CRIMINAL JUSTICE IN GERMANY

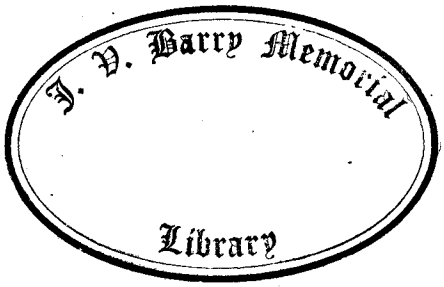
AND

DEVELOPMENTS IN VICTIMOLOGY AND THE PHILOSOPHY OF LAW

(Report of an Official Visit)

by

W. CLIFFORD



INTRODUCTION

For some years now I have been deferring an invitation extended to me by the Government of the Federal Republic of Germany to visit criminological institutes and research centres in that country. Finally, since I had to be in Muenster as a member of the Organising Committee for the Third International Symposium on Victimology, the German Government arranged this visit at their expense to extend over a period of 10 days, following my conference attendance. Prior to the German visit, I attended the World Congress on Philosophy of Law and Social Philosophy at Basle in Switzerland and the Third International Symposium on Victimology at Muenster and I followed the German visit with a brief call at Vienna to contact the United Nations there in connection with the paper produced by Dr. Mukherjee and myself on Topic 1 of the Agenda for the Sixth UN Congress.

On my return I was scheduled to stop briefly in Bombay to deliver the Kumarappa-Reckless Lecture, but this flight was cancelled due to a fire destroying part of the airport in Bombay and I returned directly to Australia.

This report is an account of that journey, with such information as I feel might be useful to members of the Board of Management, to the staff and to others concerned with criminology in Australia.

The Philosophy of Law

A World Congress on Philosophy of Law and Social Philosophy is held every year and attracts a limited number of people from various countries, mainly academics who are engaged in the teaching of law. There were about 300 or 400 people at the Congress in Basle and if one allows for the local attendance, the outside participation was limited. Nevertheless, the Congress was interesting because there was representation from America, East and West Europe, India, Thailand, Japan and China. This meant that there

was a great variety of approaches to the meaning of law from a Marxist interpretation at the one extreme, to a strident Aquinas type natural law approach at the other extreme. The positivists were confronted by those concerned with ulterior meanings in law and there were some unusual papers which are described in Appendix 1 to this report.

China sent an official representative, who gave his paper and then hurried back to China, but since he was discussing the new criminal code in China, the up to date information was of considerable value. He spoke in English and if his paper has been recorded, it should prove to have been a useful contribution once it has been stripped of the political references to the "Gang of Four"!

The organisation of the Congress was interesting, because any person attending could write a paper - and he may have a chance to deliver it if the time could be arranged. This meant that several hundred papers were produced in their original languages. These were then reproduced in miniature form and made available in boxes to all participants at a cost of Dml per copy. Needless to say a collection of all papers would, therefore, be extremely expensive, but it was possible to collect those of most interest and I was fortunate in being able to send back to the Institute a number of these. Interpretation was provided only in one large hall of the University of Basle, where the Congress was held. At all other meetings, where the various papers were presented there was no interpretation and the participants had to manage as best they could in their own languages. This tended to mean that German speaking people foregathered, French speaking people concentrated where French was spoken and the English speaking groups were separate and distinct. However with English spoken so widely, it was the English speaking groups which were the most popular.

I regard these discussions on the essential meaning

of law as being of fundamental importance for crime and criminology. At the basis of most of our work is the issue of fundamental values and it is these matters which are the concern of philosophical lawyers. Needless to say at this time the views are divergent and it is possible to interpret law, its rights and obligations in a variety of ways. Nevertheless I feel that discussions of this type, however abstruse they may seem, are vital to the major issues with which we are concerned.

It is worth mentioning that this particular organisation for the Philosophy of Law and Social Philosophy is greatly influenced by Professor Kaminka of the Australian National University who is an an acknowledged expert on Marxist law and his wife, Professor Alice Tay of the University of Sydney who was appointed a few years ago to the chair previously occupied by Sir Julius Stone.

Now we know the form and pattern of these meetings, it will be possible for us to produce papers for future international gatherings, even when we cannot be there.

Victimology

The subject of victimology is not new and was broached in the 1930's by a number of papers indicating that a criminal event was not only an event perpetrated by the offender. In so many cases there was provocation or the crime might have arisen out of preceding relationships between the victim and the offender. The argument was that the criminal event must be regarded as a totality of inter-relationships and not taken to be just a single act initiated and executed by the criminal himself. In 1973 Professor Israel Drapkin organised the first International Symposium on Victimology in Jerusalem. This was still a criminological centred occasion, but already implications of a wider conception of victimology were beginning to appear. It is probably no coincidence

that this International Victimology Symposium and the second one which took place in Boston in 1976 were both arranged by Jewish people concerned, inter alia, about political victimisation.

At the Third Symposium in Muenster, this came to a head, when there was a division between the criminologists who wanted to keep this as a purely criminological subject and those who sought to widen it to the extent that there would be a new international body dealing with victimology in general. The danger of the last possibility is that, of course, victimology could include the interests of almost every minority group, deprived individual or organisation anywhere in the world - and could, in fact, have only a very peripheral implication for crime as this is usually defined.

The significance of the action in Muenster, however, was underlined by the importance of the people attending. Practically all the most important people in criminology were there from the United Nations, the Council of Europe, the International Society of Criminology etc. Again East and West were represented, the Americas, Africa, Asia and the Far East. I was on the organising committee for this Symposium, but spent most of my time dealing with Gerhard Mueller of the United Nations, Professor Szabo, the President of the International Society of Criminology, Irvin Waller, Director of the Canadian Criminological Research Department, and others, on the possibility of this Institute becoming the organising body for a research meeting to be held prior to the UN Congress and to be held in the same place as the Congress but a few days before. I not only succeeded in obtaining preliminary approvals for this, but it has later been confirmed in a formal request by the United Nations to the Australian Mission and that this should be priority number one for any aid which Australia can provide in connection with the next Congress.

I was also distributing at this meeting copies of the Discussion Paper for Topic No. 1 of the Sixth Congress, which had been prepared by the Australian Criminal Sciences Committee and had been authored by myself and Dr. Mukherjee. Mr. Loof had bent all efforts to make sure that these copies were available for my trip and they were, in fact, extremely valuable in arousing interest and developing a closer understanding of our work and that of other countries.

Also at this conference I made contact with people I had previously known in Kuwait and Saudi Arabia, as a result of which there will be closer liaison with that part of the world. At the Philosophy of Law Congress I had taken special interest in the developments of Moslem law and the extent to which its Draconian punishments are actually used in Saudi Arabia and other Arab countries. With the personal relationships I was now able to renew after some years, I have managed to open new channels of communication and hopefully it will be possible for us to give more attention to this resurgence of Moslem law and practice in the modern world. It should be borne in mind that Mohammedanism is by nature political and expansionist and the recent injection of some of the greatest concentrations of funds in the world into this area has made sure that Mohammedanism and Moslem law will become more important in many parts of the world in the years ahead.

Also at the conference was Mr. Whitrod, who gave a paper by himself, Mr. Biles and Dr. Braithwaite on the fear of crime and I was able to assist him in making contacts with appropriate persons interested in his field. We were both gratified to be able to meet a Japanese who has been studying in Germany and who has made a comparative study of the fear of crime in Germany and a corresponding Japanese city. I was also able to have

discussions on developments in crime in Japan with Dr. Miyazawa of Keio University, who has not previously been in our circle of research workers because his European language is German and he has primarily been in contact with German researchers. However, he had read my book on Japan and had enough English to discuss this in connection with his own research.

Unexpected benefits from this Congress were also the contacts that I could make with Scandinavian, Dutch and Swiss people on developments in criminal justice in their own countries. However, as the Congress seemed to be longer drawn out than necessary and was moving into a weekend of social functions, I moved early to Bonn as a preliminary to my tour of Germany. There I was able to write up some of the material which is contained in the appendices to this report.

Criminal Justice in Germany

The official visit to Germany was extremely well organised. Mr. Ingo Radke of the German Embassy took great care to plan the visit from Canberra: and in Germany there was so much personal interest that Inter Nationes, the organisation which handles such visitors, still had my requirements from the time when this visit was originally arranged for me two or three years ago, but had to be postponed. The present visit was shorter in duration and requirements were telescoped for my convenience.

In Bonn my contact was with the Ministry of Justice and I was able to cement the relationships which had, in fact, meant an exchange of publications over the past few years. We knew of each other's work and had a mutual interest in learning more. In a recent study of suicide in Australia, we had asked for German data which the Ministry of Justice did not have; but they had taken considerable trouble to obtain this specially for us - a typical example of the kind of service which we already extend to each other and which

will be extended by the personal contacts made on this visit.

The members of the Ministry of Justice in Bonn were, of course, associated very closely with the organisation of the First Regional Preparatory Meeting for the Sixth United Nations Congress, which Germany hosted in 1977. They remembered our prominent participation and in particular Mr. Loof and our other delegates to that meeting. My contact at the Ministry was with Dr. Hobe, although I was first received formally by his superiors and accorded every courtesy. In the detailed discussions with Dr. Hobe he was assisted by Dr. Blat, engaged especially on Ministry research connected with acts of terrorism. He is collecting biographical data on the offenders, studying the implications for procedural law of the politicisation of trials by organised groups - and he is analysing the question of basic justice which arises from the present situation and the official reaction to terrorism.

Whilst in Bonn I was also met and assisted by a representative of the Press and Public Relations Office of the Ministry of Foreign Affairs. He was concerned with the broad impact of the visit and the possible arrangements for a follow up.

Also in Bonn I was escorted by Mr. von Randow, a student of economics at the University of Bonn and whose father had been the German Ambassador to Ethiopia. We had a good deal in common, since I had been in Ethiopia at about the time he was there. He provided a wealth of information about Germany and was, in return, gratified to be included in the conversations which we had at the Ministry and which opened up for him a new field of academic study.

During this time I was really impressed with the cosmopolitan nature of the population of Bonn. Of course there are the embassies and the usual proportion of Turkish immigrant workers one finds in Germany today: but I was amazed to find

bars and cafe's in some of the back streets of Bonn which were completely Arab. No German was spoken, the clientele was all Arab, they wore Arab dress and sprawled over their chairs in the fashion I know well from the Middle East. And still following the Arab pattern, they were exclusively male.

The Ministry of Justice in Bonn was a fulcral point for my visit because it gave me the pattern of criminological research work in the Federal Republic of Germany. The Federal Republic is a combination of 11 "Landes" or states. Very much like the Australian pattern, each one of these states has its own parliament, ministries and government but it seemed to me that the Federal Government has rather more power in criminal matters than the Federal Government has in Australia. Most police matters are dealt with at the Landes level: but the Bundeskriminalamt, with headquarters at Weisbaden, is the equivalent to the U.S. FBI or perhaps the Australian Federal Police and has extensive operations throughout the country. It operates data banks and technical support services for local police. There is also a separate border police, which deals with situations arising along the borders between the states. It is this force which provided the task force for the Magadishu rescue of hijacked passengers on an aircraft.

In short, there are similar complications of federal/inter-state cooperation in control of drugs, customs offences, terrorism, corporate crime etc. that one finds in Australia. Berlin is a special case. It is in practice a Lande, but cannot be so regarded because of the continuation of Allied Military Authority. In Berlin the immediate post war division of that City into four parts continues, so that although the three Allied parts of West Berlin are together a part of the Federal Republic of Germany, it has its own government and though it has its counterparts to the Federal Government services in the country, these cannot have the same status as other Landes. This is because Berlin is still an area of the Federal Republic of Germany under

Allied military control. This means that, whilst the fourth part of Berlin, i.e. the Russian part, of the divided City is dignified as the capital of East Germany, the other three parts of that City are still technically subject to the military commandants supplied by the British, French and the Americans, who retain a power of veto over Berlin legislation. This has become a formality, but not entirely so - and the administrative arrangements allow for delays and compromise which keep Berliners from the feeling of complete parity with their fellow Germans in other areas. The fact that Berlin is still an island in communist controlled Germany makes inter-communication difficult and the Federal Government subsidises air fares to encourage mobility between Berlin and other areas of Western Germany.

It was very instructive to discover that Lufthansa does not fly into West Berlin, the routes being flown by British Airways, Air France and Pan Am. This again is a consequence of the peculiar political situation.

The efficiency of the Bundeskriminalamt has been greatly enhanced by the quite enormous funds provided to the police generally and to anti-terrorist organisations and other defence forces as a result of the German experience of terrorism in the 1970s.

There are two main centres of official research (i.e. outside universities etc.). The Ministry of the Interior conducts terrorist research incorporating social, psychological and ideological studies. The Ministry of Justice has a small group of specialists for quick action research. In any terrorist emergency there is a special crisis group in the Federal Chancellors Office and the Chancellor takes personal responsibility. Significantly, large sums have also been set aside for specialised research into the sociology, psychology and the methodology of terrorism and university authorities are being brough onto councils to deal with this kind of work. Projects being funded include some which deal with the complications of the modern law, which permits the

dramatic confrontations mentioned above, others concentrating on the complications of handling terrorists inside prisons and still other studies which are investigating the political events which led up to the incidents from which terrorism grew in Germany.

Unofficially I discovered no small concern that, whilst throughout Germany there may be less than 100 terrorists, the huge amounts being spent on their control (especially on forms of police response) was a kind of over-kill which could have serious long term implications for human rights. The explanation is easily found in the way that the Government itself has been internationally embarrassed by the activities of this small but entirely ruthless band of very determined people. It is the eternal question of how much control for what kinds of freedom - a question which troubles the U.K. and Australia as well as Germany.

Freiburg

From Bonn I travelled by train to Freiburg. Germany has an excellent railway grid, with special inter-city services which compete for convenience with the airlines. I went to Freiburg, which is at the edge of the Black Forrest, to see the famous Max-Plank Institute and to meet the Director of that section of the Institute dealing with criminal law investigation and criminality, Dr. Kaiser. Dr. Kaiser and I had met before and, in fact, when we met in September in Freiburg, he was on his way to an assignment at the United Nations Institute in Japan where he was to lecture on European systems of criminal justice. The Max-Plank Institute was originally a private foundation established for the physical and medical sciences. Gradually as its reputation grew, it expanded to take in other sciences and its legal branch is now in Freiburg in a building newly built for the purpose. The building had to face opposition from environmental protection groups and though finally built on the site originally opposed, its architecture had to fit the surroundings. It backs onto the forest itself, and it is

possible to hunt in the forest from the Institute building. For this reason the two storey building is designed like a mansion, partially hidden by trees - although it fronts onto a busy main road. The money seemed to have been spent on a rather ornate exterior.

At a working level, I found close collaboration between my own staff and people doing various studies at the Max-Plank Institute. All internal walls were partitions of a temporary nature but rather special facilities were available for different categories of visiting scholars. The Institute is much more aligned to legal than to sociological or psychological studies. However, with the passage of time the Max-Plank Institute has become more and more interested in the wider aspects of criminology and may be expected to make a very substantial contribution in the future. They have already produced some very notable publications of international importance.

This visit to Freiburg was brief - I arrived one day and left the next - but I was well looked after by my official escort, a Dr. Cramer, a legal employee of the Income Tax Department, who had done some of his studies in America. He was interested in human rights and I promised to supply him with some of the information we had on this subject in Australia - in particular he was interested in the different concepts of human rights covered by our United Nations publication on this subject. The material has been sent.

Frankfurt/Weisbaden

I visited Frankfurt in order to go to Weisbaden, which is only a short distance from Freiburg. There I visited the Bundeskriminalamt and met a very tight security organisation indeed. The official car drove away with my bags in it - including my passport - so that getting into

the building was not easy and I had to have the Commandant come down to identify me and escort me in. Once in the building I was given the greatest assistance and courtesy and shown the work that was being done.

The work of the Bundeskriminalampt is well known to us from our previous contacts through the United Nations and the statistics which they publish are of the most vital information significance for criminologists. Dr. Mukherjee has been in touch with these since he arrived in Australia and we are extremely grateful to the Bundeskriminalampt for the direct contact. The Federal Police, as already explained, have general responsibilities for dealing with federal offences and those areas of criminal behaviour which fall outside the jurisdiction of the Landes. The Police Force is supplied with the best in modern technology and recently lent three of their helicopters to Ireland for the Pope's visit. All their information is computerised and available to policemen around the country.

Berlin

The peculiar political situation in Berlin has already been described above and this had its effect on police operations. In Berlin I was met by Mrs. Laskowski, who was a geneticist and the wife of a doctor engaged on cell research. She was extremely helpful and informative and made sure that I had contact not merely with my own subject in Berlin, but with the culture of that beautiful city. The political realities of Berlin give a vivid reminder of the war and of the division of East and West. I was impressed too with the modernisation of museums and places of cultural interest. In particular, I visited the police in Berlin and I was very impressed with the work they were doing on mobilising community cooperation with the police. They have, in fact, managed by means of special squads to eliminate a great deal of the minor street crime which is often troublesome to citizens and they were providing extensive aid to the public in the selection and use of

alarms, safes and other crime prevention equipment.

My host made it possible for me to visit East Berlin on a Sunday afternoon excursion, but I had already been to East Berlin and, therefore, saw nothing which I had not previously been able to see. Nevertheless, it was interesting to observe the differences between the two Cities and to observe the way in which the divisions were maintained. The "Wall" is still a grim reminder of political conflict and whilst there is freer movement for people from West to East, there is still a tight control of travel from East to West. Russian soldiers still enter West Berlin as "tourists" and there was one U.S. military officer in uniform in the tourist bus which took us on a two hour round of the Eastern sector of Berlin.

Dr. Rasch, the Professor of Forensic Sciences at the Free University of Berlin, was kind enough to entertain me for an evening and proved to be very much in the forefront of our modern research work on forensic psychiatry. I was able to obtain papers from him which had not been available to us here in Australia and which already, since I returned, are forming part of the references in our publications.

Hannover

The reason for my visit to Hannover was to meet two persons connected with the Landes Government for Nieder-Saxony. These were Dr. Steinhilper, who has recently moved from the Bundeskriminalamt to do research work for this particular Government. However his Minister, Dr. Schwind, who is perhaps the only criminologist to be appointed Minister of Justice anywhere in the world, insisted on seeing me and generously granted me an hour of his time. He was extremely interested in the structure of the Australian Institute of Criminology and I have since provided him with details of the laws and the background to our research work.

Also I met professors at the University who were engaged in our kind of work. The Nieder-Saxony Government, on the recommendation of Dr. Schwind, has made money available for the establishment of an independent research unit which will operate with its own funds, but the relationship between it, the Government and the University has still to be worked out. We had detailed discussions on the way in which a new research team has to overcome internal jealousies and external suspicion in the building of its scientific reputation. They were already meeting some of these problems and our Australian experience was of considerable value. They had been following our progress over the years and I was gratified to find that copies of my own books were available for me to sign when I arrived. In this area too, I was well served by my escort, Mrs. von Arnim, who proved to be extremely knowledgeable and who made Hannover a very interesting place to see.

Vienna

On 18 September I travelled from Hannover to Vienna. This was to make contact with the first elements of the United Nations Crime Prevention and Criminal Justice Branch that had taken up accommodation at the new building given to the United Nations in Vienna by the Government of Austria. This is an immense complex, built in a Vienna suburb, with commanding views of the Danube and with lobbies and vestibules so extensive that they are beyond anything to be found in the United Nations buildings at present in use. There are thousands of offices provided and these are linked to conference centres and utilities by a labyrinth of passages, elevators and bridges between the buildings that one needs a map to follow. An indication of this is the fact that, having made an appointment with the man I wanted to see, we actually dodged each other for two hours and the control centre, which is also the telephone centre, did not know of his existence, although

he had been there for several weeks.

The first few persons from the Crime Prevention and Criminal Justice Branch were moved to Vienna in July and leading this was Mr. Mikhailov, who had previously worked for me in New York and was now organising the transfer of the United Nations business to Vienna. He is also the person who has been given the responsibility for Topic 1 of the Agenda for the Sixth UN Congress and one of the purposes of my visit was, therefore, to discuss with him the Discussion Paper which we had produced in Australia and to see how far this could help with the development of the UN Working Paper for this subject. I saw some of the first drafts for the Working Paper and there is no doubt that the one we have produced here in Australia was vastly superior to anything done so far within the Secretariat. However, I understand that other papers are being solicited from various parts of the world and the composite UN paper should prove to be quite valuable.

This visit was particularly satisfactory since I was able to see Madam Lusiba N'Kanza, who is Director of the Center for Social and Humanitarian Affairs. This means she covers all the other branches of this Center which are not crime prevention. She was previously a Minister in the Zaire Government, where I had also worked, and has been educated at Harvard. We discussed the policy in social welfare generally in relation to crime prevention and she expressed an interest in visiting Australia as soon as this was possible.

Since returning to Australia it has been possible to make good use of material obtained on the visit. Some of the articles attached to this report have been published. We have been able to improve upon the reference material by documents which I brought back with me and we have

followed up on the closer links already made with the German Authorities.

Once again I would like to express my appreciation to the Government of the Federal Republic of Germany for making this visit possible.

OF MICE AND MEN - BEFORE THE LAW

by

W. Clifford*

The World Congress of the Philosophy of Law and Social Philosophy meeting in Basle, Switzerland in August was told of a sow and her six piglets which were tried for murdering and partly devouring an infant in 1457. The piglets (because of their youth, innocence and the corrupting influence of their mother) were pardoned; but the sow was found guilty and duly hanged.

This was one of several cases of animals being held criminally liable in the laws of the past which were given to the meeting by Tom Regan of the State University of North Carolina. He was really calling for animals to be given a new legal recognition and appropriate rights. If, he argued, corporations and ships could be accorded a legal personality, why not the animals? One questioner asked whether this would extend to pigeons, because he hated pigeons!

There were several hundred people at the conference - a great many of whom prepared papers covering a wide range of subjects from the Marxist philosophy of law to a reinstatement of St. Thomas Aquinas. There were many attempts to bridge, at least partially, the great gap between those with leanings towards a theory of natural law and those more committed to a positivist or analytic concept of the law: and the Chinese Government sent a representative to flay the "gang of four", but at the same time to give a useful account of the new Chinese Constitution of 5th March 1978 and the new Criminal Code which, with the new Code of Criminal Procedure, will be in full effect by January 1980. He said that the death penalty had not been abolished, but it could now only be used legally by judges or the Peoples Courts - and it would be used as little as possible. No-one

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*Mr. Clifford is Director of the Australian Institute of Criminology and is at present visiting West German Institutes of Criminology as the guest of the West German Government.

ventured to ask him what was happening when the death penalty could be applied by procedures other than the appointed judges and peoples courts.

Another paper with an unusual twist was that of Lance K. Stell, who dealt with duelling. He showed that, beginning with statutes enacted in the reign of George III, duelling had been made a specific offence, so that a person who kills another in a duel is guilty of murder - and he cannot rely on a plea of self-defence. Stell's point was a question - why this should be? He saw no reason why a person's right to life should not be construed in law as a property right, allowing individuals to alienate it if they wished - by duelling, by suicide or by euthanasia. It's an interesting prospect for Western audiences, for whom Faust has long represented operatically an ancient belief that men could and sometimes did sell their souls to the devil. This implied that souls might be, conceptually at least, traded like property. As for bodies, the sale of blood, organs or tissues (to be taken on death) has been recognised in many countries: and already Law Reform Committees everywhere are struggling with all the implications. Now the prospect of offering one's life for sale creates a new dimension - although the "Right to Life" protagonists will doubtless argue that this is already being done without the individuals consent when the unborn's right to live is traded for other advantages.

There were several papers dealing with the law of Islam. Majid Khadduri, Director of Middle East Studies at the John Hopkins University, concentrated on the induced flexibility of Moslem legal precepts. For Moslems, Divine legislation ceased with the death of the Prophet and the Prophet's Traditions did not leave enough (or enough adequate) material for legal development. However since external sources not explicitly forbidden could be used from time to time and since there was always a theory of "public good" to cover doubtful points, Moslem law could be adjusted

over the years. For instance, the Tunisian Code abolished polygamy on the grounds that it was impossible for a husband to be "just" (as required by the Prophet) in his relations with more than one wife.

Konrad Dilgar, a Moslem law specialist currently at the Max-Plank Institute in Freiburg, discussed the problems of the Moslem Penal Law with its five categories of offences and punishments and its relevance in Moslem countries today. As he spoke, most of the participants thoughts were on events in places like Pakistan and Iran. On the same day the Swiss television had carried pictures of the latest sordid executions. Dilgar considered that, whilst many in Islam might wish to change these traditional penalties, they were, in fact, an integral part of the Islamic theocratic system and they could not be substantively abrogated. With Khadduri, he traced the opportunities for change which had occurred in procedure rather than substance. With the flow of money to Arab countries and the Islam revolutions, it was very clear that there could be a resurgence of Islamic power and influence. This could greatly extend the significance of Islam penal law with its death penalties, maimings and lashings, at present mainly confined to Saudi Arabia. However, such laws apply only to Moslems and there are rules of evidence which are restrictive. For the adultery which attracts stoning to death, the witnesses have to be at least two reputable Moslems!!

The papers showed that at previous Congresses the relationship of force and law had been given much attention. Alego de Cervera of Puerto Rico contrasted the two views - (1) Force comes second to law being used to enforce it. (2) Law is itself a sanctioning of successful force. He sought a way of looking at the situation a third way by means of fine temporal and role distinctions of the "vectoral results of forces". Neil MacCormick, a law professor at the University of Edinburgh, wrote a paper in which he held that coercion was not logically an essential element of the law anyway ... or at least that the proposition

deserved further attention. He speculated that in a modern industrial society, if we ask why people obey the law, we should consider that in such a society the rewards offered for obedience outweighed in value the penalties made available for disobedience.

On yet another level were to be found flow charts and network analyses of legal procedures - provided by Dr. Losano of Milan. And Asia received a good deal of attention. Prajudi Atmosudirdjo of Jakarta had submitted a thoughtful paper on the difficiences of norms and standards as between the West and the East. He looked at Law, Human Rights and Corruption. As regards law, he contrasted the Western stripping of its law of any moral or religious content with the Asian need for a spiritual element. On human rights, he showed how this was a peculiarly Western construct with no counterpart in Asia. He said -

> "To the non-modern educated Asians ... the concept of 'human rights' means nothing"

Prajudi finally dealt with corruption, showing that it was not so readily identifiable as such in Asia. In Asia, presenting money along with the petition to the higher authorities was quite traditional and this made it difficult to separate the reprehensible from the ordinary routines.

Gyan S. Sharma of Lucknow, India, delved into the persisting values of the Indian philosophical and cultural tradition for evidence that, despite the diversity of cultures in India, there was an idea pattern which was both common and constant throughout the continent.

> "The classical legal system of India substitutes the notion of <u>authority</u> for that of <u>legality</u>. The precepts of Smitri are an authority because in them was seen the expression of a law in the sense in which that word is used in the natural sciences."

Australia had a privileged position at the Conference, thanks to the untiring efforts of Professor Kamenka of the Australian National University and Professor Erh-Soon Tay of the University of Sydney, who organised this same Congress in Sydney and Canberra last year. They chaired sessions and presented papers. From the University of New England, Seweryn Ozdowski contributed a proposition that the Murphy Family Law Act of 1975 followed public opinion rather than changed the family system in Australia - based on interviews with over 300 people in Armidale.

It had been raining in Basle for the weeks preceding the Conference. It was still raining when the Conference opened. But for the period of discussions the sun shone benignly and children poured through the railway station with packs on their backs for their final summer holiday excursions. Here were norms social and legal in some kind of effect. But the peculiarities of human nature were bound to affect any non-German speaking Australian as he saw the populace of Basle at the various kiosks buying tickets for "Toto Lotto Lose".

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

NEWS RELEASE

THE VICTIMS' REVOLT

"Crime victims of the world are uniting", says Mr. W. Clifford, Director of the Australian Institute of Criminology in a report from Muenster, West Germany, where he is one of the organising committee of the Third International Symposium on Victimology. In West Germany, says Mr. Clifford, a 10,000 member strong "White Ring" organisation now represents the interests of crime victims, not only helping them to obtain compensation but counselling them in the reporting of crime and on how to secure their rights as victims when they are giving evidence in court. Behind this organisation are not only the groups that have been helping rape victims, but also the relatives of those officials or members of the general public who have been killed in acts of terrorism or indiscriminate bombings.

Matching the West German initiative are organisations like NOVA in the U.S.A. (National Organisation for Victim Assistance) and New York City has set up and financed a special "Victims Services Agency", helping victims not only to get compensation but to secure their legal rights in court and to repair the physical or material damage of crime.

Mr. Clifford suggests that this movement of victim protection is further evidence of the feeling that it is not possible, as in the past, for the individual members of the public to leave such protection of their interests to official services. He sees the likelihood of conflict between victims groups and those formed to represent the interests of offenders. He draws attention to the proliferation of special interest groups in the area of criminal justice and asks -

> "As this goes on, will it mean that political clout more than abstract justice will govern public affairs?"

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THE VICTIMS' REVOLT

by

W. Clifford*

In 1952 I wrote the first article on "Victimisation" for the "Justice of the Peace", a U.K. legal publication. Having sat in court for long hours and observed the concern of the law to vindicate the "king's peace" without any real regard for the victim except as a witness for the prosecution, I argued that far more attention should be paid to the victims of crime. It was well over ten years before attention was paid to the needs of victims of crime and a system of compensation was introduced for victims of violent crime. In the years which followed, the compensation scheme for victims was embraced by Canada, some States of America and eventually by Australia.

Compensation from the public purse was not the only problem of victims of crime which required attention however. In English law there had always been provision for a court to order, in addition to any other penalty, that the offender should make retribution. Also in civil law, the victim could always bring an action against the offender for damages. The problem was that offenders did not usually have property or the means to compensate the victim - hence the resort to compensation payable by the state.

As movements developed for helping offenders and according to them a broader recognition of their human rights, so the plight of the victim seemed to get lost in public concern to become more humane in treating those who had broken the law and ensuring to them the protection of the law they had violated. Legal aid was provided more generously to anyone accused of an offence, so that in the actual hearing it sometimes seemed that the victim himself was on trial. One of the first reactions to this came from women's movements for aid to victims of rape. A number of rape centres provided not only advice on how to get compensation, but guidance on making official reports and on how to give their

evidence. There were also demands for changing the law to avoid victims of rape being penalised in the court appearance. With the rise of terrorism, bombings and attacks on the police, there were more disgruntled victims. So gradually they have organised as special interest groups to keep their situation before the authorities. Many of them usually begin by repudiating any interest in attacking the rights or interests of offenders or people accused before the courts. They argue, however, for equal concern to be given to the needs and rights of victims of crime.

In criminology, the interest in victims began with publications on the way in which the crime was often an event arising out of a relationship between offender and offended. Even when they were strangers, it was clear that some people were more likely to be victimised than others. Then in more recent years victimisation studies have demonstrated that within a population generally, there are far more victims than those who report to the police. For example, a recent study of vandalism in the U.K. shows that only about 3 per cent of the cases of vandalism are reported - and the results of the first national study of victimisation in Australia has revealed that for some offences the rate of reporting may be only 30 per cent: and for other offences an even larger proportion of non-reporting is recorded for other offences.

Gradually, interest in protecting and helping victims has increased so that by far the most interesting feature of the Third International Symposium on Victimology held in Muenster, West Germany, this month has been the attention given to a new movement in Germany called the "White Ring" (Weisser Ring). In a year the movement has expanded to a membership of 10,000 and it is growing rapidly. It has been supported by prominent public figures, has more than an accidental association with the police and is backed very strongly by the widows and families of those killed on duty or else killed in bombing or terrorist attacks. It has already received official government assistance.

There are corresponding movements in the United States, though they have developed from divergent interests. One of these which grew out of the experience of centres for rape victims is NOVA (National Organisation for Victims Assistance) and the City of New York has financed a high powered "Victim Services Agency".

All these organisations specialise in helping victims of crime to make the necessary applications for compensation to obtain medical aid, legal representation at the hearing of the case and to counsel them on their rights and opportunities. There is special witness counselling to prepare them for their role in court and sometimes assistance is available for repairs to property damaged in the course of thefts or to obtain replacements for essential items lost by crime. The New York City Police published a booklet called "Victims Have Rights Too" which gave all kinds of information on rights and facilities, with details of how to secure them. This publication has now become a "Crime Victims Handbook". In Australia recently ex-Commissioner of Police Ray Whitrod has called (in South Australia) for a Samaritans organisation for victims of crime.

Such movements will grow as the issue of human rights versus public safety becomes sharpened by the interests on both sides. These are crucial questions, not only of law and order, but of the quality of life and they recall the basic reasons for law. In ancient times, forms of victims' vengeance had to be regulated by law to ensure a fair trial. To obtain this control in many places the authority of the ruler had to be invoked: but gradually the ruler's own interest in keeping order and obtaining the benefits of any financial penalties displaced the victim as a central figure in the control of crime. Now it looks like being re-asserted very positively by organisations of victims as democratic pressure groups. Obviously there will be a need to monitor this carefully to ensure a fair balance between the rights of the offender as well as the offended. There

will be emotional involvement on both sides and changes in the law will be necessary to regulate and protect rights on both sides.

There is, however, another extremely significant aspect of victims' organisations. Until now they have not been regarded as necessary because the state administration of the law could be trusted to protect all interests. But modern adversary type trials are not always truth gathering institutions. Instead the judge acts as a referee to ensure that the rules are followed by defence and prosecution in presenting their cases to the jury. This often gives the decision to the most forensically apt rather than to the most just. So maybe the "victim solidarity" which is growing is a reflection of dissatisfaction with the effectiveness of the law in protecting the rights of victims. Add to this the increasing recourse to private security for the work that society used at one time to trust the police to do alone; and the rise of specialised enforcement agencies for narcotics, corporate crime etc. - and a rather disturbing picture emerges. It is a prospect of official legal administration drifting (according to public opinion as reflected in public action like prisoners groups, human rights organisations and victims aid) into an ever harrowing area of technical control. As this goes on, will it mean that political clout more than abstract justice will govern public affairs. Is this really the true meaning of democracy in action?

DEATH FOR ADULTERY AND HAND-CHOPPING FOR THEFT

by

W. Clifford*

According to Islamic law, there are five kinds of criminal offences for which the penalty is very clearly specified in the Koran. These are:-

(a) Zina (adultery)
(b) Qadf (slander or false accusation of sexual behaviour)
(c) Sariqa (theft)
(d) Surb al-hamr (drinking)
(e) Qat at-tariq (highway robbery)

For adultery committed by a person legally married, the penalty is death by stoning: but if the offender is young and has never been married he (or she) may escape with 100 lashes. Similar lashings are decreed for drinking alcohol: but for theft the right hand is to be severed and, for a second offence, the left foot. Both members are cut off for the offence of highway robbery.

Perhaps the only country to apply this law in its full rigor in modern times is Saudi Arabia. Until recently this was an oddity, even in the Middle East, where so many Moslem states had introduced Western type penal codes - not abandoning Islamic law but confining it to civil and domestic affairs under the jurisdiction of Sharia courts. In these other countries the penal law of Islam was usually displaced by a "modern" code. However, as Iran has recently demonstrated so well, the Islamic clergy and Mohammedan scholars never took kindly to this secularisation of the Islamic religion which is essentially a theocracy. It is integral to their religious role that Moslem religious leaders carry political as well as religious responsibilities.

With the world's wealth now concentrating in Arab

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hands and with the resurgence of the Islamic religion as a political movement across the world, the calls for a return to the purity of the Koran, even in penal affairs, are becoming more strident. Saudi Arabia itself has been extolling its own relative freedom from crime and has been recommending to other Moslem states a return to the simple effectiveness of Islamic moral, legal and penal precepts. Thus, as the influence of Mohammedanism is increasing, the question of the humanity and usefulness of Koranic law has become correspondingly important.

In discussions with Saudi Arabians, it is clear that they are irritated by the outside impression that they spend their time harshly suppressing crime by executing offenders in public and cutting off hands and feet. They point instead to the very low incidence of crime - about 2 per cent per 1,000 people[1] and to the behavioural effect of people faithful to their religion being governed (as they see it) directly by Allah. This means having to confront God with their own conscience, an experience which it is claimed invokes a deep sense of public and private integrity: so that crime is an exceptional phenomena in this deeply religious society. The Saudis are also concerned to explain that, in practice, Islamic law is a good deal more flexible than it may appear and that interpretation of scripture provides for a variety of adaptations to circumstances.

Whilst this is undoubtedly true, it is important to realise that in an Islamic state anything written in the Koran cannot be ignored or abrogated. There is little likelihood of Moslem states, therefore, abolishing the death penalty or the final recourse to maiming, where this is felt to be necessary. Whilst this strict adherence to the Koran is limiting, it has the advantage of giving wide scope for action where nothing about a particular situation is written in the Koran.

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(1) This figure cannot be confirmed but was given to the writer personally by a very senior police official from Saudi Arabia.

A second fact of great significance is that even within the scriptures there are possibilities of interpretation. Recently, for example, differences of view have arisen between Tunisia and Iraq on the subject of polygamy. Tunisia has decided that, despite the long tradition of a Moslem being allowed up to four wives, polygamy should not be allowed because the Prophet taught that a man must be "just" to his wife. Tunisia has taken the view that, in modern conditions, it is just not possible for a man to be "just" to more than one wife at a time. Iraq has disagreed with this reading of the Koran. For Iraq, the fact that polygamy has been recognised from the days of the Prophet is an indication that the Prophet himself did not exclude the possibility of a man being able to be "just" to more than one woman.

Other opportunities for the exercise of ta-zir or discretion by an Islamic judge, occur as a result of the need always to take into account the "common good" or welfare of a society. Omar, in the period of the second Caliphate, ruled that certain thieves should not have their hands severed because, in fact, their employers were paying them so little that they had not enough to live on and had probably had to steal. Also, during a period of famine during early Islamic history, the severe penal remedies for theft were not applied because, in justice, the culprits could not be fully blamed. In Saudi Arabia today there is an underlying appreciation that until social justice for all has been achieved, it is unjust to apply to the disadvantaged the full rigor of corporal punishment. Judges are conscious that, without full social security in that country, to have a hand or foot severed is to deprive a person of the means of subsistence.

It is interesting, therefore, to see that Saudi Arabia, a country of seven million people, has no less than sixteen prisons. If it applied the Islamic law indiscriminately, that country would not need so many institutions. There is no probation or parole but sentences of imprisonment are short, e.g. five years for murder. The longest sentence is reserved for the drug traffickers, who can be sent to prison

for 20 years. This is in marked contrast to some other countries which now invoke the death penalty for drug trafficking.

Finally, there are opportunities for softening the rigors of Islamic law via the rules of procedure. Traditionally, conviction by the judges has depended upon the evidence of several Moslem witnesses of good repute - and/or upon a confession by the person accused (who often wishes to purify himself by accepting the penalties decreed). Also, over a period of centuries, various forms of circumstantial evidence have been permitted - though their role is still secondary and it is doubtful whether a person could be convicted on circumstantial evidence alone.

Yet this scope for adaptation and mitigation of Islamic law should not be carried too far. It is less significant in penal than in civil law. It is true that for the offence of adultery to be proved, there must still be four eye-witnesses who are Moslems of good repute. One might be excused for thinking that anyone prepared to commit adultery in such relatively public conditions would be inviting condemnation!! However, a confession can also lead to a penalty: and this is presumably how most of the adultery cases arise. The importance of the confession is recognised in a rather curious way in the style in which the penalty is inflicted. Where there is no confession, the offender is half buried in the ground so that he cannot run away. He is then stoned to death. If, on the other hand, he has made a confession, he will not be half-buried in the ground. Not only can he run away, but the crowd of stoners is not expected to chase him. So a confession invokes its own mercy.

Again, in evidence, the possibility of a theft being due to a mistake, a claim of right or no real fault of the offender is fully provided for, so that, in practice, maiming tends to be confined to blatant thefts probably accompanied by force or the threat of force.

Accounts differ as to the real incidence of theft, not only amongst the Saudi Arabians themselves but amongst the millions of pilgrims who flock to Mecca every year. Some maintain that there is a religious fervour which induces an extraordinary degree of integrity. Goods may be left unattended: money lost will be returned and there is no likelihood of theft. Perhaps this is true: but others suggest that, as might be expected with such enormous numbers of people on the move, thefts do occur but are not recorded, reported or indeed treated as thefts, simply because of the severity of the penalty and the disgrace implied for Islam.

In an effort to get to a more factual account of what is happening in Saudi Arabia, the writer drew on the experiences of a Moslem scholar who had been there for about a year - and on the experiences of a senior police officer in Saudi Arabia. Both agreed that in the year there had been about three or four executions televised and that hand severing was not more frequent. The exercise of judicial discretion was stressed, but it was also agreed that justice in Saudi Arabia is likely to be swift with few, if any, long drawn out hearings on points of fact or law. Of course, this must imply that the possibilities of a mistake are enhanced. Both observers stressed the high levels of personal integrity induced by the moral law which puts the offender face to face with Allah. It was emphasized that it was the strength of these informal social controls much more than the deterrent effect of harsh penalties which was responsible for the high standards of private and public behaviour which are claimed in Saudi Arabia.

What is abundantly clear is that the return to the purity of Koranic observance in Moslem states will run counter to the Western trend of excluding morals from the law of the land. It would be unthinkable for an Islamic state to divest the law of its moral precepts. It is by the widening of the moral ideals of justice and fairness that the harshness of the penal law is likely to be mitigated. Where

ideal moral and social conditions cannot be realised, there will be reasons for the judges to curtail the application of the full rigor of Islamic penalties. However, the real effect of this in practice will only be known when there are more detailed studies of legal administration in states applying the Koran.