
EDITORIAL

RETRIBUTION IN CRIMINAL SENTENCING

We live in a time when, regrettably, political discourse has become increasingly reductive. Political actors and commentators frequently seek to reduce complex subject matter to simple ‘sound bite’ propositions for easy digestion and adoption. Questions of security and crime are high on many political agendas and so it is not unusual to see politicians offering up campaign promises that include ‘tough on crime’ elements—promises which are frequently couched in unnuanced and even inaccurate portrayals of criminal law subject matter.

The calibre of the analysis reflected in discussions, in the political sphere, of criminal sentencing—a subject replete with subtlety and nuance—is often particularly disappointing. Some of the problem stems from muddled terminology.

Consider this example from Prof Jody Armour, published in an article in *The Conversation* in 2019:

...I’d argue that truly progressive prosecutors recognize that ‘hurt people hurt people’ and refuse to subordinate the values of restoration, rehabilitation and redemption to those of retribution, retaliation and revenge. [emphasis added].

There we see it, in a legal publication by a professor of law at a university in California, no less: the word ‘retribution’, recited in a kind of sinister trill together with the words, ‘retaliation’ and ‘revenge’, as though they are rough equivalents for criminal sentencing purposes. All three are set up together, standing in opposition to the more benign sentencing objectives of ‘restoration, rehabilitation and redemption’. This misuse and misunderstanding of the term ‘retribution’, in the criminal sentencing context, is widespread in everyday speech. Unfortunately, as the above example shows, it is all too common as well within the writings and commentary of some members of the legal profession and legal academe.

In common parlance, retribution is often (if not usually) equated with vengeance. Indeed, the *Concise Oxford Dictionary* includes the word

‘vengeance’ in its definition of retribution. The equation that is commonly asserted between retribution and vengeance is a plainly unsound equation for legal purposes, but its persistence obscures important concepts that jurists and moral philosophers have in mind when they use the term ‘retribution’ as it is meant in law. Such confusion presents an obstacle to rational inquiry into the important question of whether the inclusion of retribution as an objective in criminal sentencing can be justified morally, legally, intellectually or otherwise.

When used properly in the criminal sentencing context, ‘retribution’ is in fact a legal and philosophical term of art. The distinction is an important one. The purpose of this editorial is to look closely at what does and does not constitute ‘retribution’ for criminal sentencing purposes.

In Canada at least, the question of whether retribution, properly conceived, is indeed a proper objective of criminal sentencing was answered, in the affirmative, by the Supreme Court of Canada in *R v CAM* [1996] 1 SCJ No 28. There, Lamer CJC, *per curiam*, sought to explain what the word ‘retribution’ means in the sentencing context:

Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be ‘just and appropriate’ under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. [79]

And, continuing at para 80:

Retribution in a criminal context... represents an objective, reasoned and

measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

In philosophy, the concept of retribution is grounded in part in the notion of a prevailing moral balance. When the moral balance is disturbed or upset, some believe simply that there is a self-justifying moral imperative that the equilibrium be restored. As philosopher John Hospers stated in his text, *Human Conduct: Problems of Ethics*:

There is an injustice in allowing a person to inflict harm on others without the others (usually through the law) being able to inflict harm on him in return.

But this primitive approach to the righting of the moral balance is just that, primitive. It reflects the ancient nostrum of 'an eye for an eye, a tooth for a tooth' and is in no sense productive because (for, among other reasons) it is exclusively retrospective. Under such a regime, Hospers tells us:

Punishment is administered because of a past deed, and the justification given for the punishment is simply the fact that the past deed was committed. It is past-looking, not future-looking; because of, not in order that. If no good consequences were to result from the punishment, it should still be delivered. This view of punishment is apparently deeply rooted in human nature.

The chief objection to this arid 'eye for an eye' (or *ius talionis*) model, from a utilitarian point of view at least, is that it is not actuated by an intention to produce good. We think this is a fair objection. Utilitarians consider that no rule or law imposed by the state can be justified unless the adoption and enforcement of the rule or law is for the purpose of producing good. While utilitarian considerations are much in evidence in the modern approach to criminal sentencing, they are not the only factors at play (as is

shown by the ongoing debate about the fiction of general deterrence). But the core utilitarian requirement that, if punishment is to be inflicted by the state, the fundamental purpose must be produce good, surely lies behind much of the reasoning that guides the passing of every criminal sentence in a civilised society.

We began by observing that the notion of retribution owes something to the concept of a moral balance, which it plainly does. But the simplistic 'eye for an eye' approach, which also strives to set right the moral balance but does no more than strike back at the wrongdoer is, indeed, purely vengeful and an unjustifiable response to the problem of criminal misbehaviour in a just and civilised society. 'Retribution' as the term is used in *R. v CAM* (and in all enlightened discussions of the concept in relation to sentencing) is a far less blunt instrument than the primitive *ius talionis*.

Retribution in the modern juridical sense can probably be traced back to the philosopher, Immanuel Kant. For him, the concept of a moral balance, upset by criminal misbehaviour and requiring reinstatement, also figures in the analysis. But Kant's theory of criminal punishment is embedded in a kind of social contract, to which all members of society are necessarily privies. Jeffrey Murphy, in his text *Retribution, Justice and Therapy*, summarises Kant's approach as follows:

[Kant] offers a theory of punishment which is based on his general view that political obligation is to be analysed, quasi-contractually, in terms of reciprocity. In order to enjoy the benefits that a legal system makes possible, each man must make certain sacrifices—e.g., the sacrifice of obeying the law even when he does not desire to do so. Each man calls on others to do this, and it is only just or fair that he bear a comparable burden when his turn comes. Now, if the system is to remain just, it is important to guarantee that those who disobey will not gain an unfair advantage over those who obey voluntarily. Criminal punishment thus attempts to maintain the proper balance between benefit and obedience by ensuring that there is no profit in wrongdoing. The criminal himself has no complaint, because he has rationally willed or consented to his own punishment. That

is, those very rules which he has broken work, when they are obeyed by others, to his own advantage as a citizen. He would have chosen such rules for himself in an antecedent position of choice—what John Rawls calls ‘the original position’. And since he derives benefits from them, he owes obedience as a debt to his fellow citizens for their sacrifices in maintaining them. If he chooses not to sacrifice by exercising self-restraint and obedience, this is tantamount to his choosing sacrifice in another way—namely by paying the prescribed penalty. [emphasis in original]

Retribution in this Kantian sense—forming part of the social contract that depends, for its viability, upon reciprocity between and among citizens, and between citizens collectively and the state—is what we believe Lamer CJC had in mind when he gave judgment (for the court) in *R v C.A.M.*

So how, then, does Kantian retribution truly differ from the mere vengeance with which it is so commonly confused?

Vengeance or the *jus talionis*, as Hospers has noted, is exclusively backward-looking. Vengeful punishment strikes back at the wrongdoer, symmetrically, *because he has committed a wrong and for no other reason.* There is no real thought given to a moral purpose for striking back, or even to its effect upon the propensity for the wrongdoer to do wrong again. In truth, apart from achieving a ‘fearful symmetry’, there is no justification offered for it. Vengeance is really no more than a simple-minded exercise in Old Testament accounting. Where an entry appears on one side of the ledger, it must be matched by one on the other, full stop. In a 1996 review published in the Times Literary Supplement, philosopher Terry Eagleton characterised revenge in a rather colourful way:

[Revenge is] a rigorous computation in which one quantity of blood hopes to erase another. In the surreal arithmetic of getting even, to double is to cancel, to compound is to nullify.

It is thus little wonder that vengeance does not belong in the calculus of criminal sentencing. In the words of Lamer CJC in *R v CAM*:

...both academic and judicial commentators have noted that vengeance has no role to play in a civilised system of sentencing. [80]

Kantian retribution, by contrast, is coextensive with the social contract that it both affirms and upholds; the reciprocity that is such an essential element of our conceptions of justice and civilised social intercourse depends upon it. Thus, retribution is not merely backward-looking, aiming only to settle a score. Rather, when it comes into play in sentencing, Kantian retribution openly and visibly affirms and reinforces the value placed by society upon the subject matter of the rule or law that has been transgressed, and thereby (one hopes) strengthens the social contract itself. In this sense, unlike vengeance, Kantian retribution can be justified because, by affirming the fundamental values that underlie the social contract by which we are all bound, it is aimed at ‘producing good’.

The widely accepted precept that punishment must be calibrated to ‘fit the crime’ is an important part of the Kantian notion of retributive justice. A criminal sanction that is disproportionately harsh is manifestly a violation of the social contract because it violates the requirement of reciprocity.

Vengeance, which consists of unproductive moral accounting and nothing more, lacks a progressive, values-affirming purpose. Neither is vengeance calibrated to ‘fit the crime’, using the values embodied in the social contract as the applicable scale. Vengeance involves only retaliation and rough symmetry. It is, thus, properly excluded from the decision-making involved in the passing of criminal sentences. Retribution, by contrast—which is measured with care to fit the crime and the moral culpability of the offender and, at the same time, affirms the values transgressed by the wrongdoer—is an important objective of criminal sentencing.

As was noted early on in this editorial, it is sometimes observed that criminal justice systems have a ‘credibility problem’ with their citizenries. The issue arises, not infrequently, in the context of sentencing and the way it figures in public and political discourse. Some judges, it is said, are ‘too soft on crime’. Like most such criticisms, this one is often demonstrably

wrong and, occasionally, right. Having clarity in the ways in which these subjects are debated in public can only assist.

There can be no doubt that criminal misbehaviour unleashes vengeful impulses from many within the population. These are understandable but unworthy impulses, and ones to which judges must not yield. If the level of the public discussion of criminal sentencing is raised to reflect some of the nuances and subtleties of the subject in this regard, then perhaps those vengeful impulses might be curtailed. Fostering a better public understanding of the proper role and character of ‘retribution’, as the term is used in law, should assist in the pursuit of that goal.

JUDICIAL INDEPENDENCE UNDER THREAT

We continue to follow, with some considerable alarm, the developments unfolding in certain Commonwealth member states which imperil the independence of the judiciaries presiding in those countries. It is a sign of the degree to which matters have deteriorated that there is only space in this editorial to address one of several instances of state actions that, currently, are demonstrably inimical to judicial independence.

In Sri Lanka, elections of local authorities have thus far been effectively thwarted by the refusal of the Secretary of the Treasury to release funds previously allocated by Parliament to finance those elections. A deadline of 3 March 2023 for holding the elections has now passed. An application brought before Sri Lanka’s Supreme Court led to the making of an interim order by that Court requiring the Secretary of the Treasurer to cease withholding the funds. Now the three judges comprising the panel that heard the application and made the interim order have been referred to the Sri Lankan Parliamentary Committee on Ethics and Privileges for investigation—an apparent contravention of the *Commonwealth (Latimer House) Principles on the Three Branches of Government*, which are integral part of the Commonwealth Charter and to which Sri Lanka has agreed to abide. Those *Principles* state, in part, that:

Judiciaries and parliaments should fulfil their respective but critical roles in the promotion

of the rule of law in a complementary and constructive manner.

The initiating of investigatory proceedings against the Sri Lankan judges also appears to be a contravention of the *UN Basic Principles on the Independence of the Judiciary* which state, in part, ‘it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary’ and ‘there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision’.

These actions of the Sri Lankan government have drawn formal objections from, among others, the CMJA, the CLA and the CLEA (in the form of a joint statement) and the Bar Council of the UK.

Where judicial independence is not rigorously defended and protected, the rule of law itself is placed in jeopardy. It is to be hoped that the initiatives currently on foot in Sri Lanka that appear to contravene well-established precepts regarding the independence of the judiciary in that country will be rethought and abandoned.

THE CMJA CONFERENCE IN CARDIFF

The countdown is on; conference time in Cardiff is fast approaching. After a false start in 2020 owing to the pandemic, the enthusiasm of our Welsh colleagues to welcome their CMJA friends and delegates to their fair city is palpable. That enthusiasm is matched only by the enthusiasm that those planning to attend feel about travelling to Cardiff and participating in the CMJA conference there. It is certainly time now to register now to avoid disappointment. The conference takes place from 10-14 September. The 2023 conference theme is ‘Open Justice Today’.

WHAT AWAITS YOU IN THIS ISSUE

A good deal of disparate ground is covered in the substantive articles assembled for this issue of the *CJJ*.

- Karl Laird of St Edmund’s Hall, Oxford, is taking forward the journal’s examination of Deferred Prosecution Agreements (‘DPAs’). Following on from an

examination of the Canadian experience, in his two-part article Mr Laird will survey how DPAs operate in England and Wales. The Part I article in the present issue analyses how DPAs operate in practice with reference to the relevant legislation;

- Foong Cheng Leong and Yew Pui Yi of the Malaysian Bar describe the steps taken in that jurisdiction to adjust the operations of the court system to the challenges posed by the recent COVID-19 pandemic and the legacy that has been left by the process of adaptation;
- Australian psychologist and lawyer Carly Schrever is one of a very few to conduct empirical research into the phenomena of judicial stress and burnout. Her findings provide a solid scientific foundation, and some helpful context, as we continue our exploration of judicial wellbeing and the steps being taken in Commonwealth jurisdictions to foster and facilitate it;
- Prof Neil Parpworth of de Mountfort University's School of Law has contributed an article on separation of powers in South Africa and the role the Constitutional Court plays in overseeing that important dimension of the country's democracy;

- has contributed an article that is concerned with the practice of witchcraft in Papua New Guinea, as seen through the broader lens of reconciling modern approaches to human rights and the criminalisation of harmful conduct with ancient customary practices; and
- Justice Dallas Miller of the Alberta Court of King's Bench has written on identification evidence in the social media age, as seen in the context of the prevention of wrongful convictions in Canada.

LAW REPORTS: AN UPDATE

We told you in the editorial for the December 2022 issue that we are revising the way we present the content in our Law Reports section. The process of arriving at a new format—one that is more compact but still provides our readers with the knowledge they need in order to know whether they wish to follow up and read decisions to which they may not otherwise have been alerted—is taking longer than anticipated. However, we expect to return to publishing our Law Reports section with its content in a revised format in December 2023. We thank you for your patience.

PLEASE DON'T FORGET TO PAY YOUR MEMBERSHIP DUES ON TIME.

Arrears in Membership dues adversely affects the work that the CMJA can undertake on behalf of its membership and the work that the CMJA does on promoting and protecting judicial independence across the Commonwealth.

We would urge all Member Associations and Individual Members to pay their Membership on time