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Effective participation or passive acceptance: How can defendants participate more effectively in the court process?

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Abstract

This paper presents the findings of a 20 month Economic and Social Research Council funded study into the public's experiences of the Crown Court. The aim of the study was to examine victims', witnesses' and defendants' (court users') levels of understanding and perceptions of the treatment they received at the Crown Court, and to assess the extent to which they regard court processes and outcomes as fair and legitimate. The study also explored the nature of the interplay between the different players – including legal professionals and court users – in the courtroom. There were three strands to the research: interviews with criminal justice professionals and practitioners, interviews with court users and observations. A key finding that emerged through the research was the apparent limit of defendants' 'effective participation' at court. This issue is the focus of the paper.

Introduction

This paper presents the findings of a 20 month Economic and Social Research Council¹ funded study into the public's experiences of the Crown Court.² The aim of the study was to examine levels of understanding and perceptions of treatment among victims, witnesses and defendants (court users) who had participated in proceedings at the Crown Court, and to assess the extent to which they regarded court processes and outcomes as fair and legitimate.³ The study also explored the nature of the interplay between the different players – including legal professionals and court users – in the courtroom. The empirical work focused on two Crown Courts, selected to contrast with each other in terms of the areas they served. One was a large court in an ethnically diverse urban area; the other was a medium-sized court in a small provincial city with a predominantly white British population. There were three strands to the research: interviews with criminal justice professionals and practitioners, interviews with court users and observations.

Interviews with criminal justice professionals and practitioners

Semi-structured, in-depth interviews were conducted with 57 professionals and practitioners working in or around the selected Crown Courts. Respondents included court clerks and ushers; defence and prosecution advocates; full-time and part-time judges; staff and volunteers from Victim Support and the Witness Service; police and CPS staff in Witness Care Units; and registered intermediaries, who facilitate communication on behalf of vulnerable witnesses in court.

Interviews with court users

A total of 90 adult court users were interviewed, of whom half were on the prosecution and half on the defence side. Of the 45 prosecution respondents, 15 were victims while 29 were witnesses; the remaining prosecution respondent was the mother of a victim who had observed the trial in which her daughter gave evidence. The 45 prosecution

¹ Grant reference number: RES-062-23-2493. We would like to take this opportunity to warmly thank the ESRC for awarding funding for this study.

² A detailed account of the findings that have emerged from this study will be presented in the forthcoming monograph to be published by Policy Press (Jacobson, Hunter and Kirby, 2015, in press).

³ 'Victims' refers to individuals who have attended the Crown Court to give evidence in relation to alleged offences of which they, according to their own accounts, are the victims. The use of the technical term 'complainant' has been avoided in referring to this group of court users as it does not accord with how the individuals define themselves. 'Witnesses' refers to members of the public who have attended the Crown Court to give evidence for the prosecution in relation to alleged offences which they claim to have witnessed; this use of the term thus excludes victims who are also witnesses (for whom, as above, we use the term 'victim), witnesses for the defence, and professional or expert witnesses who have been required to give evidence in a professional capacity. 'Defendants' refers to individuals who have attended the Crown Court for trial (in cases where they have pleaded not guilty) and/or for sentencing (following a guilty verdict or guilty plea).

respondents were largely recruited through the Witness Service at the two Crown Courts, although some were also contacted via snowballing from our initial contacts.

Of the 45 defence respondents, 41 were themselves defendants. Most of the defendants were recruited through probation offices local to the two Crown Courts where the research was based. Additionally, four defendants whose most recent experience of Crown Court had resulted in an acquittal or case dismissal were identified and contacted through criminal lawyers and other personal contacts of the research team. The remaining four defence respondents were close family members of individuals who had been tried and/or sentenced at the Crown Court, and were recruited for the study following their involvement in a resettlement initiative that was being evaluated by colleagues of the researchers.

Observations

Observation was undertaken on the basis that it would provide the most detailed insight into how the Crown Court operates on a day-to-day basis and, particularly, into the nature of the interactions between court users and professionals in court. A total of around 200 hours of observation was carried out across the two Crown Courts. Seven trials were observed in their entirety and observations were carried out at a number of other hearings, including sentencing hearings, 'plea and case management hearings' and cases listed 'for mention' before the judge.

A key finding that emerged through the research is the apparent limit of defendants' 'effective participation' at court. This issue arose in interviews with defendants and professionals and also became apparent during observations, and is the focus of this paper.

The role of defendants at court

In 2011, around 149,000 defendants participated in proceedings at the Crown Court. Proceedings can take the form of trials, sentencing hearings and other hearings, such as plea and case management. The contested trial at the Crown Court is arguably the main type of hearing that springs to mind when one thinks of the Crown Court; it is 'at the heart of the Court; its very reason for being' (Rock, 1993: 27). However it is important to note that the large majority of defendants who appear at the Crown Court do so for sentencing only. In 2011, of the 106,000 defendants who had either been sent or committed for trial from magistrates' courts, around 72,000 (68%) subsequently pleaded guilty to all counts, while just under 32,000 (30%) maintained a not guilty plea (no plea was entered in the remaining small proportion of cases). Around a further 43,000 defendants were dealt with at the Crown Court having been committed for sentence by magistrates' courts. This means, therefore, that roughly 32,000 of a total of 149,000 defendants dealt with at the Crown Court – or just over one-fifth – went through

a trial.⁴ Of those who were tried, approximately 19,000 were subsequently acquitted,⁵ while 12,000 were found guilty (Ministry of Justice, 2012).

During a court hearing, the defendant sits in the dock – a partitioned area situated at the back of the courtroom. If a defendant gives evidence during a trial, he or she will be told to leave the dock and enter the witness box, and then to swear under oath or affirm that the evidence to be given is truthful. During a sentencing hearing, the defendant remains in the dock throughout and is instructed to stand at the moment the sentence is delivered. If a custodial sentence is passed, the judge will typically pronounce “Take him down!” and the defendant will usually be taken directly to the cells.

It is a long-standing principle in criminal law that defendants must be able to understand and participate effectively in the criminal proceedings of which they are a part (Jacobson and Talbot, 2009). This is reflected in the right to a fair trial enshrined in Article 6 of the European Convention of Human Rights, and the case law that supports it. Article 6 states that the minimum rights that those charged with a criminal offence can expect are:

- i) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- ii) to have adequate time and facilities for the preparation of his defence;*
- iii) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- iv) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- v) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The requirement for effective participation is reflected also in the criteria generally used to determine ‘fitness to plead’⁶: namely, that the defendant can plead with

⁴ These figures exclude around 13,000 defendants who appeared at the Crown Court in 2011 in appeals against magistrates’ decisions.

⁵ This number includes around 12,000 who were discharged by the judge, 2,000 whose acquittal was ordered by the judge, and 6,000 who were found not guilty by the jury.

⁶ The legal test for ‘fitness to plead’ test, which dates from 1836, is widely criticised. The Law Commission, for example, argues that the test ‘needs to be reformed so that it is fair and suitable for the

understanding, can follow the proceedings, knows a juror can be challenged, can question the evidence, and can instruct counsel.

In practice, however, the findings of this study suggest that defendants' participation in proceedings could not be described as genuinely effective. Though defendants demonstrated high levels of compliance with court processes – they generally 'followed the rules' and rarely challenged the etiquette of proceedings – it became apparent that the key response of defendants was to passively accept the nature and content of processes and procedures in the Crown Court. Their responses did not demonstrate effective – or meaningful – participation in the processes that ultimately resulted in decisions being made about their fate.

Passive acceptance

Defendants largely appeared to be swept through the court performance. They were, in the main, acquiescent observers of their fate rather than engaged in shaping it; for this reason, they can be described as displaying a kind of 'passive acceptance' of what goes on in court. Passive acceptance was demonstrated by many of the comments made by defendants in interview, including in their apathetic or unreflective responses. Other manifestations of passive acceptance included a disengagement and alienation from the court process, and a lack of understanding of both the court procedure and the language used by legal professionals, which together generate the sense of a voice unheard, or lost, in the complex mechanisms of the courtroom.

Jerome's⁷ account of his sentencing hearing demonstrates how he was the focal point of a process which he was not actively involved in:

There's a lot of looks and a lot of judging by looks without actually speaking. As soon as you walk into Crown Court, everyone, it's eyes on you. There's a lot of eyes looking at you as well while the – what's the person called, person who don't like me saying all the things about me? – yes, the prosecution. When the prosecution barrister is actually saying all the convictions I've done, you get a lot of heads turning around looking at you. So, I don't know, I didn't really like that. Makes you feel quite bad and quite small. Those looks are quite intimidating.

criminal justice system of the 21st century'. They suggest further questions for consideration including: whether or not the procedure in the magistrates' courts should mirror that in the Crown Court and what should the process be for dealing with a defendant when he or she has been found unfit to plead.

Available at: <http://lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm> [accessed 14/02/14].

⁷ To ensure anonymity, participants have been given pseudonyms.

Passive acceptance was frequently expressed in apathetic responses from defendants during interview. For example, Jonathan, a defendant with several previous convictions, provided what could be described as a stunted account of his experiences at the Crown Court:

Interviewer: *And how did you feel when you were giving evidence?*

Jonathan: *How would anyone feel, really?*

Interviewer: *Can you remember what your defence counsel said in mitigation ...?*

Jonathan: *Not really.*

Interviewer: *And can you remember what the judge said when they passed the sentence?*

Jonathan: *No; I just remember what sentence he gave me.*

Passive acceptance was also reflected in various comments about the defendant's desire to get the process 'over with' or 'forget about it'. In some cases, apathy appeared to be combined with a reluctance or inability on the part of defendants to reflect on their court experiences, as expressed in the above extract from Jonathan and in the following remarks made by Alfie:

No one wants to go to prison. But it happens. Just gotta deal with it, innit ... Like – I don't really take notice – I'm just there to get my sentence and get my punishment and get out ... [I'm] not there to meet and greet ... Get in and get out.

Some respondents had little to say about what it was like to go to court. These individuals were by no means hostile in interview, but appeared genuinely to struggle to remember and describe their experiences. One such individual was Latif, who had pleaded guilty in the Crown Court to the serious offence of wounding:

Interviewer: *At sentencing, can you remember what the prosecution said about the offence?*

Latif: *They were just talking about my criminal background.*

Interviewer: *Did you think what the prosecution said was fair?*

Latif: *Well ... I knew I was going to get done so there wasn't really a point in arguing.*

Interviewer: *Can you remember what your defence said in mitigation?*

Latif: *Can't remember.*

Interviewer: *That's all right. And so how did you feel when the judge passed the sentence that he gave you?*

Latif: *I felt all right.*

Interviewer: *And did you understand it? Was it explained to you?*

Latif: *Yes, Miss.*

Interviewer: *Did he say why he had chosen the sentence that he chose, the length?*

Latif: *I think he did, but I can't remember.*

Perhaps the claims of some defendants to have been entirely apathetic in the face of sentencing were an expression of bravado (in the context of the research interview) more than a genuine lack of concern about their fate. Ali, for example, claimed that not only did he “not care” about his sentence for drugs offences, but that he informed the judge of this: “I had to tell the judge, like, ‘Listen mate, I don’t care. Do your thing innit, whatever.’”

Passive acceptance on the part of defendants is further illustrated by the frequency with which the phrase ‘they were doing their job’ (or a variant thereof) was used by defendants when talking about professionals in court. This expression was the most used phrase across the research interviews – and seems to have several shades of meaning or implication including:

- i) that the professionals were doing what they should do: “The judge was very fair, the judge did the job ... Likewise, [the prosecution counsel] were very professional, do their job and done the best with what they had” (Sidney);
- ii) that the professionals were simply following the rules (however good or bad) of the court process: “The prosecution, their job is to be the worst of the worst, so there aren’t any niceties from them ... As I said, their job is to make me feel like shit, to make me slip up” (Jonathan);
- iii) that the professionals were doing what they did because they were being paid to do so: “They don’t care. They’re just doing their job, and getting paid loads of money. They don’t care who comes in front of them. They’re just doing their job, basically” (Leon);
- iv) that the professionals were doing the minimum required of them; “They’re just doing a job aren’t they? I mean if I was a barrister and I was defending myself I’d probably do it slightly better” (Ray).

Whichever of the above meanings are construed, all could be said to signal the speaker’s acceptance that the courts are a world in themselves, on which outsiders have little impact. This sense was sometimes heightened when lawyers from supposedly ‘opposing’ sides were perceived as being overly chummy with each other; “They’re all in cahoots...they sit at the same Bar. They see each other every day. It’s a joke. It’s an absolute joke”, said Steve, a defendant with many previous convictions.

Passive acceptance was also expressed in recurring comments made by defendants about their lack of voice within the court process. Defendants are ever-present during court hearings, yet the only real place for them to put their story across is when they give evidence at a trial. However, as highlighted above, the majority of defendants attend court for sentencing only and even those involved in trials often do not take up the opportunity to give evidence. Defendants are sometimes not encouraged to give evidence by their defence counsel – or, indeed, are actively discouraged. “I don’t want them expressing themselves when they’re in the dock. It is our job to speak for them,” remarked one defence lawyer, unapologetically.

There are many aspects of the court process itself that have the (unintended) effect of silencing defendants, including the ritual and formality of the courtroom and the complex procedures and language used. The inherently archaic nature of proceedings and interactions can contribute to difficulties in understanding among defendants:

They used very long, powerful words where if you're not well educated, if you didn't do well at school or didn't go to University or college or anything like that, because I didn't do any of that, it's very hard to take in and understand ... If you are a bit common you are going to find it very hard to understand what they're saying.

(Jerome)

Well, it's posh innit? The courts are posh. It's all posh to me, everyone in wigs; everyone talks in this funky language.

(Ali)

When I was told I had a bail date until October that didn't really mean anything to me. And I didn't really understand – I mean I did eventually – but I didn't understand why we had to go to the magistrates' court, to the Crown Court and why it took so long. Like there was no kind of explanation ... I didn't even know really what the difference between a solicitor and a barrister. At the time it just was a complete new world.

(Jenny)

It was evident that some defendants would like to be more actively engaged in the court process, as demonstrated by this extract from an interview with Sam, a defendant who had appeared at both the magistrates’ and Crown courts on multiple occasions:

The moment you're sentenced you're taken straight away, and that's the one thing I've never liked about a court. "You're done now go away. You've just

ruined your life, we don't care. Off you go." That's a bit inhumane the way it happens. For a judge to send you to prison, I would expect someone to try and give someone some advice ... Take a few minutes out and speak to the guy, say "You're too old for it now. You need to sort your life out." Don't just brush people off.

However, it is important not to overstate the extent to which the defendants were passive and accepting. Many defendants expressed anger and cynicism about the court process alongside feelings of apathy, resignation, or detachment. This was evident in complaints about bias in decision-making, such as, "it [sentencing decisions] all depends on your class, and your background, and where you come from" (Patrice), or about rude or dismissive treatment by certain professionals or staff, "[ushers] are the most rude ... they were the people that really made my visits very, very stressful" (Jenny). Defendants' expressions of anger were often infused with a profound sense of their own powerlessness. Perhaps none provides a more vivid illustration of this than Dexter, a 37-year-old with a string of convictions for (serious) violent offences behind him. Although he described himself as having "no feeling in it" when he was most recently sentenced, what emerged most strongly from the interview with Dexter was a picture of an angry individual, who had the habit of expressing his anger in a manner that was – as he himself fully acknowledged – self-destructive and futile. When discussing being held in the cells during his last appearance at the Crown Court, he said:

I was causing a lot of trouble, kicking doors and all kind of stupidity; banging, punching the doors, making noise and shouting. Stupid behaviour; stupid, stupid behaviour. I was upset. At the time you don't know. You say, "I should have handled, conducted myself differently," but you're not thinking that at the time; you're in that moment of the anger, fresh. Afterwards, you look and think, "I shouldn't have carried on like that; that was stupid." I've been very silly at times, very, very silly ...

Re-imagining penal policy: supporting effective participation

This paper has sought to demonstrate that defendants are in the paradoxical position of being central to and yet, at the same time, at the periphery of the court proceedings that concern them. Many feel belittled by aspects of the process, certainly excluded and often confused by much of the language used in the courtroom, and sometimes frustrated by the archaic nature of proceedings and the apparent chumminess of the lawyers. Arguably, those who are more inclined to display 'passive acceptance' of the court process than actively to complain about it are the ones who are most thoroughly excluded and silenced, because they simply take for granted, or are barely aware of,

their highly peripheral role within the court. The marginalisation of defendants and particularly their passive acceptance have troubling implications for defendants' capacity to exercise fully their right to a fair trial – as enshrined in Article 6 of the European Convention on Human Rights. It is an established principle in law that in order to exercise this right, a defendant must be able to participate effectively in the court process: but it appears that effective participation in a meaningful sense is a standard that a great many defendants at the Crown Court do not attain.

There are several ways in which a defendant's ability to participate effectively could be enhanced. Key considerations for the judiciary and lawyers include:

- i) the need to support and ensure defendants' understanding of the various aspects of the court process. This is an absolute necessity both during trials and also shorter hearings which can be very fast-paced and even chaotic;
- ii) recognising that compliance and apathy may mask lack of understanding and disengagement;
- iii) the potential significance of small gestures by the judge which signal to defendants that they are being treated with respect and humanity, and that their case is being dealt with fairly. This could include offering defendants a glass of water or addressing them by their full name rather than just their surname;
- iv) the judge's opportunity during sentencing, to make a connection with the defendant, in conveying a message about the seriousness and consequences of the offence. While a defendant's response to this may be largely outside judicial control, the type of language used and style and tone of remarks can support or, conversely, undermine the chances of making a connection;
- v) the need to be aware that the jovial camaraderie between prosecution and defence lawyers can feel alienating and exclusionary for defendants (and, indeed, victims and witnesses).

It might be helpful to view the above recommendations through the lens of procedural justice theory. Proponents of procedural justice⁸ argue that in order for criminal justice systems to operate effectively, they must be seen to hold legitimate authority by members of the public, particularly those who access them. Extensive research on procedural justice has demonstrated that there is a strong relationship between the quality of personal experiences of the criminal justice system, trust in the system and

⁸ Procedural justice research is associated particularly with the work of Tom Tyler (e.g. 2006; 2011a; 2011b) and colleagues in the United States. European-based research on procedural justice includes that by Hough, Jackson, Bradford and others (e.g. Hough, 2012; Hough et al, 2013a; Hough et al 2013b).

subsequent compliance with the law and cooperation with criminal justice authorities. A key way in which criminal justice systems can maintain legitimate authority is through fair and respectful treatment; accordingly, procedural justice theory offers an approach that could be of benefit to *all* court users; victims, witnesses and defendants. Beyond this, the fair and respectful treatment of court users in the criminal courts has an intrinsic moral value. In short, experiences of good treatment contribute to how individuals feel about the criminal justice system more widely, and help to inspire confidence in justice.

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