RESTITUTION AND COMPENSATION AND FINES

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I. INTRODUCTION

Money matters, indeed it does, and the latest Working Papers of the Law Reform Commission of Canada (Nos. 5 & 6) are concerned with the use that the criminal courts can put money to as part of the corrections process. Despite our current troubles with money, loss of value and inflation, the project on sentencing and dispositions directed by Professor Keith Jobson has produced a good many stimulating ideas that should lead to a systematic rethinking of the principles upon which we have hitherto been acting in this respect.

Two things need to be said to make the Working Papers intelligible. Firstly, the project staff have chosen to use 'restitution' to mean a sanction permitting a payment of money or anything done by the offender for the purpose of making good the damage to the victim, while, 'compensation' refers to a contribution or payment by the state to the victim.[1] The Code, on the other hand, uses 'restitution' to mean restoration to the victim of something that he has lost, or something for which it has been exchanged, while, 'compensation' in the Code means damages. The Code usage is the more traditional one, as expressed in the usual legal digests and dictionaries. While the use made of the words by the project staff is harmless and probably justified in order to keep their presentation clear and simple, I personally, would not like to see this particular shift in the meaning of the words carried into legislation, for several reasons but mainly because it would conflict with the accepted meaning of the terms in other branches of the law, and would lead to confusion in the administration of criminal justice.

The second point to be noted is that the project staff and the Commission take as their point of departure in Working Papers 5 & 6 the conclusions reached in Working Paper 3, *The Principles of Sentencing and Dispositions*. The impression I formed of these principles is that the project staff and the Commission concluded that it is not realistic to expect the law to do more than take note of the gravity of the offence and, through a range of dispositions, affirm, uphold and protect core community values; that rehabilitation programs and, in particular, parole have not proven themselves as reformative, on the one hand, while imprisonment is even more suspect on

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[1] LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION AND FINES, WORKING PAPERS 5 & 6, at 8 (1974).

the other hand, as there is positive evidence of its deleterious effect while its positive effects are dubious, to say the least; and that, therefore, society should seek alternatives to imprisonment in the corrections process, which exists primarily to manifest society's attitude towards its accepted values by the various processes open to the criminal law.

Among these processes, one that has untapped possibilities, is conciliation and adjustment of the conflict and harm between the victim and the offender. This brings us to the first topic, which is restitution.

II. RESTITUTION

Restitution, (as above defined for the purposes of the Working Paper), is treated primarily as a sanction and not in the context of pre-trial settlement or conciliation. The two, however, are connected, at least, historically. My impression is that the Working Paper does not bring this out vividly enough to make us realize the source of our inhibitions in using this remedy. Thus, it is reasonably clear that the Royal Courts in England took jurisdiction over more and more offences from local courts, largely but not exclusively, because the pursuit of crime was a source of revenue. The King's justice was more efficient justice but it was not particularly concerned with the victim. For example, stolen goods were forfeited to the Crown until the reign of Henry VIII, when a practice of awarding restitution to the victim began. Before that the victim had to pursue the offender by an appeal of felony in order to get his goods back.

Was it this background that led to the stringent laws against compounding a felony, or making any accommodation with a person who had wronged you in a criminal way? It was undoubtedly an element in that effect, although it is easy to see that there were other factors involved, especially the sentiment that crime is, in fact, a wrong to society, in addition to the harm caused to the victim, and, of course, there are crimes, such as driving offences, where the usual victim is only society.

In my own experience of the criminal law, mostly either as a prosecutor or judge, I have recollections of several good and sensible magistrates reacting strongly when a case raised any suggestion that the criminal law was being used to collect a debt. My own impression at the time was that this reaction was justified because the criminal law processes are so much more harsh and destructive than civil law ones. The Working Paper does not persuade me that that reaction is unsound, but it has persuaded me that some thought should be given to greater leeway for out-of-court settlements and accommodations. This should certainly be the case with most assaults and mischief charges, and could well be the case with a good many thefts.

Surprisingly, the Working Paper made no reference to work being done by a group from the Centre of Criminology of the University of Toronto in East End Toronto, of which I had heard rumors a couple of years ago. The deliberate policy of the Working Papers of avoiding specific references

of this nature, while it has its advantages is, I think, less than useful in this context. Indeed, the Working Papers refer to a great many conclusions of fact as now accepted, or now, at least, apparently the case, without any reference to sources. Apart from such data, however, the Working Papers proceed in a purely aprioristic manner. This is not to be deplored, or slighted: much work in law reform will necessarily involve a deductive approach, but it is subject to the weakness that we are aware of in the capital punishment debate. Our attitude is largely dictated by what we feel about it in our bones.

Restitution as a sanction is colored by the traditional legal attitude towards restitution as conciliation, accommodation or out-of-court settlement. It is also colored by the fact that a great many offenders appear not to have the means, present or potential, to make satisfaction for the harm they have caused. One optimistic note supplied by the Working Paper, is the number of offences that involve damage of a comparatively minor nature, well within the power of the ordinary offender to make amends for to the victim.

The chief provisions of the Criminal Code respecting restitution are sections 388, 653, 654, 655, 662.1(1), 663(1)(2)(*e*) and 742. The last mentioned is evidently a holdover from the beginnings of the Code and now applies only to section 388, which, itself, is limited to petty damage.

The court is required by section 655(1) to order the restitution of any property obtained by the commission of an offence, to the person entitled to it where an accused is convicted, and the court may make an order even where the accused is not convicted, if the court finds that an indictable offence has been committed. This section still trails a tail from the time when financial interests were able to get special protection for their dealings in negotiable paper. Sections 653 and 654, however, can be invoked only by a victim or an innocent purchaser who has had to surrender what he bought, and the subsequent provisions of the sections, (which are identical in each), demonstrate clearly that the authors were thinking in terms of civil obligation, and not in terms of penal sanctions. The need to get the authorization of the victim and the civil context in which lawyers habitually think of these two provisions, has resulted in the past in Crown counsel largely ignoring them. Even when they are invoked, courts are leery of them and may direct the applicant to seek his remedy in the civil court. Consequently, the case law dealing with the provisions is scant, and there are several questions arising out of the wording and structure of the provisions, especially subsection (2), that have not been explored at all.

A court that wishes to circumvent the restrictions of sections 653 and 654 can invoke section 663(1)(*b*), if the case is one that does not fall properly under clause (*a*). That is, if the court wishes to impose a penalty in addition to restitution, it may do so within the limits of clause (*b*)—2 years—by making restitution or reparation a condition of a probation order. Here, probation can be viewed, not as a form of suspended sentence, but as the modern equivalent of the old device of 'binding over'. This was often

used at the end of the 18th century and the beginning of the 19th century to restrain radicals who went too far, in the view of the authorities, in publishing seditous libels. William Cobbett was one who had to suffer this restraint for exposing corruption in the army.

The project staff wisely, in my opinion, insists that restitution ordered by the court is a correctional sanction and not to be confused with the civil remedy. For this reason, and equally wisely in my opinion, they reject a combined trial of the criminal offence and the civil right. Something of that nature has existed in France and it does not appear to have been particularly successful.

The Commission makes the fundamental points that the victim has been unduly ignored, and that restitution will bring his position to the fore, will exhibit to society and to the accused the values that the criminal process is designed to uphold and that, therefore, restitution as a sanction will not only have a valuable educational and deterrent effect but will go far to readjust the balance of society, possibly to the extent of a net gain in some instances. To me, this approach makes a great deal of sense, and it could be inaugurated by some symbolic change in the Code, such as an amendment to sections 653 and 654 permitting the judge to make such an order of his own motion, or even by some statement in the declaration of sentencing principles that the Commission favours putting in the text of the law.

I have some qualms about such a declaration however. People in this country are so divided between hawks and doves on questions of corrections that it is doubtful whether there can be achieved any wide consensus on sentencing principles. In the absence of such a consensus, a legislative declaration of principles would represent a triumph by one party or the other, with a pronounced tendency in the defeated party to subvert the application of the principles, or else a declaration would be adopted so wanting in principle as to be practically useless. I would, therefore, favour a symbolic change at this point and I don't see why it can't be done now, without waiting for the Commission to get its philosophy of corrections all shipshape and balanced.

III. COMPENSATION

This, as noted, means compensation from the state to supplement restitution from the offender. The Working Paper states:

> Compensation to victims of crime can be used to further the purposes of the criminal law and ought not to be lost in social insurance programs aimed at sharing the losses arising from the social and economic policies of society as a whole. That being so, the structures and mechanisms for delivery of compensation to victims of crimes should be related to the criminal law and its processes. [2]

The Commission adds that the compensation should be timely. [3]

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[2] *Id.* at 20.
[3] *Id.*

The Paper takes a quite realistic approach to the scope of the remedy, *i.e.*, the classes of harms for which there would be compensation. Personal injuries resulting from crimes of violence should be included, as should other offences, such as breaking and entering and theft from the person, that involve injuries to feelings, dignity and personal security, as much as crimes against the person do. Other property offences would be excluded, not only because they would place an undue burden on the public treasury but because they might discourage the settlement of minor conflicts, and also because they can adequately be covered by insurance.

One suggestion of the Commission that may run into practical difficulties is that fines and forfeitures should be paid into a special fund dedicated to compensation of this nature, as these funds are now largely expended in the administration of justice.

The justification for state compensation is at root, 'social reciprocity', a principle that H. L. A. Hart suggests is the basis of society.[4] Thus, "in a society that places a premium on openness and freedom from pervading police control, the citizen who falls victim to a crime should be compensated as a matter of social reciprocity."[5] An analogy is drawn with Workmen's Compensation by which society compensates individuals for their losses arising in socially beneficial work. The analogy has its dubious aspects, but the principle seems not only sound but realistic. Elsewhere the Working Papers point out that crime is incidental to almost all modern society, and that its total inhibition or control can never be perfect. Public compensation would thus be a just means of spreading the risks and costs of contemporary social life.

IV. Fines

In Working Paper 3, the Commission recommends that imprisonment ought to be used with restraint. This is not only because depriving a person of liberty is the exercise of an "awesome power"[6] but because it is costly and of doubtful effectiveness. In addition to diversion, *i.e.*, out-of-court settlements, the Commission considers restitution, community service and probation as more humane and, at least, equally effective alternatives to imprisonment that are also far cheaper. Fines as an alternative are not only less awesome but are clearly the least expensive measure possible. The Commission can only say about effectiveness, however, that "they have not been shown to be any less effective a deterrent than any other disposition."[7]

The least satisfactory part of the Commission's treatment of fines is the discussion of which offences are suitable for this sanction. There is, in fact, little or no direct discussion of this point, and the Commission's thinking

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[4] See Law Reform Commission of Canada, Principles of Sentencing and Dispositions, Working Paper 3, at 31 (1974).

[5] *Id.*

[6] *Id.* at 29.

[7] *Id.*

can be derived only from its discussion of the offences for which other sanctions are appropriate. I concur heartily in the initial suggestion to get rid of the limitation in Code section 646(2), which requires some other punishment to be added to a fine in any case where the offence is punishable with imprisonment for more than five years. I have on occasion found cases where a fine would be appropriate and have inadvertently omitted to give a nominal penalty of imprisonment with a consequent recourse to the court of appeal, so that it is obvious that this recommendation suits my idea of what is proper. Incidentally, some courts of appeal have accepted a sentence of one day's imprisonment plus a fine of a substantial amount as a suitable way of meeting the requirements of the subsection.

The next recommendations are more debatable, but on the whole I think they are sound. In substance they propose that fines should not be supported at the time of imposition by an alternative jail sentence, but every effort should be made to collect the fine before imprisonment is invoked. The resistance to such a proposal would stem mostly from the administrative ease with which the present system is administered, and the changeover would certainly cause difficulties. It cannot be denied, however, that the present system is hard on the poor and on derelicts generally, and does not produce equal justice.

To achieve equal justice, Working Paper 6 advocates a system of day-fines. These are units of measurement for a fine that would vary with the individual's pecuniary circumstances. A court would sentence to so many day-fine units and would then determine, (through the clerk of the court), what the offender's means were, following a set formula or guidelines, and from this the amount of the fine would be derived.

Indeed, a great deal of the administrative scheme in collecting fines as well as in determining the actual amount is left to the clerk-of-the-court machinery. I would prefer to see it, at least in terms, imposed upon the court with power to refer it to the clerk or some other officer. Reference would, of course, be the normal case in urban centres, but not all the magistrates—and magistrates still handle the great majority of indictable offences—have a clerical setup of the caliber envisaged by the proposals. Moreover, the proposals contemplate some judicial functions to be exercised by the clerk and these, in my opinion, should always be the responsibility of the court, ultimately, at any rate.

Well, what happens if the offender, having the means to pay, refuses to do so? The Commission recommends that, in that case, he would be dealt with as contumacious and imprisoned, or otherwise penalized, but, before that stage arrived, there would be a great deal of collection procedure to be gone through, including a second hearing as to his means after a show-cause summons and a possible warrant. These proceedings, capable of being protracted by a wily scoff law to undue lengths, would, I think, tend to put the administration of justice in contempt, and I think they could be abbreviated without any harm to civil rights or due process. The Commission suggests a pilot project before the scheme is adopted. A good many of the

recommendations could be adopted under the existing law so that a test can be made of these proposals. That strikes me as a good idea. Taking the proposals as reasonable deductions from what is commonly accepted among people engaged in corrections, I feel satisfied with them but I have no doubt others would like to see them tested.

In summary, the Working Papers on *Restitution, Compensation and Fines* struck me as sound, progressive studies that could lead to substantial improvements in the administration of criminal justice in the sentencing field. I congratulate Professor Jobson and his colleagues.