Leopold Greenberg Memorial Lecture

The Re-direction of Criminal Justice — Protection through Prevention of Crime and the Treatment of Offenders

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Introduction:

I have a few introductory comments to make.

First of all to thank those associated with the Institute for bestowing the honour upon me to deliver a lecture in memory of Mr. Justice Leopold Greenberg.

Secondly, to record on this occasion a few facts about the distinguished South African whose memory we honour tonight. (See Addendum annexed).

Thirdly, to say something about the role and the position of the Judge in South Africa. The South African constitutional system has — in broad terms — been cast in the Westminster mould. The Judges are appointed from the independent Bar (in contrast with Magistrates who are civil servants), they are appointed for life, can only be removed upon impeachment by resolution of both Houses of Parliament sitting together, and exercise their functions independently of the other branches of Government. Bearing in mind the fact that the precept is a Westminster one, constitutional lawyers amongst you will appreciate that the South African Supreme Court is not concerned with the propriety of legislation which it is obliged to interpret or with the policy of the legislature. Provided the provisions of an Act of Parliament are clear, the duty of the Courts is to administer and interpret the law as they find it.[1]

Finally, by way of introduction to our subject for discussion, let me say that all over the world countries have found that their Criminal Justice Systems require constant vigilant scrutiny and reform. This is not always adequately appreciated, even by those who fashion penal policy. I question whether the Legislature, the Courts and those involved in Corrections, have an adequate appreciation of the profound impact the criminal law has upon the tone and contentment of those whose lives are affected by its provisions. The responsibility of those who make the law and those who administer it is, of course, rendered even more awesome where the subjects in respect of whom it is made and applied have in the main no part in the processes of enactment or enforcement, either of the law or the sanctions which sustain it.

It is the duty of all those of us who are concerned with

Criminal Justice to see to it that it operates with scrupulous fairness in respect of every citizen whose life is affected by it. There is, in particular, an urgent need for those involved with the law to bridge the gap between justice, as we expound the theory upon the professional podium, and the reality of its application in the police precinct, the often squalid courtroom and the perhaps oppressive prison.

Each and every discipline concerned with the system of Criminal Justice has its role to play. Re-direction of criminal justice is not the task only of the politician with legal training. From the frontline soldier — the police officer who is in daily contact with the reality of crime — to the professor of criminal jurisprudence who instills respect for justice in his pupils, to every judicial officer as well as those who practice the criminal law before him — we all have a contribution to make towards securing a common objective. This is in a civilized community, the achievement of participation in, respect for and compliance with criminal justice; respect and participation because it provides equal justice for all and ensures long-term tranquillity and stability in the society it rules.

Anacharsis said cynically:

"The laws are like cobwebs: where the small flies
are caught, and the great break through".

Plato saw justice as the advantage of the stronger. Is it not perhaps because these indictments have so much truth and validity that we have failed in our quest for "law and order"?

It is my hope that this lecture may make some contribution towards an appreciation of the need for a re-direction of criminal justice so that it can stimulate the respect of all those who are governed by its terms.

I will divide our discussion into three chapters.

A. Re-direction of Criminal Justice.

B. Prevention of Crime.

C. Treatment of Offenders.

A. **Re-direction of Criminal Justice:**

Let us define what we include in the system of Criminal Justice. I will, for present purposes, accept that the initiation of the system occurs when a crime is committed. It does not terminate, as is so often thought, when the offender has been convicted and sentenced, but continues to operate through the process of the correction of the offender — whether in a community or an institutionalised setting — until he is resocialized and re-integrated into

the community as a law-abiding citizen.

This description of Criminal Justice enjoys support from the highest political and judicial level. Thus the Hon. *John Turner*, Minister of Justice of Canada, in an address to the John Howard Society in Ottowa on February 24th, 1971 said:

> "It is no longer sufficient for us to think of Criminal Justice and penal rehabilitation as a series of connected events. We must see it . . . as a total system. We must work to achieve clearly enunciated goals that work for the entire System . . . 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".

The Chief Justice of the United States of America, Chief Justice *Warren E. Burger*, in an address to the Association of the Bar of the City of New York on February 17th, 1970, expressed similar views when he stated:

> "I hope we can change our thinking to see criminal justice as including the entire process from the detection of the crime, apprehension of the culprit, determination of his guilt, through the process of sending him back into society . . . "

In introducing the subject I have stressed the need for a rational system of justice. If it is weak, arbitrary or capricious, order and eventually survival is jeopardised. If it is harsh or stiflingly oppressive, it can inhibit growth and development; moreover, it can give rise to disaffection, unrest and even revolt.

Herbert Wechsler in "The Challenge of a Model Penal Code" (1952) 65 Harvard Law Review 1097 at 1098 spells out the importance of these factors when he says:

> "Its (the penal law's) promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual."

This then is what the system comprehends; this is its importance in society. Its objectives are order, stability and tranquillity. What do we mean by re-direction?

In order to define a new course, let us look at the direction in which the system has moved in the past; let us see the emphasis which those involved in the operation of criminal justice have

given to it and let us examine its achievements.

In an article in the International Review of Criminal Policy (27) 1969 p. 9, under the title: "Public participation in the administration of Criminal Justice", *Severin-Carlos Versele*[2] says:

"In the course of its development, the administration of criminal justice became divorced from the people and entered an abstract realm where it was eventually forgotten that criminal justice is called upon to serve man and is subject to certain demands of society . . .

A whole set of historical influences, philosophical prejudices, economic privileges and dogmatic legal attitudes have brought criminal justice to a state of veritable social schizophrenia. Standards which are scientifically erroneous and socially outmoded are still being applied in a ritualized framework by people who are remote from real life."

It is perhaps advisable to note that the author records, in the introduction to his article, that he has been performing judicial duties for over a quarter of a century and that this "is likely to have an unconscious influence on certain of his attitudes or judgments!"

In a lecture delivered to the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Mr. *Manuel López-Rey*, Professor of Criminal Law and Criminology, Institute of Criminology, Cambridge University, said:

". . . the contemporary criminal justice machinery, rather than inspiring respect and understanding, is a contributory factor to crime, as well as an expression of socio-political injustice".

An even harsher judgment on Criminal Justice is handed down by *Karl Menninger*[3] in his work "The Crime of Punishment". He says on pp. 10 - 11:

"It does not advance a solution to use the word justice. It is a subjective emotional word. Every litigant thinks that Justice demands a decision in his favour.

I propose to demonstrate the paradox that much of the laborious effort made in the noble name of justice results in its very opposite. The concept is so vague, so distorted in its applications, so hypocritical, and usually so irrelevant that it offers no help in the solution of the crime problem which it exists to combat but results in its exact opposite — injustice . ."

He continues along these lines at p. 15 where he says:

"Unhappily, then, we must recognize that, in practice, justice does not mean fairness to all parties. To some people the law is an inexorable, inscrutable Sinai — the highest virtue is to

submit unquestionably. But to others, law and the principle of justice should, as Cahn wrote, 'embody the plasticity and reasonableness that Aristotle praised in his famous description of equity. He said:

'Equity bids us to be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his intentions, nor this or that detail so much as the whole story; to ask not what a man is now but what he has always or usually been. It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force.' "

The criticism levelled by *Menninger* is sweeping and is perhaps even intemperate. I cite the learned author and the other writers I have mentioned to indicate how jaundiced a view of justice can be taken by those who stand close to the system and have viewed its operations with some objectivity.

However, despite all our protestations to the contrary, criminal justice has been and still is retributive in its approach and vengeful in its demands. The dividends have, in view of this sterile, often bitter and destructive motivation, not been therapeutic nor truly protective. Whilst I certainly do not contend that punitive measures have no or little deterrent effect upon anti-social conduct, the overriding emphasis upon retribution and deterrence has tended to colour judicial and political thinking to such a marked extent that it has obscured the true objectives which justice seeks to attain. The world-wide increase in crime does not — to any perceptable degree — seem to have been diminished or abated by the creation of statutory control measures or the exactment of unduly severe, or harsh penalties. I would not like it to be thought that I was making my contribution to the often misinformed and intemperate criticism of South Africa. However, my experience is principally confined to the operation of criminal justice within this country. I think it would therefore be facile for me to ignore our own flirtation with compulsory corporal punishment, the extension of the ambit of the death penalty, compulsory, mandatory, prison sentences and other penal restraints.[4] Facile, because we did in time, to some degree, discover that, what we were seeking — i.e. a law-abiding community—was not to be found to any significant extent in punishment alone.[5] Our own dividends have been disheartening.[6]

The South African experience is cited advisedly. It is an experience shared by many a nation which has found that a prison population explosion and a spiralling correctional cost structure are the principal tangible fruits of their punitive zeal. What is forfeited in the unnecessary and avoidable affront to human dignity is not capable of measurement.

Whilst I have not been able to assimilate the true import of the so-called "new social defence theory" with its emphasis upon "preventative action and social therapy",[7] I do accept the need for a new emphasis in Criminal Justice; an emphasis upon the redirection of resources, both financial and human resources, towards research, rehabilitation and prevention rather than towards retribution and punishment *per se*. I believe that a synthesis is possible between the protection of society and respect for the dignity of man. I would espouse the cause that:

> " . . . the notion of penal reform should be extended so as to allow for the inclusion of measures the primary aim of which is humanitarian, i.e. the provision of whatever control the penal system can achieve with the minimum of suffering to the offender and those connected with him."[8]

For these reasons I conclude that it is imperative that the sterile punitive attitudes of those who frame and apply the law must yield to a therapeutic preventative approach; an approach which accepts with Mr. Justice *Brennan* that:

> "The State even as it punishes must treat its members with respect for their intrinsic worth as human beings. A punishment is cruel and unusual, therefore, if it does not comport with human dignity."[9]

This is an approach which recognises in full and realistic measure the need for protection through containment — even, with the limitations inherent in our imperfect knowledge of man and mankind, lengthy and perhaps indefinite containment of the offender, but directs its dedicated attention towards the prevention of crime, rehabilitation of the offender and the involvement of the community in preventative measures and rehabilitative processes.

I emphasise that I envisage as a necessary incidental of this re-direction the retention in full measure of the traditional processes of criminal justice and the sanctions which sustain them. At the same time, however, I foresee an intensification and extension of community orientated treatment methods, crime preventative endeavours, the specialised treatment of offenders, as well as the extension and strengthening of aftercare services and parole structures.

B. **Prevention of Crime:**

It is an impossible task to traverse every aspect of this subject in a brief survey. I have merely selected a few aspects of crime prevention which have struck me as significant in the course of my duties. Moreover the particular problems of the S.A. scene have affected the selection of subjects included under this sub-title.

I would first of all and as a general comment emphasise the need to strengthen police protection as a crime preventative exercise. This can be done by a variety of methods but more particularly by improving conditions of service and by providing our police forces with the modern scientific aids so necessary to secure us against the rising tide of crime.

(i) **Decriminalization:**

Some may question the inclusion of this topic under the heading of crime prevention. In my view any action which reduces the conflict between State and subject in the area of criminal justice diminishes crime. Moreover, the inappropriate use of criminal justice for purposes for which it is ill-suited and in situations it distorts, can well be criminogenic. This is so particularly insofar as it involves the offender, exposing him as it so often does, to the undesirable aspects of the operation of the criminal justice system. This can cause resentment, at worst, and a loss of respect at best. The attempts made by my own country over many decades to control the urbanization of its Black people through the system of criminal justice have been highly controversial and have considerable socio-political significance. In view of what is stated above concerning the position of the South African Judge I must decline to comment on the laws themselves. It is, I think, beyond dispute that this legislation has been the cause of substantial disaffection of a general nature and has led to some disrespect for the processes of criminal justice. It is important to record that administrative measures are presently being employed and investigations are being undertaken to attempt to reduce the large number of prosecutions under the provisions of the laws controlling the influx of Blacks into urban areas. Whilst the creation of Bantu aid centres — as these administrative aids are called — cannot be considered decriminalization in the true sense, it is an attempt by way of administrative measures to limit the incidence of conflict between citizen and State in an area concerned with the freedom of movement of the individual and does to some extent de-penalize the enactments.

A similar experiment has been embarked upon in respect of

the offence of public drunkenness. Again the experiment is not decriminalization in the true sense. The process of criminal justice is initiated — i.e. the offender is arrested and incarcerated — but the process is terminated — in this event when he has sobered up — by his release before he is funnelled through the Courts into the mainstream of criminal justice. This process will, I hope, as the remedial social and medical aids are provided, lead to the creation of detoxification centres in the true sense of the word; i.e. will enable the alcoholic to be identified and treated and also provide the necessary social supports for those who require them. The impact of a development of this kind would be substantial because in the most recent statistical year (1972), no less than 135 798 prosecutions were initiated for contraventions of the legislation prohibiting public drunkenness. (The previous two years reflected the following number of prosecutions for public drunkenness: 1970 — 129 730; 1971 — 132 053. In 1968 drunkenness accounted for 51% of the convictions of Coloureds; 25% of Bantu convictions; 19% of White convictions and 10% of the convictions of Asiatics).

The dangers of the creation of crime is put most strikingly by the Report of the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders at p. 8, under item 74, where it says:

> "The Congress considered also the matter of the 'creation' of crime, or the inducement of crime-generating conditions by the inappropriate use of criminal justice for purposes for which it was ill-suited and in situations it frequently distorted. It could well be that social change brought problems of division and inadaptability which must be dealt with, but which could not be solved by law. *The readiness of many societies to seek refuge in penal legislation before considering other legal and, perhaps, more practical social outlets and administrative solutions could increase the crimes reported.* That increase might then appear to be a result of development but, in reality, it would be an unwarranted extension of law over human conduct not previously considered criminal. *A progressive build-up of unnecessary legislation could profoundly change the very meaning of crime in any society and make the administration of justice cumbersome, if not, indeed, oppressive.*"

I believe a great deal more can be done to differentiate between deviance and criminality. Thus, many traffic offences involving the driving of a motor vehicle could be described as deviant behaviour whilst the driving of a vehicle under the influence of alcohol could well be considered criminal conduct in the true sense. Whilst administrative control measures (including in extreme cases the termination of the privilege to drive a vehicle) could be used to regulate the former, the full impact of Criminal Justice may have to be used to control the latter. Homosexual conduct between consenting adults could be classified as deviance, whilst homosexual acts committed upon children, although deviant in nature, would be rendered criminal by the gravity of the conduct and the threat which it poses to the integrity of the individual and the community. Prostitution, abortion, vagrancy and other forms of behaviour which have been and still are considered socially unacceptable by many societies, are other examples of conduct not necessarily criminal, although some such behaviour could well be considered deviant.

Decriminalization would certainly lessen the burden imposed upon the Courts and Corrections. These two bodies carry a heavy load in respect of many offenders who are funnelled through their portals for a variety of offences — from traffic offences to drunkenness — and who obtain little if any benefit from their confrontation with the law. The revolving prison door still operates most markedly in many countries in respect of the overwhelming number of offenders. This is also true of South Africa.[10] Redirection — in the sense either of decriminalization of some of the conduct currently designated as criminal or of administrative rather than judicial control of deviant behaviour — would leave the Criminal Justice System free to apply its energies to the effective control of criminality which constitutes a real threat to society.

(ii) **Education, planning and research:**

These are topics meriting thorough analysis and discussion. I can only highlight a few aspects of these three crime-preventative exercises.

In its report — "The Challenge of Crime in a Free Society" — the President's Commission on Law Enforcement and Administration of Justice in the United States of America says the following about delinquency (crime, it must be remembered, manifests itself most frequently amongst the youth and the young adult):

> "Its causes, to the extent that they are understood, are of a kind that is difficult to eliminate by any program of social action that has yet been devised. *The weakening of the family as an agent of social control;* the prolongation of education with its side-effect of prolonging childhood; the increasing im-

personality of a technological, corporate bureaucratic society; the radical changes in moral standards in regard to such matters as sex and drug use — all these are phenomena with which the nation has not yet found the means to cope." (p. 59).

I think that it is true for my own country that it has two kinds of delinquent problems. There is delinquency which is born in the inadequacies of a marginal urban existence. Deprivation pertaining to living conditions, education and job opportunity as well as a lack of parental concern, supervision, control and discipline tend to create conditions of high criminogenic proportions. Then there is delinquency which blossoms in conditions — principally in an urban setting — in which the inadequacies referred to above play no role. But, we may find that, despite affluence or material welfare, family structures are weak or inadequate; that opportunities for healthy activities in which the energies, interests and aggressions of the youth or youth groups can be channelled, are not provided or their use insufficiently stimulated. Parental discipline may be poor or inconsistent. Affluence and material welfare are by themselves no bastions against delinquency.

It is obvious that there can be no simple answers to problems as complex as those outlined above. For the delinquency which has its roots in poverty many of the answers are less difficult. For the delinquency in our more affluent communities, or where it is environmentally stimulated, the problems require a many-pronged attack. In both respects a need exists to re-examine and re-define the goals of our educational systems. Clearly greater emphasis must be given to preparing youth for responsible citizenship. Adult education — especially of the young parent — using the mass-media whenever possible — must be undertaken so that there can be a new appreciation of the importance of parental concern and discipline. Teacher and parent must be trained so that delinquency can be identified before it manifests itself in its grossest forms — at this point remedial measure of an extreme nature may have to be applied, but then it is often already too late.

I comment briefly on planning and research. Aesthetics, economics, comfort and functionality are some of the commendable goals of the planner. Through social planning the elimination of what is already identifiably criminogenic in our societal structure can be eliminated or curbed. These techniques should form part of every charter or development. In the settlement or resettlement of people we court disaster in the area of criminal behaviour if we do not plan in a manner which takes due and proper account of the social needs of the settler.

Research is an essential precursor to successful planning. Although there is so much we already know about the causes of crime which we do not apply, there is so much we still need to learn. The establishment of criminological institutes which can integrate the disciplines involved in the criminal justice system in research projects affecting their particular sphere of interest and stimulating an inter-disciplinary approach to our quest for answers to criminality, should be high on the list of those who control the allocation of human and financial resources.

I am convinced that we will, with vigorous objective research discover that society can produce some shock absorbers to cushion the destructive impact of over-population, industrialisation and the rapid urbanisation commonly associated with crime and deviance."[11]

(iii) **Public participation in Crime Prevention:**

This is where governments tend to err most frequently. It is so tempting so seek the facile cure for crime in harsher penal sanctions. If but a small part of budgets devoted to "maintaining law and order", in the sense in which the phrase is so imprecisely used by the tub-thumping politician, were to be diverted to supporting community groups involved in crime preventative activities, society would be so much the richer and more secure for it.

Voluntary community participation in crime preventative activities tend to spread their ripples more and more widely. These groups will start with a minor project — such as a volunteer probation group — and end up as a fully-fledged after-care agency running half-way houses or sheltered workshops for the discharged offender who is in need of social support.

Such participation will also lead to an abatement of retributive pressures, because as the community itself becomes involved in, and is exposed to, the problems of the offender so their cry for vengeance becomes less clamant.

All I wish to add under this head is that governments underestimate the long-term value and importance of volunteer groups.[12] They need professional leadership, but in most countries it is impossible for government, or even the professionally trained social worker or probation officer associated with the non-governmental agency, to provide the manpower necessary to maintain a probation and after-care service which deals meaningfully with the offenders' problems in society. In any event, it is desirable that the social supports necessary to lead him to a fruitful, participating life should come from the members of the community rather than from "authority" or the — to him somewhat impersonal and less empathetic "welfare".

C. The treatment of offenders:

The various facets of the Criminal Justice System outlined in the introduction are, each one of them, involved in the treatment of the Offender. These disciplines all play important roles. The first contact — and often the last contact — which the errant youth has with the law will be with the police. The manner in which this first contact is handled can be decisive. If it is too relenting, the shock of confrontation is diminished and can well be lost; if it is harsh or brutal, the reaction can be militant and destructive. The juvenile correctional facility, the prison, the after-care home, the probation and parole officer all fulfil a vital function each complementary to the other. Failure in any given area can often mean a failure of the whole system — because it fails to protect society when its impact does not succeed in diverting the delinquent into the calm waters of a conforming existence.

For several, I think obvious, reasons I have elected to discuss the role of the Courts and sentencing in particular. When he appears in Court the offender feels he is confronted by the disapproval of society, but considers that he will receive objective and considerate treatment. Here his offence will be evaluated, here the full impact of the forces of law and order will ensure the protection of society. Yet, and this he believes, especially on the first occasion he appears in a Court of law, here his personal needs will be considered and evaluated; here a disposition will be determined which will cater for his offence, the interests of society *and for him* — he who has offended against his own community.

His disillusionment must often be profound. It is true that the most meticulous care has been taken to evolve a procedure which ensures that if he is innocent he will not be convicted. Yet once this process is concluded and his offence, be it serious or trivial, is duly categorised — his end is as swift as it is final.

It is because we believe that punishment is a protective end in itself that the process of disposition is so often no process at all. It is here where the system really fails, it is here where the offender is so often fashioned; fashioned, in the sense that whilst all he needs is the corrective impact of confrontation and disapproval, instead of which sanctions are exacted which distort rather than reform him. Conversely, whilst long-term separation from society is required, short-term imprisonment is prescribed, because the fact that the offender is e.g. a sociopath is not discovered or if discovered, discounted. Thus public protection is jeopardised rather than facilitated.

I emphasise, it is because the lawyer — and through him the

community he leads — has been trained to see sentencing as the final event in the process of Criminal Justice that we have failed through the criminal law to achieve such protection as it can afford us. If only we would see the sentencing process as but one step in a series of events leading towards correction, then we may begin to hope to achieve some of the protection we seek.

How do we reform this process? There are a large number of steps which can be taken to achieve the control necessary for order in society through criminal justice with the minimum of suffering to the offender and those connected with him.[13] I make a few comments under the following heads:

(i) Sentencing as a process;

(ii) An inter-disciplinary approach to sentencing;

(iii) The training of the lawyer and sentencing officer.

(i) Sentencing as a process.

It is fundamental for a healthy sentencing structure that the legislature should not write precise prescriptions in which predetermined sentences are rigidly enacted. For this there are many reasons, most importantly perhaps, that it is only through the individualization of punishment that justice can be done both to the community and to the offender. But there are also other valid reasons, many of which are contained in an article by Leslie Sebba in the Israel Law Review under the title "Minimum sentences — Courts vs. Knesset".[14]

The Israeli Knesset is not the only legislature which has embarked upon legislative rather than judicial fashioning of penal policy, the S.A. Parliament has done so most recently in respect of the control of drug abuse.[15] Sentencing can never be the process it should be as long as the legislature succumbs to the temptation of "either merely stating the obvious or else saying too little or too much."[16]

Secondly, it is essential that there be an inter-regnum between conviction and sentence. This serves several purposes. The judicial officer needs to be protected from the uniformed retributive demands of the public whose views tend to be coloured by the "horror" of the crime, which is only too often unduly emphasised by the press and television. The prespective, even of your most dispassionate and objective judicial officer can be distorted by the consequences of the crime; consequences which may have been subjectively unforseen by the perpetrator and — unless he is a moral imbecile — which are as horrifying and startling to him as to the community revolted by his act.[17]

Procedural rules should therefore provide that save for good and adequate reasons which should be recorded by the presiding officer, no Court should impose a sentence of imprisonment upon an offender without a pre-sentence investigation and report. This will, in the majority of cases result in the disposition being delayed and a proper balance can then be struck, dispassionately, between the interests of society and the interests of the individual. The collection of information and its evaluation is a requisite of the determination of the most appropriate disposition. It is a cumbersome, time-consuming process, but an invaluable aid not only when sentence is determined, but also in the classification process in the institution and when the programme for the rehabilitation and re-socialization of the offender is designed and implemented. Moreover pre-release preparation can never really be meaningful unless it is at least also related to the offender's responses to pressures in society rather than only to his reaction to stimulae in an institutional setting. The pre-sentence report provides most valuable material for each correctional phase.

I wish to make it quite clear that I do not propose that the sentencing authority should be transferred from the Courts to some amorphous body of sentencing experts, as is so often suggested. Sir Leon Radzinowicz's comments in his recent address published under the title "Them and Us"[18] have much to commend them. I join issue with him however, on his resistance to radical reform in this area because the criminal explosion renders it unrealistic. Sentencing must become a process, but a public process governed and controlled by the judicial officer representing the community. We court undue administrative interference with the disposition process and the many obvious dangers inherent in extensive administrative control over the freedom of the individual should we not fashion our sentencing procedures to accommodate this change.

In his article referred to above Sir Leon stoutly defends the Criminal Law and Procedure of England. His defence is eloquent. He points to the absence of empirical evidence that on the Continent "they are any better at convicting criminals than we are".

He goes on to say, "The criminal law should be the Magna Carta not only of those accused of crime but of all of us. It is part of the heritage of this country, and not only England but all other countries would be the poorer if its protections were abandoned or undermined".[19] Criminal procedure and evidence is vitally important in safeguarding the rights of the individual. Determining a just sentence is in my view at least as important. I view in-

appropriate punishment of the guilty as one of the reasons why our criminal justice system has failed to protect us as it should. Sentencing as a separate process will be one step towards the attainment of the ideal of rationality and justice.[20]

(ii) **An inter-disciplinary approach to sentencing.**

Much of what has been said under sub-item (i) has validity here, but I would make a brief special plea for the involvement of the Psychiatrist and Psychologist in this process rather than in the trial where the legal label is tied to the conduct of the accused. I know that their involvement in the latter process can probably never be wholly eliminated but the inappropriate use of these sciences has done forensic psychiatry and psychology much harm. They have engaged in a field where the lawyer has the conceptual and terminological advantage; no wonder they have been bested and occasionally discredited.

They would be so much more at home when it comes to determine a fit and proper sentence. Here they are untrammeled by concepts of guilt, responsibility (diminished or otherwise) and the other legal concepts as strange to them as some of the categories in which the Psychiatrist sometimes attempts to cast the offender's conduct and character are to the lawyer.

Here there is much more room for consensus and less opportunity for polarisation which so often occurs in the criminal trial itself. The Court and the community it serves would be much better off if we could, in the main, confine the Psychiatrist and Psychologist to this field.

The sentencing process is the forum in which the social worker can with vigorous independence play a vital role. It is here where the blending occurs between the interests of society and the needs of the accused. Psychology, psychiatry, sociology, criminology and social work are certainly some of the disciplines which have a legitimate place in this process.

(iii) **The training of the lawyer and sentencing officer.**

If the contentions set out above are sound, it is clear that the sentencing process cannot work efficiently unless the lawyer has been trained to interpret and translate the information conveyed to him. We would be wasting our time should we encourage individualisation of punishment and entrust the process to someone who has no, or an inadequate appreciation as to how to fulfil this task. This point has been made by many of those close to the administration of criminal justice. Thus Stanislav Walczek, Minister of Justice of Poland says:

"The judge who is a traditionalist in his manner of thinking must become a jurist with an open mind, aware of the general principles and strategy of crime control. At the current stage of the application of modern methods of social defence, a judge cannot confine himself to hearing a case and passing sentence. He must interest himself, to varying degrees in the execution of the sentence, he must have a thorough knowledge of correctional problems and relate his decisions to their application. This requires a reform of legal studies so that they may provide jurists with adequate training in criminology, sociology and psychology".[21]

Two last points under this head. We send so many people to jail because they can't pay fines. Let us at least relate fines to the capacity of the offender to pay them. An enquiry as to the means should be made in every case and the fine adjusted accordingly. This should apply both to scaling fines upwards and downwards. S.A. courts have been contending for this practice for many years[22] and it is a problem also elsewhere.[23] This rule of practice will at least reduce the incidence of imprisonment in default of payment of fines especially if deferred fines or fines payable in instalments are imposed.

It is through the training of the lawyer that proper use will be made of probation, weekend imprisonment — an innovation introduced in S.A. in 1959 under the descriptive title "periodical imprisonment"[24] — compensation and restitution orders,[25] postponing sentencing[26] and community service[27] as a form of disposition where these punitive measures exist or where their introduction in most effective form will be facilitated.

Concluding Comments:

In his article "Them and Us" Sir Leon Radzinowicz mentions the rapid increase in crime all over the world. He grants exemption to two countries only. The one is Japan, the other is Israel. He deals with the Japanese phenomenon and then he says the following (*op cit.* p. 262) about Israel:

"The other exceptional case of a different order, is that of Israel. There also, I have seen evidence both by study and observation of a decrease, or at least no increase. Where so much of a national will and of national research, physical and spiritual are devoted to sheer national survival that in itself may act as a potent prophylactic".

Is this still true? Only you can answer this question. I would

suggest however that the comments I have made concerning Criminal Justice and its re-direction are in broad principle of application to all nations. The submissions are particularly valid where societies are not homogeneous and where there are a significant number of disadvantaged citizens who form part of a community. Judge David Bazelon in an instructive address delivered at the Hebrew University of Jerusalem[28] pinpointed the role criminal justice plays in such societies and urged that our rules should be so framed and applied as to secure equal justice for all before the law. This view I endorse.

Justice in a society depends ultimately upon its criminal law and procedure. The administration and enforcement of criminal justice in turn relies in the final event upon the sanctions which sustain stability. It is my conviction that no people can survive without doing justice to other people. "Nowhere in the entire legal field is more at stake for the community or for the individual".[29]

APPENDUM

MR. JUSTICE LEOPOLD GREENBERG

Leopold Greenberg was born at Calvinia on the 21st March, 1885. He received his early education at Grey College, Bloemfontein, from where, in 1900, he went to the South African College School, Cape Town (now the University of Cape Town). He had a brilliant scholastic career. During his four years at SACS he was placed first both in the Matriculation and Intermediate examinations, and also obtained an Honours degree of Bachelor of Arts. His exceptional ability in English resulted in his professor recommending him to take up a literary career. But Mr. Greenberg decided upon the law as a profession, and on his leaving College in 1904, proceeded to Johannesburg, where he entered the office of Mr. Attorney Lindsay. There he studied for and obtained, in 1907, his final LL.B. degree. Two years later he was enrolled as an Attorney, in which capacity he practised until 1911, when he was admitted as an Advocate of the Supreme Court. His practical experience at the side-bar proved of great value to him. He rapidly rose to the fore at the Johannesburg Bar, and was seen in many of the big cases on the Rand. In addition to possessing those invaluable attributes of voice and presence, he was soon recognized as a lawyer of great ability. His brief was always the subject of the most careful preparation, and a keen intellect and clear

conception of the finer points enabled him to present his client's cause in the most convincing manner.

In July 1924 he took silk, but had only a brief period as a K.C., for in November of the same year Mr. Advocate Greenberg became the Honourable Mr. Justice Greenberg; an appointment which met with universal favour, though he is much missed at the Transvaal Bar. It is perhaps sufficient indication of his ability and personality that he was elevated to the Bench at an age younger than any Judge since the Anglo Boer War. A little over a year has shown that he is as successful in the administration of justice on the Bench as he was in its exposition from the Bar. It is no limited opinion which considers that South Africa's youngest member of the judiciary will emerge as one of South Africa's greatest judges.[1]

In 1938 Mr. Justice Greenberg became Judge-President, and in 1943 he was elevated to his present position. It would be difficult to overvalue the services rendered by him to the State during the thirty years of his judicial career. The characteristic of his work has been its thoroughness. To every question of law or fact which came before him he gave his whole mind. Every argument put to him he considered carefully and dealt with searchingly. Reasonings attractive but sophistic survived not his pitiless analysis. His judgments, models of clarity, showed his method of approach and his line of reasoning leading to the inevitable result.

To be a really good judge demands many gifts, rarely combined in one person. It has been said that above all things, a judge must be a gentleman, and this is doubtless true if the word 'gentleman' be used in its proper sense and not taken to mean merely one who mistakes form for morals. And another requirement is a sense of humour, i.e. a power of analysis and the instinct to realize the incongruous. Both these gifts Mr. Justice Greenberg undoubtedly has. His whole judicial career shows the former: of the latter there are many stories current, of which I venture to tell one. In a jury trial in which he was the judge, the evidence was clear, and it contained no suggestion that the accused was *non compus mentis;* nevertheless the foreman announced the unanimous verdict of the jury to be 'not guilty'. Observing a look of surprise on the judge's face, he added hastily, 'On account of insanity'. 'What, all nine of you?' asked the judge.[2]

[1] S.A.L.J., Vol. XLIII, 1926, pp. 1 and 2 — written at the time of his elevation to the Bench of the Supreme Court, Transvaal Provincial Division.

[2] S.A.L.J., Vol. LXXII (Part I). February 1955, pp. 1 and 2, written by G. A. Mulligan on the occasion of his retirement in 1955.

Reference List

[1] *S. v. Shangase,* 1972(2) S.A., 410(N) relying on *Builders Ltd. v. Union Government,* 1928 A.D., 46 at p. 56.

[2] Juge au Tribunal de Bruxelles; Director of Research, Institute of Sociology of the Free University of Brussels; Secretary-General, International Society of Social Defence.

[3] Chairman of the Board of Trustees of the Menninger Foundation in Topeka and Senior Consultant to the Stone-Brandel Centre in Chicago.

[4] Act 33 of 1952 made a sentence of whipping not exceeding ten strokes compulsory for rape, robbery, culpable homicide where intent to commit rape or robbery was involved, assault with intent to commit rape and robbery, breaking or entering any house or building with intent to commit an offence. Certain persons were excepted such as, e.g. persons over the age of 50 years, habitual criminals and persons suffering from ill health as well as females.

By virtue of Sec. 4 of the Criminal Procedure Amendment Act, No. 9 of 1958, now Sec. 330(1) of Act 56 of 1955 the legislature extended the discretionary power of the Courts to impose the death sentence. Previously the Courts had the discretion to impose the death penalty (in addition to the mandatory power in the event of a conviction of murder without extenuating circumstances) in respect of the crimes of treason or rape. The amending legislation added robbery (including an attempt to commit robbery) if aggravating circumstances are found to be present and house-breaking or attempted house-breaking with intent to commit an offence, if aggravating circumstances are found to have been present. As Ellison Kahn in an exclusive and informative article entitled "Crime and Punishment 1910-1960" in Acta Juridica, 1960 at p. 191 states, these are crimes which, "however much they may have attracted that penalty (the death sentence) in bygone times, had been treated as non-capital at least from 1840". In 1965 by virtue of the provisions of Sec. 10 of Act 96 of 1965, kidnapping and childstealing were added to the list of "capital crimes".

Compulsory prison sentences were prescribed in accordance with a legislative prescription based principally upon the number of previous convictions, the nature of these convictions and sentences previously imposed in respect thereof; individualised treatment of the offender was ignored — see the provisions of Sec. 334 (*ter*), 334 (*quat*) and 335 of the Criminal Procedure and Evidence Act, No. 56 of 1955 as amended.

[5] Compulsory whippings were abolished and the power to impose corporal punishment limited by the provisios of Sec. 12 of Act 96 of 1965 and see *S. v. Kumalo,* 1965(4) S.A., 565(N). Sec. 335A introduced by Sec. 20 of Act No. 9 of 1968 into the Criminal Procedure and Evidence Act rendered "compulsory sentences" discretionary where circumstances justifying the imposition of a lesser penalty were found to be present.

[6] The prison population (daily average) increased over a period of the last 14 years by 83% against a population growth of 33%; the daily average for the latest statistical year (1972) was 91,253 (or approximately 425 per 100,000).

[7] Marc Ancel, Le défense social nouvelle.

[8] Rupert Cross: Punishment, Prison and the Public, p. 45. The author goes on (at p. 46) to stress that any change in the penal system can be described as an endeavour to achieve penal reform "if it is aimed directly or indirectly at the rehabilitation of the offender or if its object is to avoid, suspend or reduce punishment on humanitarian grounds".

[9] *Furma v. Georgia* — slip opinion, p. 14.

[10] The prison figures for the period ending June, 1972 (Statistical Report of the Commissioner of Prisons of the Republic of South Africa for the period 1.7.71-30.6.72, R.P. 91/1972), reflect admissions of 440,922 of which 238,866 were committed to serve sentences of one month or less. The percentage of those committed to serve periods of 4 months and 6 months imprisonment or less, represented 91% and 84% of the total committals respectively.

[11] For a fuller discussion of this topic see the report of the 4th United Nations Congress referred to above. See also the International Review of Criminal Policy Nos. 27 (1969) U.N., and 29 (1971), The Challenge of Crime in a Free Society (*supra*) and a Report of the proceedings of the National Conference on the Prevention of Crime, Centre of Criminology, University of Toronto. For a South African comment see South African Law Journal (88) 1971, p. 210.

[12] See the informative review by Yasuyoshi Shiono in the International Review of Criminal Policy — Use of Volunteers in the Non-Institutional Treatment of Offenders in Japan — (1969) 27 at p. 25.

[13] See generally D. A. Thomas "Sentencing — The basic principles" (1967) Criminal Law Review 455 and Rupert Cross *op cit.*

[14] Vol. 6 No. 2. April 1971.

[15] See the Provisions of the Abuse of Dependence Producing Substances & Rehabilitation Centres Control Act 41 of 1971. The Court's attempts to soften the impact of the legislation are strikingly similar to those adopted by the Israeli Courts — see S vs. Shangase above, footnote (1) — but were met by a radical, rigid amending provision — see Act 80 of 1973.

[16] Quoted by Johannes Andanaes in "Choice of Punishment" in the Scandanavian Studies in Law, 1958, 55 at p. 58.

[17] Voet, writing on the duties of the Judge in the seventeenth century said; "It is true, as Cicero says . . . the anger should be specially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little . . ."

[18] The Cambridge Law Journal 1972, 260 at p. 276.

[19] The procedure whereby sentences were determined in England did not always receive the same plaudits. Thus R. M. Jackson in the 3rd edition (1960) of his work "The Machinery of Justice in England" says:

"An English criminal trial, properly conducted, is one of the best products of our law, provided you walk out of court before the sentence is given; if you stay to the end, you may find that it takes far less time and enquiry to settle a man's prospects in life than it took to find out whether he took a suitcase out of a parked motor car".

(This criticism is, as far as can be traced not repeated in the 4th Edition of this work.)

[20] Wechsler *op cit* p. 6. (*supra*).

[21] "Planning Crime Prevention and Control in Poland". International Review of Criminal Policy No. 26 — 1968 U.N. by: Stanislaw Walczak — Minister of Justice, Poland.

[22] See eg. R. v Frans 1924 T.P.D. 419
R. v Nhlapo 1954 (4) S.A. 56. (T), S.v.
Apollos 1971 (3) S.A. 265 (C), S.v.
Jansen 1972 (3) S.A. 86 (C)

[23] So for example the task force on the administration of justice in the United States of America in its report on the Courts says at p. 18:

"Two unfortunate characteristics of sentencing practices in many lower courts are the routine imposition of fines on the great majority of misdemeanants and petty offenders and the routine imprisonment of offenders who default in paying fines. These practices result in unequal punishment of offenders and in the needless imprisonment of many persons because of their financial condition.

Thirty years ago the National Commission on Law Observance and Enforcement called attention to the inordinate number of offenders who were imprisoned for failure to pay fines. A more recent study of the Philadelphia County jail showed that 60% of the inmates had been committed for non-payment. And in 1960 there were over 26,000 prisoners in New York City jails who had been imprisoned for default in payment of fines".

That the problem in S.A. was even more acute, appears from the report of the Lansdown Commission (U.G. 47 of 1947, par 545) which found that on analysis of 9 representative gaols in respect of prisoners admitted during the period 1st January 1945 to 30th June 1946, 65% of White, 87% of Coloureds and Indians and 83% of Natives were incarcerated in default of the payment of fines. No more recent representative statistics are available.

[24] Sections 329 and 334 (bis) of the Code.

The reports of the Commissioner of Prisons reflect the following use of this form of sentence over the past five years:

1.7.66 - 30.6.67	:	243
1.7.67 - 30.6.68	:	217
1.7.68 - 30.6.69	:	201
1.7.69 - 30.6.70	:	224
1.7.70 - 30.6.71	:	388
1.7.71 - 30.6.72	:	388

[25] See the article under this title by Ian McClean in the Criminal Law Review 1973 p. 3.

[26] *Ibid* p. 12. Article by Louis Blom Cooper Q.C.; and see the provisions of Sections 352 of the S.A. Criminal Procedure and Evidence Act.

[27] *Ibid* p. 16. — Article by Lady Barbara Wootton — Community Service.

[28] See the Israeli Law Review. Vol. 2. January 1967, under title "The Relation between Criminal and Social Justice".

[29] Wechsler *op cit.* p. 6 (*supra*).

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