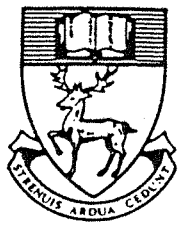

UNIVERSITY OF SOUTHAMPTON

FACULTY OF LAW

DANGEROUS OFFENDERS

IN

CRIMINAL JUSTICE

SENTENCING AND POST-SENTENCING

A COMPARATIVE STUDY
BETWEEN IRAQI AND ENGLISH LAW

BY

ABDUL KADHIM JASIM JODAH

B.A. Law, B.A. Politics
Higher Diploma Law

A thesis submitted for the
degree of Master of Philosophy

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TO THE MEMORY
OF MY FATHER

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UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF LAW

Master of Philosophy

DANGEROUS OFFENDERS IN CRIMINAL JUSTICE

SENTENCING AND POST-SENTENCING
A COMPARATIVE STUDY BETWEEN IRAQI AND ENGLISH LAW

By Abdul Kadhim Jasim Jodah

One of the many areas of legal reform in Iraq today lies in the field of criminal policy. Of particular importance is the criminal policy which concerns the treatment of the dangerous offender.

The existing laws concerning the dangerous offender are not consonant with the needs of the present socialist aims, and the movement towards reform therefore must first examine a large number of studies and suggestions put forward through an academic study of the law, before any coherent and far reaching legislation can be implemented to replace the current legislation in force. This dissertation is one such academic study of the law dealing with the dangerous offender and it seeks to make its proposals for reform by comparing the perceptions and concepts of the treatment of dangerous offenders in both Iraq and England.

The work begins, in Chapter 1, with an historical study of the dangerous offender in Iraq, in which an outline of the concept of dangerousness is given together with a perception of what currently constitutes the dangerous offender in Iraqi society.

Chapter 2 follows with a comparison of the historical development of such offenders in England. As the current perception of what constitutes a dangerous offender in Iraq is insufficient for practical purposes, the study, in Chapter 3, of the concept of criminal dangerousness aims at establishing a working definition of what constitutes such an offender. Chapter 4 then goes on to discuss the identification and limitation of the concept of dangerousness to show the way in which this concept has been, and can be, used.

The sentencing of dangerous offenders in Iraq and England is discussed separately in Chapters 5 and 6, to enable a comparison of the modes of dealing with such offenders in both countries.

Chapter 7 will be confined to the examination of the treatment of dangerous offenders in the post-sentencing stage; this stage occupies a useful position in modern criminal policy whereby it aims at achieving an object of reforming the criminal.

Finally, Chapter 8 summarises the dissertation and sets out proposals which may be used in present and future attempts to reform Iraqi criminal policy in respect of the dangerous offender.

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CHAPTER ONE

1.0 AN HISTORICAL STUDY OF THE DANGEROUS OFFENDER IN IRAQ

1.1 Introduction

In order to understand the Iraqi Penal Code with regard to the dangerous offender, it is necessary to review the historical development of penal policy towards such offenders.

The point of origin of the development of Iraqi penal policy can be traced to the dawn of Islam. This is an appropriate point to begin at, because the influences of the Islamic law (Shari'a) are still prevalent within the Iraqi penal system; the main source of the Iraqi criminal law is derived from the Shari'a. Therefore this chapter will be divided into three sections, the first of which will deal with the way in which Islamic law is practiced. The second section will examine the extent to which Western ideas have influenced Islamic law and the degree to which the latter has been modified by this influence. The third section, which this study will refer to as "The Legal Reform Stage", will relate to the new mode of thinking which emerged and prevailed throughout the post-revolutionary period following 1968, when Socialist ideas influenced the criminal law in Iraq.

1.2 The Stage of Islamic Criminal Law

After the emergence of Islam in the Middle East and its establishment there, the Shari'a became the universal legal system throughout the Arab world. Therefore it could be said that the Shari'a forms the background for the present Iraqi system of criminal law, and hence its penal policy. As such, this section will be devoted to explaining the rationale behind the Shari'a and the way it deals with crime.

1.2.1 Characteristics of Punishment in the Shari'a

The Shari'a divides crime into three categories: Hudud, Quesas, and Ta'azir (Schacht, J., 1964, pp.175 forward). Hudud (1) offences are acts prohibited by God and punished by defined mandatory penalties because the offences proscribed violate a right protected by the Qu'ran (1). A penalty imposed by virtue of being a divine right means that the proscription is necessary for the protection of public interests.

When a crime is committed against the person, Quesas (2) penalties are imposed. Quesas refers to a specified punishment in the Qu'ran and the Sunna, and the right to impose the penalties for such crimes rests with the victim or his next of kin as avengers of blood. However, the latter also have the discretion, as an alternative to inflicting the prescribed penalty, of either accepting compensation (Diyya), or pardoning the offender. The ruler cannot pardon crimes incurring Quesas penalties, but if the next of kin grants a pardon, the ruler may at his discretion impose a Ta'azir punishment on the criminal.

Ta'azir crimes include all crimes for which there are no specified penalties in the Qu'ran or the Sunna. Whether an act is punishable under Ta'azir is left to the ruler or judge to determine according to public interest and the changing conditions that occur with the passing of time.

Islamic jurists agree that punishment under the Shari'a cannot be imposed unless three requirements are satisfied. It must: 1) be consistent with the principle of legality; 2) be individualised; and 3) apply equally to all persons.

As the principle of legality is based on several Qu'ranic verses and Hadiths (3), it is clear that the validity of punishment under Islamic Shari'a depends on what is written in them. Jurists have derived two fundamental principles from these texts. First of all, no criminal charge can be made unless the crime is defined by

law. Secondly, there is a presumption of lawfulness, such that all things are presumed permissible unless specifically prohibited by law.

The principle of the legality of punishment applies strictly in Hudud crimes. These crimes are specified with their penalties and laid down precisely in the Qu'ran; a judge has no discretion as to the punishment imposed. This principle also applies to Quesas crimes, but not as strictly as it does with Hudud crimes. For instance, if a Quesas crime is committed and the next of kin decide to pardon the offender, the judge will not be able to impose the Diyya (4) but will have the authority to determine a Ta'azir penalty for the crime.

Ta'azir penalties may be imposed on acts forbidden by the Qu'ran for which a commensurate punishment is absent. Examples of such crimes are bribery, bearing false witness, breach of trust, gambling, and tampering with weights and measures.

For such crimes the aspect of the principle of legality which requires that no charge be made unless the crime is defined by the law, is applied with great flexibility as the definition of the crime, which though not specifically proscribed in the Qu'ran or the Sunna, can be inferred from these texts by the ruler himself or a judge to whom he delegates this authority. The second aspect of the principle of legality, dealing with punishment, is applied in an equally flexible way as the ruler or judge is given the authority to select the appropriate penalty from among the many specified in the Qu'ran, the Sunna, or the consensus of jurists (Ijma') (5). Ta'azir penalties can also be applied to Hudud crimes which are not properly proven. Thus, for example, theft is punishable as a Had (6) penalty only if the accused freely and voluntarily confesses twice in an open court or if there is testimony by two competent witnesses, and if there is any doubt concerning the material evidence of the crime or if there are surrounding circumstances which mitigate the commission of the offence, the criminal cannot be punished by a Had

penalty (7), but if there is sufficient evidence, he can be punished with a Ta'azir penalty.

Ta'azir punishments may also be imposed on acts which harm the public interest. The basis for punishment in these cases are Shari'a principles which state that individual sacrifice in the form of severe punishment is necessary to protect the public welfare, so that the greater evil can be prevented by the lesser evil. Again, it is clear that both aspects of the principle of legality, when applied to this type of crime, are interpreted with great flexibility.

It is apparent that a system, where the criminality of an act and its punishment is moulded to fit each individual case and lacks a prior general listing of criminal acts and their respective penalties, does not strictly accord with the principle of legality as understood in positive legal terms. Islamic jurists point out, however, that the ruler or judge is bound, in the criminalisation and punishment of such acts, to Islamic values and the public interest. Nevertheless, it must be noted that such a general restriction is inconsistent with the principle of legality in its parent form, since the illegal act must conform exactly to the prototype explicitly described by a law, which also prescribes the penalty (8).

Ta'azir crimes were not codified at the inception of the Islamic state in order to give the ruler or the judge the ability to respond with flexibility to subsequent changes of circumstances in Islamic society through the instrument of the criminal law. For that reason special emphasis was placed on the qualities and qualification of judges to whom so much discretion was given. The law assumed that the greater the confidence in the judge's knowledge and fairness, the less would be the need to restrict him. Furthermore, the small number of judges and the simplicity of life and its related problems in the early days of Islam reduced the likelihood of unjust results. In any event appeal to the ruler could always redress any injustice.

In our times, however, the principles of the Shari'a require that the application of the principle of legality to crimes of Ta'azir be embodied in specific laws as the necessities of life demand. The degree to which Islamic jurists were sensitive to the importance of specifying crimes and penalties before their occurrence is evident from the rejection of the notion of Qiyyas (9) (analogical reasoning) in Hudud and Quesas crimes. Thus, since Hudud crimes are specifically dealt with by the Qu'ran, their pre-ordained character cannot be questioned, and since the essence of Qiyyas is reasoning from the cause to the principle, Qiyyas in Hudud is precluded. Furthermore, Qiyyas allows for the possibility of error, but the possibility of error raises doubt, and charges which carry Hudud penalties are nullified by doubt. (see El-Awa, 1983, pp.58, 125-126, 130, 134, 151, 172, 209, 216, 233, 257. See also Oodah, A.K., 1986, pp.78-81 - in Arabic - Schacht, 1964, pp.178-187).

1.2.2 Individualisation of Punishment

A basic principle in Islamic law, as expressed in a number of Qu'ranic verses, is that the responsibility for a crime is the criminal's alone and cannot be borne by anyone else.

Thus, the individualisation of punishment under Islamic law is a fundamental principle, whether the penalty is a Had, Quesas or Ta'azir. The Diyya, by contrast, is not strictly punishment, but is in the nature of compensation which must be paid to the victim as reparation for the injury. It is sometimes confused with punishment because the amount of compensation is specified in advance. That practice is evidenced by the firm adherence to the principle of equality of all persons before the law, irrespective of social status. Diyya is paid to the next of kin in cases of murder and intentional injury if the victim or his family forego their rights of retribution under Quesas, and chose instead to accept it. It is also paid in cases of unintentional homicide, involuntary manslaughter and injury.

When the criminal is poor, his family or his tribe assumes collective responsibility for paying compensation (Diyya) in cases of homicide or assault. This rule is founded upon the policies of social solidarity and of alleviating further wardship by providing compensation to the aggrieved family.

The principle of individualisation can be interpreted in two ways in respect of financial penalties. One, by holding that the penalty is not transferable to the family on the death of the convict, as in Iraq, and the other by requiring that the burden be transferred to the family of the deceased convict, as is done in some other countries like Egypt. (See Al-Shriff, A.S.M., 1986, pp.191 forward. Ibn Qudamah, 1974, Vol.9, p.467. Al-Kasani, A.B.I.M.m 1909-10, Vol.7, p.246. Al-Hattab, 1909, Vol.6, p.268).

1.2.3 The Objectives of Punishment Under Shari'a

There is now such an increased emphasis on the reformation and rehabilitation of the offender in Islamic law that many people have mistakenly believed that those are the only objectives of the system. However, that view does not accurately reflect the reality or represent the wishes of Muslim societies. For crime is not just an event which provides an occasion for rebuilding the character of the criminals, but an evil which the criminal intentionally and voluntarily inflicts on society. It is thus necessary for society to respond to such acts with punitive measures sufficiently severe to deter the public generally, and the criminal particularly from repeating his offences. (Al-Shirazi, 1913, Vol.2, p.288. Ibn Al-Humam, 1895-1898, Vol.4, p.112. Al-Mawardi, 1960, p.221). Thus the object of punishment under the Shari'a is geared more towards retribution than reform.

It seems clear that punishment must have the following three objectives: retribution, deterrence, and reformation or rehabilitation. Since crime is deemed to be a challenge to the prevailing values of society and a violation of the victim's rights,

punishment must also seek to provide justice for the victims of crimes (Goodhart, 1953, p.93). This is not to imply that punishment is nothing more than the thoughtless impulse for revenge. Rather, the search for justice entails a measured response which serves as an index of social values and progress. Satisfaction for the victim and his family is a necessary part of that search, which in turn plays an important role in the process of social control (Jones, H., 1965, pp.134-145; Michael Lessonoff, 1971).

The deterrent function of punishment serves as a warning to the public not to commit crimes, to forbid them from imitating the criminal lest they suffer his fate, and to guarantee the safety of those who are threatened by crime. Public deterrence is not achieved merely by defining the crime and prescribing its punishment. It depends essentially on the speed with which the accused is tried and punished (Blanchard, B., 1968, p.59).

The goals of justice and deterrence in no way diminish the goal of reformation, for its importance in Islamic law is not disputed, and its realisation reflects the broadening of man's horizons and the nobility of his aspirations. The success of criminal and penal policy in any society is measured by the degree to which it harmonises these goals. Thus, the rehabilitation and re-education of the criminal must be considered at the sentencing stage to ascertain the degree to which these goals are compatible with the actual punishment imposed ((El-Awa, 1983, p.77).

Islamic jurists also take the view that punishment is a means of deterring the criminal from repeating his crimes. Islamic law thus intends that the mere knowledge of the existence of punishment will be sufficient to prevent the commission of a crime, or failing that, the execution of it when the offence is committed should prevent the criminal from engaging in similar conduct in future. This definition encompasses all three objectives of punishment, as achieving justice is basic to all the regulations and precepts of Islamic law. The concern of the Shari'a for the reformation of the

offender is evidenced by its aim to use punishment as a means of preventing the criminal from returning to a life of crime (Ibid, p.78).

Achieving justice is a necessary goal of any system of punishment and for any form of penalty, whether it be Had, Quesas or Ta'azir. General and individual deterrence takes precedence over rehabilitation where Hudud and Quesas crimes are concerned, and this is evidenced by the fact that the penalty must be carried out publicly. Muslim jurists agree that general prevention is the policy which underlies the public infliction of punishment (Oodah, 1986, p.755).

The best illustration of this policy can be found in Hudud crimes (10). The applicability of Hudud penalties has been greatly narrowed by numerous exceptions and conditions, but the principle that although a Had penalty is nullified by doubt, it can be replaced by a Ta'azir penalty, is indicative of the strength of the general deterrent policy within it. Muslim law regards Hudud penalties as the best form of general deterrence for specifically grave crimes. Thus, for the crime of theft, the Qu'ran prescribes: "As for thieves, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah....." (Surah Al-Ma'idah, verse 38). However, it is significant to note that repentance following the commission of rebellion nullifies the imposition of the corresponding Had penalty. Moreover repentance, according to some jurists, can also nullify the imposition of penalties in other Hudud crimes (Ibid, p.755).

It can be argued that Ta'azir penalties also have a general deterrent effect because the consensus of jurists point to their goal as being one of discipline and correction. These forms of punishment are designed to apply to the majority of crimes and to include any penalty that the ruler or judge finds appropriate, such as imprisonment, exile, flagellation, and verbal admonishment (Ibid, p.756).

1.2.4 Protection of the Rights of the Offender in the Islamic Criminal Justice System

Protecting the rights of the offender is particularly important if the penalty involves loss of liberty for an extended period, for then the likelihood that the convict's rights may be violated increases.

Islamic jurists have directed much attention to the development of Quesas and Hudud punishments, which are mostly corporal in nature. These jurists have sought to establish rules to ensure that execution does not bring about more pain or injury than called for by the penalty (Al-Shirazi, 1913, Vol.2, p.198). It is equally important that the protections afforded by these rules also apply to Ta'azir punishments.

It is universally recognised under Islamic law that the legal guardian (relative) of the victim has the right to demand retaliation for murder, on condition that such punishment is carried out under the supervision of the ruler or his representative. The purpose of this rule is to avoid torture of the convict as unjustified revenge. Execution of punishment by the guardian without official permission incurs Ta'azir upon him (Oodah, 1986, p.757).

The prevailing opinion among Islamic jurists is that the victim is not allowed to carry out Quesas penalties except in blood vengeance, even though he is an expert in applying Quesas (Ibid, p.757). There is concern that he might punish the convict too severely. Instead, Quesas penalties for crimes of beating and wounding should be carried out by trained officials (Al-Hattab, 1909, Vol.6, p.253-254. Al-Shirazi, 1913, Vol.2, p.197). Some jurists contend that blood vengeance should be carried out only by the sword, this being at one time the quickest means of inflicting death whilst causing the least amount of pain and torture (Al-Kasani, 1974, Vol.7, p.246).

1.2.5 Imprisonment

Imprisonment is a Ta'azir penalty whose main objectives are discipline and correction. Jurists have traditionally regarded it as the detention of the convict for a limited period, and it includes occasional visits by authorities to inspect the prison to ensure that the conditions for the treatment of the prisoner are satisfactory (11).

The jurist Abu Youssef says that by jailing prisoners, the Imam (12) deprives them of the means to earn a living and thus must provide them with the basic necessities of life, for depriving prisoners of such essentials might lead to their deaths (Abu Youssef, 1883). The traditional Islamic view of imprisonment is expressed in terms of restricting the right of the convict to move about freely (Ibn Qudamah, 1974, Vol.10, pp.347-348). The Prophet referred to a prisoner as 'asir', a designation indicating that the imprisoned convict is in the custody of the state, which in turn is responsible for him (Ibn Al-Humam, 1895-1898, Vol.2, p.216).

Ibn Qayyim al-Jawziyya expands the concept of the asir to include not only confinement to a place designed for this purpose, but also the restriction on his freedom which in any way guarantees that he will not resort to crime. He states: "It is not confining the person to a narrow place, but hindering and preventing him from inflicting harm on others." (Ibn Qayyim al-Jawziyya, 1961).

Islamic jurists have long recognised the serious consequences of imprisonment. Some argue that it is as serious as Hudud penalties and should therefore be nullified in case of doubt. They would restrict its use to dangerous and incorrigible criminals who are held in prison until they show signs of repentance and who are only then released (Ibn Abidin, 1851, Vol.3, p.260).

The Sunna contains examples of caring for prisoners and the Prophet's exhortations that the man to whom he had entrusted a prisoner care for him and treat him deferentially (10).

Abu Youssef (the famous judge who established a sub-school within the Hanafi school) held that since it was the ruler who deprived the prisoner of his freedom, it was that ruler's duty to provide all the necessities for the prisoner who became his ward and responsibility (Abu Youssef, 1883).

All scholars agree that a prisoner maintains certain rights such as freedom of opinion, integrity of his person, body and mind, and the preservation of his dignity and honour, because imprisonment is only a means of restricting a person's freedom.

The scholar Ibn Ferhon holds that the order for imprisonment must be issued by the judge who sentenced the prisoner and must contain the name of the prisoner, the crime for which he was found guilty, the period of imprisonment, the date at which imprisonment is to start, and the date at which imprisonment is to terminate; all this information should be written in the records of the prison (Ibn Ferhon, 1882, p.227).

All the above clearly indicate how Islamic law protects human rights, and how humanely it treats prisoners.

1.3 The Stage of Western Influence

Islamic criminal law remained in force in most of the Arab countries until the latter part of the nineteenth century. In some countries such as Saudi Arabia, Sudan and, to some extent, Libya, it still continues to be practiced today.

1.3.1 The Era of Ottoman Turkey

Early in the sixteenth century, the Ottoman Empire occupied the Arab countries, including Iraq, and this occupation lasted for almost four centuries. The Ottoman Turks based the whole administration of justice on the Shari'a. They endowed the Grand Mufti, the mufti of Istanbul who was at the head of the hierarchy, and bore the title of Shaykh al-Islam, with a special authority. He

became one of the highest officers of state and was charged with supervising the activity of the judges.

The Ottoman sultans distinguished themselves by legislative activity. The very first of these Ottoman laws, that of Sultan Mehemmed II (1451-1481), refers to Islamic law and freely uses its concepts. It presupposes that the Had punishments are obsolete and replaces them by Tazir and/or monetary fines. In fact these provisions went beyond merely supplementing the Shari'a with the ruler's own policy and were mostly adaptations of religious law (Al-aoje, 1980, p.49). One of the most important needs was to find a way to apply them uniformly throughout the sphere of Ottoman influence which encompassed many different cultures, traditions and languages.

The laws of Suleyman I (13) show a considerable change in the penal law; penalties such as emasculating the seducer, hanging incendiaries on certain types of thieves and house-breakers, cutting off the hands of forgers and coiners 'where it is customary', and, as an alternative, the imposition of fines on thieves (which revives this particular Had punishment) and the use of torture, when there was circumstantial evidence of theft or receiving generally never existed in this form under the Shari'a (Schacht, 1964, p.91).

The Shari'a was, however, not officially abandoned as yet; on the contrary, Ottoman Turkey tried to codify and to incorporate parts of the Islamic religious law into the law of the state. This was the Mejelle-i-ahkam-i adliyye, which remained in force in the territories (which later became independent states where detached from the Ottoman Empire after 1918) until it was replaced by new civil codes in Lebanon (1932), Syria (1949) and Iraq (1953) (Anderson, 1953, pp.43-60, also 1959, pp.36-37. See also Liebesny, H.J.).

By the twentieth century, a review of the situation in Iraq shows how little progress was achieved in terms of economic and social development following four centuries of Ottoman Turkey rule.

Treaties (14), guaranteeing the rights of Europeans within the Ottoman Empire, existed as far back as the late seventeenth century (Mahamsani, S. The Legislative Situation in the Arabic States, pp.16 forward). These treaties were later used as pretexts for Western intervention within the Ottoman Empire, especially when its power began to decline. At the stage of decline, and because of widespread unrest within the Ottoman territories, attempts were made at reforming the political system by the introduction of a new Islamic constitution (15), based on Western liberal ideology. These reforms were made not only as concessions to quieten the domestic unrest but as a measure to prevent the Western powers intervening in the internal affairs of the Empire on the grounds that Europeans were not receiving adequate protection. Moreover, such reforms would give Ottoman rule a modern face which, by making it appear to embody enlightened principles, such as the right to a fair trial in an open court and punishment imposed only by these courts, would accord with Western thinking and thus dispel the possibility of European intervention in the Empire. These reforms led to the enacting of laws such as the Ottoman Penal Code of 1858 which was a compromise between Islamic simplicity and the Code Napoleon (Jenaih, 1981, p.39), and the Criminal Procedure Code of 1879 which had, as its essence, extracts from French law.

In this way Islamic law was influenced by Western legal ideas and one of the results of the mingling of these two legal philosophies was the abolition of corporal punishment, and its replacement by wider custodial sentencing.

1.3.2 The British Occupation

The fall and disintegration of the Ottoman Empire during the First World War brought the British Army to Iraq and, in the early stages of occupation in the Basrah province, the Iraq Occupied Territories Code (16) was brought into force. This Code established criminal courts, to supplement the military courts, under the authority of the General Officer Commanding and supervised by two senior and junior judicial officers who were both members of the

Indian Political Department (Ireland, P.W., 1937, p.82). After the capture of Baghdad in early 1917, it was apparent that the British Army intended to follow a different line of policy by establishing an Arab administration in that city. The military authorities announced that the Occupied Territories Code was not to be introduced into Baghdad. The policy adopted therefore was not "to make a clean sweep of the Turkish legal system and to introduce a new system based on English models as had been done in Basrah Wilayet (province)", but rather "to carry on the Turkish organisation of Courts and system of law, making such immediate modifications as are necessary to ensure justice and a reasonably efficient administration". (Administration Report of Justice from the Occupation of Baghdad to 31.12.1917, p.4).

The Ottoman Penal Code presented many difficulties in the re-organisation of the criminal courts. Although based on the French Penal Code, it had been subjected to so many amendments since it was issued in 1858 that it was, in the opinion of the Senior Judicial Officer, "unscientific, ill-arranged and incomplete". (Memorandum on Baghdad Penal Code 1918). The first difficulty was overcome by the creation of a special code known as the Baghdad Criminal Procedure Regulations Code, brought into operation on 1st January 1919. Until then all criminal cases had been tried by Military Governors and Political Officers. Although the Regulations adopted one or two sections from the Ottoman Criminal Procedure (Young, 1933, p.226), its main provisions revealed the inability of those in the Civil Administration to dissociate themselves from Indian traditions or to escape from the application of British Military Law (17).

The Ottoman Penal Code was replaced on the 1st of January 1919, by the Baghdad Penal Code, based largely on the former, but with amendments and additions from Egyptian sources, which in turn were based on the French Penal Code. The most frequent type of punishment used to deal with crime in both the Ottoman and Baghdad Penal Code was imprisonment. But the primitive ways in which these

sanctions were carried out did not develop in accordance with more modern theories of punishment (Jenaih, 1981, p.40).

The Code remained in force long after the end of British occupation and even survived two revolutions.

1.3.3 The Republican Reign

After the Revolution of the 14th of July 1958, which brought down the monarchy and established the republican system, a new movement started to change most of the Iraqi laws, particularly its criminal laws.

The main turning point in the modern political history of Iraq happened after the Revolution of the 17th of July 1968 which led to many important legal changes such as the replacement of the Baghdad Penal Code with the Iraqi Penal Code No 111 of 1969 (see Chapter 5 for a discussion of this Code in connection with the dangerous offender), the replacement of the Baghdad Procedure Code by the Criminal Procedure Code No 23 of 1971 (which provided conditional release for first time offenders) and the replacement of the Juvenile Act No 11 of 1962 by the Juvenile Act No 64 of 1972.

1.4 Legal Reform Stage

1.4.1 Introduction

The main ideas and thoughts discussed by the working paper on "The Legal System Reform" inferred that the building of a new society and the resultant evolution of "new Arab man" (18) could not be brought about by merely changing the political system and the order of ownership, but that it was important to create new moral values and economic concepts in the direction of a cultural and humanitarian evolution which the Revolution of 17th-30th July 1968 laid down in its main foundations and defined in its directions. The working paper further indicated the necessity to exert a many-sided effort to transform these foundations and directions into

legal rules which could then become the organisational framework of society for the present and the future. Therefore legislation would play so important a role that it would become a structural element, a means of progress and an instrument in the hands of the political leadership in the process of the destruction of feudal, tribal and capitalist values, the main obstacles to the march of the revolution towards the building up of a socialist society.

In 1968, the Revolution faced legislation which expressed the ideology of the exploiting and ruling classes and groups which existed during the era of despotism and reaction, and which reflected the economic, social and political interests of that time. (The Political Report of the Eighth Regional Conference of the Arab Baath Socialist Party, pp.155-156, hereafter referred to as The Political Report 1972).

Threfore, it was natural, after the Revolution had destroyed the political power of these years and started its process towards building the new society and establishing a revolutionary regime, that the Arab Baath Socialist Party (the leading revolutionary power which bases its ideology on nationalist, socialist and democratic theory), took the initiative to carry out decisive and comprehensive changes of the previous legislation to build up a modern state of revolutionary authority which would endeavour to establish a harmonised socialist society. (The Political Report p.163).

1.4.2 The Position of the Revolution as Regards to Law

The Political Report (mentioned above) recognised the importance of introducing radical changes within the legislation (p.155) because the continuance of previous laws would have only perpetuated the imbalances and disunity within society. The Report showed that while the Revolution, its decisions and measures expressed the interests of the working classes and the national, socialist and democratic ideology of the Arab Baath Socialist Party, the prevailing law still continued to organise the social

and economic relations in society in accordance with the thoughts and interests of the classes and strata against which the party and people struggled and which the Revolution had overthrown. (The Political Report, p.164).

The Report stated that the Party had been confronted, from the day it seized power, with the problem of the prevailing laws and legislation, the existence of which made it impossible for the Revolution to lead the country. Therefore, the Revolutionary Committee and Council assumed the capacity of the Supreme Legislative Body, and its decisions took the force of law.

By this decisive measure, the Revolution was able to solve an important part of this problem and to continue the operation of social and economic transformation. But, in spite of its importance, this measure was not sufficient for facing the problem as long as most of the inherited laws still prevailed.

So, in keeping with the ideology of the Arab Baath Socialist Party, the Report found it necessary to reconsider, in a unified form, the inherited legislation for change, improvement or abolition, whichever was appropriate.

Therefore it recommended that, in the light of the qualitative development which the Revolution had achieved in all the fields, the introduction of a decisive and comprehensive change in the inherited legislation was imperative. (The Report, p,241).

However, this change was to be accomplished, "... in a form that goes in harmony with the development brought about in the process of the Revolution and the new social relations created by it ... and with the strategic goal of the Revolution." (The Report, p.165), "... and in what goes in harmony with the principles of the Party and the Revolution, and with the requirements of present revolutionary transformation and its latter development and with the measures taken by the leadership of Revolution and the legislation

issued by it in political, economic, social and administrative fields." (The Political Report, p.241).

1.4.3 Aims of Criminal Legislation Reform

Generally, in essence, and irrespective of the nature and standard of legal technique employed in their construction, criminal legislation aims at supporting the classes and strata prevailing in society. In Iraq, the Revolution of July, 1958, inherited criminal laws with a content that responded to the nature of the former regime which subjugated a significant part of the citizens to the rule of backward feudal and tribal customs.

Despite the economic and political change which took place after July the 14th, 1958, no serious change in the legislation inherited occurred. This presented the July Revolution of 1968 with the burden of achieving reform. (Legal System Reform Act, p.29).

The Legal System Reform Act, in the light of the circumstances continuously developing for the better, found it essential to firstly determine new bases of criminal policy.

1.4.4 The Bases of Criminal Policy

To define the bases of criminal policy it is necessary, in the first place, to state the basic starting points on which this policy rests and to then define the general targets which the policy intends to achieve.

Firstly, with regard to the basic starting points, every scientific criminal policy can be founded on the following:

(a) Preventing the impulse towards criminal behaviour by humanely making available provisions which allow a person to fulfil his human needs.

(b) Analysing criminal conduct by examining the social structure and the objective laws of society which govern activity, on the ground that crime is a social phenomenon and not an individual one inherent in a certain man or group (ie, a person or persons regarded as criminal by nature).

(c) In searching for the causes which lead to criminal behaviour, any judgements based on elements isolated from an offender's personality must also take into consideration his mutual relations with other individuals, as man is a whole, an actor and a product in a specific social, economic and political condition.

(d) To be criminally responsible, an individual must be able subjectively and objectively to commit a crime. If the principle of the criminal liability is confirmed, its scope can then be defined strictly or leniently, depending on the circumstances which contribute to forming the will and choice of the offender.

(e) A crime should be evaluated on the basis of its constituent elements, and according to the extent to which it conflicts with the interests of society, or according to the danger it poses to society, in the case of dangerous criminal behaviour.

(f) Apart from those who commit crimes affecting the security of the state, people's rights, or the honour of loyalty to the home-land, the emphasis of an offender's punishment should be geared, not towards harsh treatment, but towards showing him the error of his ways, by teaching him to respect the basis of social life and by rehabilitating him as an active member of his society which could make better use of him as its instrument. Punishment thus will fulfil the aim of acting as an instrument of deterrence as well as a means of re-educating offenders.

(g) In determining criminal responsibility, the judicature should, as far as possible, investigate the reasons for criminal acts together with any social and private circumstances which contribute to the commission of such acts, to ensure that a just

decision, which will have positive effects on the development of the offender's personality, is reached.

(h) In examining recidivism, a study should be made of the causes which delay the assimilation of offenders into society, and the advice of experts who specialise in this field.

Secondly, the general objectives of criminal policy in Iraq should emanate from the reality of the social, economic and political development within the state, and the achievement aimed at by the Revolutionary power in these fields. Therefore they should aim at:

(a) Securing the system, the institutions of the state and the popular democracy.

(b) Protecting the basic concepts of socialist life and educating citizens to respect the spirit of living within a socialist community.

(c) Discarding the capitalist nature inherent within the criminal legislation, particularly that in the Penal Code, and to attach to economic crimes the significance required at the present stage of change which has followed the greater development of public ownership and the state's role in administering and guiding the national economy. It is therefore essential to revise the former penal system which was dominated by capitalist thought, to encourage the socialist trend which is reflected in the revolutionary legislation in Iraq, and to pay greater attention to the laying down of general rules which govern crimes involving the national economy. In the framing of these general rules it is important to concentrate particularly upon the violations which affect public ownership, co-operative ownership, the means of production, the organisation of agricultural and industrial production, and the rules for distribution of services and commodities; it is also important to concentrate on violations which involve the misuse of delegated powers and the distortion of them to an extent which harms the

national economy or the abuse of them to promote an illicit private interest. It is however also important to protect private ownership as a social function and to have its role prescribed within an economic plan. In order to secure the success of such a criminal policy in the economic field, one must inevitably reconsider some of the general bases of the Penal Code in areas concerning the issues of conspiracy, recidivism and attempt. Equally important is the need to co-ordinate the criminal policy in the field of economics so as to make it an integral part of the policy pursued by the state in legislating within this field. The goal of this need is to provide a guarantee for the success of the state's economic policy.

1.4.5 The Bases of Criminal Legislation

The aforementioned criminal policy will have no value unless its bases are reflected in positive legislation. As the Penal Code is the most important positive criminal legislation in Iraq, it can be used to illustrate the most prominent grounds on which any criminal legislation can be based.

From a scientific and social viewpoint, the Penal Code effectively contributes in protecting the achievements and the aims of the Revolution, and it is based on the following ideas:

(a) To cease regarding some former offences which do not conflict with socialist philosophy as punishable crimes, and to regard acts which conflict with the state's economic interests as punishable crimes.

(b) To reconsider dividing crimes into felonies and misdemeanours, and to give them new limits. Petty crimes which can be classified as contraventions can then be dealt with by special legislation, which will assist those who commit them to respect the law and their community.

(c) To stress the importance of making use of positions of influence for the purpose of illegitimate earnings a punishable

crime, and to bring such an offence within the ambit of the general theory of the abuse of powers.

(d) To define criminal liability in the light of the new socialist concept of relations between the individual and society. If the traditional view defines the liability on the bases of the principle of choice, the new reformative view must take into consideration objective and personal factors.

(e) The scientific view of the criminal, the crime and the victim, must play its role in defining a new concept of non-liability and in designing the means for reforming the criminal, and the protection of society.

(f) To enable legal defences to be invoked in cases of crimes which involve the interests of the state, society, and the public and co-operative sector.

(g) To introduce new substantive penalties which are not restrictive of liberty, but which, in their scope, effectively encourage the offender to do his best to make reparations for damage caused by him, prevent the repetition of crimes and involve the active support of society in improving a criminal's behaviour.

(h) To impose penalties, restrictive of liberty, on persons committing serious crimes and on recidivists who refuse to reform, whilst reserving more severe punishments, such as the death penalty and life imprisonment, for extremely dangerous crimes.

(i) When assessing the suitability of a punishment, the Court must give due regard to the degree to which the crime poses a threat to the fabric of society, and it must take into consideration the personality of the criminal, his history, and the personal and objective circumstances of the case.

From the above discussion it seems clear that social dangerousness has an important role to play in penal policy, as the

wide discretionary power given to the Court in deciding the weight of the sanction is reflected to a great extent in penal individualisation. This penal individualisation is the basis of the treatment of the dangerous offender.

To conclude, the treatment of the dangerous offender developed simultaneously with the development of Iraqi Criminal Law. So, at the time when Islamic Criminal Law was in force, dangerous offenders were dealt with (sometimes) rather severely. Islamic Criminal Law remained in force until the latter part of the nineteenth century. Thereafter the influence of Western thinking began to take place on the treatment of dangerous offenders. This influence has been interpreted in terms of a new criminal law which was a compromise between Islamic simplicity and the Napoleonic Code (Jenaih, 1981, p.39). As a result of the mingling of the two legal philosophies, the new Code abolished corporal punishment and replaced it with the practice of wider custodial sentencing.

The influence of Western thoughts on dealing with dangerous offenders remained in force until the late 1970's; it even survived two revolutions and, in fact, still exists today in the provisions of the present Penal Code. However, in 1977, a new trend in penal policy emerged with the issue of the Legal System Reform Act [Law No (35)] 1977. The rationale of this trend seems to be that "Laws are a reflection of the ideas and economic interests prevailing in society" (Political Report, p.163), and is in harmony with the socialist and democratic ideology of the present ruling Party.

The main characteristics of the new direction are clearly explained by the provisions of the Legal System Reform Act 1977. This law provides for the dismantling of the capitalist nature of the criminal legislation, particularly that within the Penal Code, and attaches a significance to economic crimes which accords with the new trend. Criminal policy in the economic field is therefore an integral part of the policy pursued by the state in the field of economic legislation, and it also becomes a basic guarantee for the

success of the national economic policy. Therefore the degree of dangerousness is proportional to the extent to which a dangerous offender threatens the foundations of socialist society (Law of Legal System Reform, p.30); the greater the threat posed to the basis of that society, the more dangerous the offence will be.

Footnotes

(1) Jurists differ on the number of Hudud offences. Some list seven such crimes: theft, highway robbery, adultery, defamation (false accusation on adultery), wine drinking, apostasy, and rebellion. Some jurists omit rebellion, while others restrict the list to the first four crimes only, classifying wine drinking and apostasy as crimes of Ta'azir, since neither the Qu'ran nor the Sunna (deeds and sayings of the Prophet; follows the Qu'ran as a source of law) prescribed specific penalties for them.

(2) Quesas crimes include murder, maiming and battery.

(3) Hadiths: sayings of the Prophet - see also Sunna (footnote (1) above).

(4) Diyya: compensation (damages) for Quesas crimes.

(5) Literally means consensus. A source of law and a method of interpreting the principles and norms of the Shari'a.

(6) A crime against the law of God (seven crimes specified in the Qu'ran for which prosecution and punishment in case of guilt is mandatory); see note (1) above.

(7) Hudud penalties cannot be imposed if there is any doubt concerning the material elements of the crime or if there are surrounding circumstances which mitigate the offence.

(8) Thus Ta'azir resembles the doctrine of analogy which was relied upon at one time in Soviet and Socialist law.

(9) Literally means reasoning - reasoning by analogy. A source of law and a method of interpreting the principles and norms of the Shari'a.

(10) See note (1) above.

(11) Ali ibn Abi Talib (cousin of the Prophet and the fourth caliph to succeed him) used to make surprise visits to jail to hear the complaints of the prisoners and to ensure that they were not mistreated by the jailers.

(12) The ruler.

(13) The so-called hanun-names enacted by the Ottoman sultans.

(14) E.g., the Anglo-Ottoman Treaty of 1675 and the Franco-Ottoman Treaty of 1673.

(15) Two constitutions were enacted by Sultan Abdul Majrel, one in 1839 and the other in 1856 when the first failed to be implemented.

(16) This Code was largely based on similar laws already enforced in India.

(17) Both these traditions formed the basis of the Sudan Code of Criminal Procedure from which the Regulations were drawn.

(18) The revolutionary ideal of the type of person that would inhabit an Arab socialist society.

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CHAPTER TWO

2.0 AN HISTORICAL STUDY OF DANGEROUS OFFENDERS IN ENGLAND

2.1 Dangerous Offenders From 1852-1894

The apparent rise in crime in the middle of the nineteenth century was due to several factors, especially the ending of the practice of transportation brought about by the refusal of Australia's eastern colonies to accept any more criminals, and the continuing development of cities in England as a result of the Industrial Revolution. A major indicator of the increase in the crime rate was the growth of the police force at that time (Radzinowicz & Hood, 1986, p.231). The existence of an anonymous, mobile criminal class, pressed the Government into taking action to deal with this problem (Radzinowicz & Hood, 1980, p.1308).

2.1.1

There were differences in approach to the problem. One nineteenth century commentator, who dealt with the criminal fraternity, Matthew Davenport Hill (1) (19792-11872), a reformer of the criminal law (Dictionary of National Biography, Vol. 16, p.402), laid down the following principles for dealing with criminals:

First of all Hill stated that "the object of criminal jurisprudence should be the repression of crime to the lowest possible level, the treatment of the criminal being a means to that end, not an end itself." (Ibid, pp.403-404).

Secondly, he felt that "with retribution for sin, man, in regard to his fellow man, has nothing to do." (Ibid, pp.403-404).

Thirdly, he argued that "punishment solely as a deterrent being often futile, at best insufficient, and always uncertain in effect, two methods alone exist of preventing crime by penal means, namely,

incapacitation or reformation." (Hill, 1857, p.403, pp.462-473 & pp.651-657).

Under Hill's concept of incapacitation came capital punishment and imprisonment. Criminals guilty of murder, but who have been reprieved, those who are guilty of inflicting irremediable injury, and those who have repeated convictions for grave offences, thus showed themselves to be incorrigible. Therefore he proposed, in 1846, that a prisoner should be detained until he was completely reformed. Hill was confident that this would lead to the reform of petty offenders leaving a small number of dangerous criminals who could be "detained indefinitely on a similar principle to that on which lunatics are kept under a restraint, which is only withdrawn when the patient is relieved of his malady." (Hill, 1846, p.12).

In dealing with all other prisoners he adopted the principles laid down by Captain Maconochie, formerly Governor of Norfolk Island, which Hill thus summed up as the method by which one can reform an offender from the moment of capture, right through the period of his detention and up to the time at which he is considered ready for release. Thus, the prisoner may earn "indulgences and liberation" only by good conduct and hard work. (Dictionary of National Biography, Vol. 16, p.404). This principle was in part adopted by the Penal Servitude Act of 1853. (Ibid, p.404). According to this Act, a prisoner whose conduct had been good could be released before the expiration of his sentence on a ticket of leave. The main condition of a ticket of leave was that he would be sent back to prison on proof that showed he was associating with persons of evil repute, and was not in possession of any visible means of earning an honest livelihood. This measure was almost wrecked at the outset by the Home Office. Convicts, however bad their conduct had been, were discharged on the expiration of a certain portion of their sentence, and scarcely a single license was revoked except on the commission of a fresh crime. Crimes of violence increased, and this was attributed to the system. (Ibid, p.404).

The medical analogy was a familiar theme of Hills. In 1845 he had described prison as "a hospital for the treatment of moral diseases"; those who proved to be incorrigibly depraved would be detained "until .... released by death". (1) (Hill, 1857, p.103, pp.462-473 & pp.651-657).

Hill's idea of 'treating' criminals to help them is of limited value here, because if the dangerous offender fails to respond to the treatment, Hill is implying that he is beyond rehabilitation and should be left to die in prison. This approach only manages to close one eye on the problem and does not solve it. Further attempts should be made to help the offender, and he should not be ignored or treated as if he were suffering from a fatal disease.

There were some who supported Hill's argument for indeterminate sentences, like William Rathbone-Greg (1809-1881), who considered that incorrigibility was established by a second conviction. The first conviction merely indicated that the offender was a "frail member of society" who could be punished by a short term of imprisonment. The second conviction showed guilt, because the offender had then stepped "from the class of casual into that of professional depredators", and he thereafter belonged "to the criminal population". (Greg, 1870, pp.84-98. See also Dictionary of National Biography, Vol. 23, pp.88-89).

This conception, however, lacks accuracy, because the first offence may be relatively serious, or the offender may have committed many offences before being caught, and thus already be an experienced criminal, but not be recognised as one. Similarly there may be those offenders who have committed more than one petty crime and who will not constitute a serious danger but who will be treated as being so.

Greg thought that commission of the second offence gave society the right and duty to protect itself, "by reforming him and incapacitating him until he is reformed". (Ibid, pp.84-98).

Society should have a right to protect itself and reform the criminal for each offence he commits, not just for the second offence, and incapacitation until he has reformed may result in society exceeding it's rights and punishing the criminal with undue severity in proportion to this crime.

2.1.2 Cumulative Sentencing

Hill's idea of an indeterminate sentence for dealing with the dangerous offender was replaced by the idea of cumulative sentencing which was "designed to ensure that progressively heavier punishment would follow with certainty upon each reconviction." (Radzinowicz & Hood, 1986, p.237). Henry Mayhew envisaged this system as a means of destroying the criminal class. Young offenders were to be dealt with in reformatory schools, whilst older offenders serving longer sentences would lose their criminal ways, and be unable to influence potential wrongdoers. (Ibid).

The Gloucestershire Magistrate, Thomas Barwick Lloyd Baker (1807-1886) (Dictionary of National Biography Supplement, Vol. 1, pp.106-107), expounded the cumulative sentencing idea in a series of articles beginning in about 1857. By 1863, his ideas on cumulative sentencing became clear and it was apparent that he took a harsh attitude towards offenders: a week or ten days on mere bread and water for a first conviction; twelve months imprisonment for a second conviction; seven years penal servitude for a third, and penal servitude for life or for some very long period which would allow surveillance on a ticket of leave (2) for the greater part of the criminal's life, on a fourth. (Baker, 1863, pp.331-32).

There were others who supported cumulative sentencing. Alexander Thomson of Banchory suggested a certain ascending scale of punishment that would ensure two or three years imprisonment upon the third or fourth conviction. For proven habitual offenders Thomson suggested life imprisonment. (Thomson, A., 1857, pp.403-410). Many, however, thought that execution of habitual criminals

was preferable to lengthy prison sentences. (Stephen, J.F., 1973, Vol. 1, pp.457-480).

2.1.3 The Dual Track System

A proposal for life imprisonment upon second or third conviction was made by Henry Taylor in his published letter to Gladstone in 1869. (Radzinowicz & Hood, 1986, p.240). He planned to divide imprisonment for habitual offenders into two phases. Firstly a severe deterrent period of imprisonment, designed to show the prisoner that the prospect of long incarceration was unpleasant and undesirable. Secondly, a protective phase of life imprisonment divided into three five-year spells during which the prisoner would be entitled to more privileges and eventually short periods of conditional leave. Incarceration in this latter part of the dual-track system was for society's protection but was meant to be humanitarian as well as preventative. Taylor's ideas, however, were not adopted. (Ibid, p.241).

The Royal Commission on penal servitude reported in 1863 that punishment was not sufficiently feared because of the short duration of the sentences. The minimum term laid down in 1859 was three years, but the Commission recommended raising it to seven years (the old minimum for transportation). In fact, the Penal Servitude Act of 1864 made five years the new minimum for penal servitude (an Act to amend the Penal Servitude Acts 27 & 28, Vict. C.47 (1864, S.2)), but the Government was pressured into making this a mandatory seven years for anyone with a previous conviction for felony. However, judges could use their discretion to sentence an offender to ordinary imprisonment (the maximum term of which was two years), if they thought this was too severe. This frequently resulted in lower rather than higher sentences being imposed, and thus the legislation was counter-productive. (Habitual Criminal Bill [Bill 73], 4 August 1869, Cols. 1255-1256).

A second attempt to impose a mandatory minimum sentence and to close the discretionary loophole was made by the Habitual Criminals

Bill of 1869, which included a clause making seven years penal servitude mandatory on a third conviction for felony; but the Bill failed when the Home Secretary withdrew it, conceding that it could result in great hardship. (Ibid, Col.1258).

The Habitual Criminals Bill in 1869 was introduced by the Liberal Government with the intention of increasing police supervision of the criminal classes for seven years after they had served their sentences, and giving a power of imprisonment for one year to the Courts, if ex-offenders were acting suspiciously, could not prove their earnings were honest or defaulted on their ticket of leave arrangements. (Habitual Criminal Bill No 32, 1869, Col. 223). There was opposition to the shift of the burden of proof from accuser to accused, and the possibilities for abuse of power by police and magistrates, but this was ignored by the Government (3).

The 1869 Bill's deficiencies soon became apparent when it was realised that the police would not be able to enforce the Act because they lacked the resources to watch over the large number of criminals involved. The Prevention of Crime Act 1871 sought to correct these deficiencies by altering the burden of proof to a "reasonable ground for belief" (The Prevention of Crime Act 1871, S.7), by reinstating tighter conditions of supervision for ex-convicts and no longer making police supervision mandatory. (Ibid, SS. 4 & 5). However, it retained the power to imprison those with two previous convictions for felony if they were living by dishonest means or acting suspiciously. (Ibid, SS. 7 & 8). In addition, the Courts had discretion to decide which offenders should be under surveillance. (Ibid, S.8).

The police were accused of harassment when trying to enforce these duties with ticket of leave offenders and so were forced to assume a more low-key role. (Radzinowicz & Hood, 1986, pp.258-259).

A Convict Supervision Office was set up in 1879, by the Metropolitan Police, staffed by plain clothes officers who were expected to work in harmony with the Discharged Prisoners' Aid

Society. (Home Office Printed Memoranda, Vol. 2, 1886, p.695 at p.703).

Although some modern historians have seen legislation dealing with the habitual criminal as a significant factor in the reduction of crime, their view is doubtful. (Radzinowicz & Hood, 1986, p.260). F. Hill and W. Crofton devised a plan to eliminate the criminal class altogether by the simple measure of asking them to account for their livelihood; but this was impracticable and contrary to English liberties and tradition, and so was unsuccessful. The employment of convicts in the army or navy had been useful in providing prisoners with a decent wage earlier in the century but, upon returning to civilian life, finding an honest wage with a dishonest character was difficult.

Progressive penologists and positivists realised (as did Winston Churchill), that "the penalty of surveillance" achieved little, and so police supervision of ex-convicts was abolished in 1910. Infrequent supervision of other habitual criminals continued, but only at the rate of a dozen or so cases each year until the practice finally ceased altogether in 1948. (Ibid, p.261).

2.2 The Gladstone Committee, 1894

During the late nineteenth century there was a distinct increase in criticisms of and comments on the prison system. An article in the Fortnightly Review for April 1894 criticised the whole prison system, particularly the Chairman of the Prison Commission, Sir Edmund Du Cane, and his method of running the system. The author, the Rev. W.D. Morrison, Chaplain of Wandsworth Prison, argued that the "experience of the unfortunate inaccuracies of the respected Chairman of the Prison's Boards forbids us to place undue reliance on his unverified opinion on any important point relating to the movement of crime." (Morrison, 1894, p.464). The article discussed prison discipline and felt that, instead of reforming the prisoner, it had the effect of turning him into a "gaol-made" criminal, the most dangerous and incorrigible class of all criminals. He went on to state that, although disciplining

prisoners might punish them, "shatter their intellect", or even drive them mad, it would never succeed in deterring them from pursuing a career of crime. Furthermore, Morrison argued that as the methods of prison discipline tended to make a naturally unstable mind worse, by intensifying the initial cause of a man's fall, one could never expect such a man to be a law-abiding citizen when released into the world at large. Thus no man could be expected to improve when the utmost was being done to make him worse. Therefore the article suggested that, in order to arrest the advance of recidivism, a prison system had to be organised which would remove rather than enable the intensification of the conditions which produced the dangerous criminal; any prison system which aggravated these conditions was bound to fail as an agency for deterrence. (Morrison, 1894, p.468).

As far back as 1890, a writer in the Law Quarterly Review had described the English prison system as "a manufactory of lunatics and criminals." (Renton, 1890, p.338). The Daily Chronicle published a series of articles under the title "Our dark places". (Cross, 1971, p.2). These articles showed that the local prison system had broken down completely, and also the prevailing malaise that existed in the general attitude towards prisons at the time.

The Government took the view that an inquiry was necessary, if only as a means of satisfying the public conscience, and on 5 June 1894, the then Home Secretary, Mr Asquith, appointed the famous Departmental Committee on Prisons under the chairmanship of Mr Herbert Gladstone.

2.2.1

The Report of the Committee on Prisons, 1895 (hereafter the Gladstone Report), reflected the real situation "of all prisoners confined in local and convict prisons, and under treatment". (The Gladstone Report, para 2, p.1). The Report does not look like a statement of penal policy but, on further investigation, it appears to be fully justified.

Du Cane commented that the instrument appointing the Committee was somewhat remarkable when considered in connection with the actual Report. (The Nineteenth Century, Vol. 38, July-December 1895, p.278). The Report's enquiries was concerned with six subjects connected with prisons and prisoners, to which two were subsequently added. These were:

(a) The accommodation provided for prisoners.

(b) Juvenile and first offender; and to what extent they should be treated as classes apart.

(c) Prison labour and occupation; with special reference to the moral and physical condition of the prisoners.

(d) The regulations governing visits to and communications with prisoners.

(e) The regulations governing prison offences.

(f) The arrangements by which the appointment of a deputy governor is limited to prisons with more than 700 prisoners; and a warder in charge acts as governor in prisons with not more than 100 prisoners.

The two further subjects subsequently added were:

(g) The prison treatment of habitual criminals.

(h) The classification of prisoners generally.

(Ibid, p.278).

Of the numerous recommendations (4) made by the Committee, the most important one stipulated that dietary punishment should only be inflicted when no other efficient susbstitute could be found. (The Gladstone Report, para 95, p.35). There were other recommendations

that were also, unquestionably, of great significance. To take two of the most noteworthy examples:

(a) The age of a juvenile under the Prisons Act, 1865, was to be raised from 16 to 17. Juveniles were to be specially treated in prisons, and not to be subjected to ordinary prison discipline and regulations. Further, the Court was to have fuller powers for securing parental responsibility and liability. (The Gladstone Report, para 82, p.29).

(b) The proposal of an intermediate or pre-release prison. This was to be an experimental idea which would only be realised in the prison hostel system. (The Gladstone Report, para 91. See also Ruggles-Brise, The English Prison System, 1921, p.30). It was to involve the selection of a small local prison which would then become an intermediate prison between the stages of discharge and release. (The Gladstone Report, para 91).

2.2.2 The Habitual Criminal

The Gladstone Report acknowledged recidivism to be "the most important of all prison questions, and it is the most complicated and difficult", since "the retention of a compact mass of habitual criminals in our midst is a growing stain on our civilisation." (Para 18, p.5).

The Report adopted its view from the contemporary climate and prevailing views on the habitual offender, which regarded him as a growing danger in the community. These views expressed their fear of such an offender by emphasising that existing penal processes had no appreciable effect upon him. (Brone, H.L., 1895, p.231). Thus, as Brone put it:

"He goes in and out of the gaol caring nothing for the law, which seems powerless against him. What is to be done with him? The answer is plain. He should not be allowed to go free; he is not entitled to the liberty which he will still so persistently misuse.

Courts and Jurisdictions still hesitate to adopt this seemingly severe but assuredly just principle, and the survival or increase of recidivism is largely affected by the fact that the professional offender is so constantly at large." (Ibid, p.231).

Therefore the Committee was strongly in favour of "further corrective measures" (The Gladstone Report, para 85, p.31) against such offenders. These prisoners, "when under sentence, complicate prison management, when at large they are responsible for a greater part of undetected crime; they are a nuisance to the community." (Ibid, para 85, p.31). This brought the Committee to suggest that consideration might be given to a new form of sentence by which habitual criminals would be segregated under special conditions for long periods (a forerunner of preventative detention), the rationale behind this sentence being that, to prevent habitual mischief, the offender had to be kept out of it. (Southerton, P., The Story of a Prison, 1975, p.8).

2.2.3

The Gladstone Committee did not try to define habitual criminals and suspended the task of the definition until "a new form of sentence should be set up". (The Gladstone Report, para 85, p.31). The Committee encountered difficulties in distinguishing between petty persistent offenders and dangerous offenders. Many definitions had been made for "habituals"; they were defined as "that class of criminals who are, distinctly from calculating motives, going in for a class of crime which only exposes them now and again, when they are caught, to short terms of imprisonment." (Minutes of Evidence (C.7702-1), p.209 Q 8675).

Also, "the habitual prisoner who is constantly in prison for a small offence who is constantly suffering small terms of imprisonment" was identified as "one of the most dangerous classes of offenders". (Ibid, p.17 Q 431). For insufficient reasons the Committee excluded those who committed serious offences. It appears that the Committee believed that very long sentences "frequently

make them desperate and determined when again at large not to be taken alive." (The Gladstone Report, para 85, p.31). Surely this ignores the fact that a serious offender can be persistent as well as dangerous.

The picture of dangerous offenders in the mind of the Gladstone Committee was that of:

"a large class of habitual criminals not of the desperate order, who live by robbery and thieving and petty larceny, who run the risk of comparatively short sentences with comparative indifference. They make money rapidly by crime, they enjoy life after their fashion, and then on detection and conviction they serve their time quietly with the full determination to revert to crime when they come out ...". (Ibid, para 85, p.31).

According to this, it seems that repetition in crimes against property, whatever their degree of seriousness, was the main concern of the Committee. Moreover, "the wilful persistence in the deliberately acquired habit of crime" as a formulation for dangerousness was still vague and inadequate. Therefore the Committee, at the end of paragraph 85 (relating to habitual criminals) "had to concede that a workable definition escaped it", and thus found refuge "in a doubtful proposition." (Radzinowicz & Hood, 1986, p.266).

Accordingly, the Committee acknowledged: "This is a question which necessarily must be taken in conjunction with our suggestion that a new form of sentence should be set up. To lay it down that a prisoner should be regarded as an habitual criminal does not meet the case .... it probably would be necessary to give a certain amount of discretion to the Court." (The Gladstone Report, para 85, p.31).

This argument is questionable in that it begs the question of how any type of sentence and system of detention be devised without

a clear cut definition of the types of offenders on whom it may be imposed.

2.2.4

Despite its defects, it could still be argued that the Gladstone Report was the single most important influence on the way in which the prison system was to develop during the twentieth century, such that 1895 can be regarded as a turning point. Although the prison system has retained, to some extent, its more purely custodial and punitive functions, the main thrust of official policy, since that time, has been to use imprisonment constructively to reduce the number of offences committed. This policy, based on developments in penal theory from the nineteenth century onwards, was crystallised by the Gladstone Committee Report in 1895 in terms of the twin objectives of deterrence and reform. The prison authorities were then able to put these ideas into practice for a period of fifty years with virtually no legislative interference. (Harding & Kaffman, 1988, p.129).

2.3 The Prevention of Crime Act, 1908

The habitual criminal had been presented as the familiar character of the dangerous offender throughout the first half of this century. Therefore the sections in Part II of the Prevention of Crime Act, 1908, were concerned with the problem of habitual criminality.

The Gladstone Committee proposed the first suitable step of a future cure to the habitual criminal when they reported:

"that a new form of sentence should be placed at the disposal of the judges by which offenders might be segregated for long periods of detention, during which they would not be treated with the severity of first-class hard labour or penal servitude, but would be forced to work under less onerous conditions. As loss of liberty would to them prove eventually the chief deterrent, so by

their being removed from the opportunity of doing wrong, the community would gain". (The Gladstone Report, para 85, p.31).

This view, which concerned the habitual criminal as a wild animal who might be detained "for long periods" to protect the community from him, was not very strange to the judiciary and other concerned people at that time because it was in agreement with another opinion, that of the Prison Commissioners who reported in their annual report for the year 1902, that the habitual criminal "might be segregated by order of the Court for long periods of time". These two ideas reflect both public opinion and the official idea which was well represented in the introduction of the Secretary of State for the Home Department, Mr Gladstone, on the 27th of May 1908, when debating the Bill of Prevention of Crime. Firstly he stated that "the proposals are the outcome of careful study and long consideration". (The Parl. Debates, Vol. 189, 1908, Col. 1122). Then, he introduced his proposals for preventive detention, on grounds that:

"The present system is not .... deterrent to two classes. The first of these is that class which is a nuisance rather than a danger to the state, those who are criminals chiefly because of physical or mental deficiency rather than by reason of a settled intention to pursue a life of crime. For that class the present system is not the right one .... A second and far smaller class of prisoners consists of more formidable offenders, men who are physically fit, who take to crime by preference, decline work when it is offered them, and refuse the helping hand. They laugh at the present system of imprisonment; and when they leave prison it is practically certain that they will return sooner or later." (Ibid, Col. 122-123).

Thus Mr Gladstone classed these two types of criminal as dangerous offenders, but distinguished them by proposing preventive detention in the case of persistent criminally motivated offenders, that is, punishing them for crimes that might be committed in the future. (Radzinowicz & King, 1977, p.224).

On the 21st of December 1908, the Prevention of Crime Act, received the Royal Assent; on the 1st of August 1909, it came into operation. (The Prevention of Crime Act, 1908, S.19, 1 & 2). This Act can be described as a new step in the evaluation of criminal law in England (Radzinowicz & King, 1977, p.220) because it established a new sentence, that of detention of habitual criminals, under which the habitual criminal could be detained for a period not exceeding ten nor less than five years, after serving a sentence of penal servitude appropriate to the initial crime, for the protection of the public. (Ibid, p.220).

To discuss all the issues that arose from the Act would go beyond the scope of this work; therefore this study will confine itself to the essential points relating to the treatment of habitual offenders.

Although the Act tried to protect offenders' rights, prior to conviction as habitual criminals, it was in fact unsuccessful because of the complicated procedures involved, which more often than not led to the conviction of petty habitual offenders - a contradiction of the aims of the Act, which sought the preventive detention of dangerous criminals.

Another problem was the wide discretion in sentencing powers, which led to arbitrary sentences in the guise of protecting the public interest. (Morris, N., 1973, p.47). The legislature did not lay down any criteria to control this power given to the judge.

Furthermore, the Act neither defined what constituted a dangerous habitual offender nor when habitual offenders should be detained, and left this matter for the judge to decide.

At the time, the Act claimed to protect the individual's rights, but it forgot the offender's rights as an individual. (Ibid, p.80).

The Act survived for forty years, until it was replaced by the Act of 1948. It was destined to perish, for several reasons:

Firstly, the development of civilised law usually allocates one sanction for each crime; in contrast the Act in practice imposed "a dual track system", which punished criminals by preventive detention in addition to penal servitude. Indeed there were objections to the Bill from both Houses of Parliament on this point but the Act was issued despite these early objections.

Secondly, as mentioned above, the practical definition and sentencing of professional habitual criminals, for the protection of the community, needed to be clearly distinguished in a unique class of its own.

Lastly, the negative aspects of the Act were such as to concentrate on segregating and isolating habitual criminals from society rather than positively contributing to establishing ways of reforming such offenders.

2.4 The Period from 1908-1948

Although the Report of the Departmental Committee on Persistent Offenders 1932 covered a wider classification of offenders than dangerous offenders, it could nevertheless be considered for discussion as part of the topic dealing with the treatment of dangerous offenders. Therefore, it is necessary to look at the most important points of the Report. The Report mentioned that the reason "for an enquiry into the methods of dealing with persistent offenders" was because persistent offenders were "neither reformed nor deterred by the sentences passed upon them". (Report of the Departmental Committee on Persistent Offenders, 1932, para 2, p.2).

The statistics showed that a substantial number of prisoners were repeatedly sent back to prison, because the methods of dealing with them failed "to check the criminal propensities of such people", and could "actually cause progressive deterioration by

habituating the offenders to prison conditions". (Ibid, para 5, p.3). General public opinion also showed a concern, pointing to the methods of dealing with persistent offenders as unsatisfactory. The Committee believed that the Courts needed to get additional powers to enable them to apportion each punishment according to the committed offence. Therefore, they recommended a new type of punishment, "detention for any period being not less than two, nor more than four years with the object, ... of subjecting the offender to such training, discipline, treatment or control as will be calculated to check his criminal propensities". (Ibid, para 40, p.16).

This recommendation, in addition to what was mentioned in para. 20 of the Report, stated that: "It may be necessary for the Court to have regard to such points as the offender's age, his health, his circumstances, the prevalence of the offence and other matters." (Ibid, para 20, p.9). This seems at first sight to be in harmony with an essential principle of the Modern Criminal policy, ie, individualisation of punishment.

However the Committee in fact tended to expand the use of preventive detention by proposing (Ibid, para 37, p.15) to exceed the proper limits that were provided in the Prevention of Crime Act 1908. It thus recommended the inclusion, for the purpose of preventive detention, of the age group between Part I of the Act of 1908, which provided for Borstal detention for offenders under 21, and Part II which provided for preventive detention for offenders over 30 years. (Ibid, para 37, p.15). The Committee pointed out that the consequence of the 1908 Act was that offenders, whose ages were between 21-30 years, were not covered by any sort of preventive measures.

It could be argued that the Prevention of Crime Act 1908 was a better and more civilized measure because it did not cover this age group. The number of offenders between the ages of 21 and 30 was 13,989 for the year 1930 (Ibid, para 38, p.15), and such offenders, at the optimum age in their lives when they could be used for work

and production in the interests of the common welfare of society, would have deprived the community of the benefits of their energy had they been sentenced in accordance with the Committee's recommendation.

The Departmental Committee suggested sentences not only for those likely to benefit from reformative training, but also for those who, though not liable to training, needed to be under control in the interests of public protection. As a result of this recommendation the Criminal Justice Bill of 1938 (5) provided for a sentence of preventive detention for a term not less than two years, nor exceeding four years for more "obstinate" criminals. (The Advisory Council on the Treatment of Offenders, 1963, para 9, p.2. See also Parl. Debates 1938-39, Vol 342, Col 280).

One important difference between this provision and the 1908 Act is that, whereas it was previously necessary for an offender to have been given a sentence of at least three years penal servitude, the 1938 Bill (which became an Act in 1948) only required "that the offender should be convicted on indictment of an offence punishable with a term of imprisonment of two years or more". (Hammond & Chayen, 1963, pp.10-11).

2.4.1

The 1948 Act did not distinguish between the nature of the offence and the offender as an undesirable person, while in the Act of 1908 this distinction was very clear because of the condition that no sentence of preventive detention should be passed unless the offender had been sentenced to penal servitude for a term not less than three years for the same offence. As a result, juries hesitated to classify the offender as a habitual criminal and add to what was already a fairly substantial sentence. The 1948 Act removed this difficulty by setting out more precisely what constituted a habitual offender instead of leaving this matter to a jury. (Ibid, p.11).

The 1948 Act provided the criterion for preventive detention in Section 21, subsection 1(a); this was the provision which made such detention expedient for an offender who had been punished for a maximum sentence of imprisonment of not less than two years (a comparatively low penalty in the scale of maximum penalties).

Therefore, many offenders without committing serious offences became liable to preventive detention. This resulted in some offenders, who were not of the same degree of dangerousness as other offenders sentenced to long terms of imprisonment, being sentenced to preventive detention. (Ibid, p.185).

2.4.2

The Departmental Committee of 1932 recommended "prolonged detention" (preventive detention) for habitual criminals where short sentences would be unproductive or insufficient because of the seriousness of the offences. The Committee mentioned three kinds of offenders for whom prolonged detention might apply. These were:

(a) Professional criminals, for whom crime was a way of life,

(b) Certain sexual offenders, and

(c) Persistent offenders who practice crimes against property on a comparatively small scale, and which are considered as misdemeanours (as opposed to felonies). (The Departmental Committee on Persistent Offenders, 1932, p.20).

The Committee's recommendation became enacted and appeared as the already mentioned Section 21, subsection 1, of the Criminal Justice Act 1948, which thus provided that "where a person who is not less than twenty-one years of age:

(a) Is convicted on indictment of an offence punishable with imprisonment for a term of two years or more, and

(b) has been convicted on at least two occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence,

then, if the Court is satisfied that it is expedient with a view of this reformation and the prevention of crime that he should receive training of a corrective character for a substantial time, followed by a period of supervision if released before the expiration of his sentence, a sentence of corrective training for such term of not less than two nor more than four years as the Court may determine."

The recommendation of the 1932 Departmental Committee relating to habitual criminals provided that "where a person is convicted on indictment of a crime and since attaining the age of sixteen years he has at least three times previously been convicted of a crime, the Court, if of the opinion that the offender is of such criminal habits or mode of life that it is expedient for the protection of the public that he should be kept in detention for a lengthened period of years, may, in lieu of any other sentence, pass a sentence of detention for a term of not less than five years and not more than ten years." (Ibid, p.20). This recommendation was accepted by the legislature and appeared in Section 21, subsection 2, in the following form: "where a person who is not less than twenty-one years of age:

(a) Is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and

(b) Has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training;

then if the Court is sastisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released

before the expiration of his sentence, the Court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five nor more than fourteen years as the Court may determine". As such the Act of 1948 adopted the Committee's recommendation with only a few changes in the details." (Morris, 1973, p.248).

The Act of 1948 avoided many of the difficulties found in the previous Act of 1908, such as the latter's complicated procedures. First of all the jury's duty to inquire into the habitual criminality of the offender was removed, and thus they had no say in whether he should be eligible for preventive detention. Only the judge still had a discretion. Secondly, the Act of 1948 did not require any procedure, except in the case of an indictable offence, such a procedure being an important "preliminary to a sentence of preventive detention". (Hammond & Chayen, 1963, pp.2-3).

The consequence of this was that it became easier to impose a sentence of preventive detention. The number of preventive detention sentences given each year between 1948 and 1961 have averaged around more than two hundred. (Ibid, pp.2-3).

2.4.3

There was no statute provided to keep records of the number of offenders liable to preventive detention during the 1948-61 period, but it has been estimated that the numbers were between 1300 and 1600 per year. (Ibid, pp.2-3).

Judges became more careful in their use of preventive detention during the latter part of the 1950's. In the case of R. v. Grimwood at the Court of Criminal Appeal on 19th March 1958, Mr Justice Streatfield, in modifying the sentence of eight years' preventive detention passed on the appellant by the Recorder of Norwich to one of imprisonment for two years, said that "the recorder in passing a sentence of eight years' preventive detention was no doubt actuated by the thought that the appellant was a petty pilferer and it was

necessary to protect the public, but in the opinion of the Court, a sentence particularly of preventive detention ought really to have relation to the gravity of the crime itself". (Crim. L. Review, 1958, p.403). On the 26th of February 1962, the Lord Chief Justice in the Court of Criminal Appeal said that too much use was "being made of the power to impose preventive detention", which, he felt, and should be regarded as a last resort, and he suggested that if the crime were a serious one, "a sentence of imprisonment of sufficient length may often properly be given which will give adequate protection to the public." (Parker, 1962, 1 WLR, p.402). This attitude perhaps explains the very sudden fall in the number of preventive detention sentences from the year 1955 onwards (see Appendix 3).

The Home Secretary in 1961 asked the Advisory Council on the treatment of offenders "to review the marking of the preventive detention system", and the Advisory Council reported unfavourably on it. (Advisory Council on the Treatment of Offenders, 1963, p.23).

In 1963 the Advisory Council on the Treatment of Offenders recommended the abolition of the system altogether, as they believed "that if preventive detention were abolished and nothing were put in its place, the general deterrent effect of the penal system would not be weakened to any significant extent." (Ibid, p.23). The upshot of all this was that the use of preventive detention fell again to 0.6% in 1963, and to 0.3% in 1964. (The Advisory Council on the Penal System, 1978, p.50).

Section 26(1) of the Prison Act, 1952, (formerly Section 21 subsection (3) of the Act of 1948), which deals with the treatment of detainees, provides that "a person sentenced to corrective training or preventive detention in a prison for the term of his sentence subject to his release on licence in accordance with the following provisions of this section, and while so detained shall be treated in such manner as may be prescribed by rules made under section 47 of this Act".

The Prison Rules 1949 (6) include thirteen special rules applicable only to detainees. These rules explain the three stages of the sentence of preventive detention. The first stage, which was to be served in a local prison, had the object of teaching the prisoner that he had to show good conduct and industry to earn his promotion to the next stage. The maximum period for the first stage was two years, but it was possible to reduce this to nine months with good behaviour.

The second stage was to be served in a central prison and detainees were not allowed to associate with other prisoners except during the period of industrial or agricultural employment. It was possible for arrangements to be made under which a prisoner who passed into the second stage could "become eligible to earn privileges over and above those allowed to a prisoner serving a sentence of imprisonment, including:

(a) Payment for work done at a higher rate,

(b) Facilities for spending money earned in prison either at a prison store or on such articles, including newspapers and periodicals, purchased outside the prison as may be approved,

(c) The cultivation of garden allotments and the use or sale of the produce in such a manner as may be approved,

(d) The practice in the prisoners' own time of Arts or Crafts of such kinds and in such a manner as may be approved,

(e) Additional letters and visits,

(f) Association in common rooms for meals and recreation".

(The Prison Rules, 1949).

This meant that prisoners in the second stage of preventive detention had a somewhat easier life than the other prisoners sentenced to ordinary imprisonment.

The rules provided that admission to the third stage would be decided by an Advisory Board (7). The prisoner who was admitted to the third stage was eligible for release on licence when he had served two-thirds of his sentence, otherwise he would not have been eligible for release until he had served five-sixths of his sentence. This meant that, for a maximum sentence of fourteen years preventive detention, the difference between release after two-thirds of the sentence and that after five-sixths of the sentence, was two years and four months; for a minimum sentence of five years, the difference was ten months. (See Appendix 2).

2.5 The Criminal Justice Act of 1967 and Powers of Criminal Courts Act 1973

The decline in the use of preventive detention in the 1960's, which resulted from the influence of the Lord Chief Justice, Lord Parker, and the recommendations of the Advisory Council on the Treatment of Offenders (Home Office 1963) which proposed "abolishing the system altogether rather than retaining it, either as it stands at present or in a modified form" (The Advisory Council on the Treatment of Offenders, 1963, p.23), led to the passing of the Criminal Justice Act 1967, S.37(1), of which ended the practice of preventive detention.

2.5.1

What was thought to be needed at the time was something that would make it more likely for a judge, in an appropriate case, to break with the tradition of adjusting the length of a prison sentence to the gravity of the offence (by which method he would increase the sentence disproportionately according to the offender's record). It was believed that this could be achieved by offering the Courts the opportunity for such an increase without requiring

them to make the jump necessitated in the case of preventive detention. (Cross, 1971, p.157).

After prohibiting any further sentences of preventive detention, the 1967 Act provided that when certain conditions were fulfilled, the Court could pass an extended prison sentence when satisfied "by reason of the offender's previous conduct and of the likelihood of his committing further offences", that such imprisonment would be expedient to "protect the public from him for a substantial time." (Criminal Justice Act, 1967, S.37 (2)).

The House of Lords later decided that the term beyond which the sentence could be extended should be that which the judge would have considered appropriate if Section 37 had not been passed. (Director of Public Prosecutions v. Ottewell, Law Report A.C., 1970, p.604).

Section 37 makes it clear that the "extended term which may be imposed under this section for any offence may exceed the maximum term authorised for the offence apart from this section if the maximum so authorised is less than ten years or exceed five years if the maximum so authorised is less than five years." (Criminal Justice Act, 1967, S.37 (3)). Unless he is granted parole during the second third of his sentence, a person subject to an extended sentence will be released on licence at the expiration of two-thirds of the term; in either event the licence may endure until the entire sentence expires. One of the conditions for an extended sentence in the Act is the conviction of an offence punishable by two years' imprisonment or more, with three previous convictions on indictment for such offences. The previous offences must have been sufficiently serious to have led to substantial custodial sentences, and the current offence must have been committed within three years of the last conviction or release from custody. (Ibid, S.37).

It seems that the judges did not welcome Section 37 of the Criminal Justice Act with open arms, for, in 1968, there were only 27 extended sentences, while the numbers for 1969 and 1970,

respectively, were no more than 74 and 129. (See p.25 of Chapter 5 for further details).

To sum up, an extended sentence is a measure of public protection against dangerous offenders. It is the last in a series of such measures, formerly operating under the title of preventive detention, introduced in different forms in 1908 and 1948, and acknowledged to be unsuccessful in their aims of protecting society from the depradations of dangerous offenders. (Harding et al, 1985, pp.237-240). The extended sentence, which replaced the last version of preventive detention in the Criminal Justice Act 1967, has been increasingly rarely used by the Courts and no longer appears in the official statistics. In its 1978 Review of Maximum Penalties, the Advisory Council on the Penal System stated that the measure was "demonstrably inappropriate to the problem it was intended to solve and unwanted by the Courts which have been empowered to use it." (para 115, p.54).

Although the Advisory Council recommended its abolition, it is still in operation. Nevertheless, it is of small practical significance. It is mainly of interest as part of the history of failed attempts to deal with the dangerous offender.

Footnotes

(1) See his speech on the laying of the First Stone of the Birmingham Gaol, October 29, 1845, where he uses the expression "a moral hospital", in Suggestions for the Repression of Crime (1857), p.103 and pp.462-473 and pp.651-657 (mentioned in Radzinowicz & Hood, 1986, margin p.231 SUPRA).

(2) The ticket of leave was introduced in Britain in 1853 (see Bartrip Peter W.J., "Public opinion and law enforcement: The ticket-of-leave scares in midvictorian Britain", in edit. Bailey Victor, Policing and Punishment in Nineteenth Century Britain, Redwood Burn Limited, London, 1981, p.153), and although at the time it was new to the British system, it had been widely used in Australia for many years before. "Any convict now under sentence of transportation, or who may hereafter be sentenced to Transportation, or to any Punishment substituted for Transportation by this Act" would be eligible for "a licence to be at large in the United Kingdom and Channel Islands", the convict "allowed to go and remain at large according to the Term of such Licence." But "it shall be lawful for Her Majesty to revoke or alter such licence." (See Penal Servitude Act, 1853, 16 and 17 Vict. C.99, Section IX).

(3) Memorandum on the Present System of Licence-Holders reporting themselves to the Police under the Penal Servitude Act, 1984, issued by the Commissioner of the Metropolitan Police, The Times, March 10, 1869, p.11b. This denied allegations of police harassment and blackmail.

(4) Number of recommendations are 25.

(5) It should be noted that this Bill did not become an Act.

(6) As amended by the Prison Rules 1952, the Prison Rules 1962.

(7) See Appendix 2, para 166 et seq.

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CHAPTER THREE

3.0 THE CONCEPT OF CRIMINAL DANGEROUSNESS

3.1 Introduction

Dangerousness is a dangerous concept (Shaw 1973, p.270). The idea of dangerousness is included in almost all Model Criminal Codes (Morris 1974, p.62).

The concept of criminal dangerousness has begun to occupy a very important place in legal systems and is still a subject of argument within the whole field of criminal science. In recent years, there has been a great deal of interest shown in this concept and its definition (eg, see Bottoms 1977; Prins 1975, 1981, 1983; Welsh 1976; Hepworth 1982). Scott, in his paper on this subject, pointed out that it was (Scott 1977, p.127) "easier to say what dangerousness is not than what is ..... it is not simply that which is noxious or evil, and it is not necessarily a violent or explosive trait of an individual". The aim of this chapter is to undertake an exploratory study of this concept.

The problems associated with the concept of criminal dangerousness arise from man's inability to know himself. Human nature, which encompasses an infinite collection of emotions, feelings and motives, varies not only from one individual to another, but also within the same person on different occasions (Walker 1980, p.91). At any one moment in time, emotions, feelings and motivation will obviously be influenced by the personal and psychological state of the individual. Even amongst experts, perceptions of the concept of dangerousness vary from one individual to another, depending on the viewpoint adopted when determining the concept (Habib 1976, pp.92-92 & Bahnam 1971b, p.1055). There is likely to be a further discrepancy between the perception of the lay-person and that of the expert [see Floud & Young 1981, p.6, for their discussion of the concept of harm; also see the discussion as

to whether dangerousness should apply to individuals themselves or to situations, actions, or activities by Walker 1980, p.90].

A study of the concept of dangerousness will lead to a definition of dangerousness. To arrive at this definition there must be an explanation of the meaning and various degrees of danger. It should also be borne in mind that any discussion of danger must include an understanding of its relation-ship with harm, since any concept of danger must be viewed with reference to the expectation of harm. Danger and harm also need to refer to daily social hazards.

In order to reach an operational definition of 'dangerousness', this chapter will be divided into three sections. The first section will be confined to a definition of danger, and to reach this, the concept of harm will also be discussed, since 'harm' is a usual product of danger. The discussion of danger and harm will be located inside the framework of 'good', namely, values that satisfy a human need. Such 'good' may be owned by individuals or society, whether material or incorporeal, personal or social, and as such are important supporting pillars of the fabric of society. To clarify the idea of the differing levels of danger, we can divide danger into two degrees - high and low. The highest degree of danger is reached when we can say that there is a <u>certainty</u> of harm resulting, the lower degree is when there is only a probability of harm, in which case the layman can take an exceptional course of action to avoid possible harm.

After explaining the concept of danger and its differing degrees in terms of harm, the theoretical framework for the operational definition of dangerousness will be established. This definition will not be confined merely to physical and psychological harm to individuals, but will encompass other types of harm afflicting society.

To achieve this aim of finding a workable definition of dangerousness, the second section will be devoted to examining the

effects of particular dangerous crimes in the social environments where illegal human conduct occurs. Social daily life evolved with society's development, resulting in the appearance of new types of illegal human conduct, and the creation of unusual and abnormal offences. The perpetrators of such offences, in spite of the great harm they cause, do not always receive the punishment they deserve. Some of these abnormal offences do not receive the attention that they warrant of Western thinkers, and even where such offences are considered, they are not linked to a concept of dangerousness such as that propounded at the end of this chapter. (An example of the offences in question are crimes involving multi-national corporations).

The reason for selecting a few types of serious offence and not others is because they can be considered examples where great harm affects 'good' (as defined above), especially in Third World countries, which provide a fertile breeding ground for such offences. The definition of dangerousness should be broad enough to cover these sorts of crimes and their resultant harm.

The identification and diagnosis of these harms is a duty that should concern all research connected with the criminal law, in order that they be considered when legal reform takes place in Third World countries. For example, Iraq in 1977, enacted a new law "Reforming the Legal System". This reviewed all the current laws in order to change, repeal or create new laws where necessary. This work is still continuing, and although many areas of Iraqi law have been completely changed, the Criminal Code has not. More research and study needs to be done on the Criminal Code to highlight its loopholes, as there are still gaps in the law which are exploited by dangerous offenders to achieve their illegal aims. The law had not effectively covered economic crimes, having concentrated more on homicide, robbery and sexual offences etc.

Most of the offences dealt with in the second section are particularly relevant to Third World countries, and need more

attention than has been previously given by those responsible for planning criminal policies there.

The third section will seek to find an operational definition of dangerousness, after reviewing and discussing other well-known definitions. As there are difficulties in finding an operational definition, it will be necessary to outline the essential elements for any such definition. This will make it easier to use in practice.

3.2 Danger; Definition and Degree

Before attempting to give a definition of danger, a distinction must be made between this concept and its possible outcome - harm. Although it is permissible to say that danger does or does not exist, with no grey indeterminate area in between (Habib 1976, p.98 op.cit), it is not possible to say that nothing exists between harm and an absence of harm (Habib 1976, p.98 op.cit). Danger itself can be a signal of future harm. Dangerous driving, that is driving outside the directions of the law, can be seen somewhere on a line between safe driving and a possible future accident.

The concepts of danger and harm will be addressed within the context of the individual. This would seem to be valid because society at large can suffer danger and harm in the same way as the individual. (Bahnam 1979, p.108 op.cit & Al-aamree 1973-1974).

3.2.1 Good

In order to define harm, we need to discuss good as a value which satisfies a human need. This good can be either material or incorporeal according to the need it satisfies. If the human need which this good satisfies is a material need such as the right to life and the rights of ownership, this good is material. They both satisfy a material need, in the individual right to life; the individual enjoys the benefits of life, whilst in ownership, he

enjoys the benefits of properties. However, if the need is incorporeal, the good that it satisfies is an incorporeal good, such as religious belief which satisfies an incorporeal need. Further examples of incorporeal good are - a man's reputation, his honour, his right to liberty in all its forms, and the secrecy of correspondence between people, because these fulfil an incorporeal need which gives a feeling of security and peace of mind. The owner of a good can be an individual, as illustrated in the above examples, or a society as in the case of the internal or external security of the state. A society's need to protect its existence gives the state, through the workings of its legislative system, the right to protect its internal and external security. Any act which infringes this right or this good will impel the state to prevent such an infringement by punishing or reforming the perpetrator. This will have the aim of preventing a repetition of the offence either by the same offender or by someone else, and will thus prevent that society's right to security and stability from being exposed to the danger of disintegration or extinction.

From what has been stated previously, it is clear that goods either of the material type or the incorporeal type might be owned by individuals or society; and because the totality of these goods constitute the entity of society and its existence, regardless of the fact that their owner may be a human being or an incorporeal person (such as firms or the state in its capacity as the society's statutory system), it results in a reciprocal obligation by all concerned to protect these goods. The means or the ways which are used for such a process of protection is the penal law. For this reason, the penal law distinguishes between crimes which are harmful to public welfare and crimes harmful to the individual's welfare, despite the fact that in all types of crime, society is, directly or indirectly, the injured party.

Crime embodies both harm and danger. Harm refers to that which impinges upon the social entity as a consequence, whereas danger embodies the possibility of that harm being repeated. The crime of murder, for instance, puts an end to an individual's life, and in so

doing, offends against one of the basic premises of society, which is the protection of its members. The harm resulting from the loss of an individual is not devastating if we take into account the large number of people which make up society. However, this harm can be devastating if we take into account the possibility of its repetition and the potential ability of that harm to affect a large number of people, as it does in some types of crime (which the third section of this chapter illustrates with examples). This can be likened to the exposure factor of hard soil when eroded by contact with fast-flowing water from streams and floods, leaving behind an element of vulnerability in the land which can increase with a further occurrence of this process of erosion and depletion.

If it is true that protection of the lives of members of society is amongst the fundamental pillars supporting and enabling its survival, then it is also true that there exist other pillars on which the cohesion of the human structure of society depend. Therefore it is necessary to protect particular intrinsic principles and conditions which facilitate the co-existence between individuals in a common nation, because without these principles and conditions, such co-existence is inconceivable. Society is destroyed by the division of its members. For instance, a man's obligation is to refrain from taking another man's life or from taking his goods by misappropriation, or from harming his safety, because these restrictions constitute some of the essential pillars for building a society. Therefore, if men kill each other, steal from each other or attack each other without restraint, anarchy would spread, leading to the disintegration and ultimate destruction of society, the result of which would be that every individual would seek another place which offered the possibility of a secure life.

As stated above, goods could be exposed to danger after the perpetration of a crime because of the possibility of this act being repeated. Moreover, they could be exposed to danger before the perpetration of a crime because an act in that direction may be perceived as a step leading towards the same crime. The right to life as a good can be exposed to the danger of destruction as an

indirect result of the crime of murder (i.e. the possibility of its being repeated). In addition, this right (i.e. the right to life) could be exposed to the same danger by an act which might not directly lead to the same destructive result, but which constitutes a direct step towards it - for instance, using firearms in a city or driving a car with excessive speed might not actually put an end to a man's life, but experience has shown that using firearms in a crowded area exposes one or more persons to the danger of death, despite the fact that death as a consequence might not take place in all cases. However, its possible occurrence in many cases justifies the fear of such conduct, that is to say, because of the harm that may result from shooting, or driving at excessive speed, it is deemed necessary to take precautionary measures against such behaviour and to charge those who perpetrate them in order to protect public safety.

The right of ownership is another pillar on which social existence stands. Hence, the purchase or exchange of an owned item with someone else, using counterfeit money, affects this right which will suffer a direct harm. As regards the counterfeiting of money, it is a step leading towards the perpetration of such harm, because the mere counterfeiting of money precedes the dealing in such money. The law, fearful of the harm that can result from counterfeiting, has therefore prohibited it in order to protect the right to ownership. The protection of this right or good leads to the safeguarding of the national economy.

The conclusion is that the social entity rests on pillars which are made up of material and incorporeal goods. So for the purpose of protecting the social entity effectively, it is necessary to take into careful consideration, not only the conduct which directly exposes these goods to harm, but also the behaviour which is considered a step leading towards direct harm. These can be termed as degrees of dangerousness.

3.2.2 Harm

It seems to follow that harm is the removal or reduction of a good which satisfies a human need (Bahnam 1971a, p.109 op.cit). This good might be 'material' or 'incorporeal' in nature. The removal or reduction could be through either total or partial destruction of this good (Habib 1980, p.35). For instance, the removal of the right to ownership could be through the total destruction of the good itself the subject of this right, or through partial destruction, i.e. by reducing it. It could also be through partial or total deprivation of the good from the owner. Anyone who steals goods belonging to someone else, even though he does not destroy or damage this good, deprives the owner of the benefit of his good (Habib 1976, p.102 & Bahnam 1971a, p.110 op.cit). He thus removes or reduces a good from the owner which satisfied one of his needs, that is, the tie or relationship between the owner and the object. Harming one of the interests or social values protected by law is by definition a crime; the law punishes a crime in order to protect these interests and social values, upon which the whole general fabric of society is based (Habib 1980, p.35 & Bahnam 1971a, p.112 op.cit). The word harm applies only to an incident which has actually taken place; that is the actual removal or reduction of an asset which satisfies a human need of the asset owner. When an incident takes place which could potentially lead to the removal or reduction of an asset, but which in fact does not, it is not harmful. For example, a person may drive in the opposite direction to the flow of traffic and not cause an accident until he crashes into an oncoming car. Until the crash there is no harm in the accepted sense of the word, only the possibility of harm. This possibility of harm is the notion of danger. (Habib 1980, p.35 op.cit).

3.2.3 Danger

In answering the question of what is meant by danger it is interesting to look at German jurisprudence which is divided into two doctrines: the personal doctrine and the material doctrine.

(Habib 1976, p.104, Habib 1978, p.38 & Bahnam 1971a, p.113 op.cit). Supporters of the personal doctrine consider that danger does not exist in reality, only harm or absence of harm exist (Bahnam 1971a, p.113). If harm occurs then this means that nothing could have prevented it or did prevent it from occurring and, if it did not occur, then it was not possible for it to occur. Thus, between harm and an absence of harm there is no place for the intermediate phenomenon known as danger (Bahnam 1971a, p.114). This danger stems only from our imagination and ignorance and does not exist, except in the imagination of those believing in its existence (Bahnam 1971a, p.114). This last point can be dealt with by saying, as pointed out earlier, that danger is the middle ground between harm and the absence of harm and is an indication or warning of harm.

It seems that these arguments are not strong enough to meet those of the supporters of the material doctrine who consider that danger is an actual material entity. They argue that, if this entity did not exist, the law would not be able to prohibit certain types of dangerous behaviour such as reckless driving. How can the law prohibit this type of behaviour if its characteristic, danger, does not exist in reality, but only in the imagination of individuals (Bahnam 1971, p.114). Furthermore, if danger is not an actual entity, then there would be no basis for the punishment of unintentional crimes, for which the individual is punished for his behaviour, not for his intention, as he did not intend the result. It is his behaviour that is subject to blame because it included the risk of the result, and he should have avoided it. Therefore, if danger had no real existence, there would have been no place for this blame and the subsequent punishment.

The Italian jurist Arturo Racco's definition of danger is surely correct, when he describes it as the ability of certain phenomena or factors to lead to the removal or reduction of a good which satisfies a need (Habib 1980, p.41 op.cit). This ability has a material form. On the material side, its reality is extracted from the events of life and everyday circumstances. On the personal side, it is based on a belief in its existence not only in the minds

of one or several individuals, who think that they are facing danger, but in the minds of all people (Habib 1976, p.105 & Bahnam 1976, p.115). For this reason it is used as a justification for confrontation. It justifies the penal responsibility of anyone who attempts to commit a crime in spite of the fact that actual tangible harm has not been inflicted (Habib 1976, p.105 & Bahnam 1971a, p.115 op.cit).

3.2.4 Degree of Danger

Since danger is the ability of phenomena and factors to cause harm, the potential of these factors to create danger changes according to circumstances and conditions (Bahnam 1971a, p.116 op.cit). Although there is a possibility of harm resulting from a certain factor, it cannot be said that this factor is 'danger' unless the expectation of harm has reached such a degree that the emergence of a serious feeling of anxiety and fear of the actual occurrence of harm is in fact justified. For instance, the carrying of a weapon by a person licenced to carry it is not in itself a danger, but then there is a possibility of danger; whereas if the weapon is carried by an unlicenced person, there is a danger. (Bahnam 1971a, p.117).

Also, using a vehicle to go from one place to another is not a dangerous thing to do, but if a fault arises in the brakes of the vehicle and it is still being driven, then a danger is created; before that there is nothing but the possibility of harm. This is not a danger itself, but the risk of danger or a potential danger (Bahnam 1958, pp.216-218 & 1971a, p.117 & 1971b, pp-581-584 op.cit). A minimum degree of danger exists when there is a serious fear that harm or an illegal act will occur (Walker 1980, p.89). Seriousness means that there is a concrete indication of certain factors present which cause fear to laymen who have to take exceptional action to avoid the possible harm. This amount of fear is the minimum degree of danger (Bahnam 1971a, p.119). Any lower degree means that there is not enough seriousness for the fear of harm to occur. There is only the possibility of harm and, therefore, danger is not likely to

exist. However, the greater the amount of fear, the greater the likelihood of danger as a warning of the occurrence of harm (Bahnam 1971a, p.118). The level of danger likely to occur in each case depends upon the relationship between certain factors, those that are conducive to the creation of danger, and those that are likely to prevent danger. Thus, where a youth who has taken drink and/or drugs is about to drive a fast car, encouraged by his companions, then there are many factors present conducive to a dangerous outcome. However, if preventive factors were introduced, such as the influence of a more sensible colleague or parent willing to drive instead, then the chances of danger are greatly reduced. In this way, then, the possibility and degree of danger resulting from any particular act is dependent upon the relationship between conducive and preventive factors. In the case when the above factors are equal to each other, there will be as much chance of the danger existing as there will be of it not existing. If the conducive factors are greater than the preventive ones, a high level of danger will exist and this will serve as a warning of a high level of possible harm. If all factors are conducive to harm without any preventive factor, danger will reach its maximum level; that of certainty (Bahnam 1971a, p.120).

Everything which has been discussed in relation to the warning of harm applies to a warning in relation to an illegal act, and takes into consideration the fact that danger has a broad meaning as a warning indicator, whether of a harm or an illegal act.

To sum up, the purpose of clarifying the degree of danger is to distinguish it from the degree of dangerousness. It must be stressed that danger does not mean dangerousness, because it is regarded as an element, among the elements of crime, liked to the actus reus. As for dangerousness, it is a condition which might exist despite the absence of a crime taking place, whilst the degree of danger is the practical criteria by which we can perceive dangerousness in its theoretical framework. Hence the need to clarify the notion of danger and its degrees in terms of harm. In order to understand harm clearly, a study of good was undertaken,

because this is the subject which is affected by harm, whether the owner of this good is the individual or society, and whether these goods are material or incorporeal. Thus it has been possible to reach a perception of the degree of danger by the harm that resulted or may have resulted. The lesser degree of danger is present when it causes fear to laymen who have to take exceptional action to avoid the possible harm.

So far this study has taken the first step towards fixing a definition of dangerousness which must include all the possibilities of dangerousness and which does not confine itself to a limited variety, as is commonly the case in most existing definitions. Consequently the topic of the third section will include some types of crime representing high degrees of dangerousness, and the serious harm which they entail. In the presentation of these crimes it must be borne in mind that they have been selected for their particularly high degree of dangerousness, this degree being the connecting thread that will run through these different categories of crimes.

It will be noticed that some of these crimes have not received the required attention they deserve in Western jurisprudential practice, which could be because advanced societies are not as preoccupied with such crimes as societies in the Third World.

3.3 The Effect of Particular Dangerous Crimes

The last section described and defined the theoretical concept of danger and the degree of danger, and the point at which danger must be prevented from causing harm.

This section will look at the effects of particular dangerous crimes, and that of the technical developments of this century on these crimes. It will look at how this development has created multi-national corporations which have a great effect on the economies of Third World countries. Some of the multi-national corporations, usually in the form of cartels, have such power and influence on both their own government and the governments of host

countries, that when they indulge in illegal activities the laws prohibiting such actions are found to be ineffective. It is a disgrace that such crimes still occur despite the great harm that results to the people and properties of these countries, the cause of which is the dangerousness of those responsible for running the cartel's illegal operations.

Today, new risks are to be seen in the everyday life of a modern society, as new styles of crime develop alongside and because of general technological advancement, which lead to improved communication and transportation. This has created "a modern class of professional and political dangerous offenders - high-risk serious offenders whose activities are barely contained by the law. They are the product of the greater incentives, the new opportunities and fresh means to familiar forms of crimes offered by modern societies." (Floud & Young 1981, p.12). New risks are emerging from forms of crime such as 'white collar' crime and this is a problem particular to modern society. It has developed and flourished from the motives and opportunities afforded by modern technology and new business structures. It is not an exaggeration to say that the harm caused by these modern crimes is greater than "that which can result from almost any traditional crime". (Floud & Young 1981, p.12).

3.3.1 Territorial Crimes and Crimes Across Borders

In recent years most official reports show that violence in crime has taken a new form (Al-awji 1980, p.242). For example, in robberies and thefts involving shops, banks and houses there has been an increasing trend for the use of weapons and violent, destructive means of intrusions into property, including the use of explosive devices. In some instances, violent assaults on public and private properties are not perpetrated for exclusive material gain but seem to be done for no conceivable reason (Al-awji 1980, p.242). A report published by the general assembly of the United Nations in 1977 (UN General Assembly Item 77.A/32/199 22 Sept) indicated that offences in the world against property increased by

43% during the research period from 1970 to 1975. On the other hand offences against individuals increased by only 4.6% during the same period. Offences involving drugs showed an increase of 113%. In addition, the report showed that theft with violence increased in industrialised countries by 33.3%, whilst in underdeveloped countries the comparative figure was 58.8%. Ordinary thefts in industrial countries were greater than in underdeveloped countries, the figure being 1370.5 crimes per 10,000 head of population in the former and 354.3 in the latter. This rate suggests that the rate of theft does not correspond directly to a general standard of living, since theft occurs relatively more often in rich countries than in underdeveloped countries (Al-awji 1980, p.213).

Nor does the rise in crime seem linked too strongly to increases in population, for figures show that the rising crime rate has by far exceeded the rate of population growth (Lopez-Rey 1970, p.184). In the USA the population rate increased by 10% annually from 1960 to 1967 whilst the crime rate for the same period increased by 89%.

This pattern is similar in the UK where the number of indictable crimes rose from 80,962 in 1901 to 1,133,382 in 1965. Over the same period the population increased from 32 million to almost 48 million. This means that, during the century, crime increased by 1,300 per cent, while the population increased by only 47%. (McClintock & Avison, Crime in England and Wales, Heinemann, London, 1968, p.23).

3.3.2 Crimes Involving Multi-national Corporations

Another aspect of illegal activities across borders concerns the activities of multi-national corporations (Al-awji 1980, p.234 op.cit). These operate throughout the world as underdeveloped countries seek foreign capital for national development and corporations invest capital in new markets unfettered by the restrictive taxation laws of the country of origin. Under the guise of local investment, the multi-nationals attempt to transfer profits

and gains away from tax laws to which they should be subject (Al-awji 1980, p.234 op.cit).

A study made by the United Nations [1] covering the period frm 1960 to 1968 showed that multi-national corporations illegally transferred 6.7 billion dollars out of Latin America during that time. During 1960 to 1972 investment in these countries increased by 344% whilst monies transferred externally increased by 982%. As indicated by these figures, the process of impoverishing Latin America has been carried out by tax evasion through false accounting and so-called investments by these multi-nationals. (Ibid, p.235).

Another type of multi-national crime affecting individual welfare occurs when cartels falsify food, drug and chemical descriptions to allow export sales to poorer countries. The sale of such commodities has often been proscribed by the government of the country in which the multi-national is registered or of the country in which the commodity has been produced for reasons of public health. The International Health Association took steps to prevent such practices [2]; such decisions had no power of obligation without the support of effective criminal laws of both the governments of the country where the multi-national was registered and the relevant local governments. It is unlikely that laws restricting these practices could be introduced by the powerful lobbying pressures both in the producing and the consuming country. The lobbyists who act as intermediaries between cartel and governments are motivated by their own material interests.

The corruption caused by such practices may involve persons of high office and responsibility (even prime ministers in recent years), and the sums involved may be very great [3]. Even so, the losses involved are not visible to the ordinary public (who may ultimately have to bear the cost of the crime) and, because of the secret nature of such trans- actions, cases are rarely brought to justice. In any case, there may even be governmental pressures not to expose what may be politically embarrassing scandals. Monahan (1981, p.107), in his recent work on predicting violent behaviour,

noted that more harmful than 'street' violence was the practice of "manufacturing unsafe products, building lethal dams, and operating fatal coal mines".

It is clear that the power and influence of some multi-national companies committing such offences may be greater than that of the importing or exporting country.

3.3.3 International Organised Crime

International organised crime is a product of present day society. These criminal organisations have a pyramid structure with the leaders at the top and, at the base, their 'paid' employees who execute the orders. These large crime syndicates first grew up in the big cities of the world and now extend across international frontiers. They are involved in international drug smuggling, arms-running, smuggling currency and assassinations. Their organisation and means of communication are so well designed and controlled that they are often better than the law enforcement organisations of some countries. Consequently, many states are unable to act decisively against these well-controlled syndicates [8]. The syndicates hide behind cloaks of respectability; behind commercial enterprises such as development companies, trading companies, transportation companies, bars and restaurants. Their legal activities cover their illegal dealings in gambling, drugs, prostitution and alcohol. One crime syndicate alone in the USA had a revenue of 48 billion dollars in 1977 [9]. The leader of this syndicate, Galenti, was killed in 1979 by a rival gang and it was said that Galenti had killed at least 100 people (Al-awji 1980, p.247).

Yoder mentioned in an article "Sanctions for Corporate Illegality" that in 1978 (Floud & Young 1981, p.13 op.cit) the level of corporate crime in the United States was increasing despite the extensive use of severe penalties for corporate offenders. The position today is such that, in spite of co-operation between the law enforcement agencies on an international scale, as evidenced by INTERPOL's workings, these crime syndicates are still powerful,

profiting billions of dollars, for example, from the black market sales of weapons to Iran, Iraq, Afghanistan and so forth. The law remains ineffective against these dangerous offenders.

3.3.4

In view of what has been said about some types of crime in recent times and the risk to the lives of innocent people, one is led to the conclusion that the category of 'dangerous offender' does exist and indeed "the common sense of the general public tells it that there is ... such a person" (Conrad 1982).

To sum up, the offences discussed in this section have not included those more 'traditional' dangerous offences such as murder, sexual offences, robbery, burglary, etc, which tend to affect individuals. Instead, this study has concentrated on offences which cause harm to individuals and, consequently, whole societies. This was done in order to highlight such offences and bring them to the attention of those responsible for planning society's criminal policies.

The concept of dangerousness is usually associated with offences such as murder, robbery, sexual offences and others, because they have a tangible relationship with the public whose attention is usually focused on such crimes through the events highlighted by the mass media. Nevertheless, it is important to realise that dangerousness does have wider connotations and is also a strong element in international crimes. Although multi-national crimes and murder or burglary are vastly different in content, they are united by the common theme of dangerousness, and its resulting harm, whether on a large or small scale. The personal and social harms that result from these more unusual dangerous offences need to be made clear to the legislators, so that they are able to formulate suitable regulations to prevent their repetition. The definition of dangerousness will be discussed in the next section, so that the great harm to 'goods' will be considered in it; it should also be broad enough to include all the categories discussed above.

3.4 Definition of Dangerousness

3.4.1

Danger can be manifested in two ways:

a) It can stem from an act or behaviour that is 'likely' to result in specific harmful effects (Walker 1980, p.89); the central feature of this type of danger being that the consequences of the action are known to be dangerous. For example, careless driving in bad conditions, or making a 'U-turn' on a motorway, are likely to lead to a crash.

b) Danger can be provoked by a particular person when a combination of environmental and personality factors make it likely that this person will commit a crime in the future, even if the nature of the crime is uncertain and hard to predict (Bahnam 1971a, p.259). This state can be called 'criminal dangerousness'. Before such a person has committed a crime, the type of crime in which he will be involved is obviously uncertain. However, if one crime is committed, any prediction of future dangerousness becomes a little more certain, but does not as yet reach the point of absolute certainty. A more accurate prediction of dangerousness can be made for habitual offenders such as sex offenders who may repeatedly commit such crimes [10].

3.4.2

The suspicion that an offender has been involved in a previous crime is not the same as suspecting his involvement in future crime (Bahnam 1971a, p.261). When the offender is suspected of having committed a crime, mere suspicion will be interpreted in his favour and he will be found not guilty if the offence cannot be proved. His link with the offence is then effectively cancelled out. On the other hand the suspicion that an individual will be involved in crime in the future does not count in his favour because

the prediction of that dangerousness remains (Bahnam 1976a, p.261 op.cit). If there is only minimal suspicion that crimes will be committed, the probability of involvement in crime does not reach the point where an individual can be labelled as dangerous. This does not mean, however, that the potential to behave dangerously does not exist. Moreover, if there is serious suspicion of the highest degree of dangerousness in a person, even though the dangerousness cannot be proved, it is not cancelled out and the individual can still be regarded as potentially dangerous. Danger stemming from an individual can exist in different degrees at different times, there being a certain fluidity in the notion of dangerousness. It may remain at a static low level for a long period of time and then suddenly increase in response to circumstances, or it may be completely negated at times. Walker has pointed out that "dangerousness is not an objective quality, but an ascribed quality like trustworthiness. We feel justified in talking about a person as dangerous if he has indicated by word or deed that he is more likely than most people to do serious harm, or act in a way that is likely to result in serious harm" (Walker 1978, p.37). Steadman has also made the important point that the notion of dangerousness includes a concern with future conduct. "It is the fear of the shadowy stranger attacking in the night that elicits public fear and reaction" (Steadman 1976, p.53).

The probability that a person will commit a crime in the future is one of the criteria that can be used to indicate dangerousness and the extent of dangerousness. Although the factors that lead to a crime can be used retrospectively to assess dangerousness, it will be difficult, before the act or crime occurs, to measure 'dangerousness'. Therefore the only reliable method of estimating dangerousness will be by looking in expectation at what may occur as the result of a certain act; that is to say, by looking at the expected consequences of a certain act. Nevertheless, this expectation cannot be regarded as an absolute certainty.

The strength of expectation of the result of an act varies with the factors known. The expectation of what will happen as a result

of a particular act becomes certain or sure when all the factors leading to this act are clearly known. When most of the facts are known, it becomes probable that the act will result, but this is by no means certain. If there is a balance between the factors, whereby the factors indicating a particular outcome are equalled or cancelled out by factors suggesting that this will not happen, then the expectation of a particular result becomes merely possible. This shows the distinction in the law of causation between the certainty, probability and possibility of particular consequences resulting from a particular act (Abo-amar 1985, p.389).

Distinguishing between these different levels of dangerousness is crucial for the law, and the following examples should help to clarify this. There is a possibility of dangerousness where a person experiences difficult social circumstances, like unemployment, coupled with psychological problems such as an inability to interact with society. Nevertheless, he may not necessarily be inherently dangerous. Anyone could be capable of this possibility of dangerousness - the non-criminal as well as the criminal. There is a probability of dangerousness where a person joins a terrorist organisation in the expectation of committing future crimes. The possibility of dangerousness becomes more certain when this person joins a plot to change the political system of the state and is actively involved in the preparation of terrorist acts.

When a probability exists for a person to commit a crime in the future, there is an indication of 'dangerousness' associated with that person. This situation must be distinguished, however, from that in which there is a mere possibility that such a person will commit a crime in future because a mere possibility does not necessarily indicate dangerousness. It must be noted that the commission of a crime is not always an essential pre-condition of dangerousness, for a person can be dangerous before actually committing any crime.

3.4.3

There are different degrees of dangerousness which can be used to indicate corresponding future crime levels (Alo-amar 1985, p.391) and to refer to either serious or non-serious crimes. The seriousness of the offence can be measured by the extent to which the victim's rights are violated, and the magnitude of this violation (Abo-amar 1985, p.391).

The commission of a crime is the central condition necessary for the imposition of a punitive sanction, but the actual degree of dangerousness involved in that crime is an important criterion in deciding the degree and type of sanction imposed on the offender (Azar 1968, p.197). This degree must be considered by the courts in relation to the particular circumstances of the individual when determining a suitable sentence (Habib 1976, p.118).

The probability that someone will commit a future crime is a criterion indicating dangerousness, yet because this probability is difficult to measure in material terms, the definition of dangerousness, although not impossible, becomes difficult and ambiguous. As the definition of dangerousness is founded on the probability that the suspect will commit a crime in the future, there is an assumption that there must be factors that will lead to the crime. Whether these factors or causes are internal, relating to the physical and psychological state of being of the suspect, or external, relating to the social environment, they need to be taken into account to discover whether or not they are at the beginning of a chain of causality that ends in crime. So the probability of future crime is a measure of the relationship between the factors leading to the crime and the resulting crime (Husny 1972, pp.136-137).

3.4.4

'Dangerousness' has been subject to a variety of definitions. The Butler Committee considered that, for their purposes, dangerous-

ness was "a propensity to cause serious physical injury or lasting psychological harm. Physical violence is, we think, what the public are most worried about, but the psychological damage which may be suffered by some victims of other crimes is not to be underrated." (Home Office: Report of the Committee on Mentally Abnormal Offenders - Butler Committee, 1975, para 4.10, p.59). However, the terms 'serious' and 'lasting' are not defined. The Scottish Council on Crime defined the dangerousness of a person as "the probability that he will inflict serious and irremediable personal injury in the future" (A Memorandum by the Scottish Council on Crime, 1975, para 122, p.60). This may be contrasted with the Butler Committee's definition (mentioned above). It is unclear whether the Scottish Council's definition includes psychological personal harm, but the term 'irremediable' in the Scottish Council's definition seems to impose a tighter test than the Butler Committee's definition. The precise level of likelihood of future irremediable personal injury required by the Scottish Council before a court makes a public protection order is however unclear from the Memorandum, which makes various different statements about it. For example; (1) "the probability of serious and irremediable personal injury" (para 122, p.60), (2) "those offenders who, ... are very likely indeed, if at liberty, to commit further serious crimes of violence" (para 126, p.61), (3) "the risk though not necessarily the certainty of future serious violence" (para 128, p.61), (4) "the substantial likelihood that the offender is the sort of person who, ... commit acts causing or threatening physical harm to others" (para 149, p.66). As such the definition of the Scottish Council of dangerousness lacks accuracy. Scott defines dangerousness as "an unpredictable and untreatable tendency to inflict or risk irreversible injury or destruction, or to induce others to do so" (Scott 1977, p.128). It seems that Scott's definition is somewhat over-pessimistic with its emphasis upon "untreatability"; however, his emphasis on the predictive aspect is of principal importance as it is clear that one of the central elements in considering dangerous behaviour is the threat of repetition and the steps that might be taken to prevent that threat.

The most recent attempt made by scholars in Arabic literature to define the concept (Habib 1980, p.32) is the one that states that dangerousness is a psychological state resulting from a combination of internal and external factors, which make the individual more capable of committing a future crime. This particular definition views dangerousness as a psychological state, not as a characteristic of the individual. This state varies as "a man's self-control varies" (Walker 1980, p.91) so that one day he may react violently to an insult which might be ignored on another day. The definition however is too general and wide and may include such circumstances as repetition of minor offences which cannot be regarded as dangerous acts, such as a taxi driver who habitually parks his vehicle on prohibited sites.

It is difficult to discover a state of dangerousness in a person, especially before he has betrayed it's existence by committing a criminal act. Dangerousness is a potential state in a person caused by interaction between his personality and the surrounding circumstances. This state may, or may not, lead him to commit an illegal act in future, according to the degree of dangerousness, i.e. when dangerousness is present in its lowest degree there is only a <u>possibility</u> that he will commit a crime in future; everyone may have this potential within them. The layman or the dangerous person in specific psychological or social circumstances may or may not commit a crime.

The degree of dangerousness in a person may rise to the <u>probability</u> of him committing a criminal act from which harm results. This happens when the person reaches a specific mental and psychological state which impels him to commit a serious crime such as murder. This state can be a violent reaction to immediate provocation that anyone is susceptible to. It does not mean that the person has acted with premeditation. Therefore there is only a probability of dangerousness in such instances - the person is not inherently dangerous.

The degree of dangerousness rises to the extent of certainty in a person when there is material evidence to prove this dangerousness. For example, when a person joins a terrorist organisation, believes in its policies, actively takes part in perpetrating its acts of terrorism, and refuses to renounce these beliefs even after capture and punishment, then such a person can be described with certainty as dangerous. There is also a certainty of dangerousness in a person who, after being arrested for a serious crime, confesses to being an agent of a prejudiced political system renowned for its global terrorism, who yet unrepentingly vows to repeat the crime later, more efficiently, without being caught.

It could be considered material evidence of a state of dangerousness if an offender is again convicted for a serious crime for which he has previously been convicted. Alternatively, if someone who was previously imprisoned for three years or more re-offends by committing a serious offence, he can be considered dangerous enough to deserve a sentence longer than that normally imposed. This seemingly arbitrary selection of three years' previous imprisonment as a yardstick of dangerousness has in fact been cited because Iraqi legislators have used this sentence to reasonably distinguish between felonies and misdemeanours. Thus if someone is sentenced for three years or more, it is because he has committed a felony; if sentenced for less, it is as a result of his committing a misdemeanour. This means that felonies, as serious offences, will have to be considered. This three year limitation seems logical, since it means that the definition of dangerousness is not so wide as to include merely those 'undesirable' offenders who lack the requisite high degree of dangerousness. However, included in this definition will be those offenders who have persistently committed misdemeanours, and who, as a result of their recidivism, have had their sentences increased to over three years.

An operational definition of dangerousness should include the following conditions, in which:

1) the commission of a crime results in serious or irremediable harm to individuals or society;

2) the offender is convicted for an offence of equal gravity to one he has previously been convicted for, or for any offence punishable by three years imprisonment, or more;

3) the offender commits a crime either during his current sentence (whilst in a corrective institution) or within three years of serving his sentence;

4) there is material evidence [12] to show that the offender, even when the second and third conditions above are absent, will certainly involve himself in future criminal activity.

Serious harm is lasting psychological or physical experience which affects individuals or society. It can also be the lasting harm which affects any of the supporting strands of the fabric of society, such as the life of individuals, the external and internal security of the state or the national economy.

Footnotes

(1) Nations Unies, Conséquences économiques et sociales de la Criminalité, Document de travail, Ve Congrès pour la prévention du crime, Genève, Septembre 1975, p.25 (A/Conf/56/7). (Translated in Arabic in Al-aniji M. Crime and Criminal. Nafel Establishment, Beirut-Lebanon, 1980, p.235).

(2) Nations Unies, Les effects des sociétés multinationales sur le développement et sur les relations internationales (No. de Vente 74.II.A.5).
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(3) Global Reach. The Power of The Multinational Corporations. New York, Simon & Schuster, 1974.
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(4) L'Orient - Le Jour, Beyrouth No. 2764, 13 Mai 1978. (Translated in Arabic in Al-aniji M. 1980, p.238 op.cit).

(5) Al-Yaum, Newspaper. Dammam - Saturday 12 September, No. 5202, 1987, p.14, Cal. 3 (in Arabic).

(6) Alona Eans. Aircraft Hijacking: what is being done. American Journal of International Law, 1973, p.641. (Translated in Arabic in Al-aniji M. 1980, p.245 op.cit).

(7) See the Tokyo Convention, 1963; the Hague Convention, 1970; and the Montreal Convention, 1971.

(8) L'Orient - Le Jour, Beyrouth, 9 Décembre 1972. (Translated in Arabic in Al-aniji, 1980, p.247 op.cit).

(9) Paris-Mach No. 1574, 25 Jullet 1979. (Translated in Arabic in Al-aniji, 1980, p.247, op.cit).

(10) Pausa, P. & J.B. Traité De Droit Criminal et Criminology. T.3, p.4. (Translated in Arabic in Abo-Amar, M.Z. Study in Criminology and Penology. Dar Al-mathoahat Al-jamaia. Al-exandria 1985, p.391).

(11) In Arabic legal literature, see, Sowior, A.F. 1964, pp.499-500; Thrwhat, J. 1972, pp.245-246; Slama, M. 1975, p.107; Bahnam, R. 1971a, p.351; Abeed, R. 1977, p.484; Husny, M.N. 1982, p.248; Abdul-al-sattar, F. 1975, p.266; Murse, A.F. 1969, p.151; Al-alfy, A.A.A. 1970, p.271; Al-dahabi, A.G. 1975, p.84.

(12) Such evidence could include statements by terorists who, on conviction, refuse to renounce their activities and who vow to renew their efforts to undermine the state at the end of their sentences.

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CHAPTER FOUR

4.0 THE IDENTIFICATION AND LIMITATION OF DANGEROUSNESS

4.1 Introduction

In the Protagoras, Plato states that:

"he who undertakes to punish with reason does not avenge himself for past offence, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person .... from doing wrong again" (Plato 1925, p.139).

Twenty-four hundred years and almost as many research studies later, however, the president of the National Council on Crime and Deliquency referred to the identification of those among past offenders who needed to be prevented from doing wrong again as "the greatest unresolved problem the criminal justice system faces" (Rector 1973, p.187).

The prediction of criminal behaviour is omnipresent in any legal system. Decisions as to who should go to prison (sentencing) and when they should be let out (parole) are in substantial part predictive decisions. The reason for the legal system's reliance upon prediction is the belief that to the extent criminal behaviour can be predicted, criminal behaviour can be prevented. This prevention can take the form of changing the people who are predicted to be criminal, for example by subjecting them to correctional treatment in order to lower the probability that they will commit a crime. Alternatively, prevention can take the form of isolating those who are predicted to be criminal by incapacitating them in prison, so as to deprive them of potential victims. Reviewing the vast literature on prediction of dangerousness, in Anglo-American law, one can conclude that preventive measures against dangerous, or likely to be dangerous, individuals have always been practiced to some extent by every society in history.

Also it seems that some forms of preventive measures will continue to be used by every society (Dershowitz 1974, p.57).

This chapter will be divided into the following sections:

Section 1 - where a general introduction will be given.

Section 2 - will deal with the question of whether it is possible to develop a clear and accurate criterion for dangerousness.

Section 3 - will examine the statistical outcome of any prediction process.

Section 4 - will discuss the problems in predicting dangerous offenders.

Section 5 - will look at the possibility of predicting dangerousness.

Section 6 - will examine the effect of a failure to predict dangerousness.

Section 7 - the expert's dilemma, about the uncertainties surrounding the psychiatric prediction of dangerousness, will be reviewed in this last section of this chapter.

4.2 Criteria of Dangerousness

Neither in the United Kingdom nor Iraq are dangerous individuals and dangerous behaviour specifically defined by statute. The provisions of the Mental Health Act (UK) 1983 Part IV S.62 (1-d) enable compulsory powers to be used in the interest of a patient's own safety or for the protection of other persons. The law does make some provision for certain specific offences that may be held to imply dangerous conduct: for example, dangerous or reckless

driving endangering the lives of passengers, or, as noted above, being in possession of, or distributing, dangerous drugs. In addition a small group of offenders who persist in criminal activities, which are not necessarily of a dangerous, seriously assaultive type, but which may be relatively minor, may be liable to a sentence of extended imprisonment. The Courts must be satisfied on the basis of previous criminal record and current offence that they are eligible for such a disposal. The criteria for the imposition of such sentences are very strict and, as shown in Chapter 1, the penalty now is rarely used.

The word 'dangerous' has strong emotive connotations: for example, the history of the English Poor Law from the time of Elizabeth I onwards shows a fervent concern that the poor were not only idle but dangerous. Rennie pointed out (1978, p.5):

"for nearly four hundred years, from the thirteenth through the sixteenth centuries, the English Criminal law was obsessed with vagrants and beggars, who were viewed as a great danger to society".

They were thought to be not only dangerous to others, but dangerous also in that they threatened the social and economic structure. Foucault (1978, p.2) has suggested that from the nineteenth century onwards psychiatrists have been employed to delineate individuals who were considered dangerous and to deal with their incomprehensible behaviour.

It is important to mention that the notion of a dangerous person as "the repetitively violent criminal who has more than once committed or attempted to commit homicide, forcible rape, robbery or assault" (Dinitz & Conrad 1978) is now widely accepted by the public as a commonsense definition of the dangerous offender.

It is undoubtedly very difficult to define and identify dangerous offenders with sufficient accuracy for legal aims. Also, a greater problem is to select dangerous offenders for protective sentencing. The problem gives rise to the following questions:

What does an offender have to do to be labelled as dangerous? On what considerations may a court label him as dangerous? How far could such considerations be successfully contested? How can one specify the harm against which it is justifiable to impose additional protection to the protective sentence? Does the propensity of the offender to commit offences, without regard to the consequences, actually make him culpable, and is he likely to cause a future harm if left at large for the period of the proposed protective sentence instead of being imprisoned (Floud & Young 1981, p.20).

Furthermore this leads to consideration of who is the more dangerous, the armed bank robber, the terrorist, the Zealot, the person who deliberately and knowingly drinks too much before driving, the person who fails to inform the medical and other authorities that they have a dangerous and highly contagious communicable disease, or the peddler of dangerous drugs, such as heroin?

"The problems of assessment have given rise to considerable literature and are often cited as reasons why we cannot with a good conscience make use of the concept of dangerousness in the administration of justice." (Floud & Young 1981, p.21).

As Morris mentioned (1974), it is very difficult to predict dangerousness. Considerations of justice prevent us from detaining individuals against their will for the sake of public protection for a longer period than could be justified by other reasons (Morris 1974).

The problems in the assessment of dangerousness will be discussed later in this chapter, but before that the "criterion problem" will be discussed.

4.2.1 The Criterion Problem

It is important to mention that:

"there is no test for 'dangerousness'; there are no clear-cut criteria - only clues to be gleaned from a meticulous inquiry into many different aspects of the personality and it's development. No single factor is a necessary or a sufficient cause of 'dangerousness': each may become important or, alternatively, neutralised in the presence of others." Therefore, an assessment takes the form of a predictive judgement, not a simple prediction. (Floud & Young 1981, p.24).

Statistically speaking, the best criteria for measuring dangerousness is that which produces the minimum number of false judgements of both kinds, positive and negative. Any restriction on the criteria in order to reduce the number of falsified positive judgements will result in an increase in the falsified negative judgements. As is well known, dangerousness is a state which may result in an action in the future. It cannot be measured in a mathematical fashion. Scott described dangerousness pessimistically as "an unpredictable and untreatable tendency" (1977, p.128).

It is impossible to divide people sharply into the dangerous and the safe: dangerousness is a matter of degree and the spectrum is wide. Therefore it is extremely difficult to predict dangerousness where there is no history of an individual's dangerous behaviour and the tendency of inflicting harm may be intermittent, even episodic, rather than fixed and habitual (Kozal et al 1972). In addition dangerousness cannot be attributed to one factor; indeed, each factor may become important or, alternatively, neutralised in the presence of others. Therefore prediction of dangerousness should be attempted with an overall subjective judgement which grasps the inter-relatedness of many factors. So, both evaluation and prediction are required in the prediction of dangerousness. The evaluation will be for the offender's character - his disposition to inflict harm - while the prediction

is an estimate of the probability that he will actually do so. But what should he do to be labelled as dangerous? No doubt most people would readily accept the following definition of the dangerous offender as:

"the repetitively violent criminal who has more than once committed or attempted to commit homicide, forcible rape, robbery or assault." (Dinitz & Conrad 1978), but there is scope for disagreement here, and in order to deprive an offender of his liberty in a just way, the legal conditions should be clearly defined.

Returning to the above questions, what must an offender do to be labelled as dangerous? What sort of anticipated harm must result after which it is permissible to detain the offender? To answer these questions practically, Courts must apply a criteria, which has not yet been found, to specify the nature of the anticipated harm and the degree of the risk that that harm will result, ie, at any rate an offender could be assumed to have the tendency for inflicting, within a limited period, such a wilful harm that would justify imposing a protective sentence.

People's ideas differ upon sorts of harm. Many people believe that psychological harm is not as significant as physical harm, others refuse to equate loss of, or damage to, property with physical harm. Therefore, sometimes they may justify preventive considerations in sentencing for many kinds of harm, whilst simultaneously sustaining radical objections to other kinds of harm. Without doubt people are unwilling and reluctant to tolerate any sorts of actual harm; however this perspective changes when it is the risks of harm that are under consideration. In this case people react differently. For example, no-one would willingly subject themselves to a car crash, radiation or an assault. However, poeple may still exceed the speed limit on motorways, live near nuclear power plants or walk at night in areas with reputations for violence. In these situations some people are prepared to tolerate the risks of harm, or dangers, for whatever reason, whereas others

would not be. There is thus a difference in attitudes among people towards actual harm and to the risks of harm.

It is important to know whether there are sufficient degrees of risk, against which the public may claim protection, by measures which may deprive some individuals of their liberty. Iraqi and English penal codes rely on the distinction between serious harm and other types of harm, but because of the ambiguity of the concept of seriousness, Walker (1972) advised its abandonment. Walker raised the question of how difficult it would be to undo the harm if it happened. The more difficult it is to undo, the more seriously it will be regarded, and the lower the acceptable risk of it's repetition.

Then he recommended that:

"When the preventive measures involve serious and lasting hardship for the persons to whom we apply them .... they should be used only to prevent serious and lasting hardship to other individuals of a kind which once caused cannot be remedied."

At the same time he omitted to mention the difficulties of classifying sorts of harm, such as psychological harms, which are irremediable. It seems that his ideas about irremediable harms did not completely solve the problem of finding out criteria for dangerousness, because there are sorts of harms that cannot be remedied by compensation, such as the sense of personal violation felt by victims of the housebreaker or pickpocket, in spite of the fact that the stolen objects can sometimes be restored to their owners, or replaced. Sometimes compensation cannot make good the ill suffered, even if it is just and adequate. For example, in kidnapping, hijacking and rape, such offences inflict personal injury - pain, shock and fear - these human feelings cannot be measured in a practical way, but the main feature of all these feelings is that they are violations of goods - in the sense which has been discussed in Chapter 3, (ie, violation to individuals' and

community rights). To conclude, the distinction between serious and other harm cannot be ascertained in a definite, rigorous way.

The difficulties of classifying harm, as physical or psychological, for example loss of speech as a result of fear, led some people to discount the significance of psychological harm in comparison with physical harm. The Butler Committee observed:

"physical violence is, we think, what the public is most worried about but the psychological damage caused by other crimes is not to be underrated."

Harm to the person is a personal feeling, so it is impossible to prove that a specified remedy or compensation can equal the harm done to the victim.

Harms range in degree from the highest degree, which is deprivation of the right to life, through the destruction and weakening of physical and mental body functions, to lesser degrees of harm such as bodily harm or loss of, or damage to, property. It can be inferred from this that any one of these harms are candidates for prevention in certain circumstances. At the same time, risk of harm is not enough to justify claims for protection in the form of a preventative prison sentence or other sanction; these may be unnecessary. However, even if the potential harm to others has not occurred, a suspect's behaviour can indicate that he is at fault, and there is a risk of him causing such harm. This may then justify a claim against that suspect, even where the risk of harm being suffered to many is low. For example, a persistently dangerous driver on a motorway is at fault, even though he has as yet caused no harm, and so preventative measures, in the shape of a fine or ban, are justified.

So the validity of claims for protection requires the existence of fault, ie, that the risk of grave harm be manifested in the offender's criminal conduct. If an offender presents a substantial

risk of causing future grave harm, protective considerations should be taken into account in the determining of his sentence.

Offenders are responsible for the harm suffered by their victims directly, ie, there is causality between his act and the harm in consequence of that act, whether his victim be the community or individuals. However, his legal responsibility for the cumulative results of his act is marginal. He is only marginally responsible for the indirect consequences of his harm, such as the public alarm at the crime, and any overtime costs incurred by the police in dealing with it.

To conclude, one of the guidelines in deciding the criteria of dangerousness is the nature of anticipated harm, and its gravity. Therefore because of difficulties in this context, statutes should prescribe the interpretation of grave harm in this context to clarify it as far as possible. It is important to distinguish grave harms from other harms, on the assumption that this is the best way to guide one towards a criterion for dangerousness.

Identifying the nature of the risk of grave harms, which may justify, with other reasons, imposing protective measures, is a serious matter. Although sometimes there is general acceptance of risk, individuals differ in their considerations of how serious the risk of harm must be to justify being protected against it.

Therefore the best way to define the nature of the risk in context is to devise a list of grave harms, the risk of which could be the main reasons for imposing a protective measure. The public would be entitled to the protection of such a measure only against the risk of grave harm. The grave harm in this context should include the following categories: death, bodily injury of a serious nature, severe psychological pain, assaults against morality, loss or damage to property which results in severe professional hardship, damage to public property which cannot be remedied, damage to the environment which results in effects on public health or safety, and serious damage to the external or internal safety of the

state. (Floud & Young 1981, p.118). Therefore, for identifying the grave harms which would serve to define the sort of offences which would make it permissible for a court to consider imposing a protective measure, two appendices (4 and 5) have been provided for this purpose. Appendix 4, which has been taken from Floud & Young's Report (1981), covers actions which might be thought to involve harm, against the risk of which the public needs to be protected. These actions were selected following an excellent and thorough survey of English laws. Appendix 5, extracted from the Iraqi Penal Code, includes actions against the risk of which the public needs to be protected.

Degree of the Risk

Judging the probability of an offender committing an offence in the future, whatever it's accuracy, cannot conclude with certainty that he committed an offence in the past. The aim in predicting an offender's future behaviour must be stringent and sophisticated, leaving no relevant factors unconsidered, apart from chance.

Re-offending is the outcome of the interaction between the offender's character and circumstances. Supposing all factors relevant to the offender's character and circumstances are well known, the possibility of the prediction of his future behaviour being right equals one certainty, minus the probability of being wrong on account of chance. Whereas when sentencing for a past offence the Court is required to be convinced beyond reasonable doubt that the defendant has commited the offence in question in order to punish him, the factors to be considered before imposing a protective sentence differ. This is because a protective sentence is not simply concerned with punishing past actions but must also address the offender's future behaviour and the likelihood of him causing future harms. The imposition of a protective measure depends primarily on the correctness of an assessment of his tendency to inflict harm. If there is doubt about the future conduct, this is unlikely to convince the Court not to impose a protective sentence, whereas a different standard operates for past

offences here if the Court has any doubt about the offender's culpability, they may not convict.

In conclusion, justice requires that, in imposing a protective measure or an aggravating sentence because of dangerousness, the individual's propensity to inflict harm be assessed. This means that the judgement will contain a prediction that an offender will or will not commit a future offence if left at large. Prediction is the device by which the degree of risk that an offender will re-offend in future may be discovered, by taking into account his circumstances as well as his character. Therefore it is the validity of the prediction which determines the degree of risk that a protective sentence will be imposed unnecessarily on an offender. Criticisms of the validity of prediction will be discussed in the following sections.

Lastly, it can be asserted that finding a criterion for dangerousness is quite a difficult matter, as:

"the most rigorous attempts to select those who will commit a crime of grave harm in the future have never been correct in more than half the cases and usually far fewer." (Radzinowicz & Hood 1981, p.758).

So, this interesting finding is the first obstacle confronting any rigorous criterion for dangerousness. This obstacle cannot be overcome without admitting a degree of inevitable error. However, this can be justified in practice, for redistribution of certain risks of grave harm between a potential offender and a potential victim is a just way to deal with a dangerous offender. So what justifies the protective sentence is that the offender:

"being in the wrong by virtue of the risk he represents is what entitles us to consider imposing on him the risk of unnecessary measures to save the risk of harm to innocent victims." (Floud & Young 1981, pp 48-49).

As a result, protective sentences should not be exempt from the proportionality principle. That is, the length of the sentence should be related to the degree of risk and the frequency of that risk.

4.3 Classification of Predictions

There are four statistical outcomes that can occur when one is faced with making a prediction of any kind of future behaviour. One can either predict that the behaviour, in a case, will take place or that it will not take place. At the end of some specified period, one can observe whether the predicted behaviour has actually taken place or not.

If one predicts that crime will take place and later finds that this has indeed happened, the prediction is called a true positive. One has made a positive prediction and it has turned out to be correct, or true. Similarly, if one predicts that crime will not take place and it in fact does not, the prediction is called a true negative, since one has made a negative prediction of crime and it turned out to be true. These are the two outcomes that one wishes to maximize in making predictions.

There are also two kinds of mistakes that can be made. If one predicts that crime will take place and it does not, the outcome is called a false positive. A positive prediction was made and it turned out to be incorrect, or false. In practice, this kind of mistake usually means that a person has been unnecessarily detained to prevent a crime that would have taken place in any event. If one predicts that violence will not take place and it does, the outcome is called a false negative. In practice, this kind of mistake often means that someone who is not detained, or who is released from detention, commits a criminal act in the community. Obviously, predictors of dangerousness try to minimize these two outcomes.

4.4 Problems in Predicting the Dangerous Offenders

There is little doubt that the known offender in general and the known dangerous offender in particular are more likely than members of the public at large to commit another serious offence. Still, there has been no successful attempt to identify, within either of the offender groups, a sub-class whose members have a greater-than-even chance of engaging again in a serious offence. It follows that there may be very dangerous people in the community who are not yet known.

As has been mentioned in Chapter 3.5.3, some of the difficulties of defining dangerousness are being uncovered. So two major issues arise in this aspect: (1) what kind of behaviour is sufficiently threatening to be called "dangerous" and (2) with what degree of certainty must the predictors establish the likelihood of the kind or kinds of behaviour designated as dangerous to occur and over what period time.

With regard to the first issue, no criteria for "dangerousness" have been precisely articulated. "Presently, we know that clinicians are not as accurate as we would like" (Edward P. Mulney and Charles W. Lids 1985, p.217). The major problem is to identify criteria for evaluating the appropriateness of the many possible responses to the questions posed: assuming dangerousness or mental illness requires some form of treatment or detention, what behaviour should be classified dangerous enough to authorize deprivation of liberty by continued detention or by release under supervision?

Should all offences be considered dangerous, or only those that involve violence among strangers? How many offences are necessary to establish that an offender is unusually dangerous rather than unusually unlucky? Such questions indicate how difficult it is to predict dangerousness. Indeed, after reviewing a lengthy period of British experience in focusing on dangerous offenders, Radzinowicz & Hood concluded that:

"Inherent in all these schemes was a common fault. They were framed as if to apply to any felony, whatever its degree of seriousness, and they ignored altogether the problems posed by persistent minor misdemeanants." (Radzinowicz & Hood).

Norval Morris found that between 1928 and 1945, only 7 of the 325 prisoners committed to long-term incarceration under a British habitual-offender statute were sentenced for violence, threats of violence, or danger to the person (Morris N. 1951, p.63-65). The remainder were persistent but minor property offenders. The confusion in identifying dangerousness should not be surprising. Nor should a quick or final resolution be expected in deciding what the meaning of a dangerous offender is and how he will be recognized.

4.5 Is Prediction of Dangerousness Possible?

Despite the fact that forensic psychiatrists routinely make prediction as to the dangerousness of their patients, it has become common in psychiatric literature to find commentators expressing doubts on their competence to do so. As one psychiatrist has written:

"as a psychiatrist, I am frequently asked to make an assessment with regard to possible future dangerousness of a patient, and I must confess that I can find no firm psychiatric criteria for so doing" (McCaldon 1974, p.295).

Other psychiatrists, however, are somewhat more confident in their predictive skills. One has asserted that experience as a psychotherapist in private practice, together with five years spent as a Psychiatric Consultant to official institutions, has led him:

"to formulate clinical criteria which can be used to estimate the potential for a severely dangerous response in a particular individual" (Kelley 1977, p.132).

Although there may be some psychiatrists who claim they can predict dangerous behaviour with a reasonable degree of accuracy, and identify individuals who can fairly clearly be classed as dangerous (for example, the violent offender who expresses a clear intention to repeat his violent behaviour), statistical evidence tending to verify such claims of predictive accuracy is virtually non-existent. Cocozza & Steadman have in fact concluded on the basis of their enquiries that:

"Psychiatrists have no empirical evidence to back up the argument that they have any special expert knowledge in accurately predicting dangerousness." (Cocozza & Steadman 1976, p.1099)

What exactly do the studies which have been described in the literature say about the prediction of dangerousness?

Statistical Studies

Wenk, Robinson & Smith in 1972 reviewed three massive studies on the prediction of violence undertaken in the California Department of Correction's Research Division.

The first study was started in 1965 and attempted to develop a violence prediction scale that could be used to help decision-making in parole cases. The aids to prediction used included looking at the type of offence for which the offender was convicted, the number of previous convictions, drug use, age and length of imprisonment. The study resulted in the identification of a small class of offenders, less than 3% of the total, as the most violent group, even though 14% could be expected to be violent. This likelihood was almost three times greater than that for parolees in general, of whom only 5% could be expected to be violent if assessed by the same criteria. However, 86% of those identified as potentially violent were not discovered to have committed a violent crime while on parole.

Wenk et al reported on a second study about parole decision-making that had been undertaken in 1967. Using offenders' histories and psychiatric reports to assess their potential for violence, 7,712 parolees were categorised at various levels corresponding to their potential aggressiveness. One in five (1,630 out of 7,712) were labelled as 'potentially aggressive', and the remainder as 'less aggressive'. Yet during the follow-up study in the following year, the rate of conviction and imprisonment for crimes involving actual violence for the 'potentially aggressive' group was only 3.1 per thousand (5 out of 1,630) compared with 2.8 per thousand (17 out of 6,082) among the less aggressive group. So for every correct identification of a potentially aggressive individual, there were 326 incorrect ones.

The third study looked at by Wenk and his colleagues had sampled 4,146 California Youth Authority wards. The record of violence in the young offender's past, and a thorough investigation into his background was undertaken, with the help of psychiatric assessments and psychological testing. The subjects were observed for 15 months after their release and information on 100 variables was later analysed to see which of these had led to a violent act, or recidivism. The authors concluded that the parole decision-maker would have 19 false positives in every 20 predictions when using the offender's past history of actual violence as his sole predictor of future violence. There is however no straightforward method of classification available that could make this more efficient. Although a few statistical equations were drawn from the data, none of these could attain a better than 8:1 false positive to true positive ratio (Ibid, pp.400-401).

In 1978, the State of Michigan Department of Corrections introduced the Assaultive Risk Screening Sheet, a prediction device to aid parole decision-making. Data on more than 300 variables were collected for 2,200 male inmates who had been released on parole for an average of 14 months in 1971. The data from half the subjects were analysed to provide an actuarial table relating to arrest for a new violent crime whilst on parole. To test the predictive accuracy

of the new scale, the resulting factors were then applied to the other half of the sample. The six items in the table were: the crime description fitting robbery, sex assault or murder; serious institutional misconduct; first arrests before a fifteenth birthday; reported juvenile felony; crime description fitting any assaultive felony; and whether the person is married. By using different combinations of these criteria the offenders were placed into five different categories; very low risk (2.0% recidivism), low risk (6.3%), middle risk (11.8%), high risk (20.7%) and very high risk (40.0%). Forty per cent accuracy was achieved by checking off the type of crime committed, the nature of institutional behaviour and whether an arrest took place before the inmate's fifteenth birthday. This is a higher degree of predictability than many of the clinical studies have reached, even after lengthy examinations of their subjects.

Since 1967, the study on the United States Parole Board (Gottfriedson, Wilkins & Hoffman 1978) is the major work on statistical prediction. Because this looked at crime in general, it also included property crime. An 11 point prediction scale was formulated using several criteria, with scores between one and eleven indicating the probability of re-conviction. Yet the increased predictive accuracy of this scale can be explained by reference to the higher basic rate of returning to prison for any crime including property crime.

In conclusion, even the best statistical research available indicates that parole prediction tables may be accurate in four out of ten predictions of violent recidivism and in six out of ten predictions of non-violent recidivism.

Clinical Studies

The classic studies in point are those involving the so-called "Baxstrom experiment" undertaken in the United States in 1967. This experiment arose out of the release in 1966 of 967 allegedly dangerous patients from security hospitals following a ruling by the

United States Supreme Court that their detention there was illegal (Baxstrom v. Herald, 383 US 107, 1966 (1)). The patients were initially transferred to less secure civil hospitals, many being released into the community shortly thereafter. In the various ensuing studies involving different samples and follow-up periods, only a minority were shown to have engaged in violent conduct following their transfer or release. The majority were therefore described as "false positives".

The methodology of the initial study of the Baxstrom patients, compiled by Hunt and Wiley after a one year follow-up, (Hunt & Wiley 1968) and the conclusions of its authors, were criticized by the Committee on Mentally Abnormal Offenders (Butler Committee) in 1975. They pointed out, first, that a one-year follow-up was insufficiently long to enable a thorough assessment of the consequences of the transfers and discharges to be made (Butler Committee 1975, p.62). This point would appear to be important in the light of some conflicting results obtained in previous studies involving released mental patients. While in two studies undertaken by Rappeport and Lassen in 1965 and 1966 it was found that the first year after release was the peak period for re-arrest of mental patients for certain offences, subsequent study by McGarry (where a 37 month follow-up period was used) indicated that only 20 per cent of all arrests recorded within that period occurred in the first year (McGarry 1971). Cocozza and Steadman produced a subsequent (and the major) study of the Baxstrom patients in 1974 after a follow-up period of four and half years. Nowhere in this study, however, is it indicated why this follow-up period is long enough to render reasonably accurate results with regard to the number of acts of violence committed by released mental patients. Though it is generally accepted that with regard to common property offences, a three to five-year post-conviction follow-up will reveal between 80 and 90 per cent of all subjects who would ever re-offend, (Soathill, Jack & Gibbens found that 40 percent of those rapists re-convicted of rape within a 22-year period were re-convicted more than 10 years after their release (Ibid p.65). The statistics for rapists who in fact committed rape (but who, perhaps, were not accused, captured or

convicted) outside the 10-year period might, of course, have been higher.

Disputing the one-year follow-up study conducted by Hunt and Wiley therefore, the Butler Committee noted that a later 4-year study revealed a much higher percentage of those transferred or released than that recorded by Hunt and Wiley to have been involved in assaultive incidents (Butler Committee 1975, p.63). An important point to be made, however, is that such assaultive behaviour does not necessarily amount to real dangerousness. Critical of the Butler Committee's assessment of the Baxstrom experiment, Bottoms has stated: "... most of the assaults which were committed by Baxstrom patients were committed in the civil hospitals ...." (Bottoms 1977, p.78).

The Butler Committee further criticized Hunt and Wiley's Baxstrom study, however, by arguing that the percentages of transferred or released patients found to have engaged in assaultive conduct might well have been higher had the patients been transferred years earlier when they were younger, since there was the usual inverse relationship between age and violence. With this criticism Bottoms has no argument. He has agreed that if the patients had been released earlier, the level of subsequent violence would have been higher.

Those follow-up studies involving individuals originally classified as dangerous but subsequently released or transferred, have revealed consistently disappointing false positive rates. The false positive rate in Kozal, Baucher and Garofalos's 1972 study, for example, was 65 per cent (1972, p.371). The rates in Steadman and Halfan's 1971 study were an even less impressive 76 per cent for women and 80 per cent for men (Butler Committee p.63). In 1972 Wenk, Robinson and Smith recorded a false positive rate of 86 to 95 per cent (1972, p.393).

One can conclude that the level of predictive validity revealed in the research has been quite low. So one could use the

data on the prediction of criminal behaviour to argue for reduction in the length of detention of prisoners: since the community cannot be sure who will do harm, it should not detain anyone. With the same logic, one could use the same data to argue for increases in the length of detention: since the community cannot be sure which offender will re-offend, it should keep them all in. Supporting each of these implications depends upon how much importance one attaches to the various costs and benefits associated with each, or upon the non-utilitarian principles for punishment that one implements.

Monahan and Wexler (1978, p.38) have argued that when a behavioural scientist predicts that an offender will be dangerous to the extent that state intervention is needed, he is making three separable assertions:

1. The individual being examined has certain characteristics.
2. These characteristics are associated with a certain probability of violent behaviour.
3. The probability of violent behaviour is sufficiently great to justify preventive intervention.

The first two of these assertions, Monahan and Wexler hold, are professional judgements which can be challenged in Court. The third is a social-policy statement that must be arrived at through the political process, and upon which the behavioural scientist should have the same say like any other citizen. So what the behavioural scientist should do is to present and defend an estimate of the probability that the offender will re-offend. Therefore the decision, as to whether this probability of re-offending is sufficient to justify preventive interventions, should be left to judges and legislators who are the appropriate people to weigh competing claims among social values.

There have been numerous proposals, based upon dissatisfaction with the research findings reviewed above, to abandon prediction altogether and limit criminal disposition to consideration of "just

desserts" for the crime committed (von Hirsch 1976). The prime difficulty here, however, lies in the assessment of what constitutes "just desserts" for a given criminal behaviour.

Although there is general agreement in society about relative ranking of deserved punishments for given crimes, the absolute punishment to be justly given can only be decided by social consensus within a broad range.

The prediction of criminal behaviour is likely to remain an essential part of the criminal justice system - there is, as yet, no workable alternative.

4.6 Failure to Predict Dangerousness

One possible explanation for psychiatry's apparent failure (or, at least, unproven ability) to predict dangerous behaviour with a very high degree of accuracy might lie in the subjective and less than rigorously scientific methods which are generally used. In general, the examiner must rely upon past experience; his impressions of an offender may lead him to suspect dangerousness, though he may not be able to communicate his reasoning to others. Often he must simply say:

"My experience and intuition tell me that this man is potentially capable of repeating a violent act, but I cannot spell out exactly why I feel this way." (American Psychiatric Association 1978, p.314).

Even when considerable time and effort is expended and specific criteria are agreed upon by assessment teams, individual as well as overall measurement of such criteria may be more a matter of rough approximation than of systematic calculation. While, for example, Kozal et al (1972, p.379) have come up with eleven characteristics of dangerousness and seven of safeness, and have devised an elaborate diagnostic system involving psychological tests, independent clinical examinations[3] and a diligent reconstruction

of life history from numerous sources, they have ultimately acknowledged that their diagnoses depend on "clinical judgement" and an "estimate" of the relative number and strength of dangerous and safe characteristics. The assessment teams studied by Pfahl (1977, p.77) were generally agreed on criteria for assessing dangerousness (eg, past history of violence, recentness of violence, 'dangerous delusion', lack of control or ego strength, a tendency to rationalize past anti-social behaviour). Nevertheless, Pfahl noted that there was, once again, no rigid and objective system for measuring and weighing these; moreover there was a tendency amongst the diagnosticians' studies to strike down potentially plausible social explanations for deviance in an apparent effort to fit patients into theories of individual deviance based on psychopathology.

However, are rational scientific methods sufficiently reliable in the prediction of dangerousness? Though some studies indicate that psychologists, social workers and correctional officials may be better than psychiatrists in this regard (Dershowitz 1969, p.47), and that it is possible to identify a class of offenders with a statistically higher probability of behaving violently than the average citizen (eg, those who have engaged in previous violent conduct) (Dershowitz 1973, p.1313), Walker has mentioned that "nobody has so far reliably defined .... a group of violent males with a probability of further violence approaching even 50 per cent." (Walker 1978, pp.61-62). What then is wrong with the "rational" approach to the prediction of dangerous behaviour?

According to Megargee, any systematic clinical evaluation of a given individual's likelihood of engaging in dangerous behaviour involves at least three separate processes: (1) identifying the relevant variables (such as personality factors, eg, motivation, internal inhibition, and habit strength (Ibid p.6); and situational factors, eg, gravity of violence contemplated, distance between would-be aggressor and his victim, and the nature of their relationship), (2) assessing them, and (3) determining the interaction between them (Megargee 1976, pp.7-11).

As Megargee has pointed out, it is perfectly easy to err in the identification of the relevant variables, their assessment, and the determination of their interaction (Ibid pp. 12-13). Once errors are made, moreover, they become greatly magnified by what is known as the "base-rate problem" (Ibid p.13). Essentially, what this means is that whenever an attempt is made to predict events that occur infrequently, large numbers of erroneous predictions will result from even a moderate false positive rate (Ibid p.13). One can conclude that people dealing with dangerous offenders have not yet devised a method of accurately predicting dangerousness with an acceptably low error rate.

4.7 The Expert's Dilemma

Given the uncertainties surrounding the psychiatric prediction of dangerousness, the expert on whose report the release or continued imprisonment of a given offender depends is forced into a difficult position. It is no wonder that the psychiatrist who simply does not know whether or not a given prisoner is dangerous may choose to err on the side of public safety (thus accounting, no doubt, for a certain percentage of the "false positives" which the studies reveal) by recommending continued detention[7]. As the Butler Committee put it:

"The tendency of the psychiatrist will generally be to prefer caution: some non-dangerous individuals will be unnecessarily detained. The community must consider how many safe individuals it is prepared to detain in the hope of preventing the release of the one potentially dangerous offender." (Butler Committee 1975, p.61).

In summary, obviously there is an extreme lack of accurate devices for the prediction of future dangerous behaviour. Those concerned with making judgements about the future dangerous behaviour of others will tend to produce false positives. In view of this sad state of affairs, are there any reliable indicators of the probability of future dangerous behaviour? There is no doubt that past violent conduct is likely to be the best predictor of

future violent conduct. People with several previous convictions for violence are considerably more likely to be convicted of violence in the future than those not so convicted. Those inclined to cynicism might agree that nothing predicts behaviour like behaviour. (As an illustration, the case of men who indecently expose themselves can be used; such offenders tend to repeat their offences but they seldom go on to engage in more serious sexual criminality). It is worth noting, however, that where acts of indecent exposure are associated with minor assaults or verbally threatening behaviour, the likelihood of engagement in later serious sexual criminality is quite strong (Bluglass 1980). It is therefore very important to study the circumstances of the behaviour or offence in considerable detail, for these can often provide very important diagnostic clues.

Footnotes

(1) Baxstrom v. Herald 383 US 107, 15 L ed 2 d, 86 S.Ct. 760 p.820.

(2) People v. Burnick (1975), 14 Cal. 3 d 306 (Cal. S.C. in Bank) at pp.225-226).

(3) Here the diagnosticians are concerned with such things as the subject's state of mind when acts of violence have been committed; view of himself or herself; view of others; relationship with his or her family; view of his or her prospects for the future. See Kozal et al "The Diagnosis and Treatment of Dangerousness", 18 Crime and Delinquency, p.385.

(4) X may be unable to bring himself to slug his boss for firing him, yet may be up to the task of beating Mrs X senseless for overcooking the cauliflower.

(5) Megargee, in his article on The Prediction of Dangerous Behaviour (1976) at p.7 has cited A.H. Buse, Psychology of Aggression (New York, John Wiley & Sons, 1961) in distinguishing between "angry aggression" and "instrumental aggression": "According to Buse, angry aggression is motivated by a conscious or unconscious desire to harm the victim and is reinforced by the victim's pain, whereas instrumental aggression is a means to some other end and is reinforced by the satisfaction of some other drive. Shooting someone you hate is an example of angry aggression; shooting someone in self-defence, in the line of duty, or to fulfil a 'contract', would be examples of instrumental aggression".

(6) Professor Nigel Walker, commenting on Megargee's earlier statement that current predictive tests would produce 50,000 false positives out of a random sample of 100,000 citizens, has described arithmetical exercises like this as 'rhetorical technique', ie, "terrify[ing] us with large numbers". As he has pointed out: "Surely what we are talking about is not

whether we should go out into the streets to round up 50,000 people, but whether we should release, or continue to detain, a much smaller number who are already in our prisons or hospitals". See Walker, 1978, p.61.

(7) Nor, in Professor N. Walker's view, has it been established that there is anything wrong with so doing. As he argued (Walker, 1978, p.60): "Let us accept that in our present state of partial ignorance any labelling of the individual as a future perpetrator of violence is going to be mistaken in the majority of cases. Does it follow that it is wrong to apply this label? Only if we swallow to assumptions. One is that it is morally wrong to makes mistakes of this kind. Everyone would agree that it is regrettable; but if the decision is taken with good intentions, and one has done one's best, with the available information, to minimize the percentage of mistaken detentions, is it morally wrong? Only if we swallow the second assumption - namely the anti-protectionist's insistence that our objective must be to minimize the total number of mistaken decisions, treating a mistaken decision to detain as exactly equal to a mistaken decision to release. The anti-protectionist is using two neat rhetorical tricks at once. By referring to mistaken detentions and mistaken releases simply as 'mistakes', he is implying that they all count the same; and by glossing over the difference 'regrettable and morally wrong', he is implying that it is our moral duty to go for the smallest number of mistakes irrespective of their nature."

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CHAPTER FIVE

5.0 DANGEROUS OFFENDERS IN THE IRAQI PENAL CODE

5.1 Introduction

As stated in Chapter 3, criminal dangerousness is dependent on the circumstances of each crime. Consequently, there is a firm correlation between circumstances and dangerousness because these circumstances are considered indicative evidence for the dangerousness of crime. Every crime which the law deals with involves legal injury and the extent of this injury varies along with the crime. Dangerousness also differs in contrast with circumstance, for circumstances are either objective ones related to the criminal act or subjective ones related to the principal perpetrator. These circumstances are of two types - aggravating and mitigating. As a result, dangerousness varies according to the type of circumstance, whether aggravating or mitigating. If the application of criminal dangerousness based on probable and certain events which precede the crime is not without risk of arbitrariness, its application with respect to its rules can then be applied by assessment. We can therefore describe the assessment as being based on supposition, not certainty. The risk thus ceases to exist and the complication which impedes the approach to applying the rules of dangerousness subsequent to the crime is removed. Therefore, after the verification of the degree of criminal dangerousness through the stages of investigation and pleading, it is easy to determine the appropriate punishment for the crime.

Thus, the principle of proportion between punishment and crime which Enrico Ferri (Ferri 1930 p.151) laid down and assigned as the basis for the right of punishment, derives from the purpose of restoring the judicial system which is disordered as a result of crime. The positive law school, which considers crime by its very nature as a revealing aspect of dangerousness, aims in the field of criminal law at the extension of the scope of judicial power, and the necessity of public protection, and makes as the essence of

protection or prevention of crime the proportion between punishment and the criminal's dangerousness.

Garofalo in 1878 supported the idea of mandatory assessment correlating punishment with the criminal's dangerousness. This term was not a new notion in the principles of criminal law but it was given a new connotation by the positive school. In the view of the traditional school, danger was restricted to the status of the crime. However, the positive school objected to this because the dangerousness of the criminal develops separately from the social dangerousness and exists before the crime. This is what justifies the taking of preventive measures against such dangerousness. As for criminal dangerousness, it is subsequent to the perpetration of the crime and calls for punitive proceedings (Ferri 1928 p.565). Despite the validity of these arguments, a better view is that dangerousness can be graded or categorized, as previously mentioned in Chapter 3 of this research, but cannot be divided into two types. The criteria laid down to predict dangerousness, no matter how precise, cannot provide absolute conclusiveness as stated in Chapter 4. No matter how valid the criteria for prediction, it is hard to rely on them as justifications for intervention by the state. As long as the danger which forewarns that a crime might take place is not actually fulfilled, police intervention is not justified. A man cannot be stopped merely on the basis of the pretext that his state of mind or his circumstances foretell the possibility of his committing a crime in the future.

The law itself assumes responsibility for determining cases of dangerousness, predicting crime by certain people even before any have commited the offence. For example, there are laws allowing arrest for drunkenness, and for dealing with the mentally ill. Similarly, measures have been taken to allow the arrest of vagrants, the arrest of juveniles and adults on suspicion, and to take legal proceedings against prostitutes and people associated with them (Bahnam 1971 p.264). In all these examples, the law regards people as potentially dangerous even if they have not yet committed a specific offence.

The power of the judge to determine punishment is embodied in the extent to which the law authorizes it, with regard to the appropriate type of punishment and in conformity with the seriousness of the crime. There is a close correlation between punishment and crime. The judge's role during the investigation and hearing is to verify the fact that the crime took place and to ascertain the degree of the criminal's dangerousness; whereas his role after clarifying the extent of criminal dangerousness is to exercise his power of choice for the appropriate punishment in conformity with the degree of dangerousness. The judge's assessment of the punishment in this case will be in accordance with the criminal's attitude towards society (Jacque 1898 p.58). When an offender has been found guilty and convicted, the main concern of penal policy is then to determine how to punish him and to implement this sanction in relation to his dangerousness.

5.2 Discretionary Power of the Judge

The judge ought to take into account when using his discretionary power, the extent of the dangerousness of the crime with regard to:

1. The nature, type, means, goal and place, and any other aspect of the incident.

2. The gravity of the injury or danger inflicted upon the victim of the crime.

3. The severity of suffering and the scale of the crime.

4. The gravity of the injury suffered by society.

Other factors which the judge ought to consider during the process of assessment in the light of evidence from the points above are - the physical factor of the crime itself and the mental factor of the criminal. These two factors ought to be given equal consideration

because they both result in the determination of the type of injury caused by the crime, perpetrated by the criminal. (Carlo Saltelli, p.215).

Where the harm resulting from a particular crime is considerable, but the degree of suffering by the victim is not too great, or permanent, then it is not appropriate to impose severe punishment. However, such punishment should be imposed when a victim's suffering is greater, although the crime is similar. This proposition can be illustrated by two simple examples: the first being the case of two separate victims being attacked and struck about the head, where both suffer considerable injury. The victim whose wound is inflicted beneath his hair, and which eventually heals, could arguably be said to have suffered less lasting harm than the victim who is struck in the face, and scarred irreparably for life.

A second example would be if two busy right-handed artists were involved in separate minor car crashes caused by drunken drivers. Artist A breaks his right hand and loses his livelihood for several months, whereas artist B breaks his left hand, and is able to continue painting. Both the other drivers are culpable, and although the injuries resulting are similar, artist A will clearly suffer more lasting harm then artist B, and it is therefore appropriate to sanction the driver in his case more strongly than the driver who crashed into artist B. This will be because the judge should determine punishment on the basis of having taken an overall view of all the circumstances of the offence. It is of great importance to take all these circumstances into account since they are part of the essential triumvirate of components present in any offence: namely, that the offence = the offender + the victim + the circumstances.

The judge ought to take into account the criminal's potential for perpetrating crime with respect to:

1. the motive for the crime and the criminal's nature,

2. any previous criminal convictions, and their nature, together with the conduct and background of the criminal prior to the crime,

3. the present and subsequent conduct leading to the crime,

4. the individual, his family and his social status (Carlo Saltelli, pp.213,214).

Someone whose commission of offences may be closely connected with a natural impulse or overwhelming psychological inclination towards crime is sure to be potentially dangerous. The link between psychological factors, and the biological and moral development of an individual, results in such an individual being prone to commit other crimes. They reveal a case of moral weakness in the individual which requires punishment, not only in respect to the crime itself, but in regard to its perpetrator. In imposing punishment, it should be considered what further crimes might be committed in addition to the actual punishment of that particular crime, and the judge, in his discretionary power in deciding the punishment, is under obligation to clarify the reasons that led him to impose a lenient or severe punishment. As a result of clause 134 of the Iraqi Penal Code, the Courts are compelled to clarify in their verdicts the justifications or reasons which lead them to leniency.

The Iraqi legislature has behaved laudably in enacting clauses 133 and 134 of the Penal Code in which it has sought to safeguard the rights of both the victim and the offender. This has been done in two ways:

Firstly, where there are mitigating circumstances, clause 133 leaves it up to the discretionary power of the judge to determine what these are in each particular case. This is preferable to legislators merely making a list of mitigating circumstances with which the offender would have to comply, for it gives the judge more

flexibility. Thus, the offender will be treated fairly if there are genuine mitigating circumstances in his case.

Secondly, because clause 134 compels a judge to give the reasons that lead him to impose a particular sentence, (whether lenient or severe), the victim has the right to appeal if not satisfied with the verdict.

5.3 The Correlation of the Degree of Dangerousness with Aggravating Circumstances

It seems that it is not impossible for the Court to determine the offender's degree of dangerousness by an accurate investigation and by probing into all the circumstances of the offence. Each time an aggravating circumstance is discovered, the dangerousness becomes more serious and this means that there is an unvarying correlation between the gravity of the crime and its aggravating circumstances. In order to determine the degree of this dangerousness and its seriousness, and the extent of its close links with the circumstances, the nature of the aggravating circumstances must be specified.

Thus demands for aggravating circumstances of such gravity to result in severe punishment without a change in the legal description of the crime itself must be distinguished from the circumstances that change the legal description of the crime but not it's essence. A prime example here is recidivism; re-offending represents an aggravating factor, without a change in the legal description of the crime. That is, if someone is initially convicted of theft, serves a sentence for it, and upon release, commmits theft again, the fact that he is a recidivist will be counted as an aggravating circumstance that will be taken into account when he is punished. Therefore, the aggravating circumstance contributes to a more severe sentence even though the legal description of the crime remains the same, namely theft.

However, in cases of murder, if the offence is premeditated, this will be an aggravating circumstance, in contrast to cases where it is committed without any such premeditation. Thus, in the first instance the aggravating circumstances change the legal description of the crime, not it's essence, and this leads to a more severe punishment. Clause 406 of the Iraqi Penal Code deals with such circumstances.

Aggravating Circumstances

In the Iraqi Penal Code the following clauses have been stipulated as constituting aggravating circumstances.

Clause 135 - Without prejudice to provisions in special circumstances stipulated by the law regarding the aggravation of punishment, the following circumstances are considered to be aggravating:

1. Perpetration of a crime with a base motive.

2. Perpetration of a crime by taking advantage of the victim's poor awareness or his incapacity to defend himself or his being under circumstances which do not allow others to defend him.

3. Use of savage means to commit a crime and acting with the utmost cruelty to the victim of the crime.

4. The taking advantage by the criminal of his status as an official to commit the crime by the misuse of his office and the abuse of his authority.

Clause 136 - If one of the above aggravating circumstances is present in the crime it is permissible for the Court to pronounce the following verdicts:

1. If the stipulated punishment for the crime is a life sentence, it is permissible for the Court to impose the death penalty[1].

2. If the punishment is temporary imprisonment or detention it is permissible for the Court to impose more than the maximum punishment stipulated provided that it does not exceed twice its limit, and on the condition that the period of temporary imprisonment does not in any case exceed 25 years, or 10 years in the case of detention.

3. If the stipulated punishment for the crime is a fine, it is permissible for the Court to impose detention for a period twice that for which the offender could be sentenced according to the amount stipulated (in paragraph 2 of clause 93), provided that the overall period of detention does not exceed 4 years.

Clause 137 - If in a crime the aggravating circumstances are combined with mitigating circumstances and circumstances which require mercy, the Court first treats the aggravating circumstances then the mitigating circumstances, and lastly the circumstances which call for mercy. If there is a balance between the aggravating circumstances, the mitigating circumstances and the circumstances which call for mercy, it is permissible for the Court to invalidate all three and impose the punishment stipulated for the crime initially. However, if the opposing mitigating and other circumstances are not balanced, it is permissible for the Court to decide which bears the most significance in order to achieve justice.

Clause 138 - If a crime is perpetrated in order to obtain unlawful gain and is sanctioned by law other than a fine, it is permissible for the Court by a law to impose a fine for the crime which does not exceed the amount made by the perpetrator or the amount sought, providing the law does not stipulate otherwise.

Clause 139 - This considers the recidivist:

First: as one who is definitively convicted for a crime, and who before the end of the period stipulated for his rehabilitation, perpetrates a felony or a misdemeanour.

Second: as one who was definitively convicted for a misdemeanour, yet, before the end of the period stipulated for his rehabilitation, perpetrated any felony or misdemeanour similar to the first one. The second paragraph specifies the crimes which will be considered identical or similar for the purpose of implementing the provisions of this paragraph:

1. Crimes of embezzlement, theft, breach of trust, robbery, tampering with deeds, threat and concealment of the proceeds of these crimes or unlawful possession.

2. Crimes of defamation, slander, abuse, breach of secrecy.

3. Crimes relating to public decency and good conduct.

4. Crimes of premeditated murder and intentional grievous bodily harm.

5. Wilful crimes which are included in a single chapter of this law.

The third paragraph of clause 139 then goes on to say that the provisions of foreign law are to be disregarded in its application, except if they are pronounced upon crimes of counterfeiting, imitation or falsification of Iraqi or foreign currencies.

Clause 140 - "It is within the Court's jurisdiction in the cases of recidivism, as stipulated in the previous clause, to impose more than the legal maximum limit of the punishment provided for the crime, providing it does not exceed twice this limit and that the period of temporary imprisonment does not exceed 25 years or 10 years for detention, notwithstanding that:

1. If the punishment stipulated for the crime is temporary imprisonment, free from any restrictions, it is permissible for the Court to impose a life sentence.

2. If the punishment stipulated for the crime is a fine, it is permissible for the Court to impose detention".

Clause 406 1. - "Intentional murder is punishable by the death penalty in the following case: If the murder is premeditated."

The approach of the Iraqi legislature in clauses 135 and 136 mentioned above is unsound for the following reasons:

1. Determining the aggravating circumstances by means of enumerating them is open to criticism, because there exist aggravating circumstances which have a greater impact and a more resounding effect than the circumstances listed in those paragraphs (see Chapter 3.3 for suggested examples). It would have been preferable, and good legislative policy, to have given wider examples of these circumstances, rather than giving a list. Such examples should be as comprehensive as possible in order to try and cater for all the aggravating circumstances likely to occur.

2. The Iraqi legislature has given the judge the power to impose a heavier punishment when aggravating circumstances exist, without requiring him to justify the reasons for doing so. However a judge does have to justify, in his verdict, the reasons or conditions which lead him to mitigate a punishment, (in accordance with clause 134). It would have been preferable and consistent if the Iraqi legislature had compelled the judge to give reasons, where punishment was changed as a result of aggravating circumstances. It is in fact more important for the judge to be accountable when he has increased a punishment. When a sentence is reduced, the defendant can only benefit; but if the judge increases punishment, there may be a fear that this has been done without legitimate cause especially if reasons are not given. In this case control over the judge is ineffective because he will not be obliged to justify the reasons that led him to severity.

Judges have wide discretionary power when sentencing, and this can result in harm to a defendant where severe sentences are imposed without any reasons being given. The importance of this can be amplified as follows: If a judge imposes a lenient sentence, even though there are no mitigating reasons or circumstances, then the defendant will benefit. This can be done because of the judge's wide discretion. For example, a particular judge may imprison an offender for eight years for an offence that normally receives fifteen, even though there are no mitigating factors. This would then constitute a lenient sentence. However the reverse of this situation is whereby the judge imposes a severe sentence of fifteen years for an offence that normally warrants eight, even though there are no aggravating factors. Thus the discretion of an individual judge can result in unjustified treatment of the offender in the second case, although beneficial to the offender in the first.

It seems that the legislature has given the judge wide discretionary powers that are open to abuse and criticism, and if they are abused, the defendant may suffer unfairly. Instead, the legislature should temper the judge's discretion and effect a compromise power that respects both defendants' and victims' rights. This can be done by compelling the judge to give reasons when imposing severe sentences. This would thus reduce his wide discretionary power of punishment, but would not do so to the extent that he would be too restricted and constrained by regulations; he would still maintain the essential discretion necessary to sentence fairly.

The legislature provided in clause 138 that; - if a crime is perpetrated in order to obtain unlawful gain and which the law sanctions with a punishment other than a fine, it is permissible for the Court to impose in addition to the stipulated punishment for the crime, a fine which does not exceed the amount gained by the perpetrator or the amount sought, unless the law stipulates otherwise. However, there seems to be no need for this provision. What this clause stipulates is merely an aggravating circumstance which could be included under the aggravating circumstances which

are already specified in clause 135. In fact this crime is inclusive in the first paragraph of clause 135 because the base motive involved is unlawful gain. Alhadithi (1973 pp.139, 140, 273, 274) considers the distinction between excuses (or honourable motives for committing crime) and mitigating circumstances stipulated by the Iraqi penal law as inaccurate, and he suggests in this context: that the legislature should limit itself by stipulating the general mitigating circumstances and excuses without listing a particular or specific excuse for each crime separately. It should be left to the Court to conclude the reasons for the excuses in the light of the criminal's personal circumstances, in addition to the objective circumstances of the case, while compelling the Court to justify its sentence which has taken into account the excuse offered.

The judge may disregard the dangerousness of the offender according to the subjective circumstances of the offence even though the objective circumstances show it to be extremely grave. As an example, the case of the man who on finding his wife committing adultery kills both the wife and her paramour, could be given. Here the objective circumstances make the offence sufficiently grave to warrant the imposition of a heavy sentence. However the judge may not regard the offender as dangerous because of the circumstances in which that offender found his victims. As such he may use the discretionary power under clause 509 of the Iraqi Penal Code to impose a lenient sentence, or more importantly, he may suspend the sentence according to clause 144 of that Code.

Clause 144 - The Court when punishing a crime or felony by detention for a term exceeding no more than a year, can overrule the sentence itself by suspending the execution of the sentence if the verdict has not been imposed upon the defendant for intentional crime. It takes into account the criminal's conduct, background, age and the circumstances of this crime to see if all these aspects add up to the fact that he will not commit a new crime. When considering a suspended sentence, the Court must decide whether to suspend just the initial sentence or whether to suspend

the additional penalties too[2]. For example, if the Court's verdict was detention, plus a fine, the Court may confine the suspension of sentence to the detention only, leaving the fine still to be paid. The Court must justify in its sentence the reasons on which it had based its suspension of sentence.

The legislature, in allowing suspended sentences where an offender has no previous convictions for intentional crimes, is equating this with the idea that such an offender is not therefore dangerous. Similarly, someone with previous convictions is not necessarily dangerous. This argument is deficient. A person might fall into the trap of crime for the first time because of difficult circumstances beyond his control. Therefore, if a person has a previous conviction, it does not signify his dangerousness or the persistence of this dangerousness. When the judge pronounces his decision, he formulates the punishment within the scope of the criminal dangerousness of the person. Thus he must include in his considerations the conditions of dangerousness, and its varying degrees (see Chapter 3).

The causes of dangerousness are numerous and can be psychological, physical, hereditary and environmental. Their indicative signs give them distinct appearances and accordingly they can be considered as concrete evidence; and since dangerousness varies in its degree, this dangerousness could turn out to be of a high degree or a very low degree. Therefore the scale of punishment and the discretionary power of the judge is responsible for treating dangerousness according to its degree. Consequently, when assessing the punishment, the importance of the individual and the social right which is the subject of violation by the dangerous person must be emphasized. Different degrees of dangerousness can exist even though the offence is the same. A high degree of dangerousness is indicated by commission of serious offences without reason or justification, resulting in grievous harm. However, such serious offences may also be committed as a result of emotional, passionate circumstances or reasons, when the person is not inherently dangerous. Accordingly the mere perpetration of a crime does not

mean that punishment will be automatic and uniform for that crime, rather it must be correlated to dangerousness, because a crime is, in its reality, clear evidence of the criminal's latent dangerousness.

It can be concluded from the above discussion that there is a close correlation between aggravating and mitigating circumstances and dangerousness. Circumstances are the only true gauge for revealing dangerousness. The perpetration of crimes with base motives, the premeditation of crimes, and recidivist crimes, which clearly indicate the depth of dangerousness in the habitual criminal, are all aggravating circumstances which are indicative characteristics of the social non-conformity of the criminal. These entail that such a person should be dealt with according to the gravity of his dangerousness, by imposing a suitable punishment which will enable the realisation of the aim of allowing the criminal to return to society as a sane man, to participate in its construction and development.

The degree of dangerousness which may exist in the case of correlating crime with aggravating circumstances is not the same as the degree of dangerousness which may exist in the case of its correlation with mitigating circumstances, because the crime which is perpetrated for a 'noble' motive cannot be equated in terms of gravity and dangerousness with the crime which is perpetrated with a base motive. The crime of manslaughter in order to rob someone of his property cannot be equated with the killing of a sick man to end his suffering. It is true that the two crimes involve murder in which a man is a victim. However, they both differ as regards their gravity. Aggravating their punishment is not reasonable in the case of killing to rid the sick man of his suffering because of the absence of dangerousness; whereas in connecting murder with the motive of theft, the punishment must be more severe to conform with its dangerousness. It is clear then, that the assessment of punishment should be in conformity with an ascending or descending scale of criminal dangerousness.

Two points could be mentioned about clause 140:

Firstly, the 25 years imprisonment for the crime provided in the clause as the legal maximum limit of the punishment contrasts with clause 87 which provides that the term of life imprisonment should be no more than 20 years. (It also contrasts with clause 68 of the Prisons Establishment Act No 151, 1969, which provides the same number of years as a sentence of life imprisonment). Therefore, clause 140 should be amended to remove its contradiction with clause 87 and clause 136 (see para 2 above).

The second point is concerned with the second paragraph of clause 140, which allows the Court to impose detention instead of a fine. Increasing the punishment in this way is unnecessary since the fine can be increased if the offence warrants it without the need to resort to detention.

The way of aggravating punishment stipulated in the clause is quite enough (ie, to impose a fine that is more than the legal maximum limit of the punishment provided for the crime, providing it does not exceed twice this limit). Also, a crime punishable only by a fine does not form a great social danger which justifies deprivation of liberty. Further, this aggravation of punishment in clause 140, which allows detention instead of a fine, is at odds with civilized modern criminal policies which do not allow the alteration of a fine to detention.

Article 326 of the Criminal Procedure Act No 23, 1971, authorizes the judge to order every person who has been punished once or more, for one or more of certain offences (assault and battery, assault on property, harbouring of offenders, crimes relating to morals and decency, public transportation, and falsification of banknotes, coins or stamps), to execute a bond, for good behaviour, for a sum not less than fifty dinars and not exceeding five hundred dinars, for such period not exceeding three years and not less than one year, otherwise the judge may order that

he be detained in prison until the expiration of the period determined in the verdict. This verdict is referred to by the law as preventive detention.

The approach of the Iraqi legislation in the clause above is unsound for the following reasons:

1. It is against the principle of validity which does not allow a person to be punished without committing a crime.

2. It is against principles of justice which prevent sentencing a person twice for the same act.

3. It is not consistent with most modern criminal policies which believe that there should be a chance to rehabilitate the criminal for whatever he did, as the human soul tends to good more than evil.

4. The bond for good behaviour shakes the offender's self-confidence and heightens his state of anxiety and hopelessness (which may return him to criminality) as he realises that the community does not trust him.

Therefore it seems important to abolish the power given to the judge by clause 326 of the Criminal Procedure Act 1971.

It is worth mentioning that the Iraqi legislature did not give any definition of the dangerous offender or habitual offender. It seems that it is satisfied with the general elements provided by clause 103(1) (where any offender may be considered as dangerous to the public safety if his circumstances, record and behaviour, as well as the motives and conditions of the offence, indicate that there is a serious probability of his committing another offence).

As the provision is too generalized it cannot be used as an accurate criteria to identify dangerousness. Also it gives the judge a wide discretionary power to diagnose dangerousness without

obliging him to justify his diagnosis. Therefore as the provision lacks clarity and accuracy, it should be abolished and replaced by a list of grave harms, such as that in Appendix 5, which could then serve as guidelines for the Courts to follow.

In relation to the habitual offender the Iraqi legislature seems to have failed to distinguish between the habitual offender and the recidivist. It could be argued that it has basically ignored the existence of the habitual offender because clause 139 of the Iraqi Penal Code only deals with recidivists.

As a matter of fact, the rarity or non-existence of the habitual offenders, among the criminals standing trial before Iraqi Courts, may be due to the exaggeration of the severity of penalties and the wide discretionary power of judges. Obviously the severity can be seen from the large number of death penalties provided for the Iraqi Penal Code[3]. Moreover, the discretionary power given to the judge authorizes him to multiply the sentence or even increase the life sentence of 20 years imprisonment, to the death penalty.

The official statistics have proved (as shown by the following table), that the rate of those offending for the fifth time is negligible compared to those who offend for the first and second times. Those offending for the first and second times constitute the simplest form of recidivism.

Recidivist and habitual offender[4]

	1972	1973	1974	1975	1976
First time	6942	5896	5511	4808	6344
Second time	327	349	205	111	151
Third time	19	23	16	6	22
Fourth time	8	11	5	1	1
Fifth time	10	4	0	4	2

Source: Aualy Statistical Collection for the Iraqi Ministry of Labour and Social Affairs, p.76.

In spite of these statistical data which seem, at first glance, to show good results in the decrease of second time offenders, a critical gaze reveals that the harshness prevailing in the Iraqi Penal Code is not consistent with modern criminal policy. The trend in this policy considers the offender as an individual who has a temporary inclination towards crime, a condition which could be rehabilitated or cured by a careful selection of the penalties according to the principle of the individualisation of punishment (see Chapter 1). Moreover, it is not compatible with the new tendency of criminal policy designed by Law No (35) of the 1977 Legal Reform System. The new policy considers punishment as a deterrent and endeavours to prevent the commission of new crimes and to promote the re-education of the convicted. In addition, it is necessary to protect the convicted from the harshness of punishment and to make him accustomed to respect the bases of social life and to rehabilitate him as an active member in his society, which needs people more than machinery. Furthermore, one of the main foundations of the new policy is, in the case of recidivism, to make imperative the study of the causes of the delay in assimilating and rehabilitating those who are convicted of crimes, into society, and to obtain the advice in this area of those who are experienced specialists.

Finally, a comment has to be made on the death penalty which is contained in numerous provisions - far more than are actually needed. Despite the rational explanations given for the imposition of this penalty in regard to certain offences, its practice, as provided in clause 86 of the Iraqi Penal Code which prescribes death by hanging, is unjustifiably savage. Therefore it is submitted that the means of executing this penalty should be such as to minimise the suffering of the convicted, and examples of such methods could perhaps include electrocution or the administration of lethal doses. (Abdul-Lateef, 1979, p.133).

In conclusion, it seems that the present Iraqi Penal Code is full of contradictory elements. Furthermore, the Code is incompatible with modern criminal policy as well as the present social policy in Iraq. It is therefore submitted that the time has come to replace this Code with legislation that is more compatible with contemporary needs.

Footnotes:

(1) Iraqi law distinguishes between the legal terms 'life imprisonment', 'temporary imprisonment' and 'detention'. Life imprisonment is the maximum term available to an Iraqi Court to impose a sentence of incarceration for a period of twenty years. Temporary imprisonment is imprisonment for any time between five and twenty years, whereas detention is used to describe a period of imprisonment for five years or less.

(2) The Court has the power to choose from a range of sentences; the prime penalty which is the initial sentence, and it can impose additional penalties, such as deprivation of rights for a certain period after release from imprisonment.

(3) Clauses providing for death penalty only in Iraqi Penal Code No 111, 1969 are: 156, 157 para A, 158, 160, 161 para B, 162, 164 para D, 194, 197 para B, 200, 201, 223 para A, 406 para A, B, C, D, E, F, G, H and J.

(4) All attempts to find an updated form of this table have been unsuccessful.

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CHAPTER SIX

6.0 EXTRA MEASURES

6.1 Introduction

The previous chapter discussed the way in which the Iraqi Penal Code dealt with the dangerous offender. Therefore, this chapter, following this theme, will be confined to a discussion of how the English legal system deals in practice with the dangerous offender. To do this, there will be an examination of those extra measures that the criminal justice system uses to deal with the dangerous offender. Prior to this, the general background of these extra measures will be considered, for the purpose of finding out what they hope to achieve. Following this, the ethical basis for such measures will also be explored.

Throughout English law, there is no direct mention of the dangerous offender, or how such a person ought to be dealt with. There are, admittedly, a few offences which refer implicitly to dangerousness with the aim of deciding criminal responsibility (such as dangerous driving and the possession, manufacture and supply of dangerous drugs), yet nowhere is there any direct mention of the terms dangerous or dangerousness. (Floud & Young 1981, p.69).

The existence of the dangerous offender is acknowledged, however, in more subtle, indirect ways, for example the imposition of the life sentence indicates a belief in the offender's dangerousness and the need for the public to be protected from him. Similarly, where an abnormal crime has been committed, this may be greeted with a determinate sentence the length of which indicating that the Court considers the offender to be dangerous. Finally, for normal offences the Courts may, in some cases, impose a slightly longer sentence if they think that this is necessary for the protection of the public because the offender has a propensity for causing harm. It can be seen then, that although dangerousness is

not specifically mentioned in any statutes, the Courts have ways of taking account of it.

Dangerousness has been implicitly recognised by statute in two situations. These are where measures to protect the public are enacted by either an extended sentence, or a restriction order together with a hospital order under the Mental Health Act 1959.

The Iraqi legislature has not defined the dangerous offender precisely, but, unlike its English counterpart, it has made efforts to identify the general elements which help to indicate dangerousness in clause 103(1) of the Iraqi Penal Code (see Chapter 5.3).

6.2 The Objects of the Extra Measures

Extra measures have been created by statutes, or by the practices of the Courts, to deal with dangerous offenders in order to prevent them from causing future harm to innocent people and, at the same time, to operate as a device for crime control (Moore et al, 1984). Commensurate with this aim is the need to satisfy the humanist trends in modern criminal policies, that seek to deal with offenders as human beings and which recognise that they have their own rights which should be respected. Therefore it is necessary to protect the offender from unduly harsh punishment whilst attempting to instil in him a respect for the rules and regulations that form the basis of society, so that he can be rehabilitated as an active member of that society which, after all, needs humans more than mechanical components (Iraqi Law No 35 of 1977. Legal System Reform). It seems that the social climate will be, at some date in the near future, favourable for reducing the general length of sentences for ordinary offenders. This will pose a special problem, in that to punish the category of dangerous offenders with a special sentence consistent with their dangerousness, a special form of sentencing will be required which may be termed 'protective sentencing'. The protective sentence is one that would

normally apply for a serious offence. If shorter sentences for serious offenders become acceptable, attention will still have to be paid to those dangerous offenders who remain likely to cause harm after serving the shorter sentence (Floud 1982, pp.216-217). Incidentally protective measures affect both dangerous offenders who are mentally ill as well as those who are not. Many of the current policies and practices of the criminal law use protective measures as appropriate devices for coping with specific categories of offenders. Such offenders include vagrants, mentally disordered offenders, and the actual dangerous offender who plans his offences so as to maximise profit and minimise the risk of detection, and who executes his offence with great skill, or merely frequently commits acquisitive offences.

In conclusion, protective measures could be described as options in the hands of judges to deal with dangerous offenders in accordance with the requirements of justice and judicial individualisation. The judge has the discretion to make a hospital order as opposed to a prison sentence. Furthermore he is able to impose a restriction order if he believes it will be either in the offender's interest or in the interest of protecting the public.

The judge may also award a term of imprisonment which is longer than the tariff guideline if he believes the offender is dangerous and deserves an additional period of internment. This may further serve to deter both the offender in the future, and other potential offenders, as well as protecting the public from such criminals for as long as is reasonably possible.

6.3 Ethical Basis of Extra Measures

As has been mentioned above, protective measures affect both mentally and non-mentally dangerous offenders. However, the problem is particularly acute for mentally ill offenders because it is often assumed that they are more dangerous than other offenders, and if they are subjected to treatment in a hospital rather than ordinary imprisonment, this is regarded as more easily justifiable.

The utilitarians have no objection to imposing a protective sentence on an offender if it is highly probable that this would prevent him from causing grave harm, and that the harm that would be caused by the offence is greater than the harm of the punishment. Part of the utilitarian justification of punishment is to incapacitate the offender. This protective sentence will face a sharp problem of justice because, as mentioned in Chapter 4, predictions of dangerousness are not very reliable. Walker mentioned that it has not yet been possible to find out criteria which would ensure that results predicting future behaviour would be more right than wrong. However, he thinks it likely that much greater predictive accuracy can be achieved and suggests that it is now possible "to define a group of which a majority will commit further violence" (Walker 1980, p.98 & 1982, p.277). If one agrees with this assumption, or the estimate mentioned by Floud and Young in their report [that the false positive rate for prediction of serious violence is at least 50 per cent (Floud & Young 1981, pp.31,58)], this means that in imposing protective measures, half the offenders will be punished for a period longer than is necessary as these offenders will not cause future grave harm with an earlier release. Since a protective measure is imposed for the purpose of preventing an offender from causing grave harm in the future, and other offenders who have caused grave harm but are not judged to be dangerous, get lighter sentences, it can be said that there is an injustice done to the 50 per cent of offenders who would not in fact have caused grave harm had they been released earlier. So one offender, unnecessarily, is detained to protect one victim from a harm that would have been caused by another offender who is also under protective measures. Two offenders are thus made to suffer for the benefit of one potential victim.

From the utilitarian point of view, in order to justify the protective measure, one has to weigh the harm done to the two offenders against the harm to the potential victim. Given that the harm done to the victim is great, it would appear that the protective sentence is justified if the sentences imposed on the two offenders cause less harm to them than that which their offence has

caused. However, where the sentences are indeterminately long, as life sentences would be, it is unclear whether there is even a utilitarian justification, unless the number of potential victims increases.

It is not only future protection that would count in the calculation, but also the general concern for deterrents, both individual and general. Punishment not only deters the offender who is punished to prevent him committing similar offences in future, but also potential offenders. The offender who is punished is supposed to be deterred from re-offending by his experience of punishment, and the threat of being subjected to the same kind of punishment that was meted out to the convicted offender (Cross 1975, p.121) acts as a general deterrent to potential offenders.

In short, the utilitarian justification for imposing protective measures does not seem strong enough to withstand criticism and does not take into account all the relevant considerations.

Reviewing the retributionist justification for imposing protective measures may change the picture significantly. When the protective measure applies to those who have committed at least two serious offences (this was mentioned in Chapter 3 as one of the requirements in formulating the definition of dangerous offenders), then any person who commits the first offence can be reminded of the existence of such protective sentencing. So the risk of the offender being unnecessarily punished is one that can be avoided by choosing not to commit another offence.

Where a dangerous offence is committed, someone will inevitably suffer harm as a result; this can be the offender where he is imprisoned for an unnecessarily long spell, as well as the more obvious victim. However, retributionists feel that it is not unjust to punish the risks of harm in favour of the victim, since the serious offender has the chance to avoid committing a second crime (and its accompanying protective sentence with its attendant risk of injustice), yet the victim has no chance to avoid the injustice of

an assault. The offender should be punished for his crime, and if this punishment, in the form of a protective sentence, is too harsh, then this does not offend retributionist thinking because of the earlier element of choice spurned by the offender - a choice unavailable to the victim.

To conclude, protective measures are a device available to judges to deal with dangerous offenders, not only on the basis that they can protect the public from the harm caused by the dangerous offender, but also because they are the most appropriate way to achieve justice for both victim and offender. The way in which these protective measures should be used by the Courts to deal with different offences, will be discussed in the following sections.

6.4 Life Imprisonment

6.4.1

Before the Criminal Justice Act 1948 came into force there was a formal distinction between imprisonment and penal servitude, and between the various divisions of imprisonment. These differences were abolished by the Act and sentences of imprisonment are now uniform so far as the law is concerned. However, the situation is different as regards the Iraqi Penal Code where divisions still exist between imprisonment with and without hard labour. The differences in treatment of offenders in the United Kingdom are provided for by administrative action such as the arrangements for classifying prisoners for security purposes.

The length of the imprisonment reflects the gravity of the offence and the dangerousness of the offender. After the Criminal Justice Act 1948 and during the 1950's, the serious offender was thus punished by a lengthy term of imprisonment or even by life imprisonment in some cases. Life imprisonment was the most explicit recognition of 'dangerousness' in English sentencing practice, as well as being the maximum penalty for manslaughter and other serious

offences (eg, rape, arson and aggravated burglary) other than homicide which was then open to punishment by death. A distinction can be made between the two types of life sentence, the mandatory life sentence for murder and the discretionary life sentence which is the maximum for some other crimes (Boyle & Allen 1985, p.94).

6.4.2 Mandatory Life Imprisonment

Since the abolition of the death penalty for murder, a convicted murderer must be sentenced to imprisonment for life. When imposing such a sentence the judge may declare the period which he recommends to the Home Secretary as the minimum period which in his view should elapse before the offender is released (Murder (Abolition of Death Penalty) Act 1965, S.1). Such recommendations are made in about one out of every twelve murder cases (approximately 8 per cent) (Twelfth Report of the Criminal Law Revision Committee, para 25). The Court of Appeal have held that no recommendation should be for less than 12 years (R. v. Flemming [1973] 2 All E.R. p.401). Under the Murder (Abolition of Death Penalty) Act 1965 S.1(2), no right of appeal arises against any such recommendation, and any representation, if made, should be made to the Home Secretary (R. v. Aitken [1966] 1 W.L.R. p.1077), also see (R. v. Begley [1983] 77 Cr. App. R. p.68).

6.4.3 Discretionary Life Imprisonment

This is the statutory maximum sentence for a few serious offences such as robbery, wounding with intent contrary to S.18 of the Offences Against the Person Act 1861, rape and manslaughter. It is used for the purpose of protecting the public and as a punitive measure because it involves an indeterminate period. (R. v. Skelding [1973] 58 Cr. App. R. p.313). A Court may agree to the release of an offender after he has been cured of some mental disorder believed to have been responsible for his offence. It may not be at all clear how long the cure will take, and the case may fall within S.37 of the Mental Health Act 1983 which permits a hospital order to be made in such a case. The obvious solution would therefore be a life

imprisonment sentence primarily for the sake of treatment (R. v. Skelding [1973] 58 Cr. App. R. p.313). After the sparing use of the discretionary life imprisonment by the Courts, some relaxation in policy took place during the 1960's. The leading case of Hodgson (1967, 52, Cr. App. R. p.113) shows a noticeable tendency by the Courts to change the way that they used the sentence of life imprisonment. The criteria of this case show the influence of a variety of factors. The judge clearly had the protection of the public in mind when imposing a life sentence, although his language did not suggest the total absence of punitive intent. The accused had been convicted of serious sexual offences, including two rapes and one of buggery in respect of which he received a life sentence. The judge said:

"Having heard the evidence it is difficult to know whether you are to be regarded as a man or a monster. It is quite clear that the public, in particular women and girls, must be protected against you."

The case is of importance because, in affirming the life sentences, the Court of Appeal declared that life is justified when the offence or offences are grave enough to require very long sentences, or if it appears from the nature of his offence or his history that the offender is unstable and likely to commit such offences in the future, and that, if the offences are committed again, the consequences to others may be specially injurious as in the case of sexual offences or crimes of violence (R. v. Hodgson [1967] 52, Cr. App. R. p.113).

The Courts' relaxation of policy in imposing life imprisonment during the 1960's, after confining it almost exclusively to manslaughter convictions during the 1950's, resulted in an increase in the proportion of life sentence for non-homicidal offences from 3% in 1962 to 16% in 1976. In 1979, 157 life sentences were imposed, 47 of which were for non-homicidal offences (Report of the Advisory Council on Imprisonment Sentencing 1978 quoted by Floud & Young 1981, p.70). More up-to-date details on the use of life

imprisonment can be found in the Home Office Prison Statistics for England and Wales, as set out below:

Table II
Life sentence prisoners (including H.M.P.)
(Source: Prison Statistics, England and Wales, Table 1.2)

YEAR	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977
M	551	613	715	818	857	916	995	1105	1190	1268
F	10	13	15	16	14	17	26	32	33	41
TOTAL	561	626	730	834	871	933	1021	1137	1223	1309

YEAR	1978	1979	1980	1981	1982	1983	1984	1985	1986	
M	1343	1314	1436	1532	1605	1681	1757	1884	2020	
F	44	43	43	45	47	52	54	54	60	
TOTAL	1387	1357	1479	1577	1652	1733	1811	1938	2080	

There were two justifications provided by The Court of Appeal (R. v. Cunningham, R. v. Grantham; R. v. Holmes [1955] Crim. L.R. pp. 193, 386 & 578) in the 1950's for imposing life imprisonment instead of a long determinate sentence. Firstly, it could be imposed on offenders suffering from mental disorders where the advantage would be that the Home Office could use its power to release them when it is satisfied, from their medical reports, that their mental disorder has since been cured; on the other hand, if mentally disordered offenders were subject to a determinate sentence they would have to be released upon its expiration, regardless of any change in their mental state and dangerousness. The advantages

of this first approach became less significant after the introduction of parole in 1967, because it made an offender eligible to be considered for parole after one-third of the determinate sentence had been served in excess of twelve months. Secondly, life imprisonment could be justified as a means of protecting the public from those offenders who supposedly present a danger to them (Floud & Young 1981, p.71). The criteria established by the Court of Criminal Appeal in identifying such offenders were both objective [relating to the gravity of the offence, which remained an important criterion for the imposition of the life sentence (R. v. Connor [1960] Crim. L.R. p.275)] and subjective [concerning the offender's mental condition such as his propensity to inflict future harm]. It was not necessary when making a finding of dangerousness that the offender should have been suffering from a mental disorder within the meaning of the Mental Health Act 1959. A life sentence could be imposed on a person suffering from such a psychological or personality disorder not within the meaning of mental disorder if the all important consideration was the protection of the public (R. v. Beever [1971] Crim. L.R. p.492; R. v. McCann [1970] Crim. L.R. p.167).

The Advisory Council's 1978 Report noted how at the end of the 1960's there were two divergent approaches to the use of the life sentence. Firstly, the traditional approach as supported by Lord Denning and Justices Widgery and Mackinnon, which can be seen in the judgement for R. v. Hodgson [1968](Cr. App. Rep. 113). Mackinnon delivered the judgement and laid down the conditions necessary for imposing life imprisonment. Firstly, the offence should be of such serious gravity as to require such a sentence. Secondly, it may become clear from the nature of the offence and the history of the offender that he has an unstable character which may lead him to commit a similar offence in future. Thirdly, if the future crime is likely to be violent or could lead to special injuries and harms (such as sexual offences like rape). The second approach can be seen in the case of R. v. Turemko [1965](Crim. L.R. p.319) which set aside previously imposed sentences of life imprisonment for burglary

and two counts of robbery with violence, on the grounds that such offences were not of sufficient gravity to justify life sentences (R. v. Williams [1974] Crim. L.R. p.376).

The different criteria used by the Courts to impose life sentences have been criticised by the Advisory Council Report (paragraph 234). It disagreed with the concept of the merciful life sentence and believed that imposing determinate sentences was more merciful to the offender, where the Court was undecided about which of the two options to implement. The Council suggested a reconsideration of the Courts' recent sentencing practice with regard to the life sentence and said that its use should be restricted only to very serious offences. It was thought undesirable to broaden the criteria for mental disability of the offender, which should rather be applied only to offenders with "a serious psychological or personality disorder or a dangerous instability of character". The Council preferred the 'case law' approach used by the Courts in the 1950's and 60's, to the direction taken by the Courts on life sentencing in the 1970's.

The criterion used by the Courts to impose life sentences, namely that the offence must be grave enough to justify such a punishment, seemed to change during the 1970's when the Courts imposed life sentences in some cases for offences which would previously have been regarded as insufficiently serious for justifying life imprisonment (R. v. Beagle [1976] 62 Cr. App. Rep. 151). The Courts were then starting to develop another approach for imposing life imprisonment based on there being a high degree of probability that the offender would commit a serious future offence, even though the current crime may not have been serious enough to justify such a sentence. This is illustrated in the case of R. v. Ashdown ([1974] 58, Cr. App. R. p.339). The defendant was convicted of an offence for which the Court admitted that a sentence of no longer than five years imprisonment would be appropriate. He was found guilty of robbery using a toy pistol, and stealing £2. However, the Court imposed a life sentence in view of evidence of

his abnormal sexual drives and the probability that he would commit violent or sexual offences in future.

In the Ashdown case ([1974] 58, Cr. App. R. p.339), the Court established the principle that:

"the seriousness of the instant offence and the risk of repetition were related factors which must be weighed together" (Floud & Young 1981, p.72),

and a balancing exercise between the two is the way to discover the degree of dangerousness which may justify imposing life imprisonment.

The Courts did not, however, clarify when the nature and degree of the probability of the offender committing a future serious offence would constitute such a risk of future harm to the public that a life sentence should be imposed. Sometimes the Courts used the life sentence on the grounds of protecting the public against the risk of the offender repeating a grave future offence, but they did not clarify the degree of risk (Floud & Young 1981, p.73), whereas on other occasions, such as in R. v. Kelly ([1980] Crim. L.R. p.197), they took a sceptical view about the degree of protection to which the public are entitled.

The Courts did not give a clear cut criterion for mental instability, or the evidence required for it, except in one case in 1977 when the Court mentioned that alcoholism alone did not establish mental instability (R. v. Johannsen [1977] 65 Cr. App. Rep. p.101). In another case, R. v. Chaplin [1976](Crim. L.R. p.320), the Court of Appeal considered that the offender's emotional immaturity was sufficient evidence of his dangerousness to justify imposing a life sentence. Despite these few instances of guidance on the subject, the legal concept of mental instability remains inelegant and imprecise.

In the early 1980's, the Courts showed a distinct dislike for the life sentence, preferring to set it aside where the alternative of a determinate sentence was available. In two cases (R. v. Kelly [1980] Crim. L.R. p.27, and R. v. Hercules [1980] Crim. L.R. p.27) the Courts rejected the option of life imprisonment and substituted it with eight years imprisonment for Kelly and seven years for Hercules. The following principles can be extracted from these two cases:

a) The current offence must be a grave offence.

b) If there is a substantial risk of a future grave harm, life imprisonment could be used, even if the current offence is not of the gravest kind.

c) The life sentence may be appropriate where the offender is suffering from a mental disorder or is of an unstable character which may result in him causing future grave harm.

In conclusion, recognition of the usefulness of life imprisonment as a protective measure for dealing with dangerous offenders has not achieved a consensus of opinion in its favour. In addition, the criteria used by the Courts in practice for imposing a life sentence still lacks accuracy, clarity, and a convincing explanation as to why it is the appropriate legal cure for the dangerous offender or patient.

The use of an indeterminate life sentence as opposed to a lengthy determinate sentence can be criticised on two further grounds; firstly, if the offender has no release date to look forward to, then the meaning of his life in prison may be perceived as denuded of all value, leading to feelings of worthlessness and depression. The offender's existence may seem pointless and there will be no disincentive for misbehaviour and the commission of further offences whilst in prison. However, if the sentence is determinate, albeit lengthy, there will always be something for the offender to aim at, as well as an incentive to behave whilst in

prison. Secondly, determinate sentences are preferable on humane grounds. Since many life sentences in England are not literally for the duration of the offender's life, and they are eventually released at the discretion of the Home Office, it would be desirable to let the offender know at the outset how long he is going to be imprisoned for. It is inhumane to tell the offender he will be imprisoned for life if in practice he may be released after a certain time, when approved by the Home Office. In this respect the Iraqi legislature's approach is more laudable than the English, for in the Iraqi Penal Code life imprisonment is fixed at the term of twenty years.

6.5 Determinate Sentences

The criminal law establishes maximum and minimum levels of punishment that may be imposed by judges. This range could be called the range of determinate sentences.

The general principle of sentencing is supposed to be that the Court should not impose a sentence longer than the normal sentence on account of a prediction of dangerousness. The Floud Committee report mentioned that there is considerable evidence of a covert protective element in sentencing for:

"it is clear that determinate sentences are being passed in greater length than they would otherwise have been because of an estimated likelihood that the offender will commit or repeat a serious offence". (1981, p.86).

The protective element is not always covert, because the Court may often declare its intention of protecting the public. In R. v. Green [1981], the Court of Appeal explicitly approved a long determinate sentence for protective reasons. It mentioned that in sentencing a judge has many factors that he should take into consideration. However the facts of this case presented evidence before the judge upon which he could clearly take the view that there was a very real risk of the offender committing an offence

again upon his release. It was therefore right and "indeed, one might say that it was the duty of the sentencing judge - to regard the protection of the public as a matter of paramount importance". The trial judge had imposed a sentence of 18 years' imprisonment on a man of 40 for unlawful sexual intercourse with a girl of 10. He had approached the girl while she was playing with other children, persuaded them to help search for a lost dog, and separated the girl from the others by telling them to search in another place. He had sexual intercourse with the girl, leaving her in a hysterical condition. The offender had previously been convicted of attempted buggery, theft, and indecent assaults on girls aged 8 and 5 years, as well as other offences such as handling stolen goods, burglary and robbery. Therefore, on the evidence before the Court of Appeal, it was agreed entirely that the trial judge had been right to consider the protection of the public as a matter of paramount importance, and the Court saw nothing wrong with the long sentence of 18 years' imprisonment passed on the offender. The judge exercised his discretion to decide against a sentence of life imprisonment, but chose to keep the offender out of the public's way for a long time by passing a very long determinate sentence (1981 3 Cr. App. R. (s) pp.144-146).

The second case (which has unusual features), illustrating how the Court of Appeal has approved a long determinate sentence for protective reasons, is R. v. McAuliffe. The 28 year old defendant was sentenced for 10 years' imprisonment for burglary with intent to rape. The special consideration of this case was that the indictment charged the offender with aggravated burglary because he had been armed with a penknife at the time of the burglary; however, a plea of simple burglary had been accepted. The medical evidence indicated that the offender was a grave menace to society if allowed to remain at liberty. The case cried out for a life sentence which would have been available on a conviction of aggravated burglary. The Court of Appeal could not find grounds for interfering with the sentence because the evidence pointed to the direction that the offender was unsafe to be let loose, as his history demonstrated (Crim. L.R. 1982, p.316). It seems that this case, together with

such cases as R. v. Gowus [1982] Crim. L.R. p.187, R. v. Gordon [1982] Crim. L.R. p.240 and R. v. Chadbund [1983] Crim. L.R. p.48, mark the end of the principle that a determinate sentence should be proportionate to the gravity of the offence, and that considerations of dangerousness do not justify a disproportionate sentence except in the form of a sentence of life imprisonment. Furthermore, the case shows a technical breach of the principle that determinate sentences should not be lengthened on protective grounds.

The policy in the older cases was that a sentence of imprisonment should be limited by reference to the gravity of the offence, unless it was imposed in the special form of a life sentence or an extended sentence, in which case the gravity of the offence became a subordinate consideration (Thomas, D.A. 1970 p.305). This had two advantages; first, it restricted the use of disproportionate sentences to those offenders for whom an argument in favour of a preventive sentence could be made and, secondly, it enabled the Court to impose a sentence which would be more effective as a preventive measure authorising a period of custody.

An up-to-date review of cases, in which the Courts considered dangerousness as a factor which should enter into the calculation of the determinate sentence, would include R. v. Gooden [1979] 1 Cr. App. R. (s) p.351, R. v. Barnes [1983] 5 Cr. App. R. p.369, R. v. Stabler [1984] 6 Cr. App. R. (s) p.129, R. v. Billam [1986] 8 Cr. App. R. (s) p.48, R. v. Malcolm [1988] Crim. L.R. p.189, and R. v. Middleton [1988] Crim. L.R. p.327.

These recent decisions indicate that the Court is now more ready to recognise dangerousness in the context of determinate sentences than it has been in the past. However, uncertainties continue to surround the use of determinate sentences of imprisonment as preventive sentences in cases where the offence is one for which life imprisonment is not available, or in which the offender does not satisfy the criteria for a life sentence.

R. v. Jackson [1987] 9 Cr. App. R. (s) p.294, is such a case. The trial judge appears to have passed the sentence on this basis, rather than on the basis of culpability. The offender committed a number of indecent acts with girls aged between 11 and 13; his previous convictions included numerous offences of dishonesty between 1971 and 1978, offences of indecent exposure in 1983 and gross indecency with children in 1985. Therefore the trial judge sentenced him to a total of 10 years' imprisonment, but the Criminal Appeal Court reduced the sentence to a total of 4 years. Something similar to this approach can be found in cases such as Gordon [1981] 3 Cr. App. R. (s) p.352, where the offender was suffering from an untreatable personality disorder, yet for whom no place could be found in a special hospital, although he represented a potential danger to the public. In the more recent case of R. v. Moore [1986] 8 Cr. App. R. (s) p.376, a woman suffering from a personality disorder set fire to furniture in her flat in a nine storey block. In both the above cases the Court tried to produce a balance between protecting the public on the one hand, and achieving justice for the offender on the other by making the sentence fair in relation to the gravity of the offence. However, the balance seems to have shifted more towards the gravity of the offence. For example, in the case of R. v. Houghton [1986] 8 Cr. App. R. (s) p.80, the defendant was sentenced to 4½ years for committing indecent assaults on young boys (he had several previous convictions for similar offences). The Court of Appeal held that:

"in assessing sentence for offences of this nature it is proper for the Court to bear in mind the need to protect the public. But the Court also recognises the importance, where the statutory procedure has not been used for imposing an extended sentence, of sentencing the defendant in respect of the offence for which he is before the Court." ([1986] 8 Cr. App. R. (s) p.84).

In the case of R. v. Hewson [1986] 8 Cr. App. R. (s) pp.338-341) the offender was sentenced to 9 years' imprisonment upheld for an indecent assault on a boy of 8. The Court appears to justify imposing this heavy sentence by adopting the view that the sentence

was justified by the gravity of the offence. The Court emphasised that the offence:

"is one of the nastiest and most horrible types of assault that a grown man could make on a young child, albeit that it took only a short time. Therefore the sentence must be a long one." ([1986] 8 Cr. App. R. (s) p.341).

It seems that the protection of the public was dealt with as a factor to be weighed against the mitigating factor which was the youth of the offender. In conclusion, it seems the trend of recent decisions on the use of preventive sentences in indecent assault cases seems to be that the preventive principle is subordinate to the principle of proportionality. The protection of the public is a secondary factor which may justify the Court's ignoring of mitigating factors, but not in imposing a sentence which is disproportionate to the offence itself (R. v. Sullivan [1988] Crim. L.R. p.188, see also R. v. Middleton [1988] Crim. L.R. p.327).

One can conclude that it seems the Courts did not discover any clear-cut criteria for dangerous offenders, which makes the protection of the public from future harm reason enough for imposing a protective sentence.

"There are many who assume that this justification is made out for sentences of life imprisonment in England, but there is little evidence as to whether the courts generally capture the 'dangerous' and not the 'non-dangerous' offenders." (Ashworth 1983, p.235).

However, in spite of the Court of Appeal's rejection of the imposition of prolonged sentences of imprisonment designed to protect the public, it has simultaneously sentenced some offenders out of proportion to their offence (R. v. Slater [1979] 1 Cr. App. R. (s) p.349), and upheld prison sentences which were disproportionately long because of the offender's dangerousness for others (R. v. Gowus [1981] 3 Cr. App. R. (s) p.144); (R. v. Gordon [1981] 3 Cr. App. R. (s) p.352); (Bapty [1984] Crim. L.R. p.116).

It seems right to infer from the commentary on the Bapty case that the decision of the Court of Appeal seems to imply that there are two levels of dangerousness: the high level which justifies a sentence of life imprisonment and a somewhat lower and undefined level which justifies a disproportionate determinate sentence (Walker 1985, p.361).

6.6 Extended Sentence

The 'Extended Sentence' is a measure of public protection which allows the judge to deal in some special way with the persistent offender. It is the third and last of the legislative attempts to provide preventive measures for dealing with the persistent offender. The detailed history of attempts at producing preventive detention was covered in Chapter 2 - what was thought to be needed was something that would make it possible to deal with the dangerous offender outside the tariff by adjusting the length of a prison sentence disproportionately on account of the offender's previous convictions and sentences (Thomas 1970, p.281). The first attempt was provided by the Prevention of Crime Act 1908 which was replaced by the Criminal Justice Act 1948. The main feature of both these was that, although the sentence had a distinct name - preventive detention - there was no clear distinction between different types of offenders such as persistent offenders and dangerous offenders. The first clear distinction, between the dangerous offender and other types of offenders, was made by the Report on Preventive Detention by the Advisory Council on the Treatment of Offenders in 1963 (Floud & Young 1981, p.80):

"It must, we think, be recognised that the community ought to be protected, by some means or other within the penal system, both from the dangerous criminals, who are fortunately comparatively rare, and from the more numerous offenders who practise thefts or frauds on victims who may be severely afflicted by the loss of a small sum or seriously distressed by what may rank as very minor housebreakings." (Advisory Council on the Treatment of Offenders, HMSO 1963, p.8).

However, these recommendations of the Advisory Council on the Treatment of Offenders (HMSO, 1963) have not immediately been accepted by interested bodies. The White Paper of 1965, The Adult Offender, suggested something very similar to those recommendations in recommending a new form of sentencing for the persistent offender:

"whose character and record of offences are such as to put it beyond all doubt that they are a real menace to society, and to exclude the petty criminal who commit a series of lesser offences." (HMSO Cmnd. 2852, 1965 p.5).

This resulted in the extended sentence as a new form of sentencing to deal with the 'menace' by providing for a long period of preventive custody (Thomas 1979 p.312) or for the sake of the special licence provisions (C.J.A. 1967, s.60).

The new form of sentence is contained in sections 37 and 38 of the Criminal Justice Act 1967 which are now to be found in the consolidating Powers of Criminal Courts Act 1973, ss. 28 and 29. These sections provide that the Court may impose an extended sentence where an offender is convicted of an offence punishable with imprisonment for a term of two years or more, and the specified conditions relating to previous convictions are satisfied. The Court, if satisfied by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time, may impose an extended term of imprisonment.

The object of an extended sentence and the protection of the public is to be found not merely in the length of the sentence imposed but also in the licensing provisions contained in s. 59 and the subsequent sections of the Criminal Justice Act 1967 (R. v. Gody [1970] 2 All E.R. p.386).

The specified conditions are: 1 - that the offence was committed before the expiration of three years from a previous conviction for an offence punishable on indictment with imprisonment for a term of two years or more, or from his final release[1] from prison after serving a sentence of imprisonment, corrective training or preventive detention[2] passed on such a conviction[3]. 2 - that the offender has been convicted on indictment on at least three previous occasions since he attained the age of 21, of offences punishable on indictment with imprisonment for a term of two years or more (P.C.C.A. 1973 s.28 (3)(b)). 3 - that the total length of the sentence of imprisonment, corrective training or preventive detention to which he was sentenced on those occasions was not less than five years and (a) on at least one of these occasions a sentence of preventive detention was passed on him (P.C.C.A. 1973 s.28 (c)(i)), or (b) on at least two of those occasions a sentence of imprisonment or of corrective training was so passed and of those sentences one was a sentence of imprisonment for a term of three years or more in respect of one offence, or two were sentences of imprisonment each for a term of two years or more in respect of offences (P.C.C.A. 1973 s.28 (3)(c)(ii)). In determining whether the specified conditions are satisfied, no account must, however, be taken of any previous conviction or sentence unless notice that it is intended to prove the conviction or sentence to the Court has been given to the offender at least three days[4] before the later sentence is passed on him (P.C.C.A. 1973 s.29 (3)).

The extended term which may be imposed for any offence may exceed the maximum term for the offence if this is less than ten years, but must not exceed ten years if the maximum is less than ten years or exceeds five years if the maximum is less than five years.

An extended term of imprisonment may be imposed although it does not exceed the maximum term for the offence: Director of Public Prosecutions v. Ottewell [1970] Ac. p.642, see also R. v. Duncuft [1969] 53 Cr. App. R. p.495.

Criteria

Many criteria have emerged from the use of extended sentences by Courts in cases such as R. v. Cain [1983] 5 Cr. App. R. (s) p.272, R. v. Bourton [1984] 6 Cr. App. R. (s) p.361.

1 - Imposing an extended sentence may be either to justify a longer term of imprisonment for protecting the public than would otherwise be appropriate, or to subject the offender to a longer period of supervision. So it has been used cumulatively as a custodial and non-custodial protective sentence (Floud & Young 1981, p.81). In other words, an extended sentence has two functions - "a dual purpose" (Current Sentencing Practice G1.4(a)). It is intended to protect the public in two ways, one by keeping the offender in custody for a longer period than would be required; the other by providing that the offender will stay longer under supervision and threat of recall.

2 - The Court of Appeal has cancelled many extended sentences because the offender has recently been found to have made a significant effort to conform to the law (R. v. Cohen [1979] 1 Cr. App. R. (s) p.28, R. v. Parker [1985] 7 Cr. App. R. (s) p.242, R. v. Kenway and Cunningham [1985] 7 Cr. App. R. (s) p.457). In such a case an extended sentence should not be imposed for a term longer than would be appropriate in the form of an ordinary sentence of imprisonment.

4 - The Court of Appeal attempted to find a proportion between the term of the previous highest sentence and the term of an extended sentence. So that in the case of R. v. Melville, 4 May 1971, Current Sentencing Practice G1.4(e), the period of ten years' imprisonment, extended, had been reduced to six years' imprisonment, extended, on the ground that:

"an extended sentence of imprisonment of substantial length will not normally be appropriate unless the offender has previously served a substantial term of ordinary imprisonment." (Current Sentencing Practice G1.4(e)).

These criteria, however, do not it seems reflect the intention of the Bill (The Adult Offender 1965, p.5) to confine the extended sentence to the "real menaces" by excluding the "petty criminal". So the judicial practice as well as the legislation failed to lay down any criteria to define the sort of harm which constitutes a "real menace". Instead of providing a list of sorts of offences, it provided that eligibility must be dependent, as before, upon previous convictions.

Use of Extended Sentence

The extent to which the Courts have made use of the extended sentence since 1967 is shown in Fig. 1. It has shown an increasing trend since 1967 to a peak of 129 in 1970. Thereafter a steady decline continued until 1976, the last year for which there were figures (Floud & Young 1981, p.82) where only 14 extended sentences had been imposed. The Courts did not use extended sentences zealously. In the first complete calendar year after the Criminal Justice Act of 1967 came into force, only 27 sentences were imposed, while protective detention was used by the Courts not more than 20 times in the last year before the Criminal Justice Act of 1967 came into force. (Report of Advisory Council on the Penal System (HMSO) 1978, p.52). The extended sentence "has been increasingly rarely used by the Courts and no longer appears in the official statistics" (Harding & Koffman 1988, p.143).

The wariness of the Courts in using the extended sentence was, to some extent, due to the procedural difficulties. In addition to the defendant, the Court should be served a notice of the intention for a protective sentence (a duty which was usually done by the police). It is important to give the Court a prison governor's certificate dealing with the date of the defendant's release from his last custodial sentence. At the beginning the police served notices on all defendants who appeared eligible for extended sentences. Thereafter the inconsiderable use of the new sort of sentence made the Home Office in August 1970 (Home Office Circular 189/1970) issue a circular saying that the use of the new sentence

had been so slight that the service of notices in every case was involving the police in a good deal of negatory work. As an experimental procedure, notices were served only when the Court had indicated an intention to pass an extended sentence, and this was applied to all Courts in March 1972 (Home Office Circular 43/1972).

However, the procedural difficulties account for only a small part of the decline of the Court's use of the extended sentence. The most important reason could be attributed to a hardening of the Court's attitude against long sentences for offences not at the highest degree of gravity (Report of the Advisory Council on the Penal System 1978 p.52).

The extended sentence also gave rise to some legal problems created by cases in which the offender had been convicted of more than one offence. It was held in the case of McKenna ([1973] 58 Cr. App. R. p.237) that, although concurrent and consecutive sentences passed in respect of a multiplicity of offences upon the same offender count as one for the purposes of remission and parole (C.J.A. 1967 s.104(2)), the sentence in respect of which an extended sentence certificate is signed must relate to one offence. Two extended sentences in respect of different offences are permissible, but what is not permissible is an extended aggregate sentence of, say, eight years, made up of two consecutive sentences of four years for two separate offences, two consecutive sentences of four years for two further offences running concurrently with those for the first two offences, and a concurrent sentence of four years for a further offence.

Other problems relating to extended sentences are mainly ethical, such as the question of, to what extent is proper to punish a man more heavily for the sake of the protection of the public than he would be punished if he was not a persistent offender?

The second ethical question is on the period of extension. What principles are to guide the judge in determining the length of the extension? Neither the law nor the authorities provide an

answer. Although seriousness of the type of crime to which the offender is prone, his previous reactions to supervision or prison, and age, are relevant considerations, it is difficult to formulate useful guiding principles (Cross 1975, p.49).

It seems that all the above problems have led increasingly to discourage the Courts from using the extended sentence to prolong the period of detention. Moreover, the statutory criteria have been so complex that they have excluded the offenders where serious harm was involved. As such, the Courts, with their selective power, have been quite content to impose ordinary sentences. The use of the extended sentence seems to be petering out during the last few years and it no longer appears in the official statistics (Harding & Koffman 1988, p.143). The Advisory Council on the Penal System in 1978 accordingly recommended its abolition without specific replacement:

"In our view, the extended sentence is demonstrably inappropriate to the problem it was intended to solve and unwanted by the Courts which have been empowered to use it. It should be abolished."

Figure 1
Number of Offenders Sentenced to Extended Sentences

Year	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
Persons	7	27	74	129	97	79	32	28	33	14

6.7 Hospital Orders

Consistent with previous measures as protective devices to deal with the dangerous offender, a hospital order can be made for any offence, apart from one with a fixed penalty (in practice, murder). The purpose of a hospital order is to enable the mentally disordered offender to be admitted to and compulsorily detained in hospital for as long as is necessary for the public's as well as his own

interest. Section 37 of the Mental Health Act 1983 empowers the Court to impose a hospital order upon the mentally disordered offender. The order is available following conviction for any imprisonable offence in the Crown Court and Magistrates' Court, other than an offence for which the sentence is fixed by law. The conditions which must be fulfilled before making a hospital order are:

1. The Court must consider the written or oral evidence of two registered medical practitioners and be satisfied that the offender is suffering from one of the following forms of mental disorder: mental illness, psychopathic disorder, severe mental impairment, or mental impairment (Mental Health Act 1983, s.37(2)(a)).

2. One of the two doctors must be approved by the health authority, and both must agree on the form of mental disorder which the person is said to be suffering from (Mental Health Act 1983, s.37(2)(a)).

3. The Court must be satisfied that the mental disorder is of a nature or degree which makes it appropriate for the person to be detained in a hospital for medical treatment; where the form of mental disorder evidenced is a psychopathic disorder or mental impairment, the Court must also be satisfied that any such treatment is likely to alleviate or prevent a deterioration of the patient's condition (Mental Health Act 1983, s.37(2)(i)).

4. The Court must be of the opinion, having regard to all circumstances connected with the offence and the offender and having considered other methods of dealing with the case, that a hospital order is the most suitable method (Mental Health Act 1983, s.37(2)(b)).

5. The Court has further to be satisfied on the written or oral evidence of the registered medical practitioner who would be in

charge of treatment in the hospital, or someone representing the managers of the hospital, that a bed is available in the hospital for him within 28 days from the making of the order (s.37(4)). The lack of available hospital accommodation and the unwillingness of hospital managements sometimes frustrate the Courts (R. v. Harding (Bernard), The Times, 15 June 1983). The health authorities are not obliged under the Act to supply beds but must, on request from a Court contemplating a hospital order, provide information as to the availability of beds in its region for the admission of the person under a hospital order (s.39(1)). It should be noticed that (3) above (s.37(2)(i)(a)) introduces a "treatability" test, which should ensure that dangerous offenders would normally be sent to prison and not to hospitals which are not secure and where little can be done for them. It will also reduce the risk of offenders who are not severely mentally handicapped being made the subject of hospital orders (Hoggett 1984, p.168).

The effect of a hospital order is the same, for most purposes, as a compulsory civil commitment under Part II of the Act, except that the nearest relative cannot discharge the patient and the hospital order patient cannot apply to a Mental Health Review Tribunal within the first six months of detention (M.H.A., Sched. 1 paras 2, 9).

6.8. Restriction Orders

More closely allied to protective measures and as protective devices than hospital orders are restriction orders. If the Crown Court regards a mentally disordered offender as dangerous, and thinks it necessary to protect the public from 'serious harm' (having regard to the nature of the offence, the record of the offender and the risk of his committing further offences if set at large prematurely), it can add a restriction order to the hospital order (M.H.A. 1983, s.41(1)). The effect of this is that the offender-patient cannot be discharged, given leave of absence or transferred from one hospital to another without special authority.

An order under section 41(1) of the Mental Health Act 1983 will subject the patient to special restrictions as compared with other patients for a period specified in the order or for a period without a time limit. This order is known as a restriction order.

A restriction order may not be made unless the registered medical practitioner, whose evidence was taken into account by the Court when making the hospital order, has given evidence orally before the Court (M.H.A., s.41(2)). A restriction order ought to be coupled with a hospital order where any issue relating to the public arises, such as the case of R. v. Higginbotham ([1961] 1 W.L.R. p.1277) where the offender walked out of hospital and committed a further offence; see also R. v. Gardiner ([1967] 1 W.L.R. p.464). Further, unless the medical advice is that the patient will recover from the disorder within a definite period, restriction orders should be unlimited in point of time (R. v. Gardiner [1967] 1 W.L.R. p.469,G). In the case of R. v. Haynes ([1981] 3 Cr. App. R. (s) p.330), the Court of Appeal stated that it was wrong to determine the length of a restriction order by reference to the term of imprisonment which would have been otherwise appropriate for the offence. It is finally for the Court and not the medical specialists to decide if a restriction order is required, and the Court is not bound to accept medical evidence for or against restricting a discharge where a hospital order is made (R. v. Rayse [1981] 3 Cr. App. R. (s) 58). A defendant should be represented if the Court is considering a restriction order (Blackwood [1974] 59 Cr. App. R. 170).

A restriction order can only be made in the Crown Court (s.41(1)). However, if magistrates have convicted an offender aged 14 or more, and have the evidence required for a hospital order, they may commit him to the Crown Court with a view to a restriction order being made (s.43(1)). If the Crown Court disagrees with the magistrates, it may only impose an order or penalty which they could have imposed, unless the magistrates have also committed the offender with a view to a greater penalty than they can give. The Crown Court can remand the accused to a hospital for reports or

treatment, or make an interim order, as if it had itself convicted the offender (s.43(2), (4) and (3)).

6.8.1 Effect of a Restriction Order

Restrictions may be imposed for a definite period or without a time limit (s.41(1)). The purpose of the restriction order is to ensure that the patient is not discharged until he is ready. As there is no means of knowing when this will be, the Court of Appeal recommended, in the case of R. v. Gardiner ([1967] 1 W.L.R. p.464) that unlimited orders should be made unless the doctors could confidently predict a recovery within a limited period. Although the Butler Committee, in their 1975 report, considered that the power to prescribe a time limit was illogical and should be abolished, the Courts continued to use the Gardiner approach (R. v. Haynes [1982] Crim. L.R. p.245).

The Home Secretary can lift the restrictions at any time, if he is satisfied that they are no longer necessary to protect the public from serious harm (s.42(1)). If the patient is still in hospital when the restrictions end, either because the Court specified a limited duration, or the Home Secretary has lifted them, he is treated as if he had been admitted under an ordinary hospital order on the day the restriction order ended (ss. 41(5) and 42(1)), but he will be able to apply to a tribunal during the first six months. If the patient has been conditionally discharged from hospital before the restrictions end, he will achieve an automatic absolute discharge on that date (M.H.A., s.42(5)).

While the restrictions last, they are still severe. The patient cannot be discharged, transferred to another hospital, or even given leave of absence, without the Home Secretary's consent (M.H.A., s.41(3)(c)). During the period of a restriction order, the patient has the right to make an application to a Mental Health Review Tribunal in the second six month period of the hospital order, and thereafter at yearly intervals (M.H.A., s.70). Moreover, the Act imposes a duty on the responsible medical officer in the

hospital to examine and report directly to the Home Secretary at least once a year about every patient who is subject to a restriction order (M.H.A., s.41(6)). The Home Secretary has an independent power to discharge the patient, which is more commonly used because the discharge may be absolute or conditional (M.H.A., s.42(2)). A conditionally discharged patient is subject to compulsory after-care and may be recalled to hospital at any time (M.H.A., s.42(3)).

Sometimes a restricted patient might be detained for much longer than was justified by his mental condition, such as the case of Kynaston v. Secretary of State for Home Affairs [1981] 73 Cr. App. R. 281, in which it took two years, following the RMO's report that the patient was no longer disordered, for the Home Secretary and his advisers to agree that it was safe to discharge him. According to the Gostin (1977) argument, the restriction order was not a therapeutic disposal, but a penalty equivalent to a sentence of life imprisonment. It should therefore be governed, if not by the usual principle of proportionality, then at least by the maximum term of imprisonment applicable to the offence. This suggestion was directly contrary to the approach of the Butler Committee. This Committee was more troubled by the fact that dangerous offenders had to be released from prison at the end of their sentences and recommended the extension of the principle of indeterminate detention for them.

One can conclude that the law relating to the mentally disordered offender is trying to cure those who can be cured and to protect society from those who cannot be cured. While the defendant has the same rights as everyone else, he also has the same responsibilities. Individuals who shirk their responsibilities towards society are normally punished, but their punishment must be in proportion to the offence. Punishments should fit crimes, whether trivial or serious.

Society may have a right to protect itself against dangerous offenders, whether or not they are responsible, but even if there is nothing the medical profession can do for those not responsible, their detention should only be confined to a very special and extreme case, so as to prevent any abuse of this power.

The event of danger should be sufficient to justify the level of intervention (Floud & Young 1981). There should be an accurate criterion to distinguish those who are dangerous from those who are not. Mental disorder as such is not the criterion. There are plenty of sane people who are dangerous and plenty of insane people who are not.

Footnotes

(1) Final release includes a release on licence under the Criminal Justice Act 1967, ss. 60 or 61 but does not include any temporary discharge: Powers of Criminal Courts Act 1973, s.29(5).

(2) A sentence of corrective training or preventive detention imposed under the Criminal Justice Act 1948, s.21(I),(2).

(3) Powers of Criminal Courts Act 1973, s.28(3)(a). A certificate purporting to be signed by a prison governor to the effect that a prisoner was finally released, or had not been finally released, from that prison on a date specified, is evidence of the matter so certified: Powers of Criminal Courts Act 1973, s.29(I).

(4) "At least three days" means three clear days must elapse (R. v. Lang [1960] I.Q.B. p.681.

(5) The offender should be asked whether he has been served with the notice and whether he admits the previous convictions or sentences (R. v. Concannon [1970] 3 All E.R. p.198). A certificate purporting to be signed by a constable or a prison officer that a copy of a notice annexed to the certificate was given to an offender is evidence that it was so given and of the contents of the notice: P.C.C.A. 1973, s.29(4).

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CHAPTER SEVEN

7.0 RELEASE BEFORE THE TERMINATION OF SENTENCE (PAROLE)

7.1 Introduction

Parole occupies a useful position in modern penal policy as a legal instrument which participates in accomplishing the best form of individualisation of punishment; consequently, it helps to achieve an object of punishment in reforming the criminal (Jenaih, 1981, p.344). Parole is the final stage in the long process which society has developed for dealing with the offender. This chapter will discuss parole in terms of dangerousness highlighting the relationship between parole in general, and the dangerous offender in particular. The discussion will take account of how parole is managed by both the English and Iraqi systems.

7.2 The History of Parole in England and Wales

In the post-war years ideas about the possibilities of rehabilitating offenders had been gaining ground. Treatment became a prime motive of prisons, the Courts and the probation service, and this was coupled with the need to help offenders to settle down in the community after their release from the penal institutions. The claims for release on parole cohered easily into this framework: prisoners could be released early if this would assist in their rehabilitation, and the probation service could be involved in the process in both a supervisory and a caring role (Pauline Morris, 1960, p.31). The main ideas and thoughts on which parole has been established were set out in a 1965 White Paper 'The Adult Offender' (Cmnd 2852) in the following terms:

"Prisoners who do not of necessity have to be detained for the protection of the public are in some cases more likely to be made into decent citizens if, before completing the whole of their sentence, they are released under supervision with a liability to recall if they do not behave." (Home Office, 1965, Cmnd 2852).

The quotation from the 1965 White Paper referred specifically to long-term prisoners:

"The intention is that a prisoner should be released on licence, after consideration ..... If, after consideration of those matters, it appears that he has co-operated in the training provided and made satisfactory response, that he has reached a point in his sentence at which further training is unlikely to improve his prospects of leading a good and useful life on release, that there appears to be no significant risk of his committing a further serious offence, that arrangements are available or can be made for accommodation and occupation outside prison, ... then he may be released on licence. These are the principles on which the scheme will be operated." (H.C. Debates, Vol 738, 12 December 1966, Col 205).

Later, the concept of the 'peak of treatment' disappeared in practice. Indeed the Parole Board's Report for 1977 (para 6) advanced almost the opposite doctrine that early release may be desirable because the reformative and rehabilitative functions of imprisonment "are frequently limited" and "can therefore become expensive and wasteful of human resources".

7.3 The History of Conditional Release in Iraq

The parole system in the United Kingdom is similar to the conditional release regulations in Iraq. There are inevitably some differences between the two, which will be discussed later on in this chapter.

Unlike the United Kingdom, only two Codes control the Iraqi criminal legal system; the Penal Code and the Criminal Procedure Code. Therefore it is impossible to discuss any part of it or any new concept in it without discussing the development of the Codes themselves.

As shown in Chapter 1, Islamic law remained in operation until 1858 when the Turkish occupied authorities put in force the Ottoman Penal Code (Jenaih, 1981, p.39) which was a compromise between Islamic simplicity and the Code Napoleon of 1810. This then was the first contact Iraqi Criminal Law ever made with western penal policy. Further western influence came with the English occupation of Iraq, the effects of which lasted until 1969 (see Chapter 1.3 for further details).

After the Revolution of the 14th of July 1958, which brought down the monarchy and established the republican system, a new movement started to change most of the Iraqi laws, particularly the criminal laws. So for the first time in the history of Iraq a special new Act for juveniles was legislated. The new Juvenile Act No 11 of 1962 established new reformatory regulations (the first of their type to be used in Iraq) such as conditional release and probation regulations.

The main turning point in the modern political history of Iraq happened after the 1968 Revolution, which led to many important legal changes such as the following:

a) Replacing the Baghdad Penal Code with the Iraq Penal Code No 111 of 1969. This Code, which is still in operation, provides for the conditional release of juveniles only (Iraq Penal Code Sec 77).

b) Replacing the Baghdad Procedure Code by the Criminal Procedure Code No 23 of 1971, which provides for the conditional release of offenders (with a few exceptions listed in Sec 331(D)).

c) Replacing the Juvenile Act No 11 of 1962 with the Juvenile Act No 64 of 1972.

d) On the 6th of March 1977, Law No (35) of 1977 was enacted with the intention of reforming the whole Iraqi legal system. This Act focused on various targets and meanings of legal reform.

It also defined the foundations of criminal policy by stating the starting points on which the criminal policy is based, and listed the general targets which it intended to realise. The Legal System Reform Act No 35 of 1977 (hereafter LLSR 1977) stressed the importance of conditional release in the following points when discussing the basis of the Criminal Procedure Code:

i) The application of the conditional discharge principle in cases where the sentenced offender behaved satisfactorily in custody, the rate of discharge periods being made to vary from one crime to another.

ii) The simplification of procedures of conditional discharge, and to consider the decision issued by the Court as final.

iii) The permissibility of delivering the conditionally discharged by a Court decision to a social organisation or a group of citizens under the supervision of the People's Council, to observe his conduct during the remaining part of the punishment and to undertake an educational act so as to assist him in reforming himself.

iv) The obtaining of devices necessary for following up the conditional discharge and to ensure a parolee's success by helping him after his to encourage his return to normal life and productive work (LLRS, 1977, pp.34-35).

It seems that what the Iraqi legislature has done, in making conditional release regulations become part of the criminal legal system, is right. A period of imprisonment should be followed by a period during which the offender can be guided, assisted and supervised in his efforts to lead an ordinary life; and parole is therefore an absolutely essential part of a good correctional system. Parole may also help to bridge the gap between the closely ordered life within the prison walls and the freedom of normal community living (US Department of Justice, 1939, p.4).

7.4 Definition of Parole

One useful way of studying parole in the two different legal systems, in England and Iraq, is by discussing each detail of these separate systems at the same time. Therefore it is important, before discussing the definition of parole, to equate parole in the English legal system with the conditional release regulations in the Iraqi legal system, as what is called parole in England, the United States and Canada has the same effect as conditional release or conditional liberation in Iraq, France and all the Arabic countries (Sutherland & Cressy, 1960, p.571: Herbert Brownell, 1960, p.38).

There are no real differences between parole and conditional release; even those few that may be found in practice are not important because they often result from the differing financial abilities of states. The respective wealth or poverty of a state will inevitably affect the practice of its penal policies.

Parole, as it is understood in the United Kingdom, is a procedure whereby a sentence imposed by a Court of Justice may be varied by administrative action, while in Iraq the same procedure cannot be changed or varied without a legal action (Criminal Procedure Code, 1971, Sec 331(C)). In both the UK and Iraq, carefully selected inmates may be let out of prison in advance of their expected date of release, on condition that they agree to accept supervision by a probation officer in the UK, or the Attorney General in Iraq. Parolees must also understand that they are still under sentence and liable to be recalled to prison if they misbehave. The system of parole in England was set up by the Criminal Justice Act of 1967; in Iraq it was set up by the Criminal Procedure Act No 23 of 1971. The first parole releases took place on the 1st of April 1968.

7.4.1 The Definition of Parole in the UK

In order to prevent confusion between parole and other similar regulations such as remission or probation, parole should be defined

clearly to show its main elements and aims. One good definition of parole is the one included by the Parole Board in their report for 1968, para 5:

"Parole is the discharge of prisoners from custody in advance of their expected date of release, provided they agree to abide by certain conditions, so that they may serve some portion of their sentences under supervision in the community, but subject to recall for misconduct." (Parole Board 1968, para 5).

Anyone serving a fixed term sentence of eighteen months or more is entitled to be considered for release on licence which could run from the date when he has served a third of his sentence or a year, whichever is the longer. The licence will normally last until the date when the prisoner would have been entitled to release without licence or remission, i.e. at the expiration of two-thirds of his sentence; but in the case of prisoners who were under twenty-one when their sentences began and those serving an extended sentence, it may endure throughout the entirety of the sentence (Criminal Justice Act, Sec 60(1)(3)).

7.4.2 The Definition of Parole in Iraq

Conditional release under Iraqi law can be defined as follows: A selective legal system by which prisoners may recover their freedom, after serving a portion of their sentences in custody, if it appears to the concerned authorities that this procedure helps to rehabilitate them, provided they agree to abide by certain conditions such as supervision or any other obligations, for the breach of which they may be subject to recall (Jenaih, 1981, p.48). This definition shows the huge efforts that the prisoner must make and the main role he plays in rehabilitating himself, in order to be eligible for conditional release.

Under the provisions of section 331 (A)(B) of the Criminal Procedures Act No 23 of 1971 and its amendments, a prisoner serving an imprisonment sentence may, on the recommendation of the Attorney

General and the Governor of the prison, be released on licence by the Court which imposed his sentence or any other Court which replaced it. The prisoner must serve three quarters of his sentence or two thirds, if he is under 18 years, or six months - whichever expires later - and the rest of his sentence must not exceed five years. However, if the offender has been subjected to successive sentences, the term for his conditional release will be counted on the total term of all the sentences.

7.5 The Legal Nature of Parole

Parole is connected only with imprisonment - determinate or indeterminate - and there is no relationship between parole and any other types of sanctions. So the question is, what is the effect of parole on imprisonment? Is it possible to consider parole as the end of an imprisonment? If so, this perspective would see parole as a final release. On the other hand, if it is a mere modification of the way the penalty is executed, it would mean that parole is not a final release.

Final release depends on the basis of certain rules. Firstly, the main one is that the offender on final release cannot be recalled (Husney, 1966, p.513). A person on parole may be recalled by the Secretary of State on the recommendation of the parole board (Criminal Justice Act 1967, s.64(1)) or even without the prior agreement of the parole board; if it appears that recall is, in the public interest (a matter of urgent necessity), he may recall a licensee and consult the parole board later (Criminal Justice Act 1967, s.62(2),(4)).

A licence of parole may also be revoked by Court:

"If a person subject to any such licence is convicted on indictment ..... the Court by which he is convicted or to which he is committed ..... may ..... revoke the licence." (Criminal Justice Act 1967, s.62(8)).

In Iraq a parolee can be recalled again by the same Court which granted his parole (Criminal Procedures Code No 23, 1971, s.333 (A)(B)).

A second basis of final release is the cessation of relations between the offender and the concerned authority immediately after his leaving a penal institute, except in the case of after-care, or if there are additional penalties (Husney, 1968, p.513). However, in parole, the relationship between a parolee and the concerned authority still exists since the full penalty has not expired, although the nature of this relationship is changed by parole. A person subject to a licence must comply with the conditions specified in the licence (Criminal Justice Act 1967, s.60(4)). Final release obviously differs from parole in this way as well, since there are no conditions to be met once a subject is finally released. It can be concluded that parole cannot be assumed to be a final release and so cannot be considered as a termination of the penalty. In the light of this, the question is that if parole is not the expiration of punishment, then what is it?

Many people believe that parole is an amelioration of punishment but it is, in legal effect, imprisonment (Judge Phillips in the case of Taylor v. US Marshal 352 F. 2d, 232, 235, mentioned by Carter & Wilkins, 1970, p.517). That is, the granting of parole does not change the status of a parolee as a prisoner:

"He is in penal custody in a prison without bars, subject to the rules and regulations for the conduct of paroled convicts to be enforced by the parole officer." (Case of People v. Denne, op. cit. p.517).

The only difference in his status from that of other prisoners is that he is permitted to remain outside the prison walls, although he is still in custody.

7.5.1 The Legal Relationship Between Parole and the Prisoner

After discussion of the legal relationship between parole and penalty, the conclusion is that parole is an amelioration of the methods of implementing punishment. It seems logical to now discuss the legal relationship between parole and the prisoner eligible to be paroled. However, before that, the distinction between parole and the similar regulations of remission should be illuminated and clarified. There is no such similar regulation to parole in the Iraqi legal system, except the system of suspended sentencing. This regulation means that the Judge has the discretionary power to suspend an imprisonment sentence (less than one year) for the same term of the sentence. During that time, if the offender is convicted of another offence and punished by imprisonment, both sentences must be served consecutively. As the suspended sentence is understood to be separate from parole, as long as the two are not confused, there is no need for further discussion of this matter.

7.5.2 Parole and Remission

Misunderstanding of the distinction between parole and remission is not limited to the general public; it is found, to a lesser degree, even among prisoners. Many of them manage to keep out of trouble in prison. Clearly they do not regard parole as a continuation of custody under less restricted conditions or as a means of aiding their readjustment to society. Concerned authorities sometimes reflect the same view by referring to parole as a reward for good behaviour. Their emphasis is not on parole's rehabilitative possibilities but on it as a form of reward or expression of leniency (Hannan, 1937, pp.137-138).

Parole is the release of an offender from a penal or correctional institution after he has served a portion of his sentence, under conditions that allow his reincarceration in the event of misbehaviour. Parole contains none of the elements of executive clemency, as is the case with remission. It has no connection with forgiveness, nor is it designed as a reward for good

conduct in the institution. The basic purpose of parole is to bridge the gap between the closely ordered life within the prison walls and the freedom of normal community living (The Attorney General's Survey of Release Procedures, 1939, p.4). Parole differs from remission in three respects. It always entails a licence; it is granted, if at all, at an earlier date and, most important of all, it is not something to which the prisoner is entitled as of right (Cross, 1971, p.91). Parole also differs from remission in its history. Remission goes far back into the nineteenth century. The release on licence from penal servitude which could, in theory, be earned by all convicts at the same stage of their sentence, although there must have been much variation in practice, derives from the transportee's ticket of leave (for more details see Chapter 2, section 1).

7.5.3

Generally, from the large volume of literature on penal philosophy, specifically from that written about parole in the British legal system, and also from the smaller amount written on both topics in Iraq, one can conclude that there is no essential difference in approach between the two countries. In the British situation, where the aims of penal philosophy are essentially punitive and directed towards retribution and deterrence rather than reform, questions of risk and desert are crucial aspects of the decision as to parole's suitability. Parole is a privilege and as such is granted only to 'deserving' cases (Shea, 1972, p.68).

The Iraqi legislature has, in common with all Arabic and most third world countries, a rather harsh attitude with regard to the aims of punishment. This is so, despite the new penal policy [the basis of which is listed in the Legal System Reform Law No 35 of 1977 (see section 7.3 of this chapter where the bases relating to conditional release/parole have been discussed)]. In reality, nothing has happened to the penal policy. It has continued to assume that parole is a measure a prisoner has no right to expect such that it is a favour given only to selected prisoners.

7.5.4

The legal nature of parole can be inferred from one or a combination of any two of the three basic concepts, which have been provided by Gottesman & Hecker (1970, pp.443-461) of what happens when a prisoner is paroled: [1] grace or privilege - the idea that the offender who could be kept in prison for his full sentence is offered the privilege of release by the government; [2] contract or consent - the idea which regards parole as where the government makes a deal with the offender, letting him out in return for his promise to abide by certain conditions; and [3] custody - the idea that the parolee, even though free, is in the keeping of the government.

[1] Grace

The first of these concepts, the grace theory, would seem to parallel very closely the British situation of privilege. Such a theory rests on a dual foundation. First that the prisoner has been convicted and sentenced in accordance with the due process of law. Second, that the state has the uncontrolled option to require prisoners to remain imprisoned for the full length of their sentences. By providing an early release, the state is acting ex gratia, and the prisoner released early has no legally protected right to remain at such liberty.

That such a theory underlies the granting of parole in the British legal system is further evidenced by the fact that not only is the initial decision a discretionary one, free from appeal, but equally the powers of revocation are discretionary (Criminal Justice Act, s.26). On the contrary, the situation in the Iraqi penal system is that both decisions, although discretionary, are not free from appeal or judicial scrutiny because they are taken by the Court, which is authorised by a power to grant or revoke parole. Furthermore, at neither stage does the offender have any right to legal representation, or even to a personal hearing. Even when such

a hearing is granted it is only held before one member of the Local Review Committee (Criminal Justice Act 1967, s.59(5)).

Shea (1972, p.76) believes that the right of a parolee to consult his counsel does not seem to be essential for a fair hearing in this context, as there is no need for a person with special legal skills to help a prisoner to formulate his argument. The parole decision is basically an adjustment of the sentence and, as with the initial sentencing process, it is "relatively unburdened with legal questions". As essential as lawyers are whenever the question of guilt or innocence is concerned (for instance in a recall decision), as far as the parole decision itself is concerned, any intelligent person of goodwill should be capable of helping the prisoner present his case. These qualifications can be met by any member of the Local Review Committee.

This discussion may not have the same effect if one takes into account the dispute of Morris & Beverly (1975). They have pointed out that, although the offender may be interviewed by a member of the Local Review Committee if he so wishes, the role of the interviewer in that context is in no way that of an advocate. Such a situation might not be so serious were it not for the fact that the candidate has no information regarding the basis upon which the decision will be taken, hence he has no way of knowing how best to present his case, nor have to counterbalance any information contained in his dossier which he might, if he knew of its existence, regard as either inaccurate or at least liable to some alternative interpretation (Morris & Beverly, 1975). The best evidence to support the argument that this theory closely mirrors the British situation is the accurate description of it in the Report of the Parole Board 1975, para 13. According to this Report, criticisms of arrangements for reviewing offenders for parole, that they are not allowed a hearing or representation and are not given reasons when they are rejected for parole, should take into account the fact that:

"in this country Parliament deliberately chose an administrative rather than a legal process. In some countries parole is operated by due process of law, the prisoner being in a position to argue his case before the paroling authority and even to challenge the assessment of that authority. But where this obtains parole is a different concept. It is the right of the individual when he is found suitable, whereas under our system it is a privilege - the sentence is not modified but the prisoner is given the opportunity to complete it in more congenial conditions under supervision in the community."

The situation in Iraqi law is that the parole decision is considered as a judicial act and, because of this, there is no provision to prevent the candidate from seeking the advice of his legal counsel. Therefore parolees are able to consult their lawyers without any objection from the judiciary during both the initial and the revocation stages of the parole process (2).

[2] Contract-Consent

Gottesman & Hecker describe the 'contract-consent' theory as one whereby the state restores liberty through the medium of a bargain. The state grants the offender his liberty in consideration of the prisoner's consent to be bound by any conditions the state may impose (1970, p.450). Such a theory may well be the most tenable from the offender's point of view. However, for the offender the contract expires at the notional date of release, and he sees the system of parole as a way of abbreviating the sentence and of extending the period of automatic remission (1970, p.451).

In neither the British nor the Iraqi system does the prisoner determine the conditions of his release, and although he may have to sign the parole form agreeing to the conditions of licence, it is difficult to justify calling this a contract, since in practice it is little more than a means of informing the parolee of the terms upon which he is released.

[3] Custody

Finally Gottesman & Hecker refer to the 'custody theory' (1970, pp.452, 461). This denies that the parolee has any liberty, insofar as he is serving a sentence in the community and can be recalled at any time. In other words, from a legal point of view, it is possible for a parolee to be recalled on the basis that he might commit a further offence, or breach the terms of his licence. Furthermore such action can be taken without the right to a hearing or to representation. It is difficult to sustain the argument that in matters of recall it is fair that a man should have less protection than he had at his original trial. It is indeed arguable that he may in fact need more safeguards, in view of the assumption that parolees are probably guilty, merely by virture of their offender status.

The confused application of the custody theory reflects the basic illogicality of holding that a man can be at liberty while being in custody. A more realistic method of analysis is to view the parolee as an individual at liberty under certain restraints necessary to ensure the success of parole. While restraints may temper the exercise of liberty, they are not inconsistent with it so long as they do not rise to the level of legal imprisonment.

"A careful application of restraints, in the form of parole conditions, can well further the purposes of parole without resort to inconsistent fictions which deny constitutional protections inherent in the concept of liberty." (Gottesman & Hecker, 1970, p.461).

7.5.5

One can conclude that the legal nature of parole is to change the way in which the method of punishment (usually imprisonment) is carried out. So the original penalty does not expire but becomes suspended on the conditions listed in parole licence. This licence

requires the parolee, on release, to place himself under the direction of a supervising officer and to observe certain conditions during the period of the licence. Nevertheless, the licence may be revoked at any time if he fails to comply with the conditions of his licence, is further convicted, or if his behaviour in any way gives cause for concern.

7.6 Procedures of Parole

After reviewing the definition and legal nature of parole in both the British and Iraqi legal systems, the following sections will discuss the preparation and selection process for parole, with particular reference to the dangerous offender.

7.6.1 Eligibility for Parole

A prisoner serving a determinate sentence becomes eligible for parole when he has served one third of the sentence or one year, whichever expires later (Criminal Justice Act 1967, s.60(1)), while in Iraq he becomes eligible for parole after serving three quarters, or two thirds (if he is a juvenile) of his sentence, or six months, whichever expires later (Iraqi Criminal Procedure Act, s.331 (A)). The eligibility for parole in both systems carries no entitlement to release; it simply means that there is a power to release the prisoner on parole.

As the prisoner approaches the date when he completes the prescribed minimum period he is considered for parole unless he says he is unwilling. In Iraq, after completing the minimum period, the prisoner or, if he is a juvenile, one of his parents, his trustee, his guardian, or one of his relatives, should apply for parole (Iraqi Criminal Procedure Act, s.331 (A)). In the UK, if parole is not granted at that time, it is normally reconsidered at annual intervals until sixteen months before the date of normal discharge. (The date of normal release is reached after the prisoner serves two thirds of the sentence); whilst in Iraq, if his application for parole has been dismissed, the prisoner cannot apply again before

three months following the date of the Court's decision (Iraqi Criminal Procedure Act, s.332 (F)).

7.6.2 Selection for Parole

There are three elements in the selection procedure for parole:

(a) A Local Review Committee at each prison. This Committee is composed of the prison governor (or his representative) and not less than three other persons, who are appointed by the Home Secretary. None of these other persons may be an officer of the prison, but one of them must be a probation officer, and another must be one of the Board of Visitors of the prison. This Committee is expected to meet and consider every case in good time before the earliest date of eligibility for release on parole (the Local Review Committee Rules 1967, rr. 1, 2; as amended by the Local Review Committee (Amendment) Rules 1973). Second and subsequent reviews should take place not less than ten months and not more than fourteen months after the previous review. The prisoner, if he is willing, is interviewed by a member of the Committee other than the prison service member before the review meeting. The purpose of the interview is to enable the prisoners to put orally any factors in his case which he feels ought to be brought to the Local Review Committee's notice. A report of the interview and the prisoner's written representations, if any, are added to the prisoner's parole dossier.

In practice, parole is regarded as something of a privilege and is granted to only a minority of candidates (see section 7.5.4 of this chapter). Since most of the rejections occur at the Local Review stage, this Committee has the major role in the selection of prisoners for release on parole.

When the Local Review Committee has reached a decision, its recommendation, together with a brief outline of reasons for its decision, are forwarded with the case dossier to the

Home Office (Criminal Justice Act 1967, s.59(6); Local Review Committee Rules 1967 and Local Review Committee (Amendment) Rules 1973).

The first element in the selection process of prisoners for release on parole in Iraq is the report of the prison in which the prisoner terminates his punishment when he submits his application (even after this application he may be transferred to another prison or institution) (3). These reports contain the findings of the prison's administrators following an interview with the prisoner held before a Prisoner's Interview Committee. Every prison has such a Committee attached to it as a requirement of the Prison's Establishment Order No 7270 dated 11-7-1971 and appointed according to that Order. The Committee consists of the prison Governor, who chairs the meeting, and three other persons chosen from the staff of the prison who hold the following positions: a) the prison medical officer, b) the manager of the prison, and c) the prison social welfare officer. The information on which the Committee bases it recommendations is then included in a file known as the conditional release dossier, which also contains a report of the prisoner's conduct, his attitude or response to work in prison, the welfare problems he may have experienced whilst serving his sentence and any penalties he may have incurred for breaching the prison's regulations (4). The prison medical officer will also include a statement of the prisoner's medical record in the dossier.

The Prisoner's Interview Committee then as a matter of routine fills in a Conditional Release Form which is an extract of the dossier and which then becomes the main report on which the Courts rely in reaching a parole decision (Jenaih, 1981, p.232).

Jenaih points out in his study (5) that he found only one refusal based on the Prisoner's Interview Committee's main

report over a period of more than five years (see the decision of the Criminal Court/Nainva/18-4-1976) (Jenaih, 1981, p.235). This raises the strange question of whether almost all applicants for parole in Iraq have such excellent conduct as to merit release. In contrast, a study of the largest and most modern prison in Iraq (Abi-greab), conducted by Yasien, shows that the rate of bad conduct is as high as 71% (Yasien, p.67). Jenaih's findings, moreover, surprisingly show that most of the conditional release forms have the same response, in that the paragraphs relating to the prisoner's personal behaviour and his relationship with the staff and other prisoners as well as his ability to comply with correction and rehabilitation, are more often than not filled in with the word "good".

The conclusion, therefore, is that the Courts charged with the task of examining parole applications in Iraq have as the basis of their decisions information which is arguably unreliable. As such it is submitted that the Court, in granting or refusing parole requests, should use their discretionary power only after a more careful and detailed consideration of each individual case.

(b) The second element of the selection procedure for parole in England and Wales is the Secretary of State who may, at his discretion, decide whether or not to release a prisoner. Normally the Secretary of State will grant a release at his discretion if this is recommended by the Parole Board or the Local Review Committee (6).

When the Local Review Committee reaches its decision, its recommendation, together with a brief outline of the reasons for its decision, and the case dossier, are forwarded to the Home Office Parole Unit (Morris & Beverly, 1975, p.3). All cases that are favourably recommended by a Local Review Committee are automatically put before the Parole Board (Ibid, p.3).

The Parole Unit of the Home Office, on receiving the dossiers from the Local Review Committee, checks all the information and procedures. In the case of an applicant involved with others in the same offence, the Parole Unit assembles the files of all those convicted with the applicant and reviews them even if the Local Review Committee has not recommended for parole any of the others so convicted. It also has a duty to bring to the attention of the officials concerned any case which might warrant a veto by the Home Secretary, where such a case is recommended for parole. Cases that warrant the Home Secretary's veto would include security risk prisoners and others who at the time of their trial gained wide public notoriety (Ibid, p.3).

In Iraq, the second stage in the selection procedure for parole involves the Court of Misdemeanours. Para (c) of sec.(331)(as amended) of the Criminal Procedure Act No 23 of 1971 provides that the Court of Misdemeanours shall have the competence to examine an application for conditional release, the dossier for which it receives from the prison administration concerned. The President of the Appellate Court has the duty of allocating the caseload of such cases to the various misdemeanour courts. He does so by the issue of a notification.

An appeal from the decision of the Court of Misdemeanours can be made by the Public Prosecutor or the applicant for conditional release, to the Court of Felonies, within thirty days from the issue of decision.

(c) The third stage in the England and Wales selection procedure involves an independent central board which is known as the Parole Board. The Board is appointed by and is responsible to the Secretary of State. It advises the Secretary of State:

a - on the release on licence and recall of prisoners who have been referred to it;

b - on the conditions of the licence and the variation and cancellation of these conditions;

c - on other matters connected with release on licence or recall which are referred to it. (Criminal Justice Act 1967, s.59(3)).

The Criminal Justice Act (Schedule II) lays down that the Board shall include a member of the judiciary, a psychiatrist, a person with experience in the supervision and after-care of offenders, and a person who has studied the causes of delinquency or the treatment of offenders. Originally, in addition to the chairman, the Board consisted of sixteen members, including two or three in each of the four statutory categories. It has since been expanded several times in order to cope with the increasing number of cases referred to it. At present (since 1986), there are 55 members (Report of the Parole Board 1987, p.7).

The Board divides itself up into panels, normally consisting of four members, for the purpose of considering cases. The composition of the Board, and of certain panels, reflects the spread of specialist knowledge and experience among its membership (currently three High Court judges, three circuit judges and a Recorder, eight consultant psychiatrists, eight chief or deputy chief probation officers, four criminologists, and 34 independent members including those with experience as magistrates, Local Review Committee members, police officers and prison administrators) (Ibid, p.7).

These features of the Board's structure and organisation have given rise to no major administrative or other problems in nearly two decades of expansion and evolution. The statutory balance, which lays down that the Home Secretary cannot release the prisoner if the Board does not recommend parole, yet which states that he need not accept that recommendation, as he (the Secretary of State) is not bound to release him, normally, appears to have operated satisfactorily in practice (6) (Ibid, p.7).

It is essential for the three bodies to work in harmony in their common task to select for early release all those who merit it. The ultimate responsibility for release rests with the Home Secretary who is responsible to Parliament for the parole system.

Under Iraqi law, the third stage in the selection procedure involves the office of the Public Prosecutor. The Criminal Procedure Act in sec.332 (A)(amendment) provides that the Court should hear the argument of the Public Prosecutor in person. However, unfortunately, the Iraqi judiciary still use the previous method which only requires the submission of a written statement by the Public Prosecutor. The difference between the two methods is that the procedure provided by section 332 (A) (amended) enables a discussion of the issues between the Court and the Public Prosecutor. The Iraqi legislature's intention was, indeed, for a discussion to take place in the Courts in which the Public Prosecutor would participate.

Furthermore, it is submitted that as there is nothing in the provision to prohibit it, the applicant or his representative should be allowed to be present when the case is considered. Indeed, in practice, lawyers often represent the applicants for parole without any objection from the judiciary (see the case (E) dossier 903/appeal/ conditional release/75 on 10-11-1975 (pointed out by Jenaih 1981, margin p.245)) (5).

The Public Prosecutor's role in the selection procedure, before the Court concerned makes its decision, seems to be only one of counsel to the Court. With regard to the right of appeal it appears from the fact that, as the applicant and the Public Prosecutor have the same right of appeal, the role of the latter is further diminished. The submission here, therefore, is that the Iraqi judiciary should abandon its current practice in the process of examining cases for parole and adopt the procedure provided for by section 332 (A)(amended) in the interests of both the applicant and society as a whole. In doing so it will also be adhering quite correctly to the strict letter of the law as provided for by the Act.

7.6.3 Unsatisfactory Selection

It may be reasonable to say that selection for parole under the English parole system is unsatisfactory because a prisoner is left in the dark about the criteria which may govern the parole decision. The Parole Board, in its annual reports, has attempted to indicate some of the criteria which may be considered (Hawkins, 1973, p.11). See paras 49-80; 1968, and in particular para 59 which seems to be closer to the dangerous offender, as it deals with the recommendations relating to life imprisonment:

"the Board is able to take into account the experience of past releases of life prisoners, and can consider the views of experts on the degree and quality of risk attached to different types of offender."

Also see paras 49-63; 1969, of which para (62) relates to the dangerous offender and which discusses the difficulties facing the Board in its task:

"especially in more serious cases, of balancing the dangers of early release against the risks of detaining an offender until he has to be released without statutory supervision."

Para 61 of the 1969 Report said that so many individual considerations arise in any particular case that "there can be no general rule as to which categories of offender the Board is likely to recommend for parole".

In addition to the passages mentioned above, other discussions in Reports of the Parole Board followed the Report of 1969, for example the Report of 1971 paras 55-58, in particular para 58. This paragraph refers to the dangerous offender in terms of grave crimes; thus another criterion has been added to those listed in the previous paras (ie, 55-57). In para 58 the Board held that it was:

"bound to give particular consideration to public opinion quite apart from the element of risk, before deciding whether to recommend parole, even though there are other factors favourable to the prisoners concerned."

After scrutinising the criteria listed in the Parole Board Reports for the year 1972 paras 3-4; 1973 paras 36-50; 1975 pp.31-36; 1977 pp.37-42; 1978 pp.31-36; 1980 pp.38-44; 1981 pp.36-42; 1982 pp.32-38; 1984 pp.16-22; 1985 pp.15-21; 1986 pp.12-16; in particular paras 20-23; 1987 pp.11-13, one may agree with Hawkins in his discussion of the criteria set out in the Parole Board Reports. These criteria do not allow a prisoner to gain 'real knowledge' of what is likely to be taken into account 'in his own case' since the criteria are discussed in general terms "and, at least on the surface are not always compatible with each other".

Since there is no list of criteria to show what is likely to be decisive in an individual case, this may lead to incompatibility between such criteria as the interests of the prisoner and his family, and the safety of the public. Response to prison training may be very good but the prognosis may be extremely poor, and the Board has to balance these factors in arriving at its recommendation. Indeed the Board recognises the need to do this, as repeatedly shown in its Reports.

In the Report for 1973, para 49, the Board said that a parole decision is reached:

"after balancing all the factors, some of which may conflict with each other, in order to determine where the advantage, to the prisoner as well as to the public, appears to lie. Where these two interests appear to be opposed, our perception of the public interest prevails." (1973, p.17).

The best way out of this problem would be if the rules governing the way in which the discretion is to be exercised in particular circumstances were promulgated and made available to

prisoners. These rules could then be used as a means for both reducing the free exercise of discretion and of providing specific standards against which official decisions may be measured. In addition these could be utilised to prohibit the use of certain obviously improper criteria, or they could explicitly prescribe certain objective 'decision-making' criteria by implication, thus excluding those that might be improper (Jowell, 1973, p.179). Therefore a code of rules governing the granting of parole seems better than a list of criteria (Hawkins, 1973, p.8). This would remove much of the confusion and misunderstanding surrounding the parole decision. However, the question is whether it is possible to put, in details, the entitlement to parole in this way? The Parole Board Report for 1969, para 61 p.21, answered this question when it said that:

"since so many individual considerations arise in any particular case, there can be no general rule as to which categories of offender the Board is likely to recommend for parole."

One approach which may satisfy the critics might be along the lines proposed by the American Law Institute in its Model Penal Code, Article 305.13(1). The Code proposes that it should be the policy of the Parole Board to release a prisoner on parole when he becomes eligible for release unless it is desirable not to do so, as a deterrent, for one of the following reasons:

1. There is undue risk that he will not conform to the conditions of parole.

2. His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law.

3. His release would have a substantially adverse effect on prison discipline.

4. His continued treatment or vocational or other training in the institution, or medical treatment, will substantially enhance

his capacity to lead a law-abiding life when released at a later date. (Tappan, 1960, p.735).

Beyond these grounds of decision, the Code puts forward a set of considerations that the Parole Board should take into account, measuring them against the stated criteria, in reaching their decision. Thirteen matters are listed in sec.305.13(2) (for more details see note 7).

The considerations to be taken into account in reviews of dangerous offenders are not laid down by law, but they can be inferred from the Annual Reports of the Parole Board (see the latest two Reports for 1986 p.12, and 1987 p.11) for almost all the years between 1968 and 1987. However, since the Home Secretary's speech of 30 November 1983 (8), special emphasis has been laid on the treatment of dangerous offenders. He said that he intended to use his discretion in such a way as not to release on parole persons sentenced to over five years' imprisonment for an offence falling within the list of serious crimes specified in section 32 and Schedule 1 of the Criminal Justice Act 1982 (Report of the Parole Board 1984, p.22) (see Appendix 1). He further stated that in future there would have to be the most compelling reasons before he would agree to parole being granted in the case of prisoners serving sentences of over five years for offences of violence and drug trafficking. In such cases the Home Secretary will only grant parole in circumstances which are genuinely exceptional, or if it appears that a period of a few months under supervision would be likely to reduce the long-term risk to the public.

The last Parole Reports show that the Board took particular care in the cases of prisoners whose records showed that they were most likely to commit grave offences again. The Board felt that the public had a right to be protected from the risk of the high degree of danger that would be posed by the release of such offenders (Parole Board Report 1986, p.15).

Paragraph 23 of Appendix 1 of the Parole Board Report of 1986 pointed out that common sense and general experience were the best guides for its Committee members in identifying cases where the danger was grave. In addition to that, para 23 listed the following examples of offenders who could be categorised as 'dangerous' for the purposes of considering a parole application:

"a - A person convicted of more than one sophisticated crime intended to produce a large reward, committed on different occasions, even if violence has not been used or contemplated.

b - A person convicted of more than one act of violence (including sexual assault) or arson, committed on different occasions, leading to prolonged suffering, disability or stress for the victims.

c - A person convicted of only one such act of violence (including sexual assault) or arson if owing to his mental condition there is a substantial risk of repetition.

d - A person concerned, usually as a member of a gang, in a sophisticated crime intended to produce a large reward and accompanied by the use, or readiness to use, lethal weapons, even where the sentence is no more than five years."

Serious offenders not mentioned in the Home Secretary's statement of 30 November 1983 were dealt with according to the previous policy. That policy being, the graver the criminal record, the graver risk to the public; in this case a good reason would be required before parole is granted (Ibid, p.15). The Home Secretary is the final judge in cases which involve life sentences. His discretion is unfettered but is subject to a favourable recommendation by the Parole Board and to consultation with the Lord Chief Justice and the trial judge (if the latter is available) (Parole Board Report 1986, p.17) - for more details see footnote (8).

The situation in Iraq is completely different from that in England (as discussed above) as the whole selection procedure could be seen as a routine process (Jenaih, 1981, p.235) (for more details see section 7.6.2 of this chapter). It seems that the reason why the prisons' administrators work in such a routine way is, firstly, because they rely on the discretionary power of the Courts to make the right decision as they are the final authority vested with the power to grant parole. Secondly, the law does not lay down a clear criteria which can easily be followed in the selection process. The only criteria provided by the section 331(a) is the industry and good conduct of the prisoner during his sentence, and this criterion is widely used by the Iraqi Courts (see decisions of Criminal Court of Al-aadamah No 40/conditional release/1978 on 6-5-1978; decision of the Criminal Court of Nainva No 13/G/1975; decision of Criminal Court of Karkh No 439/conditional release/75 on 13-8-1975) (9). The reason seems to be that the Courts, usually, grant parole only to those prisoners who have completed three fourths of their sentence with good conduct and that this is considered sufficient to show that the prisoner has paid his debt to society and thus deserves to be paroled. This situation, to some extent, is similar to that of the English Courts granting remission (for more details see section 7.4.1). The support for this argument (ie, the present policy of Courts for granting parole) is in the huge area which has been covered by the exceptions stipulated in section 331(D) of the Iraqi Criminal Procedure Code (10). This section includes a large number of prisoners who are considered by the legislature as too dangerous to set free even under supervision, or whose crimes are so grave as to justify depriving them of parole. Both justifications (dangerousness and graveness) are, in this context, insufficient and it is submitted that it will be better if the matter were left to the discretionary power of the judges. These situations will be more consistent with good modern criminal policy.

7.7 Success of Parole

Parole should be seen as an integral part of the penal system, so that ideally any evaluation of its success can be seen from that

wider perspective, in which a consideration of the overall aims of sentencing and treatment will be included. Often parole's effectiveness tends to be gauged in isolation from the wider system of the legal process, and almost solely in terms of reconviction.

To consider success in these terms assumes that the process of reconviction is an absolute measure capable of precise definition.

The reconviction of a parole licence can be the result of a variety of discretionary decisions such as the report of the probation officer or the judgement of a Court in a sentence. Therefore such a measure of revocation is unsatisfactory other than for maintaining public confidence in the parole system or for the convenience of the administration (see Kassebaum, Ward & Wilner, 1971, p.217 ff).

Any evaluation of the effectiveness of parole must begin with review of the goals of parole. The first and most frequently cited goal is to protect society from criminals (Parker, 1945, p.26) by only releasing those prisoners who are considered to be in the best position for leading the life of a normal law abiding citizen. Also it:

"permits his return to prison for all or part of the balance of his sentence if he fails to comply with the rules of parole behaviour believed conducive to the prevention of felonies." (Glaser, 1969, p.13).

Another important goal is the aspect of successful integration: that is to say, complete integration into society by the end of his parole (University of Pennsylvania L.R. Vol.120, 1971, p.284).

The National Advisory Commission on Criminal Justice Standards and Goals identified the basic purpose of parole as the reduction of recidivism (persistent criminal behaviour) but noted three other aims:

(1) fairness to the criminal offender in decisions and supervision;

(2) the appropriateness of criminal punishment in relation to the expectations of the public;

(3) maintenance of the criminal justice system, that is, management of parole selection and supervision in ways that will be of great help to the efforts of police and prison officials (1973, pp.393-395). This last concern is connected with the aim of parole organisations to be seen in a better light.

7.7.1 Methods of Evaluation

The main difficulty in evaluating the parole system is to find measures which show how far parolees are able to refrain from reoffending to indicate the degree of success of their treatment within the parole system.

The criterion of recidivism is necessary to distinguish between the ability of the offender to reform by not reoffending and his ability to lead a normal life at work, school and within his family, because the success of parole should depend on the former and not the latter.

Whether unemployed, a drunkard, or even uneducated, he will nonetheless be considered a success for the purposes of evaluating parole as long as he does not reoffend (Stanley, 1976, p.173).

Since criminal behaviour is the principal concern, the main criterion has to be recidivism. It may be defined as a tendency to repeat criminal behaviour. However, recidivism can be based on various factors which explains why it varies according to the area, type of offence, or social and economic circumstances. The rate depends on how the following elements are calculated: (National Advisory Commission on Criminal Justice Standards and Goals, Corrections, 1973, p.512).

a - The Event: ((i) arrest, (ii) parole revocation, (iii) conviction).

(i) Arrest: Some studies have used arrests as indicators of criminal behaviour. If accepted as an indicator, arrests will only inaccurately show that every time a parolee is apprehended he will be deemed to have reoffended even if his arrest is not followed by indictment and conviction. Lang, in his analysis, points out the pitfalls of such gross inaccuracies.

(ii) Reimprisonment figures, though normally accurate and reliable, do not necessarily show that the parolee has relapsed into criminal behaviour. For instance his parole may be revoked because he is suspected of having committed a crime rather than because he is actually convicted of that crime (Prison Law Report, Vol.3, 1974, pp.216-218).

(iii) Convictions seem to be the most appropriate measure for gauging recidivism and although it can be said to be just it is potentially faulty. It is faulty because a person who committed a crime may be acquitted for reasons of insufficient evidence, weak prosecution, or technical flaws. Nevertheless it is just, because only a conviction can prove him to be criminal.

To sum up, all the three measures - arrest, reimprisonment and conviction - are subject to uncertainties. However, it seems that conviction is the most equitable and appropriate measure.

b - Duration: How does one ascertain the duration of non-criminal activity? Does the parolee have to abstain from criminal activity for the rest of his life? This, it is submitted, would not be a reasonable criterion in determining recidivism. According to the Standards and Goals Commission, recidivism ought to be measured for three years after the offender is released from all correctional supervision.

c - Seriousness: This is the third dimension of recidivism - the severity, intensity and degree of criminal behaviour. The severity is usually defined and measured by the penalties imposed (California Department of Corrections, 1971, p.17). This use of penalties to measure seriousness is simple and understandable as it is based on the questionable assumption that the punishment always fits the crime. So it seems that the problem for parole evaluation is unsolvable unless there is a reform of the penal process because there is no easy way to simplify the complex human issues in measuring seriousness. For example, a parolee who is convicted of an offence (not of the grave type) and who serves two months in prison, can be said to have relapsed into criminal behaviour. Suppose, however, that he is paroled in 1980, then serves time in prison for a petty offence in that same year, but thereafter does not commit any crime for the next three years. Would he not then be considered a success?

To sum up the best criterion of recidivism would be conviction of a new serious offence or an offence punishable by a sentence of imprisonment for 90 days or more; all this to apply within three years after release (see Chapter 3). It is common knowledge that the longer the sentence for an offence, the easier it is to justify a definition of criminality for the offence.

7.7.2

The success of parole (though variously and unsatisfactorily measured) is associated with other factors such as age, employment, and supportive family relationships. This does not mean that such factors will be a cause of parole success, though they may. It may only mean that an offender who is ready to succeed on parole has a stable character, is capable of working steadily and has a close relationship with his family. Reviewing the situation in Iraq indicates that there is a real need, much more than in England, for rigorous experimentation in assisting ex-offenders so that new programmes can be better designed to meet their real needs in future.

The parolee who responds successfully to remedial treatment will need less help than the parolee who is not as successful whilst in prison. An example of the latter would be one who is unstable in character, temperamental, unreliable, etc. Such a person would need constant help to keep him out of trouble for as long as possible and perhaps the assistance he will obtain will help him get a footing on his way to becoming a normal citizen (Stanley, 1976, p.169).

7.7.3 Should Parole Continue?

Rationality and moral values, as well as criminal statistics and financial costs, must enter into any final evaluation of parole. Therefore ethical and political values have a strong influence on policy choices. In this context it is very difficult to put a clear-cut answer to the question of whether or not to continue the present parole system. It is like other difficult questions of public policy - such as whether to maintain and build a strong navy or to support an atomic weapons research programme where policy choices must be made (Stanley, 1976, p.184).

Under the present penal policy of Iraq it seems that parole, or conditional release, as it is called in Iraq, is the best alternative to deal with the offender.

Unfortunately, the wide exceptions listed in section 331(D) of the Criminal Procedure Act 1973 (10) weaken this device. It is therefore submitted that this device could be better used to deal with the dangerous offender if the section were to be repealed or narrowed considerably.

Footnotes

(1) There is no sentence in the Iraqi Penal Code that exceeds a period of more than twenty years. A life sentence carries a maximum of twenty years imprisonment (Iraqi Penal Code No 111 of 1969, sec (87)).

(2) See the Appeal Case (A) Dossier 903/Appeal/Conditional Release/75, 10-11-1975 (in Arabic).

(3) In the case of a juvenile this will be the institution in whose care he is in towards the end of his sentence at the time he makes his application.

(4) These issues are assessed by the various members of the disciplining and welfare staff who have dealt with the prisoner during his sentence.

(5) Jenaih, Conditional Release in Iraq 1981.

(6) The number of cases where the Home Secretary is unable to accept the Board's recommendation for release each year is small (eg, in 1986, 15 out of 3,560 recommendations). See Report of the Parole Board 1987, margin of p.7.

(7) These are the matters which the Model Penal Code proposed for the parole agencies to take into account when weighing the criteria:

1) The prisoner's personality, including his maturity, stability, sense of responsibility and apparent development in his personality which may promote or hinder his conformity to law.

2) The adequacy of the prisoner's parole plan.

3) The prisoner's ability and readiness to assume obligations and undertake responsibilities.

4) The prisoner's intelligence and training.

5) The prisoner's family status and whether he has relatives who display an interest in him, or whether he has other close and constructive associations in the community.

6) The prisoner's employment history, his occupational skills, and the stability of his past employment.

7) The type of residence, neighbourhood or community in which the prisoner plans to live.

8) The prisoner's past use of narcotics, or past habitual and excessive use of alcohol.

9) The prisoner's mental or physical make-up, including any disability or handicaps which may affect his conformity to law.

10) The prisoner's prior criminal record, including the nature and circumstances, recency and frequency of previous offences.

11) The prisoner's attitude toward law and authority.

12) The prisoner's conduct in the institution, including particularly whether he has taken advantage of the opportunities for constructive activity afforded by the institutional prgramme, whether he had been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether he has forfeited any reductions of term during his period of imprisonment, and whether such reductions have been restored at the time of hearing or reconsideration.

13) The prisoner's conduct and attitude during any previous experience of probation on parole and the recency of such experience.

(8) The Home Secretary, L Britton's speech at the Conservative Party Conference at Blackpool (England) in October 1983, in which he outlined three main changes:

1) The introduction of minimum periods of twenty years in custody for those serving life sentences for the murder of police and prison officers, for terrorist murders, for those who commit sexual or sadistic murders of children, and for those who use firearms to kill someone in the course of robbery.

2) New restrictions upon the release on parole of those serving determinate sentences of more than five years for offences of violence or drug trafficking.

3) Reducing the minimum threshold for parole eligibility from 12 to 6 months (as foreshadowed by s.33 of the Criminal Justice Act 1982).

These changes had a great effect on the Parole Board's policy in recommending parole for such prisoners (Parole Board Report 1986, p.12; 1987 pp.17-18). The Home Secretary also indicated the policy for the exercise of administrative discretion in determining the degree to which a prisoner could be seen as dangerous.

(9) All this is listed in Jenaih 1981, p.227.

(10) Sec 331(D) provides that:

The following prisoners are excepted from enjoying conditional release:

1) A recidivist who is sentenced for more than the maximum term of imprisonment for the offence of which he was originally sentenced according to section 140 of the Iraqi Penal Code of 1969, or section 68 of the Baghdad Penal Code of 1919 (repealed).

2) Those sentenced for a crime affecting the external security of the state or for counterfeiting coins, notes, official financial bonds, and stamps.

3) Those sentenced for rape, sodomy, adultery, incest or for instigating such crimes.

4) Those convicted a second time for theft and sentenced wih or without hard labour.

5) Those convicted a second time for misappropriating public property.

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CHAPTER EIGHT

8.0 CONCLUSION AND PROPOSALS

8.1 An Historical Review of the Dangerous Offender in Iraq

This dissertation has dealt with the dangerous offender at the sentencing and post sentencing stages, and has attempted to illustrate the concept of dangerousness in terms of Iraqi and English penal philosophy. It was thus important to review the historical background of the treatment of dangerous offenders in Iraq and in England.

Islamic law being the main source of the present Iraqi penal code, it is noteworthy to mention in this summary that this religious system of law has a unique philosophy which makes ecclesiastical and secular rules inseparable. A part of this philosophy concentrates more on deterrence and less on the criminal and his reform. This is the part of the penal system covered by "Hadd" punishments, in which the Muslim legislator has no discretion in respect of their application: he cannot add, omit or alter any of the rules laid down in the Qu'ran and the Sunna when an offence merits a "Hadd". (El-Awa, 1972, p.268).

Another part of the philosophy of Islamic law manifests itself in the concept of "Ta'azir" (see footnote, Chapter 1) or discretionary punishments, where wide discretion is given to the ruler or legislator to create crimes and prescribe punishments. This concept is directly concerned with public morality and provides an everlasting basis on which the needs of Muslim society can be met.

Yet another part of Islamic philosophy concerns the strict requirements such as proving a case beyond reasonable doubt, the various recommendations of forgiveness and the consideration of the possibility of repentance, which greatly limit the number of instances when a punishment can be inflicted.

Therefore, although it can generally be said that Islamic law expresses itself mainly in terms of a deterrent and retributive philosophy, one must not ignore the reformative scope which can also be found within it.

With the spread of Islam among different cultures, societies and values, came the realisation that the enforcement of the Islamic penal system had to be relaxed because that system had been created and planned for a particular type of society which now no longer existed. (Abu Yousif, 1352 A.H.). As the society first envisaged by Islam has now changed to the extent that it no longer exists, it can perhaps be argued that the application of the Islamic penal system in modern times would not achieve its aims. (El-Awa, 1972, p.274).

8.1.1

During the era of Ottoman rule, the Islamic penal system adopted a new trend when it was modified to suit the political requirements of the state. At the stage of the decline of the Ottoman Empire attempts were made at reforming the criminal justice system, with the aim of giving it a modern appearance by making it accord with Western thinking. The two philosophies thus mingled, with the result that corporal punishment was abolished and replaced by the practice of wider custodial sentencing.

8.1.2

Following the British occupation of Iraq, the Ottoman Penal Code was replaced in 1919 by the Baghdad Penal Code which, though largely based on the former, contained elements borrowed from the Egyptian Penal Code. Although the most common form of punishment used in both the Ottoman and Baghdad Penal Codes was imprisonment, the death penalty, though less frequently used, was still prescribed in some cases.

After the Revolution of the 17th of July 1968, the Baghdad Penal Code was replaced by the Iraqi Penal Code (No. 111 of 1969) which still remains in force today. (For a full discussion of this Code in connection with the dangerous offender, see section 8.5).

8.1.3 Legal Reform

As the body of legislation inherited by the Revolution expressed the economic interests and ideology of the prevailing social classes prior to the Revolution, it was quite natural for these laws to reflect right wing or reactionary ideas.

As such the period from 1968 up to the late 1970's was devoted to directly changing some of this existing legislation through the use of higher offices and committees formed for this purpose. The result was the issuing of new laws of great political, economic and social importance such as those which concerned agranran reform and labour.

The Report of the Eighth Regional Conference of the Arab Baath Socialist Party, held in 1972, defined the nature and goals of the 1968 Revolution and recommended a revision of all the inherited laws to enable change, improvement or repeal where necessary. (The Political Report, p.163-164). This shows that the Iraqi Penal Code, although passed in 1969, did not reflect revolutionary aims and ideas because the nature and goals of the Revolution had not been defined at that stage.

In response to the recommendations of the Political Report of 1972, the Legal System Reform Act of 1977 (No. 35) determined the new bases of criminal policy which were defined first by the basic starting points on which the policy was founded, and then by the general targets which the policy intended to achieve.

The conclusion arrived at in relation to this policy is that it will have no value until its aims and objectives are translated into positive criminal legislation. As penal codification is the most

important means of bringing about positive criminal legislation, it can be used to illustrate the best elements on which any criminal legislation can be based.

Generally, the Act of 1977 outlined the new concept of dangerousness and showed how a dangerous offender should be dealt with. The new concept made the degree of dangerousness proportional to the extent to which a dangerous offender threatened the foundations of socialist society. Therefore, according to this new concept, the greater the threat to the basis of that society the greater would be the degree of dangerousness of that offence.

8.2 An Historical Review of Dangerous Offenders in England

The point at which initial attempts were made to tackle the problem of the dangerous offender can be traced to the period when the practice of transportation ended and the industrial revolution gained momentum.

There were differences in approach to the problem by those who concerned themselves with the treatment of dangerous offenders. As such some propositions of the legal reformers and commentators were implemented as statutes whilst others remained within the body of ideas that were used jurisprudentially when later reforms wee proposed.

It must be noted that there was no clear definition of the concept of the dangerous offender within the criminal jurisprudence of the nineteenth century, mainly because the concept encompassed a wide variety of offenders, known by the terms habitual offenders, persistent offenders, incorrigibles and recidivists, not all of whom were necessarily dangerous.

Thus, although the ideas on the treatment of such offenders can be traced to the middle of the nineteenth century, it can be argued that the concept of the dangerous offender is a relatively new concept in the realm of English jurisprudence.

8.2.1

Among the pioneers who studied the concept of the dangerous offender was M.D. Hill who used a medical analogy throughout his study, thus describing prison as "a hospital for the treatment of moral diseases" and those who proved to be incorrigible as deserving a sentence which would see them detained indefinitely.

A supporter of Hill's ideas was W.R. Greg who believed that a second offence gave society the right and duty to protect itself by incapacitating the offender until he was reformed.

Such ideas on indeterminate sentencing were later replaced by another involving cumulative sentencing, designed by H. Mayhew who proposed a system of progressively heavier punishments to be imposed with certainty upon each reconviction.

There were also those, like T.B.L. Baker and A. Thomas, who felt that execution of habitual criminals was preferable to reformation through lengthy prison sentences.

H. Taylor in 1869 proposed the dual track system of dividing imprisonment for habitual offenders into the two phases of a severe detention period and a protective life sentence. However, Taylor's ideas were not considered until thirty years later and even then they were not wholly adopted.

A universal plan to eliminate the criminal class altogether, with the implied aim of preventing recidivism, devised by F. Hill and W. Crofton, which involved the simple expedient of forcing men to give an account of how they gained their livelihood, was found to be too impracticable and foreign to the body politic of England ever to have a real chance of success.

8.2.2

The Gladstone Committee introduced the concept of preventive detention which was only put into practice with the passing of the Prevention of Crime Act 1908. Preventive detention, despite some modification in 1948, was unsuccessful mainly because it did not address itself properly to the problem of the dangerous offender. However the practice remained in force for a long time and was only abolished in 1967.

The Gladstone Committee, nevertheless, had its advantages in that it was able to influence the main thrust of official policy on the prison system such that imprisonment has since been used constructively to reduce the number of offences committed.

8.2.3

The Criminal Justice Act of 1967 replaced preventive detention with extended sentencing, the requirements for the imposition of which stipulated that the Court be satisfied that such a sentence would be imposed because of the offender's previous conduct, the likelihood of his committing further offences and as a means of protecting the public from his actions.

The judiciary, by and large, did not embrace extended sentencing and this attitude can be seen in the number of such sentences imposed between 1968 and 1970. The practice of extended sentencing has been rarely used in recent years and, despite a recommendation for its abolition by the Advisory Council on the Penal System, in 1978, it continues to remain in operation. The system however is only of interest as another failed attempt in the history of efforts which have sought to deal with the dangerous offender.

8.3 The Concept of Criminal Dangerousness

After looking at the historical background of the treatment of the dangerous offender in both Iraq and England, a practical definition of the concept of the dangerous offender had to be found. To do this it was necessary to clarify the concept of danger in its varying degrees as this was the best practical device for gauging dangerousness. Therefore the concept of danger was clarified in terms of harm, the expected result of danger. Consequently it was also necessary to examine the notion of values satisfying a human need, known as good, as these are the natural targets of harm. Thus the degree of danger could be ascertained by looking at the amount of harm that can be caused. As such the lowest degree of danger was defined as the state where fear was caused to a layman forcing him to resort to exceptional action. This then was the first step in providing a definition for dangerousness.

8.3.1

The next step involved an examination of the effects of particular dangerous offences with special reference to the third world where these crimes have been exacerbated and have in some cases led to new crimes, because of the technological developments of the twentieth century.

The offences in this section did not include the more 'traditional' dangerous offences such as murder, sexual crimes, robbery and burglary, but in concentrating on offences which cause harm to societies, this study aimed to highlight the latter crimes for the purpose of bringing them to the attention of those responsible for planning society's criminal policies.

8.3.2

Before arriving at a practical definition of dangerousness to cover all categories of dangerous offenders, it was necessary to discuss the perspectives of both Western and Arabic scholars.

Furthermore, in order to clarify the definition of this concept it was also necessary to discuss the different degrees of dangerousness, and this paved the way for the formulation of the operational definition which included the following conditions:

1. The commission of a crime resulting in serious or irremediable harm to individuals or society.

2. The conviction of an offender for an offence of equal gravity to one he has previously committed, or for any other offence punishable by three years imprisonment or more.

3. The commission of a crime by an offender either during his current sentence or within three years of serving his sentence.

4. The acceptance of material evidence to show that the offender, even in the absence of the second and third conditions, will certainly involve himself in future criminal activity.

8.4 The Identification and Limitation of Dangerousness

After having discussed danger and dangerousness the study went on to discuss the way in which an identification and a limitation of dangerousness could be made in which the notion of predictability was used to examine the problem of sentencing a dangerous offender. This was done by attempting to find suitable criteria for predicting dangerousness which would minimise the number of false judgements which could be made either positively or negatively. One of the guidelines in determining the criterion of dangerousness was found to be the nature of anticipated harm and its gravity. Therefore, because of the difficulties in this context, the conclusion was that statutes should provide a clear interpretation of grave harm to distinguish it from other types of harm. As such, identifying the nature of the risk of grave harms was necessary, and to define the sort of offence which would make it permissible for a Court to consider imposing a protective measure, a list of grave harms was provided (in Appendices 4 and 5).

The device used to discover whether an offender will re-offend in the future is prediction, and its validity will determine the degree of risk in which a protective sentence may unnecessarily be imposed on an offender.

However a degree of inevitable error must be admitted in all cases where a selection of those who may commit a crime of grave harm in the future is made because, as Radzinowicz and Hood point out, even the most rigorous attempts to do so have been incorrect in more than half the cases. (Radzinowicz & Hood, 1981, p.758). Nevertheless the commission of such an inevitable error can be justified by the proposition that being wrong in imposing a sentence on an offender is outweighed by the risk of allowing that person ever to cause harm to innocent victims.

Notwithstanding this justification, the problem of predicting when a person may be dangerous remains unsolved, and this becomes particularly evident when clinical and statistical studies are examined. Thus the confusion in identifying dangerous offenders continues and manifests itself in the sentencing process.

Therefore there have been numerous proposals calling for the abandonment of the use of prediction altogether and for the limitation of the criminal disposition to one of "just desserts" for the crime committed. However, as there is no workable alternative, the prediction of criminal behaviour is likely to remain an essential part of the criminal justice system.

8.5 Dangerous Offenders in the Iraqi Penal Code

The Iraqi legislature has not distinguished between dangerous and petty offenders because it seems that it was sufficiently satisfied with the discretionary power given to the judiciary in Clause 139 of the Iraqi Penal Code, which deals with the recidivist. This brings the aim of the Code closer to the retributive concept much more than the utilitarian one, as it punishes the offence in

proportion to its nature and gravity rather than for the purpose of preventing future harm to potential victims.

The situation regarding the treatment of the dangerous offender in the Iraqi Penal Code is such that, it could be argued, the discretion given to the judges is too wide and this results in the imposition of sentences that are harsher than necessary. This wide discretionary power, in particular, has the effect of causing a contradiction in terms between Clause 87 (as amended) and Clauses 136(2) and 140, because whereas the former limits the maximum term of imprisonment to twenty years, the latter give the Courts the discretion to increase this maximum by five years.

Further discretionary power has been given to the judiciary by Article 326 of the Criminal Procedure Act No 23 of 1971, where there is an authority to impose a protective sentence in the form of either a bond for good behaviour or preventive detention. This approach, it is submitted, is unsound because it is against the principle of the validity of a crime, the principle of justice, the policies of most modern criminal policies, and it only serves to reduce the offender's self-confidence whilst increasing his anxiety and sense of hopelessness.

In view of the inadequacies evident in the legislation dealing with the dangerous offender, the conclusion reached was that there is a need to introduce legislation which is compatible with contemporary needs. It is hoped that the proposals put forward in this chapter will serve as a guide for any such legislation in respect of the dangerous offender.

8.6 Extra Measures

Following the theme of the way in which the Iraqi Penal Code deals with the dangerous offender, the extra measures found in English law for the treatment of such an offender were examined.

The application of these extra measures by the Courts shows how the judiciary perceive the notion of dangerousness. Recent cases have shown a more lenient attitude towards dangerousness than that found in the enforcement of the Iraqi Penal Code. Although the approach of the Iraqi legal system may be said to be harsher, it could be argued that it is more effective than its English counterpart in dealing with the dangerous offender. Both the Iraqi and English legislatures have failed to define clearly the concept of dangerousness, and in doing so they have left the concept to be defined by the Courts, which either find it difficult to apply or easy to misapply.

8.6.1 Life Sentencing

One of the extra measures used by English Courts to deal with dangerous offenders is the penalty of a life sentence.

Recognition of its usefulness as a protective measure for dealing with the dangerous offender has not achieved a consensus of opinion in its favour. In addition, the criteria used by the Courts in practice for imposing a life sentence still lacks accuracy, clarity and a convincing explanation as to why it is the appropriate legal cure for the dangerous offender or patient.

8.6.2 Determinate Sentencing

Another type of extra measure is that known as determinate sentencing. The general principle for imposing a sentence is supposed to be that the Court should not impose a sentence on grounds of dangerousness longer than the normal one, but it is clear from case law that determinate sentences have been passed in greater lengths than they would otherwise have been. This has occurred as a result of the Courts' estimation of the probability of the offender's capability to commit or repeat a serious offence.

Nevertheless a comparison of indeterminate sentencing with determinate sentencing shows the latter to be more advantageous than

the former. This is because, with indeterminate sentencing, the offender has no release date to look forward to and this may lead to a feeling of worthlessness and depression. On the other hand, determinate sentencing, however lengthy, will always have a period of termination to which the offender can look forward to. Furthermore, determinate sentencing is preferable to indeterminate sentencing because it is more humane for the offender to know how long he will be deprived of his liberty.

8.6.3 Extended Sentencing

Extended sentencing is another extra measure; it is one exercised for the protection of the public and it allows the judge to deal in a special way with the persistent offender.

As a result of the many problems found in its application on the one hand, and the availability of the discretionary power to prolong the original sentence of the offender on the other, the Courts have been discouraged in the use of such sentencing.

The upshot of this is that extended sentencing has petered out during the last few years and it no longer appears in the official statistics. This virtual abandonment of the practice of extended sentencing is in keeping with the view expressed by the Advisory Council on the Penal System, which in 1978 recommended its abolition without any specific replacement.

8.6.4 Hospital Orders and Restrictive Orders

A hospital order is a device for dealing with the mentally disordered offender whilst the restrictive order is one for dealing with the mentally disordered dangerous offender.

The former allows the offender to be admitted to and compulsorily detained in hospital for as long as is necessary for the public's and his own interest. The latter can be added to the

former when a Crown Court regards a mentally disordered offender as dangerous and thinks it necessary to protect the public from him.

The effect of these orders in respect of the mentally disordered offender is such that they aim to cure those who can be cured and to protect society from those who cannot be cured.

However, it is submitted that in order to prevent any abuse of these aims, the detention of the mentally disordered by the above orders should be restricted to the most extreme cases.

8.7 Parole

Although the ideological developments of the concept of parole occurred at very different periods of history in Iraq and England, the time at which the concept was first put into practice in both countries is only separated by a four year gap. The Criminal Justice Act, which implemented the system in England, was passed in 1967, whilst its counterpart in Iraq, the Criminal Procedure Act, was passed in 1971.

With regard to the definition of parole the central concept as it is understood in the two countries is similar (see sections 7.4.1 and 7.4.2).

The legal nature of parole and its direct connection with imprisonment makes it a good method of treating the dangerous offender. The Iraqi legislation acknowledges this important point, but implements it very restrictively by denying parole to wide categories of prisoners on grounds of the gravity and dangerousness of the latter's crimes. In England, a nearly similar policy was adopted after 1983 with regard to parole for dangerous offenders.

The legal nature of parole is such that it changes the way in which a sentence of imprisonment is carried out as the original penalty itself becomes suspended on the conditions stipulated in the parole licence. In England this licence requires the offender to

place himself under the direction of a supervisor, whilst in Iraq the offender will be placed under the supervision of the Public Prosecutor. The licence may be revoked at any time if the offender fails to comply with the conditions of the licence or if his behaviour in any way gives cause for concern.

The three elements in the selection procedure for parole are :

a) A Local Review Committee in England, and the prison administration in Iraq;

b) The Secretary of State in England, and the Courts of Misdemeanour in Iraq;

c) The Parole Board in England, and the Public Prosecutor in Iraq.

It is essential for these three bodies to work in harmony in their common task to select all those who merit an early release. The ultimate responsibility for release in England rests with the Home Secretary who is responsible to Parliament for the parole system.

The same responsibility rests with the Courts of Misdemeanours which are responsible to the Court of Appeal.

Unlike England, the whole selection procedure in Iraq can be seen as a routine process (Jenaih, 1981, p.235). This may be attributed to the heavy reliance of the prisons' administrators on the discretionary power of the Courts as they constitute the final authority for the granting of parole. The lack of clear and practical criteria for the selection process also makes it a routine and inaccurate one. The Home Secretary's statement in 1983, which indicated a policy for the exercise of administrative discretion in determining a prisoner's dangerousness, is close in spirit to that adopted by the Iraqi Criminal Procedure Code 1971, section 331(D)(10), which indicates a policy for the use of the Courts in deciding a prisoner's dangerousness.

In spite of all the advantages of the parole system as a device for treating dangerous and non-dangerous offenders, it is difficult to say whether parole in its present form should continue. It seems more appropriate to say that there is room for further research, especially in Iraq, for reform as a means of developing parole into a successful device for dealing with offenders.

8.8 Proposals for the Reform of Iraqi Criminal Law

(1) In any new criminal legislation, provisions should be such as to enable a judge to take into account:

i) the motive for a crime and the nature of the criminal;

ii) any previous criminal convictions and their nature, together with the conduct and background of the criminal prior to the crime;

iii) the present and subsequent conduct of the criminal leading to the crime;

iv) the individual, his family and his social status.

(2) The legislature should temper a judge's discretion and effect a compromise power which respects both the defendant's and the victim's rights, by compelling the judge to give reasons when imposing severe sentences. This would reduce his wide discretionary power of punishment, but at the same time it would allow him to act with flexibility to the extent that he would still maintain the essential discretion necessary to sentence fairly.

(3) The assessment of punishment should be in conformity with an ascending or descending scale of criminal dangerousness so as to enable it to be applied in proportion to the gravity of the crime committed.

(4) The present Penal Code, being full of contradictory elements, is incompatible with modern criminal policy as well as the present Iraqi social policy; therefore there is a need to replace the Code with legislation that is more compatible with contemporary needs in respect of the treatment of the dangerous offender.

As such any new legislation should take into account the bases relating to the treatment of the dangerous offender, discussed in section 1.4.

(5) With regard to parole applications, the Courts charged with examining these base their decisions on, arguably, unreliable information; therefore it is submitted that a more careful consideration of each case would better enable them to reach a just conclusion before refusing or granting such an application.

(6) Furthermore, according to what has been discussed about the three stages of parole selection in section 7.6.2, it is submitted that an applicant for parole should be permitted to be present during the discussion of his case in Court in so far as his legal representative is allowed to be present at such a discussion without any objection from the judiciary.

(7) The wide exceptions covered by section 331(D) of the Criminal Procedure Code should be abolished because it in effect denies the benefits of parole to applicants irrespective of whether or not they deserve it; as an alternative the discretion of the judges should be enhanced so as to enable them in each case to decide whether or not the individual merits parole.

References

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APPENDIX 1

Rules for Preventive Detention made pursuant to the Prevention of Crime Act, 1908

177. - The arrangements prescribed or approved by the Prison Commissioners under these Rules shall be such that the treatment of a prisoner (other than a prisoner in the penal grade) shall be in no way less favourable than under the rules applying to him while serving his sentence of penal servitude.

Privileges

178. - Arrangements shall be made by the Commissioners, under which every prisoner may become eligible, subject to such conditions and limitations as the Commissioners may prescribe, to earn all or any of the following privileges:

(a) A money credit for work done, at such rates as the Commissioners may from time to time prescribe;
(b) Facilities for using any money credit to such extent and in the purchase of commodities of such kinds as the Commissioners may from time to time approve;
(c) Opportunities for association, not only during working hours but at other times, with suitable facilities for education and recreation;
(d) Facilities for reading newspapers and other periodical publications;
(e) Facilities for smoking;
(f) Additional facilities for writing and receiving letters and for receiving visits.

Diet

179. - Subject to the provisions of Rule 177, the diet shall be such as the Commissioners may from time to time prescribe.

Penal Grade

180. - A prisoner who is idle or careless in his work, misconducts himself, or is known to be exercising a bad influence on other prisoners or to be making himself objectionable to them, may be placed in a special grade to be known as the Penal Grade, and while he remains in that grade he shall not be eligible for any privileges under Rule 178.

181. - Prisoners in the Penal Grade may be located in a separate part of the prison, but shall not be excluded from association at labour unless this is necessary for preserving discipline and order.

Offences Against Discipline

182. - (1) All or any of the following awards may be made, in addition to those allowed by the General Rules, by the Board of Visitors or any one of them, or by a Commissioner:

(a) Transfer to the Penal Grade for such period as may be considered necessary;
(b) Forfeiture of money that may have been credited to him under Rule 178 (a);
(c) Forfeiture, restriction or postponement of other privileges obtainable under Rule 178.

(2) All or any of the foregoing awards may be imposed on a prisoner by the Governor, subject to such limits as may be prescribed by the Commissioners:

Provided that no prisoner shall by order of the Governor be kept in the Penal Grade for more than three months unless such order has been confirmed by the Board of Visitors or by a Commissioner.

183. - Any award made under Rule 182 may be terminated at any time by the authority by whom it was made.

Advisory Committee

184. - The Advisory Committee appointed under Section 14(4) of the Prevention of Crime Act, 1908, shall meet at the prison at least once a quarter; and as occasion arises shall make such individual reports on prisoners as will assist the Commissioners in advising the Secretary of State in regard to the discharge of such prisoners on licence.

Discharge

185. - On a prisoner's discharge any money which has been awarded to him under these rules and is standing to his credit shall, unless the Commissioners otherwise decide, be transferred to the society or person under whose supervision he is placed to be expended or to be held for his benefit at the discretion of such society or person.

Return to Preventive Detention

186. - Any prisoner whose licence is revoked or forfeited shall, on his return to Preventive Detention be placed in the Penal Grade and kept therein for such length of time as the Advisory Committee shall consider necessary.

Earnings

225. - (A)(1) Every prisoner not in the Penal Grade shall be eligible for earnings, and on the commencement of his sentence of preventive detention will receive 1s.

(2) The payment of earnings, provided that a prisoner is medically fit for work, will be made in accordance with (a) a basic rate, and (b) a party rate.

(3) Basic rates will be as follows:

During the first year	1s.3d. per week
During the second year	1s.8d. per week
During the third and subsequent years ..	2s.Od. per week

Time spent in the Penal Grade will not count.

(4) Party rates will vary according to the party and the amount of work performed. The minimum party rate will be 3d. per week, and the maximum 1s. per week (now altered to 1s.6d per week in accordance with a recent prison-wide 50 per cent increase of earnings).

(5) (Relates to payment when ill.)

Association, Recreation and Newspapers

225. - (B)(1) Prisoners not in the Penal Grade may be permitted to associate at meals and in the evening. They will be eligible for classes and lectures. Games, as approved by the Commissioners, will be permitted.

(2) In addition to the newspapers provided out of public funds for the use of prisoners in association, prisoners not in the Penal Grade will be allowed to purchase any periodical approved by the Commissioners, provided that after a prisoner has been in possession of such periodical for a reasonable time, it will be at the disposal of the prison authorities.

(3) It is within the discretion of the governor to allow papers to be taken into cells or to be left in the association rooms.

Visits and Communications

225. - (D)(1) Every prisoner not in the Penal Grade shall be entitled, after the first four weeks of his sentence, to write and receive a letter, and to receive a visit, once a week.

(2) A prisoner in the Penal Grade shall be entitled, after two months in the grade, to write and receive a letter and to receive a visit once in two months.

(3) Subject, in the case of visits, to the convenience of the prison administration, a prisoner shall be entitled to write and receive a letter, and to receive a visit on any day in the period applicable to his case, irrespective of the date of the last letter or visit.

(4) In lieu of a visit in any period, a prisoner shall be entitled to write a letter and to receive a reply, or to receive a letter and write a reply to it.

Special Store

225. - (E)(1) The Governor will submit to the Commissioners a list of commodities to be sold at the store, together with tenders for the supply, in order that the prices to be charged to the prisoners may be fixed and approved. Purchases will be effected by means of demands filled in and signed by prisoners which will be retained and recorded at the store.

(2) Prisoners not in the Penal Grade may be allowed to purchase pipes, tobacco and other approved articles in the store.

APPENDIX 2

THE PRISON RULES, 1949 (S.I. 1949, No. 1073)

Special Rules for Prisoners Sentenced to Preventive Detention

160. - A sentence of preventive detention shall be served in three stages in accordance with the eight following rules.

First Stage

161. - (1) The first stage shall be served either in a regional prison ... or in a local prison, and shall be for not less than one year nor more than two years.

(2) A prisoner in the first stage shall be treated in all respects under the rules applicable to prisoners serving a sentence of imprisonment.

162. - The Governor of the regional or local prison shall report to the Commissioners on the expiration of the first twelve months of the sentence, and thereafter at such intervals not exceeding three months as the Commissioners determine, on the suitability of the prisoner for removal to the second stage.

Second Stage

163. - The second stage shall be served in a central prison and the arrangements in this stage shall be such that the treatment of a prisoner (other than a prisoner in the penal grade) shall be not less favourable than that of a prisoner serving a sentence of imprisonment in a central prison.

164. - Prisoners serving sentences of preventive detention in a central prison shall so far as practicable be accommodated in a separate part of the prison and shall not be allowed to associate with prisoners serving sentences of imprisonment except in the course of industrial or agricultural employment.

165. - Arrangements shall be made under which a prisoner who has passed into the second stage may become eligible to earn privileges over and above those allowed to a prisoner serving a sentence of imprisonment, including:

(a) payment for work done at a higher rate,
(b) facilities for spending money earned in prison either at a prison store or on such articles, including newspapers and periodicals, purchased outside the prison as may be approved,
(c) the cultivation of garden allotments and the use or sale of the produce in such manner as may be approved,
(d) the practice in the prisoner's own time of arts or crafts of such kinds and in such manner as may be approved,
(e) additional letters and visits,
(f) association in common rooms for meals and recreation.

Third Stage

166. - (1) The question whether a prisoner in the second stage shall be admitted to the third stage, and the date of his admission, shall be decided by the advisory board established under Rule 171:

Provided that the date of admission of any prisoner to the third stage shall not be more than twelve months before the date on which he will have served two-thirds of his sentence.

(2) The advisory board, when a prisoner is brought before them under paragraph (1), shall consider not only his conduct in the second stage, but whether they expect to be able, within the period to be served in the third stage, to recommend his release on licence.

(3) Where the advisory board defer their decision under paragraph (2), the case shall be reconsidered at intervals of not less than three months.

167. - The period to be served in the third stage shall not in any case be less than six months and shall not normally exceed twelve months.

168. - (1) The third stage shall be designed both to fit the prisoner for release and to test his fitness therefor, and may be served in such conditions of modified security as are available for the purpose, whether in connection with a central prison or elsewhere.

(2) During this stage every effort shall be made, by special industrial and social training and otherwise, to fit a prisoner to take his place in normal social life on discharge.

(3) As and when suitable arrangements can be made, prisoners in this stage, or in the latter part thereof, may be permitted to live in conditions of modified security designed to form a transition from prison life to freedom.

(4) The advisory board may at any time order the return of a prisoner to the second stage if it appears to them to be in the interests of himself or of others to do so, and the Governor, if he considers it necessary, may so order in his discretion subject to confirmation by the board at its next meeting.

(5) The intention of paragraph (2) of this Rule shall so far as practicable be carried out for prisoners who are not selected for the third stage during the last period of six to twelve months before their date of release on licence under Rule 172.

169 and 170. - Provisions as to Discipline, and the Penal Grade as a punishment for prison offences.

Release on Licence

171. - (1) The board of visitors shall consider the character, conduct, and prospects of every prisoner serving a sentence of preventive detention, and shall report to the Commissioners on the advisability of his release on licence.

(2) For this purpose the board of visitors shall be assisted by an advisory board consisting of three members of the board of visitors approved by the Secretary of State, and such other persons not exceeding four, of whom one may be a Commissioner or Assistant-Commissioner, as the Secretary of State may appoint. The chairman of the advisory board shall be appointed by the Secretary of State.

(3) The advisory board shall meet at the prison at least once a quarter.

172. - (1) Every prisoner, whether or not he is admitted to the third stage, shall be eligible for release on licence when he has served five-sixths of his sentence of preventive detention.

(2) A prisoner admitted to the third stage shall be eligible for release on licence, subject to the provisions of this Rule, when he has served two-thirds of his sentence of preventive detention.

(3) The advisory board shall at each quarterly meeting consider the case of every prisoner who has served three months or more in the third stage, with a view to recommending his release on licence within three months thereafter if they are satisfied, having regard to his conduct in the third stage and his prospects on release, that there is a reasonable probability that he will not revert to a criminal life.

(4) Where a prisoner has under paragraph (4) of Rule 168 been returned to the second stage, and has again been placed by the advisory board in the third stage, he shall be considered for the purpose of release on licence as if he had entered the third stage for the first time.

(5) The Governor shall at once report to the Commissioners any circumstances arising in the case of a prisoner in whose favour a recommendation has been made which may affect their decision on that recommendation, and may if necessary remove the prisoner to the second stage pending the Commissioners' decision.

Orders of Recall

173. - (1) A prisoner who has been recalled from release on licence shall on his return to prison in consequence of such recall be placed in the first stage, and may at the discretion of the Commissioners be removed to the second stage within a period of twelve months from his return to prison as aforesaid:

Provided that if the unexpired period of the sentence is less than two years, the whole of it may be served in the first stage.

(2) A prisoner who has been recalled shall not again be eligible for release on licence before he has served five-sixths of the unexpired portion of his sentence and, if that period is completed in the first stage, the question whether he shall be released on licence shall be decided by the Commissioners on a recommendation of the Governor of the local prison.

APPENDIX 3

The Use Made of Sentence of Preventive Detention by the Courts

The extent to which the courts have made use of the sentence of preventive detention since the 1948 Act is shown below.

Number of offenders sentenced to Preventive Detention

	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961
After conviction at quarter sessions/ assizes	192	184	170	207	189	213	152	137	171	160	166	171	190
After conviction at magistrates' court and committal under S.29 M.C.A. 1952	52	37	41	33	48	55	45	39	44	29	49	43	47
Total	244	221	211	240	237	268	197	176	215	189	215	214	237

Source: Hammond & Chayen, 'Persistent Criminals', 1963, p.3.

APPENDIX 4

Offences Against the Person

Common law offences:

1. Murder or attempts thereat
2. Manslaughter
3. Causing an affray
4. Kidnapping

Offences against the Person Act 1861:

5. Wounding with intent to do grievous bodily harm (s.18)
6. Unlawful wounding or inflicting of grievous bodily harm, with or without any weapon or instrument (s.20)
7. Conspiracy or incitement to murder (s.4)
8. Attempting to choke, etc, or using chloroform, etc, with intent to commit an indictable offence (ss.21-22)
9. Administering poison, etc, so as to endanger life with intent to injure (s.23)
10. Causing bodily injury by explosives or causing explosions, etc, (ss.28-29)
11. Setting man-traps, etc, with intent (s.31)
12. Doing certain things with intent to endanger railway passengers (ss.32-33)
13. Attempts to procure abortion (ss.58-59)
14. Abandoning or exposing children under 2 years (s.27)
15. Assault occasioning actual bodily harm (s.47)

Explosive Substances Act 1883:

16. Causing explosions likely to endanger life but not necessarily with intent to do so (s.2)
17. Making or keeping explosives with intent (s.3)
18. Making or possessing explosives under suspicious circumstances (s.4)

Hijacking Act 1971:

19. Hijacking aircraft (s.1)

Protection of Aircraft Act 1973:

20. Destroying, damaging or endangering aircraft (ss.1-3)

Firearms Act 1968:

21. Use of firearms to resist arrest (s.17)
22. Carrying firearms with criminal intent (s.18)
23. Trespassing with a firearm (s.20)

Infant Life (Preservation) Act 1929:

24. Child destruction, ie, destruction of a foetus capable of being born alive (s.1)

Infanticide Act 1938:

25. Infanticide (s.1)

Children and Young Persons Act 1933:

26. Child cruelty, neglect, etc (s.1)

Theft Act 1968:

27. Robbery (s.8)
28. Blackmail (s.21)

Criminal Damage Act 1971:

29. Arson (s.1)
30. Criminal damage with intent to endanger life (s.1)

Sexual Offences

Sexual Offences Acts 1956 and 1967:

31. Rape (s.1)
32. Incest (s.10)
33. Buggery with a boy under the age of 16 years or with an animal (s.12)
34. Buggery under other circumstances without consent (s.12)

35. Buggery under other circumstances with consent (s.12)
36. Sexual intercourse with a girl under 13 (s.5)
37. Sexual intercourse with a girl under 16 (s.16)
38. Indecent assault on female (s.14)
39. Indecent assault on male (ss.15-16)
40. Man living on earnings of prostitute (s.30)
41. Woman controlling prostitutes (s.31)

Indecency with Children Act 1960:

42. Gross indecency towards a child under 14 years (s.1)

Property Offences

Common law:

43. False statements relating to income tax

Theft Act 1968:

44. Aggravated burglary (s.10)
45. Burglary (s.9)
46. Theft (s.7)
47. Obtaining by deception (ss.15-16)
48. Falsifying accounts (s.17)
49. Handling or receiving stolen goods (s.8)
50. Removal of articles (eg, works of art) from public places without authority (s.11)
51. False statements by company officers to deceive members or creditors (s.19)
52. Destruction or concealment of certain documents for gain (s.20)

Forgery Act 1913:

53. Forgery or uttering forged document (ss.2,3,6)
54. Demanding property on forged document (s.7)

Criminal Damage Act 1971:

55. Destroying or damaging property (s.1)
56. Threats to destroy or damage property, eg, bomb hoax (s.2)

Malicious Damage Act 1971:

57. Exhibiting false signals to ships with intent (s.47)
58. Obstructing, etc, railway with intent to obstruct, etc, anything using the railway (s.35)
59. Unlawfully obstructing railway (s.36)

Prevention of Fraud (Investment) Act 1958:

60. False or misleading statement to induce investment (s.13)

Protection of Depositors Act 1963:

61. False or misleading statement to induce deposits (s.1)

Customs and Excise Act 1952:

62. Improper importation of goods (s.45)
63. Improper exportation of goods (s.47)
64. Untrue declarations to customs (s.301)

Coinage Offences Act 1936:

65. Counterfeiting coins (s.1)
66. Uttering, etc, counterfeit coin (s.5)

Drugs Offences

Misuse of Drugs Act 1971:

67. Importation or exportation of controlled drugs (s.3)
68. Production or supply of controlled drugs (s.4)

Driving Offences

Road Traffic Act 1972:

69. Causing death by reckless or dangerous driving (s.1)
70. Reckless and dangerous driving (s.2)
71. Driving when unfit through drink or drugs (s.5)

Miscellaneous Offences

Common law offences:

72. Fabrication of false evidence with intent to deceive a judicial tribunal

73. Effecting a public mischief or conspiracy to do so (eg, disseminating false information with intent to cause alarm)

Criminal Law Act 1967:

74. False report to police tending to show that an offence has been committed or giving rise to apprehension for the safety of persons or property (s.5)

Perjury Act 1911:

75. Perjury (s.1)

76. False declarations and statements in other than judicial proceedings (ss.2-6)

APPENDIX 5

A List of Grave Harms in the Iraqi Penal Code

1. Offences against the external security of the state (ss.156-189)
2. Offences against the internal security of the state (ss.190-222)
3. Grave harms against official institutions of the state (ss.223-228)
4. Assaults against government officials and civil servants (ss.229-232)
5. Harm against the due process of criminal justice (ss.233-242)
6. Grave harm resulting from falsifying information and failing to disclose information (ss.243-247)
7. Deceiving the criminal justice system (ss.248-250)
8. Grave harm resulting from false evidence (ss.251-255)
9. Harm resulting from perjury (ss.258-259)
10. Unlawful assumption of rank or office (ss.260-261)
11. Breaking of seals and abstraction of documents (ss.263-266)
12. Prisoners and detainees escaping; assisting prisoners and detainees to escape; harbouring escaped prisoners/detainees (ss.267-273)
13. Counterfeiting and falsification in public matters (ss.275-299)
14. Destruction of documents containing or constituting an obligation (ss.300-303)
15. Grave harm against the national economy (ss.304-306)
16. Grave harm as a result of corruption (ss.307-313)
17. Criminal conversion of property and breach of trust (ss.315-341)
18. Arson and use of explosives (ss.342-348)
19. Death and grave harm resulting from wilful flooding (ss.349-353)
20. Grave harm to transportation (ss.354-359)
21. Offences against wire and wireless communications (ss.361-362)

22. Death or grave harm resulting from wilful damaging, by any means, of safety warnings used to protect labourers in the workplace (s.367)
23. Death or grave harm resulting from offences against public health (ss.368-369)
24. Harms resulting fom adultery and bigamy (ss.376,377,380,385)
25. Harms resulting from offences against a newly born child, and children who have not reached the age of 15 years (ss.381,383)
26. Sexual offences (ss.393-397,399)

Offences Against the Person

27. Homicide (s.405)
28. Aggravated homicide (s.406)
29. Incitement to suicide (s.408)
30. Causing death with intention only of causing bodily harm (s.410)
31. Unintentional homicide or manslaughter (s.411)
32. Unlawful wounding or inflicting of grievous bodily harm (ss.212-213)
33. Death or grave harm resulting from abortion (ss.417-419)
34. Death or grave harm resulting from kidnapping (ss.421-425)
35. Intimidation: threats (ss.430-431)

Property Offences

36. Theft offences (ss.440-446)
37. Extortion of documents, money or other articles (ss.451-452)
38. Cheating (ss.456-459)
39. Handling or receiving property obtained by means of an offence (s.460)
40. Wilful destruction or damage of property (ss.477-479)

APPENDIX 6

Criminal Justice Act 1982

SCHEDULES

Section 32 SCHEDULE 1

OFFENCES EXCLUDED FROM SECTION 32

PART I

OFFENCES MENTIONED IN SECTION 32(2)(a)

1. Manslaughter.
2. Rape.
3. Kidnapping.
4. Assault (of any description).
5. Riot.
6. Affray.

PART II

OFFENCES MENTIONED IN SECTION 32(2)(b)

MALICIOUS DAMAGE ACT 1861 (c.97)

1. Sections 35, 47 and 48 (criminal damage).

OFFENCES AGAINST THE PERSON ACT 1861 (c.100)

2. Section 16 (making threats to kill).
3. Section 18 (wounding with intent to do grievous bodily harm or to resist apprehension).
4. Section 20 (wounding or inflicting grievous bodily harm).
5. Section 21 (garotting).
6. Section 23 (endangering life or causing harm by administering poison).

7. Section 28 (burning, maiming etc. by explosion).
8. Section 29 (causing explosions or casting corrosive fluids with intent to do grievous bodily harm).

EXPLOSIVE SUBSTANCES ACT 1883 (c.3)

9. Section 2 (causing explosion likely to endanger life or property).

INFANT LIFE (PRESERVATION) ACT 1929 (c.34)

10. Section 1 (child destruction).

INFANTICIDE ACT 1938 (c.36)

11. Section 1(1) (infanticide).

SEXUAL OFFENCES ACT 1956 (c.69)

12. Section 12 (buggery with a male under the age of 16).
13. Section 12 (buggery with a male over 16 without consent).
14. Section 17 (abduction of female by force).

FIREARMS ACT 1968 (c.27)

15. Section 17(1) (use of firearms and imitation firearms to resist arrest).

THEFT ACT 1968 (c.60)

16. Section 8 (robbery).
17. Section 10 (aggravated burglary).

MISUSE OF DRUGS ACT 1971 (c.38)

18. Section 4 (production or supply of a controlled drug).
19. Section 5(3) (possession of a controlled drug with intent to supply it to another).
20. Section 20 (assisting in, or inducing the commission outside the United Kingdom of, an offence relating to drugs punishable under a corresponding law, as defined in section 36(1)).

CRIMINAL DAMAGE ACT 1971 (c.48)

21. Section 1(2)(b) (criminal damage, including arson, endangering life).

ROAD TRAFFIC ACT (c.20)

22. Section 1 (causing death by reckless driving).

CUSTOMS AND EXCISE MANAGEMENT ACT (c.2)

23. Section 85(2) (shooting at naval or revenue vessels).

AVIATION SECURITY ACT 1982 (c.36)

24. Section 1 (hijacking).

25. Sections 2, 3 and 6 (other offences relating to aircraft).

PART III

OFFENCES MENTIONED IN SECTION 32(2)(c)

Offences under sections 50(2) and (3), 68(2) and 170 of the Customs and Excise Management Act 1979 in connection with a prohibition or restriction on importation or exportation of a controlled drug which has effect by virtue of section 3 of the Misuse of Drugs Act 1971.