



CAPITAL PUNISHMENT

**by W. Clifford*

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It becomes increasingly difficult to write dispassionately about the issue of capital punishment. And perhaps that is a mark of both intelligence and civilisation. It will be a sad day for Western culture when the obscenities of recent Persian justice with their summary trials and cavalier public executions can be viewed with equanimity. It will be a day of equal sadness when evil men can outrage and destroy the innocent without condign punishment. However, these are instinctive and culturally conditions reactions that need to be refined by fact and reason.

There is still a public and even a law enforcement professional conviction that the death penalty is really effective in dealing with crime. There is a sense in which this is perfectly true: but it is true if, and only if, the death penalty is applied widely and for a large number of offences. It then becomes effective by removing offenders permanently. There is no public cost for keeping them in prison and we can be sure that they will not become recidivists. A real danger has been removed. Moreover, the Chinese have for a long time been using the *suspended* death sentence, as a means of reform. Few would deny their contention that a death sentence if kept suspended concentrates the offender's mind remarkably and he usually keeps out of further trouble. But whether used to eliminate offenders or threaten them with elimination, the death penalty, if widely applied, will be effective in preventing crime. The snag is that such widespread use of the death penalty is considered barbaric in our society. It belongs to an earlier epoch of human development and experience which Western culture is supposed to have outgrown. So if we use the death penalty at all, it is as a last resort for a small and highly selected group of crimes, like murder. And in this limitation it seems that we lose its effectiveness. Still the innate public confidence in the death penalty as a method of controlling crime is always with us and when not overt it lurks around sub-liminally. It is this which emerges after revolutions, as in Iran, or after social turmoil, as in Nigeria, and for a time the dramatic public executions certainly appear to have an effect on public behaviour. Yet even here this is not conclusive. In 1934 and again in 1950 Thorsten

Sellin studied community homicides before and after much publicised executions of local people, but was unable to find a deterrent effect. And over the long term, the proposition that the death penalty controls crime is certainly a great deal more debatable.

It is true of most countries that murders seem to remain constant as a kind of proportion of the population whether or not there is capital punishment. No evidence is available to show that a death penalty will reduce these "ordinary" murder rates, but there is much evidence that it does not seem to make any difference to them. The only exception to this is the recent work of economists on deterrence and in particular the June 1975 article of Professor Isaac Ehrlich in the *American Economic Review*. He used multiple regression analysis on certain national data on homicides and executions during the period 1933-69 and concluded, very controversially, that each execution probably prevented seven or eight murders. This undoubtedly had an effect on the U.S. Supreme Court then hearing arguments for and against capital punishment. However, Ehrlich's econometric method has been challenged by fellow econometricians and the question remains at least as open as it ever was.

There may be two good reasons why executions do not affect the usual murder rates. The first is that a victim is more likely to be murdered by someone he knows than by a stranger. There has been some increase in the proportion of murders by strangers in the very large cities like New York in recent years, but it is still generally true that most murders are committed by persons known to the victim. This is because they are generally a consequence of family troubles, conflicts of passion, personal animosity, rivalry, envy, jealousy and hatred — and that these are emotions which lead an offender to forget himself. He is not at the time weighing costs and benefits and, therefore, this particular rate of crime does not seem to be responsive to differentials in penalties. There is certainly evidence in Australia that death sentence or not, the murder rate has remained proportionate to population.

A second important reason why the rate of murder does not respond to the type of penalty is that, when it happens to be a calculated murder, (e.g. a murder by a "contract killer" or by persons engaged in "crime or drug syndicates") the attention of the offender seems to be shifted by the severity of the penalty to the techniques necessary for making sure that the essential evidence for conviction is never available to the authorities, i.e. by killing witnesses or making sure that they do not give evidence. It is no coincidence that few "contract killers" are brought to justice — even when they are known to the police.

It is true that this basic knowledge of the actual data on the death penalty and its relationship to total homicides does not affect the outrage of a community when an atrocious crime has been committed: and it is true that it has been a great mistake of academics and professionals to underestimate the reality of public outrage. Often in criminal justice the experts have become lost in their date to such an extent that they have ignored the significance of community rancour as a fact of social life. So, whatever the facts, there is public satisfaction when people can pull the blanket of capital punishment over their heads and convince themselves that murders are being deterred.

However, an equal and significant fact of social life is the compassion which usually exists within a society — a compassion which can be aroused whenever the true facts of a given case are fully known. This compassion can be exploited by the media and has often served to benefit undeserving as well as deserving cases.

Public outrage can quickly turn to public sympathy then when the death penalty seems to be savage or inappropriate. When the law depends upon peer group judgments as does English law in its use of juries or lay magistrates, this emotion can effect the administration of law. This was noticeable in late 18th century England, when juries would return obviously false verdicts to save certain offenders from the gallows, and in Australia until quite recently when jury sympathies were often with the accused. It is a feature of French law dealing with crimes of passion and is applied even in modern Saudi Arabia under rigid Moslem law. An Islamic judge may exercise *ta-zir* or discretion — sometimes allowing the "common good" to mitigate a penalty. Indeed some Moslem scholars are arguing that these very severe Koranic penalties can only be justifiably applied where the offender is fully guilty, but that such total responsibility in an individual case cannot be imputed until more general social justice has been attained thus reducing the pressures on offenders to commit crime. In Japan where the death penalty applies, there have been some recent executions, but for years Ministers of Justice were reluctant to sign the death warrants.

Therefore, both history and experience combine to indicate that even a bloodthirsty public cannot be depended upon to apply the death penalty consistently over any very long period of time: and anyway, it is a penalty which a democracy cannot by definition, impose systematically to control human behaviour. Most people, therefore, even if they advocate the death penalty, consider it to be an unfortunate last resort.

Churchill reminded us that the level of civilisation in a society may be measured by the way it treats its offenders. If the death penalty be the measure, then world civilisation does not extend very far. In the early 1970's a report by the United Nations Secretary-General showed that over 70 per cent of all member states used the death penalty and even abolitionists states retained it for time of war or "emergency". On the other hand there were states which had a legal death penalty but did not use it: and other states nominally abolit-

ionist found a variety of extraordinary situations which justified executions.

This international count of death penalty countries usually causes surprise. For many Western people have been reared within an atmosphere of abolitionist polemics. They take it for granted the abolition is the right way. And that is because these arguments on the death penalty are Western and in the West most publications on the subject have been abolitionist. There is something negative and distastefully reactionary about publishing books *advocating* the death penalty. In the West the idea is widespread that the taking of any human life is barbaric and inhumane. The law is not to express public vengeance but to contain it. Moreover, even the law is not infallible so that despite all the safeguards, mistakes can be and have been made which cannot later be corrected if there is an execution. But the abhorrence of taking a human life for a higher public purpose is not shared by all cultures. Death sentences have been a feature even of those societies with religions which hold all life, even insect life, to be sacred. The history of India, Pakistan, China and other cultured nations have a weft of capital punishment for certain crimes mixed with their warp of ascetic idealism. Also, as twentieth century history has demonstrated, we do not grow out of capital punishment. Even highly developed technological societies can become barbaric.

Anyway in this world pattern of capital punishment it is obvious that whether it can be efficient or not in controlling behaviour, a humane democracy can use the death penalty only very sparingly, if at all. It is not a remedy for crime which can be used without the most stringent safeguards a variety of appeal procedures and the utmost restraint. That is the meaning of the right to life within a democracy. Some would go further however, and argue that humanity demands more — it demands the outlawing of all capital punishment. It is on such a premise that at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Amnesty International will move for the total abolition of all capital punishment. Such a resolution will find general support — as did the resolution for the abolition of torture initiated by Amnesty International at the Fifth United Nations Congress in Geneva in 1975. But, given the world situation described above, such general resolutions are and will remain purely cosmetic. They are noble but largely empty gestures which reflect credit on their sponsors but little in the way of a legal or moral obligation on those who avoid being stigmatised by voting for them. Every state will vote for resolutions of this kind because no state wishes to be publicly labelled as being pro-torture or pro-capital punishment. In the same way member states of the UN can usually be induced to vote for disarmament, self-determination or against terrorism. It is when definitions or dates arise that the cracks under the plaster of such resolutions really appear.

It is always possible to vote for the abolition of capital punishment by mentally or textually adding the word "eventually" — or by making sure that the term "eventually" is nowhere excluded. And since new laws take time to pass it is obvious the immediate compliance of states with a resolution involving legislation can never be expected anyway. So every state can vote happily for the (desirability of the) abolition of capital punishment — including those states which generally deplore the fact that they have to go on using it for the time being. Therefore, the good intentions of the high minded will always tend to founder on the crags of the convenience of capital punishment. Moreover, the justification of "the elimination of the bourgeoisie" or "fighting counter-revolutionaries" or perhaps "disposing of subversive elements" will always be available to justify the use or reintroduction of the death penalty as exceptionally necessary.

The immediate practical issue nationally and internationally then is less that of abolition but that of providing an alternative until our own times. The simple tribes using customary law did not use capital punishment to deal with crime at all: ordinary crimes (even murder) were matters for compensation: but they did execute those found guilty of sacred offences (i.e. offences dangerous to the community) — or else they *exiled* them from the community. It may be argued that, at a later date, transportation supplied the New World and Australia with needed labour: but it also provided a necessary alternative to imprisonment in United Kingdom institutions overcrowded because of the decline in the number of offences for which the death penalty could be awarded. And it is apposite to the modern debate that these capital offences were being reduced because public executions for even minor offences were not reducing crime. Maiming was also a drastic alternative to the death penalty at low cost to the community which applied in many societies and is still a feature of Moslem law. In modern times the sentence of "life imprisonment" which in practice usually means a maximum of 11 or 12 years incarceration does not satisfy the public outrage when really atrocious homicides are the issue. Of course, there are murders committed in special circumstances for which the public would want there to be no more than a few years imprisonment and even the use of probation for such killings which are technically murders has aroused little comment where the public sympathy has been with the offender. The problems occur in those situations in which public sympathy is wholly with the victim. The law exists to curb vengeance but it also exists to do justice and sentimentality has to be excluded. This does not mean an exclusion of mercy — for justice without mercy can be cruel. What it means is that there should be no scope for the true maudlin, unthinking sentimentality which entertains contradictions, i.e. which is indiscriminately sorry for the offender and victim alike, which wants complete freedom for all yet adequate control, which demonstrates for absolute privacy *and* total public involvement at the same time. It may be self-comforting to deplore both crime *and* punishment both the establishment *and* deviation or the alternative society: but practical policy must fall somewhere in between and sentimentality is necessarily diluted by the need for commitment.

So, to take care of the necessary public reaction there needs to be a channel for adequate public information on cases which might give rise to a death penalty demand by the public. It is irresponsible to leave this to the media which sometimes means leaving it to chance, i.e. the chance that reporters will be there or will be able to cover the story properly. Court cases are unevenly reported: the need for drama and sensation gives rise to biased reporting — and public opinion may be a reaction to a supposed rather than a real situation. Provision needs to be made therefore for the public availability of *all* the information available to the courts. In most cases this will reduce the sense of vengeance: in the other cases where there are absolutely no mitigating circumstances it will at least not increase the existing sense of public outrage.

Then it is necessary to re-institutionalise a form of exile. Not just imprisonment but a form of exclusion from the community. The writer has already suggested an international form of exile or refuge to avoid the death penalty being passed on political opponents like Bhutto and the unfortunates executed in Iran. There is no reason why this idea could not be extended to each country using such a centre (the same or a different one) to banish those who have aroused the sense of public outrage to such an extent that something more than the ordinary life sentence for murderers is required.

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