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time would be wasted while the accused was kept waiting to hear his fate. To operate the system throughout the country, an army of experts would, I imagine, be required and I doubt very much whether the results would be an improvement on those produced by the present system.

It is important that a body like the Institute should keep alive the problem of the nature and object of the sentence that the judicial officer has to impose. It is obviously a complex subject, not to be disposed of lightly by generalities whether severe or sentimental. If we can reform the convict we certainly should do so; but we should not believe that no one would challenge. But one cannot reform a man by simply willing his improvement. Judge Thatcher, after trying to persuade Huck Finn's father into the paths of virtue and failing, concluded that he could only be reformed with a club; and no doubt in some cases punishment may really improve the convict. But more commonly the apparent improvement will be the result of re-bonding the man's character it may frighten him into conformity. On the other hand it may simply strengthen his rebellious impulses and harden him in his evil ways. Reformation is a great goal, which must never be lost sight of, but in this imperfect world other factors must also be taken into account. The punishment of A in order to deter B, C, and D from crime may be open to moral objections. In theory it is justifiable to exact a man's character it may frighten him into conformity. On the other hand it may simply strengthen his rebellious impulses and harden him in his evil ways.

There is a great field of investigation into the bases of punishment, but the more important problem, I imagine, is to secure the necessary funds to provide the institutions and staff that are required. Given the proper means of punishment or correction there will be no difficulty in getting judges and magistrates to use them. There are many ways of estimating a country's position on the ladder of civilization, but one of the best is to be found in the extent to which it succeeds in conquering crime. If a country's statistics show

in this way, for his offence on the occasion in question may in itself not have been a serious one. But a stage is reached when it seems necessary to protect the law-abiding members of the community against one who, whatever excuses may exist in his past for his previous violation, has become an incorrigible nuisance. It is to meet such cases that the system of declaring a man a habitual criminal was devised. While in theory it has certain merits, in practice it has operated in South Africa with undue harshness, especially in relation to Non-European prisoners. Some judges, who have investigated its working, decline to impose the indeterminate sentence in any case. The system is badly in need of overhauling, after which it is possible that it may become a useful instrument in the control of crime. It is common nowadays to reject the idea of allowing retribution to enter into the infliction of punishment. I believe that this disapproval is, in general, sound. But cases occur in which it is certainly natural and, I think, to some extent justifiable to the lawyer. Judge in South Africa discusses, if he does not dogmatize on, the subject of that branch of modern jurisprudence concerned with the criminal law and its enforcement. If he has suffered any personal loss through crime, that, of course, enhances his authority to speak on the subject.

The first result of this situation is that discussion of crime is usually divorced from an understanding of law in general and of the place of law in human life. This is noticeably so in the field of Native administration. How often has one heard the plaintive cry "There ought to be a law...". In response to many such cries our legislature has been making laws as plentifully as any in the world; and while it rests from June to December, the public servants take up the white man's burden and, with regulations and proclamations more-numerous and prolix than the statutes and ordinances, it carries on the making of laws, not least of those specially affecting Natives.

So the State is amply armed with laws, including the vast array of legislation that makes it a criminal offence for an African to do this or that or to refrain from doing this or that. Yet crime and the activities of law-breakers show no sign of diminishing, nor is the "Native problem" any nearer a "solution". Indeed, if we are to believe our newspapers, every now and then, especially when other news is lacking, whole waves of crime assail our cities, and the Native problem grows bigger with every session of Parliament!

This in turn leads to a clamour that the laws should be enforced against the law-breakers. The public will presumably not be satisfied until it can read in the same newspapers that at least some of the law-breakers have been safely put in prison. Then everyone feels a bit better. But the situation itself is in fact no better; it may even be worse.

It may be worse because this chain of events—crime, clamour, commitment—is a continuous one that has been proceeding now for two or more generations in growing volume. We have now reached a point of time where there is a steady stream of men emerging from prison only to be committed to prison again after
The failure of law to prevent crime can be traced to certain major considerations. First is the current confusion which labels as crime not only serious offences committed by persistent law-breakers but also petty infringements of administrative regulations such as the pass laws. It is, however, imperative to draw a sharp distinction between these two classes of crime because their cause and the nature of the remedy required is quite different. Discussion of African crime will make no real progress if the distinction is kept in mind continuously.

To clarify the issues it is well first to deal briefly with the hard core of serious crime which consists mainly of violence against persons or of the theft of property or of a combination of both. About a third, or more than 8,000, of the total number of people in prison are recidivists, i.e., men who have been in prison before. This fact in itself suggests that the common belief is false that sending a man to prison will in some wonderful fashion cure him of his criminal ways. It is obvious that our present system of sentencing Native to long terms of imprisonment is a grim failure. Its main result seems to be to unfit them for life at large and so ensure their early return to prison. No wonder that there is a steady increase in the number of those receiving the indeterminate sentence of seven years after they have already spent some, perhaps many, years in prison.

Since harsh methods have failed, is it not time that we learned the clear lesson that the history of crime teaches, namely, that more humane and enlightened methods of coping with crime are in actual practice more effective than savage and vindictive methods? No doubt the ordinary man will not believe it, but it happens to be true that when the rigours of punishment are relaxed, crime has not increased.

It is on that ground, not for reasons of soft sentiment, that the former methods are now advocated in every civilized country.

**CRIME IN RELATION TO NATIVE POLICY**

Not that we can simply leave the matter there. The nature and causes of persistent Non-European crime have hitherto received no serious study at all. The legal profession has shown no interest in criminology. Neither the Bench nor the Bar nor the Law Societies in South Africa have ever taken active steps to encourage the study of contemporary crime in either its technical legal or its broader social aspects. Our magistrates have rarely had the advantage of securing that full training or acquiring some knowledge of the social background in the light of which judicial functions are exercised. It should be added that the conditions of their appointment and promotion compare very unfavourably with those prevailing in Britain or pre-war France or pre-Hitler Germany.

Our prison visitors' boards are composed primarily of retired magistrates or others who rarely have the capacity to undertake the research required. Yet they are the only people who now have regular access to prisons, records, case histories, and similar material that must form the basis of any scientific inquiry into crime in this country. Pending a planned crime survey of the type so well done in the United States, there is little that can profitably be said about the features of serious crime that are peculiar to South Africa.

**Petty Offences**

The second main type of crime consists of petty offences against laws and regulations having the force of law. These laws are mainly the result of the form of Native administration that has been devised in South Africa. The largest set of these offences arise under the pass laws, the urban areas legislation, and from the attempt to control the consumption of liquor.

It is in this broad field that the major problem emerges. The root of the matter is that the law is expected to do something which it is far beyond the power of mere law to accomplish. There is in South Africa a deeply rooted tendency to regard law not only as the primary but as the sole agency of social control. This is a fundamental illusion. In no form of society are the laws respected by the common man unless there are also other social forces at work which encourage him to respect the force of law.

In our own European societies these other forces obviously include the home, the family, the school, the neighbourhood, the suburb, as well as the church, the professional or vocational body to which a man belongs, and, not least, the desire to advance in power or wealth since in an acquisitive society none of us is really free from this incentive.

Moreover, we all have some notion of the aims and purposes of the law, especially the criminal law, which we are expected to refrain from breaking. The spectacle of public trials conducted with great care and of benefit of doubt and a regular procedure encourages us in a high degree of confidence that the police will not bring a charge against us successfully unless there is good or even grave reason for doing so. For us the operations of the criminal law are protected by the moral values of the community of which we are members.

Now similar factors were certainly operative in tribal society, a salient feature of which was rigid conformity to law and to the established conventions that were not distinguished from law as we know it. These laws were indeed supported by such a variety of sanctions, direct and indirect, that the Bantu tribesman felt bound to obey them. It was rarely that he resisted this pressure on his mind and conduct.

It is precisely these vital if impalpable factors that are absent from the relation that has now been established between Africans and the law by our present Native policy and by our elaborate network of Native administration. Indeed, nothing measures the magnitude of our failure so clearly as the lawless habits now all too common among a people whose social heritage was marked by such deep respect for law and order.

For even if the police were archangels in blue uniforms, the nature and extent of the petty laws they are now called on to enforce against Africans would alone be enough to create an atmosphere wholly unfavourable to the cultivation of respect for law. To take only the sets of laws and regulations already mentioned—the pass laws, the urban areas legislation, the liquor laws, and the like—these alone constitute an immense range of possible offences, a range so broad that no African can be sure at any time that he is not committing an offence. I make bold to say that the legal position to-day is such that the police can arrest any African walking down the main streets of Johannesburg, the suburb, as well as the church, the professional or vocational body to which a man belongs, and, not least, the desire to advance in power or wealth since in an acquisitive society none of us is really free from this incentive.

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from those which it has traditionally held and which it still holds for most of us. It is this current conception of Native administration as a means of attaining certain ends in Native policy that has led directly to the enactment of a wide range of legislation accompanied by an equally wide range of petty offences whose only effective sanction is at present assumed to be imprisonment. We are thus employing the criminal law and the penal system for purposes they were never designed to serve and do not in fact serve in other countries. And by this abuse of means we have gone far to defeat our own ends.

**Conduct of the Police**

As it happens, however, it is quite apparent to even an untrained eye that the police are not archangels in blue uniforms nor can the criminal law really be regarded as a sure shield designed to protect the property and persons of all races alike from injury or theft. The consequence is that to African eyes the criminal law has no visible merits. They see it not as a shield to protect them but an instrument in the hands of the police to oppress them. If one tries to explain to them the meaning of its underlying principles, such as equality before the law or the rule of law, they will stare incredulously at you and ask how you account for the incident that occurred to a friend last week. You assure them that there is hardly any racial discrimination in our criminal code and its procedure, as passed by Parliament, and they promptly ask you to explain different sentences on black or white for the same type of offence, or the different attitudes adopted by the police to the two races. In a word the attractive legal theories of the jurist are falsified by the daily administrative practice to which Africans are subjected. The political, administrative, and psychological factors we find in race relations in South Africa are regularly reflected in the operation of the law. Indeed, they are assumed, even by legal administrators, who should know better, to be incidental to the natural order of things. To Africans, however, the vagaries of the legal system are not minor incidents but constitute its most vital aspect. For them the daily discriminations of actual practice make nonsense of the classic claim of the common law that justice is colour-blind.

They feel themselves caught in a vast network which has little purpose except to punish and humiliate them. The way they received my little pamphlet, *Africans and the Police*—they wrote me innumerable letters about it from all parts of the country—showed me that many even semi-educated men had no idea that they had any rights at all in relation to the police or that the police were themselves subject to law. In this respect my pamphlet was a complete eye-opener; and I fear that many still believe that I was writing about what the law ought to be, not what it is in theory, if not in fact.

The reaction of at least one Native administrator, who was formerly in the police service, is also worth recording. On receiving the pamphlet he promptly took it to the police to inquire whether such literature could be freely circulated among those for whom it was intended. I gather that he was informed that it is not a criminal offence to offer to Africans legal advice about their rights even in relation to the police!

The immediate consequence of our readiness to put men in prison on the slightest pretext is to blur the distinction I drew between petty and even heinous and crime against one's fellow men on the one hand and on the other mere petty offences against irksome administrative regulations. In our own minds we all recognize this distinction. Parking a car in the wrong place or at the wrong time is an offence known to every motorist; so is driving so recklessly as to cause a pedestrian injury or death. But everyone knows the immense difference between these two motoring "offences" because, for one thing, our criminal law draws a sharp distinction in the degree of punishment meted out to two such offenders. It sends one to prison for twelve months and fines the other twenty shillings. Now it is just this kind of difference which is absent when we send to the same prison an offender against the pass laws and a homicidal burglar.

It is tempting to suggest that we should reconstruc our whole penal code and its procedure in order to distinguish sharply between serious crimes and petty offences.

The great bulk of our criminal law and procedure is based on English law. In the past English law (but not Roman-Dutch law) recognized a considerable difference between felonies or heinous crimes and misdemeanors or petty offences. But the technical difficulties involved as well as the danger of introducing an explicit colour bar in procedure would, I fear, make such a distinction hazardous for our purpose.

It is also tempting to say that the difference between these two types of offences lies in the fact that in serious crime there is an element of moral guilt on the part of the law-breaker and in petty offences there is not. But the temptation to simplify the matter to this extent must be resisted in view of the divided and uncertain view taken by lawyers and courts of the necessity to establish an element of moral guilt in crime.

The fact is that we cannot really count on the lawyers or the courts to detect an element of moral guilt in some crimes and not in others. Where we feel that this difference exists, it is due to our reaction as members of the community in which the offender lives. The courts do usually reflect this feeling in the degree of punishment awarded him. But unfortunately we are not able to devise legal techniques adequate to ensure this desirable result, mainly because circumstances alter cases to an extent that would astonish the inquiring layman.

Unfortunately, too, a wide range of fines for various degrees of punishment is impossible with people so poor as Africans are. With them a fine of even ten shillings is too much and they must needs accept the alternative of a week in those prisons out of which we want to keep them.

Let us face the fact that there can be no solution of this problem until we recognize that penal sanctions must be abolished for petty offences by Africans against the laws concerned solely with the requirements of Native administration. In any event, it is clear that putting men in prison if they fail to observe the pass laws, the urban areas legislation, or the liquor laws does not in fact help to secure the observance of these laws. Observation of such administrative requirements can be far better secured by depriving a person of certain benefits if he fails to conform to the necessary requirements, i.e. by negative obstacles put in his way and not by positive penalty such as imprisonment. If, for instance, we had the labour exchanges we have asked for, then failure to produce a pass would simply handicap an applicant for employment when he comes to the exchange. Or when unemployment insurance benefits are available to him, as they will be in the coming years, he will find that before he can draw them, certain documents of his must be in order.

The last fundamental truth in Native administration and policy that penal reformers must not only grasp firmly themselves but also seek to hammer into the heads of every administrator and legislator.

**Native Law Problems**

There is yet a third major consideration that affects the legal order in the eyes of the layman.

With us Europeans the rules of the civil law, being for the most part necessary and sensible, contribute towards our understanding of and respect for the law. But even here Africans receive no real encouragement to try to understand and observe the law.

For it is by no means only the practice of the police and the habits of the courts that seem to illustrate for Africans the perversity and arbitrary nature of law in the society into which we have drawn them.

The recognition and enforcement of
Native law and custom has greatly, if not unexpectedly, added to the prevailing uncertainty in regard to the legal status of the African. The Native Commissioner is endowed with a discretion whether he will apply Native law or Common law to a civil case between Natives. Native law is itself very obscure on many points and we have taken hardly any steps to reduce the number of tribal customs on which a good deal of Native law depends.

But Native law and custom applies only to cases between Natives. When a Native sues a European or an Indian or a Coloured man, he finds himself under the Common law of the country.

This means that when a black man's cow kills another black man's horse, one law applies; but when the same black man's same cow kills a white man's horse, a different law applies.

Even in the most important subjects such as the law of inheritance or of guardianship of children, Africans are quite uncertain whether European law or Native custom applies to them. One could cite many instances of the complete lack of that degree of uniformity in applying law to Africans which we Europeans certainly demand and obtain in our own lives.

In addition we have introduced all Africans to the sharp distinction we draw between criminal and civil law, a distinction unknown in tribal life and one which they have been taught only at the point of the police baton. In their own thinking civil and criminal law are still all of a piece. Consequently the weaknesses and confusion apparent in one branch of the law are again carried over to affect their understanding of and reaction to the other branch.

The problems I am now touching on are not all of deliberate European interference, like the pass laws or the urban areas Acts. Some of them are inherent in the legal situation that arises when people are in transition from the tribal to the western way of life. But they are all a part of the legal and social background against which respect for law as such will either grow and flourish or wither and die.

As I see it, a variety of social forces and legal factors—some deep-seated and hard to eradicate, others more superficial and easier to eliminate—have converged to produce the present complex and unhappy position in which Africans find themselves in relation to the law. One thing, however, is as clear as the noontime sun. Respect for law among Africans is dying fast. It is therefore urgent for us to realize that the prevailing instrument of social control in a society may be either law and morals or it may be power and administration. The dominant social trends will move steadily in one direction or the other because in their mature forms such societies are at opposite poles. We have been warned that the steady growth of power and administration at the expense of law and morals will ultimately lead to a form of fascism here as it has done in other countries.

Assuming that we want our society and its public policies to rest on the pillars of law and morals, we must first appreciate the intimate relationship that exists between those twin pillars. It must be emphasized again that that involves recognizing the limits of law alone as an agency of social control. The law can only come to light in recent years and is itself very obscure on many points and we have taken hardly any steps to reduce the number of tribal customs on which a good deal of Native law depends.

Among the factors that have roused public interest in the general problem are a series of addresses by Mr. Justice House, a debate in the Senate initiated by Senator G. Hartog in 1941, the reports of the Elliott Committee appointed by the Ministers of Justice and Native Affairs in 1942 to investigate the position of crime on the Witwatersrand and in Pretoria, and the interdepartmental committee appointed by the Minister of Justice to consider the practicability and method of carrying out the recommendations of the Elliott Committee, and the debates in both Houses of Parliament last year on the Justice and Prisons Departmental Votes. A series of discussions at the South African National Conference on Post-War Planning of Social Welfare Work held at Johannesburg in September last gave further opportunity for the ventilation of public opinion, and in the last session there were debates in both Houses.

In the Senate debate in 1941, the Minister pointed out the difficulties of appointing a commission while the whole energies of the country were required for the prosecution of the war, but, having regard to the present war position, the Government feels that those difficulties no longer exist and that the time is ripe for a full inquiry. The Minister therefore accepted Mr. F. B. Allen's motion for the appointment of a commission, and has already obtained the consent of ex-Judge President Lansdowne to act as chairman. The terms of reference have not yet been settled, but the Minister has assured Parliament that they will be wide. "The time has come for wide reforms and I want a thorough investigation."

I do not propose to touch on more than a small corner of the field to be covered by that commission, and perhaps I may...