

LEGAL STUDIES

2013 Catholic Trial:

'Sentencing and punishment attempts to balance the rights of victims, offenders and society.' Evaluate this statement.

Sentencing and punishment attempts to balance the rights of victims, offenders and society to an extent, however the protection of civil liberties and offenders rights is often misbalanced, thus creating tension between these rights.

The purposes of punishment, as outlined in the Crimes (Sentencing Procedure) Act 1999 (Cth) are deterrence, retribution, incapacitation and rehab. However, the purpose of general deterrence arguable misbalances the rights of offenders, as a harsher punishment may be imposed in order to establish a general warning. Furthermore, the purpose of punishment for incapacitation is highly ineffective in the balance of rights as shown in the ALRC report, "Sentencing" as it increases chances of recidivism and encourages non-compliant behaviour, thus, reducing the rights of society on release of the offender. Furthermore, the utilisation of mandatory sentencing also creates an inequitable bias towards offenders, as this approach revolves around the, "3 strikes and out" concept, which an offender is unfairly punished often as a result of ethnicity and low SES.

Therefore, sentencing and punishment has moved towards a more rehabilitative approach, particularly in regard to young offenders. The use of diversionary programs and restorative justice as outlined in the Young Offenders Act 1997 (Cth), enhances the rights of victims and offenders as restorative justice allows victims to confront the offender, while the offender must take responsibility for their actions, known as reintegrative shaming. The effectiveness of this in balancing the rights of victims, offenders and society is evident as a 15-20% reduction in recidivism is possible from these diversionary programs. However, these are only utilised in a small number of summary cases and thus, many critics argue, in order to maintain the balance between victims, offenders and society these rehabilitation approaches must be used at a greater frequency and for an increased number of offences. The purpose of punishment for rehabilitation is evident in the case R v GDP 1991 in which a 12mth custodial sentence was changed on appeal to a 12 month probation order, as the custodial sentence would have adversely impacted on the rehab of the 14 yr old offender.

Furthermore, the reforms in sentencing have attempted to create a balance between the rights of victims, offenders and society. The reform of victim impact statements under the Victim Rights Act 1995 gives greater rights to the victim, as the subjectivity of these statements can result in diminished judicial discretion as the judges' impartiality is undermined. However, many critics argue, that this effectively balances rights as it acts as a balance to mitigating factors for an offender. Furthermore, the Juries Amendment (Verdicts) Act allows a majority 11 -1 to be applied to an offender after 8 hours of deliberation, the ALRC recognises this as a misbalance of rights of the offenders, as reflected in the 2005 report, "Majority Verdicts in Juries," as this undermines the concept of beyond reasonable doubt and the right to a fair trial as illustrated in the UDHR 1948 and ICCPR 1966.

Additionally, the implementation of plea bargaining in the sentencing process results in disequilibrium in the rights of victims, society and offenders as the Criminal Case Conferencing Trial Act 2008 codifies plea bargaining and thus, could result in the imposition of a lighter punishment. For example, R v McCartney 2009 resulted in the judge reducing the sentence of sexual assault by 16.6% due to the aforementioned act, thus creating an unfair balance to the rights of the offender.

Moreover, sentencing procedures can create a disequilibrium in the rights of all involved as shown through the presumption against bail in the 2006 amendment to the Bail Act 1977 (Cth) as the onus is placed on the offender to provide reasons for bail in certain offences. This can have diminishing

impacts on the rights of offenders as illustrated in *C v Standen* 2008, in which the police officer was held in remand for 2.5 years before trial. Thus, resulting in victim and society's rights being placed above those of the offender.

Furthermore, the sentencing procedure of appeal ensures the balance of the rights of victim, offenders and society, as illustrated through *R v AEM et al* 2002 in which on appeal by the Crown due to the leniency of the sentences of 5 and 6 years incapacitation for aggravated sexual assault. In turn, the judge raised the sentences to 13 and 14 years due to public outcry for the victim's rights, which resulted in the Crimes Amendment (Aggravated Sexual Assault in Company) Act 2003, thus ensuring an equitable outcome for victims, offenders and society.

The legal system faces significant difficulty and tension in the balancing of rights between victims, offenders and society in the sentencing and punishment as civil liberties of victims and society often erode the rights of offenders.

To what extent is the law successful in balancing the rights of victims, offenders and society? 2013 Mid year exam

The criminal justice system has the difficulty of balancing the rights of individual's civil liberties between the rights of society and victims, resulting in the difficulty of achieving equilibrium between all respective parties.

Often the law erodes individual's civil liberties in order for the assurance of protection for the wider community. This is evident through the Terrorism (Police Powers) Act 2002 and the Anti-Terrorism Act 2004 that gives the police the right to detain a suspect for 14 days on the "reasonable suspicion" they are likely to commit a terrorist act, thus degrading individual rights in order to protect society. This is further elucidated in the presumption against bail principle as depicted in the 2006 amendment to the Bail Act 1977 (Cth) as individuals who have committed serious offences such as drug trafficking, are required to prove why bail should be allowed. This can have damaging consequences on an individual as they can be held in remand awaiting trial for an extended period of time, e.g in the case of *C v Standen* presumption against bail was provided and it resulted in Mark Standen staying in remand for 2.5 years prior to the commencement of his trial.

Furthermore, the continued detention under Crimes (Serious Sex Offences) Act can result if the Attorney General applies for a warrant if there is a "high degree of probability" that the offender will recommit offence if released. Thus, highlighting that the Attorney General's post sentencing discretion can result in the imbalance of rights between the offender and society.

Police powers of search and arrest under the Law Enforcement (Powers and Responsibilities) Act 2002 give discretionary power to police that in turn can erode individual's rights and liberties. This is evident in *Darby v DPP* 2004 as an unwarranted search under the Evidence Act 1995 resulted in the arrest of an individual for the possession of drugs. However, on appeal it was recognised this evidence was inadmissible due to the denial of rights of the individual, resulting in an immediate acquittal. Additionally, the abuse of police powers can result in the imbalances of individuals rights as shown by the excessive arrest of Craig Thompson in 2013, in which the police breached the Law Enforcement (Powers and Responsibilities) Act 2002 through the unwarranted strip search of a suspect that was not accused of violent or drug related charges, thus resulting in the likelihood of mitigating circumstances when the case comes to trial.

The implementation of a majority vote through the Jury Amendment (Verdicts) Act (NSW) has undermined the rights of offenders, as the legislation is in opposition to the constitution and ICCPR which both outline the right to trial by jury. This act doesn't comply with the principle of beyond reasonable doubt and it was under recommendation by the ALRC as shown in the 2005 report, "Majority Verdicts in Juries," that this should no longer be accepted as it reduces the rights of offenders in the criminal justice system.

The implementation of the Criminal Case Conferencing Trial Act 2008 that codifies plea bargaining and undermines judicial discretion through the advocating of plea bargaining as a means for resource efficiency. However, this results in the diminishing rights of victims as shown through R v McCartney 2009 as the judge reduced the sentence of sexual assault for the offender by 16.6% to comply with the aforementioned act.

The rights of victims in the criminal justice system are depicted in the Victims Rights Act 1996 and Criminal (Sentencing Procedures) Act 1999, which outlines the role of VIS in sentencing decisions. However, these subjective factors can impede the impartiality of judicial officers and result in the implementation of an unduly harsh sentence, thus causing an imbalance between victims, offenders and society.

The effectiveness of law in response to public pressures and appeal is evident in R v AEM et al 2002 in which the appeal by the Crown against the leniency of sentencing and public outcry on the nature of the crime resulted in the increase of sentences from 5 and 6 years to 13 and 14 years incarceration. Through the use of non-legal measures the rights of victims, offenders and society were balanced through the Crimes (Aggravated Sexual Assault in Company) Act 2003 that raised the maximum penalties of these crimes.

Furthermore, the effectiveness of achieving rehabilitation and reducing recidivism is evident in R v GDP 1991 as the 14 yr old accused on appeal received a 12 mth probation order instead of a custodial sentence for \$550 000 worth of damages to property. Thus, exemplifying the importance of rehab in addressing the rights of offenders while also recognising the rights of victims and society.

Overall, the criminal justice system and the law has varying degrees of effectiveness in the balancing of rights between victims, offenders and society due to the difficulty of finding equilibrium between indiv civil liberties and the protection of victims and society as a whole.