

The doctrine

of punishment

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What goes on in a Judge's mind during a criminal trial only he can adequately tell. To decide whether a man is guilty of an alleged offence is only one aspect of his problem. Quite often this is the easiest part of his task. He listens to the evidence adduced, professionally classifies the facts according to their relevance and importance, and then applies the law judiciously to the situation before him. With experience, this application becomes almost instinctive. If, on appeal, his views are declared wrong, it is no matter for personal humiliation. He is content that justice is thereby done by the higher Court. If, on the other hand, his views are upheld, he is again pleased that justice has been done by the Court over which he presides.

This is the straightforward situation that applies to "conviction"—that is, the decision on the question of the guilt of the accused. Once an accused person has been convicted, the trial enters a new phase. The Judge has to determine what sentence to pass upon the person of the prisoner.

The law usually prescribes a maximum sentence. In some cases a minimum is fixed. (The merits of the latter are not within the scope of this article to examine.) With this prescription goes the discretion which the Court enjoys in fixing the final or definitive measure.

To help it in the exercise of discretion, the Court has power to investigate further all other circumstances of the prisoner, which may not have been admissible or relevant during the first phase of the trial. The prisoner himself may give such evidence as would be mitigating. He may state freely such reasons why the sentence to which he is liable under the law shall not be passed on him, in full or in part or at all. The Court may admit evidence of previous convictions, of general conduct, of family and other responsibilities of the prisoner, and the like.

The reason for this is simple. It is in the interests of Justice that every man brought before it must have **his due** and no more. His due is to be judged from his own particular circumstances. Besides, a Court's pronouncement may cost him his liberty or his life. A decision

on the fate of a citizen or subject ought not to be taken without caution, due consideration and diligence.

Sentence and its Aim

What then is a sentence? The ordinary dictionary would define it merely as a "determination of punishment pronounced by a court or a judge¹". One supporting view is that any sentence passed on a member of a free society is a punishment of some sort. He suffers some detriment thereby, whether it be the loss of a small amount of money by way of fine, or a short period of his liberty through imprisonment. The fact remains that he leaves the Court room not exactly the same person as went into it.

This is not, however, an entirely happy statement of the situation, for it tends to establish punishment as the infinite gratification of justice. It casts a shadow on justice by tending to attach to it a retributive nature. I would not like to dishonour its good name by such insinuations. I therefore leave the word "punishment" to those who choose to use it. In my view, sentence is the embodiment of all or anything that justice prescribes or ordains for any given person, who has been found by a court to have acted wrongly in circumstances amounting to a breach of some provision of the law.

In what sense can a judicious mind look upon a sentence as a punitive measure? Is it when it in fact amounts to a punishment, that is, when it does cause hardship or pain? Or is it when the sentencing tribunal considers it to be so? Or is it merely a convenient definition?

From the prisoner's viewpoint, a sentence today is not necessarily a punishment. Whether or not it amounts to punishment must be examined from its individual circumstances. To fine a millionaire 1 000 frs, for instance, has not the same result as fining a beggar in the street half that amount. The measure proves to be punitive to the one and not to the other. On the other hand, if it is accepted that the penal policy of most modern systems excludes retribution as an element in the treatment of criminals, then it would also appear that from the viewpoint of the Courts, punishment is not the end that is sought.

The point may be raised that this being an ultimate end, and the Courts knowing this only too well, it must be presumed that "punish-

1. See Chambers 20th Century Dictionary.

ment" is the principal aim of justice for any convicted person. Is the Court not to be judged by laymen according to its principles? If a man is presumed to intend the natural consequences of his act, why not the Court of Justice? This may be an excellent topic for a moot. It may well be that there is no ready answer to it. I would myself think that what is important to note is the difference between an "aim" or "intention" and a resultant effect. A Court's sentence may well result in considerable hardship to a convicted person. It may even cause him bankruptcy or have very adverse effects on his dependants. However, it remains true to say that the basic aim of the Court is not to produce such results. It is to give a man his due. That due is judged from the circumstances he has himself created. It may well be said, too, that the prisoner, knowing full well that his acts could result in prosecution or conviction in a Court of Law, is presumed to have intended to cause a sentence to be passed on himself for his demeanour.

A sentence in early law almost invariably amounted to punishment. The aim was to **punish** a person who infringed a rule which all members of the community had agreed to obey in the interests of order and peace. It may also have been the final expression of the wrath of the King or other Sovereign against any who dared to disobey or ignore his command.

When Courts were established they tended to stick to this concept, although with some modifications in approach. An offence was probably looked upon as an act of a naughty child invoking chastisement.

Events in history, (social and political especially) have greatly influenced changes in legal thought and this attitude of the Courts towards a convicted person. He has always enjoyed certain rights as a subject. Did conviction reduce him to a chattel without rights? No one would accept that. This century, perhaps more than any other, has brought a tremendous increase in the interest of public opinion (and of jurists) in the study of the treatment of criminals. A prisoner, whether at the Bar or serving a term, is no longer to be regarded an outcast, fit only to be treated with ignominy.

One of the greatest of English parliamentarians, Winston Churchill, (then Home Secretary) once stated the feeling of the times in these words:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the accused, and even, of the convicted criminal against the State; a constant heart-searching of all charged with the deed of punishment;

tireless efforts towards the discovery of regeneration processes; un-failing faith that there is a treasure if you can find it in the heart of every man; these are the symbols which, in the treatment of crime and criminals, make and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it².

Since these words were spoken, the world has witnessed a greater departure from its original notions of punishment. Today it may be said that a sentence is certainly not intended to be an instrument of oppressive punishment. This is probably as far as one can go. For the rest, it may be said that its functions have taken a new dimension.

What is this new dimension? The answer to this provides a guide to the Court in its determination. The theory appears acceptable that punishment should seek to **cure** crime. In this universe, the attempt is to use it as an effective deterrent. Deterrence unhappily has punishment (in its literary sense) for an ally. It derives from stern ideas portrayed by old sayings like, "Make an example of him and others will learn". In its own way it attained partial success and still does. However, the dangers of its indiscriminate use dampens enthusiasm for its unreserved adoption. While it may be necessary in State security interests, a resort to it in times of peace must not be without extreme caution. Heavy punishment is naturally the instrument here. It is a dangerous one which must either serve only the ends of truth in justice or be rejected.

I read, not without amusement, a recent announcement by the South African Minister of Justice (26th February 1965) that he intends to "introduce a bill... abolishing compulsory flogging for serious crime". Since 1952, when discretion for ordering this was removed from the Courts, the number of persons receiving strokes has considerably **increased**. The figures for 1951, 1952 and 1954 respectively were 4,783; 8,724 and 12,927. The aggregate number of strokes of the respective years were 28,152; 50,077 and 73,030. Serious crime is reported to be undiminished and even seems to grow. As a result, the discretion has been returned to the bosom of the servants of justice we call judges!

The attitude of "deterrence" alone, even if properly adopted, is hardly sufficient for a satisfactory cure of crime. One question is, who does the Court want to deter? Is it the convicted person? Or, as it has sometimes been suggested, is it intended to deter other members of the community, who might be tempted to perpetrate the same type of crime?

Does a man who has been sentenced to a long term of imprisonment feel any deterrent effects? Can a judge truly or adequately evaluate

2. 1910.

how much more effective a deterrent is a term of say twenty years than one of five years? The longer term may well rid society of a **first offender**, who is otherwise a good citizen, for twenty years. At the end of this period, it receives back into its fold an embittered man; a man probably debauched by the persuasiveness of others with nothing to live for; a man unable to readjust to the ever-changing order of society; a man with perhaps no family or job to return to; a man who probably now finds servitude within the confines of prison walls (with all its lack of income tax, responsibilities etc.) far more attractive than that of his freedom outside. Can it really be suggested that the sentence would deter him from perpetrating the same or a more grievous crime? Is he not more likely to look at honest living with a reproving stare?

Criminal statistics in Cameroon and elsewhere (America, England and France, for instance) do not show that heavy prison sentences deter persons already given to crime. How often is it realised that criminals study cases in criminal law more thoroughly than many practising lawyers! It may well be true that some of them know as much as, if not more, about the niceties of proof than we do. Each time one of a gang is convicted and sentenced (to any term whatever), other members study the mistakes made in the act of their **colleague**, not that of the **adjudicating court!** As Sir Alexander Patterson says with conjectural humour: "With the examples of their confederate before them, they continue to take the chance of joining him". (Patterson on Prisons, p. 65). The heavier the punishment, the more desperate the measures that dangerous criminals are likely to take. To encourage this trend would be utter folly on the part of the Courts.

I do not consider that the honest citizen is seriously under consideration in this regard. The mere fact of public criminal prosecution ("going to court", some put it) is enough deterrence for him. His honour and reputation, his built-up wealth and the like are his preconsiderations. He is generally fully conscious of the result of criminal actions. When, in fact, he does meet the "strong compelling circumstances" to embark on criminal activity, who can say that the knowledge of a heavy sentence experienced by others has ever guided anyone?

Reformatory Notions

In this situation, thought has inevitably been directed to the question of **reforming** the criminal by means of punishment. Can a sentence reform a criminal? There can be no real answer to this question. A long term of imprisonment in any circumstances can hardly have a reformatory effect on the criminal. It is morale wrecking and causes

social degeneration in the long run. Reform involves making a man good again. It entails a conscious effort to re-equip his conduct and thinking to the benefit of society. As I have explained above, heavy sentence tends to achieve the direct opposite of this.

The role of prisons

Supposing a reasonable sentence is imposed? Two things stand out as imperative to its effect. The first is that the convicted person must be capable of reform. He must not be what, in common parlance, would be referred to as a "dead loss" to society. No reformatory action can easily reform this sort of fellow!

The second pre-requisite is the existence of **effective prisons**. Reformatory schools have been established to help the cases of the young person, whose character is still in the process of moulding. They have achieved tremendous success. The emphasis in this type of institution is on character building and training. The young person is educated in confinement and returns to society with a trade or some other useful education.

The reformatory functions of prisons is far more important than the sentence passed in the Courts. (I would think that regular visits to the prisons paid by members of the Bench and Bar is of inestimable value. I found this to be so). It is what the prisoner experiences during his period of servitude that influences him, and possibly those in touch with him, thereafter.

Two views spring to mind. The first is that prisons should be made as uncomfortable and repulsive as possible, taking care only to ensure the basic necessities of life and health. This involves trying to discourage a return to it! The basis appears to be this: if prison becomes a place where **everyone** in society makes a desperate effort **not** to go, if the atmosphere outside the prisons can be made economically and socially more attractive, then the ideal situation would have been achieved. However, it would appear that the humanitarians have had their way so far, and the frown of international conventions has joined in the "conspiracy". The measures required for attainment may be too drastic to permit basic mental and bodily salubrity. Besides, they may well be so mal-administered as to achieve other results not bargained for.

The second view is to emphasise moral education and to teach the prisoner the fundamentals of healthy living. The problem here must not be over-simplified. Half measures could be more dangerous than

none. It is necessary for prison authorities to be in possession of sufficient data about each prisoner: brief account of the case which resulted in his conviction, his background, his previous convictions, his level of general education and the like. Each prisoner calls for specific study. This study must continue throughout his stay. Prisoners must leave confinement substantially better off mentally than they entered. They should, for instance, learn trades if not already skilled in **legal** ones. The efforts of all concerned would have been fully gratified if the released prisoner graduates in true repentance and is charged with a burning desire to seek an honest living. All of this calls for a high standard of basic education for the warders themselves.

The question has often been discussed whether prisoners should, as part of the reformatory programme, be allowed some freedom during a term. I am yet to find a satisfactory argument for granting prisoners the freedom to leave prison quarters without guard during their period of servitude. Firstly, experience has shown that some of them in fact do repeat their offences, or perpetrate others, during temporary freedom. Secondly, one of the reasons for sending a man to prison is to keep him away from the public at large for a period of time. How could he notice the changed circumstances if he is at liberty, as any other, especially at night? Is it not likely that the lives of witnesses at his trial would not be too safe? Contact with his relatives and friends can be arranged (and controlled) within the prison walls. This freedom to leave confinement is, in my view, undesirable.

Unless prisons are properly organised to play an effective auxiliary role to the Courts of Law, they would become extravagant institutions for incubating hardened criminals. There would be no justification for spending taxes paid by honest law-abiding citizens in the maintenance of those who consciously defy public law and order.

Prison Labour

In many developing countries, prisoners build roads, keep townships clean and do other useful work during their term. This is something no one can rightly criticise. What has and must be criticised is the principle of sending convicted persons to prison merely to produce or increase "cheap labour". Prisoners are **not cheap** labour. They are fed, housed and paid allowances. Are these things to be done for them as a reward for crime? Can any developing country afford to dissipate valuable public revenue in that way? The protesting question one may expect is whether this is desirable in the light of what I have said. I do not think that the use of prison labour is inconsistent with the

reformatory nature of prison life. A prisoner who is taught to build a house, or to construct roads etc., gains some experience in the field. He may well become a good brick-layer. An unskilled hand becomes skilled in something profitable to himself as well as to the community. He may learn farming methods, and thus find an incentive to work a profitable farm later.

On the purely psychological side, the prisoner sees how productive he can be. He realises that it is more rewarding to work honestly for oneself in the discipline of his instruction than to be involved in a thankless service in prison. What is more, his course of study (if it may be so called) fills his otherwise idle mind with something useful to think about. Indolence anywhere, and more so in prison, is productive of evil. While it tarries, the agents of vice enjoy the privileges of a hearing **and** of success.

Prevention

I have attempted so far to consider the guiding principles in the treatment of persons convicted of criminal offences. In any case where difficulties arise, it is invaluable to establish commissions for careful study. Extensive studies have been carried out in Europe on this topic. They have been found to be worth the money spent. Such studies have revealed collateral problems requiring attention. In Germany, for instance, it has been found that the welfare of the prisoner's dependants should be the responsibility of the public. They are thus maintained under special social welfare programme.

The emphasis today is shifting from **cure** to **prevention**. Both at the national and the international levels, large scale judicial and sociological examinations are increasingly being undertaken. In a developing world, this is inevitable. Some see crime as a major symptom of growing social diseases. Others see it merely as a terrifying threat to human safety and public peace. All are united in the realisation of the importance of at least trying to keep it in check.

While human nature remains what it is, there can be no complete eradication of crime. **Prevention** in this context must therefore be confined to notions of reduction by the antidotal. Attack, they say, is the best form of defence. Even **reform** is curative in nature and not enough. The breeding-grounds for crime must be tackled. This cannot be successful without adequate knowledge of what they are.

Extra-Judicial Measures

It is not within the universe of this discourse to deal in considerable detail with precautions outside the Law Courts and the prisons. I do not under-estimate their tremendous value by limiting their mention here to the negligible. It is outside these institutions that the work of prevention can most fruitfully be carried out. For example, unemployment, one of the greatest factors, is not a matter for the Courts and prisons.

Punishment by way of a Court's sentence is only one aspect of the treatment of crime. It plays only a limited role. The **rehabilitation of prisoners invites special treatment**. The effort of prison authorities to recondition a prisoner's mind for a new life in society must be followed up by a planned rehabilitation scheme. If this is not done, these efforts may well prove to have been in vain.

Juvenile delinquency is another aspect often treated with an attitude tantamount to indifference. In the absence of reformatory schools and inadequate almost non-existent local authority facilities for social welfare, children and young persons do not get the attention they deserve. The Courts refuse to send these youngsters to prison for obvious reasons. Corporal punishment hardly deters them, yet that is practically and painfully all that is open to the Courts. Forcing parents to enter into recognisances only increases hardship already experienced by these unfortunate guardians.

Juvenile delinquency is, in the main, a fruit of unhappy family situations. It is not unknown that the children of broken homes are the most susceptible. Where, for instance, a father languishes in jail, pursuant of a long term of imprisonment, and mother has to seek a new means of livelihood, parental care virtually disappears. An unskilled wife may well seek another male bread-earner on a temporary or permanent basis. Her general standard of living may drop. In any case, there is always the overhanging threat of ill-health for a working mother without security. All of these affect the outlook and life of the child. In appropriate cases, the public ought, through local authority bodies, or even the Government, to keep the family together by providing for dependants of criminals. Any amount employed in this way is money well spent. The expenditure involved in the prosecution and subsequent maintenance of criminals justifies this means of preventing crime.

It is also preventive to ensure that **persons awaiting trial**, some of whom may well be innocent, do not get mal-treatment. **Bail** must be

made readily available where a repetition of serious crime is unlikely. **Habeas Corpus** and **speedy trial** are other essential outlets. In these matters, judicial conscience must be given its full operating scope. The work of judges must never, like is not unknown elsewhere, be fettered by pressures or threats of dismissal. We must create the right atmosphere in which a judge can perform his difficult task without improper influences. This is all conducive to the progressive drive against crime.

Adequate care must be taken to ensure that we do not imprison our consciences with the prisoners we convict. It is also imperative that we do not even allow this to happen indirectly.

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