

# Punishment and Society: A Developmental Approach

by FASIL NAHUM\*

## Relationship of Punishment to Society

The modes and type of punishment<sup>1</sup> its frequency and severity, as well as the processes that culminate in the punishment of a deviant in a society, are reliably good indicators of the society itself. All the values of a society are crystallised in its punishments. What elements of life a society considers of value, their degree of valuability, as well as the extent society goes to protect these values, are clearly reflected in the punishment society imposes on a deviant. Thus punishment serves as a *limbus-paper* test of whether and to what extent a society is noble, creative and progressive.<sup>2</sup>

Although by no means impossible and hopefully the implications will not be lost on social scientists with sociometric interest - quantification of values and social conclusions with mathematical precision are outside the scope of this paper. Here, the modest intention of the author is to arouse concern in this decisive area by dealing with punishment in a general manner. Where it is possible to be specific, heavy reliance is placed on the Ethiopian experience, although within a comparative world context.<sup>3</sup>

Since this paper is on a social science topic, at this introductory juncture a word or two about social science may also be appropriate. The social science tendency in some quarters, which opts for the shortcut and popularizes the concept of development along purely and narrowly economic lines, as if man lives for and by bread alone, is, to the extent it directs results, unfortunate. Development, namely socio-human development, aims at the advancement of man and society in a contextual reality, not only from material subsistence to abundance, but also from superstition to scientific knowledge, and from savagery to nobility. Interrelated as these areas may be, anomalies are not uncommon where one type of development may be present but not another. To illustrate this point, it suffices to refer to the "apartheid" regime of South Africa, which in a continuum may be placed relatively more towards abundance and scientific knowledge rather than subsistence and superstition. Yet, in the treatment of the overwhelming majority of its citizens as well as in its overall racial outlook, that this "apartheid" regime

\*Faculty of Law, Addis Ababa University. The author is grateful for various constructive suggestions made on a draft of this paper.

1. Although, in a broad sociological sense, punishment may imply the measures society imposes on a deviant, here it is used as a narrow legal term referring to *post-conviction* measures.
2. This paper approaches problem-oriented research not with the Weberian value-free approach, but rather with a value-laden approach. Concepts like "noble" and "progressive" are obviously value-laden. The purposes for which the paper is written are also value-laden; it aims at a humane and just society, oriented towards human dignity.
3. What sources one employs are determined by availability and competence. The Ethiopian Penal Code of 1957 is referred to because the author is conversant with it. African and United Nations sources are relevant in that the paper considers society in general.

has to be classified as savage rather than noble is painfully clear. The fact that South African Blacks may be economically better off than workers in other African States is only part of the truth. Another part of the truth is to be found in the many legislations which negatively affect the Black South African worker. Some of these are the Native Labour Regulation Act of 1911 and the Bantu Labour Act of 1964, imposing contract labour system; the Native Land Act of 1913 and the Bantu Trust and Land Act of 1936, denying Africans the ownership of Immovable property; the Mines and Works Act of 1911 and the Apprenticeship Act of 1944, closing training opportunities to non-Europeans; the Bantu Laws Amendment of 1964, eliminating permanent residence for Africans outside the Bantustans; and the Bantu Laws Amendment of 1970, allowing the Ministers of Bantu Administration and Labour to prohibit the employment of any Black in any job in any area by any employer.<sup>4</sup> The strong and unreserved condemnation of South Africa by public world opinion, ranging from socialist and capitalist camps to the third world reflects humanity's enduring expectations that socio-human development means, and should mean nothing less than, the overall contextual enhancement of human dignity.

Thus, vital as bread is to the existence of man, his development is not limited to that factor alone. Nor is it limited to any other individual factor. What this means is that any (every) area of human concern has to be examined for purposes of establishing adequate theories of socio-human development, as well as for reaching proper conclusions which can then serve as foundation for directed action. If it is to adequately reflect socio-human reality and expectations, the spiralling continuum from non-development to development must of necessity be a multi-factor one. It is in this context that the preliminary examination of punishment and society is submitted.

### **Justice and Objectives of Punishment**

Justice would seem to be equitable with the protection and retention of broad outlines of the *status quo*, within a given socio-political framework.<sup>5</sup> And it is when this balance of necessary convenience is tipped over that punishment is applied so as to reinstate the previous order, or to establish a new balance that is as close as possible to the previous one, and to protect the *status quo* in the future. An example may clarify the statement. Where a thief steals a cow

4. J. A. Hornet, "Black Pay and Productivity in South Africa", South African Institute of Race Relations, September 1972. Note also that the Poverty Datum Line (PDL) is actually not a living wage but one intended to keep body and soul together. S.G. Rogers, "Apartheid and the African Worker", U.N. Document of May 1975.

5. Justice may be jurisprudentially looked at from the point of view of "positive law theory" that makes it dependent on positive law; or from the "social good theory" which insists that justice derives exclusively from society and consists ultimately in the improving of the social good; or from a "natural right theory" which does not make justice dependent on positive law but rather on natural right, and makes it consist in rendering to each his due. Many jurisprudential works may be referred to. Cf. Otto Bird, *the Idea of Justice*, New York 1972 for general presentation, and V. A. Tumanov, *Contemporary Bourgeois Legal Thought*, Moscow 1974, for a Marxist approach. But, no matter how it is defined, justice is a concept relative to a changing society. Justice takes on new dimensions of meaning as man moves forward (impossible to postulate) on his evolutionary course.

from a farmer, the *status quo* is upset; and to let things be as they are would be to sin against justice.<sup>6</sup> Some kind of action has to be taken by society; but what? The return of the cow, i.e. reinstatement of the previous order, or the handing over to the victim by the offender of a comparable value, e.g. a similar cow or cash, etc., i.e. establishment of a new order that is as close as possible to the previous one, would satisfy the *status quo* from the material point of view. But from a non-material point of view we have in our hands the fact of the incident that disturbed the *status quo*, which by now becomes a historical fact, and the future risk of similar incidents both by this offender and by others who may follow his example. To let the offender go, after material reinstatement, would be to invite future disruption of the established order. In order to minimize the possibility of future disturbances to the *status quo*, the obligation of the offender must be such that the resultant *status quo*, after the incident, places the offender in a disadvantageous position *vis-à-vis* what he was in before the incident.<sup>7</sup>

6. There are crimes of different nature, for instance where the previous *status quo* cannot be reinstated because a value has been lost forever, as in homicide, or where there is no primary victim but the State as a whole, as in espionage.
7. It should also be noted that justice is not only substantive, it is procedural as well. Justice is concerned not only with what we do about the thief who steals the farmer's cow, but also with *how* we go about doing whatever it is. Moreover the procedural aspect of justice is not of secondary importance. Substantive justice cannot be rendered in the absence of procedural justice. Whether and to what extent a society is noble, creative and progressive is again reflected in its adherence to these basic procedures for the attainment of justice in the processes that culminate in the punishment of a deviant. The basic elements of procedural justice can be easily summarized. Elementary as they may seem to be, their application is absolutely crucial to the attainment of justice.

The first of these elements of procedural justice is the principle of legality, i.e. that notice has to be given prior to the commission of an act (or omission) that such an act constitutes an offence. Included in the principle of legality is also the notification as to the seriousness of such a deviation, as reflected in the punishment the offence carries. The second element of procedural justice refers to the presumption of innocence.

The third element of procedural justice requires the existence of a neutral competent tribunal; within this element of a neutral tribunal one may also include the idea of appeal.

The fourth element of procedural justice refers to the actual process as the drama unfolds in a court-room and contains various inter-related points. Unless there are justifiable reasons (of morality, fairness to innocent third parties, the security of the state, etc.) a trial should be open. As a principle, not only must justice be done but it must be seen to be done. The trial must also be completed without unnecessary delay, for justice delayed is justice denied. The defendant must be told what offence he is charged with, as well as what evidence exists against him. The defendant must be given adequate time and reasonable help to be able to answer the charge. The right to examine and cross-examine witnesses, the right to question evidence presented and the right to produce his own evidence, expert and otherwise, are rights that should be made available to the defendant.

The fifth and final element of procedural justice deals with the punishment itself. Punishment should always be personal; only the one who has committed the offence should be liable to punishment. Vicarious criminal liability of the communal or spacial type, by which relatives or neighbours of the offender are punished, does not accord with basic concepts of justice. Moreover, personal punishment must be adequate but not redundant. The more scientific the punishment the more completely rehabilitated a deviant will be; hence double punishment or continuous punishment would serve no constructive purpose whatsoever.

These elements of procedural justice are expounded in detail in modern legal systems. In their application, not only can they vary from system to system but also they may require special expertise. However, a society that fails to provide for these elements and to abide by them denies procedural justice, and to that extent fails to render justice.

Two interrelated questions logically follow such a statement, namely (1) to what extent should he be disadvantaged, and (2) to achieve this, what sort of measures should society resort to? In ancient times (and in some societies not so ancient) *lex talioni* provided a rough and ready justice by answering "an eye for an eye" and "a tooth for a tooth". Other systems may not come up with as simple and straightforward an answer. Neither is it suggested here that they should, this being a delicate and complex area. It would however be unfortunate for society not to know what it is achieving through punishment.

Hence, society is inevitably always confronted with the problem of the purposes that punishment must serve. One way of tackling the problem may be by deciding from what points of view society should look at a given incident in order to reinstate the *status quo* and protect it from further disturbance. Should society focus on the incident, on the victim, on the deviant, or on general expectations of society? To put the question in more comprehensive way, what objectives should society specifically have in mind? Shall it be that of satisfying the victim - if need be, even satisfying the revenge-oriented psychological make-up of the victim, thus moving into retribution? Or, in a slightly different approach, shall it focus on the incident and try to make good for it, and in homicide cases, for instance, say, "there is no atonement without blood."? Or, shall society focus on the deviant with the purpose of understanding and rehabilitating him so that society is in the future protected from him, and incidentally from others who could become like him but would not, if by focussing on him and understanding him, society can eliminate the root causes for such deviation?

The objectives society tries to achieve through punishment of a deviant can probably be best summarised in three broad categories. The first is retribution: the objective society is most acquainted with in man's long history, ranging from the age of slavery through the age of feudalism to the present. In a socio-human development continuum from savagery to nobility, retribution is also the least desirable, the objective nearest to the theoretical starting point of savagery. The *lex talioni* school with its fatal overdose of retribution probably best exemplifies it.<sup>8</sup> That man has yet to divorce himself totally from retribution will become clear when, a few pages hence, we refer to specific types of punishment securely fastened to many modern societies in this late hour - the eve of the twenty-first century AD.

The second objective society tries to achieve through punishment, that of rehabilitation, is found at the other end of the spectrum. It is the objective man

<sup>8</sup> Hammurabi's code (18th century Before Christ) provided for elaborate provisions on the rights of a master over his slaves, although the slave had no rights with respect to the master. While a bad builder was subjected to the same grief the owner suffered through the loss of son, there was no concern for justice to the innocent son of the bad builder. A wife accused of unfaithfulness which could not be proved was expected to throw herself into the water and drown "for the husband's sake, since good name was valued more than the woman's life". However, to be fair, it should be pointed out that Hammurabi's code was designed to protect the weak from the strong and to give safety to widow and orphan. And at the time these were considered idealistic declarations appropriate to the society then current in Babylon.

is least acquainted with, and one whose threshold we are just crossing. The expansion of scientific knowledge in the behavioural sciences will undoubtedly have a far-reaching impact on punishment. Rehabilitation as an objective stands to gain handsomely thereby, and so does society.

The third objective society tries to achieve through punishment, that of deterrence, serves a dual purpose by being aimed both at the deviant and at the public at large.<sup>9</sup> Individual deterrence intends to teach the offender the lesson not only that crime does not pay but that the overall experience is too costly and painful to be enjoyable. Individual deterrence tries to defeat recidivism by convincing the offender, not through the power of gentle persuasion but through the power of the strong arm, that crime is not worth repeating. By the same token, the punishment inflicted on the deviant can serve an educational purpose directed at the public at large. Thus punishment aims towards the goal of general deterrence by notifying would be offenders what the unsavoury consequence of crime is to the criminal.

No system of punishment has a legitimate *raison d'être* other than the well-being and protection of society. And society protects itself best by approaching questions of punishment from the point of view of rational focussing on offenders and would-be offenders. On the basis of the correctness of this statement, a number of assumptions and implications, with possibly far-reaching conclusions, become inescapable. One basic assumption revolves around the rationality not only of society but also of the offender. Any message society is trying to convey properly gets at an offender only if the offender is also rational. In other words, one should be subjected to punishment only to the extent one is capable of rationality. A person who is incapable of either knowing what he is doing or appreciating the consequences of what he is doing, whatever else he may be subjected to, should not be subjected to punishment.<sup>10</sup>

Another assumption is that only one who through personal guilt offends in the carrying out of his obligation to society is subject to punishment. Guilt is a technical term referring to the socially negative state of mind of a person. Such a negative state of mind may be the result of intention, i.e. committing an anti-social act knowingly and willing the consequence, or it may be the result of negligence, i.e. failing to take such precautions as might reasonably be expected in given circumstances. An accident resulting in an antisocial act but without the accompanying mental element of guilt being present, i.e. without either intention or negligence, would not fall within the scope of punishment.<sup>11</sup>

9 Some penologists prefer to distinguish the individual from the general and consider them as two separate objectives. See C.F. Jeremy Bentham, *Bentham's Works*, pp.399-402 (London 1843) for various policy roles on establishment of maximum and minimum punishment.

10 Modern penal law, unlike its predecessors, recognises various defences such as absolute irresponsibility, partial irresponsibility and immaturity. Irresponsibility entered into intentionally or negligently is, however, not covered as a defence. The relevant Ethiopian Penal Code Articles are Articles 48, and 50.

11 The relevant Ethiopian Penal Code Articles are Articles 58 and 59.

A rational system of punishment would take the individual needs of an offender and would mete out an individually tailored punishment, suitable to the particular offender in terms of both the type and degree of measures to be taken. And in order to do so, society would have to have a scientific approach, namely that of reaching conclusions based on the observation and analysis of facts.

Finally, rational focussing on offenders and would-be offenders as a means of protecting society negates the whole realm of retribution as a valid objective of punishment. Only deterrence (general and individual) and rehabilitation remain as valid objectives of punishment. This means that punishment, to be efficient and useful, has to pass the dual test of deterrence and rehabilitation. Any punishment that is neither deterrent nor rehabilitative has no efficacy, and therefore should have no place in society. It should be promptly discarded and replaced by alternative rational measures. An ideal system of punishment would combine both objectives of rehabilitation and of deterrence in varying degree. The dangerous disposition of the offender and the nature of the crime, as well as the motivation for and circumstances of the crime, are determinant factors for the ratio in which deterrence and rehabilitation are combined.

The social cost of punishment is also an important factor that cannot be overlooked. A system of punishment of fatal overdose that goes beyond deterrence and rehabilitation so as physically or psychologically to cripple and handicap a deviant for life, so that he can no longer fully function as a healthy member of society and contribute his utmost in life, is undesirable. In such a case one is not only punishing the deviant, but is over-punishing the deviant and punishing society. The social cost of punishment directs one to consider the cost to the immediate group of family and friends that punishment of the deviant imposes as well. For instance, the incarceration of the breadwinner without providing for dependants would be a measure taken not only against the offender but against the innocent dependants. And exploitative societies that take irrational measures sow seeds for far-reaching negative consequences.

An examination of traditional types of punishment is quite revealing as to what objectives of punishment are given prominence. And, as already observed, this makes punishment an acid test of whether and to what extent a society is noble, creative and progressive. We will next turn our attention to some typical traditional forms of punishment.

### III

#### **Traditional Punishment**

##### **A. Imprisonment**

When one thinks about the different kinds of punitive measures society traditionally imposes on deviants, the one type of punishment that immediately springs to mind is imprisonment. Indeed, in the vocabulary of everyday language imprisonment and punishment are synonymous. The prison system is such a common feature of governments the world over that one is tempted to think of

the prison as a *sine qua non* - part and parcel of government - an axiomatic institution. There is no doubt that incarceration is a practice of very ancient traditions, although it is difficult to say when and where it was started. Would it be too daring to venture the theory that imprisonment started by default? Society, at a loss as to what to do with deviants, simply locked them up until it could decide what to do with them? In the absence of brighter ideas, this temporary measure in time became the most important type of punishment.

In some systems today, imprisonment is categorized as simple or rigorous.<sup>12</sup> Simple imprisonment is a punishment imposed on persons considered not a serious danger to society, i.e. those who have not committed offences of a very serious nature. Simple imprisonment is also of relatively shorter duration. Rigorous imprisonment, on the other hand, is imposed upon what are considered dangerous offenders who have committed offences of a very grave nature. Prisoners undergoing rigorous imprisonment serve big chunks of their life in maximum-security central prisons.<sup>13</sup>

Prisons are by no means pleasure houses, which is not surprising, as they are often used as society's instrument of retribution *par excellence*. In feudal Ethiopia we have some descriptions of prison and prisoners, narrated by various travellers who chanced to pass through the country from the sixteenth century onward.

The Portuguese priest Alvarez tells us of prisoners kept chained in prison tents. They were required to provide not only their own food but also that of their guards.<sup>14</sup> In the 1850s, the English traveller Richard Burton refers to the Ethiopian prison as "a filthy dungeon"<sup>15</sup> A century later another Britisher, Perham, refers to the Addis Ababa prison as "notorious," the prisoners being in a horrible condition of health, neglect and disease which lead to the prisons being cleared at intervals by typhus"<sup>16</sup> Whatever improvements prisons may have since undergone, in many a society prisons could use a few improvements in order to elevate them to acceptable human institutions.

Tempted as one is to look at the prison as an axiomatic institution whose abolition would bring down on society the wrath of the gods, it is time to give the prison a closer look. All those whose concern is penal policy and administration, as well as those who have to work hard to maintain this very expensive system, have an interest in finding out the efficacy of the prison system. In order to be allowed to continue, the prison system should have to pass the dual test of its efficacy in deterrence and rehabilitation and pass it scientifically. It does not suffice to assume that incarceration is deterrent and rehabilitative. The facts have to be researched in order to arrive at solidly supported conclusions as to the deterrent and rehabilitative characteristics of the prison system.

12 Cf. Articles 105, 107 Ethiopian Penal Code.

13 A life sentence, it should be noted, is a variation of rigorous imprisonment.

14 E. Alvarez, *Narrative of the Portuguese Embassy to Ethiopia During the Years 1520-1527*, p. 335. New York, 1881.

15 R. Burton, *First Footsteps In East Africa*, p. 190. London 1866.

16 M. Perham, *The Government of Ethiopia*, p. 194. London 1969.

## B. Corporal Punishment

Another type of traditional punishment, which is fortunately phasing out, although it is by no means extinct, is corporal punishment. Corporal punishment, as a predominant type of punishment, appeared in very many forms in various societies. Criminals were forced to undergo all sorts of mutilations under the crudest possible medical conditions which often cost the individuals their very lives. Thus, someone convicted of lying might be sentenced to the removal of his tongue, while another convicted of providing false evidence might be ordered to have his eyes plucked out. The cutting off of the nose or the ears, the doing away with the sexual organ for the male, and above all the axing off of a limb, were rather common traditional punishments in most societies.

As in most traditional societies, in feudal Ethiopia for instance, corporal punishment was an instituted form of punishment. Travellers came across the execution of such punishments and have left us their evidence and impressions. In 1830 one visitor witnessed the King ordering "a hand and both feet of the thief to be cut off", and the execution of the order being carried out in the middle of the market; the thief was latter found devoured by the hyenas in the night.<sup>17</sup> A late 19th-century traveller characterises the then emperor as "severe in his application of the cruel punishments; (he) did not hesitate to order the recedivist thief's hand to be cut off or the slanderer's tongue to be cut out. He once had the tongue of an advocate out because in defending his client too well he spoke ill of the government..."<sup>18</sup> Explaining the carrying out of mutilation, someone else reports:

... the penalty for the thief who had one previous conviction was the loss of a hand. Immediately after the verdict, a butcher would sever the tendons of the wrist and then cut the hand off with the chopper. In the meantime, women would be heating butter in a pot over a fire. As soon as the hand was severed, the stump would be dipped in the seething butter. In this way, the flow of blood would be stemmed and the deliquent's life would be saved.<sup>19</sup>

The doing away with mutilation in Ethiopia coincided with the introduction of the Penal Code in 1930, and, as the chapter dealing with punishment makes clear, the idea of corporal punishment was then limited to the sentence of flogging. Furthermore, the Penal Code of 1930 seemed to be uneasy about that sentence, and promised that flogging would soon be abolished.<sup>20</sup> Despite such a promise, however, when a new and advanced penal Code was introduced in 1957, flogging was retained as a form of punishment.<sup>21</sup> The drafter of the 1957 code had not maintained it in his work, and it was only included after heated

17 S. Gobat, *Journal of Three Years Residence in Abyssinia*, p. 336. New York 1851.

18 Perham, *ibid*, p. 148.

19 P. Hartlemaier, *Golden Lion*, p.172. London 1956

20 Article 3, Ethiopian Penal Code of 1930.

21 Article 120 A, Ethiopian Penal Code of 1957.



discussions in Parliament.<sup>22</sup> Nevertheless, he justifies its inclusion by saying, "it is no less possible to regard (flogging) as a useful institution among a proud and courageous people who are afraid not of suffering but of loss of respect, and who would approve of it, precisely because of its ethical implications"<sup>23</sup>

Initially the sentence of flogging was limited by the Code to aggravated theft and aggravated robbery.<sup>24</sup> By 1961, however, on the heels of the abortive coup d'état, several crimes were made punishable by flogging, and among them were included insults, abuses and slanders directed against the Emperor.<sup>25</sup> The Penal Code of 1957, as a sign of progress and modernity, provides that flogging be carried out only on male offenders between eighteen and fifty years of age, and that a maximum of 40 lashes be executed only after a doctor has certified the offender fit to receive the flogging.<sup>26</sup>

There is no question of the retributive value of flogging. What is at issue, however, is the reformatory or deterrent value of flogging. In the absence of studies and statistics concerned with the issue, the author would, on the basis of its retributive foundation alone, question the usefulness of flogging from the deterrent and reformatory points of view. Unless and until such usefulness is convincingly proven, one can only suggest that the corporal punishment of flogging should be allowed to follow the path of its sister institution, mutilation, into extinction and oblivion.<sup>27</sup>

### C. Capital Punishment

The ultimate traditional punishment in all societies through the ages has been the death penalty. The death penalty has been the punishment generally reserved for crimes considered exceptionally grave. And, presumably having convinced itself that these criminals were beyond any help and use, society has employed its imagination liberally in coming up with horrible means of destroying

22 S. Lowenstein. *The Penal Law of Ethiopia*, p. 340. Addis Ababa 1965.

23 J. Graven, "The Penal Code of the Empire of Ethiopia" in *Journal of Ethiopian Law*, Vol. I, p. 289, 1964.

24 Articles 635 and 637 respectively, Ethiopian Penal Code of 1957.

25 Articles 256, 445, 474, and 479-481, Ethiopian Penal Code of 1957, were included by Decree No. 60 of 1961. Others have since been included by the revolutionary Special Penal Code of 1975.

26 Article 120 A, Ethiopia Penal Code of 1957.

27 While dealing with corporal punishment, it is tempting to mention torture. Although torture is almost as old as man himself, today the practice seems to be on the increase. The U.N.'s Commission on Human Rights views torture as "a phenomenon of our times". "It is one of the grim truths of the second half of the 20th century that rarely before in history has torture been in such widespread use"; this second statement is supported with facts and figures provided by human-rights-oriented international organizations.

(Time Magazine, 16 August 1976). Moreover, torture has moved into the technological age and sophisticated devices are employed to break down an individual without leaving visible signs or marks of brutality. Torture is, however, outside the scope of this paper. No matter how widely employed, torture is not officially used as a post-conviction punishment but rather as a means of extra-trial or pre-trial investigation and extraction of information. Hopefully, a time will come in man's development when, like slavery and most corporal punishment torture will be a thing of the past.

them. One description of the practice of ancient European states that executions were made "by knife, axe, and swords, heads being knocked off with a plank or cut through with a plough, people being buried alive, left to starve in a dungeon, or having nails hammered through their heads, strangulation and throttling, drowning and bleeding to death, evisceration, drawing and quartering, torture on the wheel, torture with red-hot tongs, strips being cut off the skin, the body being cut out to pieces or sawed through with iron or wooden instruments, burning at the stake, and many other elaborate forms of cruelty"<sup>28</sup>

Present-day penal codes and statutes that have retained the death penalty have progressed to the extent of providing for executions that are free from other unnecessary cruelties. The 1957 Penal Code of Ethiopia is a good example. Having retained capital punishment, it goes on to provide specific instructions. Punishment is to be executed by hanging or, on a member of the armed forces, by shooting. However, executions are to be carried out without any cruelties, mutilation or other physical sufferings.<sup>29</sup>

Having said that capital punishment was generally reserved for crimes considered exceptionally grave, it should also be stressed that the gravity of a crime and its corollary punishment are relative concepts, existing purely as factors of the values of the power elite of a particular society limited in time and space. To cite one example, at one time in England there were over two hundred specific crimes punishable by hanging. These included the shooting of a rabbit, the theft of a handkerchief, the cutting down of a cherry tree and fishing without permit.<sup>30</sup> The assumption behind it all was that the property right of the landlord was absolute and, in a rigidly stratified feudalistic society, this right had a very important value. The feudalistic society would therefore go all the way to safeguard this right, even to the extent of providing capital punishment for what today we may consider petty infringements. (The Great Britain of the latter part of the 20th century, on the other hand, has for all practical purposes abolished capital punishment.)

A 1962 United Nations study on the subject of capital punishment points out that, out of over one hundred jurisdictions examined, 35 jurisdictions have abolished capital punishment by express constitutional or legislative enactment, and 9 jurisdictions have abolished it in practice, while the majority of the jurisdictions examined have retained the death penalty. (Total abolition of capital punishment by statute in Europe dates from 1786, when King Leopold II of Tuscany under the direct inspiration of Beccaria promulgated his celebrated code. In 1787, Joseph II of Austria did the same in his penal code.<sup>31</sup>)

One cannot help asking the difficult question as to what makes some societies abolish the death penalty already in the 18th century, while others go on

28 G. Rusch and O. Kirchhemier, *Punishments and Social Structure*, pp. 21-22. New York 1939.  
29 Article 116, Ethiopian Penal Code of 1957.

30 *Africa Magazine*, p. 17, March 1975.

31 Department of Social and Economic Affairs, United Nations, *Capital Punishment*, U.N. Publication ST/SOA/SD9, pp. 28-30. New York 1962.

retaining it even in the latter part of the 20th century. Where this is too complicated a question to ask or answer here, one may at least examine the various points that can be raised in support of or against the retention of the death penalty in the present-day world.

Explaining the rationale for the retention of capital punishment for homicide in the Ethiopian Penal Code of 1957, Jean Graven, the drafter, writes:

"In the Ethiopian context it would in particular have been an inconceivable mistake, and even an impossibility, to abolish the death penalty at the present time. It is not only necessary for social protection, but is based on the very deepest feelings of the Ethiopian people for justice and for atonement. The destruction of life, the highest achievement of the Creator, can only be paid for by the sacrifice of the life of the guilty person. As in the Christian European system of the Middle Ages, death is always a necessary condition for the pardon and salvation of the sinner, and also for expiation for the evil which he has committed, it is accepted and approved by all, and in the first place by the criminal who has deserved it, and is carried out in a dignified atmosphere quite different from that of our former executions with the ax or the guillotine."<sup>32</sup>

Again looking at capital punishment as a measure against homicide, one report states that "capital punishment is as harsh a punishment as murder is heinous a crime. Because wanton murder is so extremely morally wrong, the punishment therefore must remain proportionately extremely severe to emphasize to other would-be murderers the high outrage that society feels against the commission of such crimes. Conversely, any unjustified lessening of the severity of punishment for murder in appropriate situations could be taken by the murderer and others as an indication that our society no longer regards such murders as the most heinous of crimes"<sup>33</sup> It is interesting to note that the above rationales are limited to one crime only, namely intentional homicide. The implication seems to be that capital punishment is difficult, if not impossible, to justify satisfactorily as punishment for non-homicide crimes.

Among the arguments marshalled for abolition of capital punishment, the major ones include the following:

First, the state and its agents are involved in an act of supreme violence in the execution of the death penalty, and this takes place in circumstances of the greatest cruelty to the individual in question. The argument goes that this kind of barbarism need not be resorted to in order to meet the social need of fully condemning the gravest of crimes. Second, the death penalty introduces a seriously baneful effect on the administration of justice. A morbid and sensa-

32 Graven, *ibid*, p.289.

33 Report of the Temporary New York State Commission on Revision of the Penal Law (1965), as quoted in Lowenstein, *ibid*, pp. 337.38.

tional factor is introduced in the trial with the danger that public sympathy will be on the side of the criminal whose life is at stake. This morbid factor continues during both the trial and the execution, often making public sentiment, which should support the law and its administration, stand on the side of the criminal. Third, erroneous convictions are bound to take place. Such inevitable errors cannot be established immediately, and certainly cannot be corrected after execution. Such injustices destroy the moral force of penal law in general. And finally, experience shows that the death penalty cannot be administered with even rough equality.<sup>34</sup>

This can then be topped up with the statement made by various abolitionists that the history of punishment shows no necessary correlation between the severity of punishment and incidence of crime, which is understandable if the fact of the complexity of causation of crime is borne in mind. One is ultimately reminded from English history that, when the public hangings of pick-pockets were going on at Tyburn, others of the "light-fingered fraternity" were doing a thriving business in picking the pockets of the crowd looking in the scaffolds.<sup>35</sup>

One is entitled to ask what objectives society achieves through capital punishment; and the answers to this question are not difficult to come by. The death sentence and its ensuing cruelty has served society all too well as its maximum retributive measure. This cannot be denied. But where retribution is an objective for society to be ashamed of rather than to be proud of, where retribution is symptomatic of savagery, this point has to be registered on the side of the abolition of capital punishment.

The next objective, that of rehabilitation, cannot even be raised, since by employing capital punishment society has decided that such a person is by definition non-rehabilitable. Correctly or otherwise, society has also despairingly accepted its failure in its curative capacity. In addition, it has made the conscious decision that such a criminal cannot be purposefully and usefully employed by society any more. These are all rather heavy decisions to make. Nevertheless, that is what society decides by meting out the death penalty on an individual.

The final objective to consider with respect to capital punishment is that of deterrence. The question is, What deterrent value does the death penalty serve? As far as individual deterrence is concerned, the answer is that the criminal who is served with the death penalty is absolutely incapacitated from repeating a similar or, for that matter, any other crime. Thus capital punishment is, from the point of view of individual deterrence, not really deterrent. The objective of individual deterrence is geared towards teaching the criminal through his painful experience of social payment that crime is not worth repeating. Capital punishment is not, however, teaching the individual criminal any useful lesson that he can apply later on. Although it absolutely makes it impossible for the criminal to offend

34 Lowenstein, *ibid.*

35 L. Hall and S. Gluck, *Criminal Law and Enforcement*, p. 17. New York 1958.

society again, capital punishment does not do so by teaching him through punishment; rather it simply and effectively removes him for good.

So whether the death penalty should be retained or not really depends on the general deterrence value it has. Does capital punishment, by notifying would-be offenders what the unsavory consequence of such crimes is, serve an educational purpose directed at the public at large, and thereby deter would-be offenders from committing crimes? This is a significant question which should be answered not from the top of one's head but on the basis of scientific studies.

One such study examined capital punishment in conjunction with the crime of intentional homicide, and the author concludes:

If the death penalty carries a potential threat which has a restraining influence on human conduct, we may assume that the greater the threat the more effective it would be. It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:

- (a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects - character or population, social and economic condition, etc. in order to introduce factors known to influence murder rates in a serious manner but present in only one of these states.
- (b) Murders should increase when the death penalty is abolished and should decline where it is restored.
- (c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.

The data examined reveal that:

- (1) The level of the homicide death rates varies in different groups of states.
- (2) Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition states from the others.
- (3) The trends of the homicide death rates of comparable states with or without the death penalty are similar.

The inevitable conclusion is that executions have no discernible effect on homicide death rates.<sup>36</sup>

The United Nations Report on capital punishment referred to *supra* states that capital crimes are still relatively numerous. It goes on to make the picture more

36 T. Sellin, *The Death Penalty*, pp.15-77. New York 1959.

focussed by providing a breakdown of the crimes. It concludes that the number of jurisdictions in which offences other than murder are punishable by death is declining. This remark is however immediately qualified by what the report refers to as "the outstanding features of the legal sociology of the last thirty years - the reappearance of the death penalty for political crimes". What is responsible for this state of affairs, the report suggests, is the "trend towards an authoritarian system of criminal law". This "authoritarian trend" according to the report, has in the first half of the 20th century checked the slow movement towards gradual abolition of the death penalty that was becoming almost universal. It has also made it possible for the death penalty to reappear in a more or less permanent manner in jurisdictions where it was once abolished as well as extending the death penalty's application to new cases in other jurisdictions.<sup>37</sup>

In the present-day world, capital punishment is increasingly associated with political crimes. One African writer notes that a "distressing feature of African independence (*sic*) is the extent to which and the apparent ease with which the death penalty has become the answer to an increasingly wide range of political crimes"<sup>38</sup> Incidentally, this is not a uniquely African characteristic, but one rather common throughout the third world.

Moreover, capital punishment continues to be employed as a means of solving legitimacy problems of dictatorial regimes, of which the minority government of Southern Africa serves as an example. By their unacceptable policies, these are bound to increase societal conflict and hence the authoritarian trend. In 1974 the United Nations General Assembly passed a resolution calling upon the white minority governments of Southern Africa to treat captured guerrillas as prisoners of war rather than criminals. The appeal has gone unheeded by those governments, and captured guerrillas have periodically been served with the death penalty. The problem can in the near future be expected to increase in proportion to the increasing cognition of the exploited masses and their violent show of dissatisfaction.<sup>39</sup>

In concluding this section, one may sum up by stating that capital punishment has been employed by practically all societies. The 20th century has seen a limitation of the use of capital punishment; indeed, a number of jurisdictions have abolished it altogether by law. Others who have retained it selectively have found justification for it, only as punishment for what is in certain jurisdictions

37 The "authoritarian trend" referred to in the United Nations Report should be viewed as a factor of the upheavals and the struggles for a new world order precipitated this century. The world wars and the emergence of newly independent states in the third world, with political elites jealous of their newly gained power, make up the picture that reveals this authoritarian trend. *Department of Social and Economic Affairs, ibid.*

38 *Africa Magazine, ibid, p. 16.*

39 To put the problem in perspective, however, one is forced to agree that "the bitter truth is that most African governments are not in a strong position morally to ask the white minority governments to extend liberal interpretations of the law to their opponents, since they themselves are ruthless in dealing with dissidents". *African Magazine, ibid, p.17.*

termed first-degree homicide. Unfortunately this century has also seen the accelerated use of the capital punishment for a wide range of political crimes. The employment of the death penalty for non-murder crimes, and particularly for wholesale political crimes, seems to have a very doubtful value, when considered from a detached intellectual viewpoint.

#### IV

##### **Towards Scientific Punishment**

In the third section of this work, three traditional types of punishment have been taken up and evaluated and have been found wanting. This raises the next set of fundamental questions. Since we have minimized the importance of some traditional punishment, does it mean that society should then do away altogether with the idea of punishment? The answer is no; punishment or corrective measures for deviants who violate the norms on which society is founded are vital to the continued existence of society. The fear that, unless such corrective measures legally exist, the very fabrics of society would disintegrate and we would plunge into the abyss of savagery and the "law of the jungle" is a real concern. Thus punishment should continue as a component of justice. But the important question is, In what forms should punishment then exist? It is in line with this question that the value of traditional punishments is raised. And one simple theory we suggest is that punishment should not be retributive. Retributive punishment is a destructive force that consumes both society and the deviant, and negates the basic *raison d'être* for punishment. Punishment should be deterrent and reformatory. In order for it to be made so, it is incumbent on society to employ its creative faculties, and, aided by the ever-increasing level of scientific and behavioural knowledge, to come up with better and better corrective measures. Punishment is an area for creative experimentation, in which success in terms of reformed and rehabilitated citizens should be expected to be significantly increased. A conscious decision has to be made by society to tackle this problem courageously, and those who take initiative in this vital area should be encouraged for the benefit of society itself.

So then the real question, the question society must turn its attention to and tackle seriously, is What types of punishment are deterrent and reformatory and hence successful? Although a radical approach to the question of punishment would be welcome, the likelihood is that most societies will follow slow evolutionary roads to changing from the traditional to more efficient and scientific forms of punishment. Various reasons dictate the evolutionary approach. The predominant one is the lack of a blueprint of modern punishment, a characteristic of societies by and large. This lack is symptomatic of the relative indifference with which such a vital and constant social problem has been viewed by society. Finally, when society is forced to focus on the problem, it will have to do it not only on an experimental basis but also on a planned stage-by-stage basis. It should be pointed out that such experimentation and planning requires alloca-

tion of resources both human and material, and a conscious effort to achieve results. The ultimate transformation will not be simple and invisible, although the actual change will be on the mental plane in both deviants and society. It will necessarily be accompanied by such manifestations as outdating barbed-wire prisons and armed guards, just as previous tools for mutilation have been deposited in museums. In their place, various new institutions resembling specialised medical centres rather than prisons can be expected to emerge.

One area for reform, already under experimentation in some jurisdictions, deals with the individualization of sentencing. In most jurisdictions and for almost all crimes the legislative organ of government not only defines what constitutes a crime but also fixes the penalty. In most penal systems, the legislative role in fixing penalties is one of establishing the range of maximum and minimum imprisonment terms for various crimes. It is then left to the judge to sentence a convicted criminal, and judicial sentencing is in general final. However, the idea is evolving of what may be termed the indeterminate sentence.<sup>40</sup> What this means is that the generalised legislative prescription is first individualized by a judicial prescription during the trial, and then further individualized through an ongoing determination of the sentence by parole boards. The judge provides a maximum-minimum range for an individual offender, thus giving the parole board responsibility for determining the actual time a prisoner will serve. The logical extension of the indeterminate sentence is of course, the division of labour between judge and board, to the effect that the judge simply decides guilt and possibly the degree of guilt, and then passes the criminal over to the parole board, which then in a slow and careful process determines the actual time to be served. Inherent in the idea of the indeterminate sentence is the establishment of competent parole boards and the continued existence of the prison system together with its necessary supporting institutions.

Another area of experimentation gaining ground is that of replacing short prison sentences for less serious crimes by various measures known as secondary punishments, which include fines, special labour, temporary deprivation of particular rights, probation and conditional release.<sup>41</sup> The significance of replacement of the short prison sentence by such measures is both social and economic. The offender is, first of all, not taken away from his productive function in society, nor does society have to provide him with guards, lodging and the usual expenses that go together with the prison system. Secondly, his immediate circle of family and friends do not have to suffer indirectly by his imprisonment. Thirdly, both the deterrent and rehabilitative objectives of society are retained undiminished. Which particular measure is most appropriate to a given offender is, of course, dependent on various factors and has to be individually decided.

40 U. N. Publication ST/SOA/SD/2; and N. Hynér, "Sentencing By an Administrative Board" in *Law and Contemporary Problems* Vol. 23 (1958).

41 Articles 88, 102, 122, 123, Ethiopian Penal Code of 1957.



Again, turning to the prison system, it may be noted that interesting experience has been gained in countries such as Sweden, Holland and Denmark.<sup>42</sup> As a result of the sociological school in criminology, the prison system has been inspired to work along modern principles, of which the most important are (a) complete centralization in policy-making; (b) differentiation of institutions; (c) centralized and rational distribution of individuals to be treated in the particular institutions; and (d) a predominantly curative approach to the treatment of the individual inmates. Such prison systems have required careful and conscious planning, centralized policy-making at high governmental level, a large well-trained staff, many specialized prison units and substantial funds.

If one may throw in some food for thought for further research, the high frequency of recidivism which follows the prison system like a shadow would seem to be symptomatic of failure rather than success. And where any show of success has been possible in isolated instances here and there as outstanding exceptions to the general trend of failure, this has occurred thanks to the implementation of rational innovations and a creative attitude. The employment of psychiatrists, psychologists, social workers, sociologists, religious personnel and lawyers, rather than guards, more guards and better armed guards; the environment of spacious farm colonies rather than tiny dark prison cells; the establishment of halfway houses gradually to reintroduce prisoners to society; the use of humane and rational approaches such as creative or productive work encouragement of family ties, educational facilities, the provision of basic requirements, etc.; all these make prisoners feel they are still considered human beings rather than monsters, or, worse still, non-entities, and it is these supporting institutions that have introduced the possibility of some success in modern prisons.<sup>43</sup> Those who have resigned themselves to the continued existence of the prison or who favour the retention of some sort of prison, have proposed that imprisonment should be looked at as a treatment, in medical terms. To be effective, this treatment must be placed on a voluntary footing, the argument being that prisons should not and cannot be cured against their wishes. Hence imprisonment should be an alternative form of treatment which an offender can choose.<sup>44</sup>

The only way out of the quagmire of recidivism and the upward spiral of crime, from the punishment angle, seems to lie in the behavioral sciences, of which the ideas mentioned above are only first fruits. The lion's share of research and concentrated effort, however, lies not on the clinical side of treating deviants but rather on the preventive side. The battle against crime must start not from punishment but through isolating and understanding primary factors causing crime, and through the consequent restructuring of society and the strengthening of its fabrics as needed.

42 N. S. Timasheff, "The Dutch Prison System", in *Journal of Criminal Law, Criminology and Political Science* Vol. 48 (1958).

43 Cf. Newman, *Source Book on Probation, Parole and Pardons*, New York 1964; Reckless, *The Crime Problem*, New York 1961; Neharasol, *The Soviet Judicial System*, Moscow 1975, and Ruschke and Kirchheimer,

44 N. Morris, *The Future of Imprisonment*, Chicago 1957.

