

Crime and Punishment (Part 2)

Following on from last month's message, I want to share my views on the purposes of punishment insofar as they should be reflected in the sentences imposed by criminal courts.

The old view (which is still maintained by many) holds that there is a necessary moral connection between wrongdoing and punishment (variously called 'ethical or moral retribution', 'retributive justice' or the 'desert justification'). This theory is a refinement of the 'revenge theory' best expressed in the 'eye for an eye' principle.

An alternative view (which I prefer) is that offenders are punished only for social reasons, looking forward rather than to the past. This principle is best expressed pithily in the words of the Utilitarian philosopher, Jeremy Bentham, who wrote:

All punishment is mischief. All punishment is in itself evil. It ought only to be admitted in as far as it promises to exclude some greater evil.

Retributive justice looks to the past when it seeks to punish the offender for what he has done, while the utilitarian looks to the future to justify the imposition of punishment. The utilitarian justification for punishment is not to take revenge on the offender for his wrongdoing but to prevent future offences of a similar kind, whether by that offender or others. In short, the principle of deterrence should underpin a rational policy of sentencing. The sentence should be determined by its effect upon the person punished (particular deterrence) or by serving as a warning to others (general deterrence). In addition, the penal process can have a certain educational effect, both on the offender as well as the community at large in reinforcing the social values of the community as expressed through its criminal laws. However, the educational process should only be regarded as a side effect of punishment, and not as its primary justification. To that extent, I would therefore respectfully disagree with Lord Denning who once famously said:

The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime.

As I pointed out in last month's message, the purpose of the criminal law is not to enforce the moral standards of the community as such, but only to protect the community and individuals from tangible harm. Accordingly, punishment should not be based on moral denunciation as its primary justification.

But utilitarianism does not provide a self-contained justification of punishment, as there are cases where utilitarianism would provide too harsh a penalty, or where it would not justify a punishment at all where clearly punishment is necessary.

If one carried utilitarianism to its logical conclusion and make deterrence the sole criterion for punishment, there would be times where the easy way to abolish a socially undesirable practice would be to impose extremely harsh penalties, eg to impose huge fines or even imprisonment for parking offences. But the community would (rightly) reject such penalties because they would violate another principle that is commonly accepted as a necessary ingredient of a rational sentencing policy, viz. the principle of **proportionality**. That principle reflects the correct place where retribution ought to be

reflected in punishment – in the distribution of justice, rather than in its primary justification. The extent to which an offender ought to be punished cannot be determined solely by the need to stamp out future repetitions of the same offence; there is a moral limit to the law's power to make an offender an example for others to fear.

Conversely, there may be occasions where an offence may result in no overt harm, but may attract such moral outrage that, a failure to punish (or punish adequately) such an offence will lead to those outraged to take physical action to vent their feelings. This is the basis for laws and punishment against those that express views which give serious offence to religious or racial groups. Indeed, this was the original justification for having laws at all, because, in the absence of government having a system of law and order and punishment for violation of those laws, victims of wrongs committed against them would have to resort to self-help to gain redress for the loss and suffering they had sustained. It is to this extent that Lord Denning's dictum can be justified, but only as a postscript to any thesis on the purposes of punishment.

On a more practical note, Singapore is sadly lacking a principled and transparent penal policy. Our universities barely cover the study of criminology, and even less the more important study of penology. Possibly, this is because Government has not published detailed statistics of crime and punishment so that social scientists can undertake adequate research on the causes of crime and the effects of current penal policies on prisoners (especially recidivists). One traditional justification for the lack of such statistics is that these are sensitive figures which could be interpreted as indicating that certain communities might be more prone to commit certain crimes, but we cannot continue to put our heads in the sand and hide important social facts which need serious study by objective scholars in order to improve our society. Only rigorous research with full access to relevant information can help us determine important penological questions such as:

- Is the death penalty effective in preventing murder and other capital crimes?
- Do strict liability offences achieve their object of deterring anti-social behaviour?
- What kind of punishments best deter what kind of behaviour?
- Should we follow the UK in adopting indeterminate sentences?
- Is corporal punishment an effective deterrent against the crimes for which it is imposed as a penalty?

So I end with the message that we need to re-think our policies on crime and punishment at a more fundamental level than hitherto so as to base our laws and sentences on a proper jurisprudential as well as practical basis.

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