs to be delineated so as to avoid impacting upon the fair and objective administration of justice."[64]

VIS's were introduced to provide victims with a procedural right. Do they actually achieve that? Or do they simply provide victims with the belief that they are going to participate, but in reality that belief is ultimately shattered? "The hope is often expressed that VIS's will improve victims' satisfaction with the system."[65] Ultimately, from studies conducted, it seems that the VIS alone does not equate to satisfaction with the justice system for many victims.

> "Canadian research suggests that completing a VIS does not, of itself, increase victims' satisfaction with the system or their willingness to co-operate with the system in the future. Most victims found the completion of a VIS to be a positive experience, but their overall views depend on several other factors, particularly information on the progress of their

[64] Doak (n28) 244
[65] Ashworth (n55) 501

> case and information about the criteria for decision-making at various stages."[66]

There have been many comments made about the concern that VIS's would cause unduly harsh sentences to be imposed upon defenders where they previously would not have. Advocates opposing victim participation and in particular the VIS scheme, such as Ashworth, believe that they wrongly give a false understanding to victims who are let down when they fully realise the extent of their participation. Ashworth in particular argues that,

> "adversarial systems, in particular, use VIS and other participatory processes as 'sweeteners' to increase victims' satisfaction with the criminal justice system, to 'con' them into thinking that their interests are being looked after by the government or as a way of using victims 'in the service of offenders'"[67]

However, Edna Erez, an advocate of VIS states that,

> "studies conducted in the USA and in Australia comparing sentencing outcomes of cases, with and without VIS, and research in Australia on sentencing trends and comparison of sentence outcomes before and after

[66] Ashworth (n55) 501
[67] Andrew Sanders, 'Victim Impact Statements: Don't Work, Can't Work' Criminal Law Review (2001) June 447, 448

> the VIS reform, suggest that sentence severity has not increased following the passage of VIS legislation."[68]

The studies suggested that in actual fact, the VIS could have a potentially beneficial effect on sentencing with some cases being noted that after the VIS information was presented to the court, the sentence originally foreseen was decreased as a result of the VIS. It was noted that, generally, the VIS did not bring to the courts' attention any new information than that previously brought by other documents. Erez "blames the conservatism of criminal justice agencies for this, claiming that the problem of VIS has not been the instrument itself or its effect…but rather the hostile environment in which VIS has been implemented."[69]

There have also been some concerns voiced over the purpose of the VIS and how it was perceived by the victims. "The first and most important issue is the conceptual basis of the Victim Personal Statement (VPS) scheme. The official governmental leaflet about VPS, *Making a Victim Personal Statement* (Home Office 2009), does not suggest that the criminal justice system positively values, needs, or requires any information from the victim; rather, the making of a VPS is presented as entirely a matter of choice for the victim."[70] There is concern with the way in which the VIS has manifested itself in that victims feel that they

[68] Erez (n63) 547-548
[69] Sanders (n69) 448
[70] Anthony Bottoms and Julian Roberts J, *Hearing the Victim, Adversarial Justice, Crime Victims and the State* (Routledge 2011 New York) 38

should not, or do not want to make a VIS because the crime they suffered is not severe enough to do so. Furthermore, many victims of more serious crimes do not want to make a VIS because they do not want to relive the horror they have already gone through. This is evidently the case for many rape or domestic violence victims who want nothing more to do with proceedings. At times, in these events, the victims have not wanted to bring proceedings, however the police have done so as a result of the actions they have witnessed. For these reasons, there is a lot of debate as to whether making VIS's compulsory would equate to a step for victim participation and benefit to the system.

From a study conducted by Christine Englebrecht, she concluded that "criminal justice actors and victims held contrasting views on the purpose of participation."[71] Victims of crime seemed to believe that the purpose of participation was to allow them an opportunity to give their opinion about the punishment of the offender. They thought from the outset that they would actually have 'rights' that would be considered. The reality seems to be that, although they may put forward an opinion on how the criminal act affected them, they do not have any influence as to the sentence. They are unable to communicate their feelings personally and the prosecutor remains the final decision maker. Many victims were left feeling frustrated by what they had hoped would be actual 'rights' and what was, in reality, more a gesture containing no real powers.

[71] Christine Englebrecht, The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' Criminal Justice Review (2011) 36 129, 146

Howard Zehr and Ali Gohar, early advocates of making the needs of victims central to the practice of restorative justice, provide a useful insight into the 'needs' of victims in their analysis of restorative justice contained in 'The Little Book of Restorative Justice.'[72] Although their discussion does focus on restorative justice processes, this thesis will adopt their analysis in this thesis as it is the view of the author that their analysis could be key to understanding the basic needs of victims. Ensuring that these 'needs' are met in some way could solve the problem of victim dissatisfaction with criminal justice.

Zehr and Gohar state that there are four types of needs of victims which criminal justice neglects: Information, Truth-telling, Empowerment and Restitution or Vindication. By information, they do not mean information as to the date and time of hearings or the "legally-constrained information that comes from a trial or plea agreement."[73] Zehr and Gohar identify that victims need information in the form of answers to their questions about the offence. Why did it happen? What has happened since? Often this information can only be received by access to the offender. Zehr and Gohar highlight the importance of truth-telling for victims. They note that "an important element in healing or transcending the experience of crime is an opportunity to tell their story of what happened."[74] They suggest that there are therapeutic, cathartic benefits of re-telling the story and they highlight that in re-telling the story, it is important to

[72] Ali Gohar and Howard Zehr, *The Little Book of Restorative Justice (*Good Books 2002 New York)
[73] Gohar (n74) 13
[74] Gohar (n74) 19

do so in a setting where they can receive public recognition of it or have the ones who caused the harm listen to their story and the affects the incident has had on them.

Empowerment is also discussed by Zehr and Gohar as being a neglected need of victims.[75] Victims often feel that they have lost control of the situation. Involving them in their own case in the criminal justice system can be a way of empowering them and ensuring that they feel that their control has been restored. Finally restitution or vindication is a need of victims which is often neglected by criminal justice systems. Restitution allows the victim to move on from a situation if the offender makes an effort to make right any harm caused. Apology could be another way of the offender making right the situation with the victim. If the victim feels restitution has taken place, often the feelings of vindication, which are natural when we are treated unjustly, are lessened or even removed.

There has also been discussion since the introduction of the VIS as to whether it goes far enough in representing the victim. Many believe that it does. However, many are still of the belief that a victim should have control of the proceedings and should be able to speak out in court. They should present their VIS to the court by oral account. There are a number of issues with this belief for both the victim, offender and the justice trial. Many victims, as previously stated, simply do not want to relive the experience again. They do not want to be involved in

[75] Gohar (n74) 19

the proceedings and certainly do not want to have to stand up publicly in court to do so. It is issues such as these, where the reality of all victims not being 'ideal' comes to fruition. Victims are individuals, each with different backgrounds and characteristics. Taking each 'type' of victim and considering reforms against them individually, could result in different conclusions as to the benefit of the reform.

There are several academics[76] who believe that victims should have, as Ashworth describes them, procedural rights as well as service rights.[77] However, many of the academics in favour of these rights are dissatisfied with the VIS scheme. They believe that the VIS scheme does not in itself give victims any greater satisfaction than they experienced without it. In fact, many academics believe that "the more participative the process, the more satisfied the victims."[78] They state that the dissatisfaction of victims with the VIS scheme is in relation to the limited extent of their role. They are not aware of how the statement is used by the court, they are not aware of the many sentences available to the court when determining an offender's fate. All they are aware of is the limited time given to the reading of their statement. It is argued that "better understanding would help victims appreciate why a given sentence was passed and they would be more likely to be satisfied by it."[79] However, there is the belief that the VIS scheme is not the process that will allow for this to happen.

[76] Zehr, Gohar, Ashworth, Cardwell
[77] Ashworth (n5) 578
[78] Sanders (n69) 457
[79] Sanders (n69) 456

Conclusion

As can be seen from the analysis of participation above, it is a complex area with participation ranging from being informed and provided with support to being involved and participating procedurally in the criminal justice process. Simply stating that victims deserve greater levels of participation is a sweeping statement to make without full consideration.

First, as discussed in the previous chapter, many of the advocates for greater victim participation make their claims based upon the notion of the 'ideal' victim. However, often the victims of crime have past criminal records themselves or have in some way contributed to the incident which occurred. At times even the lines may be blurred as to who is the victim and who is the offender in any given incident. Although this thesis, due to the pragmatic need for simplicity has also focused on the 'ideal victim', it illustrates and highlights the limitations in doing so. Failure to consider the limitations created by solely focusing on the 'ideal' victim will not provide an accurate assessment of participation.[80]

The methods for greater participation are also complex and it is difficult to ensure that any given method achieves the desired results. The discussion, which focused on the lower level rights of victims, illustrated the clear divergence in the level of rights which come under participation. Irvin Waller

[80] It should be noted that this thesis will indeed focus on 'ideal victims' due to the pragmatic need for simplicity. However, the issues with limiting the focus in this way are discussed and identified and where possible this thesis will illustrate such limitations when and if they arise.

clearly identifies these low level service rights as being inalienable in criminal justice. However, absolute or not, ensuring that these low level rights are functioning effectively has not been the focus of criminal justice systems and this is perhaps to their detriment.

The discussion on VIS's highlighted the diverging opinions and problems that arise with victim participation. Further, it provided a clear illustration of the varying levels of participation which conveys the complexity of this area. The primary concern with VIS's and with any procedural right for victims is the belief that they could negatively affect the defendants' right to a fair trial. There are also concerns that VIS's would cause unduly harsh sentences to be imposed upon defenders. Furthermore, in relation to the concern of unduly harsh sentences is the concern that if harsher sentences are not given, victims will feel disheartened by the VIS scheme. There are concerns that victims have not been educated sufficiently as to the role of the VIS and as such, have unrealistic expectations as to the effect it may have on the sentence given.

Through the discussions above, both sides of the argument for and against VIS's was portrayed. There are arguments stating that VIS's could result in harsher sentences yet there are also studies which suggest that they could in fact have the opposite effect. The complexity of victim participation is clear but so too is the need for victim involvement in criminal justice by any means. The discussion of Howard Zehr and Ali Gohar's theory showing that victims have 'needs' and this is what criminal justice should focus on, provides a useful

insight into participation. This thesis is of the view that VIS's alone are incapable of fulfilling Howard Zehr and Ali Gohar's injunctions of victims needs. In order to try and assess this more fully, this thesis, in the subsequent chapter, will consider whether greater levels of participation in the form of procedural rights would benefit criminal justice.

CHAPTER THREE: THE AIMS OF CRIMINAL JUSTICE

An Introduction to Criminal Justice

"'Criminal justice' is a term broad enough to encompass most of the concerns of penology, if not criminology."[81] In order to limit the notion of criminal justice to allow for an assessment of it, criminologists have focused their discussions and theories on the *process* of criminal justice. They have considered not only criminal justice, but also the various decision making stages through which a defendant is processed. In short, they consider criminal justice by assessing the criminal justice system.

"The 'Criminal Justice System' is not a structure which has been planned as a system...To refer to a 'system' is therefore merely a convenience and an aspiration."[82] There are several stages to every Criminal Justice System; initial investigation, trial, mediation, plea-bargaining, sentencing, and punishment to state a few. Each system varies their approach to criminal justice. As Ashworth notes, "it would hardly be possible to formulate a single meaningful 'aim of the Criminal Justice System' which applied to every stage."[83] Therefore, when the question is asked as to what is the aim of criminal justice, there can be many an

[81] Ashworth (n32) 1
[82] Andrew Ashworth *Sentencing and Criminal Justice* (Cambridge University Press 4edn 2005 United Kingdom) 75
[83] Ashworth (n82) 71

answer. "Balancing conflicting aims and priorities is of course part and parcel of the criminal justice enterprise."[84]

There are varying dichotomies of all Criminal Justice Systems. Academics[85] in the field have noted that for a Criminal Justice System to "derive practical value"[86], which this thesis will interpret to mean a system which is working for our society, a Criminal Justice System must generate "societal perceptions of fair enforcement and adjudication"[87] simultaneously. Achieving this noticeably creates a potential for conflict.

People are generally very keen to categorise Criminal Justice Systems. We have due process models, and crime control models, inquisitorial systems, adversarial systems, restorative justice systems, and the list goes on. Each system will have similar aims. The differences reside in the procedures that are put in place to achieve those aims. The different approaches of varying systems in achieving the aims of criminal justice is what influences which category the system will come under. However, as Packer argued, "...no system corresponds entirely with the due process or crime control positions. Instead, each system sits somewhere on a spectrum with due process and crime control at each

[84] Carson D and 'Others', *Applying Psychology to Criminal Justice* (John Wiley & Sons 2007 England) 252
[85] Josh Bowers and Paul Robinson, 'Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility' Wake Forest Law Review (2012) 47 211, 211
[86] Bowers (n85) 211
[87] Bowers (n85) 211

end."[88] This statement can apply to every category or theory of criminal justice. No Criminal Justice System is a solely crime control, due process, adversarial, inquisitorial, restorative, or therapeutic system. Each system will have procedures which are more akin to one of these categories. It is this divergence in procedures, which allow us to understand the aims of each individual system and the hierarchy of those aims which each system pursues. In short, there is no defining aim of criminal justice, but a collection of 'common aims' which every justice system will try to achieve, albeit to different extents and through different methods.

If we take an adversarial criminal justice system and the inquisitorial criminal justice system and make a brief comparison, it is clear to see that the hierarchy of aims differs from each system, although both do contain many of the same aims. The inquisitorial system lies in direct contrast from the conflict orientated adversarial system. "Common law adversarialism is generally contrasted with West European inquisitorialism, which is said to be characterized by an active role for the fact-finder, by decisions based on full judicial inquiry and by truth-seeking rather than proof-making."[89] It is argued that the inquisitorial system seeks the truth while the adversarial system seeks an outcome.[90] In a typical inquisitorial process, the trial is conducted by a presiding judge who determines the order in which evidence is taken and who evaluates the content of the

[88] John Child and Katherine Doolin, *Whose Criminal Justice? State or Community?* (Waterside Press 2011 United Kingdom) 36

[89] Arie Freiberg, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' European Journal of Criminology (2011) 8 82, 83

[90] Langbein states that the adversarial system suffers from a 'truth deficit'.

gathered evidence. The inquisitorial system allows the court to determine the credibility of each piece of evidence without being constrained by the strict rules of evidence found in adversarial justice systems. By contrast, in a typical adversarial system, the case is organised and the facts are developed by the sole initiative of the parties. The judge in an adversarial case reaches a decision based on the evidence and motions presented by the litigants before him. Although both adversarial and inquisitorial systems have the same function, the procedures and methods differ and in turn each system places weight on different aims of criminal justice. Generally, it can be said that adversarial systems place the aim of fairness as the paramount aim while inquisitorial systems place the aim of truth-finding as paramount. It is important to note that both systems are effective and ultimately an adversarial system will seek the truth as will an inquisitorial system aim to be fair, just perhaps not to the same extent.

This thesis will not discuss further the differing systems of criminal justice. However, the brief comparison above illustrates that no system is the same and as such, there cannot be one sole aim of criminal justice. It is further noted that there are many aims of criminal justice systems. However, in response to the pragmatic need for simplicity and due to restrictions on time and space, this thesis will focus on three aims of criminal justice; fairness, truth finding and catharsis, as it is believed that these are the aims which most directly link to victims. For the purposes of this thesis, the aim of fairness is considered as the

key aim of criminal justice working together with the aims of truth-finding and catharsis. Victims' rights campaigners often question whether criminal justice is *fair* to victims, has the *truth* been uncovered and does it provide for victims to *move on* from the incident.

The Aim of Fairness

"The fundamental idea in the concept of justice is that of fairness."[91] Thibaut and Walker hypothesized this notion through their analysis of data and research. They stated that "litigants' satisfaction with dispute resolution decisions would be independently influenced by their judgements about the fairness of the dispute resolution process."[92] Further, Bowers and Robinson noted that "a criminal justice system perceived to be procedurally unfair or substantively unjust may provoke resistance and subversion and may lose its capacity to harness powerful social and normative influence."[93]

From the above, fairness is key to ensuring that the people within any given society adhere to or comply with the criminal justice system. If a system is viewed as unfair or unjust, why would people adhere to it? Inevitably, in all societies, there will be a minority of citizens who do not adhere to the system. However, without this minority we would not have 'criminals' and entering into discussions as to why this minority does not follow the rules would be futile.

[91] John Rawls, 'Justice as Fairness' The Journal of Philosophy (1957) 54(22) 653, 653
[92] Tom Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' Law and Society (1988) 22(1) 103, 103
[93] Bowers (n85) 212

Several academics[94] have carried out in-depth research on procedural justice. They have discussed the relationship between process and outcome concerning perceptions of fairness. John Thibaut and Laurens Walker's seminal theory of procedural justice suggested that fair procedures influence disputants' satisfaction with the legal system, regardless of whether the outcomes received were fair or personally beneficial. Further research conducted by Leventhal broadens Thibaut and Walker's initial theory as summarised below by Tyler,

> "Thibaut and Walker differentiated between two aspects of control that parties might have over the procedure to resolve a dispute: process control (control over the opportunity to present evidence), and decision control (control over the final decision.) Leventhal identified six criteria: consistency, the ability to suppress bias, decision quality or accuracy, correctability, representation, and ethicality."[95]

Although both of the theories detailed above consider procedural fairness in reaching the decision and the decision itself, there has been further research conducted[96] which suggests that if the procedure alone is considered fair then the parties are likely to think that that criminal justice system is fair.

[94] Tyler, Thibaut, Walker, Casper.
[95] Tyler (n92) 104
[96] Tyler Rasinski and Spodick 1985 – process control is more important than decision control and Lind et al 1983 – only process control matters

Fairness is a complex notion with a variety of arguments and theories' professing what is required to achieve fairness. Below is a summary of the key arguments of fairness. It should be noted at this point that an in-depth discussion of these theories will follow in the subsequent chapter.

Nils Christie theorises that by allowing the defendant and the victim to take control of criminal justice procedure this is a fairer way of resolving disputes.[97] However, Duff on the other hand, believes that by ensuring that the State has control over proceedings, then society's legal norms will be abided and as a result a fairer system will be created.[98] Duff's belief is supported by Kantian thinking on criminal justice in that each criminal justice system requires a 'blaming relation' and the state fulfils this role. Further, Casper has theorized, after conducting research focusing on criminal defendants, that the outcome of criminal justice determines fairness.[99] Lind and Tyler's group value theory of procedural justice has at its heart the "fundamental claim...that being listened to is *symbolically* important, as it reveals that group authorities value individuals standing in their social groups."[100]

[97] Nils Christie, 'Conflicts as Property' The British Journal of Criminology (1977) 17 1

[98] Anthony Duff *Trial on Trial, Volume 2, Judgement and Calling to Account* (Hart 2006 Portland United States of America) 20

[99] Jonathan Casper, 'Having their day in court: defendant evaluations of the fairness of their treatment' Law and Society Review (1977-1978) 12

[100] Larry Heuer, 'What's Just About the Criminal Justice Process – A Psychological Perspective' Journal of Law and Policy (2005)13(1) 209, 209-228

Although there are varying theories in relation to defining fairness, this thesis is of the view that fairness should not be viewed as a balancing act. Any rhetoric or reforms which are formed simply on the basis that they balance the rights of parties are not considered by this thesis to achieve fairness. There are key players in criminal justice, victims should not be mistreated and neither should defendants. Fairness is not something which can be defined in one simple statement which applies unanimously to everything. Fairness is not simply equality. Fairness is not balance. Fairness is measured by considering everything that has an effect on a situation so that a fair outcome can be achieved.

The Aim of Truth-Finding

The second aim of criminal justice is that of 'truth-finding'. Truth-finding is a complex aim and often one which is limited due to procedural rules. However, it is unquestionable that truth-finding is a key aim in any criminal justice system.

> "In the words of former UN Special Rapporteur, Theo Van Boven: *only the complete and public revelation of the truth will make it possible to satisfy the basic requirement of the principles of justice...* The point made by Van Boven above underlines that truth-finding is a necessary corollary of the entire criminal process."[101]

[101] Doak (n28)

Although considered as one of the key aims of criminal justice, the problem with truth-finding, is that "all procedural systems recognise overriding concerns that restrict or prevent the admission of certain pieces of evidence even if they would be necessary for presenting relevant facts..."[102] It is the view of this thesis, and several academics in the field[103] that truth-finding comes second to the overriding aim of fairness. However, in recent years, and due to the influence of victim's rights campaigners, there have been questions raised as to whether more emphasis should be placed on the aim of truth-finding and ensuring that it is a paramount consideration in criminal justice. As Jonathan Doak noted, "if we are to draw from best practice, the criminal justice system ought to prioritise truth-finding as one of its primary goals as a means of delivering justice to victims of crime."[104] However, as with any reform, there are two sides and prioritising truth-finding is something which does not come without its barriers; plea-bargaining, exclusionary rules of evidence, offender orientated systems. Each of these barriers identified can leave victims feeling disatisfeid with criminal justice systems and believing that the truth of what happened and why was never uncovered. The offender orientated system that often operates allows for a plea-bargain to be agreed which in turn means that a trial will not take place and as such the victim is isolated and left feeling disheartened by the process. "Victims may be further shocked when a plea bargain to which they were not party to and do not agree with ends their

[102] Thomas Weigendt, 'Should we Search for the Truth, and Who Should do it?' N.C.J International Law and Com Re (2010) 389, 393
[103] Thomas Weigendt, John D Jackson, Jonathan Doak.
[104] Doak (n28) 186

recourse for justice, precluding any face-to-face encounter with the perpetrator."[105]

There are also academics who believe that truth-finding cannot be the main aim of criminal justice. When discussing the adversarial system of justice, Landsman defends the adversarial systems lack of a truth-finding, noting that "[A] preoccupation with material truth may be not only futile but dangerous to society as well. If the objective of the judicial process were the disclosure of facts, then any technique that increases the prospect of gathering facts would be permissible."[106] Landsman proceeds to list examples, such as the use of psychoactive drugs and/or torture as a means to produce truth. "Thus, by necessity, a *truth at all costs* approach to criminal trials is unworkable given that exclusionary evidential rules, coupled with certain due process protections, are designed to maintain the integrity of the criminal justice process."[107] Instead, Landsman defends the adversarial trial on the basis that truth plays second fiddle to the overriding need for justice. Although Landsman is discussing the adversarial trial in respect of its truth-finding function, it is illustrative of the secondary role the aim of truth-finding can take to the overriding function of justice due to the practices put in place by justice systems.

[105] Mary Koss 'Blame, Shame and Community: Justice Responses to Violence Against Women' American Psychologist (2000) 55(11) 1332, 1336

[106] Doak (n28) 186

[107] Doak (n28) 186

The Aim of Catharsis

Catharsis is often the overlooked aim of criminal justice, but it is vital to a successful criminal justice system. Catharsis can be difficult to define, but embodies the notion of forgiveness, closure, therapy and being able to move on from the incident. Catharsis is said to have benefits for victims, offenders and the State. Thomas Scheff defines catharsis as, "a therapeutic process that discharges repressed emotions and is signalled by certain kinds of laughing, crying and analogous responses reflecting discharge of fear and anger. The effects of catharsis are the decrease of tension and the clarification of thought."[108]

Catharsis is a term used to describe the effect of dramatic performances in the theatre. There are three concepts of catharsis which are known in theatre; Aristotle, Moreno and Boal. The basis of Aristotle's concept of catharsis is that theatre allows the audience to feel connected to the performance. Theatre then presents recognized problems on stage, which allows the audience to passively relive them and resolve them subconsciously. Moreno's concept is similar to Aristotle's, but relies on active participation by drawing on negative experiences and actively reliving them on stage. Boal believes that when an audience engages with a play and offers solutions to problems, this then can be transferred into the audience's personal life and personal problems.[109]

[108] Thomas Scheff, *Catharsis in Healing, Ritual and Drama* (University of California Press 1979 United States of America) 226

[109] Stefan Meisiek, 'Which Catharsis do They Mean? Aristotle, Moreno, Boal and Organizational Theatre' Organization Studies (2004) 25(5) 797

If we take the above concepts and apply them to criminal justice, what is being said is that by reliving the memory of what happened, and coming up with solutions as to how to resolve the problem, parties can feel engaged in the process and can move on from the incident. Catharsis in criminal justice is said to have key benefits for victims.

> "Regardless of whether wrongdoers learn their lessons and repent, their punishment has moral value for others...Punishing wrongdoers vindicates their victims' worth and humbles wrongdoers by asserting that they are not entitled to abuse others. Punishment thus serves a cathartic function for victims and brings them closure."[110]

Due to the impact that catharsis is said to have on victims in criminal justice, it is important that it is discussed and addressed in this thesis. If catharsis does potentially have such important benefits for victims, and offenders, would greater victim participation help to ensure catharsis is a more prominent concern and frequent occurence in criminal justice. Can catharsis work effectively with the other aims of criminal justice; fairness and truth-finding, to enhance criminal justice and victims' experience of criminal justice. Catharsis is an effect of the procedures of criminal justice, which are in turn created in accordance with the aims discussed before. If the benefit of such an aim is so

[110] Stephanos Bibas, *The Machinery of Criminal Justice (*Oxford University Press 2012 New York) 66

great, then we must consider it in line with the other identfied aims when assessing greater victim participation.

Our Aims Of and For Criminal Justice

This chapter has provided a brief introduction into the complexities of criminal justice and defining the 'aims'. No two criminal justice systems are the same, and no system is characterised and defined by one sole category of justice. It may be that a system is more adversarial than it is anything else, but it is likely that there will be characteristics within that system which equate to other justice theories such as inquisitorial or therapeutic.

This thesis did not intend to come to a conclusion as to the aim of criminal justice which would apply across the board. However, it is hoped that it clarifies that criminal justice systems vary drastically and therefore considering any reforms should be done with caution. Furthermore, from the brief comparison of adversarial and inquisitorial criminal justice systems it is clear to see that each system places a different aim at the top of the hierarchy. As such, it is likely that there will be different results from any assessments made.

The reader will recall that this thesis focuses on three aims; fairness (being the paramount aim), truth-finding and catharsis. It is the view of this thesis that these aims are most connected to victims. The introductory discussions in this chapter on the three aims establish the ideas and views about each and also the working relationship between them. When a criminal justice system is formed,

through its procedures and rules, one aim will be distinguished as the paramount aim of that system. A functioning criminal justice system cannot have every aim at the forefront of its procedure: at some point a procedure or rule will undermine a particular aim leaving another aim at the top of the hierarchy. Dependent upon which aim is the paramount aim of a criminal justice system will depend upon the outcome of any discussions as to reforms for that system. A system which has fairness as its paramount aim may reach a different decision to a system which has truth-finding as its paramount aim. Due to the limitations of this thesis, it is necessary to select one aim, to place at the top of the hierarchy and assess victim participation. The chapter which will follow will do precisely that, taking the aim of fairness as its paramount aim.

CHAPTER FOUR: IS GREATER VICTIM PARTICIPATION A BENEFIT?

The previous chapters introduced and discussed the aims of criminal justice; fairness, truth-finding and catharsis. The complexities of Victimology, with both defining the Victim and the varying levels of participation were identified. This thesis will now make an assessment of whether greater victim participation is of benefit to criminal justice.

This chapter begins by taking the aim of fairness and assessing whether greater victim participation will benefit. However, truth-finding and catharsis will also be considered. In order to avoid repetition, this thesis does not feel it necessary to take each aim in turn and discuss the benefits for each as several overlaps will occur. As such, this thesis believes the best approach is to take fairness as the focus and to discuss truth-finding and catharsis as necessary.

Does Greater Victim Participation Benefit the Aim of Fairness?

Fairness is, in the view of this thesis, the paramount aim in criminal justice working together with truth-finding, catharsis and other aims to ensure justice is achieved. Victims' rights campaigners have used the question of fairness as their catalyst for many of their arguments in support of greater participatory rights in criminal justice. The previously mentioned 'rebalancing of rights' is illustrative of their argument that if a criminal justice system is to be fair,

victims and offenders should have equal, balanced rights to one another.[111] It has been argued that there should be a shift in focus of criminal justice from the defendant orientated system to a more centred approach on victims. Questions have been raised as to the limited involvement that victims have, with arguments being made for criminal justice processes to revert back to past years when the conflict was between the victim and the offender and the state was the bystander in proceedings. However, as easy as it is to build up momentum behind the metaphor of balance above, the key question which requires answering is whether any of these radical reforms, providing for greater victim participation will actually benefit criminal justice?

This thesis will now consider the different theories put forward by academics in the area of victim participation to evaluate whether the notion of 're-balancing' the rights of victims, to give them greater participatory rights is justified and supported by the academics. Or, is it simply a metaphor which has created the placebo effect for victims and society in that it creates the belief that criminal justice has shifted the focus to victims, when in fact this is not the case?

The academics on both sides of the debate have varying and convincing arguments. Nils Christie is an advocate for handing back the conflict to the victim and the offender and removing the state from the process. In societies, the state plays a key part in criminal justice; perhaps reforming this would be of

[111] Although, as discussed, the notion of 'rebalancing the rights' is misleading and has created many false expectations for victims thus far, greater rights may still be of benefit and this has to be addressed separate from the question of balance.

benefit. Duff on the other hand believes the opposite to Christie and holds the view that the state is a necessary part to an effectively functioning criminal justice system. Duff also considers the benefit of blame and censure in using victims in the criminal justice system. Further, there are academics who believe that a vital component of a successful criminal justice system is giving victims a voice and an opportunity to have their story heard. Both sides of the argument provide discussion as to the fairness, catharsis and at times truth-finding benefits or disadvantages. In short, it is a complicated area with many theories, discussions and not always the obvious solution.

Although, and the structure of this thesis demonstrates this, the answer is not obvious and requires considered and reasoned analysis. This is at times where governments fail in being pressured by persuasive campaigns and as such, pushing unnecessary legislation through parliament. Too often, criminal justice systems are hindered by the need to abide with legislation which was introduced in order to solve a particular problem, when in fact a reasoned assessment of the problem could have provided for a better resolution without the need for more contrived legislation. Victim participation has created great momentum in its campaign; let's hope those considering reforms of any kind make reasoned decisions and not simply 'knee jerk' decisions.

The Arguments For and Against Victim Participation

Handing Back The Conflict To The Victim And Offender

Criminal justice is a form of governance that imposes social order, resolves disputes and manages risks. In each criminal justice system, there are a network of agencies who work together to try to ensure that decisions are made, actions taken and overall, people are protected from wrongful treatment and conviction.[112] Over the years, the role of victims in this network of agencies has significantly changed from being a key player to a bystander. There have been recent calls to increase victim participation and move towards a system similar to that of the past where they were afforded a more active role in proceedings.

Nils Christie believes that 'handing back' criminal justice to the victims is a required reform of criminal justice. Christie observes that ultimately the dispute is between the victim and the offender and is thus the property of them individually; the state should not be party to the 'trial'. He is an advocate for 'handing back' the criminal justice trial to the parties to whom it belongs. His opinion is that "criminology to some extent has amplified a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property."[113] As Christie states, "In both cases a deplorable outcome."[114] In the opinion of Christie, the

[112] Davies (n17) 1-19
[113] Nils Christie, 'Conflicts as Property' The British Journal of Criminology (1977) 17 1, 1
[114] Christie (n113) 1

belief of 'handing the trial back' to the victims is formed in the opinion that this would amount to a fairer trial.

Christie's notion of 'handing back' does raise some important questions as to the fairness of criminal justice. Firstly, it is Christie's primary contention that the victim, through being represented entirely by the state is a "sort of double loser; first *vis-a-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life."[115] Christie believes that there are important benefits of being involved in the process for the victim. He believes that by denying the victim the opportunity to speak for himself during the criminal justice process, he is missing out on one of the most important stages. "He (the victim) might have been scared to death, panic-stricken, or furious. But he would not have been uninvolved. It would have been one of the important days in his life. Something that belonged to him has been taken away from that victim."[116] Christie is referring to the notion that by being involved, the victim can benefit from being able to move on from the incident, feel some sense of closure. Christie also comments that this level of participation by the victim will also be of benefit to the offender and by denying the victim the right to participate, the defender is at a disadvantage in relation to his chances of rehabilitation. "The offender has lost the opportunity to explain himself to a person whose evaluation of him might have mattered. He has thereby also lost

[115] Christie (n113) 3
[116] Christie (n113) 8

one of the most important possibilities for being forgiven..."[117]"He has lost the opportunity to receive a type of blame that it would be very difficult to neutralise."[118]

In summary, Christie's theory raises some key areas for discussion when considering the benefit that greater participation could have in advancing the aim of fairness. First, the notion of the victim becoming the key player raises the issue of the state's involvement and whether it is of benefit to fairness. Secondly, if the victim is to become a key player what are the benefits of 'having a voice' in the criminal justice process? Third, what benefits might an increased level of participation have on defendants, taking into account the effect that blame can have on the rehabilitation of the offender.[119] It is said that when an offender accepts that they are to blame, "compelled apologies could create opportunites for the sort of moral reflection that triggers personal transformation – or at least a kind of behaviour modification – and thereby reduces recidivism."[120]

However, before we consider the question of benefit, we must reflect on the previous discussion as to 'who is the victim' and consequently the different types of victim. When considering the question of benefit, this thesis will,

[117] Christie (n113) 9
[118] Christie (n113) 9
[119] It must be noted that for blame to have a positive affect on an offender, meaning that they can be reintegrated into society as an equal member, shaming must be reintegrative and not stigmatizing. Reintegrative suggest that the offender would feel remorse for their actions and want to be reintegrated into society. Stigmatiziation is disintegrative shaming and would happen in a society where no effort is made to accept the offender back into law-abiding society.
[120] Nick Smith *Justice Through Apologies: Remorse, Reform, and Punishment* (Cambridge Universtiy Press 2014 United Kingdom)

initially, base any discussions on the 'ideal victim' as previously assessed. However, consideration will also be made as to other types of victims and the affects greater participation could have on them. It is the view of this thesis that, too often, academics and advocates of victim participation focus their arguments on the notion of the 'ideal victim'. By doing this, they are limiting the assessment and not providing for a reasoned analysis. It is argued here that Christie's discussion of the benefits that 'handing back' the conflict could have on criminal justice is based upon his notion of the 'ideal victim'. Christie's view of the "'ideal victim' of criminal justice is portrayed as a frail, utterly innocent and helpless old lady (Christie 1986, The Ideal Victim)"[121] Further discussion will follow to illustrate the potential pitfalls of focusing any reforms on the benefit of the 'ideal victim' without consideration for all types of victims.

The Victim as a Key Player Replacing the State

Christie's argument is based on the provision that criminal justice should 'hand back' the conflict to the victim and the defender and consequently the state should take a 'back seat' in criminal justice procedure. Christie's main contention is that this would allow for a fairer criminal justice system. However, he also notes the loss of communication between the key parties, victim and offender and notes that this is in detriment to them also. "As it is now, the offender has lost the opportunity for participation in a personal confrontation of a very serious nature. He has lost the opportunity to receive a type of blame that

[121] Jan Van Dijk, 'Free the Victim: A Critique of the Western Conception of Victimhood' International Review of Victimology (2009) 16(1) 1, 5

it would be very difficult to neutralise."[122] Christie raises some important issues in his theory, although as he states, his literature, 'Conflicts as Property', which introduces these ideas, "...represents the beginning of the development of some ideas, not the polished end-product."[123] In the discussion to follow, we will assess his basic ideas as detailed and further exmine them in order to provide a more rounded assessment of them.

On the contrary and polar opposite side to Christie are academics such as Duff who advocate in favour of the need to have the state present. They take the view that legal norms are what binds us together as society; the concern that if such a legal norm is violated, society must repair the damage caused by such violation not only to the individual but to society as a whole. Since in this context the legal norms are not theoretical elements but real elements which enable us to live together harmoniously and the breaking of one of these norms could inhibit such harmony, the protection of these norms is ultimately paramount. In non-state societies the acts done in order to counter the violation are carried out by private parties in the form of revenge. In state controlled societies, the counter-actions are carried out by the state through the form of punishment for the action. As Duff states, "it is a matter of communication rather than just expression: it communicates – by means of hard treatment – the rejection of the incriminated action to all those that share jurisdiction."[124] This reasoning for the

[122] Christie (n113) 9
[123] Christie (n113) 2
[124] Anthony Duff *Trial on Trial, Volume 2, Judgement and Calling to Account* (Hart 2006 Portland United States of America) 20

states involvement in the counter-action of the violation of the legal norms illustrates that the offence cannot be something which is solely restrained to the victim and the offender. Christie's communication of blame and censure by the victim can be seen as expressive and only pertaining to the parties directly involved. There is no communicative element to the other members of the society as to how such an incident may be handled in the future. This is a key difference in the theories of Duff and Christie. Duff sees the need for the state to be involved in criminal justice in order to communicate coherently and effectively to the members of the society involved. Christie sees the need for the victim and offender to engage in an expressive and indeed communicative role, however only a communicative role for the parties directly involved. For a society to function effectively, "…the impact of the offence always extends beyond the direct 'parties' because the offence destabilises a legal norm that governs the actions of all citizens."[125]

Duff argues that if the 'trial' were to be 'handed back' to the victim as Christie suggests, society would be unable to control the subjects within it and the mere prospect of living relatively harmoniously with one another would simply become a dream. If there is no state to punish the offender, then who will be responsible for communicating to the other subjects within that state that the action as committed was not appropriate. Ultimately, a 'trial' without the state

[125] Duff (n124) 21

involved would lead to "arbitrary punishment, personal insecurity and legal uncertainty."[126]

Furthermore, when one thinks back to a time prior to the rules of evidence, there existed a model of the ordinary criminal trial which was accurately characterised (by Sir Thomas Smith writing in the 1560s) as an 'altercation' between prosecutor and defendant[127] Crimes were, as Christie has argued, the property of the victims and the offenders, and neither party was legally represented. The aim of this trial was to ultimately pressure the offender into trying to defend his actions. This way of doing justice is similar to the thinking behind Kantian Individualism theory. Under this theory, "individuals should be enabled 'to choose their life plans and to pursue their own conceptions of the good' so that law 'addresses the individual, in Kantian terms, as a subject with an entitlement to respect and concern."[128] This theory is formed on the basis that individual blame will be suffice for appropriate punishment. This reflects the time of the ordinary trial in that the defendant was made to account for his own actions, without legal representation or any other interruptions.

Duff also discusses the benefit that 'blame' can have on an individual and the results that it can subsequently achieve. By allowing one individual to blame a second individual for a crime and hold them to account as such, it can arouse

[126] Duff (n124) 21
[127] John Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003 New York) 1-40
[128] Norrie A, *Punishment, Responsibility, and Justice, A relational Critique* (Oxford University Press 2000 New York) 2

feelings of remorse in the second individual which can subsequently lead to "modification of the future conduct of the person blamed: by blaming him for moral defects of conduct or character we hope so to change his attitudes and motives that he will behave better in the future."[129] Duff describes "moral blame as an attempt to communicate to the wrong-doer a moral understanding of his wrong-doing; to bring him to recognise his guilt and repent what he has done."[130]

However, as with concerns around the ordinary trials methods of doing justice, there are concerns with the Kantian individualist thinking. Norrie states that "linking law and morality is problematic because the central notion of individual blame on which it rests is inadequate. It needs to be countered...by a moral conception of a 'blaming relation', which disturbs any individualistic moral and legal theory."[131] Essentially, to place this in relation to this thesis, criminal justice has developed to include not only the offender and victim but also the state. When taking criminal justice, and considering individualistic Kantian thinking, the 'blaming relation' required would be the state.

> "For the philosopher Alisdair MacIntyre, there is an essential emptiness in modern moral life which stems from the separation of the individual from her moral community...the idealization of the individual leads to a failure of modern morality, for viewing the individual in isolation from

[129] Duff (n124) 43
[130] Duff (n124) 70
[131] Norrie (n128) 3

> her community allows us to make no moral sense of the good and the bad, the right and the wrong."[132]

Essentially, what is required, as Norrie argues, is a combination of the Kantian individualist theory combined with the concept of a 'blaming relation'. This combination will provide the best method for criminal justice thinking. "The individual is an important figure in moral thinking, but only if it is understood in a fundamentally different, non-individualistic, *relational,* way."[133]

Norrie argues that the "ways in which Kantian individualism produces endemic false separations between an abstract conception of the individual and the broader social and moral context of her actions, and the effect of doing so"[134], provides further justification for the requirement of the Kantian approach to be combined with a concept of a relational blaming. The Kantian thinking, places individual autonomy at the heart of criminal justice thinking. The concern with this is that when determining and assessing one's actions and whether one can be considered responsible for said actions, the Kantian model is concerned only with whether an individual "acted in a formally autonomous manner."[135] This narrows the determination of culpability to be based solely on the person's actions and whether they had free control over their actions. It does not look to ascertain any substantive reasons to explain why the individual acted in such a

[132] Norrie (n128) 6
[133] Norrie (n128) 5
[134] Norrie (n128) 7
[135] Norrie (n128) 7

manner. "Such an approach systematically marginalizes questions about moral substance of one's acts."[136]

Christie's notion of 'handing back' criminal justice to only victim and offender would fail to assess the reasons behind an individual acting in such a manner. As with the Kantian model, all that would be considered would be whether or not the defendant had the free will to carry out the act as detailed. "Replying in person to the charges and the evidence against him was the only practical means of defence that the procedure allowed."[137] The idea behind the ordinary model of justice and the Kantian theory is that the individual himself can best determine his guilt than through any other agent. "The guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defence of others speaking for them."[138]

The argument created by Norrie for the reasoning behind the requirement of combining Kantian justice thinking with the concept of a blaming relation, provides a strong argument for the need for the state to be involved in criminal justice. Without the blaming relation, the state, you have the ordinary trial, between victim and offender, and for the reasons put forward concerning the pitfalls of Kantian justice thinking, the ordinary trial fails. As such, it can be argued that the benefit of combining Kantian thinking with the concept of a

[136] Norrie (n128) 8
[137] Langbein (n127) 253
[138] Langbein (n127) 253

blaming relation justifies the need for the state to be included in criminal justice proceedings.

From the discussion above, this thesis is in agreement with the arguments put forward by Duff and his reasoning using the Kantian Individualism Theory that 'handing back' criminal justice to the victims will not be of benefit to society. From a fairness point of view, if we 'hand back' criminal justice to victims and remove the state from the process, our society cannot function. We are unable to hold the defendants to account for their actions. There is no blaming relation. A fair criminal justice system has to work for everyone, state, victim and offender. Removing the state does not enhance criminal justice. As such, a level of participation which gave victims full control of their trial would not be of benefit. However, as noted by both Duff and Christie, some level of victim participation is required for a successful criminal justice system.

Victims Having a Voice

We have established that giving victims a participatory role, which would give them full control of criminal justice proceedings, would not be of benefit to criminal justice. However, would giving victims a 'voice' in criminal justice process be of any benefit? This is essentially a step down from the level of participation above but would still equate to greater levels of victim participation.

Christie is a strong believer that there are benefits for both victim and offender in allowing victims to be heard in their own voice. Every party to the incident would have their side heard. By allowing victims to have their voice heard, to have their say in court, there are arguments that this will also encourage therapeutic, cathartic experiences for the victim and could also allow for the offender to feel remorse far quicker when they are confronted by the real victim.

There are arguments which favour the position that the victim's participation should be through the means of an oral account by the victim themselves. In an adversarial system, "the focal point of the adversarial tradition is the trial itself...at the heart of the trial lies the principle of orality, which provides that evidence should generally be received through the live, oral testimony of witnesses in court. The entire criminal process is designed to culminate in a confrontational showdown between the prosecution and the accused, and such postures can serve only to deepen the existing conflict."[139] The principle of orality itself features strongly in many, if not all, of the justice systems whereby the spoken account of any given circumstance is stated to be of great importance in ascertaining the truth. In order to obtain the truth in a fair manner, the spoken account of all involved in the incident is important.

[139] Doak (n28) 34

Furthermore, the justice theories which are formed based upon restorative principles rather than retributive principles support the option of victims having their voice heard during the trial process.

> "The literature in the growing field of therapeutic jurisprudence provides support to the proposition that having a voice may improve victims' mental condition and welfare. Scholars in this area have discussed in length the therapeutic advantages of having a voice, and the harmful effects that feeling silenced and external to the process may have on victims."[140]

It has been stated that victims have been sidelined by criminal justice processes, they are not party to the process and do not have their needs met. They are the forgotten party. It is therefore assessed by some that giving them the opportunity to speak in court, allows for them to experience some closure with the incident and enables them to move on and hopefully recover from the offence far quicker.

It is also argued that by giving victims a voice it creates a fairer system. "Providing victims with a voice have not only many therapeutic advantages and related fairness considerations, it also ensures that sentencing judges become aware of the extent of harm suffered by victims."[141] It can be argued that it is not

[140] Erez (n63) 552
[141] Erez (n63) 555

morally right to convict someone of a crime without knowing the true facts and effects of that crime. If the judge were to convict someone as guilty to the crime and sentence them without taking into account the evidence of the offender, the judge would be regarded as making a terrible decision. Why then, is it fair for the judge to sentence an offender without taking into consideration the effect the crime has had on the victim? The victim is the one person who has been affected the most by what has happened, surely the affect it has had on them subsequently could allow for a more accurate assessment of the effects of the crime to be realised?

However, there are key issues with the principle of orality. Firstly, the offender has protected rights of 'innocent until proven guilty'.

> "Although participation of victims is not per se in conflict with the presumption of innocence, there is at least one aspect of victim participation which creates a potential prejudice: the mere fact of victim participation entails an underlying presumption that the events (the crimes) are considered to have occurred in given circumstances and that certain people were the victims."[142]

The idea of giving victims participatory rights in criminal justice does *prima facie* undermine that right of the defendant in that it establishes the

[142] Salvatore Zappala, 'The Rights of Victims V The Rights of the Accused' Journal of International Criminal Justice (2010) 8(1) 137, 146

presumption that there was definitely an incident and someone had to be the offender who committed the act against the victim. However, the fact that there is a trial could be argued to create the same presumption albeit not as obvious if the victim is not included in the trial.

There are also rules of evidence which have been designed in order to ensure that prejudices are removed from criminal justice where possible. Rules of evidence determine what evidence is admissible and can be presented before a court of law. This plays an important part in criminal justice systems which base themselves on the principles of adversarial justice. Many of the arguments put forward for the justification of the creation of the rules of evidence is that it allows for a fairer trial. "Their origin is often said to lie in an inherent distrust of the jury. That may be a little too cynical; it is perhaps nearer the truth to say that because, in our system the jury's decision-making process is subject neither to supervision nor to scrutiny it is desirable to ensure that if there is evidence to which they might attribute undeserved significance, the jury should either be prevented from hearing it or given full instructions on how to interpret it."[143] Incidentally, there are arguments made against the rules of evidence and for a relaxing or abolishing of them. The rules of evidence prevent and exclude certain evidence from being heard. There are 4 rules of evidence in common-law jurisdictions; the character rule prevents the prosecution from bringing evidence of the offender's 'bad character'. The corroboration rule requires the

[143] Elspeth Attwoll and David Goldberg *Criminal Justice: United Kingdom Association for Legal and Social Philosophy: Twentieth Annual Conference at Glasgow* (Franz Steiner Verlag 1995) 97

corroboration of evidence before any reliance can be placed upon it. The confession rule excludes evidence of an out of court confession unless it was voluntary. And finally, the hearsay rule forbids the inclusion of evidence given by one person of what another person was meant to have said. The basis for the rules are that "It is usually the case that a verdict should be based on the evidence given in court rather than what a defendant has done on previous occasions."[144] There have been some adjustments made to the rules in certain jurisdictions. For example, In England, the Criminal Justice Act 2003 re-wrote the rules concerning the production of evidence relation to an accused person's bad character. It permits for the prosecution to put forward fact evidence whereby witnesses testify to establish a pattern in the accused person's behaviour in the past that is relevant to the case. The rules of evidence aim to ensure the trial is fair for the defendant who has protected rights in criminal justice. Any reforms of criminal justice must ensure that there has been consideration made to whether the rules of evidence are undermined.

If criminal justice were to permit the victim to give an oral account of the incident, measures would have to be put in place to ensure that what was said did not prejudice the offender. Particularly in jury criminal justice trials, if the victim were given the opportunity to speak freely, although a VIS could have previously been prepared, there is no guarantee that every victim will simply read what has been written and will not alter the statement.

[144] John Hostettler, *A History of Criminal Justice in England and Wales* (Waterside Press 2009 Hook United Kingdom) 238

Secondly, for victims themselves, some do not want to be involved in the criminal justice process. Would forcing victims to participate enhance their view of criminal justice and benefit the aim of fairness? Ashworth also noted that there is a substantive question over victim participation in terms of how it could impact on sentencing decisions and, in turn, offender outcomes. His reasoning is that VIS's, and this could be extended to victim input through oral account, is there to inform the court of the affects the crime has had on the victim. Ashworth questions, "is it right that a particular offender should receive a more severe sentence because his victim suffered abnormally serious after-effects, or that another offender should receive a much lower sentence because his victim was counselled successful and apparently recovered quickly."[145] Ashworth here highlights the difficulty with taking into account the affect a crime has had on a victim and ensuring that this is reflected in the sentence given. Some could argue that in order to combat such an effect, a system is required whereby VIS's are categrosied into bands depdendent upon the crime committed to ensure reasonable impact is given to each statement. However, it is the view of this thesis that introducing such a system would undermine the cathartic benefits of the VIS. It is conceded though that the objective manner of VIS's could pose difficulties but perhaps guidelines could be created rather than strict rules to be followed. Unfortunately, due to the limitations of this thesis no further discussion can be developed here on this point, although this thesis does feel

[145] Ashworth (n55) 506

that this is a clear example of the complexities of the issues which are created by VIS's.

Often victims' rights campaigners state that victims are dissatisfied with criminal justice because they do not feel that they have had an impact on the outcome. However, is that really where victim satisfaction stems from; or should we, as Ashworth suggest, focus on ensuring that victims are offered and receive all the service rights available to help them recover from the incident before simply granting them greater procedural rights which have far more severe consequences for criminal justice?

Furthermore, there are potentially serious consequences in giving victims a voice, in their own voice i.e. victims speaking for themselves. When we talk about giving victims a voice, it literally means that; allowing them to speak their own VIS. This discussion is not about giving victims control of the criminal justice proceedings.[146] The problem which arises with discussions such as this is that victims are often misled as to their role and the effects of their role. They see having a voice as equating to greater procedural rights. This perception has, in the opinion of this thesis, been shaped by the influence of the media and politicians. They front their campaigns with misleading metaphors and misguiding promises of empowerment which some victims grasp onto. As such,

[146] As discussed above through the assessment of Nils Christie and Duff with the aid of the Kantian Individualist Thinking, the state is necessary to a successful criminal justice system and so giving victims a voice is limited to the literal meaning of this and does not in this thesis equate to giving victims any form of control role in criminal justice.

victims have been seriously let down and left feeling even more isolated and disillusioned by this 'increase' in procedural rights. Victims, through wrongful and exaggerated campaigns, believe that their input may influence the sentence given to their offender. The reality is that "it is unlikely that the majority of victim *impact* statements will have any significant effect on sentencing decisions. There is certainly no clear research evidence linking sentence severity to the existence of a victim statement."[147] If a victim believes that having greater procedural rights will equate to them having an influence on criminal justice through the means of sentencing then this is a misguided belief. Even if, a VIS was particularly impacting and divulged consequential information to the court, it is unlikely still that this would have any effect on sentencing. "Whether this (divulging inaccurate or difficult to challenge information) truly poses a problem in reality is, however, questionable. The likelihood is that information of this nature would and should simply be disregarded by the sentencing judge, but this brings us back to the problem of unduly raising victims expectations about the influence their statement is likely to have and of victims disappointment if the information in the statement is dismissed as unreliable and is ignored."[148]

Furthermore, from studies conducted world-wide, it has been concluded that VIS's do not have the impact on sentencing as many believe it would have had. A

[147] James Chalmers and Peter Duff and Fiona Leverick, 'Victim Impact Statements Can Work, Do Work (for Those Who Bother to Make Them)' Criminal Law review (2007) May 360, 363

[148] Chalmers (n56) 363

report for the Home Office on the Uses of Victim Statements by Rod Morgan and Andrew Sanders stated that, "Discovering how far VSs *actually* affect sentencing is, however, virtually impossible in most cases. Even when magistrates and judges could recall cases where there had been VSs (of which there were few), they could rarely isolate the aggravating and mitigating factors."[149] In addition, Edna Erez, states that the views and concerns expressed by opponents to VIS's concerning the imposition of harsher sentences has not came to fruition. "Studies conducted in the USA and in Australia on sentencing outcomes of cases with and without VIS's, and research in Australia on sentencing trends and comparison of sentence outcomes before and after the VIS reform, suggest that sentence severity has not increased following the passage of VIS legislation. Nor has the VIS affected sentencing patterns or outcomes in the majority of cases."[150] We can see from research conducted that it seems that VIS's do not affect sentencing outcomes in the way that many opponents and sceptics of the system believed they would.

Casper's Defendants Theory

There has been discussion over the years and very recent influences from victims' rights campaigners claiming that criminal justice systems are too defendant focused. However, necessary protection is guaranteed to defendants through due process rights that are intended to avoid convictions of innocent people. If victims' interest are unreasonably prioritized the defendant's

[149] Home Office, '*The Uses of Victim Statements*' (Information and Publications Group 15 1999)
[150] Erez (n63) 548

protection is put at stake resulting in their rights being eroded. However, many argue that victims should be afforded a level of protection similar to that of defendants in order that justice is fairer. People may ask why does the opinion of defendants matter, they are the ones who are being accused of committing the crime and causing this situation. As Casper noted,

> "there is a variety of reasons why one might pay attention to defendant evaluations of their court experiences. The recent trend in our society toward citizen evaluation of government programs is based on the premise that evaluations of the effectiveness of government activities ought to include the views of those whose lives are touched by such programmes."[151]

Furthermore, when considering reforms of any kind, we must be aware and informed on every aspect of the system that any such reform could affect. Defendants, although at times the 'wrong doers' are a vital part to any criminal justice system. If a reform can have a positive effect on their experience and their rehabilitation, then this must be assessed and considered. All justice systems strive to control the society they are a part of and to ensure where possible that those who commit crime are deterred from doing so again. A difficult task but to achieve it in any way, we must be aware of the views and opinions of the defendants who have come through the system.

[151] Jonathan Casper, 'Having their day in court: defendant evaluations of the fairness of their treatment' Law and Society Review (1977-1978) 12 237

Casper conducted an evaluation of how criminal defendants viewed their treatment.[152] He noted that often, the defendants assessed whether they have been treated fairly by the outcome or sentence they have received. As Goodstein and Landis summarise, Casper theorizes from interviewing criminal defendants: " 'Fairness' was measured not against some abstract notion about what is just (e.g., 'the punishment fits the crime' or 'equal punishments for crimes causing equal harm') but rather against reality. Thus, a 'fair' sentence meant largely two things to the men: 1) a good deal – something less than they might have gotten; 2) the going rate for an offence."[153]

Several of the defendants stated that if they had received what they viewed as a disproportionately more severe sentence than someone else who had committed a similar crime then they would have viewed that as 'unfair'. "As the outcome becomes less pleasant, defendants are more inclined to brand their treatment as unfair."[154] It has been stated that for a Criminal Justice System to achieve the aim of fairness, the system requires that offenders who have committed similar wrongs should be treated similarly. A legitimate legal system – the integrity of its core principles – relies on this principle.[155]

[152] Casper (n151) 246
[153] Lynne Goodstein and Jean M Landis, 'When is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate' A.M.B Found Res J (1986) 675, 678
[154] Casper (n151) 246
[155] Erin Kelly, 'Desert and Fairness in Criminal Justice' Philosophical Topics (2012) 40 63, 72

Casper's study suggests that defendants measure fairness based upon the outcome of a situation. This differs from the notion put forward above by the procedural justice theorists who have stated that the procedure of a criminal justice system is enough in itself for someone to determine whether the criminal justice system is 'fair' or not. For defendants it seems that the outcome is more important to them, and the procedure doesn't influence their decision as much. Casper in his study identified three variables in respect of fairness, 1) outcome, 2) equality; the defendant felt they received the 'going rate' for the crime and 3) the procedure which leads to their sentencing. "The third case-specific variable, mode of disposition, is most weakly relation to a sense of fairness, despite the sometimes impassioned debate over whether the practice increases defendant cynicism of a feeling of participation in the criminal process."[156]

Conclusion

The aim of creating a 'Fair' Criminal justice System is complex. "Fairness demands tend to erect obstacles to the easy realization of punitive demands, and procedural history teaches that it is a noble illusion to believe that what is fair in criminal justice can properly be determined in isolation from the impediments it faces in fulfilling its missions."[157] Victim participation is not a simple topic, neither is the question of fairness. From the discussion above, this thesis does not believe that it would be 'fair' and as such of benefit to criminal

[156] Casper (n151) 246

[157] Mirjan Damaska, 'Reflections on Fairness in International Criminal Justice' Journal of International Criminal Justice (2012) 10 611, 614

justice to 'hand back' criminal trials to the victims. The state has to be involved. Removing the state from criminal justice procedures creates difficulties and does not provide any benefits. This focus on enhancing victim participation has stemmed from media, political and victim's rights campaigners influence on the issue. They have used powerful metaphors to create this notion that in order to improve criminal justice for victims, we have to increase the level of rights they are afforded. This thesis believes that this argument is misplaced and has caused a whirlwind of unnecessary problems.

Victims are key players in criminal justice, they are the party who has been wronged. However, as discussed in previous chapters, it is rare that every victim is 'ideal' in character. At times even, the distinction between victim and offender can break down and often it can be blurred as to who is indeed the victim in a conflict. Nevertheless, victims and offenders have to experience criminal justice. It is hoped that both will benefit from criminal justice; offenders will rehabilitate and victims will feel closure on the incident. To do this, victims have to be involved in criminal justice. VIS's provide the perfect platform for this. However, given the discussions above it is hard from the outset to see how that is the case. VIS's have created many debates and arguments around their role and the consequences of using them.

However, from the discussion above, it is the view of this thesis that VIS's do not negatively impact criminal justice. In fact, if used correctly, and in conjunction with a fully functioning criminal justice system for victims, they can be of

benefit. Victim participation has to be considered and assessed using the whole criminal justice process. VIS's alone will not work and will not equate to a benefit if victims have not had access to the service rights which should come before the VIS. Instead of focusing on increasing the rights of victims, criminal justice systems should focus on ensuring that the service rights already in place are functioning effectively and are being accessed and utilised by victims. If from the start of the process victims are supported, informed and educated on the criminal justice process, then by the time it comes to the VIS they will understand fully its purpose and role. There should be less confusion. The likliehood of victims feeling disempowered, let down and further isolated by criminal justice is thus minimised. The lack of support, information and education of victims before the VIS, combined with the influence of the media, causes victims to have a false image of the role of the VIS. Focusing on VIS's being beneficial to criminal justice, solely based upon their influence on sentencing is not helpful. Because of the media's influence, the discussions around VIS's have focused on their impact on sentencing and the negativity of this. This has in turn lead victims to believe, falsely, that their input *should* affect sentencing. The result of this is that victims feel a sense of disappointment, of being let down *again* by criminal justice. However, if the focus of VIS's is shifted from this desire to prove that they 'can't work' and moves towards educating victims, society and the media on their actual purpose and benefits, perhaps victim satisfaction with criminal justice will increase. As such, this thesis is of the view that the VIS, combined with a focus on ensuring the service rights of victims are met, can indeed benefit criminal justice systems.

Chapter Five: Conclusion

This thesis set the question of whether 'Greater Victim Participation would benefit criminal justice?' Before an answer to this question could be considered, an understanding of 'Victim', 'Participation' had to be established. Further, before any assessment could be made of whether greater victim participation would benefit criminal justice, we had to create a defining relation. To consider whether something is of benefit, you have to first state how you will measure and determine this. This thesis took the view that if greater victim participation was to be classed as being of benefit to criminal justice, then this would be assessed and concluded if greater victim participation better achieved the aims of criminal justice. As such, the aims of criminal justice were considered the aims of criminal justice in order to understand them and be able to conclude whether greater victim participation better achieved them.

The first chapter considered the main party in question; The Victim. The Victim now considered the "forgotten man" of criminal justice was not always seen in this way. There was a time, as Stephen Schafer calls it, the "Golden age", where victims were the key players in criminal justice. However, over time, and with the influence of society, the state took over this role and became the victim's representative. In recent years, victims' rights campaigners have managed to shift the focus of criminal justice onto victims and their lack of participation. There have been calls for radical reforms to allow victims a more 'balanced' role

alongside offenders. Victimology has become populated with theorists producing ideas and notions behind the concept of 'The Victim'.

Chapter one considered the subdivisions of Victimology; positivist, radical and critical. A brief assessment of each subdivision was examined to highlight the complexities of the area. Furthermore, the concept of the 'Ideal Victim' was introduced. The 'Ideal Victim' is often used by victims' rights campaigners and academics in support of greater victim rights. However, in focusing their reforms and arguments based upon the ideal victim, they fail to assess the full picture. As discussed in chapter one, not all victims are completely innocent. Some victims may have past discrepancies, undesirable characteristics or indeed may have been offenders in the past. Focusing on reforms and arguments based on the notion of 'Ideal Victim' without consideration for the other 'types' of victims does not equate to a considered, or balanced, assessment.

In the same chapter, through its assessment of victims, it highlighted and illustrated the minefield that is victim participation. In doing so, this thesis had to state from the outset the definition of Victim which would be used for the remainder of this thesis. The decision: it is difficult to make any assessment which focuses on Victims without using the 'Ideal Victim' primarily. To try to consider an assessment using all types of victims at each stage and discussing each potential consequence or alternative to the ideal option would be convoluted and difficult to follow. This thesis concluded in chapter one that it

would focus on the 'ideal victim' in future chapters but would where possible highlight any obvious pitfalls in doing so when and if they became apparent. It is a shortfall of this thesis that more could not be said on the matter; however, due to the limitations of this research project the 'ideal' option had to be sought.

The second chapter and stage in answering the question posed by this thesis focused on what is meant by victim participation. Participation is a far ranging concept and regrettably for this thesis all encompassing. This chapter first considered the rhetoric of many of the victims' rights advocates who have campaigned for a 're-balancing' of victims rights with those of offenders. The metaphor used by campaigners has been taken way out of context by the media and has caused frustration, disillusionment and upset on the part of victims. "It is axiomatic that crime victims are important participants in the criminal justice system and that they must not be the recipients of uncaring or insensitive treatment."[158] However, with victims' increased role in criminal justice, we must move cautiously and prudently and with less focus being placed on broad sweeping metaphors such as a 're-balancing' of their rights. Claiming and advocating for victims that they can have a 'balance' of rights with those of defenders is quite simply misleading. For one, as discussed, offenders are the party on trial. Their freedom is at stake. As such, they have been afforded protective rights in criminal justice to prevent prejudice and discriminations from an overhaul of criminal justice procedure. This would not be fair. Victims

[158] Donald Hall, 'Victims Voices in Criminal Court: the Need for Restrain' American Criminal Law Review (1990-1991) 233, 265

do not have the same issues at stake. That is not to say that victims should not be afforded some rights, and the conclusion on that will follow. However, simply stating that victims deserve a level of rights which is in 'balance' with offenders is futile. This thesis details Andrew Ashworth's view on this that the language of balance is "a rhetorical device of which one must be extremely wary."[159] Once the discussion on the question of 'balance' is complete, this thesis moves to consider the difficulty in defining participation.

Participation encompasses varying levels and comes in many forms and to several different extents. Having an understanding of these levels is imperative and fundamental in answering the question posed by this thesis. Discussions are conducted as to how best to define participation. Through Edwards' article, this thesis is introduced to Sherry Arnstein's ladder of citizen participation. Although it focuses on citizen participation, we can borrow from it and effectively use this when discussing victim participation. Sherry notes that there are eight rungs on the ladder of participation. Arnstein's ladder of participation illustrates the varying degrees and levels of participation. We then combine Arnstein's assessment with that of Andrew Ashworth. Ashworth differentiates between 'service rights' and 'procedural rights' of victims. Again, this distinction highlights the variation within participation.

[159] Andrew Ashworth Criminal Justice and the Criminal Process', (1998) 28(2) British Journal of Criminology 111, 30

A discussion about the European Union influence on participation was also conducted. Since the adoption of the Treaty of Maastricht, the EU has had an influence in the area of criminal justice. As such, it is important to discuss the EU's position as to participation. The discussion is brief but ensures that the reader is aware of the outside influences also contributing to the issue. In any future discussions focusing on reforms for victim participation in any of the member states of the EU, particular attention should be paid to the EU and ensuring that reforms comply with and meet the minimum standards set. At present, the minimum standards equate to the low level rungs of Arnstein's ladder. However, as with all legislation, there is room for that to change.

From here, chapter two considered in more detail the methods of participation at the lower levels and higher levels. The discussion on the lower level service rights is brief with this thesis concluding that these rights should not be questioned and do not require further discussion. Rights such as, the right to information, to understand and be understood, to counselling to support and protection are basic rights which should be afforded to victims without question.

The discussion as to higher levels of participation is more in-depth and considers the question of procedural rights. The discussion uses the concept of Victim Impact Statements (VIS's) as its basis. Although there may be other methods for procedural participation, VIS's are relevant and current and the discussion as to the pros and cons of VIS's can transfer into the issues of victim

participation in any method of procedural participation. An in-depth discussion of the pros and cons of VIS's follows, highlighting the diverging opinions and problems that arise with victim participation.

Chapter three considered Casper's defendants theory in order to provide an alternative perspective than that of the' victim focused one currently in place within this thesis. The discussion of Casper's study illustrated that defendant's measure fairness based upon the outcome of a situation. This differs from the concept of procedural justice theorists who have stated that the procedure of criminal justice system is enough in itself for determining fairness. If Casper's theory is correct, and further study in this area would be required but due to the limitations of this thesis cannot be done here, then for defendants, having a victim present during criminal justice proceedings and participating will not necessarily alter their view on whether the system is fair or not. What is at stake for them is the outcome of the procedure.

The third chapter of this thesis considered the aims of criminal justice. As stated at the outset of this conclusion, when considering whether something is of benefit, you have to first state how you will measure and determine this. This thesis concentrated on three aims of criminal justice; fairness, truth-finding and catharsis. It was stated from the beginning that it viewed the aim of fairness as being paramount to criminal justice with truth-finding and catharsis working as necessary with fairness. These aims were conscientiously selected by this thesis as being the aims most related to victims in criminal justice. It is noted and

undisputed that there are several other aims of criminal justice, but due to the limitations of this research project, a whole encompassing discussion as to the aims of criminal justice was not possible.

This third chapter also provided a brief introduction into the aims of fairness, truth-finding and catharsis. Although there are varying theories in relation to defining fairness, this thesis is of the view that fairness should not be viewed as a balancing act. Any rhetoric or reforms which are formed simply on the basis that they balance the rights of parties are not considered by this thesis to achieve fairness. There are key players in criminal justice, victims should not be mistreated and neither should defendants. Fairness is not something which can be defined in one simple statement which applies unanimously to everything. Fairness is not simply equality. Fairness is not balance. Fairness is measured by considering everything that has an effect on a situation so that a fair outcome can be achieved. If overall, when assessing greater victim participation it can be said that it will equate to being fair then this will suffice. If any increase in participation hinders truth-finding or catharsis this will be considered when assessing if fairness is achieved.

There has been considerable debate recently as to the pros and cons of victim participation in general and more specifically with victim participation during the sentencing stage of the process.

> "However, as with the idea of participation generally, international instruments and human rights fora have traditionally fudged the issue of whether the victim ought to be allowed any input into decision-making in sentencing proceedings. While participation *per se* is enshrined as an inherently positive value in various instruments and international criminal justice, there is nothing here to indicate that victims should have a specific legal right to intervene in sentencing."[160]

The final chapter of this thesis addressed the discussions of the previous chapters and looked to provide an assessment of whether greater victim participation would benefit criminal justice. This chapter considers the arguments for and against victim participation. First, it considered the idea put forward by Nils Christie. Chrisite advocates for criminal justice to be reformed in a manner which 'hands back' criminal justice to the victim and offender, removing the state from the criminal trial. Chrisite's theory raises some key areas for discussion when considering greater victim participation. First, the concept of the victim becoming the key player, secondly the benefits of having a voice in criminal justice and thirdly the question of the benefit of blame and censure.

Discussions pursued to enhance each of these points in question. In relation to the state being involved in criminal justice, Duff advocates for the requirement of the state in criminal justice, noting that the state equates to the 'blaming

[160] Doak (n28) 148

relation'. The concept of a 'blaming relation' stems from the discussion about Kantian Individualist Thinking which provides a solid argument as to the necessity of the state in criminal justice. Furthermore, Duff also discussed the benefit that 'blame' can have on an individual and the results that this can achieve. He notes that by blaming an individual for moral defects of conduct or character it is hoped that this will alter his attitudes and motives and that he will behave better in the future. Although Duff does not agree with Christie's view that the state should be removed from the criminal justice process and replaced by the victim, both do consequently agree that some level of victim involvement in criminal justice would be of benefit.

Chapter four then proceeded to consider the concept of victims having a voice in criminal justice. The principle of orality is considered at length as to are the therapeutic advantages of having a voice in criminal justice. A brief discussion as to the rules of evidence present in common-law justice systems provides an insight into further constraints on reforms. However, ultimately the subjectivity of the principle of orality undermines the defenders rights extensively. Although orality could have therapeutic benefits, at present, it would hinder the aim of fairness. Again, that is not to say that having a voice through the means of VIS's is not beneficial. However, having victims freely speaking in criminal justice trials require further examination and consideration. There is too much subjectivity that in the view of this thesis, a reform of this sort would be required to be decided on a case by case basis, which would open the door to prejudices. If this could be monitored, it could eventually even out and not

undermine the rights of offenders as much, however at present it is deemed by this that it hinders the aims of criminal justice rather than help to better achieve them.

If victims do not focus entirely on the outcome when assessing fairness, and offenders do not focus on the procedure, then, when we consider the effects of a reform, which affects victims and offenders directly, it could be argued that instead of focusing on the process as a whole, we should split the discussion. On one hand, we should consider reforms which will allow for victims to feel that the system is fair procedurally. And then we should consider reforms which will allow for offenders to feel that the system is fair based on the outcome. Both are quite separate in their view of what is fair and as such, forming discussion about reforms without separating may not reach an outcome favourable to both. What is said above is simply an illustration of a new way of thinking about reforms for criminal justice when considering the key players rather than a fully formed considered method. However, it does provide food for thought for the future. Instead of focusing solely on the system as a whole, perhaps taking questions of procedural fairness for victims and outcome fairness for offenders will allow for us to better alter the system to achieve overall fairness.

Yet, in light of the above and the analysis and evaluation through this thesis what is the conclusion to the question initially posed? VIS's provide a route for allowing victims to be involved in the process which is sufficient and best achieves the aims of criminal justice. However, VIS's must be restricted to

informing the court of the affects the crime has had on a victim. Moving VIS's into a domain where they can influence the sentence given to an offender is not of benefit to criminal justice. As discussed above, offender's base their view of whether a system is fair based on the outcome of the procedure. If the outcome will be dramatically altered due to a reform of procedure this requires further consideration. VIS's are subjective in nature and create too many prejudicial issues if they are to have an effect on the sentence given. As discussed and highlighted by Ashworth, there are serious questions over prejudice and fairness, especially if one defender is given a harsher sentence because his victim suffered more or made more of a point of their suffering. Individuals respond to things differently. One victim may require support for longer than another. One victim may be prone to elaborate on the events and effects and state that they are far worse than what they may have experienced. How can criminal justice control and measure this to ensure that prejudices and unfair sentences are not handed out to offenders?

Until we can have some mechanism in place which can confirm whether victims are telling the truth, exaggerating the impact, are suffering particularly unusual affects then this is too difficult to manage and too easy to allow for the basic principles of criminal justice to be undermined. In short, VIS's in their current form do provide adequate levels of procedural participation for victims.

What must come hand in hand with this though is the requirement for low level service rights to be fully accessible and used. If victims feel involved through the low level rights, they are less likely to feel isolated in criminal justice. Ignoring

the low level rights and pushing them to the side as not influential is futile. A shift in focus of advocates and governments in ensuring that the service rights of victims are functioning effectively is more important and would be of more value than advocating for metaphoric procedural rights which will do no more than create a placebo effect and leave victims dissatisfied by the system due to the disillusionment created by such metaphors.

From the discussion of victim participation in chapter two, the author at this point began to understand what the conclusion to this thesis would be; the question of victim pariticpation needs to be refocused. The disillusionment that simply creating more procedural rights for victims would allow victims to participate more effectively in criminal justice and feel satisified with criminal justice procedures is, in the view of the writer, the wrong approach to take.

Arnstein's ladder of citizen participation touches on what is required. In its basic form there are eight levels of citizen participation. At each rung of the ladder, the intensity of the participation increases from 'service right' participation to 'procedural right' participation. However, in order to fully participate in society, in criminal justice, you must be awarded participation at every level. Simply giving a greater level of participation without considering and ensuring that the lower levels of participation are being offered and working effectively will in turn not equate to a more beneficial level of participation.

This thesis posed the question, 'Would Greater Victim Participation Benefit Criminal Justice?' The answer, only in conjunction with all levels of participation. On its own, no.

The Need for Further Research

In chapter four it was concluded that VIS's could work in combination with other services of criminal justice. First, criminal justice systems should focus more on ensuring that the basic service rights of victims are accessible, being used by victims and functioning to their best ability. Secondly, there should be services for victims which educates them as to the process of criminal justice and the role of the VIS. This should not be left to the media and victim's rights campaigners. If this was made clear to victims from the outset of their involvement in the criminal justice process, then perhaps it would enhance their overall satisfaction with criminal justice systems.

The studies conducted at present have focused on the use of VIS's and the effects this has on sentencing in isolation. They have also focused on the affect VIS's have had on victims. This thesis does not put forward a methodology for future research, but highlights the potential focus. The previous research highlights the pitfalls of the current processes in criminal justice systems. More focus has to be placed on creating a unified, whole system for victims which begins when the crime is reported until the trial date; if indeed it reaches this stage. Along the way, no matter what the outcome; guilty plea, full trial etc, the victim must be provided with support. If we, as a society, and criminal justice

system, change our view of seeing 'participation' as equating to 'VIS' or 'having an 'actual' voice' and instead consider participation to equate to being supported, receiveing information, knowing and understanding what is going on and indeed producing VIS or perhaps even having a voice, it is the view of this thesis that this will produce better results for victims of crime within criminal justice domains. Simply creating different 'rights' or procedures for victims to 'participate' without considering the entire process needs to stop. We have to look back at the basic, inalienable rights and ensure that these are functioning as effectively as they can and then build from there encorporating a unified, clear and accessible system.

Notably, this will have to be tried and tested. As such, studies are required whereby the focus is placed on the victim's experience of criminal justice as a whole. For example, future studies should focus on a comparative study between victims who are provided with key service rights from the start, information, support, education leading to the giving of their VIS. This would be contrasted with those victims who are provided with limited information and service rights leading to the giving of their VIS. After each set of victims have provided their VIS, questionnaires and interviews could then be conducted with them in an attempt to assess their level of satisfaction with the criminal justice system. This comparison would allow for a conclusion as to whether improving the rights of victims from a basic level could enhance their satisfaction more than simply giving them greater procedural roles.

The study should not be limited to extracting information from the victims, but also from the professionals involved in the procedure. Questionnaires and interviews should also be conducted with the persons responsible for taking the VIS to ascertain whether there were any discrepancies between the victims at this stage. Further information should also be collected from the victims' solicitors and perhaps also from the judges deciding on the case. A study as inclusive as this would allow for a fuller, more in-depth conclusion as to the benefit victim participation could have on criminal justice systems.

Final Comments

Victim participation is complex. Criminal justice systems are varied. Victims are rarely ideal. Trying to make any assessment which has to consider an analysis of each of these areas is not simple and will not come to one single conclusion. Further, as with everything, society changes, new laws are created both nationally and internationally and reforms are always needed. No system will ever be perfect. However, the more we understand, the closer we will get to creating perfection. A shift in focus is needed from the isolated concentration of the benefits and disadvantages of greater participatory rights. Taking account of and considering the whole victim process of criminal justice could well be the shift in focus which is required to fully see victim participation being considered as a benefit for criminal justice.

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