

2012 UN Youth National Conference

delivered by
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What is justice? For different people at different times it means different things.

To the ordinary person, 'justice' will often mean due punishment when a criminal is sentenced for a crime.

To the popular media, 'justice' will generally mean harsh punishment primarily focused on strong retribution and

To the politician, justice will often equate with a mix of fairness and safety.

To the accused person, justice means fairness: a fair hearing, a fair sentence that punishes not too harshly and offers hope.

To the philosopher, justice is about ethical enquiry.

To the lawyer, justice means the application of the rule of law, that is, the certainty of applying legal rules developed over centuries to resolve disputes between citizens and between the citizen and the state.

To the judge, justice is the application of the rule of law without fear or favour, affection of ill-will.

The commission of a cruel and violent crime offends society. The representative of society, the prosecution, will call for an appropriate degree of punishment for the offender who has committed such an act. If we take one of the most serious criminal offences, murder, the prosecutor will represent the interests of society in urging a period of imprisonment. In particularly shocking cases, a life sentence with no minimum term may be urged.

Immediately after the delivery of a sentence, the victim's family and supporters will often express their satisfaction or dissatisfaction with the sentence. We sometimes hear the statement 'justice has been done'. We also hear quite often, justice has been denied to the victim because the punishment handed down is perceived to be too lenient.

Victims' rights have been elevated and recognised as human rights and entrenched in legislation. Victims' rights are seen as a 'counter-weight' to the rights of an accused person. Victims have even been described as the 'forgotten party' in the criminal justice system. Sometimes, the rights of victims and the rights of accused persons will collide, at other times they may overlap. In Victoria, we are able to grapple with this through what we call the 'sentencing synthesis', the weighing of competing factors undertaken by a judge in order to arrive at an appropriate sentence for a criminal offender.

For the victim, the meting out of justice is sometimes seen as a set of scales. The balancing of the scale to one side more than the other will depend on the gravity of the offence, the moral outrage of the victims and their families and society's indignation in respect of what has happened. However, the tension over sentencing is not just between

the rights of victims and the rights of accused persons, the broader interests expressed by society in sentencing laws, such as rehabilitation, particularly towards young offenders and the goal of deterrence must also be included in the judicial synthesis.

The sense of justice possessed by victims of criminal offending is vulnerable. It is subject to emotion and influence, especially when the offence involves someone being killed. Such crimes provoke profound and enduring grief.

For the politician, justice is used, understandably, as a term to describe the achievement of social balance and equality. It is a principle which conveys to the community that their government will redress imbalance and protect the society which they serve. I will give two very different examples to demonstrate this. Sir Robert Menzies, in rebuffing a bishop

who had written to a daily newspaper of high circulation about the importance of doing justice to workers delivered the 'Forgotten People' speech. In that speech, he promoted the social role and significance of the Australian middle class. Whilst the expression 'justice' was not used, the concept we now understand as 'social justice' was conjured up.

In the 'Redfern speech', then Prime Minister Paul Keating spoke of a 'sense of justice' in the context of indigenous issues: dispossession, cultural denial, social non-recognition and cruelty. He said '...if we can imagine the injustice then we can imagine its opposite. And we can have justice.'

Through the concept 'justice', we can see the politician communicating to society the government's obligation to redress social imbalances and to protect the community.

For an accused person, justice is not social, it is particular; it is used to express their right to be treated fairly by the justice system. For Lindy Chamberlain, an accused person being processed by that system, justice was the pursuit of truth. When interviewed after her ultimate release from custody and before the Commission of Inquiry held into her case, Mrs Chamberlain said:

'It's made me angry to think that I have been told over and over again that if you'd lied and said you'd done it you'd be out of gaol, but if you tell the truth you stay in gaol. You shouldn't have to lie to get justice.'

Sometimes, justice for such an accused person can come long after their case has been decided. In 1921, Colin Campbell Ross, who ran a wine bar in Melbourne was accused of enticing a 12 year old girl called Alma Tirtschke into his bar who was later found murdered in a nearby lane.

He was charged with her murder and the Crown called a series of witnesses which included people who had seen the girl in the vicinity of the bar in question. Evidence was given by a prostitute and a barmaid about conversations they had had with Mr Ross. Significantly, a prisoner on remand waiting trial also gave evidence that Mr Ross had confined in him as to his guilt. As well as oral evidence, the prosecution also relied on forensic evidence, including strips of the girl's clothing found some distance from the scene and human hairs, said to belong to the victim, found on a blanket in Mr Ross's possession. Mr Ross was convicted, unsuccessfully appealed the conviction, and was soon hanged.

Nearly 90 years later, the Attorney-General of Victoria asked me, pursuant to section 584 (b) of the *Crimes Act 1958 (VIC)* to refer the Ross case to a panel of judges to the Supreme Court. They were requested to provide an opinion in respect of Mr Ross's trial following a petition for mercy

filed on his behalf by people with a continuing interest in his case. For reasons set out in that opinion, their Honours stated:

'At the time of his trial, Colin Ross was deprived of the opportunity of having a comparison of the blanket hairs and those taken from the head of Alma Tirtschke examined by an independent expert. Furthermore, whatever view may be taken of the expertise of [the expert who gave evidence at the trial] it is difficult, if not impossible, to reconcile his conclusions with his observations. In any event, if the jury had had before it a forensic opinion of the type advanced by [the modern day expert who provided a report] a very different view may have been taken, not only of the reliability or veracity of the confessional evidence, but also of the witnesses who observed Alma Tirtshcke in the wine saloon.

The evidence of the [the modern expert is credible and constitutes fresh evidence. Moreover, it was not evidence of a type which the defence could have obtained at the time of trial given the refusal of the Crown to make any of the hair samples available’.

Their Honours concluded:

‘nonetheless, given the importance of the hair evidence, not only to the acceptance of the confessional evidence which was vital to the Crown case, but also to the rejection of what may otherwise have been the exculpatory evidence of key defence witnesses, we are driven to the conclusion that there has been a miscarriage of justice as that concept is applied by the appellate court’.

Their Honours then proceeded to point out that the result of such a finding was not an automatic acquittal, but the quashing of the original conviction and the ordering of a new trial. Self-evidently, in the absence of Mr Ross, no such trial could take place. Ultimately, the Attorney-General granted Mr Ross a posthumous pardon. Such a pardon is not the equivalent of an acquittal, and the conviction itself remained formally unreversed following the ordering of a new trial. The Ross case is an important reminder of the limitations on our ability to rectify a miscarriage of justice once it has occurred.

Now, let us turn to the philosopher and the academic, who has been asking the question 'what is justice?' for at least 2500 years.

In 1957, the Oxford positivist HLA Hart gave a provocative lecture at Harvard law School entitled 'Positivism and the

Separation of Laws and Morals'. In that lecture, he argued that no necessary connection existed between law and morality or justice. When the Harvard Law Review proposed to publish the speech as an article, another legal academic, Lon Fuller, who had been pacing 'back and forth at the back of the lecture hall like a hungry lion' during Hart's lecture, demanded a right of reply. The essay he produced argued strongly that law is not a morally neutral concept and that to describe an unjust legal system as a system of law was to misapply that term to a form of oppression.

The Supreme Court of Victoria has considered on a limited number of occasions the application of the *Human Rights Charter* since 2004. Particularly following the decision of the High Court in *Momcilovic* there is a body of jurisprudence now developed in Victoria and the High Court which may be of national interest.

Of course there have been ongoing discussions at a national level as to whether Australia should embark upon a Bill of Rights or a Human Rights Charter. Victoria has recently considered its position and the Premier has announced that the *Humans Rights Charter* will remain in place.