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The Art of Sentencing

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Commentary

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The Art of Sentencing

THE ART OF SENTENCING—“*Punishment is, therefore, an art—a very difficult art*”. J. K. Mackay J.A. in *R. v. Willaert* (1953), 105 C.C.C. 172 at p. 176.

Study and training will usually produce at least technical proficiency in an art. In Canada there exists no formal system of training magistrates and judges prior to their entry into the sentencing office. Such training as does exist is found in the occasional review by a superior court of the exercise of the sentencing function and consequent approval or correction by that superior body.

Is there material available for those who would become proficient through self-directed study? Again there is no formal (i.e. official) guide to sentencing or to a statement of the principles involved. The Criminal Code does not deal with the purpose of sentencing nor the criteria by which sentences are to be arrived at. Certain maxima and minima are declared but with such broad limits that a great deal of discretion is left to the sentencing officer. That such discretion must be exercised judicially as opposed to whimsically is well settled, and for this some criteria are essential. Such criteria as are available are to be found in the judgments of the superior courts in the exercise of their reviewing function.

It appears to be generally accepted by the superior courts in Canada that the purpose of punishment is fourfold¹: (i) Deterrence of the prisoner at the bar and others tempted to commit like offences; (ii) Protection of the community by excluding the convict permanently or temporarily from membership therein; (iii) Reformation; (iv) Retribution.

With the exception of “retribution” the meaning of these terms seems to be fairly clear. It is in striking a balance between these four aims that the so-called “art” exists. However, before attempting any examination of the process involved in striking such a balance, the meaning of “retribution” as used by the courts must be briefly considered. In its common meaning, retribution is synonymous with vengeance and retaliation. That such is not the meaning attached to it by our courts is implicit from the judgment in *Childs*,² and explicit in this passage from *Warner*.³

“It should be said at once that the purpose of punishment for crime is not that, through the medium of a judge who is authorized by law to impose it, vengeance may be wreaked upon the guilty for their crime, as though crime was private in character. In the narrow sense a crime is usually an offence against an individual, involving his person or his property. No doubt the person against whom the offence has been committed, in that narrow sense, or, if he loses his life by the deed, his relatives and associates unconsciously conceive the idea that punishment should be imposed upon the culprit, causing suffering to him which will bear some proportion to their own, that is to say, that in the suffering of the delinquent they may find some compensation for their own. In the broader sense, in which the courts must regard it, crime is an offence

¹ See *R. v. Warner*, [1946] O.R. 808, C.A.; *R. v. Jones* (1956), 115 C.C.C. 273 per Laidlaw J.A. (dissenting) at p. 277, C.A. (Ont.); *R. v. Willaert* (1953), 105 C.C.C. 172, C.A. (Ont.).

² [1939] O.R. 9, C.A.

³ *Ante* footnote 1.

against the State and is punished by the State on much different principles."

What then does retribution mean? Some clue at least is to be obtained from the next paragraph of the report quoted above.

"[Punishment] is the expression of the condemnation by the State of the wrong done to society. There must always be a right proportion between the punishment imposed and the gravity of the offence. It is in that sense that it is said that certain crimes "deserve" certain punishments, and not on any theory of retribution."

To the untutored eye, "that sense" remains indistinguishable from "the theory of retribution." Help is to be had, however, from the following paragraph from *Willaert*⁴ referring to Bentham's *Rationale of Punishment*:

"The underlying and governing idea in the desire for retribution is in no way an eye for an eye and a tooth for a tooth, but rather that the community is anxious to express its repudiation of the crime committed and to establish and assert the welfare of the community against the evil in its midst. Thus, the infliction of punishment becomes a source of security to all and is elevated to the first rank of benefits, when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclination, but as an indispensable sacrifice to the common safety."

Here retribution in the legal sense has been distinguished from retribution in its lay meaning. It is now equated with repudiation. Unfortunately, "repudiation" in its generally accepted meaning makes little more social sense in this context than does the discredited "retribution". According to the Concise Oxford Dictionary, "repudiate" means "disown, reject, refuse dealings with, deny". It is difficult to see how repudiation in this sense can co-exist with such well settled purposes of punishment as deterrence and reformation. This is unfortunately an example of the muddled expression, if not thought, which often characterizes judicial pronouncements on sentencing. It is suggested that the word for which the learned judges are reaching is "disapproval", most likely in the form of "reprobation".

It would seem then that one of the stated functions of a sentencing officer is to express the disapproval or condemnation of the community. In this regard, it is submitted that insofar as this alleged reprobation is not a disguised form of retribution, it can serve only to make a scapegoat of the convict. That this notion of reprobation is widely held can be seen from the view of eminent judges and ecclesiastics collected by Sir Ernest Gowers in his book, "*A life for a Life?*" The point of view is, indeed, clearly put by Sir Ernest himself.

"Breaking the law must be punished, even though the offender may stand in no need of reformation and neither he nor anyone else may be likely to repeat the offence. Retribution is a convenient name for that element."⁵

⁴ *Ante* footnote 1.

⁵ *A Life for a Life* p. 115. See also the reference to a "torrent of indignation against the accused among all decent thinking people" in *Warner, supra* n. 1. The use of the expression "decent thinking" suggests that the indignation was given effect to.

It is further suggested that the condemnation of an act by the community is a stage in the protection of society, precedent not subsequent, to the conviction of an offender. In other words, the condemnation by society of an act is expressed by including that act in the category of crimes. Having done so, the purpose of sentencing can only be to ensure that the code so established is respected. In other words, the purpose of sentencing is properly confined to the protection of the community achieved by deterrence, reformation and where necessary temporary or permanent isolation of the offender.

Leaving this matter of retribution, what factors are to be taken into account by a sentencing officer in striking a balance between the alleged four purposes? In *Willaert* it was laid down that:

“. . . in the exercise of judicial discretion regard should be had to: the age of the prisoner; his past and present condition of life; the nature of the crime; whether the prisoner previously had a good character; whether it is a first offence; whether he has a family dependent upon him; the temptation; whether the crime was deliberate or committed on momentary impulse; the penalty provided by the Code or statute; whether the offence is one for which under the Code the offender is liable to corporal punishment and, if so, whether corporal punishment should be imposed.”⁶

As to how this advice is to be translated into action, the reports are silent. Such translation must consist basically of relating the particular case to the penal facilities available. The purpose of this note is not to expound the techniques of achieving such a translation, but rather to indicate the lamentable absence of any such techniques in our present jurisprudence.⁷ It should be noted, however, that the fault does not rest entirely with the courts. Until recently the penal institutions have offered adequate facilities for deterrence and protection of the community—facilities for retribution thus have been more than adequate while those for reformation have been almost non-existent. Under these conditions, to sentence for reform would be to express a pious hope. Further, it would appear that some sentencing officers have had almost no knowledge of the penal facilities available.

With the recent implementation of the Fauteux⁸ report on both Provincial and Dominion levels, there is hope that facilities will improve to a point where judges can impose meaningful sentences. The first step in preparation for such a day must be to formulate a policy of sentencing. This policy will be based on sociological rather than legal precepts and it appears axiomatic that the action of the executive in implementing the Fauteux report will be ineffective unless the Courts accept the precepts of the Fauteux report as the basis of their sentencing policy. For a court to sentence without

⁶ *Ante* footnote 1.

⁷ Plenty of good advice is available. See e.g. the magnificent symposium in 23 *Law and Contemporary Problems* (1958) No. 3. References in the reports to professional writing on penology are few and far between; but see *Childs*, *ante* footnote 2, *Jones and Willaert*, *ante* footnote 1.

⁸ Report of a Committee appointed to enquire into the principles and procedure followed in the Remission Service of the Department of Justice of Canada (1956) the Queen's Printer, Ottawa.

reference to the penal facilities is like an artist painting with his eyes closed.

With the enunciation of such a policy, a certain consistency in sentencing might reasonably be anticipated. At the moment it would seem that too much is left to the sense of fitness of the individual sentencing officer.

"Between the minimum and maximum punishment for offences prescribed by the Criminal Code it is for the trial Judge, under all the circumstances of the case, to impose such sentence as in his judgment meets the ends of justice. The circumstances in each case are different, and, therefore, it is impossible to standardize sentences. . . ."⁹

"There is no fixed principle that can be followed . . . Judges of course frequently differ with regard to sentences. Where in the opinion of one Judge a very heavy sentence is considered desirable, in the opinion of another a more moderate sentence would be sufficient."¹⁰

"In England the normal penalty in a case of this kind (rape) is five years penal servitude. . . . Nothing approaching standardization obtains here. . . ."¹¹

Consistency of principle does not mean standardization in any slot-machine sense. That the unexplained disparity of sentence is a source of great bitterness among convicted persons has been judicially noticed by the Saskatchewan Court of Appeal.¹²

The great bulk of sentencing in Canada is carried out by magistrates.¹³ These men need guidance and under our system that guidance must come from the superior courts.¹⁴ If the superior courts are not prepared to give guidance, then part at least of the process must be handed over to another agency of government. Although the Court of Appeal in British Columbia has held improper the abdication by a magistrate of his sentencing function to the Parole Board,¹⁵ the Ontario Court of Appeal apparently approved such a practice in the recent *Bezeau* case.¹⁶

⁹ *R. v. Young*, [1933] O.W.N. 777 per Mulock C.J.

¹⁰ *R. v. Brayden* (1926), 46 C.C.C. 336 at 342 per Hayen C.J. N.B.

¹¹ *R. v. Gordon* (1924), 25 O.W.N. 572 per Latchford C.J.

¹² *R. v. Christie* (1956), 115 C.C.C. 55 at 57 per McNivin J.A.

¹³ According to Magistrate J. M. Goldenberg, Q.C., writing in (1958), 1 Can. Bar Journal at p. 78, 94.4% of all Canadians sentenced in 1954 were sentenced in magistrate's court.

¹⁴ That the magistrates are aware of the problems is indicated by the addresses of Magistrate B. W. Hopkins, Q.C., and W. B. Common, Esq., Q.C., printed in (1958), 1 Can. Bar Journal at pp. 33, 49.

¹⁵ *R. v. Courtney* (1956), 115 C.C.C. 260. The magistrate had awarded a long series of consecutive sentences saying that it was up to the Parole Board to decide when the convict was to be released.

¹⁶ *R. v. Bezeau*, [1958] O.R. 617, C.A.: "I am not satisfied that the learned Chief Justice proceeded upon a wrong principle, or that the sentence of life imprisonment imposed upon the appellant was clearly wrong and, having granted the leave sought, I would dismiss the appeal.

I should like to add that the function of an appellate Court on an appeal against sentence is to correct a failure of justice and not to exercise the Crown's prerogative of extending clemency to a prisoner, or the powers of a board of parole.

If there are circumstances arising later that make it proper to afford relief to the appellant, that is a matter which can more properly be left for consideration and action by the executive." Per Schroeder J. A. at p. 621.

Whatever be the solution, it must come soon if the promised changes in the penal services are to have any effect. The modest proposals of this writer are that:

- (1) sentencing be left in the hands of the courts. (This stems from a district of administrative tribunals).
- (2) superior courts lay down a sentencing policy related to the penal institutions available.
- (3) sentencing officers be required to acquaint themselves in detail with the penal facilities available within their jurisdiction.
- (4) instruction and advice be made available to all sentencing officers as to the employment of such facilities in the implementation of the sentencing policy.

J. D. MORTON *