

Chapter 7

Victim–Centred or System–Serving?

The Legal Framework for Victim Participation in Sentencing in Kenya

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ABSTRACT

This chapter analyses the key legislative and policy developments in Kenya designed to enhance victims' participation in criminal proceedings, with a focus on the initiatives mandating victim participation in sentencing through the use of victim impact statements. It argues that while victim-oriented policy and legislative developments in Kenya rhetorically include victims in the criminal process, the manner and form of inclusion betrays an overarching thrust to accentuate criminal justice goals, rather than the victims' interests per se. This is revealed by the selectivity by which victimhood is constructed, to include only victims whose input has evidentiary remit at sentencing as well as the inclination to give a premium to the evidentiary utility of victim impact statements from the vantage of judicial officers, while giving short shrift to its value to victims. Victim subjectivity appears to be telescoped by the need to limit such participation to its evidential value in consonance with the bipartite structure of the adversarial trial in which the victim has no party status.

INTRODUCTION

This chapter examines the content of the statutory framework circumscribing the

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parameters of victim participation in criminal proceedings in Kenya as well as the sentencing policy designed to facilitate and guide its implementation in practice. It evaluates the underpinning rationales for these legislative and policy developments while placing them against the backdrop of the broader global socio-legal debates regarding the use of victim impact statements in criminal proceedings in adversarial criminal trials in general and in selected jurisdictions in the Global South, in particular. It argues that in spite of a preponderant rhetoric suggesting victim empowerment in criminal justice process, victim-oriented initiatives are virtually subservient to the imperatives of criminal justice rather than victim-centered as such. The key developments analyzed include the Criminal Law (Amendment) Act, no. 5 of 2003, The Constitution of Kenya 2010, The Victims' Protection Act no.17 of 2014, and the Sentencing Policy Guidelines (2016). The key focus of analysis is how crime victims and their interests are constructed within these legal documents and how these constructions delineate the spaces for victim participation in criminal justice and attention to their interests.

BACKGROUND

Victims of crime have played a central (prosecutorial) role in the criminal process at different historical moments (Kirchengast 2016, p.12; Garkawe 1994, 2003) although their role throughout the twentieth century has been largely marginal, as criminal cases morphed into bipartisan contests between the state as prosecutor on one hand, and the defendant on the other (Ashworth 1993, p.502). In common law legal systems in particular, this marginality manifests in the fact that victims report crimes to public officials and surrender it to their discretion to decide whether or not offenders should be prosecuted and punished. Even though their injury becomes the occasion for a public cause of action, they have no "standing" to compel the prosecution of the crime against them or to contest decisions to dismiss or reduce the charges or to accept plea bargains. They may also not challenge the sentence imposed on their offender and have no standing to participate in hearings on restitution *as a party*. Thus, in court proceedings the victim has largely been an observer or, at best, a witness (Raineri 1995, p.80). Often relegated to being 'evidentiary cannon fodder', victims have been 'conscripted' into an operational role within the criminal justice system and are generally subordinated to its goals (Doak 2005, p. 299; Rock 2014, p.24; Booth and Carrington 2012, p.380). Moreover, although they are represented by the prosecution, if their interests in pressing for the charge comes into conflict with the prosecutor's conception of public interest, the latter's will prevail as a matter of course. This is despite the fact that such public interest considerations need not be contingent upon the strength of the victim's case, or

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