CRIMINAL LAW

> "O Thou, who didst with Pitfall and with Gin
> Beset the Road I was to wander in,
> Thou wilt not with Predestination round
> Enmesh me, and impute my Fall to Sin?"[1]

The recent establishment by the Federal Government of the *Committee on Corrections* under the chairmanship of the Honourable Mr. Justice Roger Quimet of the Superior Court of the Province of Quebec, marks hopefully, a turning point in Canadian corrections.

The terms of reference of this Committee as they appear in *Hansard*[2] are as follows:

> To study the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole, including such steps and measures as arrest, summonsing, bail, representation in Court, conviction, probation, sentencing, training, medical and psychiatric attention, release, parole, pardon, post-release supervision and guidance and rehabilitation; to recommend as conclusions are reached, what changes, if any, should be made in the law and practice relating to these matters in order better to insure the protection of the individual, and, where possible, his rehabilitation, having in mind always adequate protection for the community; and to consider and recommend upon any matters necessarily ancillary to the foregoing and such related matters as may later be referred to the Committee; but excluding consideration of specific offences except where such consideration bears directly on any of the above mentioned matters.

There are of course many specific matters which will be brought to the attention of the Committee but one of the most fundamental will be the question of the sentencing role presently carried out by the Canadian Judiciary. In this regard a recent decision of the Manitoba Court of Appeal in *Regina* v. *Dick, Penner & Finnigan*[3] deserves special attention.

In that case the Manitoba Court of Appeal was confronted with a case of rape of a particularly disturbing nature. A detailed description of the appellants' conduct will be found in the majority judgment of the Court delivered by Mr. Justice Schultz at pp. 173-176 of the report.

The issue before the Court of Appeal was the question of the appropriateness of the punishment of a paddling which had been imposed in addition to imprisonment upon the appellants by Mr. Justice Bastin at the trial.

Counsel for the appellant very appropriately brought to the Court's attention the *Report of the Departmental Committee on Corporal Punishment (U.K.), 1938*, and the *Report of the Joint Committee of the Canadian Senate and the House of Commons on Corporal Punishment (1956)*.

1. The Rubaiyat of Omar Khayyam, LVII.
2. *Hansard*, April 9th, 1965, p.208.
3. (1965), 1 C.C.C. 171 (Man. C.A.).

However, the court in its decision made only passing reference to these reports and did not unfortunately choose to state the conclusions found in them.

The Court in resisting the appellants' request for the quashing of the corporal punishment imposed by Mr. Justice Bastin, approved the frequently-stated view that an appellate court should not alter a sentence passed at the trial merely because the appellate court might have passed a different one.

As a device for avoiding a difficult problem this argument is invaluable. However, one wonders why such an argument is approved when resisting the reduction of a sentence and ignored when the courts wish to increase the sentence. *R.* v. *Rogers & Kalmocoff*,[4] demonstrates nicely the inconsistency of judicial attitudes in this matter. In that case the sentencing Magistrate had expressed the view that he personally could not conceive simple drug addiction as a crime, and he went on to sentence Rogers to 3 months and Kalmocoff to 4 months imprisonment for being unlawfully in possession of heroin. Both Rogers and Kalmocoff were narcotic addicts. In his report to the B.C. Court of Appeal pursuant to s.588(1) of the *Criminal Code* the sentencing Magistrate stated:

> This court does not agree with the premise that this is a grave offence, it was simply possession by two narcotic addicts.

The B.C. Court of Appeal nowhere in its judgment mentioned a reluctance to interfere with the sentence imposed and in fact on the Crown's appeal against that sentence, increased Roger's sentence to two years imprisonment and Kalmocoff's sentence to three years imprisonment. A twelve-fold increase!

In *Dick, Penner & Finnigan,* the court expressed the view that corporal punishment would act as a deterrent both particularly and generally and that it would be a useful device in the moral regeneration of the appellants. Assuming some deterrent qualities to be contained in such a savage and brutal punishment the question of its marginal utility as a deterrent did not receive any consideration from the court. The fact that corporal punishment as a penal measure has been totally abandoned in Great Britain since 1948 was not mentioned but instead the Court at page 177 made the following remarks:

> Whatever relevancy that report [presumably the *U.K. Departmental (Cadogan) Committee Report on Corporal Punishment,* 1938] had at that time, it cannot have any now in view of the fact that more than 25 years have passed without Parliament accepting its recommendations.

Adequate research on the subject would have revealed to the Court the true state of affairs in the United Kingdom in regard to Corporal

4. 46 C.R. 309 (B.C. C.A.).

Punishment. A failure to do so has resulted in a lamentable factual error as to the provisions of the *Criminal Justice Act*, 1948 (U.K.) c. 58.

Significantly, in 1960, the *Report of the Advisory Council on the Treatment of Offenders (Corporal Punishment) 1960, H.M.S.O., Cmnd. 1213* considered the findings of the *Cadogan Committee* still valid and unanimously recommended that corporal punishment should not be re-introduced as a judicial penalty.

The aims of penal measures have evolved with the passage of time. Within the framework of the penal system which Canada has inherited from England, the evolution has moved irratically through compensation, retribution, deterrence, social defence, and rehabilitation without completely abandoning any of these aims. However, as far as propensities may be determined there has been a marked propensity to avoid retribution as an aim unworthy of an enlightened and humane society. "Cruelty done to instead of by criminals, and done legally and with the best intentions, still remains cruelty."[5]

Deterrence continues to have the support of thoughtful persons as an aim of penal policy but, there is an increasing desire that the techniques of deterrence should be as economical and humane as the state of modern knowledge will permit. Deterrent measures of doubtful marginal utility and obvious inhumanity have long been criticized and gradually eliminated in the English Penal system. This view was reflected as early as 1818 in a pamphlet written by Fowell Buxton when he said:

> . . . where the law condemns a man to jail, and is silent as to his treatment there, it intends merely that he should be amerced of his freedom, not that he should be subjected to any useless severities. This is the whole of his sentence and ought to be the whole of his suffering . . .

Commonsense and humanity dictate that where the deterrent effect of penal measures with that stated aim are doubtful, they should be as humane as the law permits. Is not the rule of reasonable doubt a reflection upon the inadvisability of applying extreme measures where doubt exists? Should this precept be ignored in sentencing convicted offenders and extreme measures applied in the face of existing uncertainties as to their ultimate effect? Surely society ought not to apply a severe discretionary penal measure in the name of deterrence when there are substantial doubts as to its efficacy.

The rehabilitation of the offender is of course as old as the influence of the Christian Church. All that has changed are the techniques. Some techniques of reformation which have accompanied our civilization in its progress are: unpleasantness, homily, industry, activity, environmental manipulation, and psycho-therapy. All of these techniques have been acknowledged to some degree by our courts. What

5. Collins, P., Dickens and Crime, pp. 127-128.

has seldom been acknowledged by Canadian courts is the relative superiority of certain techniques in terms of rehabilitative effectiveness. Indeed, our courts display a lamentable lack of discrimination when they view unpleasantness as the *sine qua non* of moral regeneration. The English penal system turned its back on this technique forever, in the *Gladstone Report* of 1895. Seventy years have passed since that famous Report and the case of *Dick, Penner & Finnigan*, yet we find a Canadian court still ostensibly applying a rehabilitative technique of the 13th century. Bentham's *mind* reduced *to a gloomy void* by one means or another, is seen as a vessel into which can be poured the correct measure of truth and beauty.

The following is a summary of the arguments for and against corporal punishment contained in the *Report of the Joint Committee of the Canadian Senate and House of Commons on Corporal Punishment (1956)*, and the conclusions of that Committee.

Corporal punishment was stated by its supporters to operate as a deterrent to serious crimes by imposing a lesson on the particular offenders subjected to it and by the fear it creates in the criminal class. Also, corporal punishment was stated to be a proper retributive punishment, in the case of vicious offences.

Those favouring the retention of corporal punishment emphasized that discrimination and care should be used in its administration. They were of the view that it was not effective against the recidivist, the hardened criminal, or the *sexual criminal* (emphasis is mine). It was the opinion of those persons favouring the retention of the punishment that it could be used to best advantage against young offenders.

The danger of doing more harm than good to particular offenders was recognized by those who favoured retention, particularly in the case of young offenders. Some form of pre-sentence investigation and report was suggested which would take into account physical, mental, emotional, environmental, and other relevant factors in the background of the offender. This was considered to be necessary, particularly in the case of young offenders who had not proven ameanable to other methods of correction and who might be so constituted as to suffer grave harm from the infliction of corporal punishment. It is interesting to note that in the case of *Dick, Penner & Finnigan* the Court expressed the view that there was nothing presented to the Court to indicate that pre-sentence investigation would have been helpful.

Those opposing corporal punishment stated that it had no unique deterrent influence. This argument was in some measure substantiated by emperical evidence before the Committee. The opinion was also expressed by some prison authorities, prison psychiatrists, prisoners-aid officials, and others in close contact with offenders that corporal punishment had no special deterrent effect.

Corporal punishment is not reformative. The Commissioner of Penitentiaries and others stated that it counteracted attempts at reform

and rehabilitation during imprisonment. The opinion was also expressed that, in addition to impeding reform, it did positive harm by embittering some offenders.

Those opposing corporal punishment were also of the view that it was unjust due to the inconsistency with which it was imposed; that it was degrading and thus could not be made the foundation of individual reform; and it might adversely affect prison officials either by bringing out sadistic impulses or discouraging the application of positive reformative measures. Lastly, the opponents of corporal punishment emphasized that it was a retributive measure not in conformity with modern penal theory and in fact remained in use only in the State of Delaware, Canada, Union of South Africa, Egypt, and certain colonial territories.

The Committee concluded that the evidence presented to it did not justify the view that corporal punishment exercises any special reformative or deterrent influences on individuals upon whom it is administered and, on the whole, it appeared to have the contrary effect. It was the view of the Committee that corporal punishment was no unique deterrent to crime and accordingly the Committee recommended that corporal punishment be abolished for any of the offences for which it is presently prescribed in the *Criminal Code.*

Of particular interest to a reader of the Report of the Canadian Committee is the obvious lack of conviction in the views favouring the retention of corporal punishment. The retentionists were particularly careful to emphasize the need for discretion in its employment. In particular the police were of the view that it was not effective against the recidivist, the hardened criminal, or the *sexual criminal* (emphasis is mine).

The hesitant support which this penal measure has received from its supporters and the adverse conclusions reached by the Canadian Parliamentary Committee received no explicit acknowledgement by the Court in the case of *Dick, Penner & Finnigan.* In fact, the deterrent effect of that Report on the Manitoba Court of Appeal has been nil. It follows, that it is highly unlikely that the reported case of *Dick, Penner & Finnigan* will have any deterrent effect upon would-be sexual offenders for, if the courts are insensitive to the findings of a Parliamentary Committee, it surely is unrealistic to expect not as well informed individuals to react appropriately to judicial pronouncements.

In concluding the discussion of this notable case the remarks of Middleton, J.A., who delivered the judgment of the Court in *R.* v. *Childs*[6] deserve to be set out. He said:

> While we are content to remain among the backward nations of the earth and have upon our Criminal Code provisions for punishment, having their origin in the dark ages, Judges can do but little. Parliament alone can inter-

6. (1938), 71 C.C.C. 70 at p.75 (Ont. C.A.).

> fere. But in all these cases the provisions of the Code give to the Judges of the land discretion; and it is, I think, our duty in all but very exceptional cases to exercise as a Court of Appeal our discretion by refusing to uphold sentences involving whipping.

The granting to the judiciary of wide discretionary sentencing powers has not been the product of rational deliberation, but, the result of historical accident. The sentencing function of the judiciary was extended at the same time as the extension of the concept of the King's Peace was taking place. Initially, the sentencing alternatives available to the judiciary were non-discretionary sentences of death, mutilation, and outlawry. The widespread use of imprisonment as a means of disposal is a comparatively recent development which took place in the 19th century with the great reduction in capital offences which then occurred.

It was not until the widespread discretionary use of imprisonment as a penal measure became established in the 19th century that the sentencing function of the judiciary assumed major importance. This discretion was given to the judiciary in an absent-minded way by a Victorian Parliament preoccupied with the problems of crime and the protection of the rights of property. The judiciary had always imposed the limited mandatory punishments formerly available so little critical thought was given to their assumption of new and wide powers in this field. Without apparent consideration of the consequences, the legislator transformed the judiciary in matters of punishment at least, from simple spokesmen of Parliament's will, to a position of almost sovereign interpreters of that will.

Reaction was not long in coming and the sovereign position of the judiciary in matters of punishment became subject to increasing attack and subsequent legislative restriction. This process of restricting the discretionary sentencing power of the judiciary is a continuing one both in England and in Canada.

An example of the way in which the discretion of the judiciary is restricted in Great Britain is found in the *Criminal Justice Act*, (1957), which requires certain courts before sentencing anyone under the age of 21, or a first offender of any age, to imprisonment, to obtain and consider information about the circumstances and to take into account any information before the court, which is relevant to the prisoner's character and his physical and mental condition. Imprisonment cannot be imposed without a pre-sentence report as readily as it can be in Canada.

In Canada, aside from the provisions of the *Juvenile Delinquents Act*, the only relevant example of the curtailment of judicial discretion in sentencing is found in the provisions of s.661 of the *Criminal Code* requiring the hearing by the court of psychiatric evidence before imposing a sentence of preventative detention.

When we look at the Canadian sentencing scene, the most striking feature is the great jurisdiction given to our magistrates. They adjudicate upon 92% of the indictable offences brought before Canadian criminal courts.[7] Their powers of sentencing according to John Hogarth of the Centre of Criminology, University of Toronto, appear to be broader than that given to a single official of the lower courts of any Western nation. He has also pointed out that in most countries outside North America sentencing for serious offences is carried out by a panel of lay and professional judges not by a single judge.

In discussing the considerations which influence Canadian sentencers when imposing sentence, it is well to point out at the beginning, that previous reported cases are confusing and contain much contradictory material. Their rational influence is probably slight.

Pre-sentence reports are tacitly provided for by s.638(2) of the *Criminal Code* and frequently precede the imposition of probation or a suspended sentence. This of course means that the views of the compiler of such a report are weighed by the sentencer in arriving at his decision. Their use is not however, mandatory.

The availability of forms of disposal must of necessity influence the type of sentence imposed. In this manner the executive has a very great negative influence upon sentence. If the government of the day fails to provide useful facilities for the disposal of convicted persons the ambit of judicial sentencing activity is accordingly reduced.

Existence of appeal procedures in appropriate cases influences the mind of the sentencer particularly in view of s.588 of the *Criminal Code* requiring a report to the appeal court by the original sentencer, in the event of an appeal from his decision.

The maximum penalty and the sentencer's desire to be consistent are no doubt important factors. The damage which has been done by the offender and the degree of provocation he suffered from will be influential.

The penal history of an offender is such a decisive factor in sentence determination that it often eclipses all other factors. So vital is it, that it is has received special treatment in ss. 572-574 of the *Criminal Code.*

The desire of the sentencer to reform a particular accused is of course a most influential factor. An example of this is found in the case of one *Bestford.*[8] Bestford aged 38 had seventeen previous convictions and had already served 8 years of preventative detention. Upon a subsequent conviction for breaking and entering he was sentenced to 10 years preventative detention. The Court of Criminal Appeal substituted a 3 year period of probation in the hope that he would reform.

7. Proceedings of the 4th Research Conference on Delinquency and Criminology, Montreal, 1964, p.531.
8. 1959, Criminal Law Review, pp. 140-141.

Other influential considerations are the offender's apparent attitudes, his employment record and the attitude of the victim.

Public opinion will influence the mind of the sentencer. Unfortunately, the measure and quality of the public opinion known to the sentencer may not be truly representative of enlightened community feeling. In this respect utterances by a poorly informed or irresponsible press can be particularly misleading.

The plea of the accused as an influential factor in sentencing has not been specifically investigated in Canada. It seems reasonable to conclude however, that it does have an influence until demonstrated otherwise. Friedland's recent Toronto study,[9] can be interpreted as giving some support to this view.

The penal philosophy of the sentencer will of course influence his sentencing practices and, if he does not clearly perceive and consistently follow an enlightened policy the social and economic costs to the community can be large indeed.

If the assumption is made that the ultimate aim of the criminal law is the protection of society from forms of behavior which that society considers harmful it is obvious that this protection can only be gained in two ways, by deterrence (including preventative measures), and by the rehabilitation of those who have not been deterred. Within the scope of deterrence ought to be included all those preventative social measures which an enlightened community takes to preserve its common welfare. Unfortunately, no accurate method as yet exists to measure the effect of deterrent provisions of penal policy or welfare programs. On the other hand, increasingly accurate assessments of the efficacy of rehabilitative programs are possible and are being undertaken.

Do substantial numbers of our judiciary possess the knowledge and will required to apply the valuable contributions of the social, and behavioral sciences to the problems of deterrence and rehabilitation? An illustration of one judge's attitude is contained in the following remarks made by Mr. Justice S. H. S. Hughes on December 4, 1964,[10] to the Conference of Magistrates of Ontario when he said among other things:

> *There is already a vast literature becoming, if I may say so without offence, more obscure and less readable every day, on the subject of correction,* and the efforts of whole armies of devoted men and women are daily directed to an ever-increasing extent towards the goals of reform and rehabilitation, the ideal of restoring to society in a useful state those who have in the past in one way or another declared war upon it. (emphasis is mine).

9. Friedland, M.L., Detention before Trial.
10. Canadian Bar Journal, Vol. 8, No. 4, p.226.

In the words of the *Streatfeild Report*:[11]

> All who have responsibility for passing sentence should be systematically provided with . . . comprehensive information, for every form of sentence, about what it involves, what it is designed to achieve and what it in fact achieves, together with information about research into the results of sentences.

The making of appropriate use of such material requires some degree of familiarity with the nature and methodology of social and behavioral sciences. The possession of this familiarity is the *sine qua non* of an intelligent sentencing policy.

In the meantime in Canada, scarce rehabilitative resources are being wastefully employed leading to criticism of both the judiciary and the social and behavioral sciences. An example of inconsistent Canadian sentencing policy for indictable offences in the areas of probation, imprisonment, suspended sentence and fining is shown in the 1962 *Canadian Criminal Statistics.*

PERCENTAGE OF PERSONS SENTENCED TO CUSTODY, PROBATION, SUSPENDED SENTENCE, AND FINE BY PROVINCES, 1962

Province	Total Sentenced	Custody	Probation	Suspended Sentence	Fine
Nfld.	905	(347) 48%	(188) 21%	(110) 12%	(260) 29%
P.E.I.	75	(38) 50	(2) 3	(17) 23	(18) 24
N.S.	1353	(548) 41	(286) 21	(162) 12	(357) 26
N.B.	1194	(523) 52	(171) 14	(224) 11	(276) 23
Que.	7690	(3735) 49	(1145) 15	(1351) 17	(1459) 19
Ont.	13763	(6480) 47	(3296) 24	(1058) 8	(2929) 21
Man.	2191	(843) 38	(284) 13	(635) 29	(429) 20
Sask.	1675	(869) 52	(218) 13	(202) 12	(386) 23
Alta.	4244	(2189) 51	(411) 10	(383) 9	(1261) 30
B.C.	5311	(2958) 56	(787) 15	(485) 9	(1081) 20
Yukon&N.W.T.	249	(163) 65	(1) ½	(38) 15	(47) 19
	38650	(18693) 48%	(6789) 18%	(4665) 12%	(8503) 22%

The attitude of those who wish to maintain the present practices which give rise to the foregoing seems to be based largely upon a laudable desire to restrict the arbitrary power of the state over the individual. This assumption by the judiciary that they are able to effectively protect the rights of the individual from the executive is of course inherently unsound as the current agitation for the creation of the office of Ombudsman shows. It is also unsound if we reflect upon the fact that the courts commit the great bulk of offenders into the hands of the executive at the present time knowing, that the executive has great powers to affect the conditions surrounding the serving of the sentence imposed by the court. In fact, the courts' effective power to guard the individual from arbitrary power for practical purposes, ends the moment the convicted person leaves the courtroom.

11. Report of the Inter-Departmental Committee on the Business of the Criminal Courts, H.M.S.O., Cmnd., 1289, 1961, p.123.

Some possible solutions which would help to end the uneconomic and inconsistent use of scarce rehabilitative resources suggest themselves.

The first approach to the problem could take the form of an insistence upon adequate training in the relevant social and behavioral sciences for all members of the judiciary involved in the sentencing of offenders. This training could be implemented in stages using among other things existing University facilities.

An interesting provision for the mandatory training of English Justices of the Peace is found in Section 17 of the *Justice of the Peace Act* (1949). This section provides that it shall be the duty of every magistrates' court committee, in accordance with arrangements approved by the Lord Chancellor, to make and administer schemes providing for courses of instruction for justices in their area.

In a White Paper[12] presented to Parliament by the Lord Chancellor in December, 1965, it was announced that compulsory training will be introduced for all Justices of the Peace appointed after the 1st January, 1966. The White Paper states that the purpose of the training is to enable the newly appointed Justices of the Peace:

> to understand the nature of their duties so that they shall acquire the judicial mind and accordingly act judicially while sitting on the Bench. To obtain sufficient knowledge of the law to follow with understanding any normal case they may be called upon to hear. To acquire a working knowledge of the rules of evidence particularly in relation to what is admissible and what is inadmissible. *To learn the various courses which may be taken in dealing with offenders so that they understand the nature and purpose of the sentences which they impose, and the other methods of treatment which they may use, and their effect.* (emphasis is mine). To understand the relationship which should exist between members of the Bench, the Clerk to the Justices, the Probation Officers and the staff of the Courts, and the duties in court of the police and of advocates.

The compulsory training is to be achieved by requiring all those who have been approved for appointment as Justices to give an undertaking that, if they are appointed, they will complete a prescribed course of basic instruction within a year. They will also be required to undertake to complete a course of Juvenile Court Training either before they are elected to a Juvenile Court Panel or within a year of becoming a member of such a panel. The Lord Chancellor has a discretion to exclude individuals from the training requirement or to extend the time within which it may be taken.

The detailed syllabus for the courses of instruction will be prepared by the *National Advisory Council on the Training of Magistrates.* Those responsible for providing the training (Magistrates' Courts Committees), are to be encouraged to make use of courses organized by the *Magistrates' Association,* by the Universities, and other similar bodies.

12. The Training of Justices of the Peace in England and Wales, (1965), H.M.S.O., Cmnd., 2856, p.16.

Most significantly, the White Paper emphasizes that: "The arrangements now announced for the obligatory training of Justices are only a beginning. They will be extended and improved in the light of experience."[13]

A second suggestion is the creation of special criminal courts having exclusive jurisdiction over all criminal cases. The training of the members of these courts would be along the same lines as that proposed in the first suggestion. Any move to create such special courts without the provision of adequate training for its members in the disciplines previously mentioned would of course, largely destroy the value of specialized criminal courts.

A third suggestion involves the creation of regional sentencing tribunals consisting of members of the judiciary and persons representing the social and behavioral sciences. To this tribunal it might be appropriate to add representation from the general public. The activities of such a tribunal would be restricted to cases where the court pronouncing guilt felt that some form of sentence other than a fine was called for. Such a tribunal would of course require the supportive services of an adequate investigative staff.

It is hoped that these remarks will focus attention upon the sentencing function which has devolved upon the judiciary and the way in which they carry it out. If in the process some light has been shed upon the shortcomings of the system it is hoped that this will stimulate constructive moves to eliminate those shortcomings. The continued expenditure of vast amounts of human and economic treasure by persons not possessed of the fullest possible knowledge of the nature of man and his society, is a luxury which no community of men can afford indefinitely.

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PRIVATE INTERNATIONAL LAW

> "Private International Law", said Dr. Cheshire, "presents a golden opportunity, perhaps the last opportunity for the judiciary to show that a homogeneous and scientifically constructed body of law suitable to the changing needs of society can be evolved without the aid of the legislature."[1]

The judiciary in the past few years has shown itself not unaware of this opportunity and perhaps its greatest contributions have been in the areas of family law and tort. In the former the concept of domicile is fundamental to so many matters that it is well to begin with a note of the development there.

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13. *Id at* p.15.

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1. Cheshire's ***Private International Law***, 7th edition, p. viii.