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LIFE AFTER DEATH

***Sir Louis Blom-Cooper*[1]**

Introduction

When Parliament abolished the death penalty for murder in England and Wales in the Murder (Abolition of Death Penalty) Act 1965, did nothing more than that. It provided no alternative penalty. The substitute for the death sentence was one of life - 'the only alternative that I know to death is life', Lord Stonham observed in the House of Lords debate - an ambiguous but fascinating puzzle for the lexicographer, if not a problem posed by the draftsman of the statute. Parliament, in effect, assigned the hangman's noose and his macabre accoutrements to the penal history museum.

The statute said virtually nothing at all about what was to follow the court's sentence for murder, 'life after death', except that a minimal provision allowing the trial judge to make a recommendation (not a legal rule) to suggest a minimum time in prison was added to the Bill at a late stage.[2] Otherwise, the Act was silent but added a probationary life of five years, after which the ;law would have reverted, unhappily, to the Homicide Act 1957 without the

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[2] The provision was little-used and soon fell into disuse until it was abolished in the Criminal Justice Act 2003.

motion to endorse abolition in 1969 – in fact, completed happily to end capital punishment. A whole life in prison literally is a violation of human dignity.

The law simply affirmed the alternative mandatory penalty to death, for the most serious crime in the criminal calendar, which interfered with the murderer's liberty at the hands of executive government, for the rest of his life in prison or in the community on licence. It did not deal with any period of custody, but historically, and confirmed in the Homicide Act 1957 in respect of non-capital murder, the sentence was a forfeiture of the prisoner's self-imposed pattern of living, during which period of the sentence the prisoner might be released on licence, subject to subsequent recall to custody on the commission or threat of a further offence. Any discharge from custody was exercised by the Home Secretary in his discretion (this was the state of the release power until the adjustment of discharge in the Criminal Justice Act 1966). Today the sentence of life imprisonment is confirmed in section 269 of the Criminal Justice Act 2003. In schedule 21 to that Act the starting point to reflect the most serious culpability of the life sentence is a 'whole life' order, suggesting that the trial court may impose imprisonment for the rest of the prisoner's natural life, for my part, the court order is in effect prospectively an entombment for life, a literal immuring within prison walls. As the Americans have dubbed the alternative to the death penalty, it is a life sentence 'without the benefit of parole'. The irrevocable penalty of 'whole life', which was established by the Court of Appeal last year, was in English law held not to violate any of the human rights which the Grand Chamber of the European Court of Human Rights had, citing the absence of any English review procedure (the sentence being irrevocable), declared to be an infringement of the European Convention on Human Rights. The conflict of judicial opinion between the English court's ruling in municipal law contrasts with the declaration at Strasbourg exercising its supranational jurisdiction; by virtue of section 2(1) of the Human Rights Act 1998 the English courts were told 'to take into account' the rulings of the European Court of Human Rights. I leave to later the consequences of the judicial disagreement. What has been happening for the last 50 years that has left temporarily unsolved the status of the crime of murder in Europe?

1 The Irrevocable Penalty of 'Whole life'

There is no doubt that during the debates on the abolition of the death penalty in 1965, there were a number of amendments from members that would have introduced substitutes for the penalty of death. All amendments were stoutly resisted by the sponsors of the Bill (it was strictly a private members' Bill, although it was greatly facilitated, even legislatively organized, by the Labour Administration). The committee stage of the Bill in the House of Lords lasted an unconscionable time throughout the months leading up to October 1965, so that the authors of

the Bill were insistent that nothing should hamper the burning desire to be rid finally of capital punishment (by then there were only 2 or 3 a year). The imminence of the end of the parliamentary session dictated that any amendment imposing a form of sentence to be imposed was deliberately, as a matter of policy, resisted. So much so that on the receipt in the House of Commons to impose a probationary period on abolition (the Bill was to lapse unless within a period of five years Parliament had, by affirmative resolution, endorsed abolition; the Bill received an affirmation in December 1969).

Without dilating upon the subsequent discussion about the alternative of life imprisonment, there was established what turned out to be a piece of mythology, that the rival disputants, the retentionists and the abolitionists, had agreed between themselves, and that a 'pact' in Parliament had been reached, whereby the reform of capital punishment was accepted on the footing that the mandatory penalty of life imprisonment meant exactly that, that the alternative should be the rest of the prisoner's natural life, a 'whole life'. The myth was given credence by some evidence; an authority mistakenly submitted to a select committee of the House of Commons in the 1980s, chaired by Sir Ivan Lawrence QC, that such a pact had in fact been established. The authenticity of such a bargain was, moreover, endorsed by Lady Scotland, as Attorney-General, presenting schedule 21 of the Criminal Justice Act 2003, a massive piece of legislation engineered by David Blunkett; he had reacted to the loss of power, in matters of sentencing, to the judiciary in 1999. The fallacy of any such compact between abolitionists and receptionists has since been demonstrably proven; the claim does not now officially appear. The best documentary evidence that there was no such deal or pact is evidence of official action after abolition of the death penalty was confirmed by the motion of Parliament in December 1969. In March 1970 the Home Secretary (then Mr James Callaghan) referred to the Criminal Law Revision Committee (CLRC) to study a review of *Offences against the Person.* The terms of reference specifically asked the committee, composed exclusively of lawyers - High Court judges, criminal practitioners, academic lawyers and administrators of criminal justice, to deal with the law and penalty for murder and manslaughter, having regard to the recent ending of capital punishment. The CLRC issued an interim report on the penalty for murder, disclosing an early divided membership on the thorny question of the mandatory sentence. In its final report in 1980 the Committee said it was still unable to reach agreement, and therefore made no recommendation to introduce a discretionary sentence of life imprisonment, which had found some favour in an amendment (first mooted and then abandoned) by the Lord Chief Justice, Lord Parker, in July 1965.

For many years the mandatory element in the sentence of life imprisonment was almost invariably criticised; it was particularly favoured by the judiciary. In his retirement, Lord Lane,

who had been the Lord Chief Justice from 1982-1992, chaired a committee under the auspices of the Prison Reform Trust. Its powerful argument based on the experiment of a ban (unique in criminal justice history) on any judicial discretion to sentence a convicted murderer was fundamentally a breach of judicial impartiality, if not independence. Yet the official result has been a resoundingly negative attitude. The Government has no present intention to change the law and penalty of murder.

It seems to me that, at heart, the issue of meaning in the classification of murders is essentially emotional. Does society expect its judicial process to mark out the gravity, the degree of moral culpability, as the template for the court sentence? Or is the public more concerned with punishment for murder than with the appropriate dispatch of the offender? The fulcrum of sentencing offenders is the role and function of punishment by society's instruments by judicial process, by which I mean both the attitude to the criminal offence and also the dispensing of a solution to future behaviour. Does the latter focus exclusively on the element of risk or is the role of discharge from custody, in part at least, a re-sentencing for the crime? The conflict judicially between Strasbourg and London reflects in their respective reasoning a leaning towards the current policies on penal affairs.

The disagreement (not inflexibly irresoluble) turns on different political attitudes. Stripped of party political partisanship, the case is nevertheless instructive. Until the middle of the 1980s there had been no interference statutorily into the administration of the release of prisoners serving indeterminate prison sentences. Except in the Crime (Sentences) Act 1997 Parliament conferred on the administration power for the fixing of the tariff and the reconsideration of discharge from custody in 1997, but only *in exceptional circumstances*, which justified the prisoner's release '*on compassionate grounds*'. That provision was thought to apply to personal factors affecting the individual prisoner who might be suffering from terminal illness or imminent death. Strasbourg felt that the statutory regime for the review and possible reduction of the prisoner's custody in prison was insufficiently clear or certain so as to give rise to a violation of the right to be treated humanely. So the area of disagreement is about the construction of legislation in the member-State. Should that factor cause more than momentary discord?

But the problem remains problematic. How does one measure one murder as worse than another? Here there is a measure of encouragement from the Strasbourg judgment. The Grand Chamber did not rule out the possibility that imprisonment for the rest of the prisoner's natural life could be vouchsafed. Why not, you may ask. But at least it confirmed that such a life sentence had to have built in a provision that established a regime of reducible imprisonment. That did not

alter the fact that a whole life prisoner might in practice die in prison before the opportunity for a review of his sentence.

Underlying the judicial attitude, there remains an issue of comparative culpability that warrants an irreducible amount of incarceration forever. The English approach is discouraging of the criteria for 'the worst of the worst' assumes the absence from the intentional killer suffers from consideration of some mental disorder that may have afflicted the prisoner in the degree of moral culpability for the physical horror of the homicidal act.
What is the evidence of the mitigation of horrendous homicides?

The specially constituted, five most senior judges in the Court of Appeal (Criminal Division) had recently 'to consider ... three appeals by defendants on whom a whole life order had been imposed ... in a case where it was contended that the trial judge had been mistaken in the view that the decision ... precluded the imposition of a whole life order' as a tariff of a period of imprisonment. ln his concluding remarks delivering the judgment of the court, the Lord Chief Justice, Lord Thomas, noted that counsel for the Crown had told their Lordships that 'it might be many years before the applications [under section 30 of the Criminal Sentences Act 1997] may be made' and that it would be assumed by the Court of Appeal that it would not discount the possibility of such applications arising very much sooner, that they would then be determined in accordance with existing legal principles. ln interpreting this at least uncertain review procedure, the English court said that it 'provides for the possibility and hence gives to each such prisoner the possibility of exceptional release'. The *possibility* of discharge from prison alive falls short of the provision of the probability of a delayed review which is traditionally less exacting on an individual who faces the moral meaning of a statutory provision that ordinarily functions in that individual's favour. Even the likelihood of a review at some time before the end of natural life would be the grant of a real, as opposed to an optimistic speculation of intended hope at the outset. No doubt, the less onerous burden on the penal administration to consider any review of a sentence tends to support the English (municipal) judicial knowledge of penal administrators' pragmatic attitude, as opposed to the rational approach of the Strasbourg judges, viewing the function of interpreting an English statute in the context of the human rights granted by the European Convention on Human Rights (specifically endorsed in the Human Rights Act 1998, under which the English courts must 'take account of' the Strasbourg jurisprudence). But an English version does not affect the view of one academic lawyer. Professor David Ormerod describes the two elements of the Strasbourg construction as having been 'underplayed' by the English judges: a decorous way of saying that they carry less weight; they are wrong. I much prefer the reasoning of the 17 (split 16-1) judges at Strasbourg.

But does the disagreement, limited as it is, on the construction of a municipal statute by the two courts matter? Each has its function; each can reasonably come to a diametrically opposed conclusion. The two functions are susceptible to judicial dialogue, as witness the remarks of Lord Phillips in the *Hardcastle* case about the admissibility of untested statements in a witness report to investigating police officers. After all, even the dialogue of the deaf in which the two courts are judicially unresponsive to what the other says, at least initially, may take place. Otherwise, extra-judicial pronouncements may resolve the apparent conflict. And even then, the law is relatively clear. Parliament may decide to go down the statutory route in favour of its authority as the guardian of international human rights' Parliament may prefer the maintenance of the utterance of its own courts as still complying with the human rights convention. lt may even countenance being the subject of a report to the Council of Europe as a member-State in violation of a Court ruling, or diplomatically turn to the wisdom of civilised institutions to resolve the disagreement, and move on.

The whole life order (or life imprisonment without the benefit of parole) is instinctively applicable to the exceptional and rare cases of murder committed by persons serving the custodial part of a life sentence. The making of a whole life order, the Court of Appeal observed, may require detailed consideration of the individual circumstances of each case. lt is likely to be rare that the circumstances will be such as to qualify for a whole life order to be imposed. One decision is no guide to any supposedly similar cases. lf the rarity of a whole life sentence is to be statutorily endorsed, then section 269 of the Criminal Justice Act 2003 should state that it is inflicted only for reasons of dangerousness and not as an additional punishment for the 'worst of the worst' murders. But is the concept (even if tenable) in practice worthwhile? I think not.

2 'Worst of the Worst'

To date there are around 50 prisoners subject to 'whole life' orders. Numerically, that figure is insignificant in the context of a daily average population of approximately 85,000 prisoners, although the number of 'lifers' (those serving sentences of life imprisonment with determinate periods of minimum sentences) is statistically significant at about 12,000. The indeterminacy of the sentence spills over to infect the penal policy which has become bipartisan between the two major political parties. The adoption since 2003 in the UK of the concept of whole life orders displays a similar discord in the USA as the instinctive alternative to impending abolition of the death penalty. Recently some six states have adopted the formula that is questionably a cruel and unusual punishment in violation of international human rights law.

The principle reflecting the infliction of condign punishment is dictated by a knee-jerk reaction to populism. It was given expression in the judicial reaction to the sentencing

structure adopted in the Criminal Justice Act 2003. That legislative move sought to link the judiciality of the 1980s with popular penal action.

In 1981 public interest was aroused by the prosecution of the Yorkshire Ripper for a series of murders; most of the unfortunate victims were prostitutes. The defendant Peter Sutcliffe was thwarted in his attempts to plead manslaughter on the grounds of diminished responsibility for serious mental disorder, a partial defence to a murder charge that was introduced in the Homicide Act 1957 (which also established non-capital murder with the tell-tale sentence of life imprisonment). The trial judge, Boreham J, declined to accept the plea bargain; the trial proceeded on the basis of the plea of diminished responsibility, unanimously supported by all the forensic psychiatrists. The jury, however, rejected the defence, and Sutcliffe was sentenced to life imprisonment, with a minimum recommendation that he serve 40 years. (At that time the tariff for a life sentence was subject to an administrative recommendation only to the Lord Chief Justice, who was then Lord Bingham.) Records indicate that subsequently that great judge thought that the failed defence of mental disorder should be taken into account for the purpose of determining the minimum term to be served. Accordingly, he expressed the inapplicability of 'whole life' and substituted for 40 years a period of 35 years as reflecting a commensurate period of custodial treatment. In the normal course of events that would have concluded the judicial pointer towards the penalty for the particular murder. With Schedule 21 of the Criminal Justice Act 2003, classifying the starting points for minimum terms of imprisonment before any question of discharge of a 'lifer' from custodial treatment could be considered, the concept of 'whole life' for the most serious category of murder entered the legislative scene. But in order to regularise the new structure of a life sentence with a whole life order directed to its penal application, the judiciary re-entered the process to re-hear the sentence that should be served as a minimum term.

Mr Justice Mitting, at first instance, did not agree with the pronouncement of sentence in 1981; in 2010 he opted for the 'whole life' order as the appropriate penalty for the multiple crimes that evoked the epithet of 'the worst of the worst', which had been rejected at the time of the original sentence. The 'whole life' order was upheld by the Court of Appeal in a significant judgment delivered by the last Lord Chief Justice, Lord Judge. He reasoned that the imposition of a 'whole life' order was amply justified. His reasoning is legally questionable, even if the verdict had popular appeal. While Lord Judge did not deny that circumstances surrounding the homicidal events and the perpetrator's perceived intention to kill unlawfully were relevant to the issue of the correct penal disposal, he held - better to regard the finding as speculation - that the jury convicting Sutcliffe had ostensibly rejected the psychiatric material of an existing mental disorder: Sutcliffe must have lied to the psychiatrists and to the

jury about his true intention to kill. Those lies made it inevitable that the homicides were rightly categorised as the worst of the worst murders. There seems to me to be a jump in the logical thinking. The defence of diminished responsibility rests upon the defendant, on a balance of probabilities. Maybe the jury had concluded that, in assessing the weight of the psychiatrists' evidence, it had failed to prove more probably than not, that it established a substantial responsibility for the homicides. The Court's reasoning, even if sound, discloses the judicial attitude towards the worst of the worst murders simply by reference to the nature of the killing. The killer's mental condition did not detract from the heinous nature of the murders.

The story does not end there. The psychiatric authorities in Broadmoor that had taken care of Sutcliffe over many years had concluded that he was no longer a risk of committing any further crimes. He was aged, he was blind and was confined to a wheelchair: he was physically harmless. At least his condition of potential discharge was favourable, even if there were a sound policy decision not to release the prisoner. I do not argue against the policy not to release the prisoner on licence. It is, however, to be deplored that the 'whole life' sentence itself is a violation of the international law of human rights, whatever its geographical or institutional source.

What happens next? A further decision of the Strasbourg court has clarified the relationship; the court decided in August not to award compensation or costs to UK prisoners, whose disenfranchisement for the time being was a breach of human rights. That demonstrates the reality that the Strasbourg court is not unobservant of its function. Some would say that the court looked over the abyss of its forensic encounter and backed off its warlike noises in order to avoid a whirlwind of opposition on a scale that might threaten its legitimacy. But in short, the correctness of denying non-pecuniary compensation has to underline the reality that the Parliament of any member-State with a clear voice is entitled to act other than in accordance with a Strasbourg finding. Put shortly, what Strasbourg says in the interpretation of a human right is the word of a supranational court, speaking to the courts of the various countries. What the latter courts will do is a matter of law according to their national legal systems. At that point the final say rests with the compatibility or incompatibility of the two laws.

The illegality under Article 3 of the ECHR of the irreducible life sentence - in US terms, the sentence of life imprisonment without benefit of parole - has had its first transatlantic impact. On 4 September 2014 the European Court of Human Rights in *Trabelsi v Belgium* found that the Belgian government had violated the Convention by extraditing a Belgian national to the

District of Colombia where there is no adequate mechanism for reviewing the whole life sentence. As yet, there has been no American response to the condemnation of Belgium for having extradited a suspected terrorist to the United States.

Conclusion

One would not expect a ringing endorsement of the claim by Oscar Wilde in the classic *Ballad of Reading Gaol,* 'that every prison that men build *I* Is built with bricks of shame'. But one might hope that at all times the judges, shamefully or not, would take account of criminological opinion, that overcrowded and unrelieved imprisonment is inhumane and wasteful of civilised mankind. Moreover, we cannot afford the prospect of a generation of geriatrics in prison. Above all, imprisonment should be severely qualified as an institution for public safety. The duty of any parole system is risk assessment, which contains no re-evaluation of the trial sentence. Professors Roger Hood and Carolyn Hoyle write in sedate terms and restrained language in *The Death Penalty* (which Oxford University Press is due to publish in its fifth edition) about lengthy imprisonment. They state:

> Those who campaign for the humane treatment of prisoners will need to refocus their attention on creating for life-sentenced prisoners a humane prison environment, accompanied by an effective and judicious system for reviewing suitability for release that adequately protects the public while respecting the humanity of the prisoner. In our opinion, sentences of life imprisonment which preclude any possibility of parole are not only inhumane, they are unnecessary and counter-productive. They raise many of the human rights issues that have been at the heart of the attack on the death penalty itself. They too should be abolished.

Fifty years after the demise of capital punishment, a rational and practical alternative to the death penalty is still unfinished business.

A Coda

To conclude a lecture that begins with a titled question mark or is deliberately ambiguous (to which I readily confess in this case) imposes on its lecturer a duty to explain the question or cure the ambiguity. The ending in 1965 of capital punishment for murder restored to Executive Government the established release powers to those serving life imprisonment for non-capital murder under the Homicide Act 1957. It exemplified the acceptance of the basic human dignity of every citizen, with the right to review at any time the indeterminate sentence. Penal policy encompassed the totality of an individual's right to liberty, subject to its limitations under the rules of criminal justice - a profound area of the Rule of Law. The title to any lecture on this subject, 'what is life?' must encompass an apt title or, at least, sub-title. For me, the latter should read: *Life after death: a proportionate loss of liberty.*