RESTRAINT IN THE CRIMINAL LAW

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In a discussion of early American law, Professor Grant Gilmore noted the unlikelihood that "a struggle for national liberation ever produces a climate which is favorable to the development of a stable legal system". Yet he explained the temper of the times in late eighteenth-century America in these terms:

> With the successful issue of the Revolution and the establishment of a centralized federal government (...) the stage was set for a fresh start — a fresh start in the building of political institutions, in the choice of the role which government was to play in the development of our society, in the provision of a system of law for the federal republic and its constituent states. It is entirely clear that the men who guided our affairs from the 1770s or 1780s until the 1820s or 1830s understood their unique and privileged historical situation: it does not fall to the lot of every generation to make such a fresh start in a vigorous, literate, and sophisticated society already in full flood of economic and social development, conscious of its immense potential for ever-growing power and wealth.[2]

Much the same might be said of those societies on the European continent that, since 1989, have begun the lengthy process of reconstituting themselves as new states. In these societies, men and women recognise that history has delivered to them an opportunity to make a fresh start. The decisions taken in the early years of this reconstitution will have lasting effects, and it is for this reason that the better part of wisdom is to act with restraint, especially in the administration and the creation of criminal law.

The virtue of restraint

Restraint is commonly considered a personal virtue. It is associated with other values, including tolerance, patience, forbearance, self-discipline and sacrifice. Its antithesis is found among faults or vices, including rashness, fury, intolerance, temptation, self-interest, domination and unjusti-

fied violence. There is no single way in which to define the personal virtue of restraint, but any account of its practice in civil society must include respect for the integrity of others and deference to their well-being. It implies an ability to check one's impulses and to subordinate personal will to accommodate others.

Even more difficult is any attempt to define restraint as a public virtue, that is, as a value that supports the institutions of civil society and suffuses the conduct of government generally and the administration of justice in particular. It must be conceded at once that restraint in this sense is, as in private morality, a value of relative importance between societies and within any society. There is no objective measure by which to gauge the degree to which the institutions and government of a society reflect, among other things, respect for the integrity of its subjects or tolerance of differences and disagreements that exist among them. At the same time, however, there can be no doubt that a reasonable observer might note, as a fact, that restraint in this form is more or less present in the institutions of a society and in the actions of those who participate in its government.

For the most part, like good judgment or polite manners, restraint is a virtue that cannot be codified even if aspects of it might be expressed in rules, principles or other conventions of conduct. In large measure, the most important features of restraint must lie always unspoken, in silence, for where there is a need to express the virtue of restraint in rules or other positive precepts it is due in part to a failure of restraint. Of course, not all positive precepts are expressions of the need for restraint; the proliferation of laws, rules, regulations and other public commands in certain conditions can exemplify nothing but the unrestrained will of the commander to dominate, with no regard for the legitimate use of social power and the integrity of those who are subject to it. Professor Gilmore expressed a related idea thus:

> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed.[3]

At some lower level of that same Hell, even due process would not be observed. But a central point of this passage remains firm: the moral worth of a society will be reflected, in part, in a restrained use of law.

Why? First, a prolix use of law can only diminish liberty and the integrity of the subject, and this in itself may be considered pernicious or evil. Second, excessive laws can only enhance contempt for the law in general, those who administer it and the institutions through which they act. Third, it is fallacy to suppose that more law necessarily causes a net gain in the advancement of social betterment, even law that is enacted for the most noble objectives. In short, while law by itself does not increase the betterment of society, the restrained exercise of judgment can.

The virtue of restraint in the administration and creation of criminal law can be seen in two ways, and these are discussed in detail in what follows. The first includes expressions of restraint in the positive law of a jurisdiction. The other – more nebulous and more important – lies in the exercise of restraint in the creation of criminal law.

Restraint in the administration of the criminal law

The most common, and the most vague, expression of the jurisprudential virtue of restraint is the Rule of Law. Although there is no precise definition of this concept across legal systems or within a legal system, it subsumes a cluster of principles that limit the authority of all agencies of the state by reference to law. The laws of a state provide only a partial indication of its commitment to the rule of law because, as is obvious, ideal laws can be ignored or abused by the agencies of a wicked state or, in other instances, by wicked agents of an otherwise good state. Another indication of the degree to which the rule of law flourishes in a particular state lies in the degree to which its agents comply with lawful norms that respect liberty, privacy and other important interests. The rule of law cannot flourish where the law and its instruments are used, without regard for the confidence or dignity of the people, to enforce the views or predilections of persons who – for the moment – hold political power.

Within the positive norms of a state, a commitment to the rule of law can be seen in its contracted international obligations, as in the agreement of a state to observe standards established in treaties, conventions and the like. More immediately, however, the rule of law is embodied in the con-

stitution of the state, wherein fundamental principles governing public institutions and the relationship between the state and its subjects are declared with more or less precision. Further amplification of constitutional principles can be found in statutes and other sources of law, if those sources are consistent with the principles declared in the constitution or – to whatever degree that the constitution may be silent – they are otherwise consistent with principles related to the rule of law.

The Constitution of Ukraine includes articles that recognise, and would guarantee, the principal concepts that are associated with the rule of law in relation to the administration of criminal justice. Foremost among these, and by no means limited to criminal matters, is the separation of the judiciary from all other institutions of the state. It is plain that there can be no respect in any meaningful sense for the rule of law if the judiciary, at all levels, is not wholly independent of control or influence by another organ of government.

Also included in various places in the Constitution of Ukraine are aspects of what is known in many legal systems as the principle of legality. This term might seem synonymous with the rule of law, but it refers more specifically to three related ideas. These ideas are unified by the principle that the state's power to invoke the criminal law can only be legitimate if it is expressed in laws that have prospective effect, are expressed with sufficient precision to inform the citizen of their content and do not confer undue discretion upon those who are responsible for their administration and enforcement. The principle of legality is thus concerned with some elementary precepts that govern the application of all criminal law: non-retroactivity, prior notice and the requirement for adequate precision to avoid vagueness or overbreadth.

It might be regarded as self-evident that the non-retroactive application of penal laws is a basic protection against the abuse of state power, in the sense that retroactive application would imply that it is legitimate for the state to use force to enforce laws that, at the time of the alleged conduct, did not exist. Yet the principle of non-retroactivity is not simply an academic, theoretical one but can have practical significance in the ordinary interpretation of penal legislation. One example will suffice. Suppose that the criminal law of a state defines assault as the intentional application of force by one person to another without the consent of the person to whom force is applied. Suppose also an incident in which two persons

agree to a fist fight and, in making this agreement, it is understood not only that bodily harm is likely to be inflicted upon one or both of the participants but also that the infliction of bodily harm is their clear intention. Neither person, however, intends to kill the other. Suppose further, and finally, that in the course of the fight one of the participants (A) strikes the other (B) in the head and that B loses consciousness and later dies as a result of injuries to his brain. A is charged with culpable homicide of B, that is, manslaughter of B by means of an unlawful act (an assault).

When this matter comes to trial the accused (through his counsel) submits to the court that he should be acquitted because there was no unlawful act of assault committed by him upon B in view of the consent that had been given by both of them to the fist fight. The court rejects this argument on the basis that a consensual fist fight is, in the ordinary course of affairs, a lawful act but that as a matter of public order the consent to engage in such conduct is invalid in circumstances where there is a risk of serious bodily harm. In this case there was such a risk and therefore the consent was invalid. Thus the accused A committed assault causing the death of B and should be found guilty of manslaughter.

The answer provided by the court might be viewed simply as an exercise in statutory interpretation concerning the meaning and the limits of consent in offences of assault. On this view, it could be argued that the principle of non-retroactivity is entirely satisfied by the prior existence of a defined offence that gives adequate notice to everyone of the scope of criminal responsibility. The specific result reached by the court is therefore nothing more than a conclusion concerning the application of a valid law that contains an element of ambiguity.

But there is quite another view that might be taken of the result in this example. If indeed the law of the state plainly defines assault as the non-consensual and intentional application of force, the effect of the court's conclusion is to eliminate the presence of consent from consideration and thus to create by judicial fiat a newly defined offence that has retroactive application if the accused A is found guilty of it. That is, despite the plain text of the law that allows for consent to negate assault, the court has said that there are instances in which, for reasons of public policy and public order, a free consent is invalid.

It is unnecessary to consider this example further, and it is also unnecessary to attempt a general statement of principle that would provide a resolution of this and similar problems. It is sufficient for present purposes to note that, while the principle of non-retroactivity is largely uncontroversial, there are many ordinary instances of statutory interpretation in which it can have great practical significance. If the legislature has complied with the constitution by appearing to create only offences that have prospective application, it would be inconsistent with the principle of legality for the courts to interpret those offences in a manner that casts a net of liability that is much wider than that defined by the legislature. While the courts are routinely required to interpret ambiguities in statutory language, their legitimate authority to do so does not include the redefinition of offences with retroactive effect.

The principle of legality also includes a requirement of prior notice, which means that no person can be held liable for an offence that he could not know was prohibited by law. While this idea overlaps in some measure with the principle of non-retroactivity, it also includes a distinct element that merits comment. Any system that recognises the precept that ignorance of the law is no excuse (*ignorantia iuris neminem excusat*) could not legitimately enforce a law if any person subject to it could not inform himself of its existence and content. In any modern state, of course, it would be nonsense to suppose that the subject could have actual practical knowledge of the law in all of its multiple facets and complexity. The profusion of laws and regulations is simply too great for the requirement of prior notice to be applied absolutely and comprehensively. Nevertheless, this aspect of the principle of legality remains of vital importance. Its thrust is to require not only that penal laws have only prospective application but also that such laws have been published in a manner that demonstrates their enactment according to the proper forms of legislative action. Prior notice in this sense eliminates the arbitrary creation of secret laws and in some measure legitimates the state's use of the criminal sanction because the subject has had notice of the prior prohibition of defined forms of conduct.

In addition to non-retroactivity and prior notice, the principle of legality requires that penal laws be stated and interpreted in terms that are neither too vague nor overly broad. This concept applies equally to the legislative function in making laws and to the judicial function in interpreting laws. Vagueness and overbreadth are not synonymous, however, be-

cause a law might be unacceptably broad and quite precise at the same time. Overbreadth concerns the problem of the scope of the criminal law far exceeding any legitimate objective of the legislature (for example, "It shall be an offence to give birth to any child that has blue eyes or blond hair"). Vagueness is concerned with the incoherence of terms used to define criminal liability. Even if penal laws are not retroactive and satisfy the requirement of prior notice, they could not conform to the principle of legality if their terms defy comprehension. In short, the principle of legality implies that a penal law might be open to objection on the ground that it is vague and overbroad or that it is vague or overbroad.

In many systems of law, the principle of legality is reinforced by a doctrine of statutory construction that is widely known as the doctrine of strict construction. In the Constitution of Ukraine, this principle finds some expression in numerous articles. The core of this idea is that penal laws should not be given any more scope than the legislature intended them to have and, more importantly, that any ambiguity in the interpretation of penal laws should be interpreted in favour of the accused.

The principle of legality is perhaps the most conspicuous expression of the rule of law as it relates to criminal matters within the state. There are countless others. The manner in which the constitution and other forms of law seek to control police powers and to protect liberty and privacy from intrusion by the state can be seen generally as manifestations of the rule of law. The rule of law is also apparent in adjectival law relating to matters of procedure and evidence, sometimes described amorphously as the law of due process, and in substantive criminal law.

As suggested previously, the adherence of a state (through its law) to the rule of law does not entail that the rule of law must necessarily have the same meaning in every state. Nor does it mean that the rule of law in states that recognise and apply the same principles will be understood in the same way. It is obvious that the rule of law in any state can only be, for better or for worse, a reflection of the values of that state and its people. For present purposes it is not possible, or desirable, to attempt an enumeration of the rules, principles and doctrines that, considered alone or in their aggregate, provide the indicia of adherence to the rule of law. The theme of this text is restraint in the criminal law, and thus it is preferable to venture some general observations on this broad theme as it relates to the administration of criminal law.

At the risk of undue abstraction, and a risk of tautology, it might be said that the virtue of restraint can be seen in the positive law of the state if it conforms broadly to a criterion of proportionality. However defined, this concept is highly relative and politically volatile because, obviously, there is no objective measure of proportionality in any political or moral context. If in abstract terms proportionality is meant to describe the relationship between the constituent parts of a legal system and its whole, as well as between the constituent parts individually and between the whole of one legal system and the whole of another, there is only the beginning of a concept that has any explanatory value. For nothing in this concept can exclude the possibility that the invocation of extreme measures (for instance, martial law) in the particular conditions or circumstances of a society might be rationalised as a proportionate, even a restrained, response to exigency. Thus the use of proportionality as a criterion of restraint and value is largely intractable since one person's concept of proportionality might be another's concept of arbitrariness or tyranny.

Despite this difficulty, there remains considerable value in the idea that restraint embraces a principle of proportionality. As the criminal law is an expression of the state's use of power, even violent power, a restrained use of power would imply that the law will authorise the use of only so much power that is proportionate to a legitimate objective of government. If the positive law of the state, be it adjectival or substantive, reflects some form of gross disproportionality, it will not command public confidence. Thus, for example, the state that authorises the executive arm of government unrestricted powers of search and seizure, at any time of day or night, without some prior justification (such as a requirement of probable cause) will be considered to have granted disproportionate powers if that state is also committed by its constitution or other measures to the protection of privacy and individual liberty. The same might be said of innumerable other powers or procedures. Further, if the substantive criminal law allows for the imposition of sentences that are grossly disproportionate to the seriousness of the offence or the culpability of the offender, the element of disproportionality would signify a lack of restraint.

In broad terms, then, if a society is committed by its constitution to observe the value of restraint in the criminal law, it follows not only that the legislature must enact laws that reflect the criterion of proportionality

but also that an independent judiciary must be empowered to enforce the same criterion in its decisions, even those that declare a failure of the legislature to respect the principle of proportionality.

Rigorous respect for restraint or proportionality in the criminal law necessarily implies that the law cannot provide an immediate response to every real or apprehended disturbance of social order. For example, if the criminal law of a given state is utterly silent as to whether knowing transmission of HIV is an offence, the principle of restraint would force the conclusion that a person who knowingly transmits HIV cannot be prosecuted for doing so unless and until the criminal law is reformed to make such conduct an offence. Similarly, in matters of procedure, genuine commitment to the principle of restraint and proportionality forces a society to accept that the formal rules of law expressing that principle cannot be set aside by way of exception in an individual case, because to do so would significantly erode the integrity of the law for all other cases.

The recognition of restraint and proportionality as relative concepts permits the disinterested observer to note that some societies attach little importance to them. These societies include those that do not restrict the coercive authority of the state in deference to individual liberty and privacy and those that do not subordinate the authority of state action to the supremacy of the law and the judgment of an independent judiciary. The same disinterested observer might also take note of societies in which the law variously expresses a commitment to restraint and proportionality but the practice of responsible officials proves only a corruption of that commitment in the daily life of the community. This was a frequent observation of the former Soviet Union, in which a constitution that was seemingly beneficent in matters of criminal justice was betrayed by a totalitarian abuse of the power of the state.

Finally, the disinterested observer might also take note of societies in which the formal expression of a commitment to restraint and proportionality is more or less enforced in the practices of the legislature and the courts when these bodies act in their respective fields of competence. What the observer would note is that a society's formal commitment to such ideals is, by itself, not much more than the declaration of a promise, and that the realisation or actual performance of that promise is an entirely different matter. A commitment to restraint and proportionality is not a commitment to absolutes but to a measured use of power. As a mat-

ter of practice, legislatures and courts are forced to confront the question whether the values of restraint and proportionality expressed in the laws of a society set too high a standard for compliance. They might respond that necessity demands an exception or that the formal rules must be altered to reflect a different conception of restraint and proportionality. In any society, however, there can be no doubt that the dedicated pursuit of restraint and proportionality through the law is always a struggle to ensure the primacy of principle over expediency.

Restraint in the creation of criminal law

The criminal sanction can be justified by reference to more than one rationale, including of course notions of morality and utility, but any rationale will reflect greater or lesser concern with restraint. The criminal law is always an invocation of the state's authority to use coercive power and violence to ensure the protection of its subjects and its own security. State violence that is inherent in the use of the criminal law thus demands reference to some standard of legitimacy. The gist of the preceding discussion is that, if a society demands restraint in the criminal law, its formal and positive laws must make proportionality manifest in its rules and principles. This requirement is evident in all aspects of the law, but it is especially apparent in matters of criminal law. However, it is not enough to say that a commitment to restraint must be manifest in the positive criminal law of a state. There is a more exacting test of the value of restraint.

A primary question concerning the scope of the criminal law is whether it is an appropriate response to identifiable social concerns. Thus, one question that must be asked is whether the criminal law has a place in resolving social issues. In abstract terms, a state that is committed to observing a principle of restraint will be reluctant to invoke the coercive measures of criminal law unless and until it is apparent that no other response is appropriate or adequate. There are, obviously, forms of conduct that leave little room for doubt or controversy on this point, including violence against the person, damage to property and serious offences against the state. Arson, treason, robbery, theft and culpable homicide are forms of conduct that without question will justify the use of criminal sanctions.

At the same time, however, it must be acknowledged that the criminal law lies in a field of conflicting values and, indeed, that the criminal law itself is a field of conflicting values. Thus, a commitment to restraint forces the question whether criminal sanctions are necessary to address the form of social conduct contemplated by responsible decision-makers. If the value of restraint has some guiding importance in the formulation of public laws, it would suggest that the criminal law should be invoked only in the last resort, when other responses would be inadequate. Of course, the matter is not a simple one since the question of the threshold of criminality is one upon which reasonable people can disagree vigorously. For example, while most might agree that littering is misconduct that might warrant penal regulation, few would argue that it should be a criminal offence. Yet most people would also agree that grave instances of environmental degradation, especially those demonstrating an element of fault or culpability in conduct, do merit the criminal sanction. Between these two poles there is ample scope for debate concerning the proper ambit of the criminal law.

The principle of restraint therefore urges that the criminal law should be used when identifiable forms of behaviour cause serious harm to the fabric of society and, conversely, that it should not be used when other responses are available and might be effective. It certainly implies that the criminal law should not be invoked for comparatively trivial nuisances.

This point has both prospective and retrospective aspects. It has obvious relevance for the future creation of criminal laws in any state. But it also has retrospective application in the sense that the old and established laws of a state might not now be consistent with a society's commitment to restraint, proportionality and the rule of law. On this basis, it might be said that new governing principles require that old laws be reviewed with the intention that any of them that cannot be reconciled with the new constitution of a state should be repealed or reformed so as to ensure consistency with current standards.

The primary test of restraint therefore is whether the criminal law should be invoked at all. If it is invoked, the relevance of restraint remains strong because it will govern the manner in which the criminal law is used. The application of restraint here is especially pertinent in two regards.

One is the degree of fault that should be included in the definition of culpable conduct. In a case of alleged theft, for example, it would be inconsistent with any notion of restraint to impose liability simply upon proof that the accused was found in possession of goods that did not belong to him. Similarly, cases involving bodily harm or death demand proof of an element of fault that is proportionate to the perceived gravity of the offence.

The other respect in which restraint remains a principle of cardinal importance relates to punishment. Excessive punishment cannot be justified under any general theory of sentencing principles. No moral claim and no claim of utility can be significantly advanced if persons found guilty of criminal offences are subjected to penalties that are disproportionate to the seriousness of the offence or the culpability of the offender. Thus, the principle of restraint might be invoked to support the view that the punishment authorised by law, and also the punishment imposed in practice, must not exceed what is necessary to satisfy and advance the valid penal objectives of a state. Accordingly, it might be said, a term of imprisonment should not be imposed upon an offender if other and less intrusive forms of sanction would satisfy valid penal aims.

The observance of restraint in the creation of criminal law is not easy; nor is it uncontroversial because, as already noted, the meaning and value of restraint in any particular context is often a matter for reasonable political disagreement. Putting aside this element of controversy, however, two notable factors affect the degree to which restraint can be observed in any given state. One is that, just as restraint often does not come easily to a person who is insecure, restraint in the application of criminal law cannot come easily to a society that is not collectively secure in its public institutions and the integrity of its officials. Another and a related concern is that restraint in the creation of criminal law is unlikely to prevail either among people who believe that the positive law can actually achieve or cause the result for which it was created or, more generally, among people who believe that law can actually resolve deep political or social disagreements. Adherence to restraint presupposes some understanding that the law, especially the criminal law, has only limited value as an efficient agent of social ordering.

Conclusion

The two passages quoted from Professor Gilmore's lectures on *The Ages of American Law* merit careful reconsideration. At a point in history when many nations have made a fresh start by reconstituting themselves, the men and women of a reasonably just society will seize the opportunity to make a reasonably just law. What that law is cannot be prescriptively defined, but the thrust of this text is that restraint is a public virtue that must be observed in making it. No doubt the men and women who participate in this undertaking understand their unique and privileged position. Restraint will be their beacon and, with any luck, it will be their legacy.

NOTES

[1] Professor Patrick Healy specialises in matters of criminal law, including procedure, evidence, sentencing, comparative criminal law and international criminal law. He teaches these subjects at McGill University, in Montreal, and has published widely on many topics relating to them.

This text was written for the Department of Justice of Canada's International Cooperation Group, as part of the Group's activities in Ukraine.

[2] Grant Gilmore, *The Ages of American Law*, New Haven, Yale University Press, 1977, ISBN 0300019513, page 9.

[3] Grant Gilmore, *The Ages of American Law*, pages 110-111.