Punishment & Sentencing: A Rational Approach

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PUNISHMENT AND SENTENCING: A RATIONAL APPROACH

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To my parents, Marica and Ante

PREFACE

In terms of the interests it deals with, sentencing is probably the most important area of the law. Ironically, it is also the least coherent. Nearly three decades ago, sentencing law was described as a wasteland in the law.[1] In the UK and Australia, this is still the case. Sentencing decisions are often made, not on the basis of established rules and principles, but in accordance with the idiosyncratic sentiments of sentencers. Sentencing law and practice in the US is, for the most part, more constrained, owing to the presence of widespread mandatory sentencing regimes in many States, but is no more principled.

The main reason for the rudimentary state of sentencing law is the absence of a rationale for punishment. If we do not know why punishment is justified and what is sought to be achieved by it, there is no prospect of developing meaningful sentencing objectives and principles. We should not be surprised at the ad hoc nature of sentencing law. As is noted by Walker and Padfield:

> [Judges do not undergo] training in which the fundamental principles of sentencing have been a subject of study ... and even those who took ... academic courses in law have not always included jurisprudence among their subjects; and even if they did by no means all jurisprudence courses pay attention to theories of punishment.[2]

This, of course, applies even more so in the case of legislators, most of whom do not have any formal legal education. The broad purpose of this book is to suggest a way of introducing principle into sentencing.

The main issue raised by the concept of punishment is how the deliberate infliction of pain on wrongdoers can be justified. There are two main theories of punishment: retributivism and utilitarianism. Retributivism represents the current orthodoxy of punishment; however, I argue that it is ultimately unconvincing. The shortcomings of retributivism include its inability to justify the imposition of harsher forms of criminal sanctions without resort to consequentialist considerations, and its doubtful premise that we should punish offenders even if no good comes from this.

It is also argued that the main criticisms that have been levelled against the utilitarian theory of punishment, and which have led to its demise as the prime philosophical justification of punishment, have been unduly persuasive. Utilitarianism is the soundest theory of punishment and should be adopted as the underlying rationale for sentencing. However, it is contended that the sentencing objectives which ought to be pursued against this background differ from those normally associated with a utilitarian theory of punishment. Traditionally, it is thought that the good consequences of punishment are rehabilitation, incapacitation and deterrence. The empirical evidence that is available, however, suggests that incarcerating high numbers of offenders does not lower crime and that punishment does not reform. The

1 Frankel, 1973.

2 Walker and Padfield, 1996, p 109.

only verifiable good consequence of punishment is that it deters a great many people from committing crime. It follows that the sole aim of criminal punishment should be to deter potential offenders from engaging in wrongdoing. Although there is a link between the crime rate and the existence of some criminal sanction, the evidence does not support a link between heavier penalties and the crime rate. Thus, the (modern) utilitarian theory of punishment advanced in this book differs markedly from conventional utilitarian jurisprudence on punishment.

This theoretical framework has several important practical implications for sentencing law and practice. The recent trend towards tougher penalties should be stopped. Further, many considerations which are currently regarded as being integral to the sentencing calculus, such as an offender's previous convictions and prospects of rehabilitation, are irrelevant. This leaves the way open for a widespread fixed penalty regime, which will assist in promoting consistency and fairness in sentencing.

Earlier versions of several chapters or parts of chapters were published elsewhere. Such sections as are reprinted, are reprinted by permission. I gratefully acknowledge permission to use the following papers here:

'Sentencing: the road to nowhere' (1999) 21 Sydney L Rev, pp 597–626.

'In defence of a utilitarian theory of punishment: punishing the innocent and the compatibility of utilitarianism and rights' (1999) 24 Australian Journal of Legal Philosophy, pp 95–144.

'The errors of retributivism' (2000) 24 Melbourne University L Rev, pp 124–89.

'Incapacitation, deterrence and rehabilitation: flawed ideals or appropriate sentencing goals' (2000) 24 Crim LJ, pp 21–45. This paper has been used with the express permission of LBC Information Services, a part of the Thomson Legal Regulatory Group Asia Pacific Ltd.

'Suspended sentences and protective sentences: illusory evils and disproportionate punishments' (1999) 22 University of New South Wales L Rev, pp 565–94.

'New criminal sanctions – inflicting pain through the denial of employment and education' [2001] Crim L Rev 184–204.

'Double punishment and punishing character – the unfairness of prior convictions' Criminal Justice Ethics, pp 10–28.

'Consistency and fairness in sentencing – the splendour of fixed penalties' (2000) 1 California Crim L Rev 1–25.

'Proportionality in sentencing: its justification, meaning and role' (2000) 12 Current Issues in Criminal Justice 142–65.

My interest in punishment was first stimulated by a series of inspirational lectures delivered by Chin Liew Ten about a decade ago. I owe an enormous amount to his writings and his many insightful suggestions on earlier drafts of this book. He assisted me in thinking through many philosophical issues and saved me from countless errors – I am, of course, responsible for any remaining errors. I am also extremely grateful to Kumar Amarasekara, who provided me with tremendous encouragement and assisted me to clarify many parts of the book, especially sentencing related issues.

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May 2001

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