CAPITAL PUNISHMENT

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A ROYAL COMMISSION was appointed in England in 1949 which presented its report in 1953, to enquire into, and report, whether the liability to suffer capital punishment for murder should be limited or modified.

It was not to advise whether capital punishment should be retained or abolished, and the terms of reference were for murder only; not for treason, piracy, or setting fire to arsenals or dockyards, which, I believe, are also capital offences.

This report is of very great interest and the members took evidence not only in England and Scotland but also visited the United States, Belgium, Norway and Sweden, and Holland, and had reports from France, Switzerland, and the British Commonwealth. Russia was unfortunately not included in the programme as it might have thrown much light on capital punishment.

I shall not attempt to give a summary of the whole of the report which runs to 500 pages, but shall mention:

(a) Recommendations on Capital Punishment.
(b) The Methods of Capital Punishment.
(c) The M'Naghten Rules.

I have left out the Commission's references to Scottish law so as not to complicate matters.

Punishment has three purposes—retribution, reformation, and deterrence.

Retribution. In the old days vengeance on the murderer was taken by the family of the murdered man, but also it was necessary that something should be done about it or the vengeance of the gods might fall on the village or locality. Gradually the state took over the duty of inflicting punishment on the murderer by subjecting him to what he had inflicted on his victim.

There is still a feeling of vengeance in the general public. The man who inflicts the most grievous harm on a fellow being

should have a similar injury done to him, and anyway he deserves it. On the other hand many people feel that capital punishment is a relic of hanging, drawing and quartering. In 1678 the death sentence was, "That you be conveyed to the place from whence you came, and from thence you be drawn to the place of execution upon hurdles, that you be there hanged by the neck, that you be cut down alive, that your bowels be taken out and burnt in your view, that your heads be severed from your bodies, that your bodies be divided into four quarters and your quarters be at the King's dispose, and may the God of infinite mercy be merciful to your souls".

Considerable emotional disturbance arises from these two attitudes and many people judge the question of abolition of capital punishment emotionally, not logically.

Reformation does not come into the picture but it was stated in evidence before the commission that in cases where a murderer had been allowed at large after imprisonment, that he very rarely again came under the notice of the police.

Deterrence is the controversial question, and it is difficult to find a conclusive answer. It is of course impossible to give any statistics as to how many people were deterred by the fear of death, but some cases were quoted where the absence of the death penalty encouraged murderers to risk punishment. The Commissioner of the London Police Force stated that a gang of armed house-breakers continued their work when one of their number had been convicted of murder and reprieved; but broke up at once when two had been convicted and hanged.

In New Zealand, the Minister of Justice stated in 1948 when there was no capital punishment, a man committed murder and said, "You do not get hanged for murder nowadays, you only get eight years for it; that shows what a good government we have now".

In the U.S.A. a man took his wife to Detroit and murdered her there and confessed to the police that she was taken there because there was no capital punishment in that state.

Another gentleman killed his mother and his mistress in France, knowing that he was likely to be guillotined he fled to Belgium where there was no death penalty. He found that he might be extradited to France unless he committed a crime in Belgium, so he went to a former teacher whom he had not seen for twenty years and shot him point blank.

It was considered by many people that the death penalty acted as a deterrent by preventing housebreakers from carrying loaded weapons in case they might be tempted to use them.

These are however only isolated cases and the test is whether murders increase after the abolition of the death penalty. It sounds very simple to take the number of murders known to the police before and after the abolition of the death penalty, but many factors make these figures unreliable.

In the first place the death penalty is usually in abeyance for some time before its actual abolition. In New Zealand the last execution was in 1935, the abolition in 1941. It was restored in 1950, but there is now an agitation to again abolish it. In Queensland the last execution was in 1913, but the abolition in 1922. People know that there is no probability of the extreme penalty being carried out, so in many places the death penalty is practically abolished before it is legally so.

The increase in the numbers of the population before and after the abolition must be considered, and whether this increase is an increase by babies who are not usually potential murderers, or by immigrants, most of whom are young males between twenty and forty.

An increase in the efficiency of the police will make a difference, for the certainty of detection is more of a deterrent than the actual penalty.

The findings of the commission were that there was a slight increase in the numbers of murders in Queensland after the abolition but a similar increase in N.S.W. at that time, where it had not been abolished; and in New Zealand there was a considerable increase in the number of murders after abolition but a similar increase in Queensland where it had been abolished for many years.

The Royal Commission stated that the statistics were so difficult and unreliable that it would not give a definite statement whether the abolition of capital punishment increases or decreases the number of murders, that is whether the threat acts as a deterrent or not.

The findings of the Commission were:

(a) The outstanding defect of the law of murder is that it provides a single punishment for crimes widely differing in culpability.

(b) The age limit below which a person be not sentenced to death be raised from 18 to 21 years. The case of Craig and Bentley is a case in point. The murderer, aged 16, shot a policeman and was not hanged, but the accessor aged 18 was, although the latter was actually in the hands of the police at the time of the crime.

(c) That mercy killers cannot be convicted of any offence but murder.

(d) That it is impracticable to find a satisfactory method of limiting the scope of capital punishment by dividing murder into degrees.

(e) That any person who aids and abets a suicide should be guilty not of murder, but should be punished by imprisonment; or if he killed the other party to the pact, he should be charged with murder.

(f) It is not recommended that a judge should be empowered to inflict a lesser penalty for murder.

(g) A method may be devised to empower the jury to decide whether imprisonment would meet the case.

The Royal Commission also reported on the methods of capital punishment.

At the first meeting of this Society held in 1931, Mr. Justice McArthur in the chair, Professor Wood Jones gave a lecture on judicial hanging. I am going to deal with the subject, not from the point of the pathological results of hanging, but with the different methods of execution.

The objects to be attained are:

(a) Certainty, there must be no hitch in the proceedings, no delay, and no fumbling. Dr. Clarence Godfrey told me that in the days before motors he, and all others who had to be present, had to sleep on the gaol premises the night before, so that everyone concerned would be present on time.

(b) As little preliminary procedure as possible to worry the victim.

(c) Speed, with no pain.

(d) The Commission considered that public opinion was against any mutilation; which excludes guillotining and shooting, and the latter requires too many executioners and is not certain.

The Commission considered various methods in England, U.S.A., France and Belgium, and came to the conclusion that hanging was the speediest and best, but with the advancement in anaesthetics the question of lethal injections should be examined at periodic intervals.

In hanging, the time taken between the entry of the executioner into the condemned cell and the falling of the drop is between 9 and 12 seconds, but may be up to 25 seconds where the cell is not suitably situated. The man is, of course, totally unconscious as soon as he reaches the end of the rope.

Various alternative methods were considered. Electrocution takes 2–4 minutes. The apparatus is much more complicated, the electricity is taken from commercial sources and in some states there have been occasions when the current failed to reach the chair.

Prior to the execution the top of the prisoners head and one leg have to be shaved, the prisoner being handcuffed to prevent him grabbing the razor, and in the execution chamber the man has to be strapped to the chair, which takes time.

Lethal Chamber. This is carried out by pouring acid on one pound of cyanide pellets. In a hermetically sealed chamber with a glass window is a wooden chair with leather straps for strapping the legs and abdomen; below the chair is a receptacle for 1 lb. of cyanide pellets, and water and sulphuric acid in a lead container with an electrically controlled trap door.

Two copper pipes lead from the inside to the outside of the chamber which can be connected with a stethoscope strapped to the prisoner's chest and at the other end of the copper pipes, outside the room, are the earpieces at which a physician listens to decide when the victim is dead. The previous preparation entails the removal of his clothing, except a pair of shorts, so that no cyanide gas will remain in the folds of his clothing, and the stethoscope is strapped to his chest. In the execution rooms he has to be strapped to the chair, the whole taking 2–11 minutes.

After the man is pronounced dead ammonia gas is forced into the chamber until the cyanide is neutralized and the ammonia is then extracted by a fan.

The Commission also considered the question of lethal injections, not yet adopted by any country. Hexobartitone or thiopentone could be given intravenously and death would be very rapid. The objections are that the patient would need to be strapped, it would need much more skill on the part of the executioner, and

medical men are supposed to save lives, not to take them, and any unusual distribution of the veins might make it very difficult or impossible.

The final conclusion of the Commission was that hanging was the most satisfactory method of execution.

With regard to hangings in Victoria: There have been 31 hangings in the last 62 years. These include three females. The last three hangings, including one female, were on one day in 1951.

I am indebted to Dr. Whiteside for the information about executions in Pentridge gaol. The executioner is at the gaol three days before, tests the rope, trap door, etc. In theory the penal and gaols department does not carry out the execution. The criminal is handed over to the sheriff who hands him at once to the executioner. The victim is allowed to hang for an hour and is then cut down, the medical officer certifies that he is dead and holds an autopsy, the coroner holds an inquest and gives his finding. In Victoria the length of time between the executioner entering the cell and the dropping of the trap has not been measured, but is very rapid.

I now wish to mention alterations recommended by the Royal Commission with regard to the plea of insanity. The M'Naghten rules as they now stand are that a man is insane if "at the time of the offence he is suffering from such a defect of reason, due to disease of the mind, that he did not know the nature and quality of the act, or did not know that it was wrong; or was suffering from a delusion of such a nature that, if it were true, it would lead him to commit the deed."

I have taken this from medical textbooks, not from legal ones, and the chief medical objection is that many patients undoubtedly insane do not come under this category, and it does not make any provision for a man who knows what he is doing but cannot help himself from doing it. The Commission considered that the test of insanity laid down by the M'Naghten rules should have added to them "disease of the mind or mental deficiency" and at the end the words "at the time of the crime was unable to prevent himself committing it".

The Commission did not recommend the adoption of a doctrine of diminished responsibility, although they admitted it worked well in Scotland.

The Commission recommended that in England and Wales the mental state of every murderer should be examined before trial

by two doctors, of whom one should be a psychiatrist of standing, who should not be a member of the prison service, and the other should be an experienced member of that service.

They did not recommend the appointment of medical witnesses by the court as this would fundamentally change the procedure of courts and have repercussions beyond the field of enquiry.

They recommended that the judge should be given power to raise the question of insanity if he believes that the trial of this issue would be in the interests of justice, but not against the wishes of the defence.

The law should be amended to abolish the verdict of "guilty but insane" to "acquittal on the grounds of insanity". The House of Lords has ruled that a verdict of "guilty but insane" is a verdict of acquittal, against which there is no appeal. I believe that the verdict, "Not guilty on the grounds of insanity", already holds in Victoria.

The question of psychopathic personality was fully discussed but no two doctors could agree on a definition. Sir David Henderson said that it is the most deplorable of all conditions, as the man is not sane enough to be at large and not insane enough to be in bedlam.

The British Medical Association said that the greatest difficulties lay in cases of:

(a) Aggressive psychopathic states.
(b) States of organic change as epilepsy and encephalitis.
(c) Depressive states where there is a desire for self-punishment.
(d) Early Schizophrenia.

The Commission would not recommend any definition of these states as the evidence was too conflicting, but the Commission was impressed by special institutions for psychopaths who have brought themselves in conflict with the law, whether this is for murder or for lesser crimes as has already been done in Norway, Denmark, and some of the states of the U.S.A.

It was also stated that the M'Naghten rules were practical in that the judge could, at this discretion, apply the rules strictly, or, if he thought they did not apply, could ignore them.

The Commission stated that most of the witnesses recognized that there were imperfections in the rules, but they worked well

in practice, and that it was impossible to devise better ones which a jury would be able to understand and apply.

Finally, it was stated, "We consider as an alternative, that an amendment of the law could abrogate the M'Naghten rules and leave the jury to determine whether at the time of the crime the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible?"

Discussion

MR. JUSTICE J. V. BARRY: Mr. Chairman and gentlemen, the report which Dr. Adey has discussed tonight is an extremely interesting document, largely because of the material it has gathered and the discussions it undertakes. I think those who have read some of the evidence which was given before the Royal Commission and who have studied its extremely interesting report, will be disappointed, however, in the lack of adventurousness which characterizes the conclusions at which that body arrives. The discussion indicates that members of the Commission were fully aware of the dynamic qualities of the special matters which were discussed, but when they came to offer their recommendations they were hamstrung by a certain conservatism, which means that the report is valuable, as I have said, largely for the material which was gathered and the discussion which was undertaken, rather than for the recommendations that the report makes. One interesting feature is, however, that the Chairman of the Commission, Sir Ernest Gower, is the author of a book *A Life for a Life?* in which he discloses the attitude which he was prevented, by reason of the terms of the Commission's reference, from revealing in the report. You will recall that Dr. Adey indicated that the report, in its terms of reference, was extremely circumscribed, and prevented the Commission from making any recommendation concerning the abolition of capital punishment. Sir Ernest Gower entered upon the task with no preconceptions one way or the other, except that as a sedate and respectable English civil servant, he assumed, very likely, that those people who were opposed to capital punishment were probably sentimentalists to whom no great attention could be paid. As a result of his investigation, however, he has, so I understand, become a convinced abolitionist, and the book which he has written is designed to support the case for the abolition of capital punishment.

Now, the three aspects which the speaker tonight has taken for discussion in relation to capital punishment require, for any

reasonably adequate examination, an evening to discuss each one of them. The question of the M'Naghten rules has, of course, agitated this Society on a number of occasions. The subject of judicial hanging has also troubled the calm contemplations of the Society, because I well recall, as one of the initial secretaries of the Society, the Society almost coming to an end at its second meeting. Professor Wood Jones had addressed the first meeting on the subject of judicial hanging, and the tenor of his observations was that the present techniques of hanging were highly inefficient and inexact, and that the method which he described was much more desirable, namely, the adoption of some form of submental trough which would fracture, with certainty, the odontoid process. There were no dissenters to Professor Wood Jones's proposition, except that Dr. Clarence Godfrey did produce a number of photographs of vertebrae which revealed that that was precisely the result that hanging in Victoria achieved. That somewhat puzzled the meeting, but the conclusion at which I arrived after subsequent investigation was that the recommended result was attained because the very large knot which the hangman in Victoria employed, although he did apply it in the traditional place, under the left ear, did operate to jerk the patient's head backwards. The second meeting of the Society was not as calm as the first meeting however. Mr. Eugene Gorman then undertook to discuss the subject of medical murderers. He chose among his instances Burke and Hare and Dr. Knox, and was incautious enough to express the opinion that while Burke and Hare were justifiably censurable for their activities, Dr. Knox was equally blameworthy. This upset Professor Wood Jones, who rose to say that what had been said was a slur on the memory of a man who was a great medical practitioner and a highly distinguished anatomist. Mr. Gorman proceeded to pour oil on the troubled flames by assuring Profesor Wood Jones that he had no wish to offend at all, and by way of placating him, that he had no doubt that if Professor Wood Jones had been placed in the same position as Dr. Knox, he would have behaved in precisely the same way! The bits and pieces of the Society were gathered together after some months, and happily it has continued on since in a highly successful fashion.

I do not propose to discuss the M'Naghten rules. There are many aspects of that subject which require discussion afresh by this Society, and some industrious member of the legal profession should submit a paper to this Society on the M'Naghten rules in

the light of the recommendations of the Royal Commission, and in the light of the recent decision which has been given by the U.S. Federal Court in the District of Columbia in Durham's case so that we may discuss how this new material may affect the revision of the M'Naghten rules. The proposition which is offered by the Federal Court is in substantial accordance with the recommendation of the committee.

There still remains, when we have discussed all the technical aspects, the important question whether society is justified in the retention of this particular method of punishment. Before I address myself to that matter, may I say that recently I had the opportunity of examining the arrangements which were made for the despatch of persons sentenced to death in two American States. I did not see a lethal chamber in California where the gas method is used, but I agree with what Dr. Adey has said, that the method of lethalization is clumsy, and seems to have no advantages over hanging. The methods that are used in Illinois and New York involve the use of the electric chair. In Chicago, in Illinois, the death chamber has a "one-way" glass window through which the spectators can see the condemned man but he is unable to see them. In New York the ceremony is conducted under much cosier conditions; there is no barrier between the victim and those whose duty it is to attend the execution. In the United States of America, occasionally the relatives of the victim are permitted to attend an execution, and indeed, in one of the most recent executions—one undertaken in Utah—of two young men who were convicted of slaying another young man, the father of the victim was present.

In Utah the condemned man has the choice of execution by a firing squad, then volunteers are asked for, and the firing squad consists of five rifles, one of which is unloaded. That, in itself, is a rather curious thing, because if a man has deliberately volunteered to despatch a fellow human being, for the soundest of reasons it may be assumed, it is still a strange thing that the arrangements should be such that an element of uncertainty as to his responsibility for the death should be introduced by the loading of only four of the five rifles.

It is told of Utah that on an occasion a person who was convicted of a capital crime and sentenced to death was required to make his choice as to the method of execution. He enquired which would cost the State of Utah the most, and on being told that

hanging would, he chose to be hanged, because, as he observed, nothing but the best was good enough for him.

However, the grimness of this subject and the fascination which it exercises upon us, for Freudian or other reasons should not, I think, blind us to the extraordinary significance that capital punishment has in revealing the outlook of a community. It is of interest to see how capital punishment is falling into disuse. At the moment it is a highly controversial subject in England, and yet the number of occasions on which it is resorted to is comparatively small. No more than a dozen people are hanged each year in England out of a population of about 48 million. In America, no more than 62 people were hanged in 1953—62 or 68 —the precise figure escapes me. In 1935, the figure had got as high as 199, but, at the present time, the use of capital punishment is becoming less and less frequent in all the communities which are ordinarily brought together under the title of the Western democracies.

It is not usual now to find any reason offered for the retention of capital punishment except arguments, the soundness of which cannot be proved. You may, if you like, prefer for emotional reasons the theory that hanging is a deterrent, but, as Dr. Adey pointed out to you, the figures from countries that have abolished capital punishment do not support it. It seems to be that the substantial arguments for capital punishment can be put quite shortly, leaving to one side the philosophical and theological argument that the commission of murder requires expiation by a form of retribution by which, under the *lex talionis,* a life is taken for a life. There may be something said for that, but I do not think it is now allowed into the discussion of the desirability of capital punishment, although I am sure it has a very marked importance in the popular approach. As Dr. Adey remarked in passing, the substantial basis of punishment is still retaliation. It would do a great deal to clear the air and remove confusion if we recognized that a primary purpose of our punitive laws is to assuage the impulse to vengeance that a community feels when a grave crime has been committed, and that the infliction of punishment by the community is done in return for the giving up by the individual of his right of private retaliation.

If we recognize that, we are then confronted with the next question, how far can we, within the interests of social safety, gratify that particular impulse, because that impulse, if it is allowed to be pursued unchecked, is, of course, socially disinteg-

rating in its consequences. There is very good reason to think that the gratification of the impulse of vengeance, which is contrary to the virtue of compassion, which is the basic virtue of society, is probably too dangerous to allow society to have in other than small and strictly regulated doses. Ultimately I think the question must be, does capital punishment meet an essential social need? The answer to that question is largely a matter of temperament. If you belong to a particular caste of mind, you may say, "Yes, retain capital punishment because it meets a necessary social purpose". If you belong to a different caste of mind, you may say, "No, the danger of society's using methods of the kind which it condemns in respect of the person whom it has convicted is so great that we cannot permit it, and where the State resorts to callousness, then it officially endorses callousness, and in that way it is endorsing something which is fundamentally anti-social in its operation". It is rarely, however, that the matter is discussed in this manner.

There are two other aspects of the matter which seem to me capable of being offered in favour of capital punishment. The first is that in a very crude and imperfect and unscientific way it removes some monsters who are far better out of the world, which rather fits in with the notion that the community has when a grave crime is committed that retribution should be visited upon the person who committed the crime. I had expected Dr. Adey to offer an answer to such an argument as that the plea ingeniously offered by some psychiatrists that to hang a man like Christie, for example, is a waste of extraordinarily good clinical material; that, instead of hanging him, and in that way preventing an opportunity for proper investigation, you should retain him and investigate him, and by this use of him endeavour to get to the revelation of the mainsprings of human conduct, which is so necessary if we are to give to behavioural investigations the dignity of a science.

The second argument for capital punishment is that society must use the threat of punishment as a mechanism of social control. Society always has used that threat and at the present stage we have not reached a development which permits us to dispense with it. If you use the threat of punishment as a mechanism of social control, then you must show that the threat is a real one; it must be demonstrated that as part of the educational and disciplinary process when the threat is disregarded and the forbidden act is committed, the punishment will be administered,

so that it will appear that the law means what it says and that the threat is not an idle one. That seems to be the real justification for retention of our present punitive methods.

Investigation of punitive methods, I suggest, should be concerned with seeing how far their use is capable of employment in such a fashion that where we keep the subject alive, we do not debase him. In deciding whether we should retain the punishment of death, we should consider how far it really serves proper social purposes. That it satisfies the impulse to vengeance is, I think, undoubted. That it stimulates all kinds of unpleasant beasties in the psychological menageries of various members of the community is also plain. The morbid interest in the hangman's performances is very widespread, as was shown by the publication of Pierrepont's memoirs up to the stage when the Home Office intervened and stopped them, and by the fact that the newspaper which was publishing them had paid the sum of £40,000 sterling for those memoirs.

It was claimed by the Royal Commission that execution by hanging was very rapid. Well, it may be. The English execution shed has a cell which is only three steps away from the trap, and the victim is hobbled, pushed on to the trap and the trap is drawn, so that it may be, as is claimed, that five to nine seconds may represent the time required for an execution, but that, of course, can be so only where you have an extremely deft practitioner of the art of hempen strangulation and where you have also a complaisant victim. But it must be said that the various figures which are set out in the report of the Committee on Capital Punishment as to the times of execution appear ideal rather than actual times, and I think that the history of hanging in Victoria, unless some of the rumours which have reached one's ears are untrue, would show that in years gone by executions were by no means as rapid.

But granting that the removal of monsters may be a desirable thing, even in this we do not behave logically. If we are going to retain capital punishment, then the logical thing to do would be to hang everybody convicted of murder. Let me say that I am speaking as a citizen, and not as a judge. As a judge, I have no criticism to offer on capital punishment at all, because as I recall the only two sentences which are mandatory for a judge to pass, and in respect of which he has no discretion, are the death sentence passed on a conviction for murder, and the sentence which is passed where a person is acquitted on the ground of insanity, where he is found not guilty on a special verdict that he was

insane at the time he committed the offence. In each of those instances the sentence is prescribed by statute. But if we are logical, if capital punishment has the merits that are claimed for it, then the logical thing to do is to carry out the sentence whenever it is passed and hang everybody convicted of murder. That is not done, and it will never be done, for the reason that murder is a legal term to describe a homicide which comes within a particular legal definition, and the homicide may range from the mercy killing which the ordinary human being would regard as in no way justifying execution, up to the most brutal form of murder which cried out for vengeance.

We should remember that the conscience of the community is growing more tender. It is growing more tender, I think, because the community is slowly growing better in its approach to the problem of crime. The present agitation for the abolition of capital punishment represents more than a rebellion against a particular form of law or a particular method of despatching a human being. It represents a move towards the establishment of a different attitude of mind in the community in respect of its wrongdoers, and that, of course, bids fair to take us to what is an examination of the basis of criminal responsibility, because criminal responsibility means punishability. The inroads that are being made at the present time on the concept of free will in connection with criminal responsibility are so great that, as Sir Henry Maine said as long ago as 1864, all theories of punishment have more or less broken down, and we are at sea as to first principles. It is these doubts that are creeping in which cause a substantial section of the community to think that the taking of life by the community, is so final and irrevocable that we should perhaps give second thoughts to the wisdom of retaining it as a method of punishment.