

A NOTE ON TOLERANCE

by John Croft

John Aubrey, the seventeenth century antiquary, wrote about one Edmund Gunter: 'When he was a student at Christ Church, it fell to his lott to preach the passion sermon, which some old divines that I knew did heare, but they sayd that 'twas sayd of him then in the University that our Saviour never suffered so much since his passion as in that sermon, it was such a lamentable one.' What follows is not a sermon. I crave the reader's indulgence for what may seem a rather rambling disquisition but the subject, tolerance in criminal justice, is a confused and confusing one.

One needs to consider tolerance in relation to its antithesis, intolerance. Tolerance does not appear to be a constant characteristic of the human race. The moral and customary codes, often enshrined in law, tend to be ambiguous. Vindictiveness, or at best a lack of tolerance, is encountered in the Old Testament. The New Testament strikes a different note, of forgiveness. 'Vengeance is mine; I will repay, saith the Lord': St. Paul thus assigns that function to God, not to man. However the history of the western world, in particular its religious conflicts – often mixed with ethnic or economic rivalry, did not pursue in practice that path of virtue, as witness countless wars of religion and the inheritance of such conflicts in Ireland, the Balkans and elsewhere. To this catalogue of wars and crusades there have been exceptions – the religious tolerance of Islam in medieval Spain and later of the Ottoman Empire are often cited – but in the west religious tolerance was not often an accepted feature of civil life much before the Enlightenment of the eighteenth century and the establishment of the secular nation state.

What has this got to do with tolerance in criminal justice? The history of penal sanctions suggests that the nature of criminal justice is essentially punitive and retributive. Deviation from the law, from the moral code, was punished corporally or capitally. This mirrors the conduct of nations before the rise of liberal and utilitarian modes of thought two hundred years ago began to influence thinking if not behaviour. Only in the nineteenth century – in England at least – does any notion of rehabilitation creep in.

Yet the liberal tradition, which invoked a certain degree of toleration or at least hope of reformation of the criminal, is now under pressure. In this context, one needs to be reminded of Winston Churchill's words as Home Secretary in 1910: 'The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man - these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and the sign and proof of the living virtue in it.' Such sentiments are somewhat distanced from the tradition of punishing the outcasts.

To-day, however, there has been a swing, sometimes driven by the media, towards a more retributive penal philosophy. It is not entirely clear how this has come about, whether from a lack of confidence on the part of the public in the forces of law and order to suppress crime or due to other factors, but the consequence has been a prison population in England and Wales which now ranks proportionately as the highest in Europe and a government, almost in desperation, on the one hand thrusting more responsibility (perhaps rightly) onto the community to control crime while on the other hand devising new and repressive penalties for wrong doers, particularly youth. A demand for greater toughness – 'Tough on crime, tough on the causes of crime' is the clarion call. So have we forsaken the path of tolerance for the highway of intolerance?

I am not sure that there is a definitive answer to this question. Religious and political fundamentalists, of course, would have no doubt about the moral justification for a hard line. Others, of a more liberal and perhaps even quasi-scientific disposition, still see opportunities for the prevention of crime, for restorative justice, and for the reform and rehabilitation of criminals – short of a radical reconstruction of the social order. The tolerance/intolerance balance is subject to swings of public and political mood, depending on the external pressures and new threats whether, for example, from murders

perpetrated by children or from terrorists. Steering a course between the Scylla and Charybdis of these alternatives has even made some liberal societies in northern Europe falter.

In this situation one seeks to enquire whether some compromise, some middle way, is possible or whether an alternative ethical construct in terms of moral reasoning can be conceived. About thirty years ago I attended, as an observer, a session of a Parole Board panel comprising about half a dozen persons. It met in the Royal Courts of Justice off the Strand in London and was presided over by a High Court judge. It was a civilised affair and concluded with a more than adequate lunch. The Panel considered a number of cases for release on parole on the basis of reports from prisons and the probation service, the latter's account being somewhat more informative than the former. But the overriding consideration which appeared to influence each decision was whether the prisoner showed *remorse* for the offence he had committed. This struck me as tantamount to an act of confession. If I were to commit intentionally a crime, I doubt whether I would show remorse for what I had purposefully set out to do and successfully achieved. (Members who served on the Parole Board in later years told me that remorse confessed by prisoners was often a contributory factor in the decision to grant parole: I do not know whether this still obtains.) In my opinion, decisions to parole offenders should be based on an as objective as possible assessment of risk – risk to society, risk to the offender in the sense that he or she might commit yet another offence and be punished accordingly. I am therefore inclined to reject the confession of remorse as an ethical compromise either to temper punitiveness or to encourage a more permissive and forgiving attitude.

I do not, however, tolerate rule-breaking easily. To take the example of vandalism – petty disfigurement of public and private property, usually perpetrated by children or adolescents. Should one deal with this behaviour harshly, not only as punishment for the misdemeanour but to deter further offences? Or should one's attitude be more understanding if not sympathetic by looking into the circumstance of the offence and its cause, and by seeking an amicable solution by persuading the offender to repair the damage and by finding a safer avenue into which such deviant behaviour could be channelled? In other words, restoration and prevention in preference to punishment and suppression.

This note has raised questions but not provided certain answers. I am not sure how we resolve the problem as I have presented it. Workers at the coal-face of the criminal justice system – police, magistrates and judges, probation and prison officers, in particular prison chaplains – will be aware of the underlying moral and ethical issues. From time to time even politicians pronounce on them. Social scientists, avoiding such moral conundrums, suggest that the roots of the problem lie in factors such as upbringing, the socio-economic environment and an hundred and one other facets of the world we inhabit. Ultimately, perhaps, the solution lies not only in our genetic or moral inheritance enshrined in custom and religious belief but in the nature of civil society, its structure and cohesion. A cohesive society tends to be a more tolerant one; one that isn't cohesive is split, and becomes intolerant towards those that deviate from its norms; this makes matters worse, because it creates outcasts and excludes them. We need to build, by democratic means, an inclusive society that is tolerant yet intolerant of those that threaten its values.

The intention of this note has been to invite the reader to think about these issues which are fundamental to the conduct of criminal justice. A divided and divisive society creates tensions which lead to acts of violence. Threatened as I believe we are by internal fissures in the body politic as much as by external forces and events, I lay emphasis on social cohesion as a basis of equitable social justice

John Croft was formerly head of the Research and Planning Unit of the Home Office, London.