A STUDY ON PUNISHMENT

I

INTRODUCTORY ESSAY.

BY

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"Penalties therefore regularly seem to be *iuris positivi, et non naturalis*, as to their degree and applications, and therefore in different ages and states have been set higher or lower according to the exigence of the state and wisdom of the law-giver."[1]

The truth of this statement is well illustrated by the development of English criminal legislation in the past 150 years. Broadly viewed throughout this period our penal policy is seen to move in three main stages. In the earliest the salient feature is a crude utilitarianism aiming at the reduction of crime through the weapon of terror. The following passage indicates how this doctrine inspired the legislator.

> If a man injured Westminster Bridge, he was hanged. If he appeared disguised on a public road, he was hanged. If he cut down young trees; if he shot rabbits; if he stole property valued at five shillings; if he stole anything at all from a bleach field; if he wrote threatening letters to extort money; if he returned prematurely from transportation; for any of these offences he was immediately hanged.[2]

The attitude of the contemporary moralist is well illustrated by the views expressed by the Reverend Sydney Smith, Editor of the EDINBURGH REVIEW in the eighteen-thirties, in the following quotations:

> The real and only test, in short, of a good prison system is the diminution of offences by the terror of the punishment.[3]
>
> Mrs. Fry is an amiable excellent woman, and a thousand times better than the infamous neglect that preceded her; but hers is not the method to stop crimes. In prisons which are really meant to keep the multitude in order, and to be a terror to evil-doers, there must be no sharing of profits—no visiting friends—no education but religious education—no freedom of diet—no weavers' looms or carpenters' benches. There must be a great deal of solitude; coarse food; a dress of shame; hard, incessant ,irksome, eternal labour; a planned and regulated and unrelenting exclusion of happiness and comforts.[4]

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[1] HALE, PLEAS OF THE CROWN, I. 13.

[2] MACKENZIE, HISTORY OF THE NINETEENTH CENTURY, 10th ed., pp. 77–78.

[3] WORKS OF THE REVEREND SYDNEY SMITH, 4th ed. (1878), vol. II, p. 244.

[4] *Op. cit.*, p. 269.

Of course in every period voices are heard objecting to the prevailing policy of the time, either from those who regard it as too progressive or those who regard it as reactionary, and Smith's declarations evoked some criticisms. To these he replied with all the vigour and directness for which his pen is distinguished. Thus he wrote:

> When we recommend severity, we recommend, of course, that degree of severity which will not excite compassion for the sufferer, and lessen the horror of the crime. That is why we do not recommend torture and amputation of limbs. When a man has been proved to have committed a crime, it is expedient that society should make use of that man for the diminution of crime; he belongs to them for that purpose. Our primary duty, in such a case, is to treat the culprit that many other persons may be rendered better, or prevented from being worse, by dread of the same treatment; and, making this the principal object, to combine with it as much as possible the improvement of the individual.[5]

The sentence "It is expedient that society should make use of that man for the diminution of crime: he belongs to them for that purpose" should be noted. It expresses in a few words the inevitable standpoint of those who adopt the doctrine of terror in criminal legislation.

Speaking generally, the study of this first stage of our criminal policy establishes the conclusion that there was no acceptance of any principle that the severity of punishment should be equated to the gravity of the offence. This principle became prominent in the second stage, when the doctrine of retribution took a leading place in contemporary thought on penal questions and therefore the crimes have to be graded according to their gravity and the punishments correspondingly graded so as to fit the crime in each case. The major assumption on which this conception rests is that every individual in the State has certain fundamental rights as a human being, which should not be forfeited by the fact that he may have committed a crime.

Certain thinkers in Europe had drawn attention to the evils which resulted from the policy of terror, especially when, as often, it allowed too great a discretion to the tribunals and also too great freedom to those who carried out the sentences of the tribunals. As a safeguard against this danger it was felt that the individual should be protected by the establishment of legal rules which would closely define the nature and the amount of punishment which should be administered for each crime. Even in England, where for a number of reasons the administration of criminal

[5] *Op. cit.*, p. 352, note.

justice was comparatively free from the evils of such arbitrary discretion there was felt to be a need for safeguards.

A celebrated article by James Mill on Prisons and Prison Discipline was published in the Encyclopaedia Britannica in 1824.[6] A passage from this aptly illustrates the present point.

> This we may assume as an indisputable principle; that whatever punishment is to be inflicted, should be determined by the judge, and by him alone; that it should be determined by its adaptation to the crime; and that it should not be competent to those to whom the execution of the sentence of the judge is entrusted, either to go beyond the line which he has drawn, or to fall short of it.

If it is to be granted that all individuals have equal fundamental rights it seemed naturally to follow that they all must bear equal responsibilities; and the result was that whereas the liberal doctrine of equality protected the individual against the arbitrary cruelties of the policy of terror, it tended to assume that all individuals have the same powers of resistance to temptation and that each will deserve the same punishment for the same crime, and moreover will react in the same way to that punishment. Thus it may be said that the liberal theory standardised individuals and concerned itself little or not at all with what at the present day is so closely studied, namely the variations of individual personality. According to this idea the primary consideration in determining the punishment to be imposed is the intrinsic nature of the particular crime which the delinquent has committed.[7]

This development marks a revulsion against the defects which were detected in the brutality of the earlier period but in its turn it was found to be insufficiently effective to reduce adequately the volume of crime. The volume of crime was a fact to cause concern to the least speculative observer but there were other forces at work in the second half of the nineteenth century which helped to create a general consciousness that our penal system needed overhauling. In all branches of science there

[6] ENCYCLOPAEDIA BRITANNICA: Supplement to 4th, 5th and 6th ed. vol. VI (signed "(F.F.)") p. 387.

[7] The view, held by the leading jurisprudential writers of the U.S.S.R., that this assessment of crime almost as a commodity to be paid for by an appropriate measure of punishment, was also a reflex of the preoccupation with commercial development which prevailed at this period, is supported by the language used by Professor Wahlberg whose work in criminal science was of the highest importance in the third quarter of the nineteenth century: see, *e.g.*, his "Criminalistische und nationalökonomische Gesichtspunkte", Wien, 1872, pp. 96–99. See also Professor Sutherland, who writes, "The classical economists insisted that reward should be commensurate with service; the classical criminologists concluded that punishment should be commensurate with disservice, or crime." PRINCIPLES OF CRIMINOLOGY, (1934) p. 317.

arose a desire to enquire into origins, and this tendency affected those thinkers who were interested in the problem of crime. Investigations (largely stimulated by the writers of the Italian school) into the social and biological causes of crime produced results which cast doubts on many of the established theories concerning free will, and the efficacy of basing criminal policy on deterrence and retribution. Advances in medical science drew attention to varieties of mental abnormality hitherto not properly appreciated. Developments in educational science also brought about a realisation that children and adolescents have their own special difficulties in life and that there was needed a new approach to their problems. Again, more attention was paid to the publication of the official criminal statistics which, to take only two features, revealed the very large percentage of juvenile offenders and recidivists. Investigations showed the ineffectiveness of the practice of short term detention, and on the other hand the corruptive effect of unscientific and antiquated prison organization.

All these forces led to the creation of a feeling of dissatisfaction with existing penal systems and this feeling was universal throughout Europe. Writers who studied the penal systems of this period were emphatic in their criticisms of their defects.[8]

At the same time there was developing the opinion that a liberalism which regarded the State as no more than an institution charged with the protection of individual rights, took too narrow a view of the nature and purpose of man's social and political organization. In many directions the State began to intervene in the activities of social and political life, and this intervention has been progressively developed. This new attitude was necessarily reflected in the criminal policy of the day: penal repression could no longer be regarded as merely a mechanical application of a few simple axioms: crime was seen to be a complex social

[8] "On pouvait dire à coup sûr, pour reprendre un mot qui depuis a fait fortune, que l'école régnante, au point de vue des résultats, était en pleine faillite. . . . . On eût pu croire que ce fût la peine, et la peine seule, qui devînt le principal facteur de la criminalité et que ce fût le droit pénal qui favorisait l'accroissement du crime." (SALEILLES L'INDIVIDUALISATION DE LA PEINE, pp. 96–7.)

"En verité, la prison, telle qu'elle est organisée, est un véritable cloaque épanchant dans la société un flot continu de purulence, et de germes de contagion physiologique et morale. Elle empoisonne, abrutit, déprime et corrompt. C'est à la fois une fabrique de physiques, de fous et de criminels." (GAUTIER, LES PRISONS, ARCHIVES D'ANTHROPOLOGIE CRIMINELLE, Vol. III, p. 355.)

"La multitude de petites peines c'est le va-et-vient incessant de la légion des délinquants habituels; c'est la prison transformée en hôtellerie, c'est le détenu s'en allant à la bonne saison, et restant en état de guerre contre la société; c'est en un mot le juge remplissant sans s'en douter, le casier de la récidive." (PRINS, CRIMINALITÉ ET REPRESSION, p. 93.)

phenomenon, calling for a constructive policy of remediation, in which prevention, education, and reformation should be leading features.

The comparative study of criminal history establishes that in periods of social and political tension legislatures are preoccupied with the task of strutting the fabric of the constitution against the dangers of an anticipated wave of criminal upheavals. Thus authoritative regimes are created which, adopting a short view, have regard to crime rather than to the criminal and, massing together offenders of different kinds, subject them to the rigours of an excessively severe penal system. Conversely, when tension is relaxing in society, legislatures are not afraid to entertain proposals of a critical and constructive character. Opportunity is then presented for a long term criminal policy which looks to reformation by individual treatment rather than to mass punishment. The second half of the 19th century on the whole presented such a condition of social stability.[9]

The opening of the third period, then, is marked by the growth of the assumption that the main purpose of penal policy is to assist security by reducing the volume of crime, and therefore that the value of any punishment is to be appraised by its effectiveness in promoting this purpose. In general the crimes which figured in the list in the 18th century have continued to exist up to the present day; but, as indicated above, there have been fundamental changes in the punishments inflicted on those who commit them, although of course, the reasons which inspired these changes have varied. Types of punishment which once were common are now rare, partly because for many offences they have been abolished and partly because the policy of the tribunals has changed so that the punishments legally available have in practice been progressively discontinued. The most striking example is provided by capital punishment. At the end of the 18th century capital punishment was the penalty ordained for more than one hundred and sixty crimes;[10] today the number of crimes punishable by death has dropped to four. Again, flogging, a sanction not so long ago much favoured by our tribunals, is nowadays inflicted in very few cases and there is a strong body of opinion pressing for

[9] Even in periods of calm there is a reluctance to revise criminal rules. "People . . . . . are afraid of undermining the practical premises of social security by investigating closely the psychological motives of criminals." (VINOGRADOFF, INTRODUCTION TO HISTORICAL JURISPRUDENCE, (1920) p. 33.)

[10] See 4 BLACKSTONE, COMM. (2nd ed. 1769) 18.

its complete abolition.[11] Furthermore, there has been a steady relaxation of the severities of those kinds of punisment which still operate. Penal servitude is very different from what it used to be; the statutory minimum period has been reduced and the criminal statistics show that the majority of the sentences actually imposed oscillate in a field adjacent to the minimum.

The new approach which characterises the third period involved a fuller appreciation of the necessity of studying the personality of the offender if the disease of crime was to be successfully attacked.[12] This led to the introduction of measures which adopted and regulated the punishment deemed appropriate for defined groups of offenders, in general without any special regard to the particular character of the crimes which they might commit. This appreciation is shown in the Report from the Departmental Committee on Prisons[13] which, speaking of persistent offenders states: "To punish them for the particular offence in which they are detected is almost useless. . . . the real offence is the willful persistence in the deliberately acquired habit of crime. We venture to offer the opinion formed during the inquiry that a new form of sentence should be placed at the disposal of the judges by which those offenders might be segregated for long periods of detention." In 1908 an Act of Parliament singled out two special groups of delinquents for one of which, now known as the "Young Adults", is prescribed a special treatment, namely, the Borstal sanction, and for the other group, being adult habitual offenders, the sanction of prolonged detention. It is significant that this statute was called the "Prevention of Crime Act".[14] The same idea of prevention had inspired the Probation Act of 1907, which in its main provisions, rejecting the doctrine that a retributory punishment must follow crime, has concentrated on the personality of the delinquent and on the external circumstances affecting his past and future conduct. When it is remembered that in the period immediately preceding the present war out of

[11] This of itself implies a change of view as to the purpose of all punishment. "Views on corporal punishment are sometimes an index to general conceptions of punishment." JACKSON, MACHINERY OF JUSTICE IN ENGLAND, (1940) p. 175.

[12] "And if we decline to follow those 19th century thinkers whom Lambrose trained or inspired, in their efforts to discover in every cracksman or pickpocket a physiological anomaly, and to resolve criminal law into a branch of medicine, we still shall hold them in enduring honour for having taught us the necessity of "individualizing" our penal discipline to the circumstances of each particular offender, so that the shoe shall always fit the foot. Former lawyers — says Van Hamel epigrammatically—bade men study Justice, but Lambroso bids Justice study men." Kenny (1909), 10 Journal of Comparative Legislation, (N.S.), p. 220.

[13] (Cmd.7702) 1895, p. 31.

[14] 8 Ed. VII, c. 59.

every ten offenders found guilty of indictable offences more than five were dealt with under the provisions of this Act it will be realized how far our criminal policy has moved away from the position it had taken up in the nineteenth century.[15]

Other statutes which provide new types of sanction are those which deal with juvenile delinquents and mentally defective persons. Further steps of the same kind are contemplated in the clauses of the Criminal Justice Bill of 1938. Side by side with these changes there has been going on a continual modification in the prison system showing two main tendencies whereby the prison regimen has not only been rendered less rigorous but has been adapted to give some effect to a policy of employing the period of detention for the reformation of delinquents. Of course the fact that these tendencies can be discerned does not mean that the policy which they indicate has been very extensively implemented in practice in all directions. What has however happened is that the aims of penal legislation are taking a more and more definite shape in the minds of the legislators and thus there is a growing effectiveness in the measures which are being adopted.[16] Modern criminal policy is proceeding empirically on the observation of proved facts rather than moving in obedience to theories of a metaphysical character as to the nature of crime and punishment. It may perhaps be said that punishment nowadays is looked on less as an instinctive reaction to crime and more as a conscious action against crime. Thus Ferri in his draft penal code[17] abandoned the use of the traditional word 'punishment' and substituted for it the expression "Measures of Social Defence."

It would be a mistake to draw the conclusion that all these modern developments are based on a humanitarian inclination towards leniency. Their purpose is very different as is pointed

[15] "Probation represents a distinct break with the classical theory of criminal law, for it attempts to deal with offenders as individuals rather than as classes or concepts, to select certain offenders who can be assisted while at liberty to form correct habits and attitudes without a penalty, and to use a great variety of methods for this purpose. It represents also a distinct break with the retributive theory of punishment. It does not attempt to make the offender suffer; it attempts to prevent him from suffering. Some suffering results from the status to be sure, but is not intentional and is avoided as far as possible. Consequently there is no good reason for insisting that probation is punishment, as some authors have in the effort to win approval for the system". SUTHERLAND, PRINCIPLES OF CRIMINOLOGY, (1934) p. 381.

[16] It is urged that there is still much room for improvement in the development and co-ordination of these aims, *e.g.*, Dr. Temple, Archbishop of Canterbury, THE ETHICS OF PENAL ACTION. First Clarke Hall Lecture, (1934), pp. 15–17.

[17] RELAZIONE SUL PROGETTO PRELIMINAIRE DI CODICE PENALE ITALIANO (Libro I) Roma. 1921.

out emphatically in official publications. Thus the Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction[18] has the following passage:

> The impression that a person placed on probation is being "let off" brings the system into contempt and spreads a false conception of its nature. The disciplinary element in probation needs emphasis, and it should be generally understood that, far from being a sentimental gesture, probation when effectively carried out makes serious demands upon the probationer.

Again in the Report of the Departmental Committee on Persistent Offenders[19] it is stated:

> The object of modern changes in prison treatment has been to remove or modify the features which conduced to deterioration of mind or character and to make imprisonment, so far as possible, a period of training. This aim is not inconsistent with the deterrent function of imprisonment. In addition to the deterrence resulting from loss of liberty, training—if the system is efficient—is a deterrent experience. It should demand from the prisoner a higher standard of effort in work and behaviour and self-discipline than is demanded by a purely punitive system.

It has always been realized that a most effective preventitive of crime would be achieved if the potential delinquent could be made to feel that detection and punishment would almost certainly follow the commission of the crime.

In a system where the machinery for detection and apprehension of offenders is weak the chances of offending with impunity are many and bolder spirits will take the risk. Such a position is generally taken as one of the justifications of a policy of terror, which is calculated to set against the chances of escape the dread of the awful consequences if the delinquent is apprehended. In the modern system however the punishment to be expected, as it is not such as to inspire great fear, will not compensate for any chances of escape which the offender can envisage. It follows that it is essential in modern criminal policy to make provisions for the maximum prospect of detection and apprehension of offenders. "The fact," writes Dr. Temple, in the first Clarke Hall Lecture[20] "that certainty rather than severity is the main source of deterrent efficacy is of great importance when we turn to the reformative aspect of penal action: for it provides the possibility of carrying far our adjustment of that action to the disciplinary needs of the criminal without depriving our action of its deterrent quality."

[18] Cmd. 5122, 1936, p. 43.
[19] Cmd. 4090, 1932, p. 7.
[20] THE ETHICS OF PENAL ACTION, (1934), p. 34.

It must be admitted that there is still much to be done in this direction. Figures quoted by the Report of the Departmental Committee on Detective Work and Procedure[21] are significant, as they are given by the police authorities themselves.

Examining the question of the 'proportion of offences which are detected' the Report expresses the opinion that as concerns *offences against the person*, as a whole 'the proportion of undetected crime is under 10 per cent. and the average for the whole country is not much over that figure'. In cases of *'fraud, false pretences, etc,'* the proportion of undetected crime is 15 per cent. In the group of offences including *'burglary, housebreaking, shopbreaking, etc.,'* the percentage of undetected crime is much higher. According to the Report 'the average proportion of undetected crime of this class in the forces as a whole is as high as 70 per cent. and the average for both county forces and city and borough forces is a little over 60 per cent. . . . ' "In the cases of *simple larceny*" states the Report—"which forms so high a proportion of the crimes committed, the proportion of undetected crimes is subject to somewhat similar variations from force to force, and on the average, is about 50 per cent."

A reluctance to base action on purely theoretical grounds has always been a marked characteristic of English thought, and our criminal policy too at all periods has always been largely shaped by utilitarian considerations.[22] It is signficant that Paley, who was strongly in favour of the use of terror was equally strong in maintaining that its sole justification was to be found in its preventive effect. As stated by him:

> The proper end of human punishment is, not the satisfaction of justice, but the prevention of crimes. By the satisfaction of justice, I mean the retribution of so much pain for so much guilt which is the dispensation we expect at the hand of God, and which we are accustomed to consider as the order of things that perfect justice dictates and requires. . . . . Now that, whatever it be, which is the cause and end of punishment, ought undoubtedly to regulate the measure of its severity. But this cause disappears when the crime can be prevented by any other means. Punishment is an evil to which the magistrate resorts only from its being necessary to the prevention of a greater.
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> The Law of England is constructed upon a different and a better policy. By the number of statutes creating capital offences, it sweeps into the net every crime, which, under any possible circumstances, may merit the punishment of death; but when the execution of the

[21] Vol. I, Chapters I to III, 1938, p. 28–29.

[22] In Germany, von Liszt deplored the waste of time spent on abstract discussion of the concept of punishment, and inaugurated in his country a modern school of criminal science which regarded punishment from a utilitarian standpoint. See "Der Zweckgedanke im Strafrecht" reproduced in his "Strafrechtiche Aufsatze und Vertrage" (1905), Vol. I, pp. 126–179.

> sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the peculiar aggravations of whose crimes render them fit examples of public justice. By this expedient, few actually suffer death, whilst the dread and danger of it hang over the crimes of many. . . . . .[23]

We now may observe a curious phenomenon: in this country, practice—by which we mean the policy adopted by the legislature, the tribunals and by those invested with executive power—shows a more definite appreciation of the purpose of punishment than is achieved by the juristic writings on this subject.

In 1864 Sir Henry Maine said,[24]

> All theories on the subject of Punishment have more or less broken down; and we are at sea as to first principles.

The truth of Maine's observations is well illustrated by the attitude of Sir James Fitzjames Stephen who some twenty years later showed a considered preference for the more ancient policy of repression by terror, and could see in the retributive doctrine prevalent in his own day nothing but a derogation from the duty imposed by what he regarded as the more clear sighted and unflinching moral standard of the past.[25]

Twenty years later still Professor Kenny in his examination of the various current opinions as to the purpose of punishment arrived at much the same conclusion as Maine, ending with these words,[26]

> It cannot however be said that the theories of Criminal Punishment current amongst either our judges or our legislators have assumed, even at the present day, either a coherent or even a stable form. To this, in part, is due the fact that . . . . . our practical methods of applying punishment are still in a stage which can only be regarded as one of experiment and transition.

Even if this statement be accepted as substantially true in 1902 it can hardly be said to be so in 1929,[27] yet it was repeated then without any modification.

When one reflects on the important part which the concept of punishment plays not only in the decisions of the legislature and of the courts but also in the conclusions of theoretical jurisprudence,[28] it is plain that every endeavour should be made to

[23] PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY, (London 1817) pp. 284–285 and pp. 288–289; see also SIDGWICK, ELEMENTS OF POLITICS, (1908) p. 114.

[24] SPEECHES, p. 123.

[25] See STEPHEN, HISTORY OF CRIMINAL LAW, Vol. 1, pp. 478–480; Vol. II, pp. 79–93. For a criticism of Stephen's views see SIDGWICK, ELEMENTS OF POLITICS, (1908) pp. 111–112.

[26] OUTLINES OF CRIMINAL LAW, 1st ed. (1902) p. 36.

[27] The date of the last edition prepared by the author himself.

[28] *E.g.*, 4 BLACKSTONE, COMM., pp. 5–7; WINFIELD, PROVINCE OF THE LAW OF TORT, p. 200.

clarify its nature and purpose. Discussing the position in the United States, Dean Roscoe Pound has written:

> Administration is necessarily affected by the fundamental conflict with respect to aims and purposes which pervades our penal legislation. But apart from this, the conflicting theories are also at work in administration. One magistrate paroles freely; another may condemn the system of parole. One executive pardons freely, another not at all . . . . . One judge is systematically severe and holds that crime must inevitably be followed by retribution; another is systematically lenient, and many others have no system or policy whatever. Thus the fact that we are not all agreed, nor are we ourselves agreed in all our moods, infects both legislation and administration with uncertainty, inconsistency, and in consequence inefficiency.[29]

In the quest of this clarity in the concept of punishment it seems that the philosopher should be called in to assist the jurist. As Blackstone said,[30]

> Sciences are of a sociable disposition, and flourish best in the neighbourhood of each other.

On the subject of punishment the moral and social sciences have in the past made available to criminal science much valuable material of which unfortunately too little use has been made. None the less the influence, whether for good or ill, exerted by the works of such thinkers as Paley, Bentham,[31] and Mill is undeniable.

These are the considerations which actuated our invitation to Dr. Ewing to provide for jurists the present survey of the main currents of modern philosophical thought in England on the subject of punishment.

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[29] CRIMINAL JUSTICE IN CLEVELAND, (1922) p. 576.

[30] 1 COMM. 33.

[31] "Our improvements in the administration of justice, extending over a period of some fifty years, are to a very great extent direct applications of the principles enumerated and repeatedly expounded by him (by Bentham) in his writings, which constituted a veritable treasure-house for legal-reformers, as well as a rich mine for statesmen and publicits." COLEMAN PHILLIPSON: THREE CRIMINAL LAW REFORMERS (1923) p. 229.