

CRIME AND PUNISHMENT IN MODERN SOCIETY**S. OWEN-CONWAY***

There are three basic conceptual questions inherent in the rationalisation of all systems of Criminal Law, ancient and modern, the answers to which questions, in so far as they are capable of being answered, providing the framework of any one particular system.

- (1) What conduct should be designated criminal and why, and by whom?
- (2) What factors make up the offence?
- (3) What should be done with offenders?

The American Law Institute's model penal code sets out what it considers to be the purposes of modern criminal law. "(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes; (c) to safeguard conduct that is without fault from condemnation as criminal; (d) to give fair warning of the nature of the conduct declared to be an offence; (e) to differentiate on reasonable grounds between serious and minor offences."

The thrust of this paper is to argue that the sole purpose of the criminal law is to announce to society those acts and/or omissions to be regarded as offences. It is the enforcing of the criminal law which results in those acts and/or omissions being processed through the legal machinery and eventually emerging as "crime". More often than not Judges adopt the first of the five objectives (a) set out in the American Law Institute's model penal code and lay particular emphasis on the prevention of criminal conduct as being the major purpose of the criminal law. In my submission that view is misplaced: the criminal law allows and to some extent encourages crime to come into existence. Without a criminal code or criminal laws actively enforced then there would be no crime. There would certainly be anti-social activity but it would not be designated criminal. The likely consequence would be a resort to self-help with retribution becoming the most powerful motivation but the processes of secondary deviation would not be so apparent in modern society although those forces would still exist to some extent. In my submission, within the American Law Institute's model penal code only objective (d) "to give fair warning of the nature of the conduct declared to be an offence" is relevant in the definition of the purpose of the criminal law. Objectives (a), (b), (c) and (e) deal with its enforcement and operation. The extent to which the judiciary and the legislature has placed emphasis and reliance on the prevention of crime as being the fundamental purpose of the criminal law is the major reason why that very same criminal law is largely seen as being wholly inadequate. "Criminal conduct" is a fact of life and will never be absent in any society in any time. Even in a society without criminal laws, certain conduct would attract to it an "unacceptable face" which the majority of that society would not tolerate and to all intents and purposes would be regarded as "criminal". Once it has been recognised that the purpose of the criminal law is to clearly delineate that conduct which is declared by society to be unacceptable, then the attention attracted to the criminal law by the rising crime rates can be divorced from the argument of whether the criminal law is satisfactory. In Queensland such an argument would then

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revolve around whether or not the criminal code was dealing adequately with conduct classified as criminal in its substantive form and whether that conduct should be classified as criminal at all, i.e., the consideration of the first two of the three conceptual questions posed in the introduction of this paper. Although the third question "what should be done with offenders?" is an essential ingredient in the concept of crime, it should be considered separately and apart in the assessment of the effectiveness of the criminal law and it in no way has any bearing whatsoever on its purpose.

Crime is analysed in modern society primarily by reference to the official crime figures. These figures only show the number of convictions successfully processed through the legal system, which in no way indicates the number of crimes actually committed. The difference between crimes actually committed and crimes successfully processed through the legal system is explained by the level of efficiency of the detection agencies; the extent to which crimes are reported and the rules of evidence practice and procedure which militate in favour of the suspected offender. This difference results in a gross distortion of the overall picture of the number of crimes committed in modern society. Simply because in 1975 the official figures in any one place show that there has been an increase in crimes of violence and all the consequences resulting therefrom, in no way indicates that there has in fact been such an increase. Police forces generally are happy to work in conjunction with the official figures only and prefer not to make reference to hidden deviance tests and their equivalents. They are concerned in particular to work in conjunction and within their tariff scales and not to have them disturbed by sharp increases or decreases in official crime figures. Thus the primary objective of any Police Force is to ensure that the level of detection remains a constant. Paradoxically a sharp increase in the level of police detection of crime would invariably result in public pressure being brought to bear on the Police Force to increase its efficiency in detecting crime.

When an offender has been convicted by a Court of Law on an inditable offence, his counsel is most concerned at that stage to neutralise the attitude of the court towards the offender. The process of neutralisation is undertaken on the offender's behalf by counsel in the form of a plea in mitigation. The plea consists essentially of putting to the court all those facts about the offender and his circumstances which may help to explain away or excuse his criminal conduct with the objective of keeping punishment down to a minimum, which in practice means securing the most favourable sentence for the offender in all the circumstances of his case. That the techniques of neutralisation have become a dominant factor in the post-conviction pre-sentencing stage of a trial is attributable to two factors (1) the knowledge that punishment will always be inflicted as a matter of course (2) that the court has in its power in respect of most inditable offences to inflict a punishment ranging from the most severe to so moderate a punishment that it hardly bears consideration as a punishment at all. This second factor distinguishes this aspect of crime and punishment in modern society from medieval society. In medieval England many offences carried a mandatory death sentence. The court was left with no discretion at all. In respect of those offences (one of which was theft) it was irrelevant that the offender may have stolen to feed his starving wife and children. Needless to say recidivism was never much of a problem. Today, wherever possible, the courts will attempt to deal with an offender on an individual basis for all offences save the most serious. For example, in Queensland murder will attract a mandatory sentence of life imprisonment; rape will attract a severe sentence as a matter of course notwithstanding the offender's personal circumstances. The offence of grievous bodily harm may attract a lengthy sentence of up to seven years' imprisonment

or a probation order may be made depending inter-alia on the techniques of neutralisation. Within most criminal legal systems of the modern world there are tariff scales in existence which are known to Judge and Lawyer alike, which scales make for wide difference in sentence at the top and bottom of the scale. The net result has been a personalisation in the sentencing process as a whole which, although more sophisticated in theory than the inflexible medieval system, has developed into something of a lottery.

Punishment in modern society, as in medieval society, always comprises four characteristics (1) It involves pain or suffering or other unpleasant consequences; (2) It is imposed on the relevant offender; (3) It is administered by human beings other than the offender, who make up an authority constituted by a legal system against which the offence is committed; (4) It is inflicted only on those who breach the criminal laws. An award of damages against a defendant in a civil action is not punishment in the strict criminal sense notwithstanding that characteristics (1), (2) and (3) are invoked. Characteristic (4) gives birth to the label "criminal" and it is the pinning of that label on the offender that marks him apart in society. He is the man with "form".

The infliction of punishment in modern society is rationalised by reference to four justifications:—retribution, deterrence or prevention, incapacitation and rehabilitation. The retributive view rests on the idea that the purpose of punishment is to inflict deserved suffering and the administration of the criminal law provides an acceptable basis within the social framework for so doing. Its marks on the criminal process are very deep. Expiation of the crime is the principle way that this doctrine is justified: "An eye for an eye a tooth for a tooth." Moral culpability is not a dominant factor within this doctrine. Punishment is proportioned directly to the harm done. It is frequently necessary to prove a more blameworthy state of mind in order to procure a conviction for an attempt to commit a crime than for the corresponding crime, yet attempts to commit crimes usually involve a lesser punishment than would the actual commission of the crime. The doctrine of retribution therefore involves simple cause and effect elements with the sentence invariably fitting the crime. Punishment to the offender is at the heart of this doctrine. The utilitarian view rests on the proposition that punishment is justified only if more good is likely to result from inflicting the punishment than from withholding it. This view embraces the justifications of deterrence, incapacitation and rehabilitation. That of deterrence takes the form of special deterrence to the offender and general deterrence to those who may offend. That of incapacitation very simply involves the use of physical restraint on an offender for the duration of his sentence. As long as the offender is incarcerated it is quite clear that he will not commit further crime. The justification necessarily involves a prediction that the offender may have a tendency to commit further crimes similar to the one for which he is presently being punished and that punishing him will simply restrain him from so doing. The justification of rehabilitation is that the offender may be prevented from criminal activity in the future by a change in his personality so that he will conform to the dictates of law. The central theme is one of reformation. This justification is another branch of the utilitarian view, for with the offender ceasing to offend, the maximum amount of good is derived not only for that offender but for society as whole. In the application of this justification the objective assessment of the offender's culpability and his social and domestic background are factors of prime importance.

Of the four justifications, only in respect of the retributive view is there any semblance of logic. The aims are simple and unequivocal. The remaining three are fraught with difficulties. In respect of the utilitarian justifications the good

that is thought to result from punishing criminals is the prevention or reduction of crime but there is little or no evidence that deterrence has any real effect either specially or generally. Indeed there is such a high rate of recidivism universally that it is difficult to understand why judges place so much importance on the efficacy of special deterrent sentences. The accurate prediction of future criminal behavioral patterns in respect of any one offender is no more than guesswork; whilst not only is it not generally known how to rehabilitate offenders, very little is known as to who is likely to commit crimes and even less about their motivation for so doing.

In today's complex society, the criminal legal systems of the modern world are moving more and more away from a retributive approach and adopting utilitarianism in some form as a more acceptable, but, in many ways, a more irrational alternative. Such a movement permits a greater diversification in the forms of punishment available. It is thought by some that this "soft" approach has encouraged an increase in the general level of crime. It is this aspect of criminal law that attracts the most public attention and criticism and it is upon this aspect that the effectiveness of modern criminal law is commonly and erroneously judged.