

Viktimologija: teorija, praksa, aktivizam

TEMIDA

Jun 2012, str. 71-84

ISSN: 1450-6637

DOI: 10.2298/TEM1202071W

Originalni naučni rad

Victims' rights are human rights: The importance of recognizing victims as persons

JO-ANNE WEMMERS*

In this paper the author argues that victims' rights are human rights. Criminal law typically views victims as witnesses to a crime against the state, thus shutting them out of the criminal justice process and only allowing them in when they are needed to testify. This is a major source of dissatisfaction for victims who seek validation in the criminal justice system. Victims are persons with rights and privileges. Crimes constitute violations of their rights as well as acts against society or the state. While human rights instruments, such as the Universal Declaration of Human Rights, do not mention crime victims specifically, a number of rights are identified, which can be viewed from the victim's perspective. As individuals with dignity, victims have the right to recognition as persons before the law. However, such rights are only meaningful if they can be enforced.

Keywords: *victims of crime, human rights, victims' rights, criminal justice.*

Introduction

The last fifty years have witnessed the birth of victimology and the victims' movement. At both the international and national level, various legal instruments have been developed in order to improve the plight of victims in the criminal justice system. The United Nations, the Council of Europe, and the European Union, are just a few examples of organizations that have adopted victims' rights instruments. Even the newly established *International Criminal Court* includes rights for victims. Domestically, countries like Canada and the United States have adopted victims' rights legislation.

* Dr Jo-Anne Wemmers is a professor at School of Criminology, University of Montreal (professeure titulaire). E-mail: jo-anne.m.wemmers@umontreal.ca

Yet, despite international and national developments, victims continue to feel shut out of the criminal justice system (Brienen, Hoegen, 2000; Young 2005; Wemmers, Cyr, 2006; Davis, Mulford, 2008). Criminal law, and in particular the common-law legal tradition, views victims primarily as witnesses to a crime against the state. As a result, victims are treated as objects and used by legal actors in order to advance their case. The absence of any role for victims in the criminal justice system, other than that of witness, is often seen as the root of victims' frustration with criminal justice and an important source of secondary victimization (Baril, Durand, Cousineau, Gravel, 1985; Shapland, 1985; Wemmers, Cyr, 2004; Cyr, 2008; Van Camp, Wemmers, 2011).

In this paper we will argue that victims' rights are human rights and that crime constitutes a violation of their rights as well as an act against the state and, in turn, that victims require recognition as persons before the law. Firstly, we need to understand what human rights are. Secondly, we will examine the rights contained in human rights instruments such as the *Universal Declaration of Human Rights* and discuss why victims are not explicitly included in them. This is followed by an examination of victims' rights instruments and their application. Throughout this paper, the Canadian situation is used as an example, to illustrate the arguments put forth by the author.

Rights and Human Rights

The word "right" has several different meanings. It has a moral and a political meaning: rectitude and entitlement (Donnelly, 2003). In the context of the present paper, we are especially concerned with rights in the sense of entitlement or something that one may do. We typically speak of someone having a right. For example, a person has the right to freedom of speech. But more than just the ability to act, rights are enforceable. They bring with them an *obligation* to respect a person's right. For example, we are obliged to respect someone's freedom of speech even if we do not agree with what they are saying. We can, however, impose limitations on rights. Rights are not endless. Generally it is accepted that one person's rights stop where another person's rights begin (Baril, 1985). To continue with the same example, a person has the right to freedom of speech but they cannot abuse that right in order to transmit messages that are racist or sexist.

Human rights are basic rights, which it is generally considered all people should have and without which we would be unable to live as humans and develop to our full potential. Human rights have four major characteristics: universal; inherent; indivisible; and inalienable (Donnelly, 2003). Universal means that they apply to human beings everywhere. Inherent are intrinsic to being human and do not rely on codification or some other external validation to exist. Indivisible means that these rights are interdependent and interrelated and therefore one cannot prioritize one right without affecting other rights. Inalienable means that no one can ever take away these rights.

Past abuses of power have led to the development of human rights instruments in order to protect the rights of individuals and groups. An important development was the creation of the *Universal Declaration of Human Rights* (UDHR) in 1948. Following the horrors of the Nazi Regime (1939-1945) the international community pulled together to create the United Nations (UN). As one of its first tasks, the UN created the *Commission on Human Rights*, which wrote the UDHR. As Ignatieff (2001) writes, the UDHR is not about Western moral superiority, but a warning by Europeans not to reproduce their mistakes and abandon individualism to collectivism. The core of the Declaration is moral individualism and respect for human dignity. It attempts to protect individual agency against the totalitarian state.

The UDHR contains some thirty rights in all. Although neither the word victim nor offender appears in it, several articles do refer to "everyone charged with a penal offence." The rights of the accused include the right to be presumed innocent, right to a fair trial, freedom from torture and the right to not be arrested or detained arbitrarily. As a declaration, the UDHR is a non-binding document. It was conceived of as a statement of objectives to be pursued by governments.

In addition to international law, many national governments have their own charter of rights, which is legally binding. For example, in Canada, the *Charter of Rights and Freedoms* (1982) outlines the rights of Canadians. The Charter is divided into sections and includes a section titled "legal rights." Like the UDHR, victims' rights are not included in the Charter but the rights of the accused are. The legal rights of Canadians ensure that they are protected against unreasonable search or seizure, they have the right to not be arbitrarily detained or imprisoned and the right to not be subject to cruel and unusual punishment. Upon detention they have the right to information, counsel and to have the validity of their detention tested. In criminal proceedings,

the accused has a number of rights including the right to information, to be presumed innocent and the right to a fair and timely trial. These rights reflect the spirit of the UDHR and place respect for the dignity of the individual before the interest of the state. Furthermore, individuals who feel that their Charter rights were not respected can seek recourse before the courts (Art. 24).

Why not victims?

It may seem odd that human rights instruments would include extensive rights for those accused of having committed crimes but not mention victims of crime. After all, victims are human too. In order to understand this apparent imbalance, it is important to recall the history of criminal law. Civil law predates criminal law. Early legal systems dealt with conflicts between citizens. The victimologist, Stephen Schafer (1968), refers to this period as the “golden age” for victims. It was not until the Middle Ages that, in Anglo-Saxon England, offences came to be viewed as acts against ‘the King’s peace’ or the state. Gradually, over time, criminal law evolved and the state replaced the victim in the legal process (Viau, 1996; Wemmers, 2003; Young, 2005; Doak, 2008). The result of this transformation is that today the criminal justice process in common-law systems is founded on the state laying charges against the accused. Victims are witnesses to crimes against the state.

Once the state ousted victims from the criminal justice process, there was an imbalance of power between the omnipotent state and the individual accused of a crime (Kirchengast, 2006; Doak, 2008). Abuses of power by tyrant kings led to calls from scholars such as Montesquieu and Beccaria (1765) for the introduction of limitations on the power of the state and the creation of rights for the accused. Today the rights of the accused are well entrenched in law. In this context, victims did not need rights because their freedom was not at stake.

Modern criminal proceedings focus on the accusations brought by the state against the accused. There are three major actors involved: the judge, the prosecutor (who represents the state) and the accused or their legal representative. Of course, many different criminal justice systems exist. While a complete discussion of the various legal traditions goes beyond the scope of this paper, it is important to note that across legal traditions, the focus of the trial is on proving the guilt of the accused. In common-law

countries, which have an adversarial system, there are only two parties: the state and the accused. It is the state's job to prove that the accused is guilty and the defence's job to show reasonable doubt. For example, in Canada, victims' involvement in the criminal justice process is completely up to the prosecution and the defence. If either thinks that it is important that the victim testify, the victim will be subpoenaed (i.e. ordered) to do so. However, if the case does not go to court, for example because it is plea-bargained, or if the victim is simply not required to testify, then the victim will essentially be shut out of the criminal justice process.

This brings us to the core issue: victims are witnesses to a crime against the state. If crimes truly were directed at the state and were not committed against individuals, then this dual-party configuration would make sense. However, in reality, crimes are committed against individuals. And these individuals – the victims of crime – seek recognition of the crimes committed against them. Victims, who once had a place in laying charges against the accused, have been completely pushed out and replaced by the state (Schafer, 1968; Kirchengast, 2006). They have been rendered powerless against an omnipotent state that has the power to force them to testify as well as the power to shut them out.

Victims' Rights

Rights empower the powerless. In order to improve the plight of victims of crime, in 1985, the UN General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which includes a number of rights for victims. In the preamble to the Declaration, the General Assembly acknowledges that the rights of victims have not been adequately recognized. According to the Declaration, its aim is "to assist Governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power."

The Declaration provides victims with the right to be treated with respect and recognition. It recognizes that victims sometimes need support in order to deal with the impact of crime and it gives them the right to be referred to adequate support services. They will often not be familiar with the criminal justice system and how it works and, therefore, the Declaration gives victims the right to receive information about the criminal justice

system and their role in it. Victims view the crime as “their” victimization (Shapland, Wilmore, Duff, 1985) and the Declaration recognizes victims’ right to receive notification about the progress of the case. It also provides victims with the right express their views and concerns at appropriate stages in the criminal justice process. The Declaration recognizes victims’ right to protection of their physical safety and of their privacy. Finally, the Declaration acknowledges victims right to reparation from the offender as well as compensation from the state.

However, the Declaration is non-binding. It is what is referred to as ‘soft law.’ It is an attempt to guide governments. There are no consequences for a government that chooses not to follow some or all of the rights included in the Declaration. In addition, the Declaration is not very specific. In order to accommodate the differences across legal systems, it is written in very abstract and general terms. This gives states a lot of latitude when interpreting it.

The application of the Declaration in Member States has proven to be problematic. In 1995, ten years after the adoption of the Declaration, the UN conducted a survey among its members to assess the implementation of the Declaration. The results showed that very few countries had modified their criminal justice system in accordance with the Declaration (Groenhuijsen, 1999). Similar findings are reported by Brienen and Hoegen (2000) in their survey of victims’ rights in 22 European countries.

In Canada, which played a lead role in the creation of the Declaration and its adoption there were some changes after 1985. To begin with, in 1988, the Canadian Criminal Code was modified in order to permit victims to make Victim Impact Statements. With this change the word ‘victim’ was introduced into the Criminal Code for the first time. The Victim Impact Statement allows victims to make a written statement about the impact that the crime had on them and submit it to the court at the sentencing hearing after the accused has been found guilty. Since 2000, victims can read their statement aloud in court. Also in 1988, the Federal-Provincial-Territorial Working Group published its *Statement of Basic Principles of Justice for Victims of Crime*. As its title suggests, the contents of this Statement strongly reflect that of the UN Declaration. Many articles are identical to that found in the UN Declaration and, like the Declaration, the Canadian Statement is non-binding.

The administration of justice in Canada is under provincial jurisdiction. Hence, following the UN Declaration several provinces introduced their own Bill of Rights for victims. In the province of Quebec a victims’ Bill of Rights

was adopted in 1988. Once again, this law was strongly inspired by the UN Declaration and uses much the same wording. For example, victims have the right to “express their views and concerns at appropriate stages of the criminal justice procedure, when their personal interests are concerned” (art. 3). This raises the question, what are appropriate stages for victim intervention? As was mentioned earlier, the UN Declaration is purposely abstract and general in order to accommodate the many different criminal justice systems found among the Member States. There is no need to remain abstract when adapting the Declaration to domestic law. There is only one criminal justice system in the province and in fact, only one criminal code for the whole of Canada. On the contrary, one needs to be concrete and specify who is responsible for what (Brienen & Hoegen, 2000). By copying the wording used in the UN Declaration, victims’ rights in Quebec are needlessly vague. Furthermore, like the Declaration, the rights contained in the Quebec legislation are non-enforceable. That is, nowhere does the law specify enforcement measures and victims’ recourse when their rights are not respected.

This problem is well illustrated in the case of Vanscoy and Even, two victims of violent crime in the Canadian province of Ontario, who hired a lawyer to represent them as they pursued the State for its failure to respect their rights as outlined in the province’s Victims’ Bill of Rights (Vanscoy and Even v. Her Majesty the Queen in Right of Ontario, [1999] O.J. No.1661 (OntSupCtJus)). The victims argued that their rights had been violated because they were not notified of pending court dates and not consulted with respect to plea resolution agreements. The judge stated:

I conclude that the legislature did not intend for s. 2(1) of the Victims’ Bill of Rights to provide rights to the victims of crime... The Act articulates a number of principles, whose strength is limited not only by precatory language, but also by a myriad of other factors falling within the broad rubrics of availability of resources, reasonableness in the circumstances, consistency with the law and public interest, and the need to ensure a speedy resolution of the proceedings. Finally, even if there was an indefensible breach of these principles, the legislation expressly precludes any remedy for the alleged wrong. While the Applicants may be disappointed by the legislature’s efforts, they have no claim before the courts because of it. (Vanscoy and Even v. Her Majesty the Queen in Right of Ontario, [1999] O.J. No. 1661 (OntSupCtJus))

The only province in Canada to provide victims with something more than vague rights is Manitoba. In 2011, the province introduced comprehensive victims legislation, which replaced the prior legislation concerning victims' rights and compensation. The new legislation describes in detail the responsibilities of law enforcement authorities as well as the prosecution and the court administration towards victims. In addition, the law includes a complaints procedure for victims. Victims in Manitoba who feel that their rights have not been respected can make a complaint to the province's director of Victims' services. While this is clearly an improvement compared to other provinces, it still does not provide legal remedy to victims. By providing victims with a complaints procedure the Manitoba government recognizes that victims' rights should be respected. However, it fails to view victims as persons before the law with enforceable rights and privileges and give them legal recourse.

Crime as a Violation of Victims' Rights

While victims are sensitive to the public interest in crime, in their view crime is an offence against society as well as offence against the individual victim (Wemmers, Cyr, 2004). They do not understand why the state does not recognize them in any role other than as witnesses. The fundamental difference between a tort and a crime is not that crimes do not affect individual victims but rather that a tort is private and does *not* include the state while a crime affects society as well. As Doak points out, "What constitutes a 'crime' as opposed to a 'tort' is purely dependent upon how crime is defined within any given society" (2008: 27). It is a subjective judgement by the victim who defines the act as a crime and reports it to the police. Hence, when the criminal justice system views the victim as a witness to a crime against the state this is fundamentally opposed to victims' perspective and, inevitably, they will be disappointed.

The notion of looking at victims through the lens of human rights is not entirely new. As early as 1985, Robert Elias argued for a "victimology of human rights." Elias warned that victimologists risked becoming pawns of abusive governments if they limit their object of study to victims of crime. Instead, he argued, victimologists should study all man-made victimizations, which includes crimes as well as gross violations of human rights such as genocide,

torture and slavery. Hence, while Elias proposed that human rights violations should be included in the field of victimology, he did not see crime as a violation of the victims' rights.

Previous work linking victims' rights to human rights can be found in the work of legal scholars such as Sam Garkawe and Jonathan Doak. Sam Garkawe, argues that the poor treatment of victims should be viewed as a matter of human rights protection. To this end, he proposes the creation of a UN Convention on Victims' Rights (2005). Following the structure of international lawmaking and human rights, a Convention would include some kind of monitoring mechanism. The idea of developing a Convention was supported by the *World Society of Victimology* and the University of Tilburg, which organized a series of expert-meetings and developed a Draft Convention¹ (Van Genugten, Van Gestel, Groenhuijsen, Letschert, 2007). In his book, *Victims' Rights, Human Rights and Criminal Justice*, Doak (2008), claims that the *European Convention of Human Rights* has encouraged domestic policy-makers and the courts to view victims' rights as a form of human rights. Concretely, the introduction of the *Human Rights Act* in the UK, which offers victims of Convention violations recourse in domestic (UK) courts, has meant that 'public bodies' such as the police, the prosecution and other criminal justice organisations are under duty to act in accordance with the Convention and respect the human rights of crime victims.

Recently, there has been significant progress in the recognition of crimes as violations of victims' rights in the European Union. In a proposed Directive of the European Parliament and of the Council of the European Union (2011) introducing minimum standards for victims of crime, crimes are explicitly considered "an offence against society *as well as a violation of the individual rights of victims*" (Art. 5, emphasis added). This is a huge step forward. In the 2001 *Council Framework Decision on the standing of victims in criminal proceedings*, which the minimum standards will replace, crime was not explicitly defined as a violation of the victims' rights. Instead, states were merely encouraged to recognize victims' "legitimate interest" in proceedings. The proposed Directive aims to ensure that the specific needs of victims are taken into account during criminal proceedings, regardless of the nature of the offence or where it took place within the European Union (EU).

¹ For more about the Draft Convention see: <http://www.tilburguniversity.edu/research/institutes-and-research-groups/intervict/undeclaration/>

Using the human rights framework, we can identify specific substantive rights that apply to victims as well as procedural rights. Regarding substantive rights, crime can be viewed as a violation of the victims' right to life, liberty and security of person (UDHR, Art. 3) or their right to property (UDHR, Art 17). To treat victims with dignity and respect (UN Declaration, Art. 1) an individual must first be recognized as a moral and legal person. In turn, this requires certain basic personal rights such as the right to recognition before the law (Donnelly, 2003). Article 6 of the UDHR states: "Everyone has the right to recognition everywhere as a person before the law." This gives rise to the notion of victim participation and procedural rights for victims. It suggests that victims must not be treated as mere evidence, but they must be regarded as subjects with personal, individual and independent standing at the criminal trial (Walther, 2011).

Victims' rights, like human rights, are only meaningful if they confer entitlements as well as obligations on people. Otherwise, they are not rights and they will ultimately fail to empower victims. Legal protection of rights is necessary in order to defend victims' rights (Kilpatrick, Beatty, Smith Howley, 1998). It is the ability to exercise our rights, using our free will and rational choice, which gives meaning to the notion of 'human dignity.' Without this ability, victims will remain voiceless objects of the criminal justice system who are forced to forfeit their individual human rights in the interest of the society.

Conclusion

The monopoly of power of the state in the criminal justice process has silenced victims, rendering them mere witnesses to a crime against the state. This approach fails to recognize the reality of victims: They directly experienced the crime and, as such, it constitutes a violation of their human rights. The victims' movement has introduced victims' rights in an effort to improve the plight of victims. However, up until now it has stopped short of viewing them as human rights. It is time to move victims' rights to the next level. We need to acknowledge the victim as a person before the law with rights and privileges.

References

- Baril, M. (1985) Vers une distribution équitable des droits et des libertés : le cas des criminels et de leurs victimes. *Mémoires de la société royale du Canada*, 23, pp. 105-113.
- Baril, M., Durand, S., Cousineau, M-M., Gravel, S. (1985) *Mais nous les témoins. Une étude exploratoire des besoins des témoins au Palais de justice de Montréal*. Montreal: Centre international de criminologie comparée, Université de Montréal.
- Beccaria, C. (1765) *Des délits et des peines*. Genève: GF Flammarion.
- Brienen, M.E.I., Hoegen, E.H. (2000) *Victims of Crime in 22 European Criminal Justice Systems*. Nijmegen, NL: Wolf Legal Productions.
- Council of the European Union (2011) *Proposal for a Directive of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime*. Brussels, 21 December.
- Cyr, K. (2008) *Empowerment et système de justice pénale: l'expérience des victimes d'actes criminels*. Thèse doctorat, Montreal: École de criminologie, Faculté des Arts et des Sciences.
- Davis, R.C., Mulford, C. (2008) Victim Rights and New Remedies: Finally getting victims their due. *Journal of Contemporary Criminal Justice*, 2, pp. 198-208.
- Doak, J. (2008) *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. Oxford, UK: Hart Publishing.
- Donnelly, J. (2003) *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press.
- Elias, R. (1985) Transcending our social reality of victimization: Toward a victimology of human rights. *Victimology*, 1-4, pp. 6-25.
- Garkawe, S. (2005) The Need for a Victims Convention. *The Victimologist*, 9, pp. 4-6.
- Groenhuijsen, M.S. (1999) Victim's rights in the criminal justice system: A call for more comprehensive implementation theory. In: J.J.M. van Dijk, R.G.H. van Kaam, J.M. Wemmers (eds.) *Caring for crime victims: selected proceedings of the Ninth International Symposium on Victimology*. Monsey, NY: Criminal Justice Press, pp. 85-114.
- <http://www.tilburguniversity.edu/research/institutes-and-research-groups/intervict/undeclaration/> Accessed 24.3.2012
- Ignatieff, M. (2001) The Attack on Human Rights. *Foreign Affairs*, 80, pp. 102 -116.

- Kilpatrick, D.M., Beatty, D., Smith Howley, S. (1998) *The Rights of Crime Victims—Does Legal Protection Make a Difference?* Washington: National Institute of Justice, U.S. Department of Justice.
- Kirchengast, T. (2006) *The Victim in Criminal Law and Justice*. Basingstoke: Palgrave MacMillan.
- Schafer, S. (1968) *The Victim and His Criminal: A Study in Functional Responsibility*. New York: Random House.
- Shapland, J. (1985) The Criminal Justice System and the Victim. *Victimology: An International Journal*, 1-4, pp. 585-599.
- Shapland, J. Wilmore, J., Duff, P. (1985) *Victims in the Criminal Justice System*. Aldershot: Gower Publishing.
- Van Camp, T., Wemmers, J. (2011) La justice réparatrice et les crimes graves. *Criminologie*, 2, pp.171-198.
- Vanscoy and Even v. Her Majesty the Queen in Right of Ontario (1999) O.J. No. 1661 (OntSupCtJus).
- Van Genugten, W., Van Gestel, R., Groenhuijsen, M., Letschert, R. (2007) Loopholes, Risks and Ambivalences in International Lawmaking: The Case of a Framework Convention on Victims' Rights. *Netherlands Yearbook of International Law*, 37, pp. 109-154.
- Viau, L. (1996) Victimes des ambitions royales. *Thémis*, 1. Available at: www.lexum.umontreal.ca/themis/96vol30n1/viau.html Accessed 25.3.2012.
- Walther, S. (2011) Victims' Rights: Procedural and Constitutional Principles for Victim Participation in Germany. In: E. Erez, M. Kilchling, J. Wemmers (eds.) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives*. Durham, NC: Carolina Academic Press, pp. 97-112.
- Wemmers, J. (2003) *Introduction à la victimologie*. Montréal: Les Presses de l'Université de Montréal.
- Wemmers, J., Cyr, K. (2004) Victims' Perspectives on Restorative Justice: How much involvement are victims looking for? *International Review of Victimology*, 2-3, pp. 259-274.
- Wemmers, J., Cyr, K. (2006) *Victims' Needs Within the Context of the Criminal Justice System*. Montreal: International Centre for Comparative Criminology, University of Montreal.
- Young, A. (2005) Crime Victims and Constitutional Rights. *Criminal Law Quarterly*, 1, pp. 432-471.

JO-ANNE WEMMERS

Prava žrtava su ljudska prava: značaj prepoznavanja žrtava kao ličnosti

Autorka u ovom članku tvrdi da su prava žrtava ljudska prava. Krivični zakon obično vidi žrtve kao svedoke zločina protiv države i tako ih isključuje iz procesa krivičnog pravosuđa osim u slučajevima kada su potrebni kao svedoci. Ovo je glavni uzrok nezadovoljstva žrtava koje traže potvrdu u sistemu krivičnog pravosuđa. Žrtve su ličnosti sa pravima i privilegijama. Krivična dela čine povredu njihovih prava kao i čin usmeren protiv društva ili države. Dok instrumenti ljudskih prava kao što su Univerzalna deklaracija o ljudskim pravima posebno ne pominju žrtve zločina, oni identifikuju jedan broj ljudskih prava koja su vidljiva iz perspektive žrtve. Kao individue koje imaju dostojanstvo, žrtve imaju pravo da pred zakonom budu prepoznate kao ličnosti. Ipak, ova prava imaju smisla jedino ako se mogu sprovesti u praksi.

Ključne reči: žrtve, ljudska prava, prava žrtava, krivično pravosuđe.