Anger and Sentencing in Ancient Greece

Opening of the Legal Year 2018

29 January 2018

Supreme Court of the Australian Capital Territory

Chief Justice Murrell

Attorney-General, judicial officers, Presidents of the Bar Association and Law Society, members of the legal profession and friends of the courts,

The Court acknowledges the first peoples of the Australian Capital Territory as the traditional and continuing custodians of this land, and we pay our respects to their elders—past, present and emerging. The Court hopes to build the recognition and respect that exists between the Court and the indigenous peoples of this country.

I thank Aunty Agnes for her Welcome to Country, the Attorney-General for his remarks, and Mr Dion Devow for agreeing to speak today.

At the 2015 opening of the legal year ceremony, I expressed the hope that it would be the last occasion when the ceremony was held in this courthouse. I reiterated the same sentiment in 2016 and 2017. Clearly, I am an optimist. This year, I will say nothing further on the subject of timing.

I would like to record the passing of Cameron Lyons of Lyons, the architects of the new Court building. He was both a wonderful architect and a gentleman. It was an absolute pleasure to work with him.

A new year is an opportunity for us to reflect on our personal lifestyles and aspirations and make improvements (or, at least, resolve to do so).

At a professional level, it is a time to recalibrate our perspectives, to reflect on broader justice issues and to renew our commitment to the rule of law and to delivering justice in the wider sense.

Anger and criminal justice in Ancient Greece

Over the summer break, some of you will have seen “Three Billboards Outside Ebbing, Missouri”. Many months after her daughter was raped and murdered, the enraged protagonist utilises three disused roadside billboards to voice her anger and frustration. The first billboard proclaims: “Raped while dying”. The second: “Still no arrests”. The final billboard: “How come, Chief Willoughby?” The movie traces how this public expression of anger plays out, both destructively and cathartically.

Anger is a natural emotional response to a wrong. But in our justice system, we don’t accord a legitimate place to anger. It is antagonistic to a calm, objective and evidence-based approach to criminal justice.

The ancient Greeks saw things differently.

Trials in ancient Athens were presided over by a magistrate, who was an ordinary male citizen serving a one-year term. The role was allocated by random lottery.

Many cases were decided by a jury of 200 or more male citizens, who voted without deliberation and by secret ballot. Majority vote determined the outcome.

In most cases, the prosecutor was the victim of the wrong, a family member, or another person involved in the dispute. The trial began with the citizen-prosecutor launching into a passionate story of personal outrage in an endeavour to convince the jury to adopt an equivalent outrage.

Anger was measurable and dispensable. Ancient texts spoke of going to court bearing "three days' worth" of troublesome anger;[1] I can only imagine the difficulties that anger-based time estimates created for court listings. The parties referred to past punishments as a guide to the level of anger that was fitting and what that anger equated to in terms of punishment; the emotive precursor to comparable cases as a relevant sentencing consideration.

When it came to sentencing, some offences carried prescribed penalties. For other offences, the prosecutor and the defendant each proposed a penalty to the jury. The jury then voted on the proposals, choosing the more appropriate.

This process, *timesis*, was designed to have a moderating effect. The citizen-prosecutor was discouraged from proposing an excessively harsh penalty for fear that the jury would then vote for the defendant's more lenient proposal, and vice versa.

In this way, the sentencing process converted the victim's personal anger into a decision determined by, and acceptable to, the community. Thus communal peace was restored after the disruption.

Possible punishments included public humiliation in the stocks, fines, varying degrees of disenfranchisement and loss of political rights, exile from the city, and death. At one time, if a fine went unpaid the criminal debtor could be enslaved to the private creditor until payment was made. This type of private imprisonment evolved into debt imprisonment in a public prison, possibly for life (at least for the poor, imprisonment often meant that a prisoner would never have the resources to pay their fine).

Lessons for today

Today, few would argue that imprisonment is an appropriate alternative to fine default (although that realisation has come rather belatedly to parts of the modern Western world). Yet in some respects the approach that the ancients took to trial and sentencing remains relevant today.

While the emotion of anger has been allocated no legitimate place in our criminal justice system, nor has it been neutralised. The expression of anger and outrage is

[1] Danielle S Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton University Press 2000) 172.

commonly voiced by the press, which purports to speak on behalf of victims of crime and the public. Generally, it is anger about the leniency of prison sentences.

I hasten to add that I agree with Lorana Bartels' point that, in the ACT, we are lucky that the media are more willing to inform than inflame.[2] That is not true of other Australian jurisdictions.

It is sentencing that excites the public mind more than any other aspect of judicial decision making. It is rare to read of public outcry against a judge's ruling on jurisdictional error or equitable estoppel. But when it comes to sentencing, everyone has an opinion. Within the past week, a federal minister has criticised the "soft sentences" imposed by some judges and called for the appointment of tougher judges.[3]

Among present company, no doubt the judges of this Court are admired to excess for their compassion towards the disadvantaged who populate our criminal courts and for their thrifty protection of the taxpayer dollar (in the ACT, the cost of imprisonment is well above the national average at $436 per inmate per day).

However, your admiration is probably not shared by the wider community. Public opinion polls suggest that many people feel that sentences are too lenient.[4]

What is "too lenient"? What is it about, say, a 10 year sentence that would make it just right, as opposed to a 3, 5 or 7 year sentence? Is a longer sentence more likely to achieve rehabilitation, general or specific deterrence? The evidence is to the contrary and, in all spheres other than sentencing, judges act on the evidence.

Despite the perception of judicial leniency, studies also show that, when presented with the same information as the sentencing judge, members of the public tend to propose a lesser sentence than the judge.[5] Both domestic and international research shows that, the more informed individuals are about crime, the less punitive they are.[6]

So these media and public perceptions of leniency have nothing to do with the evidence and little to do with what the informed public thinks—it's all about the

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[2] Lorana Bartels, 'Curing Our Addiction to Prison', *The Sydney Morning Herald* (online), 24 April 2016 <http://www.smh.com.au/comment/curing-our-addiction-to-prison-20160421-gobl0h.html>

[3] Rachel Baxendale, *Alan Tudge Says Victorian Judges' Sentences Are "Too Soft"* (16 January 2018) *The Australian* <https://www.theaustralian.com.au/national-affairs/law-council-president-judges-should-stay-away-from-politicians/news-story/590cc7e07219078310583c71753d7239>.

[4] Smart Justice, *Public Opinion and Sentencing* (23 July 2015) <http://www.smartjustice.org.au/resources/SJ_PublicOpinion.pdf>; Justice Virginia Bell AC, 'The Role of a Judicial Officer—Sentencing, Victims and the Media' (Speech delivered at the Magistrates' Court of Victoria Professional Development Conference, 22 July 2015). <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bell22jul2015.pdf>.

[5] Smart Justice, above n 2; Jeremy Story Carter, 'Jurors Would Give Softer Sentences Than Judges, Study Finds', *Australian Broadcasting Commission* (online), 28 April 2016 <http://www.abc.net.au/radionational/programs/lawreport/jurors-would-give-softer-sentences-than-judges-study-finds/7364394>.

[6] Lorana Bartels, 'Criminal Justice Law Reform Challenges for the Future: It's Time to Curb Australia's Prison Addiction' in Ron Levy et al, *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press 2017) 119.

emotion. The emotion of anger and the associated desire to exact revenge - vicarious revenge on behalf of the victim.

In this regard, the system in ancient Greece was commendable. The victim prosecutor had a voice from the outset—an angry voice. The process allowed the victim's anger to be vented and moderated.

There are two important lessons if we are to avoid engaging in an exhausting and fundamentally flawed "law and order" debate about the length of prison sentences.

First, the public must be informed about what sentencing judges do and why they do it. An informed public is likely to agree that, generally speaking, sentences are not too lenient and will be equipped to debate sentencing principles in a constructively critical way.

In ancient Greece, most citizens learned about punishment through their roles as magistrates, prosecutors and sentencing jurors.[7]

Our jury system provides an important opportunity for the public to participate in the criminal justice system and learn about it. But the public has no role in sentencing. As a profession, lawyers must foster greater understanding of sentencing. The Supreme Court is looking at ways to better inform the community.

Second, we must continue to explore ways to better deal with victim disenfranchisement, providing avenues for victims to have a voice and, if necessary, to express their anger. Today, victims still feel that their voices are not heard. They want to be included in the sentencing process and understand their position.[8]

Listening to victims will not necessarily result in the imposition of heavier sentences. It is often wrongly assumed that the issues of victim voice and sentence length are necessarily associated (that what victims really want is longer sentences). I give victims more credit than that. It is the experience in many spheres of life that, for participants, meaningful inclusion in the process is more important than outcome.

The High Court in *Munda v Western Australia* said:

> the long-standing obligation of the state [is] to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.[9]

But vindicating dignity, and conferring voice and understanding are very different.

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[7] Allen, above n 1, 4.
[8] ABC Radio National, 'The Complexities of Sentencing',*The Law Report*, 28 November 2017 (Damien Carrick, Carmel Arthur, Lorana Bartels, Cynthia Marwood, Lord Justice Colman Treacy, Julian Roberts) < http://www.abc.net.au/radionational/programs/lawreport/sentencing-models/9195748#transcript>.
[9] [2013] HCA 38; 249 CLR 600 at [54].

Of course, victims may provide the sentencing judge with a Victim Impact Statement, which the judge "must consider".[10] But to what end? Surely the sentence should be no heavier just because the victim is more articulate.

Should sentencing remarks be expressed or structured differently? Should they be better explained to the victim—and by whom? A victim has described coming to appreciate how she was recognised in the sentencing remarks only after the case concluded because she was distracted during the proceedings and fixated on hearing the outcome.[11] That is a long time to wait.

Restorative justice may offer victims a forum in which to express and process their anger. It is important that RJ be offered in a wide range of cases, including serious cases, and that the timing and delivery of RJ is not unduly constrained by legislation. Flexibility and discretion in approach will best serve the needs of victims, offenders and courts.

Conclusion

In the final scene in Three Billboards, the protagonist seems to have worked through and somewhat moderated her anger, although there have still been no arrests. But as one reviewer commented, while it may be ok for white women—or at least famous white women actors and gymnasts—to publicly express anger at being wronged, "we still don't live in a world where everyone gets to be angry".[12]

In our justice system, it is rare for a victim or any litigant to speak for themselves in the manner and at the time that they may wish to do so.

It is the responsibility of lawyers to be the voice of their clients, and of judges to listen to and respect those voices. We should all renew our commitment to do so.

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[10] *Crimes (Sentencing) Act 2005* (Act) s 53(1)(a).
[11] ABC Radio National, above n 6.
[12] Alison Willmore, *"Three Billboards" is an Unfortunate Metaphor for Our Complicated Cultural Moment* (3 December 2017) Buzzfeed News < https://www.buzzfeed.com/alisonwillmore/three-billboards-outside-ebbing-missouri?utm_term=.bhogorrBA#.qwnr5LLZK>.