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Victims or Defendants: Can there be Justice for All?

It has been said that we live in a 'risk society'.[1] Anxieties over weapons of mass destruction, international terrorism, economic instability and the environment are all deeply embedded in modern consciousness. Community concern over crime rates is only one symptom of a broader sense of insecurity, and of widespread scepticism about governments' ability to protect us.

To its credit, the *Justice For All* report[2] recognises that a government's fundamental task is to restore that sense of security, and in particular to regain the trust of victims of crime. Disturbingly, however, it assumes that public confidence in the criminal justice system can best be restored by being tougher on defendants. This is fundamentally counter-productive, because uncompromising rules to protect defendants are the primary source of the system's legitimacy, and create a far deeper sense of security than high conviction rates. Without these safeguards, justice begins to resemble coercion, and community insecurity is *increased*, not alleviated.

The proposed 'new evidence' exception to the double jeopardy rule would, for example, have dangerous consequences for system legitimacy. If the exception applies to rape, manslaughter, armed robbery and murder, many jury verdicts will in principle be liable to be quashed, and public confidence in the finality of jury verdicts will be considerably undermined. This risks giving the impression that the state only need regard jury acquittals as provisional verdicts, and that the odds are stacked against the defendant. Moreover, a conviction by re-trial has limited legitimacy, because the decision that a new trial is warranted can itself appear to predetermine a conviction.

The White Paper attempts to minimise these legitimacy problems by allowing for only one re-trial. In principle, however, it is difficult to see the difference between the first and subsequent re-trials. If new evidence legitimates one new trial, why not a second? Surely the public interest in ensuring that the guilty are convicted remains the same. Conversely, if the legitimacy of the system is fundamentally undermined by the possibility of three trials, the same must be true of two. Once the symbolic inviolability of jury acquittals is disturbed, it is illogical to limit it in this way.

JFA also recommends changes to the law relating to character evidence. Although its proposals are not finalised, the report clearly advocates greater use of character evidence in trials.[3] It displays little appreciation of how significantly this proposal would increase the risk of wrongful convictions. There is empirical support for the claim that juries exposed to defendants' prior convictions are more likely to convict, particularly where they disclose sexual offences, or offences against minors.[4] It is too easy for a skilful prosecution to create a sense of inevitability from prior convictions, and use them to conceal lacunae in its substantial evidence.

One counter-argument is that the report's recommendations bring much-needed clarity to the law, and avoid unnecessarily restricting decision-makers' access to relevant information. These are praiseworthy objectives, but they are equally fulfilled by the Law Commission's earlier, more measured proposal.[5] Some even argue that the examples given in *JFA* would be treated similarly under *present* law.[6] The point is that, to maintain legitimacy, the risk of wrongful convictions must not be increased beyond what is *strictly necessary* to protect other legitimate public interests.[7]

Another danger of emphasising victims' rights in this way is that the special protection afforded to vulnerable defendants can be eroded. The report is clear, for example, that violent mentally ill people should be treated essentially like any other dangerous offenders – after all, they pose

equivalent risk from the perspective of victims. Thus, while recommending new indeterminate detention for 'dangerous and sexual offenders', *JFA* simultaneously commends equivalent measures in the *Mental Health Bill* which provide for compulsory detention and treatment of violent, mentally ill persons.[8]

Such a 'one size fits all' regime may make some sense from the perspective of victims, but it is morally repugnant. It results, for one thing, in medical treatment being forced on those who are perfectly capable of consenting to it. Furthermore, it increases the already considerable social stigmatisation of mental illness. And it ignores the fact that the mentally ill are a particularly vulnerable social group who require *additional* safeguards in their dealings with the state. Significantly, these measures are likely to disproportionately affect minority ethnic communities – precisely the groups whose trust the government hopes to secure.[9] Finally, exposing mentally ill people to the risk of compulsory detention actually further endangers the community, because it discourages the mentally ill from seeking medical treatment.

It is not that the government is wrong to emphasise the rights of victims. My point is that these rights cannot be realised simply through harsher treatment of defendants. To the extent that *JFA* makes this mistake, it is an opportunity missed for victims: it wastes time on measures of marginal importance, but fails to give detailed commitments on reforms which victims really need.

For example, the report hardly considers radical ways of involving victims in trial processes, beyond the limited role of Victim Personal Statements introduced in 2001. It commits no new funds for grants to community-based victim support groups.[10] It creates the position of Victims' Commissioner, but provides few details of her powers, and relegates the investigation of complaints to the Parliamentary Ombudsman.[11] It neglects even to consider systems in other

jurisdictions (such as France) in which compensation is available where the criminal justice system manifestly fails to deliver justice. And, importantly, it is not supported by financial commitments to ensure the effective implementation of its recommendations – it has in fact been confirmed that extra resources will *not* be made available.[12]

The White Paper suffers from a lack of imagination. It adopts the predictable – and predictably ineffective – approach of trying to help victims by being 'tough' on defendants. This is a fundamentally counter-productive strategy: strict legal safeguards for defendants (particularly vulnerable defendants) are the cornerstone of the system's legitimacy, without which lasting public confidence is simply impossible. Instead of satisfying the community's fundamental need for security, then, the report risks eroding it further.

(Word Count: 1000. This does not include title, nor footnotes, which are for reference purposes only).

Endnotes

[1] Anthony Giddens, *The Consequences of Modernity* (Cambridge, UK: Polity Press, 1990).
[2] The abbreviation *JFA* is used in this essay to refer to *Justice for All*, Cm.5563 (London: HMSO 2002).
[3] *JFA*, paragraph 4.56 and surrounding.
[4] Jenny McEwan, 'Previous Misconduct at the Crossroads: Which "Way Ahead"?' [2002] *Criminal Law Review* p.180, at p.189.
[5] See Law Commission, 'Evidence of Bad Character in Criminal Proceedings', Law Com. No. 273 Cm.5257 (London: HMSO 2001).
[6] Peter Rook, 'The Right Dose?', *Counsel*, Oct 2002, p.17, at p.22.
[7] see *Van Mechelen and Others v The Netherlands* [1998] 25 EHRR 647, para 58.
[8] *FJA* paragraph 5.42. See also paragraph 2.15ff.
[9] See Mental Health Alliance, *Response to the Consultation on Proposed Mental Health Act Reforms*, www.mind.org.uk/take_action/mha.asp (last accessed 28 November 2002).
[10] *FJA* paragraph 2.13.
[11] *FJA*, paragraphs 2.44-2.46.
[12] See '"Justice for All": rounding up the reaction', *New Law Journal*, July 26 2002, p.1142.