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The abolition of capital punishment

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Penny Boreham:
Hello, I'm Penny Boreham. It's forty years since the abolition of the death penalty for murder in the United Kingdom. The death penalty as the ultimate sanction provokes passionate responses from both those who support it and those who oppose it. In order to understand and throw light on the fundamental issues underpinning our attitudes to this most severe of punishments, and to reflect on how people might arrive at these vehemently held and deeply felt points of view, I'm joined by Professor Gary Slapper, Director of the Centre for Law at The Open University, Professor Barbara Hudson, who's Director of the Centre for Criminology and Criminal Justice at the University of Central Lancashire, and Dr. Nigel Warburton, who is Senior Lecturer in the Department of Philosophy at The Open University. Welcome to you all.

All:
Hello.

Penny Boreham:
Just to clarify before you plunge into the discussion, it's worth reflecting that two hundred years ago here in Britain reforms began to be introduced to abolish the death penalty for more than two hundred capital offences under England's Bloody Code. These capital offences included being, and I quote, "In the company of gypsies for one month, vagrancy for soldiers and sailors, strong evidence of malice in children aged between 7 and 14", and then a few decades later in the 1830s Parliament abolished the death penalty for shoplifting goods worth five shillings or less, and other such offences. And then 140 years later we saw capital punishment for murder abolished here in Britain, that's forty years ago in 1969, but it was actually four years before that in 1965 that Parliament had voted to abolish it for a five year experiment. However, it was only eleven years ago, in 1998, that the Criminal Justice Bill removed high treason and piracy with violence as capital crimes, thus effectively formally ending capital punishment which up until that point had remained on the statute book. Is that right, Gary?

Prof. Gary Slapper:
Yes, that's technically correct. There were two further progressions. One was a subscription to a 1983 part of the protocol from the Convention for the Protection of Human Rights and Fundamental Freedoms, under which the signatory governments agreed not to execute people, but only in the context of peacetime. There was an escape clause by which you could introduce the death penalty in times of war. And then a little later, in 2003, it signed the 13th Protocol, British Government signed that, which meant that it could not reintroduce execution as a punishment, even during war, so we're fully as a country now away from being able to impose the death penalty. It's not entirely politically irrevocable because if we were to secede from the Council of Europe we would be able to, as a country, come back and introduce the death penalty. Nothing is forever in law.

Penny Boreham:
But I mean this is all extremely recent, I mean I just want you all to reflect now in the year of the anniversary for the abolition of the death penalty for murder in the UK, I want to ask you all from your perspectives why you think the 1960s was the time for this momentous decision to be made. Barbara.

Prof. Barbara Hudson:
I think the situation in the UK was a bit different from a lot of countries. A lot of countries get rid of the death penalty after some cataclysmic event, like after occupation by the Nazis, the

end of Apartheid in South Africa, the end of the Soviet Union and countries like Hungary wanting to join the EU.

Penny Boreham:
Because of a mistrust of the authorities?

Prof. Barbara Hudson:
Because they want to signal that they're clearly different from the old regime, and it's certainly probably true that most of the public in Britain are less suspicious of authority than countries which have had this experience of authority being very oppressive, and being on the wrong side of most possible moral arguments. And so I think in England cases and individual campaigns were very influential, and the one that seemed to be most influential at the time was that of Timothy Evans who was convicted and executed for a killing which it was then proved that someone else had actually done, and Ludovic Kennedy, who's just died, was not the only campaigner but the most high profile campaigner. He was a very charismatic person and I remember my mother, and some of her sisters and friends, actually having their opinions sort of visibly changed and were very thoughtful about the fact that you could never absolutely guarantee that you're executing someone who's actually guilty, and therefore it was safer to be rid of the death penalty altogether.

Penny Boreham:
Gary, this period in the sixties was the advent of investigative journalism, wasn't it, but in terms also of people becoming more aware of the details of the legality of these cases, was that also true?

Prof. Gary Slapper:
Yes, investigative journalism helped probe these things, expose the mistruths, the demonstrable injustices of the trial. In cases like Timothy Evans the jury were deprived of information in that case which, if they had had, would have more than likely resulted in a different conviction and a different verdict in the case and, similarly, with the case of Derek Bentley, the injustices, keeping from the jury that a person who you're just about to convict and have hanged had a mental age of below ten. It was by today's standards absolutely shocking and indefensible that that should be kept away from the decision-makers in circumstances which can only be judged as being deliberate, a deliberate deception perpetrated on the system, knowing that the result would be that someone would be executed, and that type of thing, I think, played very powerfully into the public domain, so the means of communication, journalism, the spreading of those inaccuracies and injustices is very important, particularly in the context of the other liberalisations of the system in relation to sexuality, in relation to laws about drugs and laws about prostitution.

Penny Boreham:
Nigel, we quoted before the Bloody Code and the fact that you could then at that point be hanged for spending a month in the company of gypsies. I mean that showed a lot about obviously the attitudes at the time. Could you see something in the sixties, philosophically talking in a more general way, which have meant that change in the zeitgeist at that time, that we'd be more ready for that change?

Dr. Nigel Warburton:
In the 1860s John Stuart Mill, a great British philosopher, was an MP as well, now he was arguing against the abolition of the death penalty on the grounds that the death penalty was actually a good deterrent against some brutal crimes. Now he didn't have a lot of evidence. I think in the 1960s the rise of the social sciences and so on, there was a lot of evidence about what was happening in Britain, what was happening in America, in other countries where there were different penal codes, and so there was a lot more to base these sorts of conclusions about what actually happened. It's a bit like Gary's point about the rise of the kind of investigative journalism that exposed the innocent cases. There's more to put into the pot there and so when people make an assertion that such and such happens as a result of the death penalty, we can't say definitively what happens or what's likely to happen, but there is evidence that can feed into any answer that we give there, so I think in the sixties there

was, you know, an academic study of what was happening around the world was relevant in a way that in the 1860s there wasn't sufficient evidence.

Penny Boreham:
So people could pull in more empirical evidence to justify whatever they were feeling – is that what you're saying?

Dr. Nigel Warburton:
Yeah, I don't think that's the only thing at stake here, of course. I think, you know, if the empirical evidence only comes in if you think the reason why we want to get rid of the death penalty is it's a deterrent.

Penny Boreham:
We often hear about polls here in Britain that state that more than half the British population want the death penalty reinstated, and actually many polls show a higher figure than that, so in order to understand the reasons people might arrive at their views on this issue, can I pick up with you again, Nigel, about the arguments that are commonly put forward?

Dr. Nigel Warburton:
Obviously the retributive element of the punishment is highly relevant to all of us, I mean most people, if they're honest, when they hear about a brutal murder, don't feel compassion and benign thoughts about the person who committed the murder. They may have an instinct to kill, you know, this is the brutal fact about human beings, they're not actually very nice most of the time, and we hopefully restrain those sorts of emotions, but there is a strong retributive element to most justifications for the death penalty. Philosophically, I think, there's a big contrast between the kind of approach which emphasises retribution, and Immanuel Kant is an example of a philosopher who thought that you should meet murder with the death penalty, so that's a retributive theory, and the kind which says that, look, whether capital punishment is right or wrong, depends entirely upon the consequences. John Stuart Mill was an example of that. In the 1860s he thought that the death penalty actually brought about better consequences as a deterrent, but the consequentialist approach emphasises what happens; the deontological approach like Kant's says look, these things are absolutely right or absolutely wrong, you know, the death penalty's right or the death penalty's wrong, no argument.

Penny Boreham:
So when we hear that over fifty percent of the population in Britain are pro capital punishment, does that surprise you personally, or do you think that that idea of retribution is very, very vibrant and alive?

Dr. Nigel Warburton:
I suspect fifty percent's an underestimate actually. I think that people have very different justifications for why they want to enact retribution, but I don't think personally that it's the state's job to facilitate retribution, that's not what I see the purpose of punishment to be, but many people do.

Penny Boreham:
Barbara, does it surprise you this figure?

Prof. Barbara Hudson:
It doesn't surprise me so much as disappoint me. I mean going back to the Ancient Greeks and the movement from private vengeance to public law is that we should not base our punishment system on these kind of strong feelings. Also I think the contemporary form of retribution is not an exact 'an eye for an eye', but more the kind of things that are associated with the 'just desserts' theory, that is that the most severe punishment should be reserved for the most serious offences, and that contemporary form of retributive theory doesn't say anything about which should be the most severe punishment, or the least severe, it just talks about the scale of punishments and which should go to which, and I think that's more defensible.

Penny Boreham:
Can we just look, Gary, at how what's being argued here ties in with the absolute reasons for having a legal system at all, right back to the fundamentals?

Prof. Gary Slapper:
Yes, it's interesting that to, I think, look at the history of capital punishment as a system for dealing with serious crimes. To carry on in 2009 or 2010, 2011 speaking about the death penalty being based on 'an eye for an eye' is just demonstrably stupid, in other words you wouldn't if, where people are raped you wouldn't suggest that the state rapes them back, if someone's glassed in the face no-one is suggesting, as far as I know, that the state glasses them in the face.

Dr. Nigel Warburton:
No, no, I think people do talk about proportional response so there might be a kind of humane way of glassing somebody in the face, as it were, by giving them a severe penalty that, you know, they're given hard labour or they're given some kind of long prison sentence that is actually proportionate to the thing that they committed, the crime that they committed.

Penny Boreham:
So the legal system isn't a humane way of glassing someone in the face, it's something more than that, isn't it?

Prof. Gary Slapper:
It's, well it has been since the mid to late 19th century purportedly based on a much more scientific way of dealing with punishment so the idea, for example, of punishing people by depriving them of their liberty for carefully calibrated portions of time, it's at that point really that you begin to get a carefully graduated way of depriving people of their liberty, so it becomes progressively more rational and, as you go through the 20th century and the early 21st century, again you get manifestations of what are seen to be progressively more humane or rational adaptive ways of punishment, community service or people giving things back to their victim, and so on, so that the nature of punishment changes.

Prof. Barbara Hudson:
Yes but that is, that move, the move from meaning the same, 'an eye for an eye', to proportionality, the most severe penalty for the most serious crime, and so that does not have to mean the death penalty.

Penny Boreham:
It's true to say, isn't it though, that sixty percent of people living in the world today still live in regimes where the death penalty is active. In your experience cross-culturally working, Barbara how, you obviously hold very dear this idea of these, these moral human rights as opposed to legal human rights. Am I right?

Prof. Barbara Hudson:
Yes.

Penny Boreham:
How do you find applying those in different cultures?

Prof. Barbara Hudson:
I would say as a citizen of a modern western country I could not possibly advocate the death penalty but what I am aware of is that in countries where the death penalty is enforced, and where it's defended from cultural or religious teachings, there are always dissident groups, human rights' activists, who equally are using the same culture, different interpretations of the same religion, to argue against the death penalty for murder, but I think in every culture, including of course Christianity, as we see in America and places here, you can argue for or against the death penalty from their own culture.

Penny Boreham:

Can I just throw open to you all, what do you all hold as a moral human right, I mean is there, is there a connection that you three can make?

Prof. Gary Slapper:
The fact and you ask, you know, what do we commonly identify together, I mean is very early in the story to do these things, that the rights that were expostulated in the Convention in Human Rights itself were largely reactive to the atrocities in, committed in Europe in the Second World War under the regimes of Hitler and Stalin, and people came away from that thinking that it'd be, it was an absolute necessity to be able to identify core values of humanity, which included the, you know, the rights to life, the right not to be subject to inhumanly degrading treatment, the freedom of expression, the right not to be victimised, and all of the things that we would regard as absolutely fundamental, and so when modern states link up with each other in this, you know, federation of various clubs of human rights, they take these as pre-conditions and so it's an expanding rather than a restricting part of the globe, and these things, the core values I think will expand over time.

Dr. Nigel Warburton:
It's interesting what Gary's saying because if you get back to capital punishment it doesn't follow from that that, that capital punishment is inhumane, I mean it doesn't, you know that seems to be something that can be debated because many people feel that it's inhumane to keep somebody in a prison for their entire life and they know that they're not going to get out, now that's, for me, would be a worse punishment than giving me a pill that I could take to kill me. So it doesn't, you know, you can say there's a natural right not to have inhumane treatment but then there's a further question is, in every case, capital punishment inhumane? Some people argue that knowing that you're going to die within a certain period of time makes it a particularly cruel kind of punishment, but I don't see that's worse than knowing you're never going to get out of this prison.

Penny Boreham:
What about the argument that it brutalises the society that sort of instates it in law?

Dr. Nigel Warburton:
Well I think there's a very important symbolic effect of judicial killing which is that it seems to legitimate a certain kind of retribution, saying the state, it's okay for the state to really take this vicious action against people who do wrong and it seems to be there's a risk, it seems to me, of contagion there, that other people think well, I'll take the law into my own hands, you know there's that paedophile, I know that person's a paedophile, he deserves to die, look the state says he deserves to die possibly, if he's committed a murder as well, I might as well take a short cut and do it because it's a long, expensive process otherwise, you know there could be all kinds of negative consequences, and I believe that what's wrong with capital punishment isn't that it's absolutely wrong, I think that it produces a worse state of affairs than most of the other alternatives available to us and it runs a risk, because it's irreversible, of punishing innocent people and never giving them another chance. The other aspect of it is you have to judge whether capital punishment actually is a deterrent against violent crimes.

Prof. Gary Slapper:
The empirical evidence that it is available and there's an absolute cornucopia of this now demonstrates that it has no discernible effect on deterring crime. You can turn to all sorts of different areas to look at this. People were being hanged in Tyburn, near Marble Arch in London, in the 19th century by the dozen, they were being strung up, you know ten in a row, and in the crowds were people committing the offences, pick-pocketing and theft, for which the people being hanged were being hanged. Crime did not diminish at any time during the savagery of the 18th and19th century regimes that you highlighted in the Bloody Code at the beginning.

Penny Boreham:
But these days people will use empirical evidence re deterrents to argue both ways.

Prof. Barbara Hudson:

Certainly the most quoted evidence is the United States and it's obviously very difficult because you can't know how many murders there'd if you reintroduced the death penalty or got rid of it. When there was a pause in the death penalty, in the late sixties and early seventies, there wasn't an appreciable rise in murders. The states that have the death penalty don't have lower murder rates than the states that do, there doesn't seem to be any effect but, as I say, you can't prove a negative, you can't prove what might have happened.

Dr. Nigel Warburton:
You can certainly prove that it doesn't eliminate murder, you know the fact that there's the death penalty in many states in America hasn't abolished murder.

Prof. Gary Slapper:
There are four hundred people on Death Row in Florida, people go on their holidays to Florida and one thing that they constantly see when they look up these things on websites is that Florida is a very high crime rate state and there are an awful lot of murders there, you've got four hundred people on Death Row, it has no discernible effect in that way.

Penny Boreham:
But should deterrents anyway be the argument that we use.

Prof. Barbara Hudson:
Not for me.

Penny Boreham:
Barbara, yes.

Prof. Barbara Hudson:
Not for me and I mean, going back to the human rights thing, I think in a lot of discussions about human rights most of the emphasis has been on rights so should education be a right, or should healthcare be a right, etcetera, etcetera, but I think for me what's important is the 'human'. For me all humans have rights and I think for a judicial system to be deciding that this murderer deserves to die whereas this one we can understand their reasons, and yes we don't condone it but it's not a murderer who'd be likely to murder again, I think this is, for me all humans, if human rights mean anything, have rights.

Prof. Gary Slapper:
Oscar Wilde once observed that the proper response should be clinical in most cases rather than penal. He observed that most people who commit crimes are either doing it out of poverty or desperation and are acting in a sort of fairly rational way, but the people who are just absolutely pathologically bad are not in traditional religious terminology evil, they're people who are clinically psychopathic and the appropriate civilised response to horrific wrongdoing of that sort will take place in a clinical context rather than a barbaric mediaeval one, in there are risky cases that people will be aware of, many of them in the United States where mentally, insufficient mentally retarded and ill people including, you know, mothers who drown four of their children, are electrocuted as an appropriate punishment and that, you know, by most modern stands is absolutely a shockingly atrocious and uncivilised way to respond to a tragic event.

Dr. Nigel Warburton:
I'd agree completely with what Gary's just said, I was going to try to bring in the psychiatric aspect of this. It seems to me that the more severe the crime the more likely there is some kind of causal explanation that has, you know, these people may have diminished responsibility for their actions and punishment presumably is supposed to rely on the sense that the person committing the crime was largely responsible for the action that they committed, they knew what they were doing, they intended the results, and so on, it wasn't an accident.

Penny Boreham:
If we go down that line, Nigel, though surely if you look more and more, I mean then everything can be given a sort of chemical explanation, can't it?

Dr. Nigel Warburton:
Well then therapy could be the answer for everybody who goes through the penal system, as Gary seemed to be suggesting almost, and when you go down that route rehabilitation becomes very important, and unless you've got some kind of exotic beliefs in an afterlife where everything will work out smoothly and you've got a chance to work off your, your crimes, you know, capital punishment doesn't allow for any rehabilitation, whereas every other kind of punishment does, even life imprisonment allows the person to come to terms with what they've done, and to understand it, and perhaps affect other people who are alongside them, and by that means perhaps minimise the chance of them committing that kind of crime.

Penny Boreham:
Now we're on this anniversary of forty years since the abolition of the death penalty for murder in the United Kingdom. I want to try and imagine forty years from now and where you think we might be, and what your concerns might be, or what you look forward to. Nigel Warburton.

Dr. Nigel Warburton:
I think there are two things that are going to be really important in the next forty years. First one, forensic science. Look, you're just going to be able to eliminate this argument about miscarriages of justice because with genetic science, massive surveillance going on, all kinds of other ways of corroborating evidence, we going to be, we're going to know who committed the crimes, so that argument that is always the risk that we're going to kill an innocent person is going to be less plausible in forty years' time than it is now, so that's one thing. So if anyone wants to defend the status quo of no death penalty they're going to have to have a better argument than that one. The other thing is with the, with the internet the level of debate is going to be much higher, people are going to actually be looking at the justifications for their gut instincts, and not just be asserting the view that I think capital punishment is wrong, it just feels wrong to me, or I think it's right, there's going to be a demand for a kind of intellectual underpinning there, but I think with the current situation it's quite difficult to get access to serious debate on this issue, won't be the case with the internet, because there's so much freely available educational material.

Penny Boreham:
Barbara.

Prof. Barbara Hudson:
As in most situations I think I have hopes and fears. My hope would be that we've become almost a planet without the death penalty. I hope that this human rights belonging to all humans is something which is spreading. My fear is that in many countries which are currently abolitionist, including the UK, we might well have brought back the death penalty and brought it back for a larger range of offences.

Penny Boreham:
There's quite a large proportion of people within the British Parliament as well who are pro the bringing back of capital punishment.

Prof. Barbara Hudson:
And the talk of David Cameron and the present opposition about repatriating criminal justice, opting out of the social chapter of the treaty, I mean there's a big movement to come out of Europe and I just worry that if that kind of pressure grows in different countries maybe Europe will feel that to preserve its economic club it's got to give way on these kind of social and moral issues, and I find that possible scenario a worry.

Penny Boreham:
Gary.

Prof. Gary Slapper:

There are two, you know, pretty clear paths along which humanity at large could tread over the next forty years. There are a number of significant regimes and cultures that are dedicated to capital punishment as an appropriate means of supporting their criminal justice systems, and they have what other parts of the world would regard as, you know, a vicious attitude towards humanity and one which is not helping to maintain law and order, but they are significant parts of the world and they may prevail.

The other pathway leads, in my view, to the beginnings of a much more, you know, civilised way of the world organising its affairs.

The next few pages of history are, of course, unwritten and so how humanity proceeds is a matter for its own choice.

Penny Boreham:
Okay. I'm going to have to stop you there but thank you very, very much Gary Slapper, Barbara Hudson and Nigel Warburton for joining us.