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SENTENCING PRACTICES AND RECIDIVISM

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INTRODUCTION

The Constitution provides that the Government of Canada has sole jurisdiction over criminal law. This power enables Parliament to define what conduct is considered criminal, set out the penalty type and/or range for offences, and specify who shall be responsible for determining the appropriate sanction and to what end.

Most criminal offences and penalties are set out in the *Criminal Code*, but other federal statutes such as the *Controlled Drugs and Substances Act* also form part of the criminal law. Prosecutors, the courts and parole boards are involved in interpreting the criminal law and implementing its objectives, as articulated by Parliament.

Unfortunately, the roles of these different institutions in shaping and applying the criminal law, and the impact of their actions on criminal behaviour and recidivism, are often misunderstood. The implications for this key public policy area are significant, and the present paper is intended to provide clarification.

PARLIAMENTARY AUTHORITY AND THE ROLE OF THE COURTS

Parliament has given the courts sole authority for sentencing offenders. This authority is set out in section 718.3(1) of the *Criminal Code*. However, judicial discretion is limited by rules made by Parliament.

First, the type of sentence that may be imposed by a court is set out in the criminal law. For example, offenders convicted of assault may receive a maximum term of five years' imprisonment.(1) However, under certain circumstances, the court is empowered to permit the

(1) *Criminal Code*, R.S. 1985, c. C-46, s. 266(a).

offender to serve his or her sentence in the community[2] subject to certain conditions. This is known as a conditional sentence of imprisonment. Other sanctions, such as a fine, might also be imposed.[3]

Second, in some cases the range of sentence that may be imposed by the court is also set out in the criminal law. This range may include a mandatory minimum penalty. For example, offenders convicted of drunk driving for the first time must receive a minimum fine of $600,[4] although they may also receive up to five years' imprisonment.[5] While mandatory minimum penalties are common in the United States, Parliament has not often chosen to limit the discretion of Canadian judges through this method.[6]

Third, the purposes and principles of sentencing are set out in detail in section 718 of the *Criminal Code*. Here, Parliament emphasizes the importance of proportionality and fairness, articulates the role of aggravating and mitigating circumstances, and mandates the use of imprisonment as a last resort. Although judicial discretion is limited by rules made by Parliament, it is necessary for the courts to interpret those rules. For example, after Parliament made the option of a conditional sentence of imprisonment available to the courts in June 1995, the Supreme Court of Canada clarified in *Regina* v. *Proulx* how this option should be used.[7] Should Parliament disagree with how the courts interpret legislation it has passed, it may amend the disputed provisions, repeal them, or in certain cases re-enact them notwithstanding the courts' objections.[8]

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(2) *Ibid.*, s. 742.1.

(3) Allen Edgar, "Sentencing Options in Canada," in *Making Sense of Sentencing*, ed. Julian V. Roberts and David P. Cole, University of Toronto Press, Toronto, 1999, pp. 117-118.

(4) *Criminal Code*, s. 255(1)(a)(i).

(5) *Ibid.*, s. 255(1)(b).

(6) Thomas Gabor, "Mandatory minimum sentences: A utilitarian perspective," *Canadian Journal of Criminology*, Vol. 43, No. 3, pp. 386 and 388.

(7) David Daubney, "Striking a Balance: A Strategy to Encourage Community Corrections in Canada," *Corrections Today*, February 2002, pp. 47-48.

(8) Section 33 of the *Canadian Charter of Rights and Freedoms* provides that Parliament or a legislature may enact laws that violate section 2 or sections 7 to 15 of the *Charter*. The law must expressly state that it operates notwithstanding the Charter's provisions, and the exemption expires after a maximum period of five years unless it is renewed.

ROLE OF PLEA BARGAINING

The provinces prosecute most *Criminal Code* offences, while the Government of Canada prosecutes offences under all other federal laws. Most criminal offences do not proceed to trial. Instead, provincial and federal prosecutors negotiate guilty pleas and sentences with the offenders' defence counsel through a process known as plea bargaining. Although the courts must approve the outcome, judges in these circumstances generally accept joint Crown-defence recommendations. Sentences are often less than if the matter proceeded to trial, but are influenced by penalty ranges and purposes set out by Parliament, and case law.

ROLE OF PAROLE

In Canada, parole dates back to 1899 when *An Act to Provide for the Conditional Liberation of Convicts – The Ticket of Leave Act* was enacted by Parliament. The law did not provide that offenders should first serve a minimum period of incarceration, nor was a new mechanism for supervision established. Instead, offenders were simply required to report to their local chief of police.(9)

Currently, the provisions of the *Corrections and Conditional Release Act* govern parole. Adjudication of parole decisions is the responsibility of the National Parole Board (NPB). The NPB is charged with "carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders."(10) Offenders are now required to serve a minimum period of incarceration before becoming eligible for parole(11) and are supervised in the community by the Correctional Service of Canada, or its provincial counterparts.

While the courts retain sole authority for sentencing offenders, the NPB has broad discretion to determine how long they remain in custody and to set terms governing their early release. The NPB may grant an offender full parole after he or she has served one-third of the

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(9) National Parole Board, *History of Parole in Canada*, on-line: http://www.npb-cnlc.gc.ca/about/parolehistory_e.htm (date accessed: 1 April 2004).

(10) *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 3(a).

(11) National Parole Board, *Fact Sheet – Types of Release*, on-line: http://www.npb-cnlc.gc.ca/infocntr/factsh/release.htm (date accessed: 1 April 2004).

sentence, or may order that the offender be detained until his or her sentence is complete.(12) Moreover, the NPB has a statutory mandate to evaluate the risk of recidivism, and to ensure that offenders who present an undue risk to society remain in custody.(13)

The provinces of British Columbia, Ontario and Quebec have their own parole boards, which have authority to grant releases to offenders serving less than two years in prison. These boards may operate somewhat differently than the NPB.

PURPOSES OF SENTENCING

There is disagreement over the purposes of sentencing. Some argue that the goal must be a reduction in crime rates, while others contend that retribution is most important.(14) An overview of the various purposes of sentencing follows:

Model	Purpose
General Deterrence	Prevent crime by other potential offenders by threatening future punishment.
Specific/Individual Deterrence	Prevent future crime by the offender being sentenced through creating fear of the consequences of reconviction.
Incapacitation	Prevent crime by removing offenders from society.
Rehabilitation	Restore offenders to the community by transforming them into law-abiding citizens.
Just Desserts	Hold offenders responsible and censure them for their actions. Amount of punishment should reflect the degree of harm committed.
Punishment	Retribution.
Denunciation	Influence public perception of the seriousness of specific crimes through the imposition of a greater or lesser penalty.(15)

(12) National Parole Board, *Parole: Contributing to Public Safety*, on-line: http://www.npb-cnlc.gc.ca/infocntr/parolec/contribe.htm (date accessed: 1 April 2004).

(13) *Corrections and Conditional Release Act*, s. 102(a).

(14) Julian V. Roberts and David P. Cole, "Introduction to Sentencing and Parole," in Roberts and Cole, *Making Sense of Sentencing* (1999), p. 5.

(15) *Ibid.*, pp. 6-11.

LEGISLATING THE PURPOSES OF SENTENCING

Historically, Canadian judges have been free to select from amongst the various purposes of sentencing when formulating judgments. It has been shown, however, that different judges may prefer different sentencing purposes for the same case, and that these preferences result in different sentences.(16)

The first effort to enact a legislative statement on the purposes and principles of sentencing was made in February 1984 by the Trudeau government with the introduction of Bill C-19, The Criminal Law Reform Act, 1984.(17) The bill died on the *Order Paper*.

Three years later, the Canadian Sentencing Commission recommended that Parliament adopt a legislative statement of the purposes and principles of sentencing.(18) The House of Commons Standing Committee on Justice and Solicitor General made a similar recommendation in 1988, when it tabled its report entitled *Taking Responsibility*.(19) In 1990, the Mulroney government issued a discussion paper that suggested a legislated statement of the purposes and principles of sentencing. *Directions for Reform: A Framework for Sentencing, Conditional Release and Corrections* was followed in 1992 by the introduction of Bill C-90, An Act to Amend the Criminal Code (sentencing).(20) That bill also died on the *Order Paper*.

In 1994, the Chrétien government introduced Bill C-41, also entitled An Act to Amend the Criminal Code (sentencing). Passed in 1995 and largely proclaimed into force the following year, the legislation included a detailed statement of the purposes and principles of sentencing. Section 718 of the *Criminal Code* now provides that:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;

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(16) *Ibid.*, pp. 11-12.

(17) David Daubney and Gordon Parry, "An Overview of Bill C-41 (The Sentencing Reform Act)," in Roberts and Cole, *Making Sense of Sentencing* (1999), p. 31.

(18) *Ibid.*, pp. 31-32.

(19) *Ibid.*, p. 32.

(20) *Ibid.*

> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

This provision codifies several sentencing purposes, including general and specific deterrence, incapacitation, rehabilitation, and denunciation. Section 718.1, which declares proportionality to be a fundamental principle, incorporates a key element of the "just desserts" model. Further, section 718.2(b) mandates that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." This is an attempt to blunt the potential for sentencing disparities discussed above. The decision not to enumerate "punishment" as a sentencing purpose is noteworthy.

RECIDIVISM AND THE IMPACT OF SENTENCING PRACTICES

Recidivism is the repetition of criminal behaviour by an offender previously convicted and punished for an offence.(21) Determining how to best calculate recidivism is a topic that continues to divide criminologists. Lack of consensus on this point complicates the task of measuring the impact of sentencing practices by making it more difficult to compare the findings of studies that examine recidivism. Also, the low calibre of existing primary studies restricts the effectiveness of meta-analysis (or analyses of a collection of research results). Further, controlled experiments involving different punishments of similar groups of offenders cannot be compared because such studies are often thought of as unfeasible and rarely done.(22)

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(21) Thomson Learning, *Online Dictionary of the Social Sciences*, on-line: http://socialsciencedictionary.nelson.com/.

(22) Don M. Gottfredson, "Effects of Judges' Sentencing Decisions on Criminal Careers," *Research in Brief*, National Institute of Justice, U.S. Department of Justice, Washington, D.C., November 1999, p. 1.

Notwithstanding these caveats, significant research has been completed in an effort to gauge the impact of sentencing practices on recidivism. However, a review of the literature reveals disappointing results. For example, in 1994, the U.K. Home Office Research and Statistics Department released a major study of reconviction rates in the United Kingdom. Its findings were consistent with previous studies in that "sentence on its own did not have a major impact upon whether someone was likely to be reconvicted or not."(23) The authors also concluded that there was no definitive evidence that imprisonment was more effective in reducing recidivism than community penalties (e.g., probation or community service orders) or vice versa.(24)

In 1999, the U.S. National Institute of Justice reported the results of a 20-year study of the crime control effects of sentences in the United States. It was found that judges' sentencing choices had little effect on crime control aims. More specifically:

1. whether the offender was imprisoned made no difference,
2. where the offender was imprisoned made little difference (except that offenders sent to youth facilities were the most likely to be rearrested in future),
3. the length of the maximum sentence imposed made no difference,
4. the length of time actually served in custody made a slight difference,
5. combining a term of imprisonment with probation made no difference,
6. imposing a fine or mandating restitution made no difference.(25)

Also in 1999, Solicitor General Canada (now Public Safety and Emergency Preparedness Canada) canvassed 50 studies involving some 336,000 offenders dating from 1958. A meta-analysis was conducted to determine whether imprisonment reduced either criminal behaviour or recidivism. It was found that prison produced slight increases in recidivism and that "[p]risons should not be used with the expectation of reducing criminal behaviour."(26)

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(23) Charles Lloyd, George Mair, and Mike Hough, "Explaining Reconviction Rates: A Critical Analysis," *Research Findings No. 12*, Home Office Research and Statistics Department, London, September 1994, p. 5.

(24) *Ibid.*

(25) Gottfredson (1999), pp. 6 and 8.

(26) Paul Gendreau, Claire Goggin, and Francis T. Cullen, *The Effects of Prison Sentences on Recidivism*, No. 1999-3, Corrections Research, Department of the Solicitor General Canada, 1999, p. 2.

A more recent meta-analysis commissioned by Solicitor General Canada and reported in 2002 canvassed 117 studies dating back to 1958 and involving some 442,000 offenders. The authors found that many criminal sanctions, including imprisonment, probation and fines, did little to reduce recidivism.(27) However, they acknowledged that the poor quality of the collection of research results involved suggests "that there is no recourse but to generate better primary studies at the individual level."(28)

CONCLUSION

The available research suggests that sentencing practices do not have a significant impact on recidivism. If this is correct, then Parliament's decision to emphasize alternatives to incarceration, and the courts' perceived willingness to embrace this principle, are more understandable. After all, the fiscal pressures faced by Canadian governments continue to be significant; and imprisonment, if not the most effective deterrent, is the most costly.

The desire to reduce recidivism is not the only sentencing purpose established by Parliament, however. Incapacitation and denunciation are also priorities, and imprisonment may continue to be the most effective means of realizing these competing goals. On these grounds, incarceration will likely continue to play a major role.

Canada's justice system is large and complex. Within it, prosecutors, the courts and parole boards work to apply the criminal law enacted by Parliament. Maintaining a balance between competing sentencing priorities is difficult, but a clear understanding of the roles of the different institutions and the effectiveness of the strategies they employ helps to clarify the issues at stake.

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(27) Paula Smith, Claire Goggin, and Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, No. 2002-01, pp. 18-19, on-line: http://www.psepc-sppcc.gc.ca/publications/corrections/200201_Gendreau_e.pdf.

(28) *Ibid.*, p. 21.