EXPLORING THE MANDATORY LIFE SENTENCE FOR MURDER

Barry Mitchell and Julian V Roberts

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FOREWORD

Ever since the abolition in 1965 of the death penalty for murder, the judiciary has persistently, but decorously urged Government and Parliament to reform both the law of murder and its mandatory penalty of life imprisonment. After pronouncements in numerous appellate cases, in which judges uniformally declared that reform could not properly be entertained in ad hoc decisions of courts in fact-specific appeals, the judicial disinclination to create a modernised law on culpable homicide has indicated the limits of the courts to reform the common law (as opposed to statutory criminal offences). Executive government is deafeningly silent. Thus there is a stalemate over reforming the law of murder, entrapped by the writings of Sir Edward Coke, four hundred years ago.

In 2004, the Law Commission, when reporting on the two partial defences of provocation and diminished responsibility referred to it, invited the Home Secretary (then the Minister responsible for criminal justice) to refer to it the whole subject of murder. Unfortunately, the ministerial response was hopelessly partial. The terms of reference to the Law Commission specifically precluded any review of the mandatory penalty, and furthermore restricted the remit by stating that there was to be no dismantling of the murder/manslaughter dichotomy. Given the straitjacket of the limited review, the Law Commission, in November 2006, produced a brave, but ultimately unavailing, attempt at clearing up what it aptly described as 'a mess'. It produced a three-tier classification, stripping off some cases from murder I into a lesser category of murder II (with an adjustment of the penalty from a mandatory life sentence to a maximum term of life imprisonment) and manslaughter in its present form. The Government rejected this solution of a three-tier substitute, and proceeded to amend, in the Coroners and Justice Act 2009, the law of provocation (introducing a stricter partial defence under the rubric of 'loss of self-control') and brought up-to-date psychiatric thinking in amending the partial defence of diminished responsibility. The new loss of self-control provision is itself a tortuous piece of legislation that puzzles judges, never mind confusing jurors.

As recently as 24 January 2011 (confirmed in the House of Lords on 9 March 2012) the Coalition Government announced in the House of Lords that it had no present plans to review the law of murder. And, apart from some minor adjustments to the provisions of Schedule 21 to the Criminal Justice Act 2003 (which set out the starting points for normal, mitigating and aggravating categories for the purpose of fixing the tariff for individual murderers before there can be any consideration of discharge from custody) no change in the law of

murder, or, more emphatically, its penalty, is envisaged. All this official bumbledom and patchwork activity by the legislature is neatly analysed by the authors. If none of it is strictly new, it is painfully true. What is pleasantly new is the authors' empirical evidence of what the public really wants.

The second half of the book turns to new material about the state of knowledge and opinion about murder – which the media maddeningly and indiscriminately use as a label when reporting any violent and unnatural killing. Helpfully, the authors demonstrate how opinion polls over recent years have predictably failed to provide an adequate test of levels of public support for the mandatory life sentence. This experimental study, however restricted in its scope, is the more welcome if only for replacing the crude instrument of opinion polls. When it comes to their handling of key methodological issues, the authors would seem to put aside their role as social scientists, when turning their attention to what politicians believe, and how they act upon public opinion.

The authors do not stop at demonstrating, from their invaluable empirical evidence, the real complexity about the present, inflexible sentencing of murderers to the mandatory life sentence, and, moreover, the significant difference between general and considered opinion. They seek to provide the answer to the ensuing questions: 'So what?' and 'What next?' Hence, their prescription for the future penalty for murder is a ternary classification – first (rarely imposed, 'in the most serious cases') of life imprisonment without the benefit of parole (which is 'whole life', currently under judicial challenge on the basis that it contravenes the ECHR); second, life imprisonment with reviewable discharge from custody at the end of the minimum term (being the tariff fixed by the court of trial); and third, fixed terms of imprisonment, the last portion of which would be served on licence in the community. Faced with a more complete picture of public opinion on these matters and the consequential intellectual acrobatics needed to fit a sentencing classification to it, legislators might reasonably consider the rather more straightforward alternative of dropping the mandatory element altogether. The authors believe, however, that their ternary classification would avoid the current potential for injustice and, at the same time, properly accommodate well-established principles of the courts in sentencing all offenders. They claim merit for their solution on the grounds that it stands 'some chance of adoption by Parliament and acceptance by legal practitioners'; although neither of these attitudes is subjected to substantiation by way of evidence or reasoned argument.

But to return to the key empirical findings from this novel and penetrating research: support for the existing law in terms of public opinion is nowhere as strong or consistent as many politicians believe. And where there are grounds for claiming public support, it turns out to be grounded on a misconception and ignorance of current practice and outcomes. The public, in evaluating time spent in custody by prisoners, is almost invariably unaware of the effects of the licensing system. The sentence is generally thought, misconceptually, to end when the minimum term has been spent. More significantly, for an eventual parsimonious solution to the present muddle, there is evidence of strong public support for

judicial discretion, even among those interviewed who believe that 'in general' judges are too lenient in passing sentence.

What happens next depends on whether politicians choose to react to a scientifically-derived description of public opinion, or one generalised by the media. Politicians should instinctively place reliance on the views of the judiciary, which is most closely involved in the administration of criminal justice, apart from having the practical experience of sentencing in cases of culpable homicide. In this extraordinarily taxing field of penal law, reliance on the wisdom of judges should not be seen by legislators as either a sign of weakness or of their incapacity to formulate sound systems of legal principle. Trial judges are effectively answerable to the appellate system for the sentencing of the individual offender for the instant criminal offence, as they do for every other criminal offence, including manslaughter and attempted murder.

Whenever it comes to bold and long-needed reform, Governments (of whatever political complexion) nowadays go in trepidation of the power of popular newspapers. Is it too much to ask of our policy-makers that they should hereafter pay less attention to the promptings of an unthinking media and rather more to the empirical evidence elicited by serious social science researchers, such as Professors Mitchell and Roberts?

Louis Blom-Cooper

ACKNOWLEDGEMENTS

The idea for this volume arose from a survey carried out in the summer of 2010 in England and Wales which examined public knowledge of, and attitudes towards, the mandatory sentence of life imprisonment for murder. The survey – the first of its sort either in this country or (as far as we are aware) elsewhere – cast serious doubts about the assumption that there is overwhelming public support for the current law. We would like to reiterate our thanks to various people who assisted and supported us in conducting that survey – to Nick Moon and colleagues at GfK/NOP and to the three-man Advisory Group – Professors Jeremy Horder (former Law Commissioner and now at King's College London) and Mike Hough (Birkbeck College London), and Mr Paul Mendelle QC – for their advice on methodological issues; to the armies of researchers who asked the survey questions and to the respondents who gave their time and goodwill by participating; and to the Nuffield Foundation for their generous funding of the survey.

In writing this volume we have been assisted by Mr George Mawhinney, postgraduate student in the Faculty of Law at the University of Oxford, in obtaining material relating to the sentencing of the most serious forms of homicide in other jurisdictions. In this regard, our thanks are also due to Ian Leader-Elliott, Emeritus Fellow, Faculty of Law, University of Adelaide, and to Professor Arieberg, Faculty of Law, Monash University. We have been assisted in obtaining useful statistical data by the National Offender Management Service at the Ministry of Justice.

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INTRODUCTION

Consider these four following criminal cases:

In 2008, a woman slipped into a hospital room where her severely disabled son lay comatose. She locked herself in the room for long enough to take his life. He had been hospitalised since suffering a tragic accident several years earlier.

Years earlier, a man finally acceded to the repeated wishes of his very seriously ill spouse, and took her life. She had been suffering for years from a terminal illness and was unable to take her own life.

The third case involved a man with a young daughter who suffered from a variety of debilitating illnesses which medical treatment had been unable to alleviate. Her father took her life in order to end her suffering.

Finally, Jim and Pete, two 16-year-old schoolboys, were walking home when they met Steve, also 16. Jim didn't like Steve, and they argued. A fight began, during which Jim pulled out a knife and stabbed Steve to death. Pete shouted to Jim 'Go on mate', but otherwise simply stood and watched, making no attempt to intervene. Jim and Pete were subsequently convicted of the murder of Steve.

Most people would probably regard these four people – the killers in the first three cases together with Pete in the fourth – as having performed an illegal act worthy of condemnation.[1] The first three were convicted of murder and sentenced to imprisonment for life,[2] and the fourth (Pete) could well be. But how many people would regard them as murderers? How many people would impose a sentence of life imprisonment which will end only at the death of the offender? All these cases arise because the law of murder in England and Wales defines these actions as murder and then imposes the same mandatory life sentence on all four offenders. These individuals will serve different periods in prison – reflecting their minimum terms – but all will carry the label of 'murderer' and the sentence of imprisonment for life for the remainder of their days. Are the interests of justice best served by these sentencing arrangements?

This book explores the mandatory life sentence in England and Wales, and its consequences for the offenders on whom this sentence is imposed.

[1] It is important to note that these three cases were not 'mercy killings' in the conventional or popular sense. The mother who took her own son's life did so despite medical opinion that he might recover at least some of his mental functions, and the daughter in the third case was not mortally ill – although she was subject to multiple disabilities and had been suffering from these for years.

[2] The first two cases occurred in England and Wales, the third in Canada, though the case would not be treated differently here. However, on these facts – taken from the Court of Appeal judgments in these three cases – the offenders would probably be sentenced to life imprisonment in all common law jurisdictions with the exception of the few where murder does not carry a mandatory life sentence.

OVERVIEW

What sentence is appropriate for offenders convicted of the most serious crime in the criminal calendar ? All offenders convicted of murder in this country are sentenced to life imprisonment, and the mandatory life sentence (hereafter MLS) is the focus of our research. We begin by describing the existing law, placing the sentencing provisions within a limited international context. This accomplished, we discuss findings from the first systematic empirical investigation of public knowledge of, and attitudes to sentencing murder.

THE ARGUMENT

Over the course of this volume we will advance the following arguments:

- The mandatory sentence of life imprisonment violates consensual and important sentencing principles of restraint and proportionality.
- Imposing the same sentence on all offenders convicted of murder results in mislabelling of crimes and offenders, and a loss of justice with respect to the most serious crimes.
- Sentencing arrangements should reflect the informed views of the community.[3]
- Retention of the mandatory life sentence has been justified by reference to the views of the public who, it has always been assumed, strongly support the MLS and oppose the use of any fixed-term alternatives but this representation of public opinion has never been tested empirically.
- Politicians and policy-makers have neglected to consider reform of the MLS out of concern for a public backlash if they are seen to propose alternatives to the MLS, or even to question the current sentencing arrangements.
- The public surveys to date which have posed questions about sentencing offenders convicted of murder have used an inappropriate methodology which misrepresents the true state of public opinion.
- Analysis of scientific public opinion evidence using a representative sample of the public and actual murder scenarios demonstrates that the public endorses a quite different sentencing model than that reflected in the current law of murder.
- The British public supports a model which would retain a life imprisonment sentence for the most serious cases of murder but which would replace the current MLS with long-term, definite sentences of custody for many less serious cases.

[3] By the word 'informed' we mean public opinion measured in an adequate manner – for example by asking the public to sentence in specific scenarios rather than asking them to punish categories of crime in the abstract (see Chapter 5 of this volume).