

WORKING PAPER 3

PRINCIPLES OF SENTENCING AND DISPOSITIONS

*Judge Jean-Pierre Beaulne**

The Law Reform Commission of Canada published its Working Paper on the *Principles of Sentencing and Dispositions* in March 1974 and, as is customary with the Commission, has invited responses. It has stressed that the document is but a general introductory paper which seeks to identify the major issues while leaving further analysis for individual follow up papers. The Working Paper does attempt to lay out the basic principles which will guide its approach to specific issues and concrete recommendations.

The then Minister of Justice, the Honourable John Turner, in an address to the Joint Annual Meeting of the John Howard and Elizabeth Fry Societies of Ottawa, in February 1971, announced that "the new Law Reform Commission of Canada . . . will shortly be starting a review of the Criminal Code. Reform of the criminal law must now reflect the total criminal judicial process, including rehabilitation programs. What must be analysed is the system as a whole and not just a component part."

In approaching the topic of sentencing I feel somewhat like a priest discussing confessions for it strikes at the very root of a criminal court trial judge's function. It has been said: "Sentencing is not a rational, mechanical process. It is a human process and is subject to all the frailties of the human mind."¹ "Le juge est un homme vivant, il juge avec toute son âme, il fait oeuvre non seulement rationnelle mais aussi humaine On lui demande de concilier des contraires: l'intimidation de la peine dans un intérêt social et l'amendement du délinquant dans un intérêt principalement individuel."² My first basic criticism of the Paper is that it does not sufficiently underline this aspect of the problem but seems to indicate, on the contrary, that the Commission has embarked on a venture which will solve, if not all, at least most of the present ills. I must, in fairness, state that it is generally a good introductory paper which will elicit responses. The comments which I will make, whether critical or laudatory, are precisely in response to the authors' invitation and to the Ottawa Law Review's project to publish a series of comments on the up to date proposals of the Law Reform Commission.

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¹ J. HOGARTH, SENTENCING AS A HUMAN PROCESS 356 (1971).

² G. GORPHE, LES DECISIONS DE JUSTICE 41.

The authors adopt a new terminology where they seek to define or re-define established concepts such as punishment, deterrence, sentencing and to introduce the concepts of sanction and disposition. As I understand the general theme it is as follows:

Sentencing is the process in which the court or officials, having inquired into an alleged offence, give a reasoned statement making clear what values are at stake and what is involved in the offence. It is a process to be related to all stages of the administration of justice and not only, as at present, to a function which begins at the end of a trial and ends at the beginning of a sanction. *Sanction* is a penalty imposed for the purposes of punishment, protection, restitution or treatment. *Punishment* is used in the narrow sense of a sanction imposed for the purpose of giving adequate expression to the seriousness of the offence, to concern over damage done to individual rights and social interests, which may contain elements of a limited retribution and which emphasize the common good and the need for public protection.

The Paper states that the purposes of criminal law, of sentencing and of disposition are closely tied together. The dignity and well-being of the individual are a prime value in the sentencing and disposition of offenders, a value which commands that attention be paid not only to the interests and needs of the collectivity but to those of the offenders and victims as well. In the above noted address to the John Howard and Elizabeth Fry Societies, the Honourable John Turner reflected "that the personal freedom of the individual should be interfered with by the state only where such interference can be proven by the state to be necessary to protect the larger interests of society as a collective whole . . . and that in a free society, we have to strike a balance between the rights of the individual and the rights of society". The Law Reform Commission believes that there are two bases upon which an initial intervention by criminal law and sentencing can be justified: the common good, and the sense of justice which demands that a specific wrong be righted. It further stresses that such intervention by the state be limited so that:

- (1) the innocent are not harmed,
- (2) dispositions are not degrading, cruel or inhumane,
- (3) dispositions and sentences are proportionate to the offence,
- (4) similar offences are treated more equally, and
- (5) sentencing and dispositions take into account restitution or compensation for the wrong done.

The Commission adds that these criteria should offer a place for deterrence and rehabilitation in a sentencing policy but a place that has limitations.

I have attempted to summarize the general trend of thought as I have perceived it. It would perhaps be à propos at this stage to offer a few comments.

The Commission has reduced the factors of deterrence and rehabilita-

tion so much so that it has brought a response from the Canadian Criminology and Corrections Association, which, in its brief³ to the Commission, commented as follows:

As we understand the proposition in the working paper, rehabilitation, deterrence and incapacitation would be recognized in sentencing but assigned relatively minor roles. The major purpose of sentencing is seen as educating the public as to the importance of selected community values by making the punishment fit the crime We suggest that the offence alone is not a satisfactory guide to sentencing even if the aim is justice and fairness in a very narrow legal sense. The offender must also be considered We suggest that the offender should be given a greater weight than the offence in sentencing We would stress the importance of rehabilitation as a guide in sentencing and dispositions.⁴

Since the Commission stresses what the principles of sentencing and dispositions should be, it would be interesting to note certain judicial pronouncements on the subject:

(1) The fundamental purpose of sentence is the protection of society and this purpose is effected by means of the realization of the other, though less fundamental, purposes of sentence, namely, preventing repetition of the offender's unlawful act during imprisonment, deterring the offender and others from committing the same or other offences, and reforming and rehabilitating the offender. The weight to be attached to these lesser purposes or factors varies with the facts of each case, and among the considerations as to the comparative weight to be given to them are the gravity of the offence (which may be judged by the penalty provided in the Criminal Code), the question whether the crime was planned and deliberate or impulsive, the presence of mitigating circumstances, the offender's age, criminal and work records, prevalence of the crime in question in the community and the offender's attitude during trial.⁵

(2) [E]ach case must be considered on its own facts, having regard to the particulars of the offence and of the accused. General principles of punishment must always be pliable enough to accommodate a careful consideration of the effect of punishment on the individual.⁶

However, with regard to the less fundamental purposes of sentence as referred to above, the courts have not always appeared to be too consistent. In two judgments reported in the same volume on consecutive pages and rendered on consecutive days by the same bench of the Ontario Court of Appeal we find the following statements:

(1) In our view . . . the learned Judge did not properly emphasize the elements of deterrence to others who might occupy the same position and contemplate the same action as Corporal Lawrence [a member of a police force found guilty of charges of breaking and entering and theft].⁷

(2) In our view the learned trial judge erred in principle both in the way

³ Brief by the Canadian Criminology and Corrections Association to the Law Reform Commission of Canada.

⁴ *Id.* at 4.

⁵ *Regina v. Wilmott*, [1966] 2 Ont. 654, 58 D.L.R.2d 33.

⁶ *Regina v. Meneses*, (Ont.), unreported decision of Sept. 9, 1974.

⁷ *Regina v. Lawrence*, [1970] 1 Ont. 816, at 818.

he construed the particular offence here and secondly, in his undue emphasis on the element of deterrence, into which error he was led by his consideration of the prevalence of crime in the City of Toronto [accused had been convicted of charge of breaking and entering and theft].⁸

Whereas the judicial pronouncement stressed that the fundamental purpose of sentencing was "the protection of society", the Working Paper states that the fundamental purpose of sentencing is "the dignity and well-being of the individual with attention being paid not only to the interests and needs of the collectivity but to those of the offender and victim as well."⁹ It will be interesting to see how the Commission will develop this change of emphasis in its subsequent Papers.

Since sentencing is a process which is to be extended to all stages of the administration of justice, the Law Reform Commission places great emphasis on its second main topic: diversion. It stresses that provision be made for some consistent and rational means for diverting minor criminal cases, which it defines, from the court and into settlement procedures. It therefore encourages the appearance of the offender before a justice or other official to answer to a charge, face to face with his or her victim, with the purpose of acknowledging his responsibility for the alleged wrong and offering in some way to restore the wrong done. The authors suggest that serious cases would not be appropriate for diversion and, since the procedure suggested is rather sketchy, allow that a Working Paper on diversion procedures concerned with who is to make the decision to divert and on what kind of evidence, preferably in an open hearing with some record of the decision and reasons for it, should be prepared.

At first blush I must conclude that what is being offered is but a new tribunal. My main criticism is that it appears that the basic presumption of innocence disappears and that the due process of law is seriously infringed. One must not tamper lightly with the judicial process which has evolved over many centuries through the wisdom and foresight of many legislators and judges. The recent introduction of the concepts of absolute and conditional discharges, supported by the Canadian Committee on Corrections, provides new alternatives which should be assessed before diversion is enshrined as part of the criminal justice process. For it is the Commission itself which makes the very bald statement that "discretion in law enforcement tends to divert business or professional classes from the criminal courts."¹⁰ If discretion to divert became the rule, would not the danger of discrimination increase a hundredfold and would it not be preferable to reduce the exercise of discretion rather than increase it?

Some very commendable views follow the discussion on diversion: establishing a Sentencing Guide with proposed criteria, questioning the value of statutory remissions, structuring discretionary power in sentencing through

⁸ *Regina v. McKimm*, [1970] 1 Ont. 819, at 820.

⁹ LAW REFORM COMMISSION OF CANADA, *THE PRINCIPLES OF SENTENCING AND DISPOSITIONS*, WORKING PAPER 3 at 3 (1974).

¹⁰ *Id.* at 8.

legislative statements of basic policy setting forth the philosophy, the purposes, the standards and the criteria to be used in sentencing and dispositions or through sentencing seminars and sentencing councils. However, another unfounded generalization mars the paper in the topic called Supervising the Execution of the Sentence where it is stated:

Until very recently the courts and Parliament have taken the view that what happens to a prisoner within the correctional institutions is entirely a matter of administrative discretion and not an area in which the traditional rules of fairness must apply. There is now some evidence that the courts, at least, are not willing to continue to turn their backs on abuses and unfairness within the prison and parole systems.¹¹

Such statements raise serious doubts as to the objectivity of the panel which prepared the Paper.

Another very important topic discussed in the Paper concerns the involvement of the victim and of the community in the process. One of the many suggestions is that the victim have an opportunity to express a view as to the appropriate sentence. On this point, I fully support the views of the Canadian Criminology and Corrections Association noted in the above mentioned paper in the following words: "We would . . . question the direct participation of the victim in the trial . . . the participation of the victim in the trial would, we suggest, lead to resentment and recrimination."¹² However the suggestion of fair compensation to the victim, which is already being enforced in many jurisdictions through Compensation of Victims of Crimes Boards, is one that should be fully supported. On the matter of community involvement one of the propositions is that individual citizens from the community sit with the judge at the sentencing stage, although the Paper clearly states earlier that sentencing boards offer no panacea to the problems of expertise or uniformity. I would strongly urge that the sentencing process remain with the trial judge with all the checks provided by an open hearing scrutinized by a free press and appeals as of right to informed appeal tribunals. How one would choose the citizen is not explained in the Working Paper and again, as in the case of diversion, duplication of efforts could ensue.

I stressed at the outset that this is but an introductory Working Paper which does provide an indication of things to come. There are, however, sufficient statements of principle to elicit response and nurture debate. I have attempted to isolate some of those principles and to offer what I think is constructive criticism. It is up to the profession and the public at large to follow suit.

¹¹ *Id.* at 17.

¹² *Supra* note 3.