

JOINT SELECT COMMITTEE
REPORTS OF LEGISLATIVE
ASSEMBLY - 1923

The Abolition of Transportation Bill

List of Reports of Select or Joint Committees
presented in the Legislative Assembly in 1923.

Serial No.	Short title of the Bill.	Date of presentation.	Remarks.
1.	The Cotton Transport Bill.	15.1.23.	} Reports of the Joint Committee:
2.	The Cantonment(House Accommodation)Amendment Bill.	15.1.23.	
3.	The Indian Boilers Bill.	15.1.23.	
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5.	The Workmen's Compensation Bill.	24.1.23.	
6.	The Indian Official Secrets Bill.	31.1.23.	
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9.	The Indian Cotton Cess Bill.	14.3.23.	-do-
10.	The Code of Civil Procedure(Amendment) Bill by Dr.Hari Singh Gour.	20.2.23.	
11.	The Hindu Law of Inheritance(Amendment) Bill by Mr.T.V.Seshagiri Ayyar.	14.3.23.	No Copy available
12.	The Exclusion from Inheritance Bill by Mr.T.V. Seshagiri Ayyar.	14.3.23.	
13.	The Code of Criminal Procedure(Amendment) Bill (Sec.4) By Mr.Abul Kasem.	14. 3.23.	
14.	The Civil Marriage (Amendment) Bill by Dr.Hari Singh Gour.	14. 3.23.	
15.	The Mussalman Wakf Registration Bill by Mr.Abul Kasem.	15.3.23.	
16.	The Abolition of Transportation Bill.	3. 7.23.	
17.	The Indian Stamp (Amendment) Bill.	10.7.23.	
18.	The Indian Naturalization Bill.	10.7.23.	
19.	The Land Acquisition (Amendment) Bill.	16.7.23.	
20.	The Cantonments Bill.	18.7.23.	
21.	The Code of Civil Procedure(Amendment) Bill by Lala Girdhari Lal Aggarwal.	24.7.23.	
22.	The Legal Practitioners Bill by Mr.K.C.Meegh.	24.7.23.	
23.	The Illegitimate Sons' Rights Bill.by r.V.K. Peddi Garu.	27.7.23.	

LEGISLATIVE DEPARTMENT.

WE, the undersigned, Members of the Select Committee to which the Bill to provide for the abolition of the punishment of transportation in respect of criminal offences was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit the following preliminary Report.

Papers Nos. I and II.

2. Several of the opinions which we have had to consider, including those received from the Governments of Madras and Bombay, criticise the Bill, in the first place, as not proceeding on any definite principle for the determination of punishments equivalent to transportation, and, in the second place, as perpetuating and re-affirming a system of rigorous imprisonment for lengthy terms which is not in consonance with principles of modern penology. One of our colleagues, Colonel Sir Henry Stanyon, has also, after an exhaustive study of the subject, developed a proposal which is based on similar arguments.

3. After long and careful consideration of the matter, we have decided that these arguments are well-founded. We think that, so long as imprisonment is limited to the two extreme forms, viz., rigorous and simple, as it now is under the Indian Penal Code, it is practically impossible by an individual examination of each enactment providing for the imposition of a punishment to arrive at any satisfactory amendment of the existing law. We further consider that the existing law, providing as it does for long terms of rigorous imprisonment, is itself unsatisfactory, and that to amend the law in such a way as to extend terms of imprisonment of this kind would be an undesirable step. We have, therefore, arrived at the conclusion that it is necessary, in order to replace sentences of transportation by sentences of imprisonment of equal or nearly equal length, to graduate the rigour of imprisonment, and further that this cannot be done without a review of the whole law of punishment by imprisonment. For example, if a maximum term of 14 years' compulsorily rigorous imprisonment is now to be broken up into two or more grades of imprisonment lessening in rigour according to the length of the total term, it might well be found necessary to increase the maximum term which may be awarded.

4. We have considered the possibility of substituting for the present sentence of transportation a sentence of penal servitude, and we think that in some respects legislation on these lines might be a satisfactory solution. We are, however, unable to recommend such a proposal by reason of the fact that prohibitive expenditure would be required for the establishment of penal settlements which would necessarily be altogether distinct from jails, and we are, therefore, of opinion that the only practical solution at present is a system developed on the lines suggested by our colleague, Sir Henry Stanyon, in his note, which we reproduce as an appendix to our report.

5. We fully realize that the adoption of our report will entail delay, as it is impossible to revise the whole of our present system of imprisonment except after careful consultation with Local Governments in regard to the practical jail problems involved in such a proposal. Nevertheless, we think that the abolition of transportation, highly desirable as it is, is not itself a sufficient justification for enhancing, even temporarily, maximum terms of rigorous imprisonment which are already in excess of those provided in the law of most other countries.

6. Apart from the necessity of consulting Local Governments, we realize that it would undoubtedly be beyond the scope of our reference to amend the Bill on the lines proposed by us without further instructions. We have, accordingly, not attempted to amend the Bill at present, and we recommend that it be not proceeded with pending the consultation with Local Governments which we have advised, and that as soon as possible thereafter the Bill should be revised and be again presented before the Legislature.

7. The Bill was published in the Gazette of India, dated the 30th September 1922.

W. M. HAILEY.

J. N. MUKHERJEE.

K. B. L. AGNIHOTRI.

N. M. SAMARTH.

P. E. PERCIVAL.

HENRY J. STANYON, Colonel.

LACHMI PRASHAD SINHA.

The 3rd July, 1923.

Appendix to the Report.

NOTE ON THE ABOLITION OF TRANSPORTATION BILL.

I take the object of this Bill to be, not to revise the *quantum* of the punishment for any offence now punishable with transportation, but to substitute for transportation an equivalent punishment of some other form. Our chief duty therefore is to find this equivalent.

The only practical form of substitution is punishment by imprisonment. At present imprisonment, as a punishment for crime, is of two descriptions, namely (1) Rigorous and (2) Simple. The former is defined in section 53 of the Indian Penal Code as imprisonment "with hard labour." The latter is not defined, and is commonly supposed to be mere confinement without any kind of compulsory work.

Under the Indian Penal Code transportation may be awarded for life, or for any shorter term not less than 7 years, except under sections 121A and 124A where no minimum is prescribed. For convenience of reference I divide this form of punishment into (1) Life transportation and (2) Term transportation.

Originally Life transportation was intended to be transportation for the natural life of the convict. But for the particular purpose of calculating fractions of terms of punishment, *e.g.*, under section 116 or section 511, Indian Penal Code, it was expressly enacted by section 57 of that Code that Life transportation should be reckoned as equivalent to transportation for twenty years. It has now become the general practice to regard and treat Life transportation as transportation for twenty years for all purposes and life-convicts who live long enough are usually discharged upon completion of that term, and even earlier where they earn remission by good conduct. Therefore, for the purposes of comparison of punishments, in this note I shall assume Life transportation to denote transportation for twenty years.

The author of the Bill before us has made no attempt to introduce any modification of the two descriptions of imprisonment above-mentioned; nor has he proposed substitution of imprisonment for transportation upon any scale of equivalence, nor proceeded upon any general principle. The substitution made in each case is more or less arbitrary; and though we read in the Statement of Objects and Reasons that "it has been desired to retain generally the views of the Legislature as to the relative gravity of each offence when it enacted the law in question," we find substantial, and, in some cases, unjustifiable reduction of the maximum sentence now in force. The proposals in the Bill in regard to sections 75, 124A, 307, 326, 395 and 400 are examples of unjustifiable reductions. This treatment of the subject has evoked a considerable amount of criticism and controversy, as will be apparent from a perusal of the opinions on the Bill which have been received, whereof a most helpful *précis* has been supplied to us.

There can be no doubt, in my opinion, that the frame of the Bill is defective in this respect, and that it is necessary to adopt a scale of equivalence between transportation and imprisonment if our recommendations are to be consistent, and designed to change only the form and not the substance of the punishment provided by law. The Bombay Government have suggested the following scale:—

- 20 years transportation = 14 years rigorous imprisonment.
- 10 years transportation = 7 years rigorous imprisonment.
- 7 years transportation = 5 years rigorous imprisonment.
- 5 years transportation = 3 years rigorous imprisonment.

For reasons which will appear hereafter this scale does not commend itself to me as satisfactory. Several experts seem to have assumed with confidence that Life transportation, taken as transportation for twenty years, is equivalent to rigorous imprisonment for fourteen years. Possibly this assumption is based on section 55 of the Indian Penal Code, which reserves power to Government to commute a sentence of transportation for life "for imprisonment of either description for a term not exceeding fourteen years." I do not think that the Legislature intended to suggest that transportation for life was to be measured in severity by imprisonment of either kind for fourteen years. The authors of the Indian Penal Code expressly stated in their Report that transportation was a form of punishment more severe than imprisonment, and the treatment of the two forms in that Code and in section 402 of the Criminal Procedure Code, 1898, indicates that the Legislature adopted that view, according to which no term of imprisonment could equal in severity a sentence of transportation for life.

In my opinion no safe inference can be drawn from anything in the Indian Penal Code or other British Indian enactment as to any scale or standard by which the Legislature compares transportation as a measure of punishment with imprisonment. The alternatives of imprisonment to transportation given in various sections are no guide. So far as Life transportation is concerned we have a wide divergence in such alternatives in the Indian Penal Code. In one case there is no alternative—section 311; in other cases we have death (section 302); *rigorous* imprisonment for 10 years (section 194), imprisonment of either description for 14 years (section 222), for 10 years (section 121), for 7 years (section 472), and for 3 years (section 121A).

As regards Term transportation we have section 59, Indian Penal Code, which, excluding cases of abetment and attempt to which its application depends upon the offence abetted or attempted, is directly applicable in 145 cases. Under this section imprisonment of *either description* (and therefore of unequal severity) for any term not less than seven years may be converted into any term of transportation from seven years up to the maximum term of imprisonment provided for the offence concerned. Let us consider this in the light of an illustration. A and B have been found guilty and adjudged punishable, A with *rigorous* imprisonment and B with *simple* imprisonment for seven years. Under section 59 both these offenders may be transported for fourteen years. It is clear that no basis for comparison or measurement by the Legislature of transportation with imprisonment can be inferred from such provisions.

There is no offence in the Indian Penal Code punishable with *simple* imprisonment only for more than the two years provided for an offence under section 165. In every case to which section 59 can be applied rigorous imprisonment appears as a form of punishment. In practice, Courts acting under this section have invariably regarded transportation as a substitute for an *equal* term of rigorous imprisonment. There is nothing for or against this practice in the Statute Law; but the existence of the practice may have influenced the author of the Bill in substituting rigorous imprisonment for transportation in many places. But, notwithstanding the view held by the authors of the Indian Penal Code and adopted by the Legislature as above noted, it seems now to be generally admitted that under present-day conditions imprisonment with continuous hard labour for seven years and upwards is a punishment of far greater severity than transportation for an equal term. On the other hand, any balancing of simple imprisonment with a term of transportation can be achieved only with the help of a very flexible imagination.

It appears to me that transportation is a form of punishment which gradually lessens in severity with time, as the convict becomes reconciled to his exile, initial misery and despair being replaced, first by apathy and then, by attachment to the new life, or by the prospect of approaching return to the old. He grows accustomed to and trained in labour, and by good conduct earns increased liberty of movement, lightening of toil or more congenial work, and other concessions and privileges. Grief at separation from relations and friends is countered by the absence of the sense of degradation which contact with them would have kept alive. Thus a sentence of transportation, while severely punitive for a time, gradually becomes reformatory.

I think, therefore, that a sentence of rigorous imprisonment for a few years, followed by simple imprisonment for the rest of the term, the severity of the former being graduated towards the latter, would be the nearest equivalent to the same term of transportation. Section 60 of the Indian Penal Code empowers every Court which sentences an offender to imprisonment to direct "that any part of such imprisonment shall be rigorous and the rest simple"; but in a forensic and judicial experience extending over 42 years I have never come across a single instance in which this discretion was exercised; the probable reason for this omission being the wide gulf which divides the judicial and general estimates of the relative punitive values and appropriate use of the two forms of imprisonment to which section 60 refers. Moreover, I believe that Courts have never felt themselves called upon to make any serious attempt to obtain equipoise between a sentence of imprisonment and a sentence of transportation. Where action under section 59, Indian Penal Code, has been taken it has been influenced by other factors, such as the desirability of removing the criminals concerned from the scenes of their crimes, because imprisonment had failed as a deterrent, or because the Executive Government had indicated that jails were crowded and a more liberal use of the power to transport was expedient. The necessity for ascertaining a standard for the correct inter-measurement of the two forms of punishment arises for the first time with this Bill, and, in my opinion, no convincing common measure can be found as the law now stands. If I am right in my view as to the "incidence" of transportation on the transportee, then we can only obtain a satisfactory equivalent by having a more graduated scale of severity in imprisonment than is provided by the two extremes enacted by section 53 of the Indian Penal Code.

It is necessary to retain the two *descriptions* of imprisonment given in section 53 to avoid disturbance of the very frequent use of the words "either description" in the Code; but we might recommend the sub-division of each description into two classes thus:—

Rigorous	...	{	Class I, i.e., with hard labour.
		{	.. II, i.e., with moderate labour.
Simple	...	{	Class I, i.e., with light work and degradation.
		{	.. II, i.e., mere confinement without degradation or compulsory work.

As regards rigorous imprisonment, I agree in the view put forward, chiefly by the Hon'ble Judges of the Madras High Court that long continued imprisonment with hard labour is to be deprecated. The Hon'ble Mr. Justice Coutts Trotter has written, "You require altogether different conditions for a short and long sentence. The short sentence aims at a sharp and uncomfortable punishment, and, so long as it is short, it may properly be made 'rigorous'—

that is to say extremely—uncomfortable to the actual delinquent—in the hope of reforming him. The long sentence is passed either on account of the great gravity of the offence—requiring a deterrent sentence in its length for the warning of the community at large—or on account of the proved recidivist tendencies of the prisoner, which render it necessary to remove him out of mischief. * * * Conditions which would be salutary as a sharp lesson for say two years, would be mere savagery if imposed for twenty where the real object was merely to remove the offender.”

I think this is sound penology. It has been long recognised in England, where hard labour cannot be imposed on a convict for more than two years. For any longer term of imprisonment he is subjected to much less arduous conditions of penal servitude.

The learned Judge seems, however, to have fallen into error in supposing that the Bill under consideration entirely overlooks the above principle. The Bill leaves section 60 of the Indian Penal Code untouched. The responsibility for such an oversight rests on the Courts which have left the section a dead letter so far as it makes the application of the principle possible by a judicious combination in punishment of rigorous and simple imprisonment. This omission justifies the Legislature in not leaving the matter wholly to judicial discretion any longer. Therefore, reverting to my proposed sub-divisions of rigorous imprisonment, I would further suggest that a maximum of 3 years be provided for class I to be followed by a maximum of 4 years in Class II; and that any further term should be suffered as simple imprisonment of the first class. If this is approved, the following scale of equivalents might be used to guide us in our recommendations as to the substitute for transportation in each case:—

Transportation.				Imprisonment.			
For life or 20 years	...	...	...	3 years rigorous imprisonment, Class I.			
				4 " " " " II.			
				Rest of term simple imprisonment, Class I.			
For 14 years	...	...	...	3 years rigorous imprisonment, Class I.			
				4 " " " " II.			
				7 " simple imprisonment, Class I.			
For 10 years	...	...	...	3 " rigorous imprisonment, " I.			
				4 " " " " II.			
				3 " simple imprisonment " I.			
For 7 years	...	...	...	3 " rigorous imprisonment, " I.			
				4 " " " " II.			
For 5 years	...	...	...	3 " " " " I.			
				2 " " " " II.			

This scale has the advantage of correspondence in the terms of the two forms of punishment, greatly facilitating the task of recommending the substitution of one for the other.

I would treat the scale as representing the maximum of each class of rigorous imprisonment which may be imposed. Subject to this rule I would leave a discretion with the Courts to vary the proportions, *but not the order*, of the three classes used in the scale, according to the circumstances of each particular case; but in the absence of directions by the Court sentences of imprisonment for 5 years and upwards would be suffered as above set out. For example if the sentence passed upon a convict was imprisonment for ten years without further direction by the Court, he would undergo rigorous imprisonment in Class I for 3 years, in Class II for the next 4 years, followed by simple imprisonment in Class I for the remaining 3 years. But the Court would be competent, when passing sentence, to direct that the prisoner should suffer rigorous imprisonment in Class I for 2 years, in Class II for 3 years, to be followed by simple imprisonment in Class I for 5 years.

I would reserve Simple Imprisonment in Class II for offenders whom it may be necessary to deprive of their liberty for political and other crimes not involving moral depravity, and whose position, caste, antecedents or the like may render it proper to exempt them from the ordinary degradation of incarceration in jail. But this is a detail which may be left to the discretion of the Courts.

It seems to me that in the way suggested above the imprisonment which it is now necessary to substitute for transportation could be imposed so as to secure some approximation to conditions automatically attaching to a sentence of transportation. Judicial punishment must I think be regarded from two points of view, namely,

- (1) its effect on the criminal sentenced ; and
- (2) its effect on the community at large.

As regards the criminal, punishment is designed to be punitive and deterrent, or punitive and reformatory, the former being the object of a short sentence and the latter being one of the purposes of a long sentence. As regards the community the aims of the law are (a) to satisfy a public demand for justice, and (b) to set up a preventive warning. The gradations of punishment which I have recommended above seem to be consistent with all and to afford increased facilities for the achievement of some of these purposes. The due execution of such sentences is a matter for the Executive Government ; but the establishment of penal settlements into which prisoners who have served their respective terms of rigorous imprisonment, can be transferred for purposes of reform, would seem to be most desirable.

The next main feature of the Bill which seems open to criticism is the arrangement of the two Schedules. As to this I agree with the suggestion made by His Excellency the Governor of the United Provinces in Council in the third paragraph of the letter from the Deputy Secretary, United Provinces, to the Secretary to the Government of India, Home Department. In the Bill we find instances where the amendment of a single section is partly in one Schedule, and partly in the other. Such a course if enacted will place a premium on error and confusion, especially in the subordinate Courts.

There is a consensus of opinion with which I agree that in the case of sedition, punishable under section 124-A, Indian Penal Code, the Bill proposes a maximum punishment which is no equivalent to the existing enactment and will be most inadequate in cases—of which there will be many—where the removal of the seditious for a long term without hard labour being imposed may be as desirable for him as for the community at large and the State. There are many other substitutes for transportation set out in the Bill which are anomalous or open to criticism on other grounds ; but I need not labour them in this Note. If my proposals for substitution of imprisonment for transportation on the basis of an approved scale are accepted the amendment of each section will be a simple and non-controversial matter, while the Bill Schedules will be “scrapped.” If those proposals are not approved, then each single item in those Schedules will have to be considered in Committee upon its merits, and discussion here would be premature. If that has to be done it will be a great convenience to members if a statement can be prepared and printed showing (1) the existing law and (2) the proposed amendment thereof in two columns vertically side by side, with a third column left blank for noting recommendations approved by the Committee. Similar statements with the third column filled in could afterwards be served to Members of the Assembly for purposes of the debate on the Bill.

I am aware that an adoption of the proposals I have made, or of anything resembling them, will entail a recasting of the whole Bill, but I believe that this will demand less time and labour than a consideration in detail, unassisted by any scale of equivalents, both in Committee and in the Council Chamber, of every section dealt with in the two Schedules now appended to the Bill. With a scale for guidance, which need not be incorporated in the Bill, and with general provisions set out in the body of the Bill, the substitution of sentences would become consequential and largely beyond the range of controversy.

MUSCOORIE ;
15th June, 1923. }

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(U. P. Europeans).