Erskine May, Vol. III, Chapter XVIII, pp. 393-405

The Criminal Law

Capital Punishment

The deepest stain upon the policy of irresponsible government, is to be found in the history of the criminal law. The lives of men were sacrificed with a reckless barbarity, worthier of an Eastern despot, or African chief, than a Christian state. The common law was guiltless of this severity: but as the country advanced in wealth, lawgivers grew merciless to criminals. Life was held cheap, compared with property.(1) To hang men was the ready expedient of thoughtless power. From the Restoration to the death of George III.,—a period of 160 years,—no less than 187 capital offences were added to the criminal code. The legislature was able, every year, to discover more than one heinous crime deserving of death. In the reign of George II., thirty-three Acts were passed creating capital offences: in the first fifty years of George III., no less than sixty-three. In such a multiplication of offences all principle was ignored: offences wholly different in character and degree, were confounded in the indiscriminating penalty of death. Whenever an [394] offence was found to be increasing, some busy senator called for new rigour,(2) until murder became, in the eye of the law, no greater crime than picking a pocket, purloining a ribbon from a shop, or pilfering a pewter-pot. Such law-makers were as ignorant as they were cruel. Obstinately blind to the failure of their blood-stained laws, they persisted in maintaining them long after they had been condemned by philosophers, by jurists, and by the common sense and humanity of the people. Dr. Johnson,—no squeamish moralist,—exposed them:(3) Sir W. Blackstone, in whom admiration of our jurisprudence was almost a foible, denounced them.(4) Beccaria, Montesquieu, and Bentham(5) demonstrated that certainty of punishment was more effectual in the repression of crime, than severity: but lawgivers were still inexorable. Nor within the walls of Parliament itself, were there wanting humane and enlightened men to protest against the barbarity of our laws. In 1752, the Commons passed a bill to [395] commute the punishment of felony, in certain cases, to hard labour in the dockyards: but it was not agreed to by the Lords. In 1772, Sir Charles Bunbury passed a bill through the Commons, to repeal some of the least defensible of the criminal statutes: but the Lords refused to entertain it, as an innovation. In 1777, Sir W. Meredith, in resisting one of the numerous bills of extermination, made a memorable speech which still stands out in judgment against his contemporaries. Having touchingly described the execution of a young woman for shop-lifting, who had been reduced to want by her husband's impressment, he proceeded: 'I do not believe that a fouler murder was ever committed against law, than the murder of this woman, by law;' and again: 'the true hangman is the member of Parliament: he who frames the bloody law, is answerable for the blood that is shed under it.' But such words fell unheeded on the callous ears of men intent on offering new victims to the hangman.(6)

Warnings more significant than these were equally neglected. The terrors of the law, far from preventing crime, interfered with its just punishment. Society revolted against barbarities which the law prescribed. Men wronged [396] by crimes, shrank from the shedding of blood, and forbore to prosecute: juries forgot their oaths and acquitted prisoners, against evidence: judges recommended the guilty to mercy. Not one in twenty of the sentences was carried into execution. Hence arose uncertainty,—one of the worst defects in criminal jurisprudence. Punishment lost at once its terrors, and its example. Criminals were not deterred from crime, when its consequences were a lottery: society could not profit by the sufferings of guilt, when none could comprehend why one man was hung, and another saved from the gallows. The law

was in the breast of the judge; the lives of men were at the mercy of his temper or caprice.(7) At one assize town, a 'hanging judge' left a score of victims for execution: at another, a milder magistrate reprieved the wretches whom the law condemned. Crime was not checked: but, in the words of Horace Walpole, the country became 'one great shambles;' and the people were brutalised by the hideous spectacle of public executions.

Reform of the Criminal Code

Such was the state of the criminal law, when Sir Samuel Romilly commenced his generous labours. He entered upon them cautiously. In 1808, he obtained the remission of capital punishment for picking pockets. In 1810, he vainly sought to extend the same clemency to other [397] trifling thefts. In the following year, he succeeded in passing four bills through the Commons. One only,—concerning thefts in bleaching grounds,—obtained the concurrence of the Lords. He ventured to deal with no crimes but those in which the sentence was rarely carried into execution: but his innovations on the sacred code were sternly resisted by Lord Eldon, Lord Ellenborough, and the first lawyers of his time. Year after year, until his untimely death, he struggled to overcome the obduracy of men in power. The Commons were on his side: Lord Grenville, Lord Lansdowne, Lord Grey, Lord Holland, and other enlightened peers supported him: but the Lords, under the guidance of their judicial leaders, were not to be convinced. He did much to stir the public sentiment in his cause: but little, indeed, for the amendment of the law.

His labours were continued, under equal discouragement, by Sir James Mackintosh. In 1819, he obtained a Committee, in opposition to the government; and in the following year, succeeded in passing three out of the six measures which they recommended. This was all that his continued efforts could accomplish. But his philosophy and earnest reasoning were not lost upon the more enlightened of contemporary statesmen. He lived to see many of his own measures carried out; and to mark so great a change of [398] opinion 'that he should almost think that he had lived in two different countries, and conversed with people who spoke two different languages.'

Sir Robert Peel was the first minister of the crown who ventured upon a revision of the criminal code. He brought together, within the narrow compass of a few statutes, the accumulated penalties of centuries. He swept away several capital punishments that were practically obsolete: but left the effective severity of the law with little mitigation. Under his revised code upwards of forty kinds of forgery alone, were punishable with death. But public sentiment was beginning to prevail over the tardy deliberations of lawyers and statesmen. A thousand bankers, in all parts of the country, petitioned against the extreme penalty of death, in cases of forgery: the Commons struck it out of the government bill; but the Lords restored it.

With the reform period, commenced a new era in criminal legislation. Ministers and law officers now vied with philanthropists in undoing the unhallowed work of many generations. In 1832, Lord Auckland, Master of the Mint, secured the abolition of capital punishment for offences connected with coinage: Mr. attorney-general Denman exempted forgery from the same penalty,—in all but two cases, to which the Lords would not assent; and Mr. Ewart [399] obtained the like remission for sheep-stealing, and other similar offences. In 1833, the Criminal Law Commission was appointed, to revise the entire code. While its labours were yet in progress, Mr. Ewart, ever foremost in this work of mercy,—and Mr. Lennard carried several important amendments of the law. The commissioners recommended numerous other remissions, which were promptly carried into effect by Lord John Russell, in 1837. Even these remissions, however, fell short of public opinion, which found expression in an amendment of Mr. Ewart, for limiting the punishment of death to the single crime of murder. This proposal was then lost by a majority of one: but has since, by successive measures, been accepted by the legislature,—murder alone, and the exceptional crime of treason, having been reserved for

the last penalty of the law. Great indeed, and rapid, was this reformation of the criminal code. It was computed that from 1810 to 1845, upwards of 1,400 persons had suffered death for crimes which had since ceased to be capital.

While these amendments were proceeding, other wise provisions were introduced into the criminal law. In 1834, the barbarous custom of hanging in chains was abolished. In 1836, Mr. Ewart, after a contention of many years, secured to prisoners, on trial for felony, the just privilege of being heard by counsel, which the cold cruelty of our criminal [400] jurisprudence had hitherto denied them.(8) In the same year, Mr. Aglionby broke down the rigorous usage which had allowed but forty-eight hours to criminals under sentence of death, for repentance or proof of innocence. Nor did the efforts of philanthropists rest here. From 1840, Mr. Ewart, supported by many followers, pressed upon the Commons, again and again, the total abolition of capital punishment. This last movement failed, indeed; and the law still demands life for life. But such has been the sensitive,—not to say morbid,—tenderness of society that many heinous crimes have since escaped this extreme penalty: while uncertainty has been suffered to impair the moral influence of justice.

Secondary Punishments

While lives were spared, secondary punishments were no less tempered by humanity and Christian feeling. In 1816, the degrading and unequal punishment of the pillory was confined to perjury; and was, at length, wholly condemned in 1837.(9)

In 1838, serious evils were disclosed in the system of transportation: the penal colonies protested against its continuance; and it was afterwards, in great measure, abandoned. Whatever the objections to its principle: however grave the faults of its administration,—it was, at least in two particulars, the most effective secondary [401] punishment hitherto discovered. It cleansed our society of criminals; and afforded them the best opportunity of future employment and reformation. For such a punishment no equivalent could readily be found. Imprisonment became nearly the sole resource of the state; and how to punish and reform criminals, by prison discipline, was one of the most critical problems of the time.

Condition of the Prisons

The condition of the prisons, in the last century, was a reproach to the state, and to society. They were damp, dark, and noisome: prisoners were half-starved on bread and water,—clad in foul rags,—and suffered to perish of want, wretchedness, and gaol fever. Their sufferings were aggravated by the brutality of tyrannous gaolers and turnkeys,—absolute masters of their fate. Such punishment was scarcely less awful than the gallows, and was inflicted in the same merciless spirit. Vengeance and cruelty were its only principles: charity and reformation formed no part of its scheme. Prisons without separation of sexes,—without classification of age or character,—were schools of crime and iniquity. The convicted felon corrupted the untried, and perhaps innocent prisoner; and confirmed the penitent novice in crime. The unfortunate who entered prison capable of moral improvement, went forth impure, hardened, and irreclaimable.

The New Prisons

Such were the prisons which Howard visited: and such the evils he exposed. However inert the [402] legislature, it was not indifferent to these disclosures, and attempts were immediately made to improve the regulation and discipline of prisons.(10) The cruelty and worst evils of prison life were gradually abated. Philanthropists penetrated the abodes of guilt; and prisons came to be governed in the spirit of Howard and Mrs. Fry. But, after the lapse of half a century, it was shown that no enlarged system had yet been devised to unite condign punishment with reformation; adequate classification, judicious employment, and instruction

were still wanting. The legislature, at length, applied itself to the systematic improvement of prisons. In 1836, inspectors were appointed to correct abuses, and insure uniformity of management. Science and humanity laboured together to devise a punishment, calculated at once to deter from crime, and to reform criminals. The magistracy, throughout the country, devoted themselves to this great social experiment. Vast model prisons were erected by the state: costly gaols by counties,—light, airy, spacious and healthful. Physical suffering formed no part of the scheme. Prisoners were comfortably lodged, well fed and clothed, and carefully tended. But a strict classification was enforced: every system of confinement,—solitary, separate, and silent,—was tried: every variety of employment devised. While reformation was sought in restraints and discipline,—in industrial [403] training,—in education and spiritual instruction,—good conduct was encouraged by hopes of release from confinement, under tickets-of-leave, before the expiration of the sentence. In some cases penal servitude was followed by transportation,—in others it formed the only punishment. Meanwhile, punishment was passing from one extreme to another. It was becoming too mild and gentle to deter from crime: while hopes of reformation were too generally disappointed. Further experiments may be more complete: but crime is an intractable ill, which has baffled the wisdom of all ages. Men born of the felon type, and bred to crime, will ever defy rigour and frustrate mercy. If the present generation have erred, its errors have been due to humanity, and Christian hopefulness of good. May we not contrast them proudly with the wilful errors of past times, neglect, moral indifference, and cruelty?

Nor did the state rest satisfied with the improvement of prisons: but alive to the peculiar needs and dangers of juvenile delinquents, and the classes whence they sprang, it provided for the establishment of reformatory and industrial schools, in which the young might be spared the contamination and infamy of a gaol, and trained, if possible, to virtue.

The New Police

Our ancestors, trusting to the severity of their punishments, for the protection of life and property, took little pains in the prevention of crime. The metropolis was left to the care of drunken and decrepid watchmen, and scoundrel thief-takers,— [404] companions and confederates of thieves. The abuses of such a police had long been notorious, and a constant theme of obloquy and ridicule. They had frequently been exposed by parliamentary committees; but it was not until 1829, that Mr. Peel had the courage to propose his new metropolitan police. This effective and admirable force has since done more for the order and safety of the metropolis, than a hundred executions, every year, at the Old Bailey. A similar force was afterwards organised in the city of London; and every considerable town throughout the realm, was prompt to follow a successful example. The rural districts, however, and smaller boroughs, were still without protection. Already, in 1836, a constabulary of rare efficiency had been organised in Ireland: but it was not until 1839 that provision was made for the voluntary establishment of a police in English counties and boroughs. A rural police was rendered the more necessary by the efficient watching of large towns; and at length, in 1866, the support of an adequate constabulary force was required of every county and borough.

Summary Jurisdiction

And further, criminals have been brought more readily to justice, by enlargements of the summary jurisdiction of magistrates. A principle of criminal jurisprudence which excludes trial by jury, is to be accepted with caution: but its practical administration has been unquestionably beneficial. Justice has been administered well and [405] speedily; while offenders have been spared a long confinement prior to trial; and the innocent have had a prompt acquittal. The like results have also been attained by an increase of stipendiary magistrates, in the metropolis and elsewhere,—by the institution of the Central Criminal Court,—and by more frequent assizes.

Flogging in the Army and Navy

The stern and unfeeling temper which had dictated the penal code, directed the discipline of fleets and armies. Life was sacrificed with the same cruel levity; and the lash was made an instrument of torture. This barbarous rigour was also gradually relaxed, under the combined influence of humanity and freedom.

Footnotes.

1. 'Penal laws, which are in the hands of the rich, are laid upon the poor; and all our paltriest possessions are hung round with gibbets.' Goldsmith's Vicar of Wakefield.
2. Mr. Burke sarcastically observed, that if a country gentleman could obtain no other favour from the government, he was sure to be accommodated with a new felony, without benefit of clergy. Paley justified the same severity to unequal degrees of guilt, on the ground of 'the necessity of preventing the repetition of the offence.' Moral and Political Philosophy, Book vi. ch. ix.
3. 'Whatever may be urged by casuists or politicians, the greater part of mankind, as they can never think that to pick a pocket and to pierce the heart are equally criminal, will scarcely believe that two malefactors, so different in. guilt, can be justly doomed to the same punishment'—Rambler, i. 114; Works, iii. 275. In this admirable essay, published in 1751, the restriction of death to cases of murder was advocated.
4. 'It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium* to every case of difficulty.'—Comm., iv. 15.
5. Bentham's work, 'Théorie des Peines et des Récompenses,' appeared in 1811.
6. Sir William Meredith said: 'When a member of Parliament brings in a new hanging Bill, he begins with mentioning some injury that may be done to private property, for which a man is not yet liable to he hanged; and then proposes the gallows as the specific and infallible means of cure and prevention.'
7. Lord Camden said: 'The discretion of the judge is the law of tyrants. It is always unknown: it is different in different men: it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable.'—St. Tr., viii. 58.
8. This measure had first been proposed in 1824 by Mr. George Lamb. See Sydney Smith's admirable articles upon this subject. Works, ii. 259, iii. 1.
9. 56 Geo. III. c. 138; 1 Vict c. 23. In 1815 the Lords rejected a Bill for its total abolition. —Romil1y's Life, iii. 144, 166, 189.
10. Two bills were passed in 1774, and others at later periods; and see Reports of Commons' Committees on gaols, 1819, 1822; Sydney Smith's Works, ii. 196, 244

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