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Topic: Which penal aims might be fulfilled through the use of imprisonment and sentencing?

Introduction

Criminal justice is a prerequisite of social order and states design penal aims to prevent crime and protect the public. These aims are reflected in sentences which can take the form of imprisonment, community service or monetary punishment.

This essay will focus on the penal aims which are fulfilled through imprisonment and on the role of sentencing in achieving them. Firstly, the philosophy surrounding the relationship between punishment, imprisonment and sentencing will be discussed to make clear the basic concepts for analysis. Each penal aim will be examined separately with retribution coming first. It will be concluded that although retribution can be achieved through imprisonment, its application should not only depend on the seriousness of the offence but also on other criteria e.g. the offender's motive. Deterrence will also be explored. It will be argued that it is unclear whether prison really deters crime and to achieve this, current sentencing strategies should change. Reformation will also be examined with focus on the penal application of rehabilitation and restoration within prison. For effective reformation within prison, the judge's discretion in sentencing is an important element. Lastly, it will be noted that the application of incapacitation within prison is unclear and sentences should be properly allocated to offenders who pose considerable danger to the public. Having explored these penal aims, the relationship between sentencing and the increased use of custody will be discussed. It will be concluded that to achieve these penal aims effectively, the Criminal Justice System should review their existing criteria by combining designed laws, social norms and judicial discretion.

The link between punishment, imprisonment and sentencing

Punishment is one of the most unpleasant activities an authoritative source has to impose on any individual in response to a behaviour or disobedience considered morally wrong according to religious, governmental and individual principles. For Fienberg, punishment is

“a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment. Condemnation or denunciation conjoins resentment and reprobation”.¹ Through punishment the state aims to achieve certain ends such as retribution, societal protection, deterrence, rehabilitation and restoration to accomplish one of its basic responsibilities which is the equality of all citizens’ rights e.g. security.² It sends a powerful message to lawbreakers and citizens that residents must follow some moral obligations to make society a safer place to live in.

A form of punishment available to all legal systems is imprisonment. In practice, this is an onerous punishment because it violates some of the basic liberties of the individual e.g. the right to privacy.³ Such violation is not unjustified. There are many crimes such as those which cause death, psychological trauma or loss of the ability to feel secure for which monetary compensation may not suffice.⁴ Monetary penalties are not as effective as imprisonment for restoring equality of conditions among citizens if victims still suffer while criminals live as free citizens, burdened only by compensation payments.⁵ Therefore, in an attempt to make the Criminal Justice System (CJS) as drastic as possible, many legislators worldwide opt for a system in which many of the aforementioned aims of punishment are reflected through imprisonment. As a thorough discussion will be given later to these penal aims, a quick overview will follow giving an explanation of each aim.

Penologists, prison administrators and judges in favour of imprisonment as retribution argue that sentences imposed on offenders must be proportionate to the gravity of the offence.⁶ These people must be identified, sent to prison and secluded from those who act lawfully so that they receive the punishment they deserve.⁷ Relative theories justify incarceration as a means to achieve deterrence. They purport to ensure that the experience of time in prison is so distasteful that the criminal will avoid committing offences in future.⁸ It is also argued that by punishing one individual, others are dissuaded from perpetrating the same offence.⁹ A third aim is social protection as imprisonment

¹ Fienberg, J. (1994) “The Expressive Function of Punishment” in Easton S. and Piper C. (2008) Sentencing and Punishment ; The Quest of Justice, Oxford University Press pp.73

² *ibid*, pp.26, 29 See also: Pakes F.(2004) Comparative Criminal Justice, 1st edition, Willan Publishing, Chapter 7

³ *ibid*

⁴ Lippke R. (2007) Rethinking Imprisonment , 1st edition, Oxford University Press, pp.27

⁵ *ibid*

⁶ Ashworth A. (2005) Sentencing and Criminal Justice, 4th edition, Cambridge University Press

⁷ Findlay, M., and Henham, R., (2005)., Transforming International Criminal Justice: retributive and restorative justice in the trial process

⁸ Easton, P., (2007), *op.cit*

⁹ *ibid*

serves to make the offender unable to perpetrate crime because he is off the streets and cannot endanger the general public¹⁰. Another aim is reformation. Its purpose is to eradicate the causes of crime through the rehabilitation of the offender.¹¹ Therefore, prison is regarded as a “device” which detains the “patient” long enough for him to control his behaviour and become a better citizen.¹² Imprisonment can be used as a place of restoration for many offenders. As Newell notes, prisoners “are censured and called to account, they have issues to work on for the future and have an opportunity to make amends to the victims they have harmed” .¹³

As discussed, different aspects regarding the benefits of imprisonment exist, each one aiming to eliminate crime. It must be noted, however, that penal policy reflects contemporary views about the purposes of punishment and how the prison sentences which help to achieve the aforementioned penal aims must be imposed e.g. whether reform and rehabilitation are desirable objectives for prison sentences.¹⁴ Unfortunately, it is not infrequent that views on the imposition of punishment reflected in penal policy do not represent public perceptions of justice.¹⁵ This phenomenon exists in many countries worldwide including the UK where there is a lack of common purpose¹⁶ between the CJS and its sub-system faculties e.g. police, courts and probation service etc.¹⁷ This situation negatively affects the sentencing system resulting in false or ineffective convictions as well as general public dissatisfaction motivated by the media (e.g. moral panic) about the legitimacy of punishment.¹⁸ Frequently they argue that the imposition of a particular sentence is not correct and therefore cannot quash the crime effectively.

This overview gives an insight into the philosophy surrounding the relationship between punishment, imprisonment and sentencing. With this in mind, a thorough expansion of each separate penal aim will be given.

¹⁰ ibid

¹¹ Edgar K., and Newell T.,(2006) Restorative Justice in Prisons: a Guide to Making it Happen, Waterside press

¹² ibid

¹³ ibid, p20

¹⁴ Newborn T., (2007) Criminology,1st edition, Willan Publishing

¹⁵ ibid

¹⁶ In England and Wales the enforcement of prison sentences is an **executive and not a judicial responsibility**

¹⁷ Newborn T., (2007), op.cit.

¹⁸ ibid

Retribution

Retributive theory is based on the notion that offenders must be identified so they receive exactly what they deserve (“lex talionis”) and retributivists believe that it is the state which ought to punish those who criminally harm others.¹⁹ This is correct and in many cases the prison should exact full retribution on the offender i.e. he must receive what he deserves exclusively within prison and in no other way, especially those who are morally culpable for crimes so serious that they interfere with the ability of victims and other citizens to live decent and autonomous lives.²⁰ Undoubtedly, the extent of retribution lies with the state to punish those who breached the law, regardless of the potential benefits of persecution.²¹ As retribution means that sentences must be proportionate to the gravity of the offence, a strong message can be sent to offenders if this penal aim is fulfilled in prison.²² It can make them recognise the extent of the harm caused to their victims.²³ Understanding the extent of his responsibility through punishment, which serves as a censure by the state for his wrongdoings, the offender may respond positively to the call for remorse. Additionally, through the application of proportional sentences, retribution “respects the rule of law values, and places limitations on state power over offenders”.²⁴

It is necessary to mention the basic principle of equality which means that everyone is equal and has the same rights and benefits as prescribed by the rule of law.²⁵ It is the responsibility of the state to respect, maintain and allocate the basic moral freedoms of all its citizens whilst at the same time communicating and justifying the importance of these freedoms to them.²⁶ Citizens therefore have the responsibility to honour this contract with the state²⁷ by obeying the law. The reason for mentioning this is to highlight the fact that this “contract” is breached when it is violated by crime. As Lipkee rightly remarks, “crimes render unequal that which, as a matter of distributive justice, ought to be equal”.²⁸ The solution to this problem lies in imprisonment. Putting lawbreakers in prison for their actions

¹⁹ Findlay, M., Henham R. (2007), op.cit

²⁰ Lipkee., R., (2007), op.cit

²¹ Ashworth A., (2005), op.cit.

²² Lipkee., R., (2007), op.cit

²³ ibid

²⁴ Ashworth A., (2005), op.cit. p.84

²⁵ ibid pp. 72,

See also: Barnett., (2006) Constitutional and Administrative, Routledge Cavendish

Also: “No man is above the law; every man and woman, whatever be his or her rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdictions of the ordinary tribunals” Dicey, AV, Introduction to the Study of the Law of the Constitution (1885), 10th edition, 1959, London: Macmillan pp 188,193,195, respectively

²⁶ Lipkee., R. (2007)., op.cit

²⁷ See also: Social contract theory -- Thomas Hobbes, (1651) Leviathan

²⁸ Lipkee., R. (2007), p.24

and punishing them proportionally to their crimes is a just way for the state to fulfill retribution and communicate moral truth to penalise those whose wrongs have exceeded the boundaries of their rights whilst diminishing the legitimate interests of others.²⁹

Many theories which adopt similar ideas to those mentioned above have been developed within the arena of retributivism. One of them is the so-called “unfair advantage theory” which looks at the restoration of “the fair balance of benefits and burdens which is disturbed by crimes”.³⁰ More specifically, this theory argues that the level of severity of a crime is reflected in punishment which is justified in terms of depriving the unfair benefits gained by a criminal from their victims and community in general because they have violated the law.³¹ Undoubtedly, this rationale of retribution can be fulfilled through the use of imprisonment because in prison the offender cannot exploit the benefits gained through crime e.g. money. Nevertheless, to consider the role of sentencing in applying this theory, the answer is difficult. As Lipkee stated, the advantages obtained from crime are subjective, particularly if the offence is not monetary.³² This opinion is confirmed by Bagaric who stated that “this theory has difficulty in dealing with offences where the degree of freedom obtained by the offender has no correlation with the disadvantage incurred by the victim”.³³ Furthermore, if judges imposing sentences consider only the proportionality of the unfair advantage obtained, there is the danger of people spending time unjustly in prison while others who committed more serious offences enjoy a freedom not entitled to them.³⁴ A simple paradigm is enough to prove this issue. For example, those who commit murder may not profit so much from their offence (especially when they have killed out of anger) as some thieves would if they unlawfully obtain valuable property.³⁵ Nevertheless, nobody thinks an offence against property is more severe than murder. As David Dolinko convincingly states, it is illogical to think that killers are freer than thieves, since the latter is obviously the less serious crime. However, neither killers nor “thieves are morally free of the prohibitions they violate”.³⁶ Nor is it the case that killers “necessarily have or create more options for themselves than thieves”.³⁷ Everything depends upon the circumstances under which each crime is committed.

²⁹ Ibid, p.21

³⁰ Bagaric M.,(2001) *Punishment and Sentencing: A Rational Approach* , Cavendish Publishing, pp86-87

³¹ ibid

³² Lipkee, R., (2007), *op.cit.*, pp20-25

³³ Bagaric M., (2001), *op.cit.*,p.87

³⁴ ibid

³⁵ Lipkee R., (2007). *op.cit.*, p.21

³⁶ ibid.,p.21

³⁷ Ibid., pp.21-22

So there are problems in rationalising retributive sentences simply through the seriousness of the unfair advantage obtained. To avoid this, judges can consider the extent of gain by looking at crimes individually. Offences can be divided into categories such as those against persons or against property and then guide the judges as to how to estimate the degree of advantage that someone gained when he committed an offence by making a comparison only with offences of the same type. However, it should never be forgotten that everything depends upon the seriousness of each crime.

The aforementioned rationale of retribution is almost impossible as we have just seen to be framed objectively within sentencing decisions. However, with other appropriate rationales this problem does not arise. The role of sentencing in achieving them is significant. This is because if the state imposes sentences disproportionate to the seriousness of the offence committed, then redress cannot be applied properly to offenders.³⁸ However, the current focus of retributive sentence on the seriousness of the crime has been criticised. To avoid such criticism and achieve real retribution for offenders, it is beneficial to review the criteria under which retributive sentences are imposed. This will help pass sentences to minimise criticism and consequently destroy the argument favouring the abandonment of this important penal aim which, as characterised in *Fuman v Georgia*, has the power to promote “the stability of a society governed by law”.³⁹

Criminal Justice should not focus only on the seriousness of the offence but also the circumstances and motives of the offender. According to Newborn, retribution “pays scant regard to the notion that punishment should be inflicted upon those that are held to be responsible for an offence i.e. whether killing was an accident or a deliberate act”⁴⁰ Concurrently the judge, through exercising judicial discretion, must take into account the context of the society in which the criminal offence took place.⁴¹ By doing so, penal systems will allocate a sentence appropriate to each offender.

³⁸ Ashworth A., (2005), op.cit. Chapter 3

³⁹ *Furman v Georgia* 408 U.S. 238 (1972) U.S. Supreme Court Decided June 29, 1972 available at: <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/furman.html>

⁴⁰ Newborn T., (2007), op.cit., pp.524

⁴¹ Henham, R., (2005), *Punishment and Process in International Criminal Trials*, Aldershot: Ashgate Publishing

Deterrence

Excluding retribution, other penal aims have the potential to be fulfilled by utilising imprisonment. One of them is deterrence. As already mentioned and as stated by Beccaria, the purpose of deterrence, either individually or generally, is to reduce crime through the apprehension or fear of punishment people may have if they offend or re-offend.⁴² It will be shown that deterrence has the potential to be achieved through the use of imprisonment.

Prison has the purpose not only of making lawbreakers and fellow citizens understand that every member of society has moral obligations to obey, but also to deter offenders from breaking the law.⁴³ In having the unpleasant experience of being in prison for any length of time and the deprivation of any social life means that offenders may be persuaded that offences had best be prevented in future (individual deterrence).⁴⁴ Nevertheless, does the idea of imprisonment have the potential to discourage the vast majority of citizens who have never been imprisoned from committing crime? Probably yes, if we consider that people are rational beings who calculate the benefits and costs of their actions.⁴⁵ This attribute may sometimes act as the most significant factor in preventing them offending. Nevertheless, as Easton and Piper rightly stated, even if we recognise the desirability of using a specific mode of ideology on how punishment can eliminate crime rates, in practice it is uncertain whether the existing policy on deterrence is or can be successful.⁴⁶ Therefore, whether prison really deters crime is a matter for discussion. Is it the fear of a prison sentence that prevents people committing a crime or are there other reasons? This question has been subject to debate by many authors and legislators.

Wilson, for example, believes that sanctions must be of deterrent character. According to him, this form of punishment has the potential to eliminate criminal acts. He argues that “to assert that ‘deterrence doesn’t work’ is tantamount to either denying the plainest facts of everyday life or claiming that criminals are utterly different from the rest of us”.⁴⁷ Even if

⁴² Cavadino M., James D., (2002), *The Penal System: an introduction*, Sage, p.34 See also: Easton P., (2007), *op.cit* Chapter 4

⁴³ Pakes F.(2004) *Comparative Criminal Justice*, 1st edition, Willan Publishing, Chapter 7

⁴⁴ Easton P. (2007) *op.cit*.

⁴⁵ D. Wippman,(1999) “Atrocities, Deterrence and the limits of the International Justice” *Fordham International Law Journal* 473; Drumbl, ‘Collective Violence and Individual Punishment’ 590-591

⁴⁶ Easton P. (2007) *op.cit*.p.123

⁴⁷ Wilson., J (1983) *Thinking About Crime*, 2nd edition, p.21

See also: Hugo A.. and Cassell P. (2004), *Debating the Death Penalty: Should America have capital punishment?*,

offenders have a poor conscience, they still consider the costs and benefits of their actions and rationalise their choices.⁴⁸ Empirical research confirms Wilson's analysis and suggests that harsh prison sentences influence these calculations.⁴⁹ However, other empirical evidence opposes this. According to these findings, there is no correlation between the severity of punishment and crime reduction.⁵⁰ Additionally, the imposition of the exemplary sentence, which provides that the penalty imposed on one offender must be disproportionately harsh to deter others from perpetrating a similar offence,⁵¹ is another issue which many researchers disagree on as to whether sentencing plays a significant role in achieving deterrence in prison. Two research projects carried out in England prove this statement.

The first one, undertaken in 1958 in Notting Hill, showed that exemplary sentences caused reductions in racial troubles whereas the other one in 1977 in Birmingham proved the opposite.⁵² Here, a young boy was ordered into custody for twenty years because he took part in a violent robbery.⁵³ His sentence was publicised nationally through the media as an exemplary sentence.⁵⁴ Unfortunately, during the period before and after the penalty was passed, discouraging results were revealed.⁵⁵ The rate of reported robberies increased prior to the trial and rose for several weeks afterwards.⁵⁶

For forty years or so, empirical data failed to confirm that there is a strong correlation between sentencing (either harsh or lengthy) and deterrence. According to the Halliday report, "the limited evidence provides no basis for making a causal connection between the variations in sentencing severity and differences in deterrence effects".⁵⁷ There are many reasons justifying this conclusion. Firstly, the best chance of deterrence lies with those who are aware of the changes in punishment and sentencing for a particular offence e.g. ten years imprisonment for robbery.⁵⁸ Yet, according to Lippke, even if would-be-

Oxford University Press: p.189

⁴⁸ *ibid* p.124

⁴⁹ *ibid* p.124

⁵⁰ Lipke, R., (2007), *op.cit.*,

⁵¹ Ashworth A., (2005), *op.cit.* p.77

⁵² *ibid.*, p.78

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ Halliday, J. (2001) *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, London: Home Office, p.128

⁵⁸ Lipke, R., (2007), *op.cit*

offenders are informed of such changes, only some of them will be deterred despite knowing they will be arrested and obtain enhanced sentences.⁵⁹ Others may not care about being caught which may only affect how they perpetrate the crime and not whether they do so or not. Additionally, many offenders, particularly those who are young and impulsive, are not motivated much by rational choices of risk and profit.⁶⁰ “Others are poor or alienated from the social order, individuals for whom entanglement with the CJS is less of a stigma and may be a badge of honour”.⁶¹ In short, there are reasons to suggest that sentencing plays a role in achieving deterrence but simultaneously plenty to suggest the opposite view. Everything is a matter of personal opinion.

The ambiguous effectiveness of deterrence is not left unobserved by its opponents, especially retributivists. Deterrence is one example of a consequentialist theory of punishment. This is because consequentialism means that an act must be performed if its consequences are “at least as good as any alternative available to the agent (i.e. if it maximizes value)”.⁶² Equally deterrence is based on the outcomes of punishment. Punishment must be imposed in such a way so as to provide positive consequences for the individual and the general public i.e. diminish offending and re-offending.

Retributivists object to this kind of theory because there is no moral basis for inflicting punishment other than for acts already committed for which the offender has been found guilty.⁶³ As Kant argues, it is not ethical “to use individuals, even criminals, as means to an end” but to punish them when it is deserved.⁶⁴ If the state does not impose sentences on individuals purely for their unlawful acts, there is the danger of sending innocent people to prison and depriving them of their right to live autonomous lives.⁶⁵ Deterrence provides opportunities for immoral judgments. A penal aim like deterrence cannot be justified “if it does more harm than good” (deterrence allows harsher punishment).⁶⁶ Lastly, it seems that deterrence affronts the rule of law.⁶⁷ In contrast to retributivism, deterrence does not set boundaries on state power over sentencing. This was confirmed in the Nikolić case by

⁵⁹ *ibid*, p.252

⁶⁰ *ibid*

⁶¹ *ibid*, p.252

⁶² David O. Brink, Punishment, available at <http://philosophy.ucsd.edu/faculty/dbrink/courses/13/handout-8.html>

⁶³ *ibid*

⁶⁴ Kant, Immanuel. “On the Right to Punish”. Schauer, F. and W. Sinnott-Armstrong, Ed. *The Philosophy of Law: Classic and Contemporary Readings with Commentary*. Harcourt Brace and Company, 1996. 701-705. See also: On Punishment available at: <http://www.yellowpigs.net/philosophy/punishment>

⁶⁵ Stubbs A., (1981) The Pros and Cons of Consequentialism, *Philosophy*, Vol. 56, No. 218 (Oct., 1981), pp. 497-516

⁶⁶ *ibid*

⁶⁷ *ibid*

the ICTY Appeals Chamber where it was mentioned that penal systems should develop “a culture of respect of the rule of law and not the fear of the consequences of breaking the law”.⁶⁸ It seems the existing sentencing system of deterrence is not the most effective for eliminating crime. This does not mean, however, that this consequentialist theory of punishment should be abandoned entirely.⁶⁹ Therefore, what role should sentences play in achieving this aim of punishment? Is it better to find other ways to bring about deterrence?

The previous discussion brings us to the conclusion that deterrence cannot be achieved effectively within prison or through current sentencing strategies. Ashworth suggests it would be a good idea if penal systems increased police enforcement with a “general crime prevention tactic” which would have as a primary aim the alteration of people’s minds.⁷⁰ Deterrence can take the form of a socio-pedagogical moral propaganda. This can be achieved, for example, by radio or television broadcasts as well as by seminars enlightening offenders in prison and the general public about the importance of crime avoidance.⁷¹ States should attempt to provide the necessary welfare e.g. employment to deter people from crime.⁷²

Reformation

Another penal aim with a forward-looking justification of punishment is reformation. It is based on the rationale that if punishment must be imposed, it is better to improve the offender so as to benefit the offender, victim and society in general.⁷³ It is obvious, however, that most Criminal Justice Systems do not have such aims or any reparative components.⁷⁴ This makes it hard for the criminal to make changes.

Rehabilitation is one theory based on the aforementioned rationale. This is influenced by positivism which describes crime as the social, biological, psychological or psychiatric pathology of people.⁷⁵ These people need reform and this is what the advocates of rehabilitation believe. The question arising here is whether this penal aim is fulfilled

⁶⁸ *Momir Nikolić* ICTY T.Ch.I 2.12.2003 paras.89-90

⁶⁹ On Punishment available at: <http://www.yellowpigs.net/philosophy/punishment>

⁷⁰ Ashworth A., (2005), op.cit

⁷¹ op.cit

⁷² ibid

⁷³ Cavadino M., James D., (2002), op.cit, p.46

⁷⁴ ibid

⁷⁵ Newborn T. (2007), op.cit

through imprisonment.

In many states this is possible with special prisons designed to play a dual role in helping the offender reform his behaviour both morally and socially.⁷⁶ Firstly, the importance of public confidence is something that states who adopt rehabilitation within prisons never forget.⁷⁷ Imprisonment can make offenders understand that their action is so serious as to be unacceptable to the state and general public.⁷⁸ This awareness is an important step towards reformation. Such prisons try to avoid being a place where the offender leaves in anger with debts, health and drug problems.⁷⁹ Special programmes designed for inmates try to eradicate the causes of crime, teach offenders morality and empower them to control their thoughts.⁸⁰ To eliminate re-offending and promote offenders' reformation, mentors working within the probation service help find them a job and a home after release. Unfortunately, evidence suggests that a prison's potential to realise this aim is predominantly low for some groups.⁸¹ In England, for example, Cann et al compared adult male offenders with young male offenders who participated in specific prison programmes, Reasoning and Rehabilitation (R&R) and Enhanced Thinking Skills (ETS) from 1998-2000.⁸² They observed that the adults did better than the younger group. As Ogloff specified, this is because these programmes are designed only for white, adult, male offenders thus other groups have difficulties with this "one size fits all" model of programme.⁸³ Similar outcomes arose in America, Canada and other countries which incorporate rehabilitation into their CJS for similar reasons.⁸⁴ To eliminate such problems, prison rehabilitation services need to be more effective to meet everyone's specific characteristics and needs.⁸⁵

To achieve effective rehabilitation, sentences are an important element. As Ashworth states, sentences should be imposed so as to match the needs of each offender.⁸⁶ This

⁷⁶ Ward T., Maruna S., (2007), *Rehabilitation*, Routledge

⁷⁷ *ibid*

⁷⁸ How to make prison more restorative: Restorative justice and Prison staff available at: www.restorativejustice.org.uk/Resources/pdf/How2makeprismorerest.pdf

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² Cann, J., (2003) *Understanding What Works: accredited cognitive skills programmes for adult men and young offenders*, Home Office Research Findings 226

⁸³ Ogloff, J. R. W., (1975) *Anger Control: Development and evaluation of an experiment treatment*. Lexington , KT:D.C.Health

⁸⁴ Todd R. Clear, George F. Cole, Michael D. Reisig,(2008), *American Corrections*, Thompson, pg. 352

⁸⁵ Andres Aristizabal, Valerie Jones, and Sylvia Bayme, *Rehabilitation: Prison?*, <http://studentorgs.utexas.edu/alas/Andres/temporary/project3/>

⁸⁶ Ashworth A., (2005), *op.cit.*p.78

can be achieved if the court considers a probation officer's psychiatric report and takes the appropriate action.⁸⁷ After a period of therapy and if those who supervised it have evidence that the offender is cured, then this will be referred to the court to consider whether he is "sufficiently reformed and that the public will remain safe when they are released".⁸⁸ This measure is not new. In the Erdemović case, the Trial Chamber mentioned "substantial evidence"⁸⁹ of rehabilitation and noted that the personality of the offender was corrigible but "reformable and should therefore be given a second chance to start his life afresh upon release".⁹⁰

Prison officers working on rehabilitation programmes suggest that prisoners should identify their responsibilities to those harmed by their crimes which will help their reintegration progress.⁹¹ This can be applied by restoration. Restoration focuses on the development of relationships between the community, victim and offender.⁹² They all work together for the creation of a safe environment of respect and reconciliation.⁹³ As Newell stated, this cooperation can help victims come to terms with the crime, whilst at the same time stopping offenders re-offending, becoming accountable and taking responsibility for their actions to "make good the wrong they brought about".⁹⁴

Prisons can play a significant part in each government's attempt to incorporate restorative justice into the CJS. It can offer opportunities for the victims of serious crimes to overcome the damage caused and enable the most serious offenders to have a restorative meeting in which the prisoners pledge "to working for the community, the victim and their own supporters".⁹⁵ This can encourage these parties to make a commitment to repair the harm caused by the offence.⁹⁶ Following these meetings, imprisonment can offer offenders the chance to think about the victim's suffering. Imprisonment can also help them analyse the harm caused to their victims.⁹⁷ Prison staff can also help the offender understand the purpose of dialogue and reduce the damage caused to the victim and community.

⁸⁷ Edgar K., and Newell T.,(2006)

⁸⁸ *ibid*, p.19

⁸⁹ Kapmark E.(2009), Bosnian War Criminal's strategic repentance, available at: <http://www.eurekastreet.com.au/article.aspx?aeid=17373>

⁹⁰ Erdemovic ICTY T.Ch.5.3.1988 para. 16

⁹¹ Daniel W. Van Ness, Restorative Justice in Prisons, available at <http://www.restorativejustice.org/editions/2005/july05/tjprisons>

⁹² Edgar K., and Newell T.,(2006)

⁹³ *ibid*

⁹⁴ *ibid*, pp.116-120

⁹⁵ *ibid*, p.117

⁹⁶ *ibid*

⁹⁷ *ibid*

Restorative approaches of justice were applied in Belgium.⁹⁸ As Edgar describes, Belgian prisons used restoration to make imprisonment an effective way to achieve reconciliation between parties and crime deterrence.⁹⁹ Similar steps were taken in Canada as well as in some English prisons in 2001 e.g. Bristol, Norwich etc.¹⁰⁰ These attempts emphasise the need to recover the confidence of victims and the public.

In attaining restorative justice, “sentencing should provide a context where the rationales that inform penal policy are negotiated in ways that reflect meaningful connections between the institutions of punishment and those individuals and communities affected by them”.¹⁰¹ As Henham suggests, restorative sentencing can provide positive results if applied adequately at criminal trials, both internationally and domestically.¹⁰² Judges should utilise their discretion to accommodate the penal moralities of the CJS and fulfill the aspirations of those affected by the crime.¹⁰³ This helps control the dissatisfaction which, as previously mentioned, exists if the imposition of punishment reflected in penal policy does not represent public perceptions of justice.

Incapacitation

One more issue needing discussion is whether imprisonment has the potential to protect society from future crime by incapacitating offenders. Mathiesen identified that one of the social functions of imprisonment is to reassure people that “something is being done” about the threats to law and order.¹⁰⁴ This is supposedly achieved by placing “the prisoners in a powerless situation”¹⁰⁵ thus making particularly crime-prone individuals (selective incapacitation) or those who perpetrate specific types of offences such as “dangerous” offenders (categorical incapacitation) incapable of offending for a substantial period of time.¹⁰⁶ The USA uses incapacitation extensively. Its extreme application has increased the number of incarcerated offenders.¹⁰⁷ It is estimated that since 1972 the

⁹⁸ *ibid*, p.118

⁹⁹ *ibid*, p.118

¹⁰⁰ *ibid*, p.119

¹⁰¹ Henham R., (2009), Exploring the relationship between sentencing and the legitimacy of trial justice, *International Journal of Law, Crime and Justice*, 37:65-82, p. 79

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ Cavadino M., James D., (2002), *op.cit*, p.195

¹⁰⁵ Mathiesen T., (1990), Sage Publications, p.138

¹⁰⁶ *ibid* --See also: Criminal Justice Act 2003

¹⁰⁷ Garland, D. (2001b) “The meaning of mass imprisonment”, in Garland D., (ed.), Special Issue on Mass

proportion of prisoners is much higher than in Scandinavian and European countries.¹⁰⁸ (The effects of the increased use of custody will be discussed later).

Imprisonment has some incapacitation effects. As Lippke stated, if perpetrators of terrorism and murder, particularly those acting on their own, are sent to prison, there is minimal likelihood that others will replace them.¹⁰⁹ Additionally, there are high rate offenders, particularly those incarcerated at the beginning of their criminal careers, whose imprisonment may result in significant crime reduction, particularly against members of society.¹¹⁰ Does this mean that imprisonment thereby effectively diminishes unlawful acts in society at large thus achieving social protection?

Criminologists discovered that this is not as clear as it seems. Research results indicate that a significant number of offences i.e. more than half of street crime is perpetrated by lawbreakers acting with others.¹¹¹ Hence, the imprisonment of some group members is not enough because the rest may persist in offending, yielding slight, if any change to crime decline.¹¹² Additionally, such outcomes may result in the replacement of those imprisoned, possibly by more capable offenders. In cases of the illegal market, other criminals may begin to provide the services of those who previously supplied them and who are now incarcerated.¹¹³ This is not to say that imprisonment does not have the potential to accomplish effective incapacitation. The problem lies in the fact that the penal system administration regarding offenders' incapacitation is not appropriate. Mathiesen identifies the media and the CJSs as tending to focus on lower working class offenders e.g. minor property, personal violence offences, whereas those who are responsible for more severe types of social harm such as major acts of pollution are not "seen as appropriate subjects for the ultimate sanction of imprisonment".¹¹⁴ This failure to imprison white collar criminals and the imposition of lenient regulations and national laws increase the likelihood of failure to provide social protection.¹¹⁵ Therefore, all governments need to be more effective with the criteria they have regarding the decrease in the rate of offending. On one hand, governments should explore more effective measures to imprison lower working class

Imprisonment in the USA, Punishment and Society, vol 3, no 1, See also: Easton P. (2007) op.cit.

¹⁰⁸ ibid

¹⁰⁹ ibid

¹¹⁰ ibid, p.74

¹¹¹ ibid, p.44

¹¹² ibid

¹¹³ ibid

¹¹⁴ Cavadino M., James D., (2002), op.cit, p.195, See also: Mathiesen, T. (1990), op.cit,

¹¹⁵ ibid

criminals committing traditional crimes i.e. burglary and homicide, and not do so superficially. On the other hand, penal systems should also focus on corporate offenders if they want to decrease the likelihood of social insecurity.

To achieve these proposals, sentences should be properly allocated to offenders who pose real danger to the public. Ashworth states that studies suggest that false incapacitating sentencing can put “non dangerous” offenders in prison.¹¹⁶ For example, it would be unethical and unnecessary if we incapacitate individuals who commit a crime under specific circumstances (situational dangerousness) just in the hope of protecting society from future crimes.¹¹⁷ If the risk is wrongly estimated or undetected, this leads to false convictions and consequently the release of dangerous offenders into society.¹¹⁸ To avoid such injustice, judicial discretion should be preserved for sentencing in serious cases. According to Henham, the judge should make a moral choice between “retributive and reductivism justice in the sentencing of dangerous offenders...except for cases where the evidential balance unequivocally favours public protection”.¹¹⁹

The relationship between sentencing and the increased use of custody

Coyle points out that in the USA, Europe and other parts of the world, the increase in penal severity has partly been caused by more statutory minimum sentences as well as the constant use of prisons as a “social dustbin” for socially inadequate, drug-dependent or mentally ill people.¹²⁰ Penal severity is also fuelled by the media which reflects public opinion, particularly in parts of England and Wales lacking social cohesion.¹²¹ This has caused conditions in prisons like overcrowding i.e. “shared cells with unscreened toilets” as well as ineffective custodial sentences and measures.¹²² This prevents Criminal Justice Systems around the world achieving their penal aims effectively within prisons. The only way of solving this is to review the pre-existing sentencing criteria for achieving the aims of punishment by combining laws, social norms and judicial discretion in such a way so as to apply the most effective penal aims for each case to help offenders desist from offending

¹¹⁶ Ashworth A, (2005) op.cit

¹¹⁷ ibid

¹¹⁸ ibid

¹¹⁹ Henham R., (1998), Human Rights, Due Process and Sentencing, British Journal Of Criminology, Vol.38, No 4:592:610, p.608

¹²⁰ Coyle A. (2003), Capital Punishment: Prison Privatisation and Human Rights, Charity Press

¹²¹ Newborn (2007), op.cit

¹²² ibid

and protect the general public from such unlawful acts.

Conclusion

All aims of punishment (i.e. retribution, deterrence, reformation and social protection) have the potential to be achieved through imprisonment. However, what is needed is the correct administration of them by Criminal Justice Systems worldwide. Their achievement depends upon the implementation of effective sentences, respect and cooperation between offenders, victims and community to avoid unfair punishment as well as useless and dangerous amplification in the use of prisons.

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