

# The Abolition of the Death Penalty in the United Kingdom

How it Happened and Why it Still Matters



Julian B. Knowles QC

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# Dedication

The author would like to dedicate this monograph to Scott W. Braden, in respectful recognition of his life's work on behalf of the condemned in the United States.

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**Cover image: Anti-death penalty demonstrators in the UK in 1959.**

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# Foreword

As a barrister, Julian Knowles has been at the forefront of the fight against the death penalty worldwide for years. He has been involved in many of the leading death penalty cases – in the Privy Council and the Caribbean Courts of Appeal – as well as working on death row cases in Oklahoma and Florida for three years after graduating from Oxford.

In this study, he draws on his own extensive experience, as well as his profound knowledge of English legal history, to analyse the very particular process of abolition in the United Kingdom.

In other countries, abolition has followed revolution or liberation, as in South America; or legal challenge, as in South Africa; or has been part of a continental movement towards abolition, as has been the case with abolition in eastern Europe. In the United Kingdom, as Knowles shows, it is to Parliament and the individual consciences of MPs taking a political and moral lead that we owe the abolition of the death penalty.

But this study also reveals the very important part in the movement to abolition played by the widespread popular outrage at the injustice and inhumanity of individual executions in the 1950s and, in particular, the three controversial cases of Timothy Evans, Derek Bentley, and Ruth Ellis. The analysis of those cases and their impact is one of the most valuable aspects of this study. But it also shows the crucial role played by campaigning organisations such as the Howard League and the National Council for the Abolition of the Death Penalty.

No two countries and no two continents are alike in their reasons for abolition.

What will lead to abolition in the retentionist states that remain is not predictable. However, this study is not just of historical interest. It points to the need to press for abolition on many different levels. Reasoned debate, political campaigning, and historical parallels are all crucial. But so too is the work of detailed analysis and advocacy in individual death row cases. Nothing can more eloquently make the case for abolition than the specific analysis of individual cases – whether it be the execution of the abused Filipino maid Flor Contemplacion in Singapore, the cases of Derek Bentley and Timothy Evans in the United Kingdom or the tragic case of the orphan Dave Wilson from St Kitts, otherwise called “Mr. Shit” because he was found abandoned in a public latrine. Mr. Wilson was executed before he had a chance to appeal his case as he did not have a lawyer to represent him and nobody to speak on his behalf. This study greatly contributes to the cause of abolition – not just by its analysis of the way in which momentum for change gathered in the United Kingdom, but also by the way it looks at actual cases – including the whole forgotten history of executions for cowardice in World War I.

Edward Fitzgerald CBE QC  
Doughty Street Chambers  
November 2015

# Introduction

This year marks the 50th anniversary of the enactment of the Murder (Abolition of the Death Penalty) Act 1965, which suspended and effectively abolished the death penalty for capital murder in England, Scotland and Wales.<sup>1</sup> The abolition of capital punishment<sup>2</sup> represented perhaps the most important policy change during an era of marked social liberalisation and enlightened thinking. It was a Conservative Home Secretary, Henry Brooke MP, who, in August 1964, authorised the final two executions carried out in the United Kingdom.<sup>3</sup> In October 1964, the electorate, tired of the Conservative governments of Harold Macmillan and then, briefly, Sir Alec Douglas-Home, handed power to Harold Wilson's Labour Party. Wilson allowed Parliamentary time for Sydney Silverman MP's Private Member's Bill, the Murder (Abolition of the Death Penalty) Bill.<sup>4</sup> The 1965 Act meant that future Home Secretaries would not have to exercise judgment over life and death.

The purpose of this paper is to examine the history of capital punishment in the United Kingdom and, in particular, the sequence of events that led to its abolition; to assess the impact that domestic and international law would have on any attempt to reintroduce it; to look at the legacy of the death penalty in the former British colonies that are now independent, and in the British Overseas Territories; and to consider the implications that the use of the death penalty abroad has for extradition and asylum cases in the United Kingdom.

Abolition did not come about as the result of one single event, or for one reason alone. It happened because of a combination of sustained Parliamentary campaigning; public disquiet over three controversial executions in the 1950s; botched reforms to the law of murder in the 1950s; and changing attitudes towards social and penal affairs, most of all, the acceptance by an enlightened majority of MPs that the state just ought not to be in the business of taking human life. It is worth emphasising that this was a Parliamentary decision which was not supported by the public: abolition came in the face of popular support in the UK for capital punishment, at least in the abstract, which has lasted more or less until the present day.<sup>5</sup>

The legacy left by our use of capital punishment continues to impact directly on the United Kingdom's relations with other countries who still deploy judicially sanctioned homicide as part of their legal systems. It should be a matter of real pride that the United Kingdom is now a vocal opponent of the death penalty worldwide, and that the painful lessons it learned on its journey to abolition – some of which are examined here – continue to matter.

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<sup>1</sup> The 1965 Act received Royal Assent on 8 November 1965 and, in accordance with s 3(4), came into force the following day. The Act did not extend to Northern Ireland, and capital punishment for murder was abolished there by the Northern Ireland (Emergency Provisions) Act 1973, s 1. The last execution in Northern Ireland, that of Robert McGladdery, took place on 20 December 1961.

<sup>2</sup> The death penalty remained on the statute book until 1998 for treason, piracy with violence, arson in Her Majesty's dockyards, and military offences, but no executions had been carried out since 1946 for any offences other than murder.

<sup>3</sup> These took place on 13 August 1964, when Gwynne Owen Evans was hanged at HMP Manchester and Peter Allen was hanged at HMP Liverpool, both for the murder of John Alan West on 7 April 1964.

<sup>4</sup> While the Government was officially neutral, the Bill had unofficial Government support and had been mentioned in the 1964 Queen's Speech: *Hansard*, HC Deb 21 December 1964, vol 704 cc870-1010.

<sup>5</sup> Gallup polls were collected on the topic of capital punishment from 1938. For an overview of mid-20th century American and European results, which includes Britain, see Erskine H., 'Capital Punishment: The Polls', *Public Opinion Quarterly*, 1970, 34(2): 290-307.

## A brief history of capital punishment in the United Kingdom up until the 19th century

The first generally recognised written death penalty laws can be found in the Sumerian Code of Mesopotamian King Ur-Nammu,<sup>6</sup> which stipulated that the crimes of murder, rape, robbery and adultery were to be punished by death. Three centuries later, in the 18th century BC, the Code of King Hammurabi of Babylon prescribed the death penalty for more than 20 different offences.<sup>7</sup> The death penalty was also part of the Hittite Code in the 14th century BC.<sup>8</sup> The Draconian Code of Athens, in the 7th century BC, made death the lone punishment for *all* crimes.<sup>9</sup> In the 5th century BC, the Roman Law of the Twelve Tables also contained the death penalty. Death sentences were carried out by such means as beheading; boiling in oil; burying alive; burning; forced ingestion of poison; crucifixion; disembowelment; drowning; flaying alive; hanging; impalement; stoning; strangling; being thrown to wild animals; and quartering (being torn apart).

Capital punishment was used in the countries that became the United Kingdom<sup>10</sup> virtually throughout their history until 1964. Hanging is thought to have been introduced to Britain by the Saxons in the 6th century AD, especially for traitors, murderers and those guilty of serious crimes.<sup>11</sup> Corporal punishment and mutilation were used for lesser offences. The payment of blood money was also common. However some early written laws, such as the Dooms of Æthelberht,<sup>12</sup> made no mention of capital punishment at all. In contrast, King Alfred's laws<sup>13</sup> did expressly provide for the death penalty. The offence that would come to be called high treason, and other offences committed in the King's presence, were punishable by death.<sup>14</sup> In 930AD King Æthelstan raised the age of criminal responsibility from 12 to 15 because 'he thought it too cruel to kill so many young people and for such small crimes as he understood to be the case everywhere'.<sup>15</sup>

The early Norman period in England saw a significant, although temporary, move away from the use of capital punishment. William the Conqueror<sup>16</sup> opposed killing except in time of war, and his reign, following his invasion of England in 1066, saw comparatively few executions. His eldest son,

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<sup>6</sup> C. 2100 BC.

<sup>7</sup> Langdon S., 'The Sumerian Law Code compared with the Code of Hammurabi', *Journal of the Royal Asiatic Society* (New Series), Vol 42 No 4, October 1920, pp489-515.

<sup>8</sup> The Hittites were an Indo-European people who created an empire centred on Hattusa in north-central Anatolia.

<sup>9</sup> Draco was the first legislator of Athens in Ancient Greece. His written Code replaced the prevailing system of oral law and blood feud, and was to be enforced only by a court. The harsh nature of the Code resulted in the word 'draconian' passing into the English language as an adjective for something strict or unforgiving.

<sup>10</sup> The Acts of Union of 1706 and 1707 effected the union of Scotland, England and Wales into the United Kingdom of Great Britain. On 1 January 1801, Great Britain and the Kingdom of Ireland united to form the United Kingdom of Great Britain and Ireland. Most of Ireland left the union as the Irish Free State in 1922, leading to the remaining state being renamed as the United Kingdom of Great Britain and Northern Ireland in 1927.

<sup>11</sup> Block B., Hostettler J., *Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain* (Waterside Press, 1997), p271.

<sup>12</sup> C. 560 – 616, King of Kent. In his *Ecclesiastical History of the English People*, the Venerable Bede lists Æthelberht as the third king to hold imperium over other Anglo-Saxon kingdoms. In the late 9th-century Anglo-Saxon Chronicle Æthelberht is referred to as a *bretwalda* or 'Britain-ruler'. He was the first English king to convert to Christianity. His 'Dooms', or laws, were some of the earliest written laws in a Germanic language. They were concerned with setting and enforcing the penalties for transgressions at all levels of society; the severity of the fine depended on the social rank of the victim, with crimes against the Church penalised the most, more greatly even than those against the king.

<sup>13</sup> 849–899, King of Wessex, who styled himself King of the Anglo-Saxons.

<sup>14</sup> For example, article 4 entitled 'Plotting against a lord', provided: 'If any one plot against the king's life, of himself, or by harbouring of exiles, or of his men; let him be liable with his life and in all that he has; or let him prove himself according to his lord's wer.'

<sup>15</sup> Foot S., *Æthelstan: The First English King* (Yale University Press 2011), pp140-142.

<sup>16</sup> C. 1028–1087, Duke of Normandy and the first Norman King of England (1066–1087).

William Rufus,<sup>17</sup> who succeeded him, also had little enthusiasm for the death penalty. However, Henry I,<sup>18</sup> who succeeded William Rufus, was a more enthusiastic proponent of capital punishment and reinstated hanging for the crime of grand theft. All crimes classified as felonies attracted the death penalty unless the law specifically stated otherwise. These offences included murder, manslaughter, arson, highway robbery and larceny. Theft of small amounts was a non-capital offence. Hanging was the normal punishment, although other methods of execution were sometimes used.<sup>19</sup>

Justice for the Anglo-Saxons, and even after the Norman invasion of 1066, was administered by a combination of local and royal government. Local courts were presided over by a lord or one of his stewards. The King's court – the *Curia Regis* – was, initially at least, presided over by the King himself until almost the end of the 12th century, to determine guilt or innocence in criminal cases. Under this system, trials were generally by ordeal.<sup>20</sup> The accused would be forced to pick up a red hot bar of iron, pluck a stone out of a cauldron of boiling water, or something equally painful and dangerous. If his or her hand had begun to heal after three days they were considered to have God on their side, thus proving their innocence. The number of 'not guilty' verdicts recorded by this system is not known. Another extremely popular ordeal involved water; the accused would be tied up and thrown into a lake or other body of water. If innocent, he or she would sink. William II<sup>21</sup> banned trial by ordeal, and it was eventually condemned by the Church in 1216.

The seeds of the modern justice system were sown by Henry II,<sup>22</sup> who established a jury of 12 local knights to settle disputes over the ownership of land. In 1178, Henry II first chose five members of his personal household – two clergymen and three laymen – 'to hear all the complaints of the realm and to do right'.<sup>23</sup> This panel, supervised by the King and 'wise men' of the realm, was the origin of the Court of Common Pleas. Eventually, a new permanent court, the Court of the King's Bench, evolved, and judicial proceedings before the King came to be seen as separate from proceedings before the King's Council.<sup>24</sup>

One way in which offenders might escape trial before the civil courts (and thus death, which was a frequent penalty) was by claiming 'the benefit of clergy'. This was originally a provision by which clergymen could claim that they were outside the jurisdiction of the secular courts and so should be tried instead in an ecclesiastical court under canon law, which generally imposed less harsh penalties. Eventually, it became a mechanism by which first-time offenders could receive a more lenient sentence for some lesser crimes (so-called 'clergyable' offences).

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<sup>17</sup> C. 1056-1100.

<sup>18</sup> 1068-1135.

<sup>19</sup> Clark R., *Capital Punishment in Britain* (Ian Allen Publishing 2009), p12.

<sup>20</sup> For example, the Assize of Clarendon, enacted in 1166 and the first great legislative act in the reign of Henry II (promulgated at Clarendon Lodge in Wiltshire), required that: anyone, who shall be found, on the oath of the aforesaid [jury], to be accused or notoriously suspect of having been a robber or murderer or thief, or a receiver of them ... be taken and put to the ordeal of water'; Hurnard, N., (1941). 'The Jury of Presentment and the Assize of Clarendon', *English Historical Review* (1941) 56 (223): 374-410.

<sup>21</sup> 1087-1100.

<sup>22</sup> 1154-1189.

<sup>23</sup> Plucknett T., *A Concise History of the Common Law* (1956), p148.

<sup>24</sup> [www.judiciary.gov.uk](http://www.judiciary.gov.uk)

Following the system of civil courts established by Henry II in 1166, in the Assize of Clarendon a power struggle ensued between the King and Thomas Becket, Archbishop of Canterbury. Becket asserted that these secular courts had no jurisdiction over clergymen because it was the privilege of clergy not to be accused or tried for crime except before an ecclesiastical court.

In 1170 Becket was murdered in Canterbury Cathedral by four of Henry's knights, who believed they were carrying out Henry's implicit wishes ('Who will rid me of this turbulent priest?'). Following Becket's death, public sentiment turned against the King, and he was forced to make amends with the church. As part of the Compromise of Avranches,<sup>25</sup> Henry was purged of any guilt in Becket's murder but he agreed in return that the secular courts, with few exceptions – for example, high treason – had no jurisdiction over the clergy.

At first, in order to plead the benefit of clergy, the alleged offender had to appear before the court tonsured and wearing ecclesiastical dress. Over time, this proof of clergy-hood was replaced by a literacy test. At a time when generally only those in Holy Orders could read and write, defendants demonstrated their clerical status by reading from the Bible. This opened the door to literate lay defendants also claiming the benefit of clergy. In 1351, under Edward III, this loophole was formalised in statute, and the benefit of clergy was officially extended to all who could read.<sup>26</sup>

Unofficially, the loophole was even larger, because the Biblical passage traditionally used for the literacy test was Psalm 51.<sup>27</sup> Thus, an illiterate person who had memorised Psalm 51 could also claim the benefit of clergy. The psalm became known as the 'neck verse', because knowing it could save the defendant's neck by transferring his case from a secular court, where hanging was a distinctly possible sentence, to an ecclesiastical court, where death could not be imposed. If the defendant who claimed benefit of clergy was particularly deserving of death, courts occasionally would ask him or her to read a different passage from the Bible; if, like most defendants, he or she was illiterate and simply had memorised Psalm 51, he or she would be unable to establish the defence and would be liable to be put to death if convicted.

Notwithstanding the benefit of clergy doctrine, subsequent centuries saw a steady increase in the number of executions. It has been reported that during the reign of Henry VIII<sup>28</sup> as many as 72,000 people were executed.<sup>29</sup> Execution methods of the time included burning at the stake (particularly for those accused of witchcraft); hanging; beheading (for nobles or those whose sentence of hanging, drawing and quartering was commuted as an act of 'mercy'); hanging, drawing and quartering (particularly for those accused of treason); and boiling alive (reserved for poisoners).<sup>30</sup> There were also numerous capital offences.<sup>31</sup>

<sup>25</sup> Reached on 21 May 1172 at Avranches Cathedral in Normandy between Henry and the papal legates sent from Rome to negotiate the terms of his absolution for Becket's murder: see Warren W., *Henry II*, (University of California Press, 1973), p115.

<sup>26</sup> See *Mullaney v. Wilbur*, 421 U.S. 684, 692-93 (1975) (US Supreme Court), which contains a useful summary of the 'benefit of clergy' doctrine.

<sup>27</sup> *Miserere mei, Deus, secundum misericordiam tuam*: 'O God, have mercy upon me, according to thine heartfelt mercifulness.'

<sup>28</sup> 1509 – 1547.

<sup>29</sup> Harrison, W.; Edelen, G., *The Description of England: Classic Contemporary Account of Tudor Social Life* (1995, Dover Publications Inc), p193.

<sup>30</sup> In England, a statute passed in 1531 by the second session of the Reformation Parliament, *An Acte for Poysoning* (22 Henry VIII c 9), made boiling a legal form of capital punishment. It was applied to murderers who used poisons after the Bishop of Rochester's cook, Richard Rice, gave a number of people poisoned porridge, resulting in two deaths in February 1532: Kesselring, K.J. (September, 2001), 'A Draft of the 1531 "Acte for Poysoning", *The English Historical Review* Vol 116, No 468, pp894-899.

<sup>31</sup> The Tudor period also saw reforms of the benefit of clergy 'defence'. Reforms in the time of Henry VII only permitted it to be claimed once (those relying upon it were branded on the thumb to make sure they could not claim it for a second time). Beginning in 1512, statutes passed during Henry VIII's reign restricted the benefit of clergy by making certain offences 'unclergyable' offences; in the words of the statute, they were 'felonies without benefit of clergy'. These offences included murder, rape, poisoning, petty treason, sacrilege, witchcraft, burglary, theft from churches and pickpocketing: see Kesselring K.J., *Mercy and Authority in the Tudor State*, (Cambridge, 2003), pp104-5.

## The Bloody Code

While the Tudor period is often regarded as having been especially bloody, it pales so far as judicially imposed death sentences are concerned when compared with the centuries that followed.

The number of capital crimes in Britain increased significantly during the 18th century. In 1688 there were 50 offences on the statute book punishable by death, but that number had almost quadrupled by 1776,<sup>32</sup> and it had reached 220 by the end of the century. Capital offences ranged from the serious to the trivial to the bizarre, and included: forgery; poaching; damaging Westminster Bridge; stealing items above a certain value; associating with gypsies; cutting down a tree;<sup>33</sup> being out at night with a blackened face; and robbing a rabbit warren. The system of laws and punishments for capital offences between 1688 and 1815 (when the number of such offences began to be reduced, as described later in this paper) is often known as the ‘Bloody Code’.

Many of the laws introduced during this period were concerned with the defence of property, and so constituted a form of class suppression of the poor by the rich.<sup>34</sup> George Savile, 1st Marquess of Halifax, expressed a contemporary view when he said that, ‘men are not hanged for stealing horses, but that horses may not be stolen’.<sup>35</sup> After the turmoil of the English civil war in the 17th century, the landowning class emerged as the supreme rulers of Britain. They based their power on property ownership, and saw the law’s main purpose as protecting their property. They were ruling a country of six and a half million people, most of whom had no political rights whatsoever. The crime rate was not particularly high, but the property-owning classes feared that it was, or that it would grow, as towns grew in size and the old village community crumbled.

The Bloody Code was therefore a threat: severe retribution would be visited upon those thinking of breaking the law by infringing property rights. A great deal was made of hangings. They were held in public, and thousands turned out to watch, especially in London, where the offenders would be drawn through the streets in carts over several miles from Newgate Prison, in the City of London, before being hanged at Tyburn.<sup>36</sup> The intention was clearly to make the executions act as a deterrent in order to make others observe the law. The method of hanging involved the condemned being ‘turned off’ ladders or the cart, resulting in painful and slow strangulation, with the victims often soiling themselves, as the crowd cheered or booed, depending on the victim’s popularity and/or the notoriety of his or her crime.

<sup>32</sup> Wilf, S., *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America*, (2010, Cambridge University Press), p139.

<sup>33</sup> One of the many capital offences created by the Black Act 1723 (9 Geo 1, c. 22). The last hanging under the Black Act took place on 12th August 1814 when William Potter was hanged at Chelmsford for the crime of cutting down an orchard.

<sup>34</sup> Sharpe, J., *Crime, Order and Historical Change*, in Muncie, J.; McLaughlin, E., *The Problem of Crime* (2nd ed., 2001, Sage Publications), p116.

<sup>35</sup> Savile G., *The Complete Works of George Savile, First Marquess of Halifax*, edited with an introduction by Walter Raleigh, ‘Of Punishment’ (Oxford, Clarendon Press, 1912), p229.

<sup>36</sup> The permanent ‘triple-tree’ gallows situated at what is now Marble Arch.

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Execution at Tyburn, London. The last public execution there took place in 1783. Marble Arch now stands on the Tyburn site.

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Chief warden and his assistant at the inner door of Newgate Prison, London. The prison was demolished in 1902 to make way for the construction of the Central Criminal Court.

It is therefore unsurprising that during this period the severity of the law made juries sometimes reluctant to convict defendants and so send them to their death for what were frequently trivial offences. For example, grand larceny, defined as the theft of goods worth more than 12 pence, was one of the crimes that attracted the death penalty, but, as the 18th century wore on, jurors often deliberately under-assessed the value of stolen goods below the crucial figure that would have made a sentence of death mandatory.

During this time, the death penalty was generally carried out expeditiously after sentence. In the case of murder, as opposed to other capital offences, it followed immediately after conviction. In 1751, *An Act for better preventing the horrid Crime of Murder*,<sup>37</sup> provided that all persons convicted of murder were to be executed on the next day but one after sentence, unless convicted on Friday, in which case they were to be executed on the following Monday and kept in solitary confinement upon bread and water until they were executed. The Act also provided that, as some ‘further terror and

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<sup>37</sup> The Murder Act 1751, 25 Geo. 2, c. 37. The Act’s long title made clear its purpose: ‘Whereas the horrid crime of murder has of late been more frequently perpetrated than formerly, and particularly in and near the metropolis of this kingdom, contrary to the known humanity and natural genius of the British nation: and whereas it is thereby become necessary, that some further terror and peculiar mark of infamy be added to the punishment of death, now by law inflicted on such as shall be guilty of the said heinous offence...’

peculiar mark of infamy' that 'in no case whatsoever shall the body of any murderer be suffered to be buried', and required that it either be publicly dissected or hanged in chains.

The extreme rigour of this regime of immediate execution for murder was re-enacted in the Offences against the Person Act 1828,<sup>38</sup> but was repealed by the Act of 1836<sup>39</sup> because of the fear of erroneous and irreversible convictions – or, as the Act put it, 'more effectually to preserve from an irrecoverable punishment any persons who may hereafter be convicted upon erroneous or perjured evidence'. It was enacted that henceforth sentence of death in murder cases should be pronounced in the same manner and the judge should have the same powers as after convictions for other capital offences – namely, to postpone the sentence until further order.

## Reform of the Bloody Code

In 1770, Sir William Meredith MP<sup>40</sup> suggested that Parliament consider 'more proportionate punishments'. His proposal was rejected, but it started a debate about the severity of the law.<sup>41</sup> With more than a thousand people a year being sentenced to death (although only a small proportion of that number actually being executed), it was clearly a debate that was needed. The cause of reform was taken up by Sir Samuel Romilly MP,<sup>42</sup> who became the principal champion of the efforts to get Parliament to de-capitalise minor crimes.

As a law reformer Romilly, though much influenced by Jeremy Bentham, drew his original inspiration from Jean-Jacques Rousseau and Cesare Beccaria.<sup>43</sup> Around 1807 he began to give serious attention to the problem of reform of the criminal law and of the Bloody Code in particular. He succeeded in persuading Parliament to abolish the penalty of death in cases of private stealing from the person,<sup>44</sup> but failed to carry a similar reform in regard to shoplifting, stealing in dwelling houses, and on navigable rivers. In 1811 he promoted provisions that substituted transportation for death in cases of stealing from bleaching grounds,<sup>45</sup> and in the following year succeeded in getting Parliament to repeal the statute<sup>46</sup> that made it a capital offence for soldiers or seamen to be found vagrant without their passes. In 1814 he pursued provisions that mitigated the harshness of the law of treason and attainder.<sup>47</sup>

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<sup>38</sup> 9 Geo. 4, c. 31.

<sup>39</sup> 6 Will. 4, c. 30.

<sup>40</sup> 1725 – 1790, MP for Wigan and, later, for Liverpool.

<sup>41</sup> Gatrell V., *The Hanging Tree: Execution and the English People, 1770–1868*, (Oxford, 1997) p326.

<sup>42</sup> 1757 – 1818, Solicitor-General and MP, variously, for Queenborough, Horsham, Wareham and Arundel.

<sup>43</sup> Cesare, Marquis of Beccaria-Bonesana (1738–1794), was an Italian jurist, philosopher and politician, best known for his treatise *On Crimes and Punishments* (1764), which condemned torture and the death penalty and was a founding work in the field of penology.

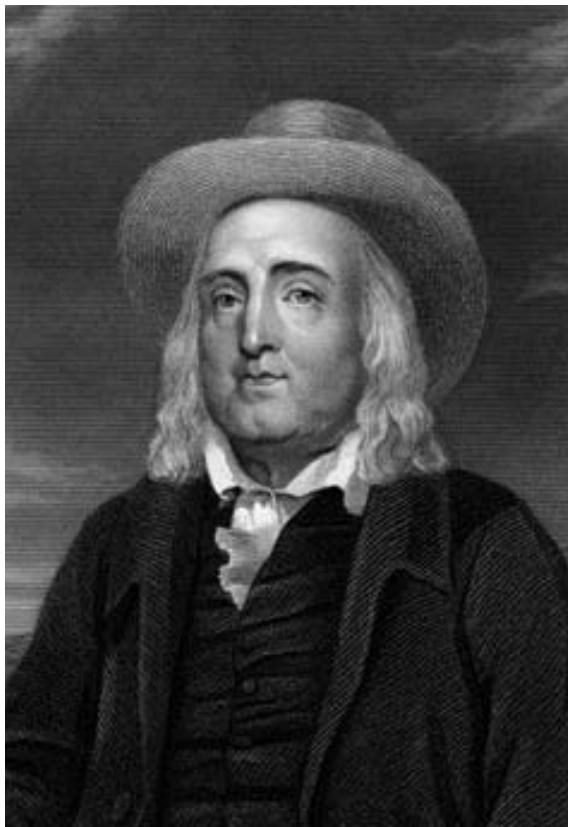
<sup>44</sup> 1808, Stat. 48 Geo. III, c. 129.

<sup>45</sup> Stat. 54 Geo. III, c. 39.

<sup>46</sup> 39 Eliz. c. 1.

<sup>47</sup> Stat. 54 Geo. III, cc. 145, 146. Attainder, or *attinctura*, was the metaphorical stain or corruption of blood that arose from being condemned for a serious capital crime (felony or treason). It entailed losing not only one's property and hereditary titles, but typically also the right to pass them on to one's heirs. Both men and women condemned of capital crimes could be attainted. Article III, section 3 of the United States Constitution forbids attainder except during the defendant's lifetime.

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Jeremy Bentham (1748-1832), English social reformer and philosopher whose work informed the abolitionist cause.

Sir Samuel Romilly (1757-1818), Solicitor General and principal champion of efforts to reform the Bloody Code.

After Romilly's death in 1818, Sir James Mackintosh MP, who supported Romilly's proposals for reducing the severity of the criminal law, took up the abolitionist cause. On 2 March 1819, he carried a motion against the Government for a committee to consider capital punishment, by a majority of 19. In 1820, he introduced six bills embodying the recommendations of the committee, only three of which became law. The Lord Chancellor, Lord Eldon, secured an amendment to keep the death penalty for stealing to the value of more than £10. On 21 May 1823, Mackintosh put forward a further nine proposals to Parliament for abolishing the punishment of death for less serious offences.

In 1823, the Judgment of Death Act<sup>48</sup> was enacted. This abolished the mandatory death penalty by giving judges the discretion to immediately reduce the mandatory death sentences for crimes other than treason and murder to lesser punishments of imprisonment or transportation. The death sentence was still recorded, but the defendant was treated as having been reprieved.

The next four decades of the 19th century saw the gradual abolition of the death penalty for a large number of offences. The Punishment of Death, etc. Act 1832<sup>49</sup> reduced the number of capital crimes to around 60. Between 1832-1837, Sir Robert Peel's Government introduced various bills to reduce the number of capital crimes. Shoplifting and sheep, cattle and horse stealing were removed from the list in 1832, followed by sacrilege, letter stealing, returning from transportation (1834/5), forgery

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<sup>48</sup> 4 Geo 4 c 48.

<sup>49</sup> 2 & 3 Geo 4 c 62.

and coining (1836), arson, burglary and theft from a dwelling house (1837), rape (1841) and, finally, attempted murder in 1861.

By 1861, the number of capital offences had been reduced to just four by the Criminal Law Consolidation Acts<sup>50</sup> of that year. These offences were murder, high treason, piracy with violence, and arson in the Royal Dockyards. In effect, from this point onwards, there was only one capital crime, namely murder, for which criminals would be put to death in peacetime.<sup>51</sup>

## The ending of public executions

During the first 68 years of the 19th century, numerous individuals were to lend their voices to the abolitionist cause. Several, including the author Charles Dickens and the Quaker movement, campaigned in particular for the ending of public executions. By the 1860s, public executions – with their attendant drunkenness and rowdiness had become – as one historian has put it – ‘cruel and increasingly shocking’.<sup>52</sup> At the beginning of the 18th century, hangings were attended by all classes of society and were considered an excellent day out. The rich would pay handsomely for the best seats to get a good view of the event. By the end of the period, it was mostly the lower classes who were attending executions. This could no longer be tolerated. As Lizzie Seal put it, the exclusion of the crowd from the execution scene on the one hand ‘appeased [the] squeamishness’ that was part of the developing middle-class culture of sensibility, and on the other meant that hanging could be carried out as a ‘more orderly, bureaucratic affair, over which the state had firmer control’.<sup>53</sup>

The last man to be publicly executed in the United Kingdom was Michael Barrett, on 26 May 1868. He was hanged in England for his part in the Clerkenwell bombing of December 1867, when Fenians attempted to blow up the wall of Coldbath Fields Prison in order to free captive Irish prisoners. The bombing killed 12 bystanders and severely injured many more. As Barrett hanged, the crowd reportedly sang popular songs.<sup>54</sup>

Three days after Barrett’s execution, Parliament passed the Capital Punishment Amendment Act 1868,<sup>55</sup> whose long title explained that it was ‘An Act to provide for carrying out of Capital Punishment within Prisons.’<sup>56</sup> Section 1 provided that judgment of death to be executed on any prisoner sentenced on any indictment or inquisition for murder was to be carried into effect within

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<sup>50</sup> 24 & 25 Vict. cc. 94 – 100. The seven Acts were: The Accessories and Abettors Act 1861 (c. 94); The Criminal Statutes Repeal Act 1861 (c. 95); The Larceny Act 1861 (c. 96); The Malicious Damage Act 1861 (c. 97); The Forgery Act 1861 (c. 98); The Coinage Offences Act 1861 (c. 99); The Offences Against the Person Act 1861 (c. 100).

<sup>51</sup> Executions for treachery and other wartime offences are considered later in this paper.

<sup>52</sup> Gatrell V., *The Hanging Tree: Execution and the English People, 1770–1868*, (Oxford, 1997), p590.

<sup>53</sup> Seal L., *Capital Punishment in 20th Century Britain: Audience, Justice, Memory* (Routledge, 2015), p13.

<sup>54</sup> Pratt J., *Punishment and civilization: penal tolerance and intolerance in modern society*, (Sage, 2002), Chapter 2.

<sup>55</sup> 31 & 32 Vict. c. 24.

<sup>56</sup> The Act followed the work of the Royal Commission on Capital Punishment 1864–1866 under the chairmanship of the Duke of Richmond (Parliamentary Papers. Session 1866. vol. 21), which had rejected outright abolition of the death penalty (although some members supported abolition) but recommended the ending of public executions.

the walls of the prison<sup>57</sup> in which the offender was confined at the time of execution.<sup>58</sup> The sheriff charged with the execution, and the gaoler, chaplain, and surgeon of the prison, and such other officers of the prison as the sheriff required, were to be present at the execution. Any justice of the peace for the county, borough, or other jurisdiction to which the prison belonged, and such relatives of the prisoner or other persons as it seemed to the sheriff or the visiting justices of the prison proper to admit within the prison for the purpose, could also be present at the execution.<sup>59</sup> After the execution had been carried out, the surgeon of the prison was required to examine the prisoner's body and ascertain the fact of death, then sign a certificate for delivery to the sheriff.<sup>60</sup> A coroner's inquest had to be held within 24 hours of the execution (in practice, it was held on the same day).<sup>61</sup> Section 6 required the prisoner to be buried within the precincts of the prison, unless the Secretary of State ordered otherwise.<sup>62</sup>

## Executions for offences other than murder during the 20th century

As has been shown, from about 1861 murder was the only peacetime crime for which offenders were sentenced to death and executed. That remained the position until abolition. However, offenders were executed for other offences during both world wars.

During World War I, 306 British and Commonwealth soldiers were executed for offences under the Army Act 1881 and the Indian Army Act 1911,<sup>63</sup> such as cowardice and desertion.<sup>64</sup> This was a tiny proportion of the approximately 20,000 soldiers who were sentenced to death.<sup>65</sup> The executions were controversial at the time, although not among the general public, which remained largely ignorant of what had gone on. That controversy grew during the 20th century, when developments in psychiatric medicine revealed that many of the men executed were suffering from shell-shock as a result of their terrible experiences on the battlefields.<sup>66</sup> The unfair nature of many of the courts martial and the process by which the sentences were 'confirmed' (or not) by the military hierarchy were also exposed as a result of work by military historians and in at least one application for judicial review.<sup>67</sup> Campaigners, one of the most prominent of whom was Andrew McKinlay, the Labour MP for Thurrock, repeatedly sought pardons for those who had been executed.

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<sup>57</sup> In fact, all executions (with the exception of military executions during World War I) from 1868 onwards were carried out inside prisons.

<sup>58</sup> Section 3 of Capital Punishment Amendment Act, 1868, see note 55.

<sup>59</sup> Section 3 of Capital Punishment Amendment Act, 1868, see note 55. In practice, it does not appear that the prisoner's relatives were ever permitted to be present at the execution.

<sup>60</sup> Section 4 of Capital Punishment Amendment Act, 1868, see note 55.

<sup>61</sup> Section 5 of Capital Punishment Amendment Act, 1868, see note 55.

<sup>62</sup> Section 7 of Capital Punishment Amendment Act, 1868, see note 55.

<sup>63</sup> Indian Act, No 8 of 1911.

<sup>64</sup> Army Act 1881, s 4, set out the offences in relation to the enemy which were punishable by death.

<sup>65</sup> *Hansard*, HC Deb 24 July 1998 vol 316 col 1385.

<sup>66</sup> Babington A., *For the Sake of Example* (Penguin, 2002).

<sup>67</sup> *R (Harris) v Secretary of State for Defence*, CO/5391/2004.

A review of the Great War's capital cases was promised by the Labour Party in the lead up to the 1997 General Election, but, in 1998, the Government announced that it had declined to grant a blanket pardon because the passage of time meant, in the Government's view, that the grounds for a blanket legal pardon on the basis of unsafe conviction did not exist. The Government also rejected the course of examining each case individually to reach a conclusion because, in many cases, the records had been lost or were too sparse to reach any reliable conclusion. This would, in the Government's view, mean that nothing could be done, even though grounds might actually exist for interfering.<sup>68</sup>

On 15 August 2006 – following judicial review proceedings<sup>69</sup> brought in 2004-2005 by Gertrude Harris, the daughter of Private Harry Farr, who was executed for cowardice on 18 October 1916<sup>70</sup> – the Government announced that a clause would be included in the Armed Forces Bill, which was then before Parliament. This would grant a conditional pardon (ie, against sentence only) in respect of those who had been executed. Des Browne MP, the Secretary of State for Defence, explained the reasons for his decision in *The Telegraph* on 16 August 2006:

*Although this is a historical matter, I am conscious of how the families of these men feel today. They have had to endure a stigma for decades. That makes this a moral issue too, and having reviewed it, I believe it is appropriate to seek a statutory pardon. I hope we can take the earliest opportunity to achieve this by introducing a suitable amendment to the current Armed Forces Bill. I believe a group pardon, approved by Parliament, is the best way to deal with this. After 90 years, the evidence just doesn't exist to assess all the cases individually.*

*I do not want to second guess the decisions made by commanders in the field, who were doing their best to apply the rules and standards of the time. But the circumstances were terrible, and I believe it is better to acknowledge that injustices were clearly done in some cases, even if we cannot say which – and to acknowledge that all these men were victims of war.'*

The change of heart by the Government was in very large part due to the judicial review brought by Mrs Harris, which demonstrated that Private Farr had been unfairly treated *even by the standards of the time*.<sup>71</sup> The main objection made by those who opposed pardoning executed soldiers such as Private Farr was that it would involve imposing contemporary standards on wartime conditions.<sup>72</sup> Private Farr's case gave the lie to that argument, and showed that he had been inexplicably denied basic protections that had been given to other soldiers in his position. For example, he was not medically examined before his court martial, and the contemporary medical evidence that he was suffering from shell-shock after being injured by an exploding shell (and evacuated from the front line as a consequence) – having previously been a brave and conscientious soldier – was not considered by the military chain of command that confirmed his death sentence. When, on 14 October 1916,

<sup>68</sup> Hansard, HC Deb 24 July 1998 vol 316 cc1372-86.

<sup>69</sup> R (Harris) v Secretary of State for Defence, CO/5391/2004.

<sup>70</sup> Wessely S (2006), 'The life and death of Private Harry Farr', *Journal of the Royal Society of Medicine* (2006) 99 (9): 440-3.

<sup>71</sup> According to press reports, the pardon also owed much to the personal intervention of the Ministers responsible, Des Browne MP, Secretary of State for Defence, and Tom Watson MP, Parliamentary Under-Secretary of State at the Ministry of Defence, who were reportedly much affected by their meeting with Mrs Harris: McDonald H, 'War shame ended by plea of a daughter', *The Guardian*, 28 October 2007.

<sup>72</sup> For example, in refusing a pardon in 1993, the then Prime Minister, John Major MP, said: 'I have reflected long and hard but I have reached the conclusion that we cannot rewrite history by substituting our latter-day judgement for that of contemporaries, whatever we might think.' *The Independent*, 20 February 1993.

General Haig wrote the single word ‘Confirmed’ on Private Farr’s papers – and so sealed his fate – he did so without knowing that several of Private Farr’s superiors had asked that he be spared because of his shellshock.<sup>73</sup>

PRIVATE HARRY FARR © PA IMAGES



Private Harry Farr (1891-1916), shot for cowardice on 18 October 1916 despite suffering from shell shock. He was pardoned in 2006.

Name of Accused Officer in Command charged	Date of Trial	Punishment	How should he be treated?
Sgt. M. J. J. McPherson Farr 2950 Ldy. 30th Battalion Royal North Lancashire Regt. Reservist	2 Oct 1916	GUILTY	DEATH
			CONFIRMED

The record of Private Farr’s sentence, 2 October 1916. Note General Haig’s handwritten ‘Confirmed’ in the fourth column.

It is highly likely that Private Farr’s case was not unique, and that there were other cases where executed soldiers had been denied basic due-process rights – such as being medically examined – which the Government *at the time* stated in Parliament were always given to soldiers facing capital charges. For example, on 19 February 1918 the following exchange took place between James Macpherson MP, the Under-Secretary for War, and several MPs, in relation to soldiers suffering from shell-shock who were accused of cowardice or desertion:<sup>74</sup>

James Macpherson: *‘I have on more than one occasion stated that the most extreme care and caution are taken in every case of suspected shell-shock.’*

Joseph King: *‘Is care taken at the time to have the accused examined by a medical man to see what is his condition mentally and physically?’*

James Macpherson: *‘Every possible care is taken in that direction. I have already told the House and my Hon. Friend that where there is the least suspicion of shell-shock every possible medical advice is obtained.’*

<sup>73</sup> Papers on file with the author, who was junior counsel for Mrs Harris (led by Edward Fitzgerald CBE QC).

<sup>74</sup> *Hansard*, HC Deb 19 February 1918 vol 103 cc589-590.

John Whitehouse: '*Then why have they been shot in such cases?*'

James Macpherson: '*I strongly resent that statement. The Hon. Member knows as well as I do that it is quite untrue.*'

The evidence in Private Farr's case shows that what was untrue was what Macpherson had said on this occasion, and which he had repeated on other occasions.<sup>75</sup>

The provision of the Armed Forces Bill containing the pardon for executed soldiers passed into law as s 359 of the Armed Forces Act 2006. Section 359 is entitled 'Pardons for servicemen executed for disciplinary offences: recognition as victims of First World War' and provides:

- (1) *This section applies in relation to any person who was executed for a relevant offence committed during the period beginning with 4 August 1914 and ending with 11 November 1918.*
- (2) *Each such person is to be taken to be pardoned under this section in respect of the relevant offence (or relevant offences) for which he was executed.*

The 'relevant offences' under the Army Act 1881 and the Indian Army Act 1911 are specified in s 359(2). Section 359(4) provides that the section does not affect any conviction or sentence, give rise to any right, entitlement or liability, or affect the prerogative of mercy.

There were also a number of executions in the United Kingdom for spying and treachery during World War I.<sup>76</sup> Spies were tried under various sections of the Defence of the Realm legislation and were shot at the Tower of London.<sup>77</sup> Probably one of the most famous – or notorious – World War I executions was that of the Irish patriot Sir Roger Casement, who was tried and executed in 1916 for treason contrary to the Treason Act 1351.<sup>78</sup> Casement had been involved in encouraging Irish prisoners of war to fight for Germany, in return for which Germany promised not to invade Ireland. He was hanged at HMP Pentonville by John Ellis on 3 August 1916.

During the inter-war years, anxiety was stoked in certain quarters about the military executions that had taken place during World War I, especially with regard to the lack of legal representation and rights of appeal.<sup>79</sup> Although there had not been any particular public reaction against the executions, a number of Labour and Liberal MPs pursued a Parliamentary campaign to restrict the use of capital

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<sup>75</sup> Shephard B., *A War of Nerves: Soldiers and Psychiatrists in the 20th Century*, (Harvard University Press, 2003), pp70-71.

<sup>76</sup> Karl Lody, 6 November 1914; C. F. Muller, 23 June 1915; W. J. Roos, 30 July 1915; H. P. M. Janseen, 30 July 1915; E. W. Melin, 10h September 1915; A. A. Roggin, 17 September 1915; F. Buschman, 19 September 1915; G. T. Breeckow, 26 October 1915; I. G. Ries, 27 October 1915; A. Meyer, 2 December 1915; L. H. Zender, 11 April 1916.

<sup>77</sup> Defence of the Realm Consolidation Act 1914 (5 Geo 5), and the Regulations made thereunder.

<sup>78</sup> 25 Edw 3 St 5 c 2. The 1351 Act declared that treason was committed 'if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be properly attainted of open deed by the people of their condition'. The charge alleged against Casement was of adhering to the King's enemies elsewhere than in the King's realm, namely in Germany. The defence unsuccessfully submitted that the Crown had failed to prove an offence in law. The contention was that the words 'or elsewhere' governed only the words 'aid and comfort in the realm' and had no application to the words 'be adherent to the King's enemies in his realm'. However, in an interpretation based on the insertion of a comma after '... and comfort in the realm', in a judgment dated 18 July 1916, the Court of Criminal Appeal (Darling, Bray, A. T. Lawrence, Scrutton, and J. J. Atkin.) held that the Act applied in respect of 'adhering to the King's enemies' wherever the adhering took place and wherever the enemies were. Prior to his execution, Casement famously wrote in a letter that he was to be 'hanged on a comma'.

<sup>79</sup> Seal L., *Capital Punishment in 20th Century Britain: Audience, Justice, Memory* (Routledge, 2015), p17.

punishment against soldiers, resulting in amendments to the Army Act 1881 by s 5 of the Army and Air Force (Annual) Act 1930, which confined the military death penalty to treachery.

So it was that there were no military executions in the British forces for purely military offences during World War II. However, there were a number of executions for treachery and treason during and after the war.

Section 1 of the Treachery Act 1940 provided that any person who, with intent to help the enemy, did, or attempted or conspired with any other person to do, any act which was designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, was guilty of a felony and liable to suffer death after conviction.

There was an overlap between the 1940 Act and the laws of treason; however, treason had always had special and restrictive rules of evidence, and there was doubt about whether it applied to non-subjects, and (as Casement's case had shown) precisely what activities it covered. So the 1940 Act was passed to remove any ambiguity about the law.<sup>80</sup>

In the years 1940 – 1947, 17 people were executed after conviction by a civil court of an offence other than murder. Two had been convicted of treason,<sup>81</sup> and 15 had been convicted of an offence under the Treachery Act 1940.<sup>82</sup> There was also one execution of a person convicted by a court martial of an offence under the Treachery Act 1940.<sup>83</sup> This was Josef Jakobs, who became the last person executed at the Tower of London when he was shot by a firing squad on 15 August 1941.

The Treachery Act 1940 was suspended in 1946 by the Treachery Act (End of Emergency) Order and repealed in 1968 by the Criminal Law Act 1967.<sup>84</sup>

## 20th-century restrictions on capital punishment

The 20th century saw the imposition of a number of restrictions on the use of the death penalty. Section 103 of the Children Act 1908 provided that no child under the age of 16 could be executed. The minimum age for execution was raised to 18, the legally recognised age of the commencement of adulthood, by s 52 of the Children and Young Persons Act 1933. The last person under the age of 18 to be executed was 17-year-old Charles Dobel, who was executed at Maidstone – along with William Gower, aged 18 – on 2 January 1889, for murder.

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<sup>80</sup> *Hansard*, HC Deb 22 May 1940, Vol 361 cc185-95; Seaborne Davies D., 'The Treachery Act', 1940, (1941) *MLR* Vol 4, No 3, pp217-220.

<sup>81</sup> John Amery, 19 December 1945, HMP Wandsworth; William Joyce, 3 January 1946, HMP Wandsworth;

<sup>82</sup> Jose Waldberg, 10 December 1940, HMP Pentonville; Karl Meir, 10 December 1940, HMP Pentonville; Charles Van Der Kieboom, 17 December 1940, HMP Pentonville; George Armstrong, 9 July 1941, HMP Wandsworth; Werner Waelti, 6 August 1941, HMP Wandsworth; Karl Drucke, 6 August 1941, HMP Wandsworth; Karl Richter, 10 December 1941, HMP Wandsworth; Jose Key, 7 July 1942, HMP Wandsworth; Alphons Timmerman, 7 July 1942, HMP Wandsworth; Duncan Scott-Ford, 3 November 1942, HMP Wandsworth; Johannes Dronkers, 31 December 1942, HMP Wandsworth; Franciscus Winter, 26 January 1943, HMP Wandsworth; Oswald Job, 16 March 1944, HMP Pentonville; Pierre Neukermans, 23 June 1944, HMP Pentonville; Joseph Vanhove, 12 July 1944, HMP Pentonville; Theodore Schurch, 4 January 1946, HMP Pentonville.

<sup>83</sup> 3 & 4 Geo. VI c. 40; *Hansard*, HC Deb 1 February 1965, vol 705 c219W.

<sup>84</sup> SR & O 1946, No. 893.

The Infanticide Act 1922 made the killing of a baby by its mother no longer a capital crime. Section 1 provided that where a woman by any wilful act or omission caused the death of her newborn child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and because of that reason the balance of her mind was disturbed, she was to be convicted of infanticide and punished as if she had been guilty of manslaughter, notwithstanding that the circumstances were such that but for the Act the offence would have amounted to murder. This exemption was extended by s 2 of the Infanticide Act 1938 to include the killing of a child of under one year. In reality, no woman had been hanged for the crime of killing her newborn baby since 1849. The Sentence of Death (Expectant Mothers) Act 1931 excepted pregnant women, who were no longer to be hanged for their crimes after giving birth.

The most significant restriction on the use of capital punishment in the 20th century was the Homicide Act 1957,<sup>85</sup> which created the new offence of capital murder, and provided that all other murders were to be non-capital murder and were to carry a mandatory sentence of life imprisonment. The 1957 Act also introduced a new partial defence of diminished responsibility, the effect of which was to reduce murder to manslaughter.

The origins of the Homicide Act 1957 lay in the Report of the Royal Commission on Capital Punishment, under the chairmanship of Sir Ernest Gowers,<sup>86</sup> which was established in 1949 to examine capital punishment. As this paper will show, the anomalies created by the Homicide Act 1957 led directly to the suspension and abolition of the death penalty.



Sir Ernest Gowers (1880-1966), appointed Chairman of the Royal Commission on Capital Punishment in 1949.

<sup>85</sup> 5 & 6 Eliz.2 c.11

<sup>86</sup> 1880 – 1966, a career civil servant with no apparent expertise in penology.

World War II brought about a change in thinking among some of the new MPs elected in May 1945. While some had long been opposed to execution, for the most part the death penalty had not caused a great deal of controversy within Parliament. However, the loss of life during the war – and in the Nazi death camps in particular – undoubtedly caused many to reflect upon the value of human life. Writing in the foreword to *Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain*,<sup>87</sup> Lord Callaghan of Cardiff, the former Labour Prime Minister, who was the Home Secretary at the time of abolition, said that Sydney Silverman, the undisputed leader of the abolitionist campaign in the House of Commons:<sup>88</sup>

*'... carried a formidable armoury that convinced many of us just back from the war in the late 1940s that hanging should go. I cannot say that, until then, hanging had impinged on my thinking, and it was only when I reached Parliament in 1945 and was confronted by the need to take a position, that I concluded that hanging should be abolished. In the debates of 1948, I voted for abolition for the first time and, after that decision, did so steadily thereafter, whenever the issue came before the House.'*

In April 1948, the House of Commons voted in favour of a bill introduced by Sydney Silverman to suspend the death penalty for five years. The Labour Home Secretary, James Chuter Ede, announced that he would reprieve all murderers until the future of the bill was resolved. The House of Lords rejected the bill, and also the alternative of dividing murder into degrees, only the most serious of which would have carried the capital penalty. Following the vote, in November 1948 the Home Secretary promised to set up a Royal Commission to examine the subject.

On 20 January 1949, the Prime Minister, Clement Atlee, announced to Parliament that the King had approved the setting up of a Royal Commission on Capital Punishment, under the Chairmanship of Sir Ernest Gowers, with the following terms of reference:

*'To consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and, if so, to what extent and by what means; for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison system would be required; and to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions.'*

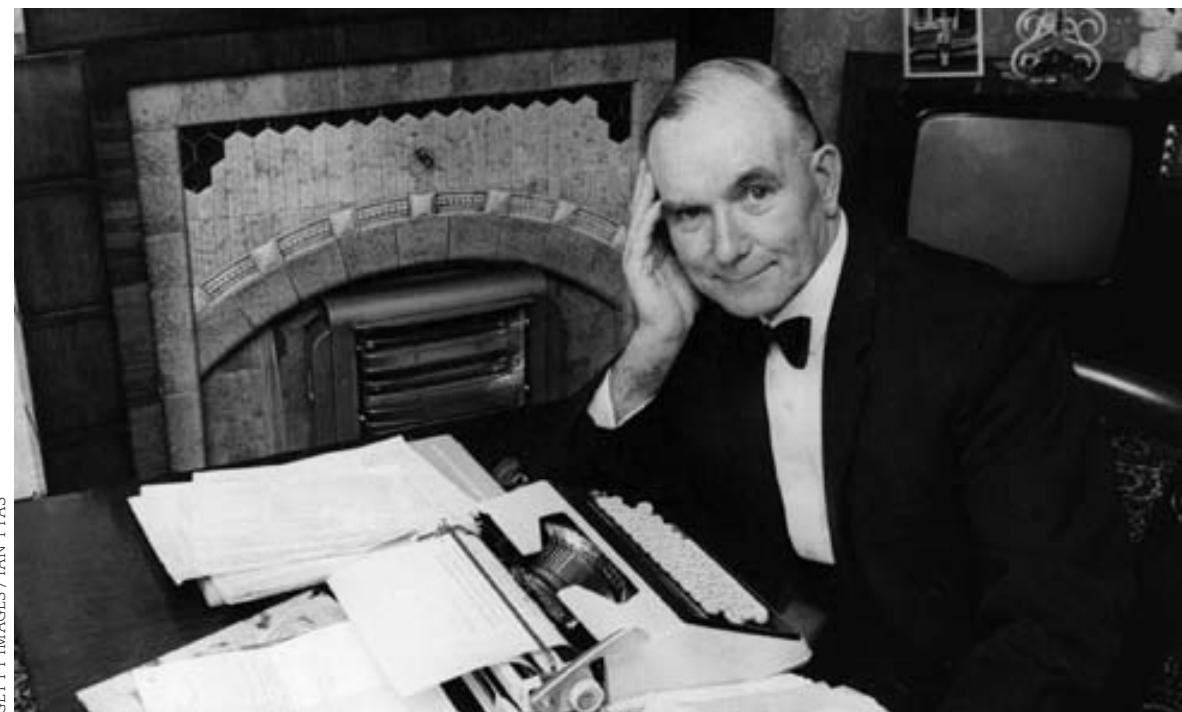
The Commission was debarred by its terms of reference from considering the question of the complete abolition of capital punishment, but in the course of its investigations it accumulated information that was relevant to this issue, as well as to the question of limiting the scope of capital punishment.

The Commission, comprising 10 men and two women, had 63 meetings over four years. It took evidence from a wide range of people with expertise in the field of executions, including judges, prison governors and chaplains, medical officers and staff, and also the then principal hangman, Albert Pierrepoint. It also visited 10 British prisons, plus Broadmoor Hospital, and prisons in various European countries and the United States, in order to examine their capital punishment practices.

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<sup>87</sup> Block B., Hostettler J., Waterside Press, 1997, ppvii-viii.

<sup>88</sup> Labour MP for Nelson and Colne and founder of the National Campaign for the Abolition of Capital Punishment (NCACP), whose tireless work led directly to the abolition of the death penalty.



Albert Pierrepoint (1905-1992), Chief Executioner from 1941 until 1956. He carried out more than 400 executions during his career.

The Commission eventually reported in September 1953.<sup>89</sup> Its report was nothing if not lengthy, extending to more than 500 pages and including 200 pages of statistical tables and diagrams.

The report began by considering the various ways in which an offender's liability to suffer capital punishment was limited, namely by the action of the prosecution in limiting the charge, for example, to manslaughter; by the action of juries in refusing to convict of murder in certain cases; and by the exercise of the Royal Prerogative of mercy. The Commission held that it was undesirable to rely upon such means to overcome the excessive rigidity of the law of murder and the mandatory sentence of death upon conviction, which they considered to be the law's outstanding defect. The Commission said at p21, para 6 of its report:

*'Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder. To illustrate their wide range we have set out briefly... the facts of 50 cases of murder that occurred in England and Wales and in Scotland during the 20 years 1931 to 1951. From this list we may see the multifarious variety of the crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and'*

<sup>89</sup> Cmd 8932.

*carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all.'*

The Commission therefore sought ways in which the liability to be convicted for murder might be limited and brought more closely into line with what they interpreted to be popular sentiment with regard to the sort of people who should be executed. The result was five specific proposals for altering the law of murder:

- the abolition of the doctrine of constructive malice;<sup>90</sup>
- the extension of provocation to cover mere words;<sup>91</sup>
- the alteration of the law relating to suicide pacts;
- the raising of the minimum age at which a person could be sentenced to death from 18 to 21;
- the abolition of the M'Naghten Rules relating to insanity, or their extension to cover cases that were not at that time included.

One of the Commission's principal areas of concern was mentally ill prisoners facing capital charges. The background to this issue was the case of Daniel M'Naghten, who killed Edward Drummond, the private secretary to the Prime Minister, Sir Robert Peel, on 20 January 1843, the intended victim being Peel. At his trial, the jury found M'Naghten insane and acquitted him. The verdict caused considerable public concern, so the Lord Chancellor, Lord Lyndhurst, opened a debate on the subject of criminal responsibility in the House of Lords in March 1843, which led to the formulation of the M'Naghten Rules on insanity.<sup>92</sup> These state that in order to establish a defence on the ground of insanity, it must be proved by the accused person that, at the time of committing the act, s/he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act s/he was doing; or if s/he did know it, that s/he did not know that what s/he was doing was wrong. This is a stringent test that even severely mentally ill defendants often failed to satisfy.

Having taken a great deal of evidence, the Commission made a number of recommendations in this area. The result was s 2 of the Homicide Act 1957, which created the new partial defence of diminished responsibility. Section 2 of the Homicide Act 1957 (in its original form) provided that diminished responsibility was available as a partial defence reducing murder to manslaughter where the accused was, at the time of the offence, suffering from an abnormality of the mind that substantially impaired her/his mental responsibility for her/his acts or omission resulting in

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<sup>90</sup>Constructive malice was the doctrine that malice aforethought, the *mens rea* for murder, could be attributed to the defendant if death was caused during the commission of another felony (such as robbery or burglary). Section 1 of the Homicide Act 1957 abolished constructive malice except where the intention implicit in the other crime was an intention to kill or to do grievous bodily harm.

<sup>91</sup>At common law, only acts could constitute provoking conduct: *Duffy* [1949] 1 All 932n; cf. *Holmes v. DPP* [1946] AC 588.

<sup>92</sup>*M'Naghten's Case* (1843) 10 Cl. & F. 200. See *R v Holt* 15 Cr App R. 10; *R. v. True* 16 Cr App R 164; *R. v. Windle* [1952] 2 QB 826; *R v. Sullivan (Patrick Joseph)* [1984] AC 156; *Attorney General of South Australia v. Brown* [1960] AC 432.

murder.<sup>93</sup> The burden of proof is on the accused to show that s/he was suffering from diminished responsibility.<sup>94</sup>

Section 3 of the Homicide Act 1957 amended the common law of provocation by widening it to include verbal provocation as well as physical provocation, and by providing that it was for the jury to decide if such provocation had been proved and, if so, to be permitted to bring in a verdict of guilty of manslaughter rather than murder.<sup>95</sup>

In the 50-year period 1900-1949, 83 men and 13 women between the ages of 18 and 21 had received the death sentence, 30 of the men being executed. There had been four bills introduced in Parliament during the same period to increase the minimum age for execution to 21; the Commission was of the same view and recommended this change. It was not incorporated into the Homicide Act 1957, however, and an 18-year-old was executed in England in 1960<sup>96</sup> and a 19-year-old in Scotland after 1957.<sup>97</sup>



Francis Forsyth, executed aged 18 on 10 November 1960. Eighteen was the minimum age for execution.



Mary Ann Hale, 70, prays outside HMP Wandsworth on the morning of the execution of Francis Forsyth, 10 November 1960.

<sup>93</sup> Section 2 was substantially amended by s 52 of the Coroners and Justice Act 2009.

<sup>94</sup> *Byrne* [1960] 2 QB 396.

<sup>95</sup> The common law defence of provocation and s 3 were repealed and replaced by the 'loss of control' defence in ss 54-56 of the Coroners and Justice Act 2009.

<sup>96</sup> Francis 'Flossie' Forsyth, aged 18, was executed on 10 November 1960 at HMP Wandsworth for the capital murder of Alan Jee.

<sup>97</sup> Anthony Joseph Miller, aged 19, was executed on 22 December 1960 at HMP Glasgow for the murder of John Cremin.

The Commission was not of the view that women should be exempted from the death penalty *per se*. It acknowledged that women committed fewer and typically less heinous murders, which was why such a high proportion (90%) were reprieved in the 20th century, but felt that the death penalty should be retained for the most serious female offenders. In the event, only three women were executed after the Commission's report and before abolition.<sup>98</sup>

There was considerable discussion in the report about the exercise of the Royal Prerogative of mercy (i.e. the reprieve process). While, as a matter of constitutional theory, the Royal Prerogative of mercy was exercised by the Sovereign, in practice the decision whether to spare a condemned defendant lay with the Home Secretary, whose advice the Sovereign followed as a matter of constitutional convention.<sup>99</sup>

The Commission found that the reprieve rate was, on average, just over 45%, which was clearly unsatisfactory. In the first half of the 20th century, 533 death sentences out of 1,210 were commuted.<sup>100</sup> The Commission took evidence from the Home Office as to the Home Secretary's practice in recommending reprieves.<sup>101</sup> There was concern expressed over the constitutional aspects of non-elected officials circumventing the law through the reprieve process. In essence, the Commission was concerned that the mercy process was operating as a resentencing process. The evidence showed that the death sentence was being passed where a reprieve was the almost certain outcome; in other words, the prerogative of mercy was being used to inject a degree of flexibility into an otherwise intransigent sentencing system. The inappropriateness of this practice, and the non-equivalence of mercy and proportionate sentencing, was articulated by the Judicial Committee of the Privy Council many years later in *Reyes v The Queen* [2002] 2 AC 235, para 44:

*Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature, mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted.*<sup>102</sup>

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<sup>98</sup> Louisa Merrifield, 18 September 1953; Styliou Christofi, 13 December 1954; Ruth Ellis, 13 July 1957.

<sup>99</sup> The Royal Prerogative of mercy finds expression in essentially two types of pardon: free, i.e. unconditional pardons and conditional pardons. A free pardon is not the equivalent of an acquittal; its effect is to remove from the subject of the pardon 'all pains penalties and punishments whatsoever that from the said conviction may ensue', but it does not eliminate the conviction itself: see *Foster* [1985] QB 115, 130; *Phillip v. Director of Public Prosecutions* [1992] 1 AC 545, 557. A conditional pardon has the effect of quashing the original penalty and replacing it with a lesser penalty. Thus, those under sentence of death who were reprieved received a conditional pardon, which substituted a sentence of life imprisonment for the death penalty: see *R. v. Secretary of State ex parte Bentley* [1994] QB 349.

<sup>100</sup> Of those convicted of murder and sentenced to death in England and Wales between 1900 and 1949, 91% of women and 39% of men were reprieved: see *Report of the Royal Commission on Capital Punishment* (Cmd 8932), p326. No convicted murderer was executed in Scotland between 1929 and 1944: see p302.

<sup>101</sup> The Permanent Under-Secretary at the Home Office at the time, Sir Frank Newsam, provided an insight into how the reprieve system operated in practice in his book *The Home Office* (George Allen & Unwin, 1954), pp114-116. Once he became Permanent Secretary, Newsam had personal involvement in the process whereby the Home Secretary decided whether to reprieve those condemned to death. Newsam would (with other officials) make a (non-binding) recommendation to the Home Secretary as to whether or not to grant a reprieve. He also signed the letters informing the prisoners' families of the Home Secretary's decision: Bentley W.G., *My Son's Execution* (WH Allen, 1957), p147-9. As discussed below, material released in 1992 showed that Newsam and his deputy, Phillip Allen, both recommended mercy for Derek Bentley, but that their advice was ignored by the Home Secretary, Sir David Maxwell-Fyfe MP, who decided that Bentley should hang: *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349, 355.

<sup>102</sup> Despite the Commission's concerns, the rate of reprieve following the enactment of the Homicide Act 1957 remained at around 50%, as the Home Secretary James Callaghan MP highlighted when he opened the debate that resulted in the abolition of the death penalty for murder: *Hansard*, HC Debts, 16 December 1969, cols 1149-1151.

The Commission also examined the various methods of execution as an alternative to hanging, including the guillotine, shooting, electrocution, gassing and lethal injection. The last was opposed by the British Medical Association on the grounds that its members would have to be involved in carrying out executions, rather than in just certifying death, and was considered impractical and not necessarily humane by the Commission. Shooting was rejected on the grounds that 'it does not possess even the first requisite of an efficient method, the certainty of causing immediate death'.<sup>103</sup> The Commission visited prisons in the United States and examined electrocution and lethal gas in depth, but did not conclude that these methods offered any significant advantage over hanging. Those giving evidence to the Commission frequently emphasised their belief that execution should be rapid, clean and dignified. The Commission considered that hanging, as described and demonstrated by Albert Pierrepoint to the Commission members on a visit to HMP Pentonville in November 1950, came closest to this model. They determined that the British style of 'long drop' hanging was still the best available method of execution, but thought that it had no particular unique effect as a deterrent to murder.<sup>104</sup>

It is difficult to read this section of the Commission's Report, or Pierrepoint's account in his autobiography, without concluding that the Commission was deceived by Pierrepoint's self-generated myth about the efficiency of his work.<sup>105</sup> Although Pierrepoint claimed that all of his victims died instantaneously – and in his book he described in almost pornographic detail how he would examine his victims' necks after execution to feel the fracture – modern evidence suggests that he was mistaken in his belief as to the humanity of his executions.

In a paper, *The possible pain experienced during execution by different methods*,<sup>106</sup> neurobiologist Dr Harold Hillman described the physiology and pathology of different methods of capital punishment. He derived his data from observations of the condemned persons, post-mortem examinations, physiological studies on animals undergoing similar procedures, and the literature on emergency medicine. He concluded that while it is difficult to know how much pain the person being executed feels or for how long, because many of the signs of pain are obscured by the procedure or by physical restraints, one can identify those steps that are likely to be painful. The general view has been that most of the methods used are virtually painless, and lead to rapid dignified death. However, Dr Hillman presented evidence that shows, with the possible exception of intravenous injection, that this view is almost certainly wrong. Given this work, it is unlikely that – in the hundreds of executions Pierrepoint carried out – no execution ever miscarried.

Also, if Pierrepoint's own accounts are to be believed, he always achieved the sought-after 'hangman's fracture' – or fracture dislocation – of the axis vertebra (the second cervical vertebra, C2). However, recent research has shown that such fractures were the exception in judicial hangings, and the cause

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<sup>103</sup> Report, p710.

<sup>104</sup> Long-drop hanging, also known as the measured drop, was introduced to Britain around 1872 by the executioner William Marwood, as a supposed scientific advance on the standard drop, which had replaced the short drop, which had caused a slow and painful death through prolonged asphyxiation. Instead of every victim falling the same standard distance (between four and six feet), the victim's height and weight were regularly measured in the condemned cell and were used to determine how much slack would be provided in the rope so that the distance dropped would be enough (in theory) to ensure that the victim's neck was broken, but not so much that s/he was decapitated. The careful placement of the eye or knot of the noose (so that the head was jerked back as the rope tightened) contributed to breaking the neck. The Home Office had a 'table of drops' to aid the executioner in calculating the 'right' drop.

<sup>105</sup> Pierrepoint A., *Executioner: Pierrepoint* (Eric Dobby Publishing, 2005). There are many passages in the book where Pierrepoint speaks of his profession in almost spiritual terms, when the reality is that he was someone who volunteered to kill other people in return for money.

<sup>106</sup> Perception, 1993;22 (6):745-53.

of death was due to a range of head and neck injuries, particularly compression or rupture of the vertebral and carotid arteries, leading to cerebral ischaemia.

In their 2009 paper,<sup>107</sup> Catherine Hellier and Robert Connolly concluded that the rapidity of loss of consciousness and death was highly dependent upon knot positioning and the length of drop, which had varied through the history of hanging as a capital punishment in the UK. Also, in 1992, two researchers at the University of Sheffield's Medico-Legal Centre examined the cervical vertebrae of 34 victims of judicial hanging. They reported that, in only six cases, was there a fracture of the axis vertebra, and only one other fracture was seen in the series. The fractures were of two types. Three were the traditional 'hangman's fracture', while three were of a type that had been previously unreported. The incidence of fracture was unassociated with drop, date, age or hangman. The results of the post-mortem examinations on these subjects were reviewed and found to be grossly inaccurate with regard to fractures. The results indicated that the traditional hangman's fracture occurred in only a small proportion of cases of judicial hanging.<sup>108</sup> The inference can therefore be drawn that the pathologists who carried out post-mortem examinations on executed prisoners participated in a cover-up to preserve the myth of the supposed efficiency and 'humanity' of long-drop hanging.

In reality, despite the Royal Commission's four years of work and its lengthy report, its efforts produced little significant change in the United Kingdom's system of capital punishment. The most important change of the time was brought about by the Homicide Act 1957, namely the restriction of the death penalty to certain categories of murder. Ironically, however, this was a change that the Commission had not favoured. Despite the fact that the system of degrees of murder exists in many American states, and (at the time) in several European countries, the Commission said it could discover no satisfactory basis upon which to found a classification of murder. It concluded at para 534 of its report that, 'the object of our quest is chimerical and that it must be abandoned'. The Commission also rejected introducing a discretion in sentencing, whether the sentence was to be imposed by the judge<sup>109</sup> or the jury.<sup>110</sup>

Notwithstanding the Commission's conclusions, in ss 5 and 6 of the Homicide Act 1957 Parliament created the new offence of capital murder, conviction for which carried a mandatory death penalty, while all other murders were classified as non-capital and carried a maximum sentence of imprisonment for life.<sup>111</sup> The 1957 Act represented a significant repudiation of the Commission's work and directly influenced the course of the debate on abolition.

Section 5 provided that murder in the following circumstances was capital murder:

- Murder in the course or furtherance of theft;<sup>112</sup>
- Murder by shooting or by causing an explosion;<sup>113</sup>

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<sup>107</sup> Hellier C, Connolly R; 'Cause of death in judicial hanging: a review and case study', *Med Sci Law* 2009 Jan;49(1):18-26.

<sup>108</sup> Jones R., Nasmyth-Jones R.; 'The occurrence of cervical fractures in victims of judicial hanging', *Forensic Sci Int* 1992 Apr;54(1):81-91.

<sup>109</sup> As in India: *Bachan Singh v State of Punjab* [1980] 2 SCJ 475, 515.

<sup>110</sup> As in many of the US states that retain the death penalty.

<sup>111</sup> Homicide Act 1957, s 7.

<sup>112</sup> Section.5(1)(a) of Homicide Act 1957.

<sup>113</sup> Section 5(1)(b) of Homicide Act 1957.

- Murder in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;<sup>114</sup>
- Murder of a police officer acting in the execution of his duty, or of a person assisting a police officer so acting;<sup>115</sup>
- Murder of a prison officer acting in the execution of his duty, or of a person assisting a prison officer so acting, by a person who was a prisoner at the time when he did or was a party to the murder.<sup>116</sup>

Section 5(2) created the so-called ‘triggerman provision’, whereby only the person whose own act actually caused death would be liable for the death penalty.<sup>117</sup> It provided that if, in the case of any murder falling within s 5(1), two or more persons are guilty of the murder, it would be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him; but the murder shall not be capital murder in the case of any other of the persons guilty of it.<sup>118</sup>

Section 6 also provided for the death penalty for repeated murders. It stated that a person convicted of murder was liable to the death penalty if before conviction of that murder he had, whether before or after the commencement of the 1957 Act, been convicted of another murder done on a different occasion (both murders having been done in Great Britain).

The Homicide Act 1957 also introduced other refinements to the British system of capital punishment. As a replacement for the traditional words of the death sentence, which involved the defendant being told that s/he was to be hanged by the neck until dead, s 10 provided that, in the future, the words of the sentence were merely to be to the effect that the defendant was to ‘suffer death in the manner authorised by law’. Also, s 12 introduced provisions to avoid double executions taking place in the same prison on the same day.

In a valuable article, *Swinging Sixties: The Abolition of Capital Punishment*,<sup>119</sup> Liz Homans, of Bangor University, correctly identifies that the Homicide Act 1957 represented an uncomfortable compromise, and that it was an attempt by the Conservative Government to head off full abolition. The abolitionist cause had been aided by the election of a new generation of Conservative MPs such as Enoch Powell, who, unlike their predecessors, were morally opposed to capital punishment.<sup>120</sup>

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<sup>114</sup> Section 5(1)(c) of Homicide Act 1957.

<sup>115</sup> Section 5(1)(d) of Homicide Act 1957.

<sup>116</sup> Section 5(1)(e) of Homicide Act 1957.

<sup>117</sup> Cf. *Daley and Montique v. The Queen* [1997] UKPC 58, on the equivalent provision in the Jamaican Offences Against the Person (Amendment) Act 1992, s2(2). The Judicial Committee of the Privy Council held that some form of contact with the victim is required and that merely being guilty of murder on the basis of joint enterprise is insufficient to attract liability for capital murder under s2(2).

<sup>118</sup> This provision, had it been in force at the time, would have prevented Derek Bentley from being sentenced to death. He, notoriously, was executed in January 1953 for the murder of a police officer despite being under arrest at the time his co-defendant, Christopher Craig (who was too young to hang) fired the fatal shot. The Bentley case is discussed in detail later in this paper.

<sup>119</sup> *History Today*, (2008) Vol 58 Issue 12.

<sup>120</sup> For contemporary discussions of the Homicide Act 1957, see Prevezer S., ‘The English Homicide Act: A New Attempt to Revise the Law of Murder’, *Columbia Law Review*, 1957, 57(5): 624-642; Edwards J., ‘The Homicide Act 1957: A Critique’, *British Journal of Delinquency*, 1957, 8: 49-61.

The five categories of capital murder defined in the 1957 Act were those that appeared to the Government to strike at the roots of law and order, and in which its deterrent effect was most likely to operate. But there were obvious anomalies; for example, murder in the course of rape (which is unquestionably more heinous than murder in the course of theft) was, nonetheless, defined as non-capital murder. As Homans notes, the 1957 Act pleased no one: 'retentionists and abolitionists alike were offended at the anomalies that the Act had created.' She also quotes a Home Office report from the time, which recognised that the 1957 Act had failed to reflect any generally felt sense of justice:

*'The ordinary person judges the culpability of a murderer more by the heinousness of his crime than by the method of killing which he employed; but the Government recognised in the framing of the Homicide Act that there is – as the Royal Commission... pointed out – no means of defining capital murder in a way that reflects this judgement.'*

While it was intended to prevent full abolition, the 1957 Act represented the beginning of the end of capital punishment in the United Kingdom. As Homans rightly concludes, the Government soon recognised that the Act was unsound, but made no move to alter it. Even had it been politically possible, her research shows that Home Office reports argued that there was little justification (based on the deterrence argument) for returning to the pre-1957 situation. On the other hand, public opinion made any move towards complete abolition difficult, especially for a Conservative Government, because the majority of the party remained firmly and vocally opposed. In September 1964, the Prime Minister, Sir Alec Douglas-Home, was told by the Home Secretary, Henry Brooke,<sup>121</sup> that 'the Homicide Act is unworkable in its present form and the next Home Secretary, of whatever party, will have to end the death penalty'. This was a prediction that proved to be largely correct.

GETTY IMAGES / EVENING STANDARD



Lord Brooke of Cumnor, the last Home Secretary to allow an execution to proceed.

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<sup>121</sup> Henry Brooke, MP for West Lewisham (1938–45) and Hampstead (1950–66) was the last Home Secretary to let an execution proceed, on 13 August 1964, when Peter Anthony Allen was hanged at Walton Prison in Liverpool and Gwynne Owen Evans was hanged at Strangeways Prison in Manchester, both for the murder of John Alan West on 7 April 1964.

## The growth of the abolition movement in the early 20th century

Although the suggestion that the death penalty ought to be abolished had been proposed by a few enlightened penal reformers in the 19th century and earlier, the firm beginnings of the movement that eventually secured the abolition of the death penalty in the United Kingdom can be traced back to the 1920s.

As has been seen, in the late 1930s Parliament voted to abolish military executions in nearly all cases,<sup>122</sup> so World War II did not see the wide-scale use of firing squads against British soldiers that had been a feature of the Great War. From then on, the Labour Party would be instrumental in putting abolitionism on the political agenda,<sup>123</sup> and in 1927 the Party took an abolitionist stance in its *Manifesto on Capital Punishment*.<sup>124</sup>

Parliamentary abolitionists were supported in their efforts by several extra-parliamentary groups such as the Howard League for Penal Reform<sup>125</sup> and the National Council for the Abolition of the Death Penalty (NCADP), which had been established after the controversial execution of Edith Thompson in 1923 for the murder of her husband by her lover, Freddie Bywaters.<sup>126</sup> The NCADP was set up in 1925, after 18 months' work by a consultative council of representatives of societies working for abolition. The NCADP merged with the Howard League for Penal Reform in 1948.<sup>127</sup>

Thompson was convicted on the basis of letters she had written to Bywaters, which the prosecution said was evidence of her encouraging her lover to commit murder. Modern analysis of the case demonstrates that she was condemned as much for being involved in adultery as for encouraging murder, of which there was little evidence. The accounts of Thompson's mental collapse in the condemned cell during the last days of her life, and of her being hanged while virtually unconscious through fear, make for pitiful reading.<sup>128</sup>

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<sup>122</sup> Army and Air Force (Annual) Act 1930, s 5.

<sup>123</sup> Seal L., *Capital Punishment in 20th Century Britain: Audience, Justice, Memory* (Routledge, 2015), p17.

<sup>124</sup> Rowbotham J., 'Execution as Punishment in England: 1750 – 2000', in Kilday A, Nash D (Eds), *Histories of Crime: Britain 1600–2000*, (Palgrave Macmillan 2010), p186.

<sup>125</sup> Founded in 1866 as the Howard Association and named after the early penal reformer John Howard, the Howard League is the oldest penal reform organisation in the world. In 1923, The Howard League took a referendum of its members and adopted abolition as one of its campaigning priorities: Rose G., *The Struggle for Penal Reform*, (Stevens, London, 1961), p203.

<sup>126</sup> Logan A., *Feminism and Criminal Justice* (Palgrave Macmillan, 2008), pp130-1.

<sup>127</sup> The NCADP's records are held at the Modern Records Centre, University of Warwick.

<sup>128</sup> Weis, R., *Criminal Justice: The True Story of Edith Thompson* (Hamish Hamilton, 1988). In the 1930s, F. Tennyson Jesse's novel *A Pin to See the Peep Show*, a thinly fictionalised account of the Thompson/Bywaters case, highlighted flaws in capital punishment.

GETTY IMAGES / BENTLEY ARCHIVE / POPPORFOTO



GETTY IMAGES / KEYSTONE



December 1922: Frederick Bywaters (left) and Edith Thompson (right) were sentenced to death for the murder of Percy Thompson (centre).

Edith Thompson, controversially executed in 1923 for the murder of her husband Percy Thompson.

The 1920s saw the development of a sophisticated and statistically backed argument for abolition that questioned the deterrent effect of the death penalty in the high proportion of cases where the murder was impulsive or where the murderer was ‘mentally abnormal’. Abolitionists deployed statistics to show that the ending of capital punishment in other countries had not resulted in higher murder rates and emphasised the risk of an innocent person being hanged.<sup>129</sup>

## Moves in Parliament to abolish capital punishment

In 1929, a resolution in the House of Commons calling for the abolition of capital punishment resulted in the appointment of a Parliamentary Select Committee. In 1930, the Select Committee recommended that capital punishment be suspended for a trial period of five years, but no action was taken. It concluded that:

*‘Our prolonged examination of the situation in foreign countries has increasingly confirmed us in the assurance that capital punishment may now be abolished in this country without endangering life or property, or impairing the security of society.’<sup>130</sup>*

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<sup>129</sup>The supposed deterrent effect of capital punishment has been extensively studied in the United States using a range of sophisticated statistical techniques. A report, released on 18 April 2012, by the National Research Council of the National Academies – and based on a review of more than three decades of research – concluded that studies claiming a deterrent effect on murder rates from the death penalty are fundamentally flawed. The report stated:

The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.

<sup>130</sup>Hansard, HL Debs, vol 306 col 1108.

The election immediately after the end of World War II returned a Labour Government and a significant number of MPs who were opposed to the death penalty.

The Criminal Justice Act 1948 reopened the debate about capital punishment and represented the first serious attempt at abolition. The Parliamentary Penal Reform Group organised a petition against the death penalty, which was signed by 187 MPs. However, the Bill that appeared before the House of Commons in 1947 contained no reference to capital punishment. Opinion on abolition among Cabinet Ministers was divided, and the Cabinet decided that there should be a free vote in the House of Commons on any amendment concerning the death penalty. A suspension was proposed in an amendment to the Bill moved by Sydney Silverman, and passed in the House of Commons with a narrow majority, but the amendment was defeated in the House of Lords.<sup>131</sup> The House of Lords also defeated a further Government amendment, proposing different degrees of murder with varying penalties. It was immediately after these votes that the Government proposed the setting up of the Royal Commission on Capital Punishment, which eventually reported in 1953, as described earlier in this paper.

The NCACP often worked alongside the Howard League for Penal Reform, which undertook research while the NCACP focused on political work and the dissemination of information. The NCACP attracted some heavyweight political support, including that of Harold Wilson, whose Government eventually abolished capital punishment; Jeremy Thorpe, who became leader of the Liberal Party in 1967; and Julian Critchley, a prominent Conservative MP. Gerald Gardiner, a leading member of the Bar (and later Lord Chancellor), and the publisher Victor Gollancz chaired the organisation.

The NCACP made great use of reasoned arguments about the lack of utility of the death penalty, but at the core of the NCACP's campaign lay the belief that the death penalty simply had no place in a civilized society. Some in the NCACP were keen to use open meetings to raise public awareness, but their basic *modus operandi* was to seek to achieve a parliamentary majority in favour of abolition. From the outset they dissociated themselves from tactics that risked linking the cause with any hint of 'hysterical emotionalism' and instead worked to create a respectable, non-partisan image. The first secretary of the NCACP, a young Quaker called E. Roy Calvert, emphasised the need for abolitionist arguments to be based on logic, rationalism and science and that research was needed in order to provide statistics in support of the abolitionist position.<sup>132</sup>

In February 1955 the Conservative Government announced that it would not accept any of the Royal Commission's recommendations. By way of retaliation, in November 1955 Sydney Silverman MP introduced the Death Penalty (Abolition) Bill to the House of Commons and it was passed by the House of Commons in February 1956. Once again, the Home Secretary, now Major Gwilym Lloyd George MP, announced that there would be no executions while Parliament decided upon the law.<sup>133</sup> In July 1955 the Bill failed in the House of Lords by 238-95, and capital punishment resumed in the

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<sup>131</sup> In the intervening period, the Home Secretary, James Chuter Ede, announced that he would reprieve all condemned prisoners until the law was settled. Between March and October 1948, 26 people were thereby reprieved.

<sup>132</sup> Twitchell N., *The Politics of the Rope*, (Arena, 2012), p23.

<sup>133</sup> Forty nine people were reprieved during the moratorium, and there were no executions between 10 August 1955 and 23 July 1957, when John Vickers was executed at Durham.

United Kingdom two years later, in July 1957.<sup>134</sup> Although the bill failed, the breakdown of votes among Conservative MPs showed that its composition was changing to include more abolitionists.<sup>135</sup>

## Three controversial cases

There can be little doubt that the abolition of the death penalty in the United Kingdom was finally achieved in significant part because of public disquiet over three executions in the 1950s, namely those of Timothy Evans in 1950, Derek Bentley in 1953, and Ruth Ellis in 1955. Each case raised different concerns but, taken together, they made the case for abolition in a way that purely theoretical and moral arguments could not.

### Timothy Evans

GETTY IMAGES / POPPERFOTO



Timothy Evans (1924–1950), arriving in London under police guard following his arrest in South Wales for the murder of his wife and child. He was wrongly executed in 1950 and pardoned in 1966. The murders were committed by his necrophiliac landlord, John Christie, executed in 1953.

The tragic case of Timothy Evans has been the subject of a film<sup>136</sup> and numerous books<sup>137</sup> and television programmes, and there can be no reasonable doubt that Evans was innocent of the crime for which he was executed.<sup>138</sup>

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<sup>134</sup>John Vickers became the first person to be hanged under the provisions of the Homicide Act 1957: *R v Vickers* [1957] 2 QB 664.

<sup>135</sup>Seal L., *Capital Punishment in Twentieth Century Britain: Audience, Justice, Memory* (Routledge, 2015), p13.

<sup>136</sup>10 Rillington Place (1971), with John Hurt as Evans and Richard Attenborough as Christie.

<sup>137</sup>Undoubtedly the most important book on the case is Kennedy L., *10 Rillington Place* (Victor Gollancz, 1961), which conclusively demonstrated Evans' innocence. Michael Eddowes' book, *The Man on your Conscience* (Cassell, 1955), was the first book to argue convincingly for Evans' innocence and did much to keep the case in the public eye after the Establishment had attempted to assuage concerns about it via the Scott Henderson Reports, dealt with below.

<sup>138</sup>Despite this having been the conclusion of a High Court judge; a Home Secretary; the Home Office's independent assessor; the Criminal Cases Review Commission; and a Divisional Court, as well as numerous authors, there is still the occasional attempt to argue to the contrary: see, for example, Oates J., *John Christie of Rillington Place: Biography of a Serial Killer* (Wharncliffe Books, 2012); Gammon E., *A House to Remember: 10 Rillington Place* (Memoirs, 2011); Eddowes J., *The Two Killers of Rillington Place* (Little Brown, 1994).

Evans was an illiterate lorry driver from South Wales. In 1947 he married Beryl Thorley and, in 1948, the couple moved into the top-floor flat at 10 Rillington Place, Notting Hill, London. Their neighbours in the ground-floor flat were John Christie, a post office clerk and former special constable, and his wife, Ethel. Unknown to Evans, or anyone else, Christie was a necrophiliac serial killer who had already killed at least two women at the property prior to the Evans' arrival (and who were buried in the garden); Christie would go on to murder at least another three women, as well as his wife, over the next five years.

Timothy and Beryl's daughter Geraldine was born in October 1948. The following year, Beryl became pregnant again. As the couple was struggling financially, Beryl decided to have an abortion (which was then illegal), and Evans reluctantly agreed. Learning of their plight, and as a ruse in order to be able to sexually assault and murder Beryl, Christie offered to perform the abortion, relying on his (largely invented) first aid skills to convince the young and gullible couple that he was qualified to do so. One day in November 1949, with Evans at work, Christie sexually assaulted and strangled Beryl and then raped her dead body. He then hid her body in the washhouse at the back of the house. When Evans returned from work, Christie told the learning-disabled lorry driver that Beryl had died during the abortion, and that he should leave London because the police would assume that Evans had killed her. Christie told Evans the police would never suspect him because, as a former special constable, he was one of them. After Evans had gone home to South Wales (lying to his relatives about the reason for his sudden appearance alone), Christie murdered Geraldine and also put her body in the washhouse. The reason Christie murdered the baby was undoubtedly his realisation that the presence of the baby without her mother would be bound to attract attention sooner or later.

As events unravelled during the subsequent weeks after the discovery of the bodies, Evans was arrested and confessed to murdering his wife in reaction to the shock of being told that his daughter had also been found murdered. Before Evans left for South Wales, Christie had told him that Geraldine was going to be adopted by a couple in East Acton.

At the time, the phenomenon of false confessions was largely unknown, so – although by the time of his trial Evans had recanted his confessions and realised that Christie must have been responsible for the murder of his wife and child<sup>139</sup> – he was not believed. Christie's evidence at Evans' trial in January 1950 condemned him. Christie was even present in court at the Old Bailey when Evans was sentenced to death. According to Ludovic Kennedy, after Evans was sentenced to death, his mother confronted Christie outside the court at the Old Bailey and accused him of the murder. Christie's wife, Ethel, retorted that her husband was a good man and not a murderer. Sadly, she was wrong. Christie went on to strangle Ethel in late 1952, and was executed for her murder in July 1953.

Evans was executed at HMP Pentonville on 9 March 1950 by Albert Pierrepoint.

Three years later, a new tenant in the house at 10 Rillington Place found the bodies of three women (Kathleen Maloney, Rita Nelson and Hectorina Maclennan) hidden in the papered-over kitchen pantry, a recess immediately next to the washhouse where Beryl and Geraldine Evans had been found. A further search of the building and grounds turned up three more bodies: Christie's wife, Ethel, under the floorboards of the front room; Ruth Fuerst, an Austrian nurse and munitions worker; and Muriel Eady,

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<sup>139</sup> In one of the most tragic scenes in *10 Rillington Place*, the film of the case, John Hurt as Evans tells the medical board gathered to judge his competence to be executed: 'Christie done it! I say Christie done it!' The board does not react, as this issue is irrelevant to their enquiry, although it is the truth.

a former co-worker of Christie. Fuerst and Eady were both buried in the right-hand side of the small back garden of the building. Indeed, Christie had used one of their thigh bones to prop up a trellis in the garden, which – tragically – the police had missed in their earlier searches of the property. Had they found the bone then they would have almost certainly found the two bodies and it is inconceivable that Evans would ever have been charged.

Christie was arrested on 31 March 1953, and during the course of questioning confessed four times to killing Beryl Evans. He never admitted killing Geraldine Evans, however. He also confessed to murdering Fuerst and Eady, saying he had stored their bodies in the washhouse before burying them in shallow graves in the garden. It was in the same washhouse that the bodies of Beryl and Geraldine Evans were found earlier, during the investigation into their murders.

Christie was tried for murdering his wife and found guilty, his defence of insanity being rejected by the jury. He was hanged at HMP Pentonville on 15 July 1953 by Albert Pierrepoint.

Because Christie's crimes raised doubts about Evans' guilt – after all, how likely was it that two stranglers could have ended up living in one small house? – the Home Secretary, Sir David Maxwell Fyfe, commissioned an inquiry to investigate the possibility of a miscarriage of justice.<sup>140</sup> It was chaired by the Recorder of Portsmouth, John Scott Henderson QC. The inquiry was held in secret, and there was virtually no opportunity for Evans' next of kin to take part in order to press the case for his innocence. Scott Henderson had little time to do his work, as it had been decreed that the inquiry had to be completed before Christie's execution. It therefore ran for just one week, and its findings upheld Evans' guilt for both Beryl's and Geraldine's murders with the explanation that Christie's confessions of murdering Beryl Evans were unreliable because they were made in the context of furthering his own defence that he was insane.<sup>141</sup>

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10 Rillington Place, Notting Hill, London; home of Timothy Evans and his family and John Christie and his wife.

GETTY IMAGES / KEYSTONE



John Christie (1899-1953), necrophile and murderer; Timothy Evans was wrongly hanged for a murder committed by Christie.

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<sup>140</sup> *Hansard*, HC Deb, 6th July 1953 vol 517 cc863-7.

<sup>141</sup> The Scott Henderson Report is reprinted in Kennedy L., *10 Rillington Place* (Victor Gollancz, 1961).

The speed and certainty of Scott Henderson's conclusions were their downfall. As Ludovic Kennedy wrote in *10 Rillington Place*, if – given the complexity of the issues involved in the case and the difficulty of discerning truth from lies in both Evans' and Christie's confessions – Scott Henderson had said that in the time available to him he had been unable to reach any conclusions, no-one could properly have criticised him. However, he declared himself able to disentangle the whole complicated, tragic and sorry affair and, in so doing, routinely ignored evidence pointing to Evans' innocence in order to uphold the Establishment's desired view that justice had not miscarried – a view that he would have known he was expected to reach.<sup>142</sup>

Scott Henderson's conclusions were met with incredulity by MPs, the press, and the public alike: if Christie's confessions were unreliable, why should those of Evans be acceptable, despite all the evidence that showed them to be untrue? His report was debated in the House of Commons two weeks after Christie was executed, where its conclusions were destroyed by the forensic analysis of Geoffrey Bing and Michael Foot. Bing, the MP for Hornchurch, said:<sup>143</sup>

*'The inquiry arose because it subsequently turned out that in Evans' case the principal witness for the Crown was found to have murdered six women in exactly the same way as he had, in the witness box, by implication, accused Evans of murdering two female persons. Quite apart from any confession, or absence of confession, it would be a really extraordinary coincidence that there should be two killers, killing their victims in exactly the same way, hiding them, as it turned out, in exactly the same place, and acting completely independently of each other. That is what Mr Scott Henderson found had taken place.'*

*'This coincidence alone would be quite sufficient to justify looking into the case, but when one looks at the second coincidence one finds that it is the even more remarkable one that Evans, without knowing anything about any of the murders committed by Christie – not one word was said in the cross-examination – nevertheless chose to accuse, just by chance – and that is Mr Scott Henderson's case – the one person, probably in the whole of London at that time, who was murdering people in exactly the same way.'*

*'If it had been known at the trial of Evans that Christie, who was described by the prosecution as the principal witness, had in fact already murdered two women, hidden their bodies temporarily in the very washhouse where Evans was accused of hiding the bodies, and had subsequently buried them in the garden, Evans would have been bound to be acquitted.'*

Following on during the debate, Foot, MP for Plymouth Devonport, said:

*'The Hon. and learned member for Hornchurch has already produced many overwhelmingly powerful reasons why this report is not worth the paper it is printed on, because there are little snippets picked here and there to suit Mr Scott Henderson in order to reach this conclusion, which it is clear he had reached before he had started... this report is rubbish... nobody with any sense of justice would believe it...'*

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<sup>142</sup> For example, Evans had confessed to putting the bodies in the washhouse on particular dates (10 and 14 November 1949) and said he left London straight afterwards (which was true). However, some workmen working on the house at the time had given evidence to the police that they had cleared out the washhouse after those dates, and that there was no possibility that bodies could have been hidden there. Scott Henderson simply ignored this evidence in concluding that Evans' confession was true: *Hansard*, HC Deb 29th July 1953, vol 518 col 1439.

<sup>143</sup> *Hansard*, HC Deb 29 July 1953, vol 518, cols 1435–85.

The Scott Henderson reports<sup>144</sup> probably qualify as two of the most unconvincing official documents ever published in this country. But, in defence of Scott Henderson, it can be argued that he may have come to realise that Evans was innocent but that, as a consequence of human frailty, the prospects of declaring (for the first time) that an innocent man had been executed was too much for him to bear, so he toed the line he was expected to take.

Be that as it may, there was continuing disquiet over the Evans case during the rest of the 1950s and the early 1960s. In 1965, the Home Secretary, Sir Frank Soskice, appointed Mr Justice Brabin to examine the Evans case. The Brabin Inquiry was held at the Royal Courts of Justice between November 1965 and January 1966, and Mr Justice Brabin's report was presented to Parliament in October 1966.<sup>145</sup>



GETTY IMAGES / GAMMA-KEYSTONE

Anti-death penalty demonstrators outside HMP Wandsworth, London, in November, 1959.

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<sup>144</sup> Scott Henderson was forced to issue a supplementary report after his censure during the Parliamentary debate. This did nothing to assuage the concerns about his work.

<sup>145</sup> Cmnd 3101. An abridged version of the report was published in 1999: Coates T. (Ed.), *Rillington Place, 1949: Report of an Inquiry by the Hon Mr Justice Brabin into the Case of Timothy John Evans* (Uncovered Editions, 1999).

Mr Justice Brabin's conclusions were nothing short of bizarre. While it had always been obvious – even to Scott Henderson – that the same person had been responsible for murdering Beryl and Geraldine,<sup>146</sup> Mr Justice Brabin concluded that Evans had probably *not* murdered Geraldine (for which he had been tried and executed) but that he probably *had* murdered Beryl (for which he had not even been tried), although he also said the jury would not have convicted him of either murder had it known of Christie's murders. In other words, Mr Justice Brabin's conclusion was that although Evans was probably innocent of the crime for which he had been executed, he was probably a murderer nonetheless, and so there had not been a miscarriage of justice.

Again, it appeared that a lawyer just could not contemplate that an innocent man had been executed. Fortunately, the new Home Secretary, Roy Jenkins, saw through Mr Justice Brabin's sophistry. On 10 October 1966 he gave the following answer in the House of Commons to a written question:

*I am sure the House would wish me to express our thanks to Mr Justice Brabin for the painstaking and thorough way in which he conducted the inquiry into this case and for the comprehensive nature of his report. Mr Justice Brabin's conclusion, as the House will be aware, is that it is now impossible to establish the truth beyond doubt but that it is more probable than not that Evans did not kill his daughter, for whose murder he was tried, convicted and executed. In all the circumstances, I do not think it would be right to allow Evans' conviction to stand. I have, therefore, decided that the proper course is to recommend to Her Majesty that she should grant a free pardon, and I am glad to be able to tell the House that the Queen has approved my recommendation and that the free pardon was signed this morning.*

*'This case has no precedent and will, I hope and believe, have no successor.'*

There was then a question from John Hall MP:

*'Is it not a fact that although the report indicates that in all probability Evans was not responsible for his daughter's death, it is nevertheless probable that he was responsible for his wife's death?'*

The extract from *Hansard* shows that that question was met by MPs shouting 'No'. Jenkins replied:

*'Yes, but I am also aware that Mr Justice Brabin said that there were certain circumstances which, in his view, would have meant that a jury could not have regarded this as beyond reasonable doubt, and, furthermore, I have to deal with the case in which Evans was tried, convicted and executed.'*

In January 2003, the Home Office awarded Timothy Evans' half-sister, Mary Westlake, and his sister, Eileen Ashby, substantial ex gratia payments as compensation for the miscarriage of justice in his trial. The independent assessor for the Home Office, Lord Brennan QC, accepted that 'the conviction and execution of Timothy Evans for the murder of his child was wrongful and a miscarriage of justice' and that 'there is no evidence to implicate Timothy Evans in the murder of his wife. She was most probably murdered by Christie.' Lord Brennan believed that Mr Justice Brabin's conclusion that Evans probably murdered his wife should be rejected, given Christie's confessions and

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<sup>146</sup>This was the prosecution case at Evans' trial, namely, that both murders had been committed by the same person as a single transaction. The victims' bodies had been found together in the same location and had been murdered in the same way by strangulation. Evidence of both murders was put before the jury on the basis that they were committed by the same person. Evans was tried only for the murder of Geraldine because of the rule of practice at the time that only a single murder charge could be included on an indictment: *R v Jones* [1918] 1 KB 416, disapproved in *Connelly v DPP* [1964] AC 1254.

conviction.<sup>147</sup> He awarded Westlake and Ashby six-figure sums by way of compensation, recognising the profound effect that Evans' wrongful conviction and execution had had on their lives and health.

What was probably the final chapter in the Evans case was written in 2004, when the Criminal Cases Review Commission refused to refer the case to the Court of Appeal so that Evans' conviction could be quashed. The Commission accepted that the preconditions for referral contained in s 13 of the Criminal Appeal Act 1995 were met, and that there was a real possibility that the Court of Appeal would decide that Evans' sister had a substantial emotional interest in the determination of the appeal if a reference were made, sufficient to qualify her as an approved person for the purposes of the Criminal Appeal Act 1968. The Commission stated that it was nonetheless minded not to exercise its discretion to make the referral, having regard to its conclusion that the quashing of the conviction would not be of substantial benefit as against the costs and resources that would be involved in a referral. In essence, the Commission concluded that Evans' innocence had been sufficiently proved and officially acknowledged, so that the formal step of quashing the conviction would be superfluous and a waste of limited resources. The Commission's refusal to refer the case was upheld by the High Court on 17 November 2004.<sup>148</sup> Stanley Burnton J. said at para 35 of the judgment:

*'I am happy to express my agreement with the conclusion of the Commission that Timothy Evans has been exonerated of the murders of his wife and child. It is recognised that he committed neither murder. The free pardon which he was granted was a formal vindication and when granted the only available vindication of the only murder of which he had been convicted. The Home Secretary did all he could. The subsequent payment of compensation to his surviving family assessed on the basis that he was wholly innocent makes the position abundantly clear. I hope that these public expressions in open court of his innocence will give some solace to his family.'*

Endorsing this conclusion, and referring to the free pardon that Evans received in 1966, Collins J. said at para 36:

*'It has been generally and correctly regarded as a recognition that Timothy Evans was wrongly convicted and that there was a serious miscarriage of justice. In any event, the material put before us persuades me that Timothy Evans should indeed be regarded as having been innocent of the charge of which he was convicted. Further, no jury could properly have convicted him of murdering his wife and I entirely agree that he must be regarded as innocent of that charge too.'*

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<sup>147</sup> Quoted in *R(Westlake) v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin), para 13.

<sup>148</sup> *R (Westlake) v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin).

## Derek Bentley

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Derek Bentley (1933-1953); hanged on 28 January 1953; granted a partial posthumous pardon in 1993; his conviction was quashed in 1998 by the Court of Appeal.

Evans' trial and execution in early 1950 received little publicity at the time; it was not until Christie's other murders were uncovered in 1953 that public concern began to be expressed that an innocent man might have been executed. In contrast, the case of Derek Bentley in 1952/53 was hugely controversial at the time, and has remained so.<sup>149</sup> The decision of the Home Secretary, Sir David Maxwell Fyfe,<sup>150</sup> to refuse a reprieve despite the evidence of Bentley's limited intelligence and the fact that his accomplice who fired the fatal shot was too young to hang, sparked enormous public and Parliamentary protest. Although, as the decision of the Court of Appeal in 1998 quashing Bentley's conviction showed,<sup>151</sup> his trial had been a travesty of justice, the concern at the time was not so much about the rightness of Bentley's conviction, but at the obvious injustice of Maxwell Fyfe's decision to let him hang.

<sup>149</sup> The film *Let Him Have It*, with Christopher Eccleston as Bentley, was released in 1991. Books on the case include Parris J., *Scapegoat* (Duckworth, 1991); Yallop D., *To Encourage the Others* (Corgi, 1990).

<sup>150</sup> Later ennobled as Viscount Kilmuir, he served as Lord Chancellor from 1954 – 1962.

<sup>151</sup> *R v. Bentley (Deceased)* [1998] EWCA 2516 (Crim).

Bentley was born in 1933 and had a troubled childhood, with a series of health and developmental problems. During World War II, the house in which he lived was bombed and collapsed around him, leaving him with serious head injuries. He was later diagnosed as having epilepsy. He consistently scored low on IQ tests, and while on remand for the murder for which he was executed he was assessed as 'borderline feeble-minded' (in the language of the time), with an IQ of 77.

On 2 November 1952, Bentley and a 16-year-old companion, Christopher Craig, attempted to burgle the warehouse of the Barlow & Parker confectionery company at 27-29 Tamworth Road, Croydon. Craig armed himself with a revolver and a number of undersized rounds for it, some of which he had modified by hand to fit the gun. Bentley carried a sheath knife and knuckle-duster, both of which Craig had given to him.

Craig and Bentley were spotted on the roof and the police were called. When the police arrived, the two youths hid behind the lift-housing. Craig taunted the police. One of the police officers, Detective Sergeant Fairfax, climbed the drainpipe onto the roof and grabbed hold of Bentley. Bentley broke free of Fairfax's grasp. What happened then is a matter of controversy: police witnesses later claimed Bentley shouted the words 'Let him have it, Chris' to Craig, encouraging him to fire. Craig and Bentley denied these words were ever spoken.

Craig fired his revolver at Fairfax, striking him in the shoulder. Despite his injury, Fairfax was again able to restrain Bentley. Bentley told Fairfax that Craig was armed with a revolver and had further ammunition for the gun. Bentley had not used either of the weapons that he had in his pockets.

A group of uniformed police officers arrived and was sent onto the roof. The first to reach the roof was PC Sidney Miles, who was immediately killed by a shot to the head. After exhausting his ammunition and being cornered, Craig jumped around 30 feet from the roof, fracturing his spine and left wrist.

Both Craig and Bentley were charged with murder and were tried at the Old Bailey. The trial judge was the Lord Chief Justice, Lord Goddard, an enthusiastic proponent of hanging and flogging. Bentley was charged on the basis of joint enterprise even though he had been under arrest at the time that Miles was killed, having gone out with Craig knowing he had a revolver.<sup>152</sup>

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<sup>152</sup> Cf. *R v English* [1999] AC 1.



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Lord Goddard, Lord Chief Justice (1946-1958), Derek Bentley's trial judge. Goddard's handling of the trial was severely criticised by the Court of Appeal in 1998 when it quashed Bentley's conviction.

Medical evidence was led about Bentley's limited mental capacity. Dr Hill, a psychiatrist at the Maudsley Hospital, concluded that Bentley was illiterate and of low intelligence, and almost borderline mentally retarded. Nevertheless, he was judged fit to stand trial.

On 11 December 1952, both Craig and Bentley were found guilty of murder. In Bentley's case, the jury recommended mercy. As he was under 18, Craig was not eligible for the death penalty and was sentenced to be detained during Her Majesty's pleasure.<sup>153</sup> Bentley, however, was over 18 and so was sentenced to death. An appeal to the Court of Appeal was dismissed on 13 January 1953, so all that stood between him and the gallows was the Royal Prerogative of mercy and the decision of the Home Secretary, Sir David Maxwell Fyfe.

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<sup>153</sup> He was released in 1962.

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The family of Derek Bentley on their way to his appeal on 13 January 1953. The appeal was dismissed.

It was widely anticipated that Bentley would be reprieved. A rare insight into the workings of the Home Office in relation to mercy was provided in 1992 when Bentley's sister challenged the then Home Secretary's refusal to grant him a posthumous pardon.<sup>154</sup> The day after the conviction, in accordance with usual practice, Lord Goddard wrote to the Home Secretary to give his views on the case. Goddard strongly urged Maxwell Fyfe not to reprieve Bentley, notwithstanding the jury's recommendation:<sup>155</sup>

*In Craig's case the defence endeavoured to obtain a verdict of manslaughter. Had the jury returned such a verdict I should have passed a sentence of detention for 15 years as I am convinced that he is a most dangerous young criminal... In Bentley's case the jury added a recommendation to mercy. I have no doubt the reason for their recommendation was that they realised that a capital sentence could not be passed on Craig whom they probably regarded as the worst of the two. So far as merits were concerned, I regret to say I could find no mitigating circumstances in Bentley's case. He was armed with a knuckleduster of the most formidable type that I have ever seen and also with a sharp pointed knife and he called out to Craig when he was arrested to start the shooting.'*

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<sup>154</sup> *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349.

<sup>155</sup> In 1970, the author David Yallop interviewed Lord Goddard for his book about the case, *To Encourage the Others* (Corgi, 1990). Goddard told Yallop that 'There's no doubt in my mind whatsoever that Bentley should have been reprieved' and he blamed Maxwell Fyfe for the decision to let the execution proceed. In light of the disclosure in 1992, Goddard's claims can now be seen to be false. In his 1991 book *Scapegoat* (Duckworth, 1991), John Parris, who defended Craig at the trial, had claimed (rightly as it transpired) that Goddard had urged Maxwell Fyfe to ignore the jury's recommendation.

On 16 January 1953, Philip Allen, a senior official in the Home Office, wrote a memorandum in which he advised that effect should be given to the jury's recommendation for mercy. His advice rested 'principally on the ground, which has been held to be valid in previous cases, that it would not seem right to exact the extreme penalty from the accomplice when the principal offender is escaping with his life'. There was also a reference in the memorandum to Bentley's mental state and to it being 'just above the level of a feeble-minded person'. The memorandum was endorsed with comments from Sir Frank Newsam, the Permanent Secretary, who also advised against the execution of Bentley.<sup>156</sup>

Nevertheless, Sir David Maxwell Fyfe, for reasons that he set out in a memorandum of his own, decided that 'the law should take its course' – the euphemism used by Home Secretaries for letting an execution proceed. In that memorandum he stated:<sup>157</sup>

*'It was a very bad murder, involving the death of a police officer, committed at a time when there is much public anxiety about numbers of crimes of violence. Many of these crimes of violence are committed by young persons and I must pay regard to the deterrent effect which the carrying out of the sentence in this case would be likely to have. If Craig had been of an age when he could have been executed, the sentence would have been carried out in his case and there would have been no grounds for interfering with the sentence against Bentley. It would be dangerous to give the impression that an older adolescent could escape the full penalty by using an accomplice of less than 18 years of age. I feel also that it is important to protect the unarmed police.'*



Sir David Maxwell Fyfe, the Home Secretary who commissioned an inquiry into the possibility of a miscarriage of justice in the Evans case. He also controversially refused to reprieve Derek Bentley, against the advice of his officials.

<sup>156</sup> *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349.

<sup>157</sup> *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349.

Maxwell Fyfe's decision prompted a storm of protest. A petition was signed by more than 200 MPs calling for mercy. Parliamentary practice prevented any debate on a sentence of death before it was carried out, and strenuous efforts (led by the indefatigable Sydney Silverman) in the days before the execution to secure a debate to try to reverse the decision were unsuccessful.<sup>158</sup> In light of the public protests, Reginald Paget QC appeared to speak for the majority of the nation when he said to the Speaker, who was refusing to allow the debate to be held:

*'We are a sovereign assembly. A three-quarter-witted boy of 19 is to be hanged for a murder he did not commit, and which was committed 15 minutes after he was arrested. Can we be made to keep silent when a thing as horrible and as shocking as this is to happen?'*

*'I ask your guidance because I feel that the great mass of hon. members here feel with me that we ought to be provided with an opportunity to try to prevent this dreadful thing from happening.'*

The night before the execution, protesters marched in Whitehall against the execution, while a deputation of MPs met with Maxwell Fyfe in a last desperate attempt to get him to change his mind. All these efforts failed, and Bentley was hanged at 9am on 28 January 1953 at HMP Wandsworth by Albert Pierrepoint.

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The crowd outside HMP Wandsworth for the execution of Derek Bentley on 28 January 1953.

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<sup>158</sup> *Hansard*, 27 January 1953, vol 510 cc 845-64.

Bentley's family continued the fight on his behalf after his death. His case featured prominently in the debates on capital punishment in the 1960s and in subsequent years. In 1992, the then Home Secretary, Kenneth Clarke, refused to grant Bentley a posthumous pardon because it was then Home Office policy to do so only where moral and technical innocence could be established, which, he held, was not possible in Bentley's case. However, his decision was quashed by the High Court.<sup>159</sup> The Court held that the Royal Prerogative of mercy was a broad and flexible constitutional safeguard against mistakes encompassing conditional as well as free pardons and so, where it was wished to recognise that a death sentence that had been carried out should have been commuted to life imprisonment, there was no objection in principle to the grant of a posthumous conditional pardon. It held that the Home Secretary had not given sufficient consideration to the possibility of granting a form of pardon suitable to the circumstances of the case and that, accordingly, the Home Secretary should reconsider whether it would be just to exercise the prerogative of mercy in such a way as to acknowledge the generally accepted view that Bentley should have been reprieved. Following this decision, on 29 July 1993, the Secretary of State granted Bentley a pardon in respect of the sentence of death passed upon him and carried out.

In 1997, the Criminal Cases Review Commission referred Bentley's case to the Court of Appeal. The appeal was brought by his niece, Maria Bentley-Dingwall. In a judgment given on 30 July 1998, the Court of Appeal (presided over by Lord Bingham of Cornhill, the Lord Chief Justice) identified a litany of errors at the trial that, even by the law and standards of the time, should not have been allowed to stand by the Court of Criminal Appeal when it considered Bentley's appeal in January 1953. The Court of Appeal also severely criticised Lord Goddard's biased handling of the trial. It concluded:

*'It is with genuine diffidence that the members of this court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgment the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every British citizen... For all the reasons given in this section of the judgment we think that the conviction of the appellant was unsafe. We accordingly allow the appeal and quash his conviction. It must be a matter of profound and continuing regret that this mis-trial occurred and that the defects we have found were not recognised at the time.'*

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<sup>159</sup> *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349.

## Ruth Ellis



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Ruth Ellis and her lover David Blakely. On 15 July 1955 she was executed for his murder.

The whole issue of capital punishment was raised again in 1955, two years after Bentley's execution, when Ruth Ellis was executed for murdering her boyfriend, David Blakely, in a fit of jealous rage.<sup>160</sup>

From a humble background, Ellis came to London to seek work and was drawn into the world of London nightclub hostessing, which led to a chaotic life of brief relationships, some of them with upper-class nightclubbers and celebrities. At times it merged into prostitution, and Ellis had a number of pregnancies illegally terminated. She married briefly and unsuccessfully, and had two children.

In 1953, Ellis became the manager of a nightclub. At this time she was being lavished with expensive gifts by admirers, and had a number of society friends. She met Blakely, three years her junior, through the racing driver Mike Hawthorn. Blakely was (apparently) a well-mannered former public school boy, but was a drinker who could be selfish and violent. Soon after starting the relationship with Ellis he moved in with her, despite being engaged to another woman. Ellis became pregnant for the fourth time, but aborted the child, concerned about her future with Blakely.

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<sup>160</sup> The film *Dance with a Stranger* (1985) is a dramatisation of the case, with Miranda Richardson as Ruth Ellis and Rupert Everett as David Blakely. Books on the case include: Blackhall, S., *Ruth Ellis, True Crime: Crimes of Passion*. (2009, Igloo); Jakubait, M. and Weller, M. (2005). *Ruth Ellis: My Sister's Secret Life* (2005, Robinson Publishing); Laurence M. Van Den Bergh, A. (1990). *Ruth Ellis: A Case of Diminished Responsibility?* (1990, Penguin); Hancock, R., *Ruth Ellis: The Last Woman to Be Hanged*. (Weidenfeld & Nicholson, 1985).

Ellis then began seeing Desmond Cussen, a former RAF pilot. The relationship with Blakely continued, however, and became increasingly violent and embittered as Ellis and Blakely continued to see other people. Blakely offered to marry Ellis, to which she consented, but she lost another child in January 1955, after a miscarriage induced by a punch to the stomach in an argument with Blakely.

In the week before Easter 1955, Ellis was ill and bedridden. Blakely was kind and appeared devoted. The couple planned to spend the Easter weekend together. On the Good Friday, Blakely left the flat that they shared in the morning, promising to return at 8pm to take her out for a drink with some friends. However, he did not return.<sup>161</sup>

On Easter Sunday, 10 April 1955, Ellis took a taxi from Cussen's home to a flat in Hampstead, where she suspected Blakely might be. As she arrived, Blakely's car drove off, so she paid off the taxi and walked the quarter mile to The Magdala, a pub in South Hill Park, Hampstead, where she found Blakely's car parked outside. At around 9.30pm, Blakely and his friend Clive Gunnell emerged from the pub. Blakely passed Ellis, who was waiting on the pavement next to The Magdala. He ignored her when she said, 'Hello, David.'

As Blakely searched for the keys to his car, Ellis took a revolver from her handbag and fired five shots at Blakely. The first shot missed and he started to run, pursued by Ellis round the car, where she fired a second, which caused him to collapse onto the pavement. She then stood over him and fired three more bullets into him. One bullet was fired less than half an inch from Blakely's back and left powder burns on his skin. One shot ricocheted off the road and injured a woman who was on her way to the pub.

Ellis was arrested by a passing off-duty policeman, made a full confession to the police, and was charged with murder. She stood trial at the Old Bailey before Havers J. and was defended by Aubrey Melford Stevenson QC. The outcome of the trial was virtually a foregone conclusion, especially when Ellis confirmed (in answer to the single question put to her in cross-examination) that, when she shot Blakely, she intended to kill him, and the judge declined to leave provocation to the jury as a possible defence, despite Melford Stevenson's submissions to the judge that he ought to do so.<sup>162</sup> She did not appeal her conviction.

However, Ellis was an attractive 28-year-old, blonde mother of two young children who, through her demeanour in court and because of the violence she had suffered at the hands of Blakely, attracted enormous public sympathy (even though there are reasons to believe that she almost certainly did not want to be reprieved until shortly before her execution, when she changed her mind).<sup>163</sup> There were strong moves for a reprieve, with thousands of people signing a petition in favour of mercy. However, the Home Secretary, Major Gwilym Lloyd George, stood firm and refused a reprieve.

Ellis was hanged on 13 July 1955 at HMP Holloway by Albert Pierrepoint. She was the last woman hanged in the United Kingdom.

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<sup>161</sup> This account is taken from the judgment of the Court of Appeal in 2003, *R v Ellis* [2003] EWCA Crim 3556.

<sup>162</sup> *R v Ellis* [2003] EWCA Crim 3556, paras 35–36.

<sup>163</sup> While in the condemned cell she decided to actively pursue a reprieve and sacked her trial solicitor and instructed instead Victor Mishcon, later Lord Mishcon, who had acted for her in her divorce: Hancock, R., *Ruth Ellis: The Last Woman to Be Hanged*. (Weidenfeld & Nicholson, 1985), p173. However, Mishcon's efforts came too late to save her.

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The crowd outside HMP Holloway for the execution of Ruth Ellis on 13 July 1955. She was the last woman to be executed in the United Kingdom.

Although there were strong grounds for a reprieve, the widespread campaign for mercy for Ellis nonetheless demonstrated the arbitrary nature of the mercy process. Ellis was young and telegenic, and connected to people who were celebrities of their day. In contrast, Styllou Christofi, who was executed in December 1954, aged 54, for the murder of her daughter-in-law, failed to attract much media attention or sympathy because, unlike the pretty Ellis, she was less glamorous. To the media and the public, a blonde nightclub hostess was much more alluring than a grey-haired grandmother who spoke little English. For this reason, few people made any effort to try and save Christofi's life.<sup>164</sup>

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<sup>164</sup> Hancock, R., *Ruth Ellis: The Last Woman to Be Hanged*. (Weidenfeld & Nicholson, 1985), p171.



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Styllou Christofi (1900-1954), executed on 15 December 1954 for the murder of her daughter-in-law. Unlike the pretty Ruth Ellis, there was little sympathy for Christofi.

In 2003, after a reference by the Criminal Cases Review Commission, the Court of Appeal dismissed an appeal against conviction brought by Ellis' surviving sister, Muriel Jakubait.<sup>165</sup> However, at para 1 of its judgment the Court of Appeal recognised the effect that the case had had on the abolition of the death penalty:

*'At the time the case attracted considerable publicity and the decision by the then Secretary of State not to reprieve her was one with which many people disagreed. In the debate that was then raging about the use of the death penalty, the carrying out of the death penalty upon her was almost certainly one factor that influenced thinking on the issue.'*

However, the Court of Appeal held that, on the law as it stood at the time, Ellis had been rightly convicted:<sup>166</sup>

<sup>165</sup> *R v Ellis* [2003] EWCA Crim 3556, paras 35-36.

<sup>166</sup> Although the law of provocation existed in 1955, it did not then recognise or accommodate what later came to be known as 'battered wife syndrome', nor recognise that a premeditated murder (such as Blakely's obviously was) could nonetheless have been legally provoked. It was not until the 1990s that the law was able to make this paradigm shift: *Ahuwalia* (1992) 96 Cr App R 133 *Thornton (No 2)* [1996] 2 Cr App R 108. But the real difficulty for the defence of provocation in this case, as the Court of Appeal identified at paras 76-78, is that there was no real evidence of a sufficient 'trigger' in the form of provoking behaviour by Blakely.

*'Whether it is right that the only circumstances in which the common law recognised conduct other than violent conduct as a sufficient basis for a finding of provocation was the finding of a spouse in an act of adultery or whether other exceptional circumstances might have sufficed, it is clear to us that the events of the Easter weekend leading to the killing in this case could not justify any such conclusion that there was provocation of the kind recognised by the law in this regard.'*

## Suspension and then abolition of the death penalty in the United Kingdom

The last executions in England (and the United Kingdom) took place on 13 August 1964. Peter Anthony Allen was hanged at Walton Prison in Liverpool and Gwynne Owen Evans was hanged at Strangeways Prison in Manchester, both for the murder of John Alan West on 7 April 1964.<sup>167</sup> The last execution in Scotland was that of Henry John Burnett on 15 August 1963 in Craiginches Prison, Aberdeen, for the murder of seaman Thomas Guyan. The last execution in Northern Ireland was that of Robert McGladdery at Crumlin Road Gaol, Belfast, on 20 December 1961, for the murder of Pearl Gamble.<sup>168</sup> The last execution in Wales was that of Vivian Teed in Swansea on 6 May 1958, for the murder of William Williams.



Peter Anthony Allen and Gwynne Owen Evans, the last people to be executed in the United Kingdom, on 13 August 1964.

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<sup>167</sup> The fact that the men were executed in different prisons for the same murder followed the recommendation of the Royal Commission in 1953 that the practice of double executions be ended, the proposal being enacted in s12 of the Homicide Act 1957.

<sup>168</sup> It is likely McGladdery murdered Pearl Gamble because she had rejected his advances at a village dance. This meant that, ironically, McGladdery's crime would not have been capital murder had the Homicide Act 1957 extended to Northern Ireland, which it did not, except in relation to courts martial (see s 17(3)). This point was heavily emphasised in the attempts made on his behalf to win a reprieve, but the savagery of the murder coupled with McGladdery's reputation ensured that he hanged: see Glen P., *Cold Blooded Murder* (John Blake Publishing, 2010). However, this case demonstrates again the arbitrary nature of the Homicide Act 1957.

The last person sentenced to death in the United Kingdom was 19-year-old William Holden in 1973 for the capital murder of a British soldier during the Troubles. His sentence was commuted to life imprisonment in 1973, and in 2012 his conviction was quashed by the Court of Appeal of Northern Ireland on the basis of fresh evidence that showed he may have been questioned unlawfully.<sup>169</sup>

The Labour Party's victory in the general election of 13 October 1964 finally gave the abolitionists the chance they had been waiting for. The incoming Prime Minister, Harold Wilson, was a life-long abolitionist and was determined to see that the abolitionist cause succeeded.



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Harold Wilson, elected Prime Minister in October 1964. A staunch abolitionist, his Government ensured that Sydney Silverman's Private Member's Bill had sufficient Parliamentary time to pass.

The Murder (Abolition of the Death Penalty) Bill was introduced by Sydney Silverman in 1964 as a private member's bill, although with government support.<sup>170</sup> During the bill's second reading, on 21 December 1964, Silverman pointed out that in many ways, the death penalty for murder had been abolished by the Homicide Act 1957, and that the question now before the House of Commons was whether the limited exceptions to capital punishment preserved by the 1957 Act ought to be retained.<sup>171</sup>

<sup>169</sup> *R v. Holden* [2012] NICA 26.

<sup>170</sup> The Parliamentary history of the bill is as follows (references in square brackets are to *Hansard* volumes in HC Debates and HL Debates respectively). House of Commons: first reading – 4 December 1964, [703] cols 927-8; second reading – 21 December 1964, [704] cols 870-1010; committee stage – 18 March 1965, [708] cols 1486-616 and 1737; 24 March 1965, [709] cols 487-536; 31 March 1965, [709] cols 1571-1620; 7 April 1965, [710] cols 405-54; 14 April 1965, [710] cols 1325-72; 28 April 1965, [711] cols 373-418; 5 May 1965, [711] cols 1279-326; 12 May 1965, [712] cols 459-78; 19 May 1965, [712] cols 1371-422; 26 May 1965, [713] cols 529-78; petitions – 15 June 1965, [714] cols 213-4; Cons – 25 June 1965, [714] cols 2113-209; report stage – 13 July 1965, [716] cols 358-407; third reading – 13 July 1965, [716] cols 407-66; Lords' amendments considered – 28 October 1965, [718] cols 365-99; Royal Assent – 8 November 1965, [718] cols 1373. House of Lords: first reading – 14 July 1965, [268] cols 453; second reading – 19 July 1965, [268] cols 456-76 and cols 480-582; 20 July 1965, [268] cols 590-714; committee stage – 27 July 1965, [268] cols 1170-83 and cols 1191-272; report stage – 5 August 1965, [269] cols 405-25; third reading – 26 October 1965, [269] cols 529-48 & cols 550-57; return to Commons with agreed amendments – 2 November 1965, [269] col 735; Royal Assent – 8 November 1965, [269] col 872.

<sup>171</sup> *Hansard*, HC Deb 21 December 1964 vol 704 cc870-1010.

*'The title of the bill states that it is a bill to abolish the death penalty, but I think it useful to say at the outset of the remarks which I hope to make to the House that the title goes substantially beyond the amendment to the present law proposed by the bill. I am not proposing to invite the House, on this occasion, to debate all the pros and cons of the preservation or abolition of the death penalty for murder. That battle – a long, grim, sometimes dreary, sometimes exciting battle – was won in 1957 in the Homicide Act.'*

*'We are not concerned today with whether we ought to abolish or preserve the death penalty for murder. That we have already decided. The question before the House today –the only question remaining for Parliament to decide – is whether we shall abolish or retain not the abolition of the death penalty for murder, but the exceptions to that abolition which were made in the Homicide Act 1957, and since there is scarcely anybody who has a good word to say for these exceptions, the answer to the question which is presently before Parliament ought not to be difficult.'*

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Sydney Silverman MP (1895-1968); Liverpool solicitor, Labour MP and leading proponent of the abolition of capital punishment from the 1940s onwards.

Silverman then elegantly and eloquently answered the argument that public opinion appeared to be in favour of retention of the death penalty and that Parliament should abide by the public's alleged wishes:

*'For my part, in this business of Parliamentary responsibility in a Parliamentary democracy, in this business of what it is right or wrong for a Member of Parliament to do, especially when he is acting in accordance with his own judgment and his own conscience and not in accordance with directions from a Whip or out of loyalty to a Government...'*

*'To those who are a little, in my opinion, over-sensitive to what is, I think, quite mistakenly thought to be public opinion – I say this, maybe a little boldly, but with no intention of giving offence to anybody – I should like hon. members to imagine what their duty would be if they had the responsibility of deciding, if there were a man whom they knew it would be wrong to kill, if, in respect of that man, there were violent public pressure, nevertheless to kill him. Would it be right for a responsible legislator or member of the Government to kill that man, whom he thought he ought not to kill, because of some popular immediate pressure which might change its mind the next morning? Surely, anyone who did that would be repeating the mistake that Pontius Pilate made 2,000 years ago.'*

*'Parliament must take its own responsibility. In exercising that responsibility, we in Parliament must be very conscious that we are responsible to those who send us here and must answer to them for what we do here. This is what we are not merely ready but anxious to do. But that does not mean that we must subordinate our judgment, still less that we must distort our consciences, in order to do something we believe to be wrong because if we do not we might lose a vote or even an election. So I say that the Government of the day were perfectly right to decide, as they did decide, in principle and subject to the exceptions that are left, to abolish the death penalty for murder.'*

The debates in Parliament on the bill ranged far and wide, with many good (and bad) points being made. The debates need to be read in full in order to capture the extent of the arguments. While deterrence, the anomalies in the Homicide Act 1957, and the controversial cases described earlier in this paper were all discussed, the fundamental moral repugnance of the death penalty to a new generation of law-makers also found voice during the debate. Making his maiden speech, Mark Carlisle, Conservative MP for Runcorn, made this argument the centrepiece of his contribution:<sup>172</sup>

*'I support the bill because of my belief in the sanctity of human life. It is because I believe that it is wrong to take human life that I believe that it is equally wrong whether that life is taken by the individual or by the State. Following the premise that the taking of human life is wrong, I believe that the State, acting on behalf of all of us as members of society, can only be justified in inflicting the death penalty upon a fellow member of society if it can be shown that that act is necessary for the safety and security of society.'*

*'I do not believe that revenge is a proper motive on which to conduct our penal code. Neither do I believe that the taking of the life of a condemned and convicted murderer in any way does or, indeed, should lessen the grief and anguish which is felt by and for the family of that man's victim.'*

In the end, the bill passed and the Murder (Abolition of the Death Penalty) Act 1965 came into effect on 9 November 1965.<sup>173</sup> The death penalty for capital murder in England, Scotland and Wales was suspended for a period of five years, and the 16 men who were under sentence of death at the time were reprieved.<sup>174</sup> The 1965 Act's long title is:

*'An Act to abolish capital punishment in the case of persons convicted in Great Britain of murder or convicted of murder or a corresponding offence by court martial and, in connection therewith, to make further provision for the punishment of persons so convicted.'*

<sup>172</sup> Hansard, HC Deb 21st December 1964 vol 704 col 908.

<sup>173</sup> 1965 c. 71. The Act did not extend to Northern Ireland, except with regards to courts martial: s 3(3). The death penalty for murder in Northern Ireland was abolished in 1973 by the Northern Ireland (Emergency Provisions) Act 1973, s 1(1).

<sup>174</sup> <http://www.capitalpunishmentuk.org/abolish.html>

Section 1(1) of the Act provides (as amended):

*No person shall suffer death for murder, and a person convicted of murder shall... be sentenced to imprisonment for life.*

The 1965 Act replaced the penalty of death with a mandatory sentence of life imprisonment. Section 1(3) provided that for the purpose of any proceedings on or subsequent to a person's trial on a charge of capital murder, that charge and any plea or finding of guilty of capital murder was to be treated as being or having been a charge, or a plea or finding of guilty, of murder only, and that if, at the commencement of the Act, a person was under sentence of death for murder, the sentence would have effect as a sentence of imprisonment for life.

During the bill's passage through Parliament, the Tory peer Lord Brooke of Cumnor tabled an amendment, the effect of which was to insert a 'sunset clause' into the bill.<sup>175</sup> Lord Brooke was the Home Secretary who, in 1964, as Henry Brooke MP, had last permitted executions to proceed. The clause provided that the Act was to expire on 31 July 1970 unless Parliament provided otherwise by affirmative resolutions. In the absence of such resolutions, the death penalty for capital murder as defined in the Homicide Act 1957 would have returned. Thankfully, Brooke's attempt to save hanging was thwarted. Having ceased to execute, the prospect of doing so again was, for many, unthinkable. Writing in *Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain*,<sup>176</sup> Lord Callaghan of Cardiff, who was Home Secretary at the time, explained that, in 1967, as the time for expiry of the 1965 Act approached:

*I thought about the matter carefully and knew that I would find it extremely difficult, if not impossible, to fulfil my responsibilities if a case of hanging was likely to come before me when the five-year period ended, with the certainty that we would revert to the former unsatisfactory law and practice. I talked with Harold Wilson,<sup>177</sup> who encouraged me to sound out opinion to see what support there would be to put an immediate end to hanging without waiting for the five-year period to run its course. I found enough room to go ahead. In retrospect, I think what decided me was when I learned that the leaders of the Conservative Party<sup>178</sup> and the Liberal Party<sup>179</sup> would both be likely to support immediate abolition.'*

In opening the debate on 16 December 1969 on behalf of those who wished to see the 1965 Act made permanent, the Home Secretary, James Callaghan, made the anomalies that the Homicide Act 1957 had created the central plank of his case:<sup>180</sup>

*The Homicide Act represented an attempt to do what the Royal Commission on Capital Punishment, after four years' deliberation, concluded was not practicable, namely, to divide murder into a category for which the penalty would remain hanging, and another category for which the penalty would be life imprisonment. The Homicide Act, as is Parliament's right, attempted to do this and it reserved the capital penalty for murder done in the course*

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<sup>175</sup> *Hansard*, HC Debs, 16 December 1969, col 1149.

<sup>176</sup> Block B., Hostettler J., Waterside Press, 1997, pvi.

<sup>177</sup> 1916 – 1995. Prime Minister 1964 – 1970 and 1974 – 1976.

<sup>178</sup> Edward Heath MP (1916 – 2005), Prime Minister, 1970 – 1974.

<sup>179</sup> Jeremy Thorpe MP (1929 – 2014), MP for North Devon, 1959 – 1979.

<sup>180</sup> *Hansard*, 16 December 1969, cols 1149 – 1151.

*or furtherance of theft; by shooting or by causing an explosion; in the course of, or for the purpose of, resisting arrest or escaping from legal custody; and for murder of a police officer or prison officer acting in the execution of his duty, or a person assisting him.*

*'The anomalies in this attempt that was made by the House, with every desire to succeed, to categorise murder are so well known that I shall barely dwell upon them this afternoon. I merely remark that the capital penalty was not retained for murder by poisoning, which to many is perhaps the most deliberate and cold-blooded form of murder. Nor was it retained for child murder, which fills us all with horror and revulsion, and is the kind of murder that most excites public anxiety. The Homicide Act made the distinction between capital and non-capital murder rest upon the choice of weapon, and upon sophisticated legal argument about the relationship of the criminal's other unlawful activity to the act of murder which he was charged with having committed.'*

*'The Homicide Act was aimed at confining capital punishment to those forms of murder which particularly struck at public order.'*

*'The statistical report on murder which we have all been studying in recent weeks discloses that, during the currency of the Homicide Act, 59 people were convicted of capital murder. Of these, 29 were executed, and 30 were reprieved. Executions fell to two a year for murders recorded in 1962, 1963 and 1964. I remark, in passing, that even those who believe in the deterrent effect of capital punishment must surely regard as grotesque a situation where capital punishment was still part of the panoply of the law but came to be as little used as it was in those latter years of the Homicide Act. It is simply not credible that the structure of law and order should depend upon the execution of two criminals a year. And my view of the Homicide Act is shared by nearly everyone who had any part in its operation.'*

Callaghan finished his speech with an unapologetic appeal to morality:<sup>181</sup>



ROLLS PRESS / POPPERFOTO

James Callaghan, Home Secretary in 1969 when abolition of the death penalty became permanent: "When society exacts this penalty it acts on the same level as the murderer himself."

<sup>181</sup> Hansard, 16 December 1969, cols 1168-1169.

*Finally, my position is this. What we are discussing is the right of the State to exact the death of a citizen as a punishment for committing murder. That is an awesome power which is rightly denied to the private citizen. If it is to be given to the State then the onus of proof rests wholly and heavily on those who would bring it back as a punishment. I agree entirely with what was said by Lord Templewood, a former Home Secretary, that capital punishment lowered the moral standard of the whole community. That is my conviction, too. When society exacts this penalty it acts on the same level as the murderer himself.*

The appropriate resolutions were duly passed by both Houses of Parliament and the 1965 Act became permanent. Subject to any repeal of the 1965 Act, the death penalty for murder in England, Scotland and Wales was abolished.<sup>182</sup> Section 3(2) and the Schedule to the 1965 Act repealed the death penalty provisions of the Homicide Act 1957 and other statutes concerned with the death penalty for murder.

The 1965 Act only abolished the death penalty for capital murder as defined in the Homicide Act 1957, and death remained an available penalty for high treason, piracy with violence, arson in the Royal Dockyards, as well as capital offences under military law. The death penalty for arson in the Royal Dockyards was abolished by the Criminal Damage Act 1971.

The death penalty was finally completely abolished in the United Kingdom in 1998, with enactment of the Crime and Disorder Act 1998, s 36<sup>183</sup> and the Human Rights Act 1998, s 21(5).<sup>184</sup> These provisions were enacted principally because of the United Kingdom's ratification of international instruments prohibiting the death penalty. These are considered in the next section.

## Subsequent attempts to reintroduce capital punishment

Following the abolition of capital punishment, during the 1970s and, in particular, during the 1980s – by which time the (generally) pro-hanging Conservatives<sup>185</sup> had returned to power and had shifted firmly to the right under Margaret Thatcher – there were several attempts in Parliament to reintroduce the death penalty, and regular calls outside Parliament to reintroduce hanging, especially after terrorist incidents and particularly notorious murders.

Between 1965 and 1994 there were 13 attempts in Parliament to reintroduce the death penalty.<sup>186</sup> The last vote took place on 21 February 1994 by way of amendment to the Criminal Justice and Public Order Bill, which was then before the House of Commons. The proposal was rejected in the House of Commons by 403 votes to 159. The death penalty for the murder of a police officer was rejected by 383 votes to 186. Labour and Liberal Democrat MPs voted solidly against, while Conservative MPs were split (a typical pattern on death penalty votes), with 122 voting against, and 148 in favour.

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<sup>182</sup> 16 December 1969 (House of Commons); 18 December 1969 (House of Lords).

<sup>183</sup> Treason and piracy.

<sup>184</sup> Military offences.

<sup>185</sup> While many Conservative MPs were opposed to capital punishment, the party conference regularly voted to demand its reintroduction and the Prime Minister, Margaret Thatcher, regularly voted in favour of restoration.

<sup>186</sup> Hansard, 21 February 1994, col 39.

It is notable that each time that Parliament was asked to consider reintroducing the death penalty during this period it was rejected by ever-increasing majorities. There is no doubt that the miscarriages of justice perpetrated by the British judicial system that came to light during the 1980s and 1990s played a significant role in changing the minds of those who had previously supported the restoration of capital punishment. For example, speaking during the 1994 debate, the Home Secretary, Michael Howard, explained that he had previously been in favour of reintroducing hanging,<sup>187</sup> but had changed his mind because he had come to realise that the system that he previously regarded as infallible could make mistakes.<sup>188</sup>



Mahmood Mattan (1923-1952); a Somali immigrant executed on 3 September 1952 for the murder of a Cardiff shopkeeper; his conviction was quashed by the Court of Appeal 46 years later in 1998.

This point was well made by the Court of Appeal in 1998, when it quashed the conviction of Mahmoud Mattan,<sup>189</sup> a Somalian who was executed in 1952 for the murder of a shopkeeper in Cardiff. New evidence uncovered by the Criminal Cases Review Commission that had been suppressed by the police at the time pointed very strongly to another suspect as having committed the crime, and so indicated that Mattan had been innocent. In quashing the conviction, Rose LJ said:

*It is, of course, a matter for very profound regret that in 1952 Mahmoud Mattan was convicted and hanged, and it has taken 46 years for that conviction to be shown to be unsafe. The Court can only hope that its decision today will provide some crumb of comfort for his surviving relatives. The case has a wider significance in that it clearly demonstrates... capital punishment was not perhaps a prudent culmination for a criminal justice system which is human and therefore fallible.'*<sup>190</sup>

## The impact of the United Kingdom's international law obligations on the death penalty

Even the fringe minority of MPs who still support capital punishment accept there is no chance of it ever being reintroduced in the United Kingdom. This is significant, in part, because of the international legal obligations on the United Kingdom arising from its membership of the European Union (EU) and the Council of Europe. Reintroduction of the death penalty would require the United Kingdom to leave these organisations and to renounce the European Convention on Human Rights. While these measures would be popular with certain sections of the Conservative Party, it is unthinkable that they would be regarded as an acceptable price to be paid in order to restore capital punishment to the statute book.

As long as the United Kingdom remains part of the EU, reintroduction of the death penalty is an impossibility because the EU is implacably opposed to the death penalty and requires complete abolition as a pre-condition for any country wishing to join the EU. The EU uses all its available tools of diplomacy and cooperation to work towards the abolition of the death penalty. The EU is a leading institutional

<sup>187</sup> Hansard, 21 February 1994, col 40.

<sup>188</sup> Hansard, 21 February 1994, col 45.

<sup>189</sup> R v Mattan [1998] EWCA Crim 676.

<sup>190</sup> Lizzie Seal commented perceptively on this tragic case in her *Capital Punishment in Twentieth Century Britain: Audience, Justice, Memory* (Routledge, 2015), p21, in comparison to the Ellis case.

Issues of race and ethnicity did not fire cultural reaction in the way that youth and femininity did ... Mattan was not a cause célèbre and the execution of those outside of British citizenship and the community of sentiment had low cultural salience, even as the death penalty's cultural ambivalence deepened in the 1950s.

actor and lead donor to the efforts by civil society organisations around the world in the abolition of the death penalty. Also, article 2 of the EU Charter of Fundamental Rights<sup>191</sup> provides that no-one shall be condemned to the death penalty, or executed.

The most comprehensive international instrument to which the United Kingdom is party which operates to prevent reintroduction of the death penalty is Protocol No. 13 to the European Convention on Human Rights (ECHR). It was the predecessor of Protocol No. 6, which required the United Kingdom to abolish the death penalty in 1998 for those civil offences for which it had been retained as a penalty, although the Government went further and abolished the death penalty for military offences also.

Article 2 of the ECHR specifically preserves the death penalty. However, Protocol No. 6 required state parties to abolish the death penalty in peacetime.<sup>192</sup> The UK ratified the sixth protocol in 1999 and it formed one of the Convention rights in Sch 1 to the Human Rights Act 1998.

Subsequently, the Parliamentary Assembly of the Council of Europe established a practice whereby it required from states wishing to become a member of the Council of Europe that they committed themselves to apply an immediate moratorium on executions, to delete the death penalty from their national legislation, and to sign and ratify the sixth protocol. The Parliamentary Assembly also put pressure on countries that failed or risked failing to meet the commitments they had undertaken upon accession to the Council of Europe. More generally, the Assembly took the step in 1994 of inviting all member states who had not yet done so to sign and ratify Protocol No. 6 without delay.<sup>193</sup>

This fundamental objective to abolish the death penalty was also affirmed by the Second Summit of Heads of State and Government of member states of the Council of Europe held in Strasbourg in October 1997. In the summit's Final Declaration, the Heads of State and Government called for the 'universal abolition of the death penalty and [insisted] on the maintenance, in the meantime, of existing moratoria on executions in Europe'. For its part, the Committee of Ministers of the Council of Europe indicated that it 'share[d] the Parliamentary Assembly's strong convictions against recourse to the death penalty and its determination to do all in its power to ensure that capital executions cease to take place'. The Committee of Ministers subsequently adopted a Declaration 'For a European Death Penalty-free Area'.

In the meantime, significant related developments in other forums had taken place. In June 1998, the EU adopted 'Guidelines to EU Policy Toward Third Countries on the Death Penalty' which, *inter alia*, stated the EU's opposition to the death penalty in all cases. Within the framework of the UN, a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, was adopted in 1989. Also, for a number of years, the UN Commission on Human Rights has regularly adopted resolutions that call for the establishment of moratoria on executions, with a view to completely abolishing the death penalty. Also, capital punishment was

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<sup>191</sup> 2000/C 364/01.

<sup>192</sup> Article 1 of Protocol No. 6 provides: 'The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.' However, Article 2 provides: 'A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war...'

<sup>193</sup> Resolution 1044 (1994) on the abolition of capital punishment.

excluded from the penalties that the International Criminal Court and the International Criminal Tribunals for the Former Yugoslavia and Rwanda are authorised to impose.

The specific issue of the abolition within the Council of Europe of the death penalty also in respect of acts committed in time of war or of imminent threat of war should therefore be seen against the background of these wider developments concerning the abolition of the death penalty. It was raised for the first time by the Parliamentary Assembly in Recommendation 1246 (1994), in which it recommended that the Committee of Ministers draw up an additional protocol to the Convention, abolishing the death penalty in peacetime and in wartime.

While the Council of Europe's Steering Committee for Human Rights, by a large majority, was in favour of drawing up such an additional protocol, the Committee of Ministers at the time considered that the political priority was to obtain and maintain moratoria on executions, to be consolidated by complete abolition of the death penalty. A significant further step was made at the European Ministerial Conference on Human Rights, held in Rome in November 2000 on the occasion of the 50th anniversary of the ECHR, which pronounced itself clearly in favour of the abolition of the death penalty in time of war. In Resolution II adopted by the Conference, the few member states that had not yet abolished the death penalty or ratified the sixth protocol were urgently requested to ratify it as soon as possible and, in the meantime, to respect the moratoria on executions. In the same resolution, the conference invited the Committee of Ministers 'to consider the feasibility of a new additional protocol to the convention which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or of imminent threat of war'.<sup>194</sup> The conference also invited member states that still had the death penalty for such acts to consider its abolition.

The government of Sweden presented a proposal for an additional protocol to the convention at the 733rd meeting of the Ministers' Deputies in December 2000. The proposed protocol concerned the abolition of the death penalty in time of war, as in time of peace. The Committee of Ministers adopted the text of the protocol on 21 February 2002 at the 784th meeting of the Ministers' Deputies and opened it for signature by member states of the Council of Europe, in Vilnius, on 3 May 2002.

Protocol No 13 to the ECHR requires state parties to abolish the death penalty in time of war. Article 1 provides that: 'The death penalty shall be abolished. No-one shall be condemned to such penalty or executed,' and, by Article 2, no derogation is permissible under Article 15 of the ECHR. To date, Protocol No 13 has been signed by all member states of the Council of Europe with the exception of Armenia and Poland.

The impact of the coming into force of Protocol No 13 on the status of the death penalty within the ECHR was profound. In *Öcalan v Turkey* (2003) 37 EHRR 10, para 198, the European Court said that it could not exclude, in the light of the developments in state practice on capital punishment during the 1990s, that state parties to the convention had agreed through their practice to modify the second sentence in Article 2(1) in so far as it permits capital punishment in peacetime. The court said it could also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3, although it did not reach a final conclusion.

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<sup>194</sup> Paragraph 14 of Resolution II.

However, by 2010, when the court came to consider *Al-Saadoon and Mufdhi v United Kingdom*, Application No 61498/08, it concluded at para 120 the position had evolved.

All but two of the member states have now signed Protocol No. 13 and all but three of the states that have signed have ratified it. These figures, together with consistent state practice in observing the moratorium on capital punishment, were, in the court's view, strongly indicative that Article 2 had been amended so as to prohibit the death penalty in all circumstances. Against this background, the court did not consider that the wording of the second sentence of Article 2(1) continued to act as a bar to its interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty.

The UK's ratification, first, of Protocol No. 6 and then of Protocol No. 13 has had two principal consequences. First, it required the UK to abolish the death penalty for all offences. Second, ratification resulted in the UK acquiring a new international obligation not to subject those under its control to a risk of being sentenced to death or of being executed either by extraditing them or otherwise returning them, for example, by deportation.<sup>195</sup> In 2004, Article 1 of Protocol No. 13 was substituted for Article 1 of Protocol No. 6 as one of the Convention rights in the Human Rights Act 1998.<sup>196</sup>

Accordingly, extradition from the UK ought not to be permissible where there is a real risk that the defendant will be sentenced to death, irrespective of whether the sentence is likely to be carried out. This follows from the wording of Article 1 of Protocol No. 13, which prohibits both the sentencing of prisoners to death *and* the carrying out of the execution.

However, there is a tension between this prohibition and the provisions of the EA 2003. Section 94 provides:

*94(1) The Secretary of State must not order a person's extradition to a category 2 territory if he could be, will be or has been sentenced to death for the offence concerned in the category 2 territory.*

*(2) Subsection (1) does not apply if the Secretary of State receives a written assurance which he considers adequate that a sentence of death:*

*(a) will not be imposed, or*

*(b) will not be carried out (if imposed).*

Given that Article 1 of Protocol No. 13 prohibits the sentencing of any person to death irrespective of whether or not the sentence will be carried out, it is difficult to see how the Secretary of State

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<sup>195</sup> *Soering v United Kingdom* (1989) 11 EHRR 439 did not prohibit extradition on capital charges *per se*, but held that where execution would be preceded by long incarceration on death row then extradition was prohibited by Article 3 because of the suffering that the defendant would undergo during this period.

<sup>196</sup> Human Rights Act 1998 (Amendment) Order 2004 (SI 2004/1574).

would be acting compatibly with Article 1 if he were to accept an undertaking that a person would be sentenced to death but not executed. However, in *Government of Ghana v Gambrah* [2014] 1 WLR 4464, where the defendant faced a mandatory death sentence in Ghana if he were extradited, the Ghanaian government had undertaken not to carry out the sentence. The High Court held that the case had to proceed on the basis that the death penalty would not be executed and that the risk that had to be assessed by the United Kingdom in pursuance of its obligations under Articles 2 and 3 of the convention and under Article 1 of Protocol No. 13, was whether the death penalty would be carried out and not merely whether it would be imposed, and thus that the United Kingdom would not violate its obligations under those provisions if it extradited a requested person where there was no real risk of a death sentence against him being executed. Accordingly, the High Court held that the mere imposition of the death penalty in a requesting state, coupled with an acceptable assurance that it would not be carried out, was no bar to extradition.<sup>197</sup>

Hence, in order for extradition to be compatible with Article 3 and Article 1 of Protocol No. 13, the Secretary of State should receive a written assurance that the death penalty will not be imposed in the requesting state.<sup>198</sup> The effectiveness of any such undertaking must be critically scrutinised<sup>199</sup> and, ideally, there should be evidence of the undertaking's effectiveness in the domestic law of the requesting state.<sup>200</sup> English courts have jurisdiction to scrutinise the effectiveness of undertakings given by foreign states in relation to extradition,<sup>201</sup> including those concerning the death penalty.<sup>202</sup> Only where it is clear that the undertaking provides adequate protection for the defendant should the Secretary of State accept it under s 94(2).<sup>203</sup>

## The impact overseas of the use of the death penalty in the United Kingdom

The mandatory death penalty for murder was exported by the United Kingdom into the laws of the colonies that made up the British empire, and occasionally its use there was the subject of debate in Parliament at Westminster.<sup>204</sup>

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<sup>197</sup> The author was leading counsel for Gambrah.

<sup>198</sup> *R (St John) v Governor of Brixton Prison* [2002] QB 613; *Minister of Justice v Burns* [2001] SCC 7.

<sup>199</sup> See House of Commons and House of Lords Joint Committee on Human Rights, 20th Report, 26 July 2002, para 28.

<sup>200</sup> *R v Secretary of State for the Home Department ex p Launder (No 2)* [1998] QB 994.

<sup>201</sup> *Ahmad and Aswat v Government of the United States of America* [2006] EWHC 2927 (Admin) (undertaking that the defendant would not be sent to Guantanamo Bay).

<sup>202</sup> *R (St John) v Governor of Brixton Prison* [2002] QB 613, para 64.

<sup>203</sup> In the United States, undertakings are given by the Department of Justice on behalf of the federal government. However, capital punishment is mostly imposed by individual states at the instance of the local district attorney. There have been cases where, despite the fact that the federal government has requested a state not to carry out an execution, the execution has proceeded regardless: see *Paraguay v United States* (the *Breard* case), 9 April 1998 (ICJ); Koh, 'Paying "Decent Respect" to World Opinion on the Death Penalty' 35(5) *UC Davis Law Review*, 1085–1131; Rieter, 'Interim measures by the World Court to suspend the execution of an individual: the *Breard* case' NQHR 1998, 16(4), 475–494; *Germany v United States of America* [1999] ICJ Rep 9 (ICJ); Feria Tinta, 'Due process and the right to life in the context of the Vienna Convention on Consular Relations: arguing the *LaGrand* case' (2001) 12 EJIL 363.

<sup>204</sup> Hansard, HC Deb 5 March 1947 vol 434 cc483–91.

During the 1960s, many of these former colonies achieved independence, and retained the use of the death penalty almost without exception. These countries also adopted written constitutions, which were to have a profound impact on their use of the death penalty.<sup>205</sup> The final court of appeal for most of the jurisdictions in the region was (and, for some, still is) the Judicial Committee of the Privy Council.

In 1992, the London law firm Simons Muirhead & Burton decided that a coordinated strategy was needed in order to attack the death penalty in the Caribbean. Although executions in the region had become sporadic, the threat was ever present, and numerous prisoners had come close to execution. Saul Lehrfreund joined the firm as its first full-time lawyer engaged in Privy Council capital litigation, and he was joined shortly afterwards by Parvais Jabbar. The two set about assembling and coordinating a team of counsel with one goal: to impede as much as possible the use of capital punishment in the region.<sup>206</sup> The lawyers' work proved to be spectacularly successful.<sup>207</sup> As a result of this coordinated litigation strategy,<sup>208</sup> a number of restrictions have been imposed on the use of capital punishment in the Caribbean. These include: a long delay in the carrying out of an execution can render it unlawful;<sup>209</sup> executions may not be carried out before the conclusion of proceedings before international bodies;<sup>210</sup> sufficient notice to the condemned person must be given before his or her execution;<sup>211</sup> the mandatory death sentence has been held in certain jurisdictions to be in violation of constitutional provisions prohibiting cruel and unusual punishments, because it deprives the sentencer of the ability to consider the individual person's circumstances;<sup>212</sup> and procedural protections are required during the mercy process.<sup>213</sup>

The death penalty in the region appears to be in abeyance at the current time.<sup>214</sup> After a flurry of executions in the region in the 1990s, including nine executions over a few days in Trinidad in June 1999,<sup>215</sup> a single execution took place in The Bahamas in January 2000,<sup>216</sup> and a single execution in St Kitts in 2008.<sup>217</sup> Since then there have been no executions in the region.

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<sup>205</sup> Knowles J. B., in Hodgkinson and Schabas, *Capital Punishment: Strategies for Abolition* (Cambridge University Press, 2004), Chapter 13.

<sup>206</sup> In 2006, The Death Penalty Project Limited (DPP) was formed with its sister charity, The Death Penalty Charitable Trust. The charitable status has enabled the DPP to apply for grants from a diverse range of funders and it is now supported by the UK Foreign and Commonwealth Office, the United Nations Voluntary Fund for Victims of Torture, as well as a number of charitable foundations. The continued support of Simons Muirhead & Burton for the DPP is essential, as it provides its offices and covers many of its other administrative costs. In more recent years the DPP has extended its work to other regions, including Africa and the Far East.

<sup>207</sup> Among this team of counsel, special recognition must be given to Edward Fitzgerald CBE QC. He has argued the great bulk of the constitutional challenges and, as a consequence, is probably responsible for saving more lives than any other barrister in the history of the profession.

<sup>208</sup> At the time, the final court of appeal for these jurisdictions; since then some of these countries have renounced the Privy Council's jurisdiction and the final right of appeal now lies with the Caribbean Court of Justice.

<sup>209</sup> *Pratt and Morgan v. Attorney General of Jamaica* [1994] 2 AC 1, not following *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 WLR 1342 and *Riley v Attorney-General of Jamaica* [1983] 1 AC 719.

<sup>210</sup> *Thomas v Baptiste* [2000] AC 1.

<sup>211</sup> *Guerra v Baptiste* [1996] AC 397.

<sup>212</sup> *Reyes v The Queen* [2002] AC 235 (Belize); *Hughes v The Queen* [2002] 2 AC 259 (St Lucia); *Fox v The Queen* [2002] 2 AC 284 (St Christopher and Nevis); *Watson v The Queen* [2005] 1 AC 472 (Jamaica); *Bowe v The Queen* [2006] 1 WLR 1623 (The Bahamas). However, in *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 and *Boyce v The Queen* [2005] 1 AC 400 (Barbados) constitutional challenges to the mandatory death penalty failed because of the particular form of constitutional savings clauses in those countries, which immunised pre-independence laws from being declared as being in violation of the constitution.

<sup>213</sup> *Neville Lewis v Attorney General of Jamaica* [2001] 2 AC 50, not following *de Freitas v Benny* [1976] AC 239 and *Reckley v Minister of Public Safety and Immigration (No 2)* [1996] 2 AC 527.

<sup>214</sup> February 2015.

<sup>215</sup> *Boodram v Baptiste* [1999] AC 1709.

<sup>216</sup> *Higgs v Minister of National Security* [2000] 2 AC 228.

<sup>217</sup> Charles Laplace was hanged on 19 December 2008 without having exhausted his rights of appeal.

The territories that remained colonies, or British Overseas Territories as they became known,<sup>218</sup> and that did not seek independence, also generally retained the death penalty as part of their laws. They have now all abolished capital punishment. This did not come without a struggle. While these territories have their own law-making powers to a greater or lesser extent, the British government's ultimate responsibility for good governance of the territories led it to pursue a policy of revoking (or forcing the revocation of) all statutory provisions for the death penalty in those territories where it had, up until recently, been legal.

In 1991, the British Government enacted an Order in Council in respect of its Caribbean territories, namely Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands, the effect of which was to abolish capital punishment for murder.<sup>219</sup>

In respect of Bermuda, the British Government was unable to extend the abolition via Order in Council because of Bermuda's almost autonomous status and its almost total power of self-governance. However, the British Government warned Bermuda that if voluntary abolition was not forthcoming it would be forced to consider whether to impose abolition by means of an Act of Parliament. As a result, the Bermudian government introduced its own domestic legislation in 1999 to abolish capital punishment. The last executions in an overseas territory, and indeed the last on British soil, took place in Bermuda on 2 December 1977, when Larry Tacklyn and Erskine Burrows were hanged for several murders, including (in Burrows' case) the 1973 murder of the territory's then governor Sir Richard Sharples. Burrows was a member of a black nationalist movement.

Although not part of the United Kingdom, the Isle of Man and the bailiwicks of Guernsey and Jersey are British Crown dependencies with their own legislatures.

In the Channel Islands, the last death sentence was passed in 1984; this was commuted. The last execution there was in Jersey on 9 October 1959, when Francis Huchet was hanged for the murder of John Perrée. Capital punishment was abolished in Jersey in 1986 and in Guernsey in 2003. The last execution in Guernsey took place in 1854. Sark abolished the death penalty in 2004.

The last execution on the Isle of Man took place in 1872, when John Kewish was hanged for the murder of his father. Capital punishment was abolished by the Tynwald in 1993. Five people were sentenced to death (for murder) on the Isle of Man between 1973 and 1992, although all sentences were commuted to life imprisonment.

The last person to be sentenced to death in the UK or its dependencies was Anthony Teare, who was convicted at the Manx Court of General Gaol Delivery, in Douglas, for a contract murder in 1992; he was subsequently retried and sentenced to life imprisonment in 1994.

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<sup>218</sup> British Overseas Territories Act 2002.

<sup>219</sup> Caribbean Territories (Abolition of the Death Penalty) Order 1991 (SI 1991/988).

## Conclusion: why the abolition of the death penalty in the UK still matters

The long journey to abolition of the death penalty in the UK was not an easy one. As this paper noted at the start, abolition is often seen as merely a reflection of the 1960s' shift towards a more 'permissive' society. However, the abolition of capital punishment did not reflect any sea change in public opinion, which remained firmly opposed to abolition.<sup>220</sup> In actuality, the vote was not – or not merely – an example of some general sense of 1960s enlightenment, but was the culmination of the effect of the confluence of a variety of streams of motivations, philosophies, experiences and tragedies.

It is highly unlikely that there will ever be any attempt to reintroduce capital punishment in Parliament, and any attempt to do so will fail. Even those few Parliamentarians who continue to support its use accept that there is no practical possibility of it ever returning to the statute book. Ann Widdecombe, a former Conservative Home Office minister and supporter of capital punishment, writing the foreword to Richard Clark's *Capital Punishment in Britain*,<sup>221</sup> said:

*'Capital punishment will never return to Britain and when I was shadow Home Secretary I did not waste time calling for it, preferring instead to concentrate on remedies which were available.'*

There is no doubt as to the long-standing policy of the United Kingdom Government to oppose the death penalty as a matter of principle and to work for its worldwide abolition. This principled stance, which is actively taken forward in outreach work by the Foreign and Commonwealth Office (FCO) and a number of NGOs, including The Death Penalty Project, Reprieve, and others, is the main reason why the abolition of the death penalty in the United Kingdom still matters, even many decades later. Our bitter experience of the tragic outcomes that any system of justice that allows death as a punishment is bound to produce,<sup>222</sup> together with the empirical evidence that abolishing capital punishment has no adverse consequences in terms of crime rates, and the acceptance of the premise that the state-sanctioned taking of life is wrong, means that the United Kingdom now leads the way in the international movement for worldwide abolition.<sup>223</sup>

The Government's current strategy (published in revised form in 2011) is set out in *HMG<sup>224</sup> Strategy for Abolition of the Death Penalty 2010-2015*.<sup>225</sup> According to the executive summary, the strategy 'sets out the UK's policy on the death penalty, and offers guidance to FCO overseas missions on how they can take forward [the Government's] objectives'.

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<sup>220</sup> According to YouGov, in August 2014 (the 50th anniversary of the last hangings in England), by 45–39% of those surveyed, people tended to support the reintroduction of the death penalty for murder. YouGov found that support has been dropping steadily – in 2010, 51% were in favour and 37% opposed, and people born after 1964, in the 18–39 age bracket, tended to oppose its reintroduction. This may suggest that the UK is approaching a moment when a majority will oppose it, but has not yet reached that point.

<sup>221</sup> Ian Allen Publishing, 2009.

<sup>222</sup> Although United States Supreme Court Justice Scalia, a well-known supporter of the death penalty, apparently really believes that the United States' legal system is so perfect that it has never executed an innocent person: *Kansas v. Marsh* 548 US 163 (2006).

<sup>223</sup> On 5 August 2015, *The Independent* reported concern among some NGOs that, although in 2014 the FCO's Human Rights and Democracy Report had referred to the Government's work as being part of its sustained and long-term efforts to see an end to the death penalty worldwide, references to the death penalty were to be abandoned in future. However, the FCO confirmed in response that the Government remained committed to advancing global abolition of the death penalty and that it was wrong to suggest otherwise.

<sup>224</sup> Her Majesty's Government.

<sup>225</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/35448/death-penalty-strategy-oct-11-15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf)

In answer to the question ‘Why is the death penalty an issue for us?’, the strategy says that the United Kingdom cares about the death penalty because:

*Promoting human rights and democracy overseas is a priority for HMG. It is the long-standing policy of the UK to oppose the death penalty in all circumstances as a matter of principle because we consider that its use undermines human dignity, that there is no conclusive evidence of its deterrent value, and that any miscarriage of justice leading to its imposition is irreversible and irreparable.*

*It affects British nationals – there are a number of British nationals who have been sentenced to death and others awaiting trial for a crime which may carry the death penalty.*

*It affects our provision of police or other justice and security assistance to countries which retain the death penalty. In countries where the assistance we offer could lead to the death penalty, the assistance we may be able to offer will be limited.*

*It affects extradition cases – we cannot extradite someone to a country which retains the death penalty if there is a risk that they will face the death penalty.*

The Government’s stated objectives include increasing the number of abolitionist countries, seeking further restrictions in countries where it is used, and ensuring that EU minimum standards are applied. Those standards include the requirement that capital punishment must only be carried out pursuant to a final judgment by an independent and impartial court after legal proceedings complying with international standards – ‘including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, and where appropriate, the right to contact a consular representative.’

There are four main channels that the Foreign and Commonwealth Office can use to achieve the Government’s aims.

First, there are bilateral initiatives. These include high-level lobbying; political dialogues, including through raising the death penalty in bilateral human rights dialogues; funding projects through the Human Rights and Democracy Programme; and raising individual cases of British nationals. The Government’s policy is to use all appropriate influence to prevent the execution of any British national.<sup>226</sup> The Government also raises individual cases of third country nationals where there is deemed necessary and/or effective.

Second, the Government works through the EU. The EU Death Penalty Taskforce meets approximately twice a year to discuss and drive forward EU action on the death penalty, and continues work virtually throughout the year. The Government also raises individual cases in countries that retain the death penalty and that do not meet the minimum standards as set out in the EU Guidelines on Human Rights. These standards include only imposing the death penalty for the most serious crimes, and not imposing the death penalty on juveniles, pregnant women

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<sup>226</sup> See *R (Sandiford) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697, where the Supreme Court upheld the UK Government’s policy of declining to pay for legal representation for British nationals facing the death penalty overseas, notwithstanding its opposition to the death penalty.

or the insane. There must have also been a fair trial, a right to appeal, and the right to seek a pardon or commutation.<sup>227</sup> There are also lobbying initiatives to restrict and reduce its application in retentionist countries, and EU states pursue common action in international forums such as the UN, including by taking a coordinated approach to UN resolutions on the death penalty.<sup>228</sup>

Third, the Government works through the UN, supporting UN General Assembly Resolutions on the use of the death penalty biennially, working with others and lobbying where required to secure appropriate language and increased support for each successive resolution. The Government also supports recommendations to specific countries through the Universal Periodic Review process, and follows up on recommendations that have been accepted, for example through funded projects or lobbying activities. The Government also follows up on recommendations made by the UN Human Rights Committee and supports the UN rapporteur on extrajudicial, summary or arbitrary executions, acting on the basis of his reports, and using them as a tool to apply pressure.

Fourth, the Government also works through the Commonwealth to restrict the use of the death penalty in those Commonwealth countries where it has been retained. Relevant Commonwealth bodies include the Commonwealth Heads of Government Meetings, which are held every two years, and the Commonwealth Ministerial Action Group, which deals with violations of the Harare Declaration, which sets out the Commonwealth's fundamental political values.

The United Kingdom is firmly cemented in as a brick in the wall of states opposed to capital punishment in all circumstances and it is now, thankfully, inconceivable to see this position ever changing. Our experience of the death penalty and its abolition continues to inform the work of those campaigning worldwide to end executions. Significant progress has been made in restricting the use of capital punishment in Africa, and there is much work ongoing in Asia, especially in relation to China, which by some margin is the world's most prolific executioner.

The result has been a shift in the dynamic of the debate about capital punishment around the world. As Professors Roger Hood and Carolyn Hoyle, authors of *The Death Penalty: A Worldwide Perspective*,<sup>229</sup> commented in 2015:<sup>230</sup>

*'The situation on the global plane has undoubtedly moved towards universal abolition. Instead of abolitionists being on the weaker flank, constantly being called upon to justify their position, it is now the retentionists that are on the back foot.'*

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<sup>227</sup> The full list of EU minimum standards can be found at <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>.

<sup>228</sup> For example, on 20 December 2012, the 67th General Assembly adopted a fourth resolution (A/RES/67/176) with 111 countries voting in favour, 41 against and 34 abstentions (another seven countries were absent at the time of the vote). This called on states *inter alia* to progressively restrict the use of the death penalty and to reduce the number of offences for which it may be imposed, and to establish a moratorium on executions with a view to abolishing the death penalty.

<sup>229</sup> 5th Edn, Oxford, 2015.

<sup>230</sup> *Oxford Law News* (No 19).

# Author

## Julian B. Knowles QC

Julian specialises in international criminal law, human rights law and media law. Throughout his career, Julian has been involved in death penalty work. Before being called to the Bar, Julian worked as an assistant in the public defender's office in Oklahoma and Florida, representing death-row prisoners. He began working with The Death Penalty Project at Simons Muirhead & Burton as a pupil more than 20 years ago, providing *pro bono* legal representation to death-row prisoners in the Caribbean, and the relationship has continued throughout his career. He has won numerous capital criminal appeals in the Privy Council and been involved in many of the cases that have resulted in significant restrictions being placed upon the use of the death penalty.

Death penalty work aside, Julian has appeared in numerous headline-making cases, and in many appeals in the House of Lords, Privy Council and Supreme Court. Some of Julian's notable cases include: *South Africa v Shrien Dewani* (2010 – 2014); the 'Phone Hacking' Litigation (2013); *R v Vicky Pryce* (2013); the 'MPs expenses' prosecutions (2010 – 2011); *R v Kenneth Noye* (2011); the *Jean Charles De Menezes* case (2007); *R v Siôn Jenkins* (2004 – 2006); the *Guinness* appeal (2002); and the *Pinochet* case (1998 – 2000). He is also the co-author of the leading work in the field of extradition, *The Law of Extradition and Mutual Assistance* (Oxford, 2013).

# The Death Penalty Project

The Death Penalty Project works to promote and protect the human rights of those facing the death penalty. We operate in all countries by providing free legal representation, advice and assistance.

For more than 20 years, our work has played a critical role in identifying a significant number of miscarriages of justice, promoting minimum fair-trial guarantees in capital cases and in establishing violations of domestic and international law. Through our legal work, the application of the death penalty has been restricted in many countries in line with international human rights standards. Our training programmes and research projects create awareness of the issues surrounding the death penalty, encourage greater dialogue and provide a platform to engage with experts and key stakeholders.



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