

1 HISTORY

(a) Introduction.

Imprisonment as a central and independent penal measure is an historically recent phenomenon. Although the modern prison has its historical precedents, such as medieval dungeons and the gaols and workhouses of the later feudal epoch, its emergence as the central and ultimate weapon in the criminal justice systems of Western countries is no more than two hundred years old.

Forms of punishment (and in fact the notion of penal sanction itself) reflect underlying economic, social and political forces. In this sense the rise of imprisonment can be seen as a response to both the economic changes which produced industrial capitalism and the main political development which accompanied the transformation of society - the rise of the central state and its monopolisation of legitimate coercion to maintain civil order. (Kennedy. M. "Beyond Incrimination: Some Neglected Aspects of Punishment." in Chambliss and Mankoff (Eds) "Whose Law? What Order?" Smith and Fried "The Uses of the American Prison" Lexington. 1974.)

The emergence of the formally rational state gave birth to a new concept of political obligation known as citizenship which focussed on the relationship of the individual to central authority. For this new political order to command allegiance and maintain its legitimacy not only new theories, but also new forms of legitimate coercion were necessary. It was within the context of these fundamental changes in Western society that the modern prison system appeared.

In the sense, therefore, that penal practices are a function of wider social, political and economic forces the significance of penal theory can be seen as merely ideological. In the words of Smith and Fried (1974: p.7)

"...the theoretical innovation in which reform movements originate are the expression of an already accomplished change in the political, economic and social complexion of the society".

On this point see also (Rusche and Kirchheimer "Punishment and Social Structure" Columbia University Press. 1939. pp.141-2.)

(b) The Feudal Period

In the early period of feudalism the legal system was composed of custom and tradition. (Kennedy, 1976: pp.39-42). This corresponded to the system of social relationships then prevailing. It was a coherent natural hierarchy in which political obligation was to one's own position in that hierarchy. The social system

"...rested on the belief that whatever has been has the right to be. Precedent, not innovation, ruled. It was the formative foundation of feudal society finding its expression not in hierarchy as we know that word today but in the mutually binding obligations of mutually given oaths all the way up the feudal scale. Land; the only real capital, was tied up solidly by customary obligations and could not for that reason become a commodity for sale in any market. Labor had the same provisions. The whole notion of exclusive proprietary rights was repugnant to people generally." (Kennedy, 1976: p.39-40) In the feudal order the ethic of individual responsibility, central to our modern legal system, was not present. Vassalage, feudal land tenure, and the feudal system for the distribution of goods and services represented the institutionalization of the ethic of shared (or collective) responsibility and this ethic was the foundation for kinship solidarity and the resolution of physical conflicts:

"Perhaps nothing better exemplifies the cooperative ethic more than the extra-judicial and quasi-judicial vendetta or faida. Kinship vengeance neatly balanced kinship protection of the accused from vengeance. In any feud it was impossible to distinguish acts of punishment from acts of war; it was also impossible to distinguish acts of crime from acts of war. Crime and punishment were never known until after the battle was over, and when over, the guilty had already been punished. Feudal justice did not require the death of the individual who had done the killing. It did require the death of one or more of his kinsmen who protected him. Guilt was more a projection than a feeling on the part of the killer, unless the killer had slain one of his own. In that case, punishment was self-imposed if imposed at all."

(Kennedy, 1976, p.41).

Compensation and arbitration were means employed to avoid or terminate blood feuds and this would usually involve the imposition of fines and penance (Rusche and Kirchheimer, 1939; p.8-14). The failure of the poor to pay heavy fines led to the use of corporal punishment against them. Imprisonment was at this time used as one form of corporal punishment. It was not so widespread as the other forms (mutilation etc.) because of its disadvantages from an economic point of view. The important feature to recognise, however, is that in this period these wrongs were private and their resolution or repression was a private responsibility, not that of any publicly constituted authority. As Kennedy implies above, the notions of crime and punishment did not fall into a clear dichotomy in such a social order and in fact if anything this mechanism for resolving conflict and restoring the peace more closely approximates the compensatory basis of our contemporary civil law.

The twelfth and thirteenth centuries saw the making of an economic revolution. The growth of commerce - the rise, on a much larger scale than before, of artisan and merchant and the increase to significant proportions of internal trade - brought with it the institutionalisation of private property - citizen entrepreneurship, and the market system. This was to undermine the traditional feudal order and its system of shared ties and obligations and lay the foundations for the rise of the individualist ethic:

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Under the market ethos, since society could not share one's risks and costs, it could not share one's opportunities and gains. Each man as an entrepreneur was responsible for himself, his conduct, and its consequences good or bad. This ethic came eventually to expression in civil and criminal law procedures, this ethic held little significance because States had not yet developed a clear monopoly over the power to pardon, and few of the ruthless practices common to the newly developing world of commerce had come to be proscribed under any legal order. (Kennedy, 1976: p.43).

There is evidence that during this period imprisonment (or confinement to be more accurate) was used in a systematic fashion against some wrongdoers. In twelfth century England sheriffs, who were the king's officers in the counties, became responsible for the safe custody until trial of all those suspected of committing crimes within their localities (Babington, "The English Bastille", MacDonald, 1971, Chapt.1) These gaols operated as a county concern and the gaoler was expected to make a business out of the establishment he administered. The important point is that the use of imprisonment was of secondary significance in the emerging penal system. It was employed to detain until trial or execution of a sentence, and for non-payment of fines.

Throughout the middle ages capital and corporal punishment were the central measures of imprisonment, a costly alternative if it was not to be financially self-sufficient, remained secondary to these other measures. Fifteenth and Sixteenth

century European society saw a general rural decline, and increase in overall population, and rapid urban development. Mass unemployment resulted. Disorder abounded. Feeling their property and their rule threatened the aristocracy felt a harsh criminal law was necessary to control and repress these unruly classes. There was widespread use of execution, flogging, mutilation and other brutal penal measures as these were cheap and quick forms of punishment or extermination in periods of widespread unrest and 'criminal' activity (Rusche and Kirchheimer, 1939: p. 14-23)

(c) The Breakdown of Feudalism and the Emergence of Prisons.

During the sixteenth and seventeenth centuries alternative penal measures arose as a consequence of the expansionist policies of the European nations, one aspect of the rapid economic transformation which was beginning to take place. The galley and transportation were penal responses based on purely economic motives - the need for a cheap supply of non-free labour.

(See Rusche and Kirchheimer, 1939:p. 53-62, Smith and Fried, 1974: g.12-13; Langbein, J.H., "The Historical Origins of the Sanction of Imprisonment for Serious Crime". Journal of Legal Studies, Vol. V(i), p. 35).

As far as the galley was concerned free labour could not be procured for such inhuman tasks as it involved. Transportation arose to meet the need for a labour supply in the colonies. In this sense conviction was more suitable than the provision of free settlers, for in the case of the latter the ready availability of land in developing colonies tended to encourage independence

and a break from master/servant, landlord/tenant and other capitalist social relationships at a time when the colonising nations sought to consolidate their grip upon the newfound wealth of the colonies (Rusche and Kirchheimer, 1939: p. 58-62). This discussion is not directly relevant to transportation to Australia which was a later development requiring independent consideration.

Social, economic and political circumstances in the late sixteenth and seventeenth centuries also produced another important penal institution - the house of correction or workhouse - which was a direct forerunner of the modern prison. The house of correction is described by Rusche and Kirchheimer (1939: p. 42) as follows:

"The essence of the house of correction was that it combined the principles of the poorhouse, workhouse and penal institutions. Its main aim was to make the labor power of unwilling people socially useful. BY being forced to work within the institution, the prisoners would form industrious habits and would receive a vocational training at the same time".

(see Sabington, 1971: p.11-12)

This institution was directed at the disinherited masses produced by the prevailing economic conditions - beggars, vagrants and so on, who it was deemed necessary to control in the interests of civil order. Langbein (1976: p. 45-46) describes the emergence of these "dangerous" classes in the following quote:

"Throughout the sixteenth century the position of the poorer classes was deteriorating and their numbers

increasing. By the second half of the century, when Europe was too densely populated for its resources and no longer riding a wave of economic growth, ... the trend was toward the pauperization of considerable masses of people in desperate need of daily bread. The causes were several. Because the European states had become strong enough to preserve order and to control the power of the great lords, the feudal private armies were being disbanded as power passed from the leaders of men to the holders of wealth. Contemporaries all over Europe recorded that former retainers and soldiers were turning to begging and pillaging. In the cities the growth of manufacturing created a workforce more exposed to destitution during the low points of the business cycle. In England the numbers of this nascent urban proletariat may have been swelled by agricultural laborers and small yeomen displaced in the enclosure movement. Simultaneously, the influx of bullion from the New World caused a general rise of prices. Food and clothing and rents rose more quickly than wages, so that the poor could obtain fewer of the necessities of life. Finally, the agencies for giving aid to the poor were themselves in a process of transformation. The dissolution of the English monasteries under Henry VIII was unique in rapidity and extent, but elsewhere in Europe those charitable foundations, hospitals, and monasteries, which had reached their greatest development during the preceding two or three centuries under the aegis of the Church, were being dissolved or had deteriorated.

What poor relief there was seemed ill-organized and counter-productive - so indiscriminate that it did nearly as much to increase beggars as to relieve them. (Langbein, 1976, p.45-46).

It may well be asked why these "criminal" classes were not repressed with the traditional capital or corporal methods of punishment instead of being met with the creation of an institutional apparatus which necessarily commanded more resources than the traditional forms. It is necessary to point out in the first place that the new institutions did not replace, even substantially, the older forms. Capital punishment, for instance, continued to have widespread application and to be imposed regularly until the end of the eighteenth century. In fact, between 1688 and 1820 the number of capital offences grew fourfold. These changes, predictably enough, were largely in the area of property crimes. (Hay, Property, Authority and the Criminal Law, in Hay et al: *Albion's Fatal Tree*. Allen Lane. 1975 p. 18.) New institutions were, on the other hand, supplementary and represented a response to new problems produced by the rapid transformation which was taking place in social relationships and social institutions. Economic and social forces produced both quantitative and qualitative changes in a social class (or grouping) which had hitherto been to a large extent institutionalised and accepted in society, namely beggars (see Hay, 1975: p.35-36) a burgeoning bourgeoisie, armed with the doctrines of calvinism, and determined to promote the central value of work and effort militated against the continued existence of begging as an acceptable social institution. The fact that the poor and dispossessed classes were no longer merely marginal to social life, but constituted its mainstream also made them a potential threat to the social order and thus in need of containment and control. However, the

need for control was accompanied by the need to provide a disciplined but free labour supply. These new goals and changing circumstances could not be met by recourse to the brutal methods of the past. The convenience, from an economic viewpoint, of traditional methods was more than compensated for in these new developments by the fact that they were run in most cases as profit making enterprises or in such a way as to recoup expenditures (Rusche and Kirchheimer, 1939: p.41-52).

Perhaps more important in understanding the rise, in the sixteenth century, of imprisonment as an independent penal measure, as well as the emergence of other measures, such as the galley and transportation, are "the changes in political doctrine that allow for the wholesale congregation of prisoners in one place and under one jurisdiction - organised servitude." (Smith and Fried 1974: p.11) Smith and Fried go on to say:

"Galley slavery, deportation, and penal servitude, all innovations of the sixteenth century, require a centralised administrative agency that is seen as legitimately the sole proprietor of civil order and thus the exclusive agent of punishment. We are not arguing that the town and church councils at this time did not still maintain this authority as well; rather, the period is marked by an increase in the power of the crown to exact punishment at the expense of these other agencies." (ibid).

The situation in the late sixteenth and seventeenth centuries provided an immediate prelude to modern developments. The focus of the house of correction on the working and poorer

classes is in a relative sense, replicated in the operation of our contemporary prison systems. Thus, for example, as we noted in the "Knowledge of Crime and its Causes" submission, p.53-54)

"over the period 1970-74 New South Wales prisons were the repositories for 23,462 of its citizens for non-payment of fines, in other words for being poor." Again, the Bureau of Crime Statistics and Research reports discussed in our previous submission (p.23-30) detail the massive over-representation of the poor working class and blacks in the contemporary N.S.W. prison system. (eg. 90% of long term prisoners coming from occupational categories skilled and unskilled workers) Again by way of example 25% of receptions in 1972-72 in N.S.W. were for drunkenness/disorderly conduct, and vagrancy (N.S.W. Dept. of Corrective Services Annual Report, 1973-74 p.74 Table 16.)

Until the eighteenth century, imprisonment was a penal measure of secondary significance. Prisons existed largely to keep men rather than punish them. The economic and political changes of the eighteenth and nineteenth centuries ushered in new forms of punishment, most importantly the modern prison. They also ensured the decline of the house of correction and the notion that imprisonment could be used as a means of providing productive labour:

"...the industrial revolution was making it more and more difficult to obtain any real profit from the demoralised and indiscriminately assembled prisoners. The development of machinery had so destroyed the value of work by hand that it was entirely out of the question to support a remunerative system of non-

machine labor in the jails..." (Rusche and Kirchheimer, 1939. p.110).

Perhaps more significant than the technological changes in bringing the decline of productive prison labour was the fact that industrial capitalism rested upon the operation of a free market in which the wage labourer had the right (ie felt the economic compulsion) to seek work.

(d) The Rise of the State Apparatus

Of fundamental significance in this period were the demands of the bourgeoisie on central authority to rationalise law and other state functions so as to secure their interest even those of the landed elites and guarantee the triumph of the free market over the remnants of feudalism. Smith and Fried describe this process as follows:

"Briefly, with the growth and rapid expansion of textiles, mining and especially foreign trade came an increased demand for a money market, stable credit rates, and a political order that would insure security for vast money transactions. Where notions of good conscience and charity may have been adequate safeguards in a highly personalized economic situation, it is apparent that the greater the distance and more complicated the transaction, the less compelling were such factors. It was the rising merchant class that caused, noticed, and acted upon the inverse relationship between conscience and opportunity - charity and profit - and hence led to the discovery of impersonal mechanisms governing large-scale transactions. That these mechanisms were precisely those that would, under the circumstances, increase the degree and security of profit generally went unnoticed. Accordingly, it was argued that both public policy and law should be congruent with impersonal forces of the market place. That those forces insuring the growth of capitalism were given the status of inherent psychological principles governing the behaviour of all men tells us more about the material needs and ideological scope of the new entrepreneurs than about any self-evident, natural, laws of human behaviour.

(Smith and Fried, 1974: p.15-16).

The consolidation of political power by the bourgeoisie, to be exercised through the medium of the state apparatus called forth new theories and new forms in the relationship between the individual and the state, necessary to ensure the legitimacy of the states presence in the lives of its subjects. Where the states' coercive activities were concerned this legitimacy could not be secured if the brutal methods and theories of the past (such as flogging, mutilation and capital punishment) were employed:

"Basic to the idea of punishment is the legitimacy of coercion. And coercion was now to be exercised exclusively by the state. But a state was considered legitimate only in so far as it guaranteed the widest possible sphere of individual autonomy. Thus state-imposed incarceration presented at least the appearance of a contradiction". (Smith and Fried, 1974: p.18).

Whilst imprisonment presented the appearance of a contradiction in terms of the professed role of the bourgeois state it provided a control mechanism which, unlike the traditional methods, could be justified as really being consistent with the state's concern for the liberty of the individual. Here the role of the utilitarian theorist was crucial. If it could be established that the criminal was essentially different from the law-abiding citizen and that punishment was reformatory in the sense that it would make a productive citizen out of a "criminal", then state administered punishment could be justified on the grounds of social utility. This could never be achieved where brutal forms of punishment designed to "expel" (by death, mutilation or banishment) offenders from society were employed. Imprisonment, on the other hand, could be argued to be protecting both the interests of the society and the interests of the individual criminal. (Smith and Fried, 1974: p.18-23). Central, of course, to this new theory of crime and punishment was the elaborate criminal justice framework, embodying due process, a graduated system of punishment and so on, which has lasted into the present day, substantially unaltered.

Although the penal theories and practices of the Quakers in Pennsylvania in the late eighteenth century are often hailed as the genesis of modern imprisonment they were only one example in the general movement described above which responded to the emergence and consolidation of capitalist social and economic relationships.

(e) Summary

This historical overview has been necessarily general. Our concern has been to historically locate imprisonment as an institution and to point to the economic and social determinants of its development and emergence as the ultimate and central weapon in the armoury of western criminal justice systems.

In particular we have not attempted a specific analysis of the further historical development of the Australian prison system, its genesis in the requirements of British colonialism and imperialism, and its continued development as a central institution in the maintenance and consolidation of bourgeois hegemony. Such a mammoth task is beyond our resources at this stage, although two P.A.G. members are working in a long term project to research this area.

To summarise the main points that have emerged from our historical research and the overview provided above:

(1) Imprisonment is a central and independent measure is an historically recent phenomenon. Although the modern prison has its historical precedents such as medieval dungeons and the gaols and workhouses of the later feudal epoch, its emergence as the central and ultimate weapon in the criminal justice systems of western countries is no more than two hundred years old.

(2) Forms of punishment (and in fact the notion of penal sanction itself) reflect underlying economic political, and social forces. In this sense the rise of imprisonment can be seen as a response to both the economic changes which produced industrial capitalism, and the main political development which accompanied this transformation of society - the rise of the central state and its monopolisation of

legitimate coercion to maintain civil order.

(3) The maintenance of civil order has historically been essentially: the maintenance of class rule. Prisons thus have their roots in the exploitation of the rulers by the ruled, of the economically powerful, by the less powerful. Their actual use over the historically recent period they have been in operation, has been clearly and unmistakably that of class control, their victims have been overwhelmingly working class and poor. And this class control function is still the predominant one even today, as can be seen from the many studies demonstrating the class composition of contemporary N.S.W. prisons.