

MORALITY, CULTURE AND FRAUD

by

SALLY RAMAGE ®



The recent newspaper article in the Financial Mail on Sunday 22nd August, 2004, caused me concern, not because of the seemingly human rights issue of whether the alleged VAT fraudsters would have had a fair trial had information been with-held by HMC&E but in the foreground is the underlying issue in society today. The article is titled “£2 billion a year VAT fraud cases frozen”, by James Oliver. Are we so engrossed in implementing the rights of the person that we are failing to see the big picture , which is that society has lost its toe-hold on the reasons behind the formation of states and security. We have states to protect communities and we have government for the security of those communities . Since modern society is not single minded when passing moral judgements , it is difficult to see what the norm is for moral behaviour.

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Morality depends on tradition and the potential fraudster is required to base his behaviour

mainly upon that tradition. Taken together with the fact that we are all different and that we have little control over the bio-chemical factors which affect us and can give us inherited anti-social tendencies, crime may result if the tendencies of the individual and his environment outweigh the resistance which can be opposed to them.

Nevertheless, the primary concern of society, and the first duty of its legal instruments, is the protection of the majority from the misdeeds of the fractional minority and so we cannot afford to discriminate always between the variables which go to make up criminal behaviour. So as society, we deal with results for the sake of the general welfare.

Culture and fraud

An analysis of how different societies view and treat different acts of persons belonging to those societies show that deeds such as fraud can be seen to be a reflection of the society in which it is perpetrated and is given treatment according to the society against which it is perpetrated.

If, say in country A, serious fraud is much more common here than in country B, then a resident of country A is more likely to commit serious fraud than is a resident in country B. If in country A there are plenty of businesses and law finance and contract laws so that it is very easy to commit serious fraud in country A, and the opposite is true in country B, then if a resident of country A commits a serious fraud and I am the judge but I come from country B, in passing sentence, I am likely to give him the maximum sentence the law of country A allows. It can be argued that the fraudster from country A is under an environmental burden and so I am not fair in judging him by my standards.

Suppose that there are genetic differences between the residents of country A and country B in that country A's residents are better fraudsters because they have mental and physical capacities that make for people of great cunning, nerves of steel, skill in manipulation, then they must receive special consideration because they are unlike the people of country B. Suppose that country A has other environmental factors in that residents there raise their children to be fraudsters. Then fraud would be much more common in country A. And suppose that residents of country A are harder to socialise than is the human norm because of some genetic factor. Then they would have a greater tendency to fraud. That this theory could be applied to the situation of the UK and the US would be to explain why 50% the UK's Serious Fraud Office defendants receive sentences of 5 years imprisonment whereas in the US the sentences are in the region of [\[2\]](#) fifteen to twenty years for serious fraud.

So it can be argued that fraudsters are raised in the white collar families in society and can be classed as such and can be argued that they are a result of their environment. Croall and also

[\[3\]](#) Sunderland give definitions of white collar crime. It could explain why it is that a certain type of criminal behaviour is more common in a certain population due to the increased prevalence of skills in that population required for this type of crime and that opportunities abound for members of the white collar community to engage in this type of behaviour with impunity.

As to the genetic factors, if the desire to commit fraud has a genetic cause, the source of the desire can be argued not to be regarded as a mitigating circumstance. But if we are to make the same moral judgements for environmental factors as for genetic factors, then we must treat all persons uniformly, irrespective of any factors.

This would make a nonsense of law and cases such as R v Peter Young[2003] unreported, would be tried and sentenced regardless of insanity. If we admit the factor of insanity, we must admit factors such as environment and genetics. But the law is slow to do this and seems to be afraid that psychiatry might understand the transgressor too well and might forgive too readily.

If punishment is viewed as a deterrence, it would reduce crime. The aim in deterrent punishment is to instil in the individual a regard for the law because of his fear of the punishment which will follow if he transgresses. This leads to an ethical question and that is, whether legally correct behaviour maintained for the reason of deterrence is worth having. We all of us are trained socially in the element of fear. These are the foundations on which we build our sentiments. They develop into sincerely held moral principles, to which, when they are matured, we cling in the face of the most appalling temptations and difficulties.

How severely are we justified in punishing criminals merely to reduce the amount of criminality? How far we go is going to be determined by our sense of compassion and decency. It follows that the more civilised a country, the more vigorous its restriction on punishment. This imposes a practical limitation upon the utility of very severe punishments. Where punishments are very severe, it is impossible to impose it and so it defeats its own ends. An example of this is the death penalty for theft offences in the UK in the nineteenth century, which resulted in magistrates acquitting obviously guilty persons because they were not prepared to impose the death penalty for petty offences.

The affectionless psychopath, as most fraudsters are, is therefore an individual for whom the prudent calculation of gains and losses required by the deterrent theory would be quite

impossible. It may be the reason for the lenient sentences to fraudsters in the UK. It is therefore surprising that fraudsters from other countries do not , as it were, ‘forum shop’ and come to the

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UK to do fraud. Many observers have noted that criminals of this type, who constitute a substantial proportion of persistent offenders, are quite incapable of learning even from the

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experience of punishment, much less from the threat of it.

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Deep psychological studies by psychoanalysts such as Flugel show that , nevertheless, deterrent punishments are the ally of the law-abiding individual in his struggle to keep his own anti-social wishes under control. He states : *“The criminal, by his flouting of the law and moral rule, constitutes a temptation of the id. To our own unconscious and primitive wishes; it is as though we said to ourselves, ‘if he does it, why should not we?’. This stirring of criminal impulses within ourselves calls for an answering effort on the part of the super-ego, which can best achieve its objects by showing that ‘crime doesn’t pay’. This in turn , can be done most conveniently and completely by a demonstration on the person of the criminal. By punishing him we are not only showing him that he can’t ‘get away with it’ but holding him up as a terrifying example to our own tempted and rebellious selves.”*

The limitations of deterrent punishments must still be borne in mind. There is much crime, especially of the more serious sort, on which it has little effect, and many criminals, particularly of the more persistent type, on whom it will make little impression.

In the United Kingdom, punishment for fraud offences consist of imprisonment and also

confiscation of the proceeds of fraud wherever possible. This is enacted in the Proceeds of Crime Act 1995 which can be seen as restorative justice. For example in a 2003 case , Lee Rosser was handed consecutive prison terms in two trials concerning conspiracies to defraud investors in a ‘malt whisky scheme’ and a ‘millenium champagne scheme’.. The UK’s Serious Fraud Office traced his assets and won a confiscation judgement. The court was told that through Rosser’s fraud, the benefit from the fraud of £5 million , but that because he made a large number of cash transactions and his expensive lifestyle, his realisable assets were few. The court nevertheless ordered him to pay £519,000.

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Contrary to this obvious benefit from the fraud perpetrated, is the case of R v Olubitan , the facts of this particular case bore no evidence that the conspirator received any pecuniary advantage from the conspiracy. Therefore the confiscation order was quashed.

The United Kingdom is different to the rest of the European Union in that the prosecutors apply for a confiscation order after a serious fraud conviction whilst in the rest of the European Union , a freezing order on assets is the opening gambit in most actions of suspected fraud. Such an EU freezing order is achieved through a criminal investigation presided over by magistrates. In England trusts are often used in which to protect assets from confiscation but a discretionary trust may be made to pay the creditors when the beneficiaries become bankrupt.

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The 1824 case of the Trial of Henry Fauntleroy for forgery illustrate that the criminal offences of fraud and forgery have been diluted from an offence which carried a sentence to hang, a capital punishment to the recent UK serious fraud case of R v Mitchell, Kirkup, Mason and Chapman

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in which the lenient sentences of 120 hours of community service was passed.

The UK Proceeds of Crime Act 1995 resembles the informal German restitution and mediation within the German Justice System except for the fact that it is a statute in the UK and an informal alternative procedure in Germany where, in adult penal law, the restitution order has been recognised since 1953 as a condition of probation and as a means of diversion by the prosecutor or judge.

In 1990, the UK offender-victim arrangement was introduced and since 1994, courts may reduce punishment, place an offender on probation, or refrain from punishing at all for offences punishable by up to a year in prison provided the defendant has already compensated the victim or at least honestly attempted to do so before trial. The main difference between restitution and the offender-victim arrangement in German law and British law is that these restitution arrangements in Germany are alternatives to punishment whilst in the United Kingdom they are additions to punishment. In Germany the judge may decide on civil liability within the criminal

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proceeding but not so in the UK.

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Partick Devlin in “The enforcement of morals”, 1965, Oxford University Press, stated that society cannot live without morals, these morals being the standard of conduct which the reasonable man approves. He argued that a man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained, these two instruments being teaching which is doctrine and enforcement which is law.

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The Economist, "Bosses behind Bars", 12 June 2004.

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Edwin Sutherland defined white collar crime as "... approximately... a crime committed by a person of respectability and high social status in the course of his occupation." White Collar Crime by Hazel Croall, 1992, Open University.

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Of the 78 fraud defendants to SFO cases over 5 years, only 3 were Australian, 2 were Nigerian and 2 were Irish, the remainder being British.

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Doran, J., "Reinventing the wheeler dealer after a ban", Monday May 31, 2004, Times Newspaper. In this article, the writer states that after fraudsters are tried and sentenced, there are always more avenues for them to pursue such as mortgage broking, unregulated areas such as hedge funds or currency trading firms. It sites examples of fraudsters such as Jack Grubman, a former analyst of Salomon Smith Barney. He was fined \$15 million to settle an investigation into his conduct. He now works as a consultant. Another example is Nick Leeson, the rogue trader who brought down Barings Bank after racking up losses of £850 million. He served 4 years in prison and now lives in the Irish Republic, making his living as a sought-after guest speaker.

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Flugel, J.C., (1950), "The psycho-analytic study of the family", London: The Hogarth Press.

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R v Olibutan [2003] The Times Nov 7, Court of Appeal, Criminal Division.

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Fauntleroy began as officer in his father's London bank in 1800. In 1814 economic conditions were bad and he began forging signatures of securities belonging to bank's customers, selling them and covering up the forgery by clever devices, constantly charging accounts at the Bank of England. His forgeries became more and more extensive, enabling Fauntleroy to live extravagantly. So extensive and so intricate were his forgeries that they covered a large number of customers and he used forgeries to cover forgeries. In 1824 his forgeries were discovered by the Bank of England. He was arrested, tried and was found guilty and sentenced to hang.

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In R v Mitchell and others [2004] unreported, the group set up a company to assist businesses seeking start-up and development capital. No venture capital was made available to any client within a five year period and the group received £5 million income from these clients. They filed false sets of accounts. They spent the £5 million on themselves with big salaries, luxury travel, high quality cars and plush offices. There was no money left to be confiscated.

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It is interesting that a statistical comparison of frauds in the year 2000 in Germany, United Kingdom and France show that there were 895,758 frauds in Germany, 318,324 in the United Kingdom, 142,583 in France, 371,800 in the whole of the USA, translating into 10 per 1000 people, 5 per 1000, 2 per 1000 and 1 per 1000 persons respectively. Source: www.nationmaster.com