

# THE RHODESIAN LAW JOURNAL

Editor: R. H. CHRISTIE, Q.C.

April 1972

1972 R.L.J.

Vol. 12, Part 1

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DEPARTMENT OF LAW  
UNIVERSITY OF RHODESIA

The journal is published twice yearly, in April and October.

Editorial, circulation and advertising correspondence should be addressed to the Editor, at Department of Law, University of Rhodesia, P.O. Box M.P. 167, Mount Pleasant, Salisbury, Rhodesia.

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Printed by Sebri Printers, Salisbury, Rhodesia.

## MODERN THINKING ON THEORIES OF PUNISHMENT

BY

S. LEON

*The author is a third-year law student at the University of Rhodesia, and submitted this essay in the normal course of his studies. Taking the classical theories of punishment in turn, he concludes that in the light of modern research and thought retribution, deterrence and prevention all have a place in the assessment of the most appropriate punishment but are greatly outweighed by rehabilitation—the need to make convicted criminals into better and not worse members of society.*

*A promising method of rehabilitation is to switch the emphasis from punishment to compensation and reconciliation by putting the prisoner on normal, constructive labour under conditions that will give him an incentive to work hard in order to pay off his debt as soon as possible.*

The traditional theories of punishment as presented by lawyers and jurisprudential writers should be considered from the point of view that they were developed as a consequence rather than as a cause of the various methods of sanction used in recent history, covering the latter period of the development of criminal law in the past two hundred years. Punishment is defined by Friedman in the following terms:<sup>1</sup>

“The characteristic of criminal law is the imposition of official sanctions calculated to interfere with the life, liberty and property of the offender for certain objectionable conduct classified as criminal by statutory or common law.”

This is a simplistic but accurate description of what, until recently, was the well established punitive reaction to perpetrators of criminal offences. There are similarly well-established theories that have been propounded and accepted to a certain degree and at certain times, in order to bolster or reinforce this punitive reaction.

### RETRIBUTION

Retribution is perhaps the oldest and finds its origin in the *lex talionis* of the Code of Hammurabi of 1875 B.C. which in simple terms

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<sup>1</sup> *Law in a Changing Society* (1959), p. 177.

is the biblical notion of justice—"an eye for an eye and a tooth for a tooth". Retribution covers both the vengeance of society and the victims as well as the expiation or atonement of the offender which has often been propounded as a separate theory. The expiation of the offender is claimed to arise directly from the vengeance wreaked upon him. *Prima facie* this seems totally barbaric; however, the modern supporters of the theory of retribution have two strong arguments.

Firstly, in the words of Sir James Stephen<sup>2</sup> it is "the legal provision for an inevitable impulse of human beings". It provides control against lynch law and the possibility of people not bringing charges or giving evidence. The complexity of modern society necessitates state control of these inevitable impulses and for the state to act on behalf of citizens in order to keep society relatively stable despite the conflict of individuals.

Secondly, a more modern theory has been proposed. It is that at some time all people have an urge to crime and in punishing a criminal we are expressing the same instincts that a criminal possessed when he committed the crime, Karl Menninger, United States psychiatrist and a severe critic of the present system of punishment, argues as follows:<sup>3</sup>

"We need criminals to identify ourselves with, to envy secretly and punish stoutly. They do for us the forbidden, illegal things we wish to do and like scapegoats of old they bear the burdens of our displaced guilt and punishment—the iniquities of us all."

This so-called "scapegoat theory" has even gone further by the somewhat far-fetched argument that the punishment of criminals is a sublimation of aggressive and even libidinal tendencies and that the fight against crime is subconsciously organised so that crime is actually maintained. This theory is largely Freudian and lacks efficacy in view of the strong criticism levelled at Freud by modern psychiatrists.

Far more credible and logical are the "social solidarity" theories in respect of retribution.<sup>4</sup> The regulation of our society is dependent on each individual knowing what can and cannot be done, and he must know that he will not be prejudiced by doing what is right. Therefore social solidarity is maintained not by deterring the potential criminal but by affirming general law-abiding ideals in society.

Criticisms of retribution have recently been to the fore, particularly in the light of soaring crime in urban areas and the development of reformist theories. This latter development has arisen particularly in view of the development of the relatively new disciplines of social science,

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<sup>2</sup> See Sutherland and Cressey, *Criminology* (8th ed., 1970), p. 326.

<sup>3</sup> *The Crime of Punishment* (1969), p. 153.

<sup>4</sup> Sutherland and Cressey, p. 330.

criminology and psychiatry. It is argued that retribution does not look to the future when the criminal will eventually be released, often so culturally and morally deformed as to pose a bigger threat to society than before he ever went to prison. Aspects of this argument will be considered in more detail later. It has also been shown, particularly through the study of social anthropology, that primitive societies, including Shona society,<sup>5</sup> ran efficiently by emphasising reconciliation and compensation in dealing with offenders and any ideas of social outrage were absent or secondary.

It will suffice to say at this stage that retribution has some strong points in its favour but the infliction of physical and mental suffering employed to meet the objects of retribution in fact results in ends quite contrary to these desired objects. As some reformists point out, society may still exact its retribution and in Hegel's terms dialectically negate the crime.<sup>6</sup> This may be achieved without the revenge aspect and the evil connotations and results which accompany it. The effectiveness of the retributive aspect is impossible to measure in regard to society but may to some extent be measured in regard to the individual. It is generally accepted that recidivist figures in most Western countries, with the exception of the Scandinavian countries, are high. The difficulty of successfully calculating such statistics is illustrated in *Crime, Courts and Figures*, by Nigel Walker.<sup>7</sup> There is a multitude of variables such as sex, age, the high rate of unsolved crimes and, most important, the difficulty of knowing to what extent the avoidance of offences is a measure of the rehabilitation of the offender. However, the large degree of repeaters in many penal institutions leads to the belief that recidivist figures are high. This does not, however, show that some retributive aspects, particularly the social solidarity theories, are of no value.

#### DETERRENCE

Deterrence has been cited popularly in support of punishment. The primary argument claims deterrence of potential offenders by engendering a fear in past and potential criminals of being punished. This theory is hedonistic, i.e. based on the assumption that people regulate their behaviour by calculation of pleasure and pain.<sup>8</sup> However, it is unlikely that offenders consider this when acting under stress, and mal-adjusted persons are often masochistic in this respect. The rising crime rates are also contradictory of the theory of deterrence. Furthermore, there is a widespread feeling amongst the public that only the unlucky

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5 Child, *The History and Extent of Recognition of Tribal Law in Rhodesia* (1965), pp. 18 and 100.

6 Doyle in Acton ed., *The Philosophy of Punishment* (1969), pp. 159-60.

7 See chapter 13.

8 Sutherland and Cressey, p. 327.

get caught and this often neutralises the fear that the possibility of punishment may cause. In England and Wales in 1968 of all robberies made known to the police only 39,5% were "cleared up".<sup>9</sup>

In favour of deterrence there is again the social solidarity argument. E. A. Ross summarises this:<sup>10</sup>

"The rules of the social game are respected by the many good men chiefly because they are enforced on the few bad. . . . The law, therefore, however minor its part at a given moment in the actual coercion of citizens, is still the cornerstone of the edifice of order."

A prevailing attitude, particularly among judicial officers, is that harsher penalties will control a crime wave or a spate of one particular type of crime. This denotes a confusion between individual deterrent and general expressions of hostility towards crimes, but it is true exemplary sentences are often successful in controlling public disorder, e.g., in cases of assaults on Pakistanis in England and petrol-bombing cases in Rhodesia. Exemplary sentences are subject to criticism from the point of view of the morality of sacrificing the offender, but priorities of desired effects often negate this.

The difficulty of measuring deterrent efficacy is again pointed out by Walker<sup>11</sup> when he states five essentials that must coincide to give an accurate assessment:

1. Statistics of the frequency of reported offences of this type must be kept uniformly over a period;
2. During this period the penalties must be changed, preferably as sharply as possible;
3. The change must be well publicised;
4. It must not coincide with any other social developments likely to effect the frequency of the crime;
5. The probability of incurring the usual penalty for the commission of the offence must be fairly high.

The difficulties involved in capturing all these essentials at once are obvious. However, a sound and interesting experiment was done by R. Schwartz and Sonya D. Orleans with the help of the United States Internal Revenue Service.<sup>12</sup> Nearly 400 taxpayers were divided into four matched groups. Members of the "sanction group" were interviewed and asked questions to remind them indirectly of the penalties which they might suffer if they tried to avoid taxes. Members of the "conscience

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<sup>9</sup> Nigel Walker, *op. cit.*, p. 34.

<sup>10</sup> See Sutherland and Cressey, p. 328.

<sup>11</sup> *Op. cit.*, p. 92.

<sup>12</sup> See Walker, p. 94.

group" were interviewed with questions designed to arouse their civic sense and feelings of duty. The third group were asked only neutral questions avoiding both sorts of stimulus. The fourth group were not interviewed at all and acted as a control. The interviews took place one month before the taxpayers were due to file their returns for 1962. The Internal Revenue Service compared the returns of the four groups for the year before the assessment year 1962. The reported gross incomes of both the sanction and conscience groups showed an increase compared with the small decreases in the third and fourth groups. The conclusion was conservatively stated, i.e. the attempt to stimulate both fear of penalties and civic conscience seems to have had effect.

The last aspect of deterrence is the effect of prosecution and its consequences. The Wilrose-Stokes sample of 1968<sup>13</sup> showed youths (male) in their late teens and early twenties, eight cards exhibiting prevalent reasons for fear of prosecution which the youths put in order of importance:

1. What my family would think about it	..	..	..	49
2. The chances of losing my job	..	..	..	22
3. Publicity or shame of appearing in court	..	..	..	12
4. The punishment I might get	..	..	..	10
5. What my girlfriend would think	..	..	..	6
6. What my mates would think	..	..	..	2
7. Whether I should get fair treatment in court	..	..	..	1
8. What might happen to me between being found out and appearing in court	..	..	..	2

While it seems that the first is the major deterrent it is important to note that 43% said they would have been held back from law-breaking or at least worried by a conscience or some other form of internal restraint. This lends support to the social solidarity theories and the wider implications of educational and family institutions which inculcate such values. However, the deterrence of deviants or members of criminal subcultures, where fears of loss of status do not exist, and may even be enhanced by prosecution, is minimal.

Again the evidence is critical of the success of deterrence because of high recidivist rates, the existence of large well-organised criminal subcultures and public support for colourful criminals. It should be emphasised that its effects on social solidarity are of value but these effects may similarly be achieved without the application of physical and mental torture.

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13 See Walker, p. 101.

## PREVENTION

The theory of prevention may be described simply in that if he is locked away or hanged the criminal cannot commit an offence. There is a good example of this under the Rhodesian emergency regulations.<sup>14</sup> This is a very short-sighted theory, apart from the application of the death sentence, because eventually the prisoner must be released. A new theory of prevention based on Bentham's utilitarian approach has been propounded which seeks to identify potential criminals before they commit offences. The United Nations Social Defence Institute has been set up in Rome to study this possibility.<sup>15</sup> Whilst it may be possible to some degree to isolate the symptoms of criminality and apply them to characteristics of groups and communities, how is one to apply it to the actual offender and on what basis? Moral questions arise as to whether one may treat such a potential offender and on what basis.

## MODERN DEVELOPMENTS

The traditional theories of punishment have both their attributes and defects but it is submitted once again that these theories are more in the line of justifications and were not the cause of various forms of punishment that have been used. In support of this contention is an analysis of different punitive reactions effected in Western society in recent periods and the factors external to law and punishment that have caused their use. This is what Sutherland and Cressey refer to as the theory of cultural consistency.<sup>16</sup> This means that various punitive methods used have been consistent with general tendencies of behaviour at the time.

Two hundred years ago the treatment of criminals by mutilation and public shame was consistent with the belief that physical suffering was the accepted lot of mankind. Today the general interest is in the reduction of physical suffering and is inconsistent with any purely punitive reaction to crime. The modern commercial period with the theory that everything has its price saw punishment put on the basis of paying for a crime. Uniformity of punishment arose from the *egalite* of the French Revolution. Individualisation in medical treatment has seen a similar trend in penology, where the reformist outlook is "let the punishment fit the criminal". A few generations ago punishment was meted out at home, at school, in the Church (and still is in some countries) but this is not so in most Western countries today and therefore it may be inferred that a purely punitive reaction by authorities is no longer widely accepted. An all-pervading aspect is that the values most highly regarded by society

14 Emergency Powers (Maintenance of Law and Order) Regulations, RGN 71 of 1966, s. 41.

15 The Institute, according to a pamphlet issued by it, was set up in 1968 by special agreement between the United Nations and the Government of Italy.

16 Op. cit., p. 337.



invoke more vengeful penalties for contravention.

Over the past two hundred years two major changes in the methods of implementing punitive sanctions are noticeable. First an increase in the use of imprisonment and secondly a decrease in the use of the death sentence and other forms of physical torture.

The reasons for this are various. Widespread imprisonment has only become possible relatively recently because of stability and affluence and with it the possibility of building and manning the required number of institutions. Loss of freedom today is considered suffering whereas this was not so when personal freedom was not the norm. Imprisonment became popular at the time of the Industrial Revolution when life became a valuable economic asset in the form of a labour force. Lastly, brutal punishment was and is more prevalent where the distance between punishers and the offenders is wide. Today where there is a far greater degree of common experience between the two groups there is a greater degree of sympathy for the criminal.

Other important factors affecting the development of punitive methods are given by the social structure theorists.<sup>17</sup> They correlate variations in punishment to the social structure. For example, it is claimed that the demand for strong or lenient punishment is directly proportional to the demand for labour. This is based on the contention that crime is committed by the lower classes and punished by the upper. This theory is stated somewhat narrowly. It would be more accurate to say that the degree of expendibility of individuals in society will have a direct effect on the severity of punishment. Finally, it is valuable to note that the more homogeneous a society the lesser the degree of punitiveness. An example of this may be found in a comparison of the Scandinavian countries and the United States. The social structure theories are, however, very much in the realms of pure theory.

What should be concluded then from the above discussion? It is that punishment has been applied haphazardly, unscientifically, inconsistently and without any well-established purpose. It also raises the pertinent question as to whether lawyers have the correct training to deal with this complex matter.

#### REHABILITATION

The modern emphasis amongst some lawyers, criminologists, sociologists, psychologists and psychiatrists on reformation of the system and rehabilitation of the criminal now becomes vital. It does not matter whether the punitive approach is barbaric or not. What is required is a

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<sup>17</sup> See Sutherland and Cressey, p. 341.

reasoned, pragmatic approach to the whole question. Reform and rehabilitation are necessary for the following reasons:

1. New knowledge acquired through social and medical science;
2. The necessity to take the bull by the horns and establish the best method of treating criminals and to apply this method consistently;
3. The high rate of recidivism, the large-scale criminal subcultures, the increasing crime figures, the decreased safety for the ordinary citizen in urban areas, the unsatisfactory prison conditions evidenced by the spate of prison riots, and the emphasis in most spheres of life today on prevention and cure all point to the need for reform;
4. The increased complexity of urban conglomeration particularly lays the security of the established social order open to abuse by deviant elements. It is no longer sufficient to punish offenders, make them perhaps more anti-social than before and then let them loose. We simply cannot afford this luxury.

It is necessary first to realise that those who advocate the abolition or curtailment of punishment do so on a scientific basis.

“Certainly the abolition of punishment does not mean the abolition or curtailment of penalties. Penalties should be greater and surer and quicker in coming. I favour stricter penalties for many offences, and more swift and certain assessment of them. But these are not punishments in the sense of long, continued torture.”<sup>18</sup>

The basis of the reformist argument is that punishment achieves very little and if applied haphazardly can even be detrimental to its purported aims. It is argued by some psychologists<sup>19</sup> that all human behaviour is of two types:

1. Conditioned emotional response;
2. Types of behaviour that have been found to be rewarding. There are two types of rewards:
  - (a) Positive reward;
  - (b) Rewards which free a person from an anxiety, e.g. poverty, loneliness, etc.

The effectiveness of any punishment will depend on how the behaviour it is intended to punish was learned. If a person learned his behaviour by positive reward then positive punishment will rectify it. On the other hand if behaviour is learned by the lure of freedom from an anxiety then punishment will be likely to reinforce that behaviour. Further punishment has a slim chance of success unless an alternative is offered to that

<sup>18</sup> Karl Menninger, *The Crime of Punishment* (1969), p. 202.

<sup>19</sup> E.g. Hilgard and Atkinson, *Introduction to Psychology* (4th ed.), chapter 6, particularly p. 151.

person to achieve his goal, within reason, by legally and socially accepted methods. Otherwise rehabilitation will fail and recidivism will occur when the prisoner once again attempts to achieve his desires in a socially deviant manner.

It is necessary also for the prisoner to see a direct nexus between his crime and his punishment. A vandal will learn his lesson far better if he is forced to work and spend his money on restoring what he has desecrated rather than merely by being fined or imprisoned. A restriction on his freedom may also accompany this. Kathleen J. Smith<sup>20</sup> is worth quoting for she summarises the need for reform of the punishment system.

The deprivation of "usefulness, responsibility and prospects exceeds the requirements of punishment, reason and purpose and causes the failure, inhumanity and criminality of prisons . . . as a result prisons have the effect of sabotaging society by turning on to it more criminals instead of fewer, weaker morality instead of firmer, more burdensome economics instead of lighter."

In general, reformers advocate that penalties should remain but public vengeance and the lust for seeing people hurt should be ignored. There has been in recent years some degree of reform, more so in some penal institutions than in the concept of punishment itself. The United States boasts some modern, progressive prisons which tend to look like motels and have recreational facilities that are excellent. An example is Lehachapi near Bakersfield in Indiana, where inmates see no bars or walls, get weekend passes and join their wives at motel rooms in the "corrective facilities" grounds.<sup>21</sup> The experience in such institutions has unfortunately not shown much improvement in rehabilitation over less progressive institutions. The answer to this rather surprising result is, in Kathleen Smith's terms, failure to "humanise" the prison and its treatment of prisoners. A pseudo-sympathetic approach will be likely to fail as dismally as a purely punitive approach.

What type of reform will achieve the most desired purposes of punishment? If such purposes are taken to be the protection of society, deterrence, reform of the offender and to exact retribution in order to satisfy society, all are available. The only realistic answer seems to be a "self-determinate" sentence imposed with the aid of Menninger's proposed "diagnostic centre".<sup>22</sup> The rehabilitation of the offender can be achieved by applying him to normal, constructive labour within a normal society, for which he must get normal wages.<sup>23</sup> This will serve to integrate an

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20 *A Cure for Crime* (1965), p. 12.

21 *Time* magazine cover story, 18th January 1971.

22 Kathleen Smith, *op. cit.*, pp. 13 ff.

23 Rauche and Kirscheimer, *Punishment and Social Structure* (1967), p. 152.

offender, neutralise his alienation from society and give him a legally acceptable way to achieve his ends. Punishment may still be applied by denying a prisoner freedom to see his family and lead a normal social existence except at specified times. The essence of the self-determinate sentence is that the prisoner must work off his debt to society. In other words, the emphasis is on compensation and reconciliation. In the case of theft or robbery the loss to the victim must be made good by returning it or paying it off by giving over most of his monthly wages. The actual working out of methods of compensation so as to be effective and so as not to remove a prisoner's motivation to work would take time and experience. This would serve, further, to make crime unattractive because a potential offender might find earning an honest living preferable in the first instance, because that is what he would have to do if caught anyway. The retributive aspect would be incorporated in this, though not to the same degree as in a purely punitive system. This would be a progressive development in itself. This system would even improve law enforcement because there would be strong motivation for a criminal to turn in his accomplices, for if they helped to pay off the debt his period of sentence would be reduced.

Finally, the only effective way to protect society is to ensure rehabilitation of the criminal. The diagnostic centre would allow the prisoner to control the length of time he has to serve himself.<sup>24</sup> Such a centre is already being used in Kansas where a team of four psychiatrists, social workers and other experts diagnose and control the sentence of a prisoner. 50% of the felons brought before the group of experts are put on probation and of those the recidivist rate is 25%, which is a good deal lower than the national percentage.<sup>25</sup>

One must be careful of painting too rosy a picture, for there are problems which accompany any such reforms. The system of the self-determinate sentence must be strictly controlled by a high authority, possibly even the judiciary. This point is made all the more pertinent by the example of black power leader George Jackson who was killed in 1971 after spending eleven years in prison.<sup>26</sup> His criminal offence originally was one of petty theft. There is also a danger of prisoners putting on a "rehabilitated face" for the benefit of the authorities. To plant informers in the institution would defeat the object of self-responsibility intended to be introduced. The expertise of the panel should be able to control this sort of abuse to a considerable extent. Security may pose a further problem. However, an expert diagnostic board should be capable of separating those who can safely be sent out to work. One assumes that

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24 Karl Menninger, *op. cit.*, pp. 228-9.

25 *Time* magazine cover story, 18th January 1971.

26 *Time* magazine, *loc. cit.*

few prisoners will want to sabotage a system that puts the control over the duration of their sentences in their own hands.

Other difficulties concern external factors. Firstly, it may seem optimistic, but the efficiency of the criminal system up to the sentencing stage must be improved. Only 20% of reported crimes in the United States are solved,<sup>27</sup> with the result that the criminal thinks he was merely unlucky to get caught when most other people get away with it. This does not make for easy rehabilitation. Menninger's criticism of the trial should be carefully noted:<sup>28</sup>

"Nothing could be more unfair than a fair trial operating on the assumption that in respect to behaviour control 'all men are equal'."

Secondly, there must be a follow-up to the rehabilitation programme after release. There can be little hope of reform of the prisoner if he knows that society will not afford him his basic needs outside.

Certain practical difficulties will have to be overcome, some of which can only be tackled on a long-term basis. The legal profession, despite its resistance to change, must include in its training courses to enable its members to cope with these problems. The public should begin to be educated in this respect, particularly, it should be emphasised, for its own benefit. Finally, perhaps the biggest stumbling block to reform is to convince authorities, particularly governments, that a high priority should be given to expenditure in this regard.

Despite all these problems, the need for reform of the system, with an emphasis on rehabilitation of the criminal, is undeniable.

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<sup>27</sup> *Time* magazine, loc. cit.

<sup>28</sup> Karl Menninger, op. cit., p. 92.



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