THE PUNISHMENT FOR CRIME AMONG NATIVES.

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The assumption of rule in Papua found a rudimental people. So backward were they in communal arrangement that not even did there exist the primitive law-giver to regulate the punishment for crime by so much as the archaic method of insisting upon the claims of the individuals injured. The matter of redress for wrong was left to the inclination of the individuals who had suffered and the punishment or satisfaction varied with the power, the will, or the opportunity of the sufferer or his adherents. No particular regard was paid to the object of punishment, very often an innocent person suffering for the crime of another, the latter thereupon becoming free from molestation. Sometimes satisfaction was gained by swift action, sometimes it was postponed for long periods and sometimes no satisfaction for the crime done was ever had at all. It cannot be said that there existed any generally accepted idea as to the degree of punishment except that death was the prevailing form. There being no semblance of a legal system to serve as a foundation, Government was not faced with the problem of choice, and the only hope for posterity was of the establishment of the legal system of civilization to the exclusion of all else.

Where criminal jurisprudence has developed with the people and has been formulated by them for the common weal, through moral demands, they are so bound up with it that its application is conventional. This system suddenly imposed upon a people incapable of comprehension and ethically opposite comes as a shock, which without some softening, would be sufficiently violent to overthrow the social structure and to cause the ultimate extinction of the race. As the criminal system adopted is founded on the requirements of civilization there could be no lowering of principle. It is through the attitude of the Courts in their treatment of the criminal sanctions in relation to native crime that the necessary

adjustment is made between the sanctions provided and the social condition existing.

The theories of punishment in civilized communities, where the criminal law has developed with civilization and is an inseparable part of the social system, cannot be regarded as stable even now. When the same system is applied to Papua in addition to the varying theories of punishment found in the white community there are the numerous problems which arise out of the application of the system of civilization to a primitive people. Just as in a white community there is the need for uniformity as far as it can be had from the wide powers of the Judges and their varying mental attitude, a congruity of application of the criminal sanctions to the native races is to be sought. In Papua, fortunately, so far approximate co-ordination has been achieved in this regard. The responsibility imposed by the wide powers in relation to punishment is in no way lessened but it assumes a somewhat different character. The problems of punishment in a European community are to a great extent confined to the immediate effect on the community, but in the consideration of punishment as affecting native races, future results are of far greater importance than consequences which may have the effect of instant prevention but which would be deleterious to the race as a whole.

The paramount object of punishment in any community is the prevention of crime. The difficulty here is to carry out the paramount object while at the same time to guard against a result which would be detrimental to the preservation and advancement of the people. The punishment is to be the maximum that can be awarded, having the paramount object in view, after taking into consideration all the matters essential to the preservation and civilization of the native races of which the Court can properly take note. This is what may be called an economic application of the criminal sanctions. If this theory is respected the punishment may not entirely effect the paramount object, or approach the stage reached in civilized communities, during the evolutionary period, but it is considered that such a contingency is to be borne rather than that

the native races should perish through a failure to take into account those matters which appear to be essential to their preservation and development.

Although criminal punishment acts on the individual both mentally and physically the chief aim is to effect the prevention of crime by the action it has on the minds of others. This aim assumes even greater importance when the criminal sanctions are being applied to native races. Execution of course, puts it for all time beyond the power of the criminal to commit further crime and imprisonment also prevents a repetition of the crime during the period of incarceration, but the fear of further crime being committed by the same individual is outweighed by the value the criminal is likely to have as a preceptor among the people. Execution also has a strong tendency to prevent crime in European communities through the terror it inspires in others. In native society it has far less value in that regard for the sanction for most crime committed against the primitive social order has always been death. It has always been expected and has followed as a natural sequence unless it could have been avoided by the perpetrator in some way, so that unless the difference in the manner of carrying out the death penalty by its novelty can inspire terror, it has little deterring effect on the minds of others. It would happen mostly, however, that the criminal would merely disappear from his tribe and be seen no more. What would remain to the rest of the tribe would be a notion that the criminal had been put out of the way by the Government but the manner of his exit from their midst would be vague and too unsubstantial to make any lasting impression on them. The effect of criminal punishment on the prevention of crime among natives is to be had largely from the influence on the minds of others through the instrumentality of the criminal. As the agent conveying the results of the object-lesson it follows that he cannot be put to death, nor is the knowledge that he has to impart to be unnecessarily withheld from his people by too long imprisonment.

In addition to the various considerations which usually affect the minds of judges in arriving at the particular penalty, to be awarded in a given case, the main considerations determining punishment for native crime are as follows:-

(1) No previous knowledge of the Government or only a vague idea of the Government existing.

(2) Some knowledge of the existence of the Government but inability to resort thereto for the punishment of crime.

(3) Crime committed arising out of native custom.

(4) The degree of advancement made through contact with civilization.

(5) The decline of population in a particular tribe.

(1) It is a fundamental principle that everyone is presumed to know the Law. It is bound up in our system and cannot be ignored. This presumption is satisfied by arrest and trial for it can be carried no further when it is an evident fact that the delinquent does not know the Law and has never had an opportunity of knowing it. The native becomes a criminal only because of the law which somebody, of whom he has never heard, has imposed upon him. In justice the Court cannot award any punishment at all. The mere conviction without penalty is not without beneficial results for it has a certain civilizing value from the enforced visit of the distant tribesman to a government centre. What he has seen and what he has experienced is carried back with him and remains with him, at least, even if he does not influence others of his tribe by his impressions.

(2) Having adopted the criminal system it naturally follows that the means of applying its sanctions must be provided before it can be hoped that the system will be accepted. It is of course idle to provide the elaborate machinery of the law without affording the means of putting the machinery in motion. The native can scarcely be expected to refrain from resorting to his own primitive method of redressing wrong merely because somewhere to his knowledge there is a Government existing. If his tribal district is hemmed in by other hostile tribes through which he

would have to pass in order to lay his complaint or if the innate fear of the world beyond prevents his seeking the aid of the Government at a distance and the visits of a government official to his district can be but rare, his tribe cannot be considered within the ambit of effective government control which postulates a strict adherence to the law. It is impossible to preserve constant contact with many tribes owing to the physical features of the country. More often are the distant tribal districts being penetrated and more and more are they being brought under proper control, but until such time as the inability to seek the aid of the law can be negatived the courts cannot award punishment for crime. Crime is never countenanced and arrest and trial follow as a necessary sequence but the delinquent cannot receive punishment for following his natural bent when nothing has been effectively provided to supplant it.

(3) In order that punishment should deter through the terror it inspires the delinquent must know that he is doing wrong, or, if he knows he is doing wrong it does not suffice unless also he can help doing wrong. If his mental apptitude is such that he is unable to refrain from committing an offence, the fear of punishment cannot make him avoid doing so. The native custom which supplies the motive is such an ingrained part of his social system that to him it is no wrong to commit crime in obedience to it. The urge, too, is so great that although he may have acquired a sufficient conception of the law's demands, he is mentally incapable of resisting the impulse of his tribal creed. The Courts regard crime committed in obedience to inherent native custom in the light of criminal responsibility. The untutored savage can be likened to the child of tender years who knows not the difference between right and wrong or to the person of natural mental infirmity which deprives him of the capacity to control his actions. But, in truth, they are neither children nor persons of mental infirmity whom the law relieves of total criminal responsibility, but the Courts take it upon themselves to relieve them of a measure of criminal responsibility because of the motive which urged the crime.

This is as it affects the criminal himself and the punishment awarded is sufficient to deter him from further crime, or rather should it be said that it suffices to influence him in not committing further crime through the enlightenment gained during imprisonment. As a deterrent to others through the fear it inspires punishment has little or no value when the crime is committed in obedience to native customs so that a greater punishment having for its object the deterrence of others is not warranted. The enlightenment of the delinquent is to some degree imparted by him to other members of his tribe on his return from prison and by this and other influences of contact there is a gradual process of breaking down of superstition and evil custom.

(4) The fourth consideration requires an intimate knowledge of the history of the various native races since the advent of the European as well as the disposition of the various centres of white population and the spheres of government and missionary influence. There is the presumption that an offender belonging to a tribe existing in geographical proximity to the centre of white population or which has come under the permanent influence of government or mission has made such advancement by contact that he should know better than to commit crime. This presumption, however, is not always safe for it may be dispelled by the knowledge that in spite of the geographical proximity and the efforts of government and mission the people have failed to profit by their nearness to civilization or to accept the proffered assistance to a higher standard. As far as their appreciation of the existence of Government goes, and their acceptance of what it stands for, they are hardly in a more favourable position than the people of distant tribal districts who have received little opportunity. For crime committed by civilized persons there is a reason, a motive, though not always disclosed, unless the perpetrator is insane when the law provides particular treatment for him. Taking murder as an example, if it is shown that there was an entire absence of motive and the killing was done merely for the sake of killing, there would be a decided inclination to place the

prisoner in the hands of a medical man for examination for insanity. In dealing with natives, however, when there is an entire absence of motive it is not a suggestion of insanity but merely that the people have not shaken off the blood lust of ages and have failed to accept the moral feelings of their mentors. There is a peculiar reason very often given for the commission of crime which appears to the sophisticated white man as irrational, but when it is put forward to those who have some knowledge of the native races and their history it is understandable and the treatment it receives has no regard to mental deficiency. The reason or motive referred to here is that which is given for killing a person quite innocent of any injury to the murderer but merely because the murderer's wife or some relative or friend died and he is sorry. He vents his feeling of sorrow or rage upon the person of another, perhaps one whom he has never seen or even heard of before. Crime committed for no reason at all, or with such a reason as has been described, by a native the bent of whose tribe has been always the desire to kill for the sake of killing, cannot be treated as having been done through the mental derangement of the perpetrator. It is to be considered as the deed of one who belongs to a backward race which has not responded to the civilizing influences within its reach. The delinquent is to receive punishment for his crime and the amount of it depends on the degree of advancement he is considered to have made, arrived at by a review of many and varied circumstances. It is inconceivable that he should be awarded punishment in equal degree to that which would be given to a European for corresponding crime when he is void of that moral sense which binds the actions of the European with the law which the latter himself has helped to create. What he is awarded is something much less, hoping for the day when he will emerge from the slough of ignorance and savagery on to the firm ground of civilization.

(5) The problem of depopulation or the preservation of the race is one which vitally concerns the Administration and it is a subject which receives constant and careful attention from that source. It may be considered that it properly belongs to administ-

rative government and a recognition of it by the Courts is an incursion into the province of administrative government, but when punishment is likely to affect the economic position of the people it is difficult for the Administration to employ the proper safeguards through ministerial acts. It would not be practicable for the Executive to examine each particular case, and if it were, it could not be considered without an examination into all the other circumstances which influenced the mind of the Judge in arriving at the punishment awarded. This is apart from the impropriety of undue interference with judicial sentences by systematic examination. The Administrative Government, therefore, must rely upon the Courts to assist where necessary in its endeavour to preserve the race for an uplifted posterity. This consideration influences the Court when the delinquent is a member of a tribe which is decreasing or concerning which there is the fear of a decrease and then particularly when a number is charged with committing a crime in company.

In dealing with ordinary native crime little assistance can be had from the accepted consideration determining punishment for crime committed in white communities either as regards the offence or the offender. For example, as regards the offence the greatness or smallness of the evil likely to result from acts of the kind, the place, the time or the company, have little or no influence. The frequency or rarity with which crime is committed, however, is a consideration which at times receives due weight. In white communities either may be a matter of extenuation or aggravation according to the mind of the Judge. In dealing with native crime, however, it is submitted that it is as a rule more efficacious to treat the circumstances of rarity as a matter of aggravation rather than of extenuation for when a tribe has advanced so far that crime among its members is rare they are more susceptible to punishment, and in order to preserve the highly satisfactory position an exemplary punishment may be warranted.

For native crime, often the punishment awarded does not approach in severity that which the native himself would give were it left to him, nor, indeed does it equal the punishment for corresponding crime committed by a European. It may appear to some observers that a punishment much less than that which the native has always regarded as a proper retribution for crime would render the crime less serious in the eyes of the native, which will not assist him to appreciate our moral teaching or that it will cause him to look upon our measures of justice as falling short of the standard we claim to set up, creating a lack of faith in our institutions and our tutelage. The sanctions of savagery however, have been wholly displaced by those of civilization and the native races have to be moulded into the new order. The Courts can only treat crime shorn of all the logic of the savage in his conception of punishment and with a proper correlation of the laws adopted and the backward state of the people.

When the punishment imposed is light in comparison, the people have not reached the stage when they reflect upon the difference to the disadvantage of our methods. What they do see is what we wish them to see, the great difference to our attitude towards offenders and theirs. There is not in fact among the most backward tribes a conviction that our punishment is less in degree than their own as the novelty of ours is enough to dispose of any impression of insufficiency.

There are some tribes which have been in constant contact with civilization since the advent of government and have assimilated sufficient of our moral convictions to note the relation between them and the law. Crime among them is rare and if committed the punishment is equal in severity to that awarded among whites. There are other tribes however, which are intermediate between the backward tribes where punishment is light and the sophisticated tribes first spoken of. The people are in a transitory stage from adherence to obnoxious native custom to acceptance of the moral teaching of civilization. The reflection of the more advanced among them may be adverse to our treatment of the

sanctions when applied to delinquencies of their tribe but until the transition has been effected and has become visible as a collective gesture the opinion of a few cannot influence the considerations determining punishment.

There are sound reasons for maintaining that the attitude of the Courts in their treatment of native crime has been productive of beneficial results. Experience has shown that the proportion of criminals who have received punishment by imprisonment and have again committed crime after release is remarkably small. It has also been observed how often the returned criminal becomes a strong restraining influence among his fellowtribesmen through disinclination to join in suggested crime or by active disapproval.

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