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INSTITUTE OF CRIMINOLOGY

UNIVERSITY OF SYDNEY

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The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

THE DILEMMA OF SENTENCING

A proverb is ascribed to the Chinese which captures something of the dilemma of sentencing which emerges from these pages :

> *"Beat your child once a day. If you don't know why, he does".*

It is because we cannot secure entire agreement about the *rationale* for sentencing that disparities appear to arise in the maximum (and sometimes minimum) sentences allowed by Parliament and the individual sentences imposed by judicial officers for apparently like offences. Theories, of course, abound. They range from the Removal from Society, Denunciation, Retribution and Deterrence theories, at the one end of the spectrum to the Restoration, Compensation, Behaviour Modification and Rehabilitation theories at the other. Unfortunately, the theorists' language is sometimes used loosely by practitioners. Judge Roden points out that all too frequently "deterrent" sentences are synonymous with "heavy" sentences; "rehabilitation" becomes synonymous with "light". The aim of deterrence is to modify conduct, for fear of the consequences. Yet if the consequences are perceived to be remote, or are not known or appear to be applied unequally and irrationally by the courts, a "deterrent" sentence is not likely to have the desired result. Judge Roden illustrates this point by reference

to the comparative severity typically visited upon those convicted of culpable driving causing death by the same judges who deal lightly with appeals against sentence on conviction of driving under the influence. The *conduct* may be precisely the same in each case. Only the consequences may distinguish the two crimes.

Beside disagreement on the fundamental aim of sentencing, many other factors are identified in this seminar as the cause of apparent disparity in sentences. They include the incomplete perceptions often conveyed by inadequate reporting of the full facts of a case, the inconsistent legislative policy which arises from the piecemeal amendment of the Statute Book and the erosion of fine values by the passage of time, the separate trial of co-criminals and the individuality of judges and magistrates, who have the function of imposing the sentence. The speed with which many sentences have to be passed, particularly in the Magistrates' Courts and uneven fact presentation, inherent in the adversary trial, all contribute to some degree of inequality in the sentences imposed for like offences in Australian courts. Should we be concerned about this? Is it anything more than a feature of human justice? Are the inequalities at an acceptable level? What should we do about them?

EQUALITY IS JUSTICE

There is no doubt that perceptions of unequal sentences or apparently excessive or (more usually) inadequate sentences agitate our community from time to time. Examples are mentioned in the seminar and many will spring to the mind of the average reader. It seems to be assumed that equal "guilt" will be equally punished. Dr. Francis and Dr. Coyle have set about testing scientifically the degree of variance in penalties imposed by different magistrates for like offences. In order to reduce the experiment to the greatest degree of objectivity possible, a videotape procedure has been adopted, by which component parts can be varied, in order to test the relative importance of multiple factors including age, appearance, sex, racial origin, the offence and so on. The results so far emerging from their work are recounted in this report. They suggest that the more

extravagant claims of variance in sentencing are simply not borne out, if the videotape experiment is reliable.

Judge Roden, in his paper and oral comments, questions the fundamental assumption that sentences *should* be equal in every case. So long as individuals impose a sentence with discretionary powers conferred, within limits, by Parliament, it is inevitable that disparities will arise. This is a feature of human justice. What some condemn as disparity and inequality, others applaud as flexibility and individualised decision-making.

One reflection of the concern in some quarters about inequality in sentencing and the alleged inadequacy of some sentences is the current moves, especially in the United States, towards mandatory minimum sentences which reduce the judicial officer's options, once a defendant has been convicted of a particular offence. A like reform, reflected in the *Criminal Code Reform Act* of 1977 (S.1437) now before the United States Congress seeks to define crimes with precision and to assign specified sentences to particular offences, listing aggravating and mitigating circumstances that can modify the penalty. Various suggestions are contained in these papers, designed to reduce inequalities in sentencing, short of passing the problem from the judicial arm of government to the legislature, by the adoption of fixed penalties. The suggestions include the special training of judges and magistrates (including by the use of videotape techniques), regular meetings amongst them to discuss sentencing practices, the provision of greater legislative guidance concerning the hierarchy of crimes and the introduction of improved reporting of appeals against magistrates' sentences, for the guidance of the lower courts where the great bulk of sentencing is done.

ALTERNATIVES TO IMPRISONMENT

A major theme to emerge is the need to consider alternatives to imprisonment. The range of alternatives available will inevitably raise the objections of those who seek complete equality in penalties imposed for apparently like conduct. If there is but one penalty, for example, death or a fixed term of imprisonment, equality may, superficially, be achieved. However,

in any system of individualised justice, this approach is bound to leave many dissatisfied. For example, a money fine falls unequally upon the middle class and affluent, on the one hand, and the unemployed on the other. Imprisonment has well identified social inefficiences as a correctional measure. Furthermore, it is extremely labour-intensive and costly and achieves little discernable positive good either for society as a whole or for the victims of crime. A recent announcement by the Minister for Welfare in Queensland, Mr. Herbert, estimated that the average cost of keeping a prisoner in a Queensland gaol was $23,000 per year, allowing for $9,000 loss of wages by the prisoner and payments of social security to the prisoner's dependants. By comparison, the cost of supervising a person on probation or parole was about $300 per year.

Considerations of this kind have taken criminologists and lawyers to the scrutiny of alternatives to imprisonment The recommendations of the Australian Delegation to the Fifth United Nations Congress on the Prevention of Crime and Treatment of Offenders in Geneva in September 1975 included a recommendation that consideration should be given by the Commonwealth and State Governments to:

> "the revision of the laws with respect to sentencing to promote the greater use of alternatives to imprisonment, having regard to the costs and other unsatisfactory features of the punishment of imprisonment. Such a revision should take into account the need to rationalise existing provisions, fill in gaps that exist in their operation, develop new alternatives, introduce sentencing principles and criteria, and establish a legislative intent that imprisonment is to be used only as a last resort".

The Parliaments of the United Kingdom and New Zealand have already enacted restrictions on imprisonment. Section 20 of the *Powers of Criminal Courts Act* 1973 (U.K.) provides that a court shall not pass sentence of imprisonment on a person who has attained the age of 21 and has not previously been sentenced to imprisonment

unless the court is of the opinion that no other method of dealing with him is appropriate. Section 43A of the *Criminal Justice Act* 1954 (N.Z.) likewise provides that no court shall sentence any person to imprisonment for a term of less than six months unless "having regard to all the circumstances of the case, including the nature of the person's offence and his character and personal history, the court has formed the opinion that no way of dealing with him other than imprisonment is appropriate".

These statements of legislative recognition of the potentially harmful effects of incarceration, so that it is relegated to the position of a measure of last resort, obviously require the closest possible attention to the provision of sentences, alternative to imprisonment. Attention was given to this subject in the seminar.

Among the alternatives, some of which were identified and discussed are the following :

* Recognizance
* Fines, including "day fines" i.e. a fine expressed in terms of average earnings not money
* Compensation and restitution orders
* Probation
* Periodic detention
* Suspended sentences
* Attendance centre orders
* Community work orders
* Work release orders.

The alternative of community service orders attracted the keenest attention of the seminar, the experiments in Tasmania and Western Australia being described. The most hopeful statistic of all was provided by Mr. J.P. McEvoy of the Probation and Parole Service who suggested that experience in England has shown in one scheme that 40% of offenders, after finishing their compulsory community service order, actually continued to work with the community group in a voluntary capacity. Amidst all the pessimistic statistics on the effect of institutional rehabilitation this figure may bear a message of hope.

SIXTH UNITED NATIONS CONGRESS

The Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders will take place in Sydney in August 1980. The assembly of this major Congress in Australia will bring to this country nearly 2,000 Ministers, Judges, Academics and other leaders in the fields of law, criminology, police corrections, social welfare and allied disciplines. The spotlight of attention will be placed upon Australia's criminal justice system generally and the treatment of offenders, in particular. The agenda for the Congress will most likely include the self-same subjects as are debated in these pages. Australia, which began its colonial history as a penal colony, has special reasons to give urgent attention to the punishment and treatment of offenders and the principles and policies which should guide those who sentence them. The debate recorded here has value in identifying some of the major themes that will have to be addressed. Identifying the problems may be the beginning of wisdom.

M.D. KIRBY

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