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QUEEN'S BENCH DIVISION

SIR IGOR JUDGE, PRESIDENT OF THE QUEEN'S BENCH DIVISION

CURRENT SENTENCING ISSUES

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I was very newly in practice at the Bar when I was given my first and I suspect most enduring lesson that sentencing is an art, not a science.

It was Quarter Sessions Grimsby in the late 1960s. A client threw a brick through a shop window and waited for the police to arrive. They came and arrested him. He waited for a criminal charge to cover the damage. At court, he elected for trial by jury and immediately pleaded guilty. It caused problems for the system as my client should, in normal circumstances, have owned up at the Magistrates court. I put in a strong plea about him. The Judge sent him to prison for five years – the maximum sentence.

I was horrified, but my client seemed perfectly at ease with this sentence. He explained that the Judge had understood something which I had not. He had been captured at Dunkirk and had been placed in a POW camp. After he was freed, he was incapable of living life in the community. He would therefore regularly commit a crime that caused as little harm to the victim as possible, which would ensure the police would be called and that he would be sent back to prison. The Judge had understood that he was sending my client back to a place where he was able to live.

This sentence was not merely excessive, it was horrendous. There was no discount for the guilty plea. But it was a merciful sentence. And if it did cost the community a place in prison, hadn't that particular defendant earned it?

All that happened in the late 1960s, and my view ever since, both when in practice, as well as when sitting as a Recorder, and later a judge, is unchanged. You can have your guidelines. You can have the endless – is it now 17, or may be more? – factors which the judge is under a statutory obligation to address. In the end you may be able to sentence a piece of paper by a process which you can colourably describe as scientific. But sentencing a fellow human being is indeed an art, a human skill, a skill in humanity, not a science, and it is this skill, and its application, that is embodied in the possibly pompous sounding phrase, "judicial discretion". Whenever that phrase is used, and the debate is

constant and may well go on again, you need to think of the young barrister, and the sentencing judge at Grimsby Quarter Sessions, and his maximum, but merciful sentence.

That experience at Grimsby highlighted another current problem. That case occurred just after the Criminal Justice Act 1967 had come into force. That was the first Criminal Justice Act since 1948. The next one lay ahead in the early 1980s. We don't do things like that any more.

The tidal wave of criminal justice legislation is relentless, and although it constantly comes in, unlike the tide it never seems to ebb.

My concern here is not just the quantity of legislation, the absence of certainty, the vast increase in complication in the sentencing process. All those things matter. My concern tonight is that it can also produce injustice. An example is the case of *S*. The simple question was whether a defendant was guilty of an offence of failing to register as a sex offender contrary to the 2003 Sexual Offences Act. Any intelligent observer would have been baffled to discover whether there could be any doubt about whether the defendant was or was not guilty of this criminal offence.

For the Court of Appeal to decide the issue, we heard detailed submissions about the legislative provisions in no less than five statutes, the Sex Offenders Act 1997, the statutory provision which was in force when the appellant had pleaded guilty, the Criminal Justice and Public Order Act 1994, which was replaced by section 73-79 of the Crime and Disorder Act 1998, bar an amendment to section 4(1)(a) of the 1997 Act which was contained in paragraph 144 of Schedule 8 to the 1998 Act, the Powers of Criminal Courts (Sentencing) Act 2000, which repealed sections 73-79 of the 1998 Act after they had been in force for just over four months, and finally the Sexual Offences Act 2003. Would you like me to play that again for you?

The problem was so complicated that three judges had to reserve judgment because at the end of the hearing we could not work out whether or not the defendant was guilty. After reserving judgment we concluded that no offence had been committed. Yet this appellant had spent time in custody. This is not a unique example.

And the amount of legislation puts the Parliamentary Draftsman under increased pressure. Shortly before he retired Lord Justice Rose commented:

“If a history of criminal legislation ever comes to be written it is unlikely that the 2003 Act will be identified as a year of exemplary skill in the annals of Parliamentary drafting.”

Your smile is fair enough, but delivered in Lord Justice Rose's characteristically understated, but no less vivid way, he was describing a process by which the court is required increasingly to interpret complicated legislation which ought to be plain. And the very fact that there has to be an argument before the Court of Appeal about what legislation actually means itself demonstrates that there is uncertainty in the criminal justice system,

when above all aspects of the law, the criminal justice system should be certain.

So the sentencing decision made by the judge in court, and the statutory framework which provides the law which he must apply, both impinge on the overwhelming current sentencing issue which John Samuels spoke about. On Friday the prison population was 81,455, of whom 289 were held in police cells. Including the arrangements with the police to use police cells the absolute maximum capacity was 81,617. The prisons are full. Why they are full is another question. As a society, whether we like it or not, we must face the fact that they are full, and focus on reality.

The numbers of juveniles in custody was virtually 2,500 when I looked at the figure or 2,478 as of Friday.
The capacity is 2,859.

Ten empty prison places in Durham may not be very much use when the criminals come from and are convicted in say Kent. Just think of the cost of transport.

And in the context of young offenders, the task of rehabilitation is that much harder if those members of their families who are standing by them, and some do and some sadly do not, cannot get to see them on a regular basis.

We have nearly 26,760 offenders are currently released into the community on licence. Without licensing arrangements, just pause and think, there would be nowhere to keep them. Where would they go?

As at 30th June fractionally over 100,000 offenders who were subject to a community order. If anyone perceives any connection between the statistics of those in custody and on licence, and those on community orders, it is in fact completely coincidental.

Now, for today's purposes, I am not advocating, I repeat, I am not advocating that the prison population should be increased or that it should be reduced, nor indeed that it should remain static.

That is not my theme tonight. My essential theme is that we must be taking a strategic view of these issues, thinking long term. What I am encouraging this audience to do is to think, and to encourage others to think, about issues which have become obscured by political rhetoric, and indeed a general approach to sentencing issues which implies that some goodies, or baddies, depending on your point of view, are "tough" on crime, and others, again, goodies or baddies depending on your point of view, are "soft" on crime.

To those who like it, "tough" implies strong-minded, robust sentencing, or, to those who do not, it is said to be wild excessive sentencing imposed ignorant of the social deprivation and emotional damage to which many offenders were subjected in their early years. "Soft" implies soggy, woolly, liberal-minded sentencers, ignorant of the deprivation and emotional damage suffered by the victims of crime.

The same sentencers, and their “soft” sentences, are thought by others to be balanced, and careful, seeking to ensure the rehabilitation of the offender, to the advantage of the community. Some sentences of course we have to accept are just plain wrong, either too ‘tough’ or too ‘soft’, but proportionate to the number of sentences imposed overall, they are a very small proportion.

There is so much more to it than that, and like so much that is written and spoken about the sentencing process, these epithets are misleading. First and foremost, the sentencer is administering justice. But tempering justice with mercy is a concept which we know about in literature, in the very Bible itself, along with the “eye for an eye, and tooth for a tooth”. Every Christian of whatever denomination, saying his or her prayers, asks for forgiveness for his own trespasses, “as we forgive those who trespass against us”. Is that merely an incantation? Or is it a prayer that means something? Incidentally, and in passing, as a salutary admonition to those with power and influence, and that includes judges, politicians, and newspaper editors, I cannot resist my current favourite quotation from Shakespeare (*Measure for Measure*, Act two, Scene two):

Isabella says:

“How would you be, if
He, which is the top of judgment, should
But judge you as you are? O, think on that;
And mercy then will breathe within your lips.”

The admonition in that passage, although it is not the whole of Isabella’s theme in *Measure for Measure*, is not that mercy should out-trump justice, but that each and every one of us is a fallible human being. In the end, we all need forgiveness for our mistakes.

Our sources of information about the sentencing process are taken directly from the newspapers we read and the television we watch. The same facts can produce astonishing results. You might wonder if the newspapers were being published in the same country.

To make my point, two newspaper cuttings.

This is an old theme of mine. This week I see from a headline that there has been an increase of 36% in the serious crimes committed by offenders released on licence. My focus is the headline, not as it turns out whether or not the figures on which it was based may be open to question. I do not seek to diminish the seriousness of the crimes which were committed, nor their impact on the victims of them, but the headline might equally have read: 83 serious crimes committed by freed prisoners. 83 is too many, but the impact of the headline on the reader might be rather different. Yet both would be entirely reflective of the statistics, and statistically speaking entirely correct. In general, our information system is not good, and because of it, I believe there is an increasing fear of crime and an increased demand for more severe punishment for criminals. I have said it before and I say it again.

The wide perception that crime is burgeoning is a matter of perception certainly, but in this context perception, whether actually right or not, is itself a crucial fact. The fear of crime is socially destructive.

We can all think of examples of the consequences. The elderly man or woman will, because of the fear of crime, lock himself or herself into their homes at dusk. Summertime ended yesterday. The house will be locked from 4.30pm onwards and earlier as we move into the winter months. Effectively, their homes become prisons, or fortresses. Imagine going to bed every night from 4.30pm frightened if you hear a knock on the door, frightened of what might happen to you. That is no way to face the closing your days of your life.

And it happens at the other end of life. Parents become increasingly protective of their children. This is perfectly natural, and although the majority of abuse of children takes place in their homes, if you believe that there are endless nasty men, and for effective purposes it will always be men, who may interfere and abuse your children when they are out at play, of course you would not let them out of your sight for a moment. But, and it is a very important but, if that is necessary, we must not pretend that the child or children will not be deprived of something very precious, if they are constantly under the eyes of their parents, constantly being driven from their own little fortress, in a four wheeled fortress, to the fortresses of their little friends. As parents, we want our children to grow strong wings with which in due course to fly from the nest towards whichever destination will fill their own dreams. You cannot learn to fly if you stay stuck in the nest.

There are yet further issues of perception which would make a lecture on their own. I want to address the way in which the information based on criminal justice statistics as interpreted for us by our media and our politicians on all sides, contributes to short term thinking. I should perhaps emphasise that I am not making any party political points. I am simply reflecting what I read in my newspapers. Statistics are produced over very short periods. They are immediately culled to find statistics which the government of the day can present as illustrative of the government's general control, grip, and toughness on crime, and they are equally mined by the other political parties, for statistics which demonstrate that the government has lost control, and is woefully inadequate in its handling of crime. That is part of the political process.

My reflection is that it is as absurd to credit the government with some improvement in statistics over a six month period as it is to criticise the government for some deterioration. Criminals do not operate in six month cycles, nor twelve month cycles, nor even three year cycles. And, if we wish to examine trends, and extrapolate any conclusions from them, we need to be looking at periods of 5 years or 10 years or even longer, and we must examine them in the context of the demographic graph, that is in particular, the number of young men aged between 17 and 23 at any given time. It is a fact that this age group commit a vast proportion of our crime. Perhaps the young men start a little younger these days. It may follow that when there are more of them about, crime is likely to increase.

No doubt the political rhetoric is at least partly based on the very simple fact that the statistical information will be published, and interpreted – see the newspaper cuttings I showed you – so everyone needs to be alert to put the best gloss on the statistics that suits his or her point of view. But the arguments, which largely turn on the question whether the government of the day, or the opposition, is to be trusted to be tough rather than soft on crime, obscures another reality.

Our prison population in June 1995 stood at just over 51,000. At that time there were ample prison places to accommodate them all. As at July 2006, the projected prison population at the end of June that year, based on the relevant Home Office Bulletin, Prison Population Projections 2006-2013, showed that by 2009, that is some 2 ½ years away, on the highest projection the population would stand at just under 90,000, at the lowest at over 83,000, with a median projection at 86,000. If my memory is right, and I haven't checked the point, in the last 15 years, the low projection has always been exceeded. Contemplate this. The notional average cost of a prison place each year is £35,000: for juveniles it is approximately £40,000. Ignoring any rise in this cost, ignoring any prison building plan (although the last new prison, providing 300 places, cost £22 million), ignoring the cost of licence and community orders, you can calculate for yourselves the cost of keeping prisoners in custody. And of course it will be set to rise.

Again, I am not making any comment in this lecture whether we should spend more or less than the vast sum we do on the implementation of custodial sentences. What I am pointing out is that it is a vast sum, and it is public money, the taxpayer's money, which is being spent. And it comes from the overall tax fund, which pays for our hospitals, our schools, our roads, our defence, our police. How much are we prepared to spend from limited resources? Prisons do not build themselves, prison officers need to be paid, running prisons costs money. Community Orders involve great efforts by those responsible. All this involves resources. We all want the best, the very best, the Rolls Royce health services, education, transport, national security and the prevention of crime. To say we are prepared to spend "as much as it takes" on each and every one of these priorities is not an answer which recognises the realities. Someone has to choose. There has to be an order of these priorities. We have elected Parliament to decide them for us.

Surely the time has come when the potential cost of every piece of criminal justice legislation bearing on sentencing should be subject to the best estimate that can be made of cost, and the impact on the prison population and on Community Orders and made public in the course of the legislative process. From the public point of view, it would be helpful to know whether a new sentencing proposal would cost the equivalent of, say, two new hospitals, or three new schools, or a new motorway, or appropriate defensive clothing for our police and our armed forces. That would give the debate about sentencing a more realistic perspective, and enable the public to reflect on its own view of priorities. In short, the resource issue should surely now be included in any informed discussion about what we as a community want from the process of sentencing in the courts.

We must have prisons: we must have rehabilitation services. Appropriate punishment must be imposed. For judges, public protection against serious crime comes first. Sometimes where it can be achieved, rehabilitation itself provides the significant form of long-term public protection.

And is it just beyond our wildest imagination that we might, as a society, and adapt the phrase made famous by Willie John McBride's Lions in South Africa, get our rehabilitation in first? By that I mean, that as a society we should recognise the reality that the vast majority of offenders, and the vast majority of crimes are committed by those who have had a dreadful start in life. No real family life. No loving discipline. No understanding that actions have consequences. No example. No guidance by good example. That is the reality of the lives of most offenders who appear in the Crown Court. And the logical conclusion: for every offender rehabilitated before he starts committing crime, there are the victims of those uncommitted crimes who will not have to endure the consequent pain and distress. In the context of resources, you cannot calculate the value to the victim of a crime which has not been committed. It would not show on the accountant's figures. The truth is that it would be too valuable for that. The essence of the point I am making, and the theme which I have been seeking to address, is in the end perfectly simple.

On sentencing issues we, as a community, must focus on the long as well as the short term view. We need strategy and we need foresight. In fact what we need is wisdom.