



JUDICIARY OF  
ENGLAND AND WALES

## **The Annual Borderlands Lecture**

**Given by The Hon. Mrs Justice Cheema-Grubb DBE**

**St John's College, Durham University 25<sup>th</sup> October 2017**

**“What's done cannot be undone” (*Macbeth V. ii. 74*)**

**A lecture to examine the nature of remorse, its significance in the criminal justice system & the role of judges who assess it. The influence of remorse in transitional and restorative justice will also be considered.**

### **Introduction**

1. It is a pleasure and a privilege to be with you tonight. A pleasure because I love visiting beautiful Durham where our daughter is in her last year and a privilege because of the prestigious nature of this lecture demonstrated by those in whose footsteps I am honoured to follow. They include two Archbishops, a Chief of the General Staff of the Armed Forces, the founder of the Independent newspaper, and your very own Rev. Professor Wilkinson who has PhDs in both theoretical astrophysics and systematic theology! His broad interests epitomise the character of the annual Borderlands Lecture; to delve into diverse disciplines in order to identify the borders they share.

Why am I using this lecture to explore remorse, particularly in sentencing?

2. It is possible to get the impression from public discussion of judges' work that a judge can impose absolutely any sentence he wants to. That isn't correct. Sentencing is a complex exercise which prototypically displays the exacting craft of judging. To reach a lawful and just sentence engages a judge's intellectual reasoning and knowledge of the law. But those would be nothing without a dispassionate understanding of human beings. Determining in court whether an offender is truly remorseful (rather than, say, regretful, feeling guilty or ashamed) and, if so, what if any, impact his remorse should have, is not straightforward. In fact, although remorse is often put forward by advocates as a mitigating feature it is almost unheard of for an offender to give evidence of his remorse at a sentencing hearing. Experience also shows that sometimes deep remorse only emerges well after sentencing when an offender has time to reflect.
3. Internationally, expressions of remorse by way of expansive apology within schemes of transitional justice can sometimes draw a line under reprehensible conduct, remarkably swiftly. Of course, this audience will be alert to what has been called the 'messy' nature of remorse (both cognitive and emotional). Remorse features in

literature, religion, psychology and, as we shall discover, neuroscience. Plenty of borderlands there. It is a fascinating ethical and moral phenomenon; well worth exploration.

4. So, what is remorse? It is not defined in any sentencing statute in common but it is referred to in almost every formal guideline published by the Sentencing Council of England and Wales.

In the Oxford English Dictionary remorse is defined as

*'A feeling of compunction, or of deep regret and repentance for a sin or wrong committed'*

Compunction is defined as, *'the pricking or stinging of the conscience or the heart; regret or uneasiness of mind consequent on sin or wrongdoing...'*

Webster's goes further,

*'a gnawing distress arising from a sense of guilt of past wrongs (injuries done to others), self-reproach'*

5. That sense of 'pricking' or 'gnawing distress' harks back to the believed origins of the word in late Middle English: from Old French = re- (again, expressing intensive force) + mordere 'to bite, sting or attack'
6. Those of us who struggled to get through Ulysses will, nonetheless, have been struck by the phrase which describes Stephen Dedalus's repeated pangs of guilt about his recently dead mother and his younger sisters. Although he is more self-pitying than penitent the etymology of Joyce's phrase echoes the origins of the word remorse. "Agenbite of Inwit" is (or Ayebite of Inwyt) the title of a 14th-century Middle-English translation made by Dan Michel of Northgate from a 13<sup>th</sup> century treatise on vices and virtues written by the confessor to Phillip III of France. The phrase is what linguists call a "calque" - a translation of the component parts of the Latin words. "Again-bite" renders "remorsus" (from "mordere," to bite), and "in-wit" (in which "wit" means "knowledge") stands for "conscientia" (from "scire," to know).
7. These definitions suggest a powerful experience, distinct from regret, guilt and shame. How can they be distinguished? A starting point might be that guilt is transient and looks at fear of consequences for the self-whereas recurring remorse reflects on the nature of the wrong committed. Regret is a shallow pool: remorse runs deep: it cannot be trivial, we speak of 'capacity for remorse.' Shame measures us against an ethical standard and stigmatizes us for failure; remorse focusses on the harm done to another, which may not be capable of being undone.
8. Dr Hannah Maslen<sup>1</sup> has encapsulated the essential characteristics of remorse perfectly for my purposes:

*"First, the agent must painfully perceive himself to have done something that he considers to be morally wrong. Most often this means having harmed another person in some way. Second, the agent must see himself as blameworthy,*

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<sup>1</sup> **A full bibliography is provided.** This passage is from Maslen's Remorse, Penal Theory and Sentencing, Bloomsbury

*occasioning self-condemnation. Third, the focus of the agent's attention must principally be on the individual he has wronged and secondarily on himself as the one who wronged the other. Fourth, there must be a desire to atone, which is likely to manifest itself in apology and reparative action. Fifth, there must be at least an intention not to repeat the harmful action (failure to achieve what one sets out to do might count as evidence against a genuine intention, but does not necessarily preclude it.) Thus, remorse is a complex syndrome involving affect, beliefs, desires, intentions and, often, action." (Emphasis added)*

9. The clamorous attention sometimes given in our national media to whether those who commit serious offences are remorseful is not surprising. Remorse is not a marginal phenomenon. We expect someone who has deliberately done wrong and harmed another person to feel remorse. Particularly if the harm done is irreparable. We consider the capacity to feel deep sorrow at our actions and the wish to repair and restore if possible, even if inadequately, to be intrinsic to a healthy human. These expectations about ways of behaving and feeling are part of our shared morality. And a lack of exhibited or at least expressed remorse is taken to demonstrate a selfish failure to care about other people altogether. It compounds the original fault.
10. This expectation is caught up in the value we accord to individuals. Because every person is of equal significance if we harm them without any consequential emotion of deep regret and desire to atone, we fail to recognise that value.
11. Developing and expressing remorse may be relevant to how offenders are dealt with at many points after committing a crime depending perhaps on whether our favoured normative theory of the criminal justice system looks backwards (to vindicate the wronged, censure the breach and punish) or forwards (to improve and deter). As I shall explain our system does both, and more. Does genuine remorse provide good evidence of the likelihood of future deterrence from criminal conduct? There is very little empirical research to answer that question. Likewise; if remorse is such a personal element of our moral health how do judges discern it? Do advocates capture the position perfectly when they refer to 'the remorse inherent in a guilty plea' or do they thus elide two mitigating features? I will return to these questions.
12. While fiction and religion cannot be infallible guides to modern expectations of moral standards they often reflect back broadly held views or challenge them. Fyodor Dostoevsky's character Rodin Raskolnikov in *Crime and Punishment* is an iconic figure: the criminal racked by remorse. In his psychological study of a double murder and the subsequent disintegration of the criminal's mental state Dostoevsky explores the burden of guilt. Raskolnikov feels no immediate regret is for killing a mean pawnbroker and her sister. He considers himself a sort of Superman, a 'Napoleon' not bound by society's rules. During the novel he undergoes a painful internal transformation. He is presented as a character on the verge of mental collapse. He wanders aimlessly around St Petersburg. Through suffering profound remorse, he realises that he is ordinary, not extraordinary. That he is part of the world not outside it and he has the choice whether to engage with it. At the end of the 30<sup>th</sup> chapter Dostoevsky writes, "Go at once, this very minute, stand at the crossroads, bow down, first kiss the earth which you have defiled, and then bow down to all the world and

say to all men aloud 'I am a murderer!' Then God will send you life again. Will you go, will you go?"

13. Shakespeare's genius encompassed so much of the human condition and he certainly understood remorse. *Othello*, cannot bear to live after discovering that Iago had deceived him into believing that beautiful, true Desdemona was unfaithful. Othello's murder of his innocent wife is the climax of the play but when Othello cries out:

*"Whip me, ye devils...roast me in sulphur,*

*Wash me in steep-down gulfs of liquid fire"* Othello V. ii. 277-80

the impression is of someone incapable of resolving the contradiction that he who was so noble and honourable has committed such a crime. He sentences himself. His instant remorse is overwhelming so that suicide (and to his mind, damnation and eternal suffering) is the only possible outcome.

14. In the week between the Jewish holidays of Rosh Hashanah and Yom Kippur (New Year and the Day of Atonement) it is traditional to reflect upon past sins and express remorse to those we have wronged. Judaism has a lucid and practical set of instructions first elaborated in the late 12<sup>th</sup> century by Maimonides, from Cordova, in the Mishneh Torah which Maimonides completed in about 1180. The principles include seeking forgiveness from God only when the sin is against God. For sins against any person remorse must be expressed to that person through apology, reparation and appeasement. The depth of remorse envisaged by Maimonides is clear from the stricture that if our sincere personal apology is not accepted by someone we have wronged then we should find 3 witnesses and apologise to him again in front of them. If the apology though sincere and public is not accepted we should find 9 witnesses and repeat our remorse.
15. In the New Testament Judas Iscariot is the paradigm of the remorseful. Matthew 27:3- 5 tell us that when "*Judas saw that Jesus was condemned, he was seized with remorse... I have sinned he said... Then he went away and hanged himself.*" Othello-like he is judge jury and executioner.
16. The first murder in the Judaeo-Christian story is that of Abel by Cain. In Genesis 4 Cain kills Abel out of angry jealousy because Abel's offering from his flock was more acceptable to God than Cain's fruit of the ground that he had worked. God warns Cain to master his resentment but Cain cannot manage that. Abel's blood cries out from the ground and Cain becomes a fugitive and a wanderer. In the Koran, this story is told in a different version which ends a little more profitably because a raven flies down and begins to dig the ground to show Cain how to bury his brother. Cain is chastised by the bird's action and cries out in repentance that he will have the strength to do as the raven has begun and bury his brother's naked corpse.
17. However profoundly connected to our culture and belief-systems some argue that remorse should stay out of the court-room. Not least because of problems in validation (making a true assessment of such an internal phenomenon). Emmanuel Kant's concept of morality as based in reason, but each individual person's true moral heart being unknowable to anyone else, encapsulates

*"You only know me as you see me, not as I actually am"*

18. Academic psychologists object that recognising remorse as a mitigating factor could result in ‘compulsory attitudinizing’<sup>2</sup> ie it is one thing to state that remorse is morally valuable and appropriate but another to give some advantage, however nuanced, to those who demonstrate it publicly. Doesn’t the possibility of gaining some formal recognition by way of mitigation provide a powerful incentive to be less than authentic? That may be so but only if expressions of remorse are taken at face value.
19. Freud responded at length to the moral framework of Dostoevsky’s novel Crime and Punishment. His analysis touches on the role remorse could play in predicting recidivism, I suggest that it is just the beginnings of a theory but what he says is consistent with the view that moral emotions such as remorse are not ends in themselves but serve a purpose;

*“A moral man is one who reacts to temptation as soon as he feels it in his heart, without yielding to it. A man who alternately sins and then in his remorse erects high moral standard lays himself open to the reproach that he has made things too easy for himself. He has not achieved the essence of morality, renunciation, for the moral conduct of life is a practical human interest. He reminds one of the barbarians for the great migrations, who murdered and did penance for it till penance became an actual technique for enabling murder to be done.”<sup>3</sup>*

20. A branch of criminology studies the different theories of punishment. Two pertinent theories refer respectively, to desert (or retribution) and consequences, as the underlying philosophical justification for sentencing of an offender. Either, we punish an offender because he deserves it and the sentence should be directly judged by reference to the offence or the consequences of sentencing are wider and should recognise the effect of the sentence both as marking the gravamen of the crime but also the likelihood of rehabilitation and deterrence, among other factors.
21. In that context I would like to move on to describe the stated objective of sentencing in England and Wales. Parliament has declared the statutory purpose of sentencing those over 18 years of age, in s.142 Criminal Justice Act 2003 as the:
1. punishment of offenders;
  2. reduction of crime (including by deterrence);
  3. reform and rehabilitation of offenders;
  4. protection of the public; and
  5. making of reparation by offender to persons affected by their offences.
22. Put simply, although what has been done cannot be undone, remorse is relevant to sentencing because punishment is not the only purpose of sentencing. Remorse might be considered one of the forward-looking aims of sentencing even though it is inevitably, caught up in what has already happened. A Sentencing Guidelines Council (SGC) was established under s.172 Criminal Justice Act 2003. It issued many

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<sup>2</sup> Andrew Von Hirsch 1993 Censure and Sanctions. Oxford University Press.

<sup>3</sup> Freud 1961b Dostoevsky and Patricide, *Complete Psychological Works of Sigmund Freud, Vol XXI* p177

guidelines including important ones for sexual offences and robbery. Its “Overarching Principles: Seriousness Guideline” published in 2004 encapsulated the proportionality principle which is the foundation of our sentencing principle and practice. The judge must always pass a sentence which is commensurate with the seriousness of the offence. To determine seriousness, it is necessary to determine the culpability of the offender and the harm caused by the offence. But each of the purposes of sentencing play a part in determination of the final sentence. The guideline makes plain, s.142 Criminal Justice Act 2003 ‘does not indicate that any one purpose should be more important than any other and in practice they may all be relevant to a greater or lesser degree in any individual case -the sentencer has the task of determining the manner in which they apply.’ The guideline includes lists of potential aggravating and mitigating features. Remorse is identified as a personal mitigation factor, so it is potentially relevant in every case.

23. The SGC was abolished and replaced by the Coroners and Justice Act 2009 with the Sentencing Council for England and Wales; s.118. There are currently around thirty separate guidelines applying to offences as diverse as manslaughter and environmental offences. As well as those dealing with specific offences there are over-arching guidelines setting out a disciplined approach to eg sentencing youths, allowing discounts for guilty pleas and totality. The test for the applicability of the guidelines was strengthened and the structure and content of the guidelines has been streamlined for new ones. From March 2011, for any offence committed after 5<sup>th</sup> April 2010 the judge
- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case,
  - (b) must, in exercising any other function relating to the sentencing of offender follow any sentencing guidelines which are relevant to the exercise of the function, unless he is satisfied that it would be contrary to the interests of justice to do so, and
  - (c) must, impose a sentence within the offence range (subject to reductions for guilty pleas, assistance given and totality) by deciding which of the categories set out most closely resembles the case in order to identify the correct starting point (but not if none of the categories sufficient resemble the case.)
24. However, the individual judge has a discretion to choose a sentence outside a category described in the relevant guideline and explain why. The guidelines are not meant to be blueprints or tramlines. Some cases will simply fall outside those envisaged by the creators of the guideline and sometimes there will be a good rationale for departing from it.
25. The role of remorse, as we have defined it, is different to the impact of an admission of guilt. The Sentencing Council Guideline on Guilty pleas deals with that part of the sentencing exercise. Guilt does not equate to remorse. There are good pragmatic reasons for allowing a discount for those who accept their guilt by pleading guilty whether or not they feel remorse. The guideline provides a sliding scale; no such for remorse.

26. The recognition of the impact of crime upon victims is another important feature of sentencing. In recent years victims of crime are asked if they wish to make a Victim Personal Statement. These statements are considered by the judge and in some cases read out in court. They provide a voice for suffering victims. Not all victims can articulate their position but often such statements will assist the judge in assessing the actual harm caused by the offence.
27. How do the current SC guidelines work? Look at one. **Assault Definitive Guideline issued in 2011** and effective from June that year for all offenders aged 18 and over illustrates the current format of SC guidelines. For the most serious offences contrary to s.18 Offences Against the Person Act 1861. Step 1 - the offence category must be identified based on the offender's culpability and the harm caused or intended. Step 2 - the starting point must be determined followed by any necessary adjustment within the category range. These are the 2 main steps. Thereafter Steps 3 and 4 apply if there has been assistance to the prosecution or a reduction is required to the sentence for a guilty plea. Step 5 - where an offender meets the statutory dangerousness criteria set out in the criminal justice act 2003 particular sentences may be required. Step 6- is engaged if the offender is being sentenced for more than one crime. Over all a just and proportionate sentence has to be reached. Step 7 - ancillary orders such as compensation may be made. Step 8 - The judge is required to give reasons for and explain the effect of the sentence. Finally, Step 9 - it may be necessary to express allowance for a period served on remand in custody before sentence.
28. The eagle eyed among you, and this is Durham University, will have noticed that remorse features at step 2. As a factor "reducing seriousness for reflecting personal mitigation". If at step 1 category 2 had been determined the starting point would be 6 years custody but the range is from 5 to 9 years. Where within that category the case fell would depend upon the judge's assessment of the factors increasing seriousness, reducing seriousness or reflecting personal mitigation. There is no weighting within these various factors: it is the judge's task to decide where the balance between the declared purposes of sentencing lies. This is never an entirely arid exercise or an arithmetical calculation, even where a statutory minimum sentence applies.
29. Almost invariably in practice in 2017, if a court is dealing with an offender for crimes covered by a Sentencing Council guideline the advocates and the judge will discuss where within the framework of the guideline the particular crime falls. This is a transparent process. All the guidelines are published and can be inspected on the Sentencing Council's web-site. During a sentencing hearing the prosecution and defence may disagree. And irrespective of their position the judge is not bound by any agreement they reach. The introduction of guidelines was intended to improve consistency.
30. It is right to observe that it is not only the criminologists who raise objections to remorse amounting to mitigation. Members of the public, particularly those who have been the victims of crime may also not be easily persuaded that remorse is either genuine or in any way helpful. When the Sentencing Council consulted widely on proposed new guidelines for sexual offences some members of the public responded that the culpability of people who commit sexual offences and the

irreparable nature of the harm caused to the victims should preclude any mitigation at all. The Council responded to concerns about the positive impact of a lack of previous convictions by carefully delineating the way it should be approached and it added a general caveat in the guideline:

“Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.”

31. In addition, for the most serious offences, those carrying maximum sentences of 14 years or more, these include rape and sexual assault of young children the Council adds

“In the context of this offence, good character/exemplary conduct should not normally be given any significant weight and will not normally justify a substantial reduction in what would otherwise be the appropriate sentence.”

32. But the same approach has not been adopted for remorse despite the fear expressed by some of those consulted that a manipulative offender could simulate remorse and receive some undue mitigation thereby. In its report following the consultation the Council evaluated this as a concern about the assessment of genuine remorse, a universal validation issue.

“This factor appears in all Sentencing Council guidelines and is one that sentencers are adept at assessing. Sentencers sitting in court on a daily basis are alive to the ease with which ‘sorry’ can be said but not meant. Evidence obtained during the course of interviews with judges (*during the consultation process*) confirmed the way in which judges carry out this assessment; often the judges used phrases in conversation with us such as ‘genuinely remorseful’, ‘genuine remorse’ and ‘true remorse’. This confirms the Council’s view that the consideration of remorse is nuanced, and that all the circumstances of the case will be considered by the sentencing in deciding whether any expressed remorse is in fact genuine.”

33. I want to step away from the domestic setting and glance briefly at foreign schemes predicated on remorse expressed in apologies. The term ‘transitional justice’ encompasses the processes associated with a society’s attempt to come to terms with a legacy of large-scale past abuses such as the aftermath of armed civil conflict or a repressive regime. Each transitional justice initiative must conform with relevant international legal standards and obligations expressed in International Humanitarian Law and/or International Human Rights Law, combined with or alongside domestic criminal and civil jurisdictions.<sup>4</sup>

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<sup>4</sup> My thanks to Moira MacMillan for her assistance with this section.



34. International humanitarian law and international human rights treaties generally impose obligations to bring perpetrators of serious crimes to justice through traditional trials. Many also impose a requirement for State Parties to introduce legal processes through which victims can exercise a right to redress and reparation where those are missing- see for example Art 14 of Convention Against Torture. When I was at the bar I was instructed to prosecute a colonel in the Nepalese army on charges of torturing Maoist rebels during the civil war. The reach of English law extra-territorially enabled this to take place.
35. Unsurprisingly, anything less than full accountability in a criminal trial will always be seen by some as impunity. There are powerful arguments in favour of prosecution: the importance of deterrence; the need to establish individual guilt, often amongst a society's elite. But insisting that all those responsible for sustained, widespread, complex criminality must be prosecuted will almost certainly be unrealistic. The national infrastructures needed to properly investigate and prosecute will not be available and may need reform – including the judiciary. And lengthy criminal processes, while inevitable, won't ease the social and political tension of communities seeking to rebuild and reintegrate.
36. In 2005 the UN General Assembly adopted the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'.
37. There is no set template as each transitional justice mechanism is developed on a context-specific basis. The core principles are summarised in the 2010 'Guidance Note of the Secretary General: The UN's Approach to Transitional Justice.'<sup>5</sup> Which is 'to ensure accountability, serve justice and achieve reconciliation'. Central to any transitional justice mechanism is the primary decision-making role of the nation affected and the wishes of the victims and communities.
38. A contentious question in any transitional justice arrangement will be how to balance the interests of achieving peace (thereby bringing violations to an end), criminal justice (ensuring accountability for atrocities) and reconciliation (in the hope of avoiding future conflict). Where does remorse come in? The most overt demonstration of remorse in transitional justice is through the offering of a civic apology. The Centre for International Transitional Justice says, "*As a form of symbolic reparation, an apology is a formal, solemn and, in most cases, public acknowledgement that human rights violations were committed in the past, that they caused serious and often irreparable harm to victims, and that the state, group, or individual apologizing is accepting some or all of the responsibility for what happened. The decision to make an apology can and should be used to support a just and moral vision that enables victims and the public to have hope in the future.*"

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<sup>5</sup> [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)

39. However, if remorse is a feeling of deep regret or guilt for wrong-doing, then we may need convincing that something as ephemeral and “easy” as a public apology will meet the definition we have discussed. I have time for two examples: East Timor and Kenya.
40. During the 1990s and early 2000s, Indonesia’s occupation of East Timor led to violence, 1,400 deaths, approximately 450,000 forced displacements and, in some areas, famine. Some of the local population worked for and supported the occupying forces. Part of the transitional justice response introduced to encourage reintegration was a Community Reconciliation Process, which built on a local tradition of settling disputes through community dialogue.

*“Perpetrators at CRP hearings had to make formal public admissions, and could be questioned by victims and community members. A panel of three to five local leaders would then prescribe the “acts of reconciliation” that a perpetrator should perform “in order to be accepted back into the community.” These could include community service, an apology, or the payment of reparations. If the perpetrator accepted the decision, an agreement would be forwarded to the appropriate District Court to be formalized. On completion of all required ‘acts of reconciliation, the perpetrator was automatically entitled to civil and criminal immunity for all actions covered in the agreement... the participation of spiritual leaders were incorporated into the hearings, which was important because “participants believe that their ancestors, who are summoned at the beginning of the ceremony, are witnesses (to the ritual) and validate the proceedings. Their presence makes the process binding, and any failure to accept the outcome is believed to have serious consequences.”<sup>6</sup>*

41. In April 2015, both President Kenyatta and the Chief Justice of Kenya’s Supreme Court, Willy Mutunga, made a series of apologies, responding to a 2013 report by the National Truth, Justice and Reconciliation Commission. The report had detailed political assassinations and repression, detentions without trial and several massacres, including following Kenyatta’s disputed 2007 election victory which led to his indictment by the ICC. Mutunga apologised for the judiciary’s failure to provide redress for violations in the past and said that the apology was his institution’s response to the Commission’s final report and its recommendation that the judiciary acknowledge its own responsibility for past abuse.
42. Are these expressions of remorse effective? The answer seems to be; yes. As much, if not more than retributive, eye-for-an-eye-type justice, victims of serious crime and other violations want those responsible to acknowledge what they have done, and that it was wrong. An apology does this. A public apology, directed at the victims of serious crime resolves an otherwise unsettled issue and provides the victim with external validation of their experience. It draws a line. In these respects, the

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<sup>6</sup> <https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Timor-Leste-CaseStudy-2012-English.pdf>

transitional justice movement has much in common with restorative justice initiatives.

43. I mentioned forwards and backwards looking views of the role of criminal justice. Restorative justice seeks to harness both directions and so provide the opportunity for contrition and forgiveness. The American criminologist and academic Howard Zehr known as the grandfather of restorative justice defines it in this way, “*Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.*”<sup>7</sup> He has argued since the 1970’s that prison does little to help offenders confront the wrongs they have done or to learn the interpersonal skills to put them right for the future. Zehr argues that in contrast to international transitional justice structures in our domestic criminal justice system there is no place in the process where the offender can be forgiven. He can choose to rationalise or excuse his behaviour to avoid the issue. He can turn his anger on others. He will be defined as a criminal long after the punishment has ended and if incarcerated hatred and violence bred in prison may come to replace any remorse he may have had. Restorative projects were well studied when they were piloted in this country in the past. My colleague Lady Justice Rafferty, the Chancellor of the University of Sheffield will invite a reconsideration of such initiative in a lecture tomorrow evening. I add my voice to hers.
44. Indeed reparative activities are specifically mentioned in a recent Sentencing Council guideline: *The Imposition of Community and Custodial Sentences Definitive Guideline* effective from 1<sup>st</sup> February 2017.
- “Community orders can fulfil all of the purposes of sentencing. In particular they can have the effect of restricting the offender’s liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities. “
45. It has been known that expressions of remorse may sometimes work against justice. Some crimes are not reported, or at least not reported immediately because the perpetrator expresses immediate remorse. Where the victim is vulnerable, perhaps because they are young and easily influenced, or there are other circumstances such as a desire to avoid scandal, remorse may lead to the covering up of wrongs. If we had time to explore this phenomenon which is sometimes encountered in cases of sexual abuse it might be suggested that a display of penitence with this intention in mind cannot really be described as true remorse.
46. You may ask, how common are truly guilt-ridden, remorseful criminals who fit the five Maslen criteria? A pioneering psychiatrist, Professor James Gilligan who worked in the American prison system for 25 years summarises his experience of violent criminals behind bars with the paradox; no one feels more sinful than the saint and no one feels more innocent than the criminal. He is referring to the capacity of many criminals to consider themselves completely innocent, blameless and justified in what they did, irrespective of how atrocious the crime may appear to others. This characteristic of most violent criminals he has worked with was so extreme that he

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<sup>7</sup> *The Little Book of Restorative Justice*

was tempted to coin the term 'delusion of innocence' to describe it. He rationalises in this way,

*“what else could we possibly expect? It is precisely their lack of capacity for guilty feelings that permitted them to commit their crimes to begin with. I am not speaking here of men who deny their guilt as part of an attempt to overturn their conviction in court, nor of those who deny it in order to avoid being beaten, raped or killed by other inmates, most of whom believe they have a moral obligation to punish many of the crimes for which men are sent to prison (especially those against women and children as opposed to those committed against men,) I am speaking rather of those who do not deny they committed the acts of which they were convicted, but who simply fail to feel that there was anything wrong about doing so. They are, in other words, remorseless.”*

47. Before passing sentence, a court must give the defendant an opportunity to put forward his mitigation and introduce any evidence relevant to sentence, although evidence by way of live testimony is not often called by or from a defendant during a sentencing hearing. Press reports drawing attention to a 'lack of remorse' are pervasive and sometimes they are even accurately quoting the judge in court! So how do judges assess it? In the US a survey of judges showed that half were sure that the defendant was remorseful if he couldn't bring himself to look the judge in the eye. The other half were sure that failing to look the judge in the eye was a sure sign that the defendant had no remorse.
48. You see the problem. Judges assess the whole picture. In our sentencing hearings some evidence of remorse may be extant, tangible and verifiable. Examples from cases include;
  - b. Deliberate withdrawal from an on-going criminal enterprise
  - c. Removing oneself from criminal associates or from the sources of temptation
  - d. Behaviour immediately after the offence such as obtaining medical aid
  - e. Voluntary surrender and confession to the police
  - f. Efforts to reform by way of eg drug-rehabilitation or alcohol withdrawal programmes
  - g. Return to education
  - h. Assistance to the authorities in combating crime
  - i. Voluntary restitution, payment of compensation without order from the court or restoring damaged property
49. Perhaps less objective evidence can include
  - j. Expressions of remorse in police interviews after arrest
  - k. The impression of genuine remorse given to a probation officer, psychiatrist or psychologist when being interviewed for the purpose of preparing a report for the court prior to sentencing.

I. Letters of apology written by offenders to victims or the court.

50. Lord Woolf said in 2005 when the impact of the 2003 CJA etc was still being absorbed by judges, " Sentencing is part art and part science. A judge has to combine both to achieve what are today the purposes of sentencing."<sup>8</sup> Whatever submissions are made on behalf of an offender the judge is uniquely placed to assess what, if any, genuine remorse exists and as a separate question, what, if any, impact it should have on sentence.
51. An analysis of expressed remorse against antecedent history and the details of the offence itself may lead to greater or lesser weight being given to it.
52. If there are grounds for suspicion about the genuineness of remorse these will often be expressed by the person who reports it to the court. For example, in Pre-Sentence Reports the author may well test the offender when he expresses remorse and sometimes the report will include the author's opinion as to its authenticity. The responsibility of the judge is to place remorse into its context. That context may well include having presided over a trial which precedes sentencing. If, for example, an offender admits a lesser offence but denies the more serious one he may well take the opportunity of giving evidence to express remorse, inevitably limited, for what he admits doing.
53. The situation after a fully contested trial can be both more stark. Sometimes the most eloquent expression of remorse after witnesses have had to give evidence re-living the offence, will be bald in its insincerity. Perhaps less frequently, the offender may be able to face, at last, the fact that he has not got away with it, he will never get away with what he has done and a brokenness arising from that revelation might ring true.
54. I hope it is clear that at the time of sentencing the judge plays a receptive role in our system of adversarial justice. He receives, weighs and acts on the evidence available but although judges rarely intervene to seek evidence they are aware that there may be many reasons for this potential mitigating feature not being mentioned.
55. As part of the whole picture in an individual case judges may have available probation or psychiatric reports which speak of the trauma experienced by someone who commits a serious offence while in the throes of mental disorder, the grief suffered by someone who has killed a person dear to them and the impact of abuse suffered by the offender, perhaps in childhood. Other features of an individual offender such as a lack of self-esteem and a low degree of social functioning may have an impact on the ability to feel or express remorse. Mental health issues, learning disability, illiteracy and, of course youth may all limit what can be expressed. In practice it is with considerable caution that judges conclude that a particular defendant experiences no remorse at all. In that context, it is unsurprising that while Sentencing Council guidelines include remorse as a factor capable of mitigating sentence they do not include a lack of remorse as an aggravating feature.
56. The impact of developmental intellectual learning disability on a person's ability to feel, comprehend and express remorse is complex and highly individualistic. To develop this point a little, Baroness Sheila Hollins, Professor of the psychiatry of

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<sup>8</sup> Lord Woolf: The Pursuit of Justice, Oxford University Press 2008

learning disability at St. George's, University of London argues that because remorse occurs within a social contract and relationships shaped by widely held ethical norms severe disability is 'blame-making' in itself, both for those with learning disabilities and for the society into which they emerge. People with learning disabilities may assume responsibility for wrong-doing because of their life-long experiences of being blamed and there is very good evidence about their suggestibility when challenged or accused.<sup>9</sup> On the other hand a reduced ability to pick up social cues and norms may inhibit the development of an ability to balance personal rights with responsibilities to others.

57. Psychiatrists report a type of patient with acute psychosis who experiences extreme anger that prevents them believing they committed the offence or feeling that what they did was wrong. Symptoms of an illness can fluctuate and someone who killed while actively psychotic may justify the offence while his delusions are strong but weep with horror at his actions when less ill.
58. The judge who sentences may be required to evaluate whether remorse is missing from the evidence before him because of deficiencies in the socialisation of the criminal. A young man with a long history of abuse, who experiences everything that happens as someone else's fault may well have no remorse for his offences. Work may need to be done on raising his self-esteem before he can begin to experience and express remorse.
59. The highly respected expert Gisli H Gudjonsson, Professor of Forensic Psychology at Kings College London has conducted studies of the way offenders attribute blame for their criminal acts and how that process links to the effectiveness of treatment programmes. In barest outline this aspect of his work has involved constructing the Gudjonsson Blame Attribution Inventory (BAI). The scale aims to measure an offender's perceptions and understanding of his crime rather than determine actual causes. As well as measuring the amount of guilt or remorse an offender believed he felt for the crime two categories of attribution are described: external attribution which measure the extent to which offenders blame their crimes on matters such as provocation, social and environmental factors, and internal attribution which blames mental factors such as low mood, temporary loss of self-control or loss of inhibitions.
60. One particularly notable outcome of this research at the end of the last century was the confirmation that cultural and historical factors may influence the way that offenders attribute blame for their criminal acts and, inevitably, have an impact on their own feelings of guilt or remorse. By way of example violent offenders in Northern Ireland scored higher external attribution scores than violent offenders in England. This may be due to the (then) long-standing history of political violence in Northern Ireland which was used by violent offenders to justify their crimes. By contrast, and to balance, property offenders in Northern Ireland obtained lower guilt scores than property offenders in England. As to remorse there is evidence that the reporting of remorse is negatively associated with external attribution but positively with mental element attribution. This may not be surprising: remorse is, as we have discussed, a deeply personal phenomenon, it would be counter-intuitive for those

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<sup>9</sup> Eg G H Gudjonsson 'I'll help you boys as much as I can' *Journal of Forensic Psychology* 1995 2 p333-342

who blame outside factors for their offending to feel more remorse than those who place the blame at their own door. A detailed summary of Professor Gudjonsson's important work in this field is outside the scope of this lecture but he expresses the hope that further empirical work will be completed. (you may sense an echo/theme emerging.)

61. Experienced judges have to be sensitive to (assessing) the role of social expectations in the experience and expression of remorse. This is a two-way street, some offenders may come from a cultural background where even the admission of guilt but certainly any expression of remorse is considered weakness or betrayal and in other individuals the judge needs to be able to 'read' the display of remorse which the advocate may rely on but which may not be conventionally presented.
62. Evidence of deep penitent remorse in one offender may lead to a distinction between the sentence passed on a like offender who is not remorseful. A recent example of such a case is *R v Luke West, R v Kyle Pitchford-Price (2017)*.<sup>10</sup>
63. Judges do not usually have any part to play in assessing remorse expressed during the currency of a custodial sentence, except those who serve as members of Parole Boards or if, unusually, remorse is referred to during an appeal hearing. But there is a discrete category of rare cases where truly extraordinary improvements in those convicted of murder committed when they were under 18 are recognised. The House of Lords in *R (Smith) v Secretary of State for the Home Department [2005]*<sup>11</sup> held that the term such a prisoner who is sentencing to be detained during Her Majesty's Pleasure must serve in custody before being considered for Parole, known as 'the tariff' may be reduced on reconsideration if there is unambiguous evidence of unforeseen progress. A reduction in the tariff will not necessarily result in release from custody any earlier, that is a decision for the Parole Board as to the risk he poses, but a shorter tariff means that the prisoner may apply to the Parole Board earlier than otherwise.
64. The "Criteria for Reduction of tariff in respect of HMP Detainees" produced by the National Offender Management Service on behalf of the Secretary of State indicate that features such as the following may indicate (but not be conclusive of) exceptional progress:
  - i) An exemplary work record and disciplinary record in prison;
  - ii) Genuine remorse and acceptance of an appropriate level of responsibility for the part played in the offence;
  - iii) The ability to build and maintain successful relationship with fellow prisoners and staff and
  - iv) Successful engagement in work (including offending behaviour/offence related courses) with a resulting substantial reduction in areas of risk.

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<sup>10</sup> *R v Luke West; R v Kyle Pitchford-West* [2017] EWCA Crim 834

<sup>11</sup> *R (Smith) v SSHD* [2005] UKHL 51: [2006] 1 AC 159

65. The criteria also state that “to reach the threshold of exceptional progress there would also need to be some extra element to show that the detainee had assumed responsibility and shown himself to be trustworthy when given responsibility. Such characteristics may well be demonstrated by the detainee having done good works for the benefit of others.”
66. An example of such a review is *In the Matter of Salvin sub nom R v Graeme Paul Slavin [2016] EWHC 3225 (Admin)*. On the basis of exceptionally compelling evidence since 2007 the tariff was reduced from 17-15 years.
67. As I draw this lecture to an end with some questions to leave with you I would like to return to literature for a moment, you will remember that in Act 1 of Macbeth Lady Macbeth is planning murder. When she is alone in Act 1 v44 she cries out imploring,  
*“Come, you spirits....  
 Fill me from the crown to the toe topfull  
 Of direst cruelty! Make thick my blood,  
 Stop up th’access and passage to remorse,  
 That no compunctious visitings of nature  
 Shake my fell purpose...’*
68. She doesn’t want to have in her mind what consequences might flow, how she might feel after the deed. The thought of her remorse, if she lets herself dwell on it, might prevent her from doing the act. May an individual’s development of an understanding of remorse have a role to play in crime prevention? Despite Lady Macbeth’s hope to gain strength by avoiding remorse both Macbeth and his wife find their happiness and sanity consumed by the conflict between shame and guilt throughout the play and they are destroyed by the torment even before defeat by their external enemies.
69. To prevent crime, un-stopping the ‘access’ to remorse may be necessary. How can society achieve that? How to ensure that the young and all other citizens imbibe a social framework in which they are valued and which values every other individual. This must be the job of society as a whole.
70. A very recent paper by Dr Hannah Maslen and Dr Jonathan Pugh, both academic researchers currently working at Oxford University, bears the title; *“Drugs that make you feel bad?” Remorse-based Mitigation and Neurointerventions*. There isn’t time for more than a brief over-view but they divide remorse into three elements: cognitive, affective and motivational. They discuss the potential role of drugs which eg enhance empathy and memory, two factors which may be important to engendering remorse. They draw attention to the role of neuroscientists researching neural correlates of dispositions associated with criminal offending who are working to develop pharmacological agents which might be capable of altering motivation to offend. While there is no sign of a ‘Remorse Pill’ just yet such advances when they come will require refreshing our thinking about the value and role of remorse.
71. To the future then:



- a. If the passage to remorse is not stopped up and remorse is truly felt it may be transformative. Could a greater understanding of this 'messy' moral emotion make a positive contribution to reducing the prison population?
  - b. Is it time to look again at restorative justice in the same way that victim impact has come to the fore in sentencing hearings?
  - c. Is there any relationship between expressions of genuine remorse (either at the sentencing stage or afterward) and avoiding re-offending?
  - d. If moral emotions like remorse are theoretically amenable to intervention how is that intervention to happen particularly in non-custodial settings where resources may be even scarcer than in custody?
  - e. If a correlation exists, between remorse and recidivism (and it is not for me to say that it does – I simply do not know) then should lawyers pay more attention to establishing the presence of real remorse at sentencing hearings by calling their clients to give evidence before the judge? With the prospect of the evidence being tested.
72. **END:** I don't have the answers. I hope that bumping this topic up against quite so many borders tonight has stimulated the vast reserves of brain power in this room, and elsewhere, to consider trying to find the answers. Thank you.

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