Criminal law as an instrument of social control

Hon. Mr Justice Ellis *

A review of the last 200 years will show a steady improvement in the way in which we treat convicted criminals. Currently there is, on the one hand, a cry for harsher penalties, and on the other hand, a better informed perspective that indicates that present punishment by imprisonment must and will be modified to fulfil our belief in basic human rights and dignity. This essay touches on some relevant and related considerations.

In March 1987 the Ministerial Committee of Inquiry into Violence, chaired by Sir Clinton Roper, reflected a common perception when it reported:[1]

> It must be accepted that there are some criminals who are beyond reform, some younger people who will not be amenable to change, and some parents, who will not alter their ways and will always be inadequate. For them, and particularly the habitual violent offender, the short term answer must be found. The long term answer lies in finding ways to reduce the numbers that will, in the future, resort to violence or become inadequate parents and that means identifying those at risk and providing the necessary education, community support and counselling, or other help to meet it.

By international standards we enjoy an enlightened and humane system of criminal law both in its procedure and its regime of punishments. This was recognised as recently as 1983[2] when New Zealand's Report under the International Covenant on Civil and Political Rights was presented to the Human Rights Committee of the United Nations. On reflection, however, one would expect this of a small, sparsely populated country insulated from armed conflicts, and without great disparities of poverty and wealth in its population. This article is directed to the question whether we can do better. There are several approaches to this question, the first, predictably, being from the point of view of the offender, then of the victim of crime and finally from a broader social perspective. The passage I have already quoted from the Roper Report confirms what many feel, namely that human propensity for violence has not diminished over the centuries. Personal assessments of violence differ. Some describe it in terms of qualities inherent in human makeup, a consequence of original sin if you wish. Others consider it explainable in terms of environment, upbringing and even diet. For myself, like a good agnostic, I prefer to keep the options open. What is plain however is that we must take

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1 Government Printer, Wellington, 1987, 12.

2 Ministry of Foreign Affairs "Human Rights in New Zealand" (1984) Information Bulletin No. 6.

urgent steps to reduce the opportunities for violence, for example by channelling the energy elsewhere, and deal with violent offenders and their victims in a balanced way best engineered to minimise the adverse ongoing social effects of the crime.

There is little doubt that we live in a violent society and the histories of the peoples who now live here have been violent too. For the purposes of this article it is assumed that in New Zealand there is a predisposition to violence, some perceived and real social injustices, and that we have an uncomfortably high crime rate despite our relatively small population and compact isolated geography. It is proposed to review the functioning of our criminal law as an instrument of social control, in terms of human rights and dignity starting with a short historical analysis as a useful perspective from which to view the provisions of the Crimes Act 1961, Criminal Justice Act 1985, and the Mental Health Act 1969.

By and large both Maori and European communities in New Zealand prior to 1840 recognised treason, murder, rape and assault as punishable conduct. Europeans had a highly developed sense of private property, not shared by the Maori community. Nevertheless each recognised that the possessory status quo required some protection. Sanctions for transgressions naturally varied largely reflecting the social organisation available to the community in question. In all cases however the punishments were severe by our present day standards. Fraud and dishonesty were mainly property related offences, and personal deceit was antisocial conduct of a less serious nature as far as the safety of the community was concerned.

In Great Britain in 1689 the Bill of Rights[3] recorded that prior to that date excessive fines had been imposed, and unusual and cruel punishments inflicted. An outstanding case was that of Titus Oates, the celebrated Jesuit, who was convicted of perjury (a misdemeanor inferior to felony). He was sentenced to be stripped of his canonical habits, to pay a fine of 1000 marks, to be whipped from Aldgate to Newgate and from Newgate to Tyburn by the common hangman, to be imprisoned for life, and to stand five times every year in the pillory.[4] Since the passing of the Bill of Rights it has been an outstanding feature of English law that sentences followed the law. Everyone knew what to expect as punishment for a particular crime. What is remarkable however is the severity of the punishments recognised by the law and expected by the public. By 1816[5] punishments such as to be hanged drawn and quartered, burned, hanged in chains, or branded, had been abolished. The regime of punishments in order of severity were at that time death (by hanging), transportation, whipping, pillory, imprisonment, fine, and being bound over to keep the peace. In addition attainder upon conviction for a capital offence, and forfeiture of property for conviction of treason continued to be

3 1 W & M sess. 2, c.2.

4 4 Harg. St. Tr. 104, 5-6.

5 Chitty *A Practical Treatise on the Criminal Law* (1816) (Garland Publishing, New York, 1978) Vol. 1, ch. xx.

lawful consequences in appropriate cases. Corruption of the blood[6] also was visited upon the family of the offender in certain cases of atrocity. While this list of available punishments reflects a softening of community attitudes towards offenders over the preceding century, a closer inspection of the punishments themselves in quality and quantity would revolt the modern conscience. This reflects the inability of early 19th century England to cope with its crime rate. Death or transportation actually got rid of the criminal immediately and usually for good. The other penalties except fines and forfeitures involved public expenditure and social contact of varying degrees with the criminal. Pillory was regarded as the most ignominious of all disgraceful punishments. Sometimes the death of the party exposed resulted and by a far more cruel process than the ordinary infliction of capital punishment.

Again, and as best able to be ascertained, comparable punishments prevailed within Maori communities before 1840. There was summary execution, emasculation for rape,[7] banishment, enslavement, seizure of personal possessions, and varying degrees of control achieved by social techniques such as *tapu* and *rahui*. It is not justifiable, however, to urge the similarities too far. Very different perceptions of social justice prevailed in Maori society and an extended treatment of the similarities and differences would be useful in achieving a deeper understanding of what we really require of a system of criminal law. To stimulate interest and understanding the following is a summary of the situation observed personally by Judge Maning (as he later became) in the days before 1840.[8]

> If a man thought fit to kill his own slave, it was nobody's affair but his own; the law had nothing to do with it. If he killed a man of another tribe, he had nothing to do but declare it was in revenge or retaliation for some aggression, either recent or traditional, by the other tribe, of which examples were never scarce. In this case the action became at once highly meritorious, and his whole tribe would support or defend him to the last extremity. If he, however, killed a man by accident, the slain man would be, as a matter of course, in most instances one of his ordinary companions — i.e. one of his own tribe. The accidental discharge of a gun often caused death in this way. Then, indeed, the law of *muru* had full swing, and the wholesale plunder of the criminal and family was the penalty. Murder, as the natives understood it — that is to say, the malicious destruction of a man of *the same tribe* — did not happen as frequently as might be expected; and when it did, went in most cases unpunished; the murderer in general managing to escape to some other section of the tribe where he had relations, who, as he fled to them for protection, were bound to give it, and always ready to do so; or otherwise he would stand his ground and defy all comers by means of the strength of his own family or section, who all would defend him and protect

6 Corruption of the blood means that the person is stripped of all honours and dignities, deprived of all possessions, and is unable to inherit or pass on an inheritance to heirs. So, whenever it is necessary to derive a title through such a person however distant the heir may be, the claim will be radically defective for the whole hereditable blood was tainted, flowing through a polluted channel — see Chitty, supra n.5, 740.

7 Makeriti *The Old Time Maori* (Victor Gollancz Ltd., London, 1938), 91 gives a graphic description of one of the uses of the *kotiati*.

8 Maning *Old New Zealand* . . . (Whitcombe & Tombes, Wellington, 1948) 103-104.

> him as a mere matter of course; and as the law of *utu* or lex talionis was the only one which applied in this case, and, as, unlike the law of *muru*, nothing was to be got by enforcing it but hard blows, murder in most cases went unpunished.

When the two societies were brought together it is no surprise that both accepted and required that serious antisocial conduct be dealt with by severe and direct means usually at the expense of the life or person of the offender. Naturally each system observed to a degree what can be called the prerogatives of mercy exercisable by the appropriate authority. Perceptions of criminal insanity existed in both communities. Soon after the Treaty of Waitangi it was clearly established that British criminal law would govern all residents of New Zealand without destinction. This assimilation was not without its problems.

From 1883 to 1893 there were many attempts to introduce a criminal code based on the celebrated work of Sir James Fitzjames Stephen. This was overtly to codify the Common Law and, not so overtly, to amend it.[9] In the Public Bill which left the Legislative Council in 1885 for the House of Representatives the punishments provided were death, penal servitude, imprisonment (with and without hard labour), flogging and whipping, and fine. In addition there was provision for recognisances, and police supervision. The details of the punishments are not recited here but in the House of Representatives, the Bill was described by one member as "disfigured with a species of Draconian legislation absolutely written in blood" and by another as "simply bristling with monstrous punishments."[10]

Notwithstanding such criticism the proposed code was enacted in 1893 with the deletion of penal servitude as inappropriate to the colony. However one commentator observes an overall increase in severity of punishments from Bill to Act, as many more offences carried a liability to whipping and flogging.[11] This range of punishments continued through into the Crimes Act 1908. Whipping and flogging were abolished in 1941, and imprisonment with hard labour in 1954. The death penalty is restricted to treason under the Crimes Act 1961. The supreme penalty was mandatory for murder until 1941 and then again from 1950 until 1961. This summary is not intended to be exhaustive, but to show an obvious and steady movement away from what we would now abjure, in terms of the 1689 Bill of Rights, as cruel punishments. Even more noteworthy is the gradual restriction of severe penalties to what have always been considered the most serious crimes, which now include crimes involving the misuse of drugs.

To complement this mollification has been the gradual development of more caring and socially cohesive treatment of offenders. The present range of sentencing options is provided by the Criminal Justice Act 1985 and in addition to imprisonment and fine

9 See White "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 V.U.W.L.R. 353.

10 Ibid., 372.

11 Ibid., 373.

includes corrective training, periodic detention, supervision, reparation, community service and community care. For completeness there are also conditional or absolute discharges and suspended sentences.[12] In the context of an historical perspective one interesting comparison is suggested. For many centuries in England those able to read could, when accused of a crime, plead the benefit of clergy and thus evade the rigour of the Common Law. The church then took over the proceedings and in general terms exercised a jurisdiction more directly concerned with reformation and repentance than punishment.[13] This dualism in the application of the criminal law is still very much alive and indeed is an essential part of our own system today.

It is natural to be attracted to the proposition that there has been a steady progression away from severe punishments over the last two centuries. Coupled with this is an increased awareness that harsh punishments, including capital sentences, do not deter would-be offenders. One would expect that there must be some restraining influence in any regime of punishment but this view does not seem to be strongly felt by those disposed to serious and violent crime. Even more certain is that punishment in itself does not reform criminals. While training within prison may be beneficial, the prison environment overall has a detrimental effect on the prisoner. Two things on the other hand appear certain enough. Sentences of imprisonment are a punishment and they preclude the prisoner from offending at least in the outside world.[14] What then is on the horizon for the sentence of imprisonment? The answer will naturally involve both Parliament and the courts and it is convenient to refer to detention before trial, the sentence of detention, and the disposition of the sentence.

I have already referred to the 1689 Bill of Rights in force in New Zealand. It provides expressly that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[15] This simple and powerful sentence immediately highlights the two aspects of detention, imprisonment before conviction and imprisonment afterwards.

Bail involves the liberty of the subject. Once a suspect is arrested he or she must be promptly brought before a court. Bail is then considered. In most cases bail will be granted whether as of right or discretion. If bail is opposed, however, the practical response may be difficult to formulate in terms of principle. In 1982 the Criminal Law Reform Committee[16] had little difficulty in agreeing that the central provision of the proposed codification of the law on bail should be a presumption in favour of bail, a natural reflection of that golden thread, the presumption of innocence. There can be no doubt that the presumption must on occasion yield to the practical consideration of such

12 See Justice Department *Sentencing Under the Criminal Justice Act 1985* (1986) Study Series 19.

13 Hamilton *All Jangle and Riot* (1986) 42; Chitty, supra n.5, 667 et seq.

14 To any general rule there is always an exception. A case has arisen where a series of successful forgeries were made on a prison typewriter and promulgated by post.

15 Supra n.3.

16 *Report on Bail,* (Justice Department, Wellington, 1982).

matters as the suspect's propensity to reoffend, intimidate witnesses and, or course, abscond. An important and topical consideration is the court's power to impose conditions on bail, and require sureties. Conditions such as reporting regularly to the police or surrendering a passport are sensible and practical. However sureties can be a powerful influence in disputed bail applications. Bondsmen to ensure that a citizen keeps the peace are of ancient standing. They are often required as a condition of bail. The injunction in the Bill of Rights against excessive bail is directed to the sums or bonds a prisoner must put up. A poor person or a stranger to the community is plainly at a disadvantage. When considering bonds and sureties, it is worth observing that in New Zealand "cash up front" is not required. Promises to pay on default alone are sufficient. It is also true that action is seldom taken to estreat bonds on default. The absconder's bond is often valueless and there is a reluctance to pursue the sureties.

It may not be controversial to suggest that it would usually be oppressive to require a person seeking bail to put cash up or to require sureties to do likewise, but it is essential to the proper working of the law that cases of failure to answer bail should result in estreat proceedings. Relief from estreat is of course available to meet the justice of each situation. This might be seen to operate against an accused person because sureties would be harder to find, but, it is suggested that this would be unlikely. Nevertheless a wide range of conditions should be considered by the court when considering bail and all reasonable steps should be taken to ensure that wherever possible a suspect will be released on bail. Again conditions should not be excessive any more than the amount of bonds. The law of bail directly affects the liberty of citizens. It is also an area of the law where there is potential conflict between the requirements of police efficiency in detecting and controlling crime, and the proper concern for the liberty of the citizen.

Another topical and important area of pretrial detention is the police interview. While a person may not be under actual arrest when interviewed, there is a hollow ring in the police declaration that the suspect was free at any time to walk out of the interview room or ring a solicitor. All judges, lawyers and police are familiar with complaints of unfair, oppressive and even violent treatment of suspects in the interview situation. Professor Dershowitz has formulated a set of rules for the American experience on the topic. The leading rule is "it is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution."[17] To naturalise the quotation, for "Constitution" read "the Judges' Rules and section 20 of the Evidence Act 1908." While the voluntariness of confessions is often challenged at trial, not many challenges are upheld. It is not suggested here that this involves a suppression by the courts of justifiable complaints. It is rather a reflection on the quality of the police force. Concern does arise, however, over the nature of the allegations and the present methods of investigating them.

17 *The Best Defence* (Vintage Books, 1983) quoted in a recent Wellington District Law Society luncheon address.

What transpires at interviews transpires in private. Any account of it is a polarised one with the police officer on the one hand and the suspect on the other. For this reason the recording of interviews on closed circuit television should be made where possible. This would not necessarily mean that the whole interview would be replayed at trial, but that the videotape would always be available if the police or accused put the facts of the interview in issue. Anyone with any experience in the topic will know what powerful questioning techniques there are available to interrogate suspects and that many are entirely proper and useful. In most cases, however, the interview is an uneven match. The police have everything to gain and the suspect often has everything to lose. The recording of interviews on videotape is not a one sided advance. It would be a safeguard against unfair and oppressive police conduct. It would, however, be a powerful piece of evidence against an accused in many cases, as the interrogator's notes or written statement seldom capture the meaningful gestures or body language often observed in an otherwise unresponsive or inarticulate suspect. Most important of all is the resulting public confidence in police procedures so exposed in explicit form.

Of all aspects of pretrial procedures, and there are several other important ones now being considered, the interview is particularly important when the liberty of the subject is in issue. It is at the interview stage that allegations of torture abound in troubled countries. It is not surprising that Sir Robin Cooke took torture as an example when he said "I do not think that the literal compulsion by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them."[18] It is not even remotely likely, however, that torture would seek or find legitimacy in the statute book for the very reasons just quoted. In most if not all countries where torture of suspects is practised there exist impeccable constitutional provisions and Bills of Rights. It is in the private practice of the interrogator that it occurs. As indicated, there are many intellectual and physical devices short of torture that are used by all interrogators. As also indicated we are lucky in New Zealand in having a police force of the highest quality. This is all the greater reason for exposing interviews to the television camera for proper scrutiny on a later occasion. Any consideration of the interview situation must also involve a review of the right to silence and the right to counsel, memorably known as the *Miranda* principle[19] in the United States. They are not central to this discussion, however, and are mentioned only to allay fears that their importance might have been overlooked.

The second aspect of detention is the sentence of imprisonment upon conviction. In New Zealand this can be in several forms, namely life imprisonment, preventive detention, imprisonment for a term of years, corrective training, and periodic detention. Only full time custodial sentences will be considered. They can be served in a range of institutions ranging from maximum to minimum security. The standard of accom-

18 *Taylor* v. *New Zealand Poultry Board* [1984] 1 N.Z.I.R. 394 and see Joseph "Literal Compulsion and Fundamental Rights" [1987] N.Z.L.J. 102.

19 *Miranda* v. *Arizona* 384 U.S. 436 (1966).

modation will vary according to the facilities available and the numerical demands of the prison population. There is no doubt that imprisonment can be extremely stressful even to the extent of prompting suicide and murder. It is likely that if a sympathetic survey were done by psychiatrists and psychologists it would reveal a sorry amalgam of what in the outside world would be called suffering and sickness. That would be no surprise. Most of us would agree that prisons are not designed to be pleasant places to be in. Others would say that Her Majesty's free accommodation has never been of a higher standard. Such matters have traditionally been matters for political action and agitation by, for example, the Howard League for Penal Reform in England. The modern aim in New Zealand was captured by Sir Robert Stout in 1918 when he said:[20]

> Prisoners . . . need educating; they need discipline; they need industrial training; but they are human beings, and we must give them hope, and their lives should be made pleasant so long as discipline and training are not neglected.

While the quality of freedom and justice is so often discovered in the analysis of procedure, there can be no doubt that the overall health of a community or a nation can be assessed by considering its treatment of its disadvantaged, including its offenders against the criminal law. While it may be a simplistic index, it cannot be denied that how a society copes or fails to cope with its violent and antisocial elements does give a penetrating insight. This leads to the second part of the quotation from the 1689 statute prohibiting cruel and unusual punishments.

Until relatively recently it does not appear that the Common Law courts have been asked to examine any real or apparent conflict between the Bill of Rights and any of our criminal sanctions. Since the passing of the Canadian Bill of Rights there have been several Canadian decisions on the equivalent provision, and there have been decisions elsewhere, especially in the United States.[21] Whether a court is considering capital punishment or imprisonment it seems clear that the concepts of cruelty and unusualness will not be viewed disjunctively but as "interacting expressions".[22] Courts may well on the one hand accept capital punishment as neither cruel nor unusual, but be prepared to hold delay in execution as offending against the provision. Again imprisonment or even solitary confinement may survive scrutiny, but there will be limits beyond which the executive or legislature will not be permitted to go.[23]

It is interesting to observe that the relevant proposal in the Bill of Rights for New Zealand is in wider terms than the 1689 law. The proposal is that: "Everyone has the right not to be subjected to torture or to cruel or disproportionately severe treatment or

20 Sir Robert Stout *Prisons and Prisoners* (Wellington, 1918) quoted by Sir John Barry *The Courts and Criminal Punishments* (Government Printer, Wellington, 1969) 79.

21 There is a succinct summary in Hogg *Constitutional Law of Canada* (2nd. ed., Carswell Ltd., Toronto, 1985) 778-781.

22 *R* v. *Miller and Cockreill* (1976) 70 D.L.R. (3rd) 324 per Laskin C.J.C.

23 For a discussion of prison conditions in this context see *McCann* v. *The Queen* (1975) 68 D.L.R. (3rd) 661 and *Williams* v. *Home Office* [1981] 1 All E.R. 1213.

punishment."[24] This makes explicit what may already be inferred from the words cruel and unusual but it raises some further important questions. The provision is in the form of a grant of a personal right rather than a prohibition alone. Does this carry with it a right to damages for infringement?[25] The word cruel is treated disjunctively from disproportionately severe treatment or punishment. Does this mean cruelty alone would be a test? The treatment or punishment is to be proportionate, no doubt to the crime. Must it be proportionate to the criminality? Would it also serve to strike down the mandatory penalties at present in force for murder and treason? Would it also strike down indeterminate sentences such as preventive detention, or detention under the Mental Health Act 1969? These questions are not intended to be critical. The writer is in favour of a Bill of Rights and an injunction against cruel *or* unusual punishments. Also the questions have already been answered elsewhere, at least in part, for example in the neglected report *Culpable Homicide* on the question of mandatory life sentences for murder[26] and the rarity of the sentence of preventive detention. Nevertheless strong opinions exist on the possible answers to these questions and the involvement of the courts in their resolution.

It was noted earlier that the impact of our present range of criminal penalties involves interaction between Parliament and the courts. Public opinion, if it is not confused with public clamour, should also play a part. Hitherto in this area all great reforms have been achieved by Parliament. Nevertheless there are two important areas of intervention by the courts. The first is in the rare occasion when the impact of the Bill of Rights will arise. The second is in the day to day sentencing of offenders. This raises directly the vexed question of judicial discretion in sentencing. There can be no doubt that from the point of view of the victim and the public this is the part of the criminal process that can be the most difficult to follow. The victim and the public seldom, if ever, have the full facts. Again a brief historical reflection puts the problem in perspective. The English Common Law prescribed penalties. The judge would sit with the jury which would decide guilt or innocence and the judge would pronounce the penalty prescribed by law. Sentence was largely determined by the verdict, and discretion was in the mercy of the Crown. The position in 1816 is summarised by Chitty thus:[27]

> The king by his coronation oath is bound to exercise justice in mercy. But nothing can tend more to unsettle the public ideas of crime than the frequent exercise of the latter. It is contended with great eloquence and ability by a celebrated writer on criminal law, that the clemency should shine forth in the laws, and not in the executive. But it must still be admitted that there are many cases to which no general rules can apply; where 'summum jus' would be 'summa injuria,' and where foregiveness is, at once, beneficial to the crown which bestows, and just to the party who receives it.

24 *A Bill of Rights for New Zealand,* White Paper, (Government Printer, Wellington, 1985) clause 20 of draft Bill, and paras 10.162-163.

25 Ibid., clause 25, paras 10.184-190.

26 New Zealand Criminal Law Reform Committee, (Justice Department, Wellington, 1976) recommendation 2(b).

27 Chitty, supra n.5, 769.

Thereafter more and more discretion was given to the sentencing judge until the present position where, with one or two exceptions, maximum penalties only are prescribed. In each case therefore the judge has a wide range of sentencing options ranging down from the maximum to an absolute discharge. There are, however, several important guidelines. Convictions for serious drug offences and violent crime against the person are to be visited with a term of imprisonment unless there are special circumstances which require an exception; and persons under sixteen years are not to be imprisoned as a general rule. Preventive detention is now reserved for inveterate sexual offenders. The appellate courts too exercise a measure of control over the levels of sentencing, but still the range and flexibility of sentencing options is great.

The regime is now greatly different from the times when the great boast of the Common Law was that anyone convicted of a particular crime would receive the same punishment whoever he or she may be. That can no longer be said. What can be said is that each will receive the same consideration. One cannot escape the pattern many cases follow. Although a judge is unlikely to say so in sentencing the rehearsal would be an address to the offender in the following words, "You were disadvantaged at birth, you were disadvantaged in your upbringing, you were disadvantaged at school, you were disadvantaged in the workplace, you have an unenviable record of offending, all I can do is disadvantage you further by sending you to prison." Not all situations are so bleak and much judicial time and effort is spent to tailor a particular sentence to the particular offence and the particular offender. What can be said of the sentencing practice in New Zealand is that by comparison with many other countries penalties are lower. That is a product of the prevailing legislation and a history of social development that has conditioned most of us including the judges to impose the least rigorous penalty possible in the circumstances, consistent with the perceived requirements of punishment and protection of the public. So the modern position is vastly different from when verdict fixed punishment. It has led to uncertainties and to public cries that the judges are soft.[28] It encourages elegant footwork by politicians to negotiate at the same time the old paths formerly trodden by the Common Law and the church. In short modern sentencing practice is a complex exercise in balancing the competing social and personal requirements of each case.

Other ways of approaching the problem have been tried. For example in some jurisdictions the jury advises the judge on penalty. Sentencing is perhaps the most burdensome of a judge's duties and it would be preferable if the community could be better informed in a way that would not destroy the benefits of privacy in dealing with an offender's personal life, history, and hopes. The beneficial effects and importance of such recently formed agencies as Matua Whangai,[29] involving communities in pre-sentence consultation, cannot be overemphasised.

28 It is interesting to observe the range of personal attitudes of the judges surveyed in Justice Department, *Attitudinal Assessment of New Zealand Judiciary About Sentencing and Penal Policy,* (unpublished, Justice Department, 1982).

29 See Departments of Justice, Social Welfare, and Maori Affairs, *Matua Whangai Policy Document,* 1986.

The third aspect of custodial sentencing is the executive one. There are two ways in which clemency can shine forth in the executive.[30] The first is the royal prerogative of mercy to grant a pardon. The second is review by the Parole Board. For serious offences the royal pardon and the grant of immunity from prosecution are still the only way for the executive to intervene. The competing interests in the grant of a pardon, or immunity for turning Queen's evidence were also summarised by Chitty:[31]

> The law confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate.

Those considerations are still true today, and pardons or immunities are rarely granted, and if granted usually receive close public scrutiny after the event. Similarly pardons being belated exculpations are rare. The procedures involve a full and careful review by a suitable officer of the Justice Department, sometimes a review by the Court of Appeal,[32] even a Royal Commission[33] and anxious consideration by the Attorney-General and Cabinet. An interesting example of this is the case of *Mareo*[34] convicted of murdering his wife by veronal poisoning in 1936. The conviction was the subject of three successive petitions to Parliament in 1942, 1943 and 1944. The late H. G. R. Mason Q.C. told me that this case was the most worrying matter he encountered in all his long periods as Attorney-General.

Prison sentences are reviewed by the Parole Board and District Prison Boards. In simplest terms a prisoner becomes eligible for parole after half the sentence has been served or seven years in the case of life imprisonment and preventive detention.[35] Each case is reviewed on its merits and the prisoner's prospects on release are considered. Each is encouraged to obtain parole although quite naturally some are more likely to respond than others. Obviously the longer a prisoner spends in gaol, the more difficult rehabilitation becomes.[36] The result is, however, that the actual term of imprisonment is determined by two separate agencies whose considerations overlap sometimes to a large extent. The sentencing judge will consider the competing interests for punishment, rehabilitation and prevention of reoffending. The Board will be more concerned with

30 The expression is borrowed from Chitty, supra n.5.

31 Supra n.5, 769.

32 *Wickliffe* (1986) unreported, C.A. 104/86.

33 E.g. *Royal Commission to enquire into the convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Leonore Crewe* (1980).

34 [1946] N.Z.L.R. 294; and see *Mareo* (No. 2) [1946] N.Z.L.R. 297, and *Mareo* (No. 3) [1946] N.Z.L.R. 660.

35 Criminal Justice Act 1985, s.93 (but see Violent Offences Bill (No. 2) 1987).

36 E.g. *Secretary of Justice* v. *Bremner* (1986) unreported, High Court Wellington, M.220/86, — an application to recall Bremner from parole. Bremner formerly known as Gillies had been convicted of murdering a policeman in 1964 and had been released on parole in 1976 and again in 1984. The case highlights the difficulty faced when long term prisoners try to re-enter society.

the safety of the public and the welfare of the offender although the nature of the offence must have a bearing. In particular it will be astute to notice any change in the attitude of the offender during the part of the sentence already served.[37] An important difference will usually be that while the sentencing judge will have a probation officer's report and some supporting material perhaps of a medical or social nature, the Board will have much more comprehensive reports especially from those who have an initimate knowledge of the prisoner albeit in prison.

Any treatment of the detention of those suspected or convicted of crimes would not be complete without reference to part VII of the Criminal Justice Act 1985 and the Mental Health Act 1969. This is an important and difficult topic and there are several unsatisfactory aspects of present procedures that affect the liberty and human rights of the person detained. Where a person is charged with a serious crime, and is so mentally disordered that he or she is unable to plead or understand the nature or purpose of the proceedings or to communicate adequately with counsel for the purposes of conducting a defence, or where a person is acquitted of such a charge on the grounds of insanity, he or she may, depending on all the circumstances, either be detained in a hospital as a special patient or a committed patient under the Mental Health Act 1969, or be released immediately. In fact many convicted criminals suffer from more or less serious mental disorders and can receive treatment for such while in prison. This is not the occasion to address the practical difficulties that at present exist but it is understood that they are serious in terms of shortages of facilities and staff.

There is however a deepseated problem in the basic perception of what is a mental disorder both in terms of the Mental Health Act and in terms of the Crimes Act 1961, namely the well known test in the *McNaughten* rules.[38] Medical opinion is not always consistent in a particular case, and in any event it is an area of science and art that is full of uncertainties. While understanding of mental disorder has greatly increased over the last 150 years it is quite understandably imprecise in many cases. For example a reference to the "Maori sickness" can be baffling to doctors and lawyers alike. At least one recent case has shown that a person who was considered mentally disordered ten years ago, is considered today to have been merely of the lower level of average intelligence, and so not now mentally disordered.

More difficult still is the case of a person suspected of being mentally disordered and where all social agencies are of the same opinion. Defence counsel, and a suspect's family may jump at the suggestion of pleading mental disorder as a good idea to avoid a criminal conviction. No one speaks for the suspect's sanity with the result that an indeterminate period of confinement may result.[39] There is an increasing tendency to equate mental disorder with lack of criminality, and that has dangers from the point of

37 Criminal Justice Act 1985, s.96.

38 Crimes Act 1961, s.23 and *McNaughten's* Case (1843) 3 St. Tr. N.5 847.

39 For some discussions see Mullen, "Mental Health: A Case for Reform", 1986, Legal Research Foundation, 121.

view of the accused. There is no doubt that the dilemma of the mentally disordered offender can be acute, as can the dilemma faced by social agencies dealing with the situation.[40] The concern in this article is to highlight the possibility of an indeterminate detention of a suspect or offender that can result from a determination that he or she is mentally disordered or criminally insane. Other aspects of the topic of mental disorder cannot be dealt with properly in the present short compass.

With regard to consideration of the treatment of victims by the criminal law in New Zealand it is suggested that a proper approach to those needs has been lacking in our present system. The Criminal Justice Act 1985 provides for payment of up to one half the fine imposed to the victim of an offence occasioning physical harm[41] and for reparation to be ordered in cases involving property damage.[42] The civil jurisdiction of our courts also provides for the recovery for damages. We should, however, consider some greater response to crime that leaves the wrongdoer punished but feeling that he or she has paid for the crime not in suffering but by reparation. The corresponding entry in the social accounts will be the feeling by the victim not so much that the wrong has been revenged but that meaningful and useful compensation has been received. In this context most custodial sentences (periodic detention expressly excluded) do not fulfil such objects. There is a poignant quotation from Sir James Fitzjames Stephen himself in two separate essays written eighty years apart — the earlier by Justice Oliver Wendell Holmes[43] and the later by Professor H. L. A. Hart.[44] It is "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."[45] I do not intend to be diverted by this comparison, beyond drawing it to my readers' attention. The hope is, however, that our social progress involves a diminution of the "passion for revenge" and "man's inhumanity to man".

The best way of furthering such progress is for some worthwhile recompense to be provided by the offender to the victim which includes all those adversely affected by the crime. This does not mean doing away with custodial sentences, and substantial measures of compulsion, but it would mean a more human face in the treatment of both offender and victim. Substantial work has already been done for example in the compehensive report of Justice in 1962[46] the submissions of the Justice Department to the Roper Committee.[47] This should involve our best efforts, notwithstanding the

40 For such a case see the decision in *Batt* (1987) unreported, CA 309/86.

41 Section 28 (but see Violent Offences Bill (No. 2) 1987).

42 Section 22.

43 *The Common Law* (MacMillan, London, 1882), 41.

44 *Law Liberty and Morality* (Oxford University Press, London, 1963), 64.

45 *General View of the Criminal Law of England* (2nd. ed., MacMillan, London, 1890) 99 and *A History of the Criminal Law of England* (MacMillan, London, 1883) Vol. II, 81-82. The reference by Hart is in slightly different words.

46 Justice: The British Section of the International Commission of Jurists, *Compensation for Victims of Crimes of Violence,* 1962.

47 Submissions to the Committee of Inquiry into Violence, by the Justice Department, November 1986, section 5.

patent difficulties in achieving some degree of reconciliation and satisfaction between the offender and the victim. As a secondary but perhaps overall more important consideration, it should involve an increased public awareness of the problems involved and increased participation in the process. Just as banishment, slavery, and transportation have been recognised as unacceptable we should recognise that imprisonment too can be just another method of sidelining the problem.

Human rights and dignity are at the heart of the criminal law. This essay may have given undue emphasis to certain matters at the expense of more important issues. It is admitted that a much fuller treatment of the position of the mentally disordered and of the victims of offences would give it more balance. Be that as it may it is hoped that the opinions and questions ventured will stimulate some response and that that will be in favour of what we all perceive to be human rights and dignity.

ADDENDUM

After this essay was written substantial legislation has been introduced and enacted dealing with violent offending as too has the Victims of Offences Act 1987. In addition the report of the Evidence Law Reform Committee on confessions has been published recommending that immediate consideration be given to audio-visual taping of police interviews. The reader must therefore bear in mind that the position referred to is before those events.