Murder under the Charter

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Only if the death penalty can be shown convincingly to be necessary to maintain a free democratic society should Parliament restore it

In 1984 Brian Mulroney declared that if his party were elected to office he would permit a free vote in Parliament on a government bill to reinstate the death penalty. It is likely that the Prime Minister gave little thought at the time to the prospect of having to carry through with this pledge. Nevertheless, with the Gallup polls showing that public opinion is firmly behind the call for reinstatement, the Progressive Conservative MP for Peterborough, Bill Domm, took it upon himself to remind his leader of the promise he made to the electorate all those months ago.

Mr. Domm's private members' bill, which proposed to reintroduce the death penalty for those convicted of premeditated or first degree murder, treason and sedition, emerged with nineteen others from a lottery of some 180 other bills for the consideration of Parliament. Although there was, in fact, no debate on the bill, this quirk of fate has helped to force Brian Mulroney's hand, and that of his Justice Minister John Crosbie, both of whom are on record as firm opponents of the reinstatement of capital punishment.

MPs get no more than seven hours debate on a private members' bill (a maximum of five hours on the second reading and only two hours on the third), and this is far short of the time required to reach a considered decision on such a serious matter. In 1976 MPs engaged in almost 100 hours of debate before abolishing the death penalty by a vote of 130-124. Since there could not be sufficient time to deal with the issue adequately, giving Domm's bill a hearing could not be presented by the government as fulfilment of its campaign promise. In any case, it was not, of course, a government bill.

One imagines that it was for this reason that John Crosbie was reported as saying in early April that the government has a rough idea about when it wants this issue dealt with and we'll be proceeding with our proposed solution sometime in the next few months. From this and later comments we can suppose that he is still prepared to deal with the issue by introducing a government bill on which the PC whips will be withdrawn and a free vote allowed.

If this should come to pass it will place Crosbie in the anomalous position of having to introduce a bill to which he is in all conscience opposed.

An objection to Domm's bill from a government point of view would anyway have been a clause designed to restrict seriously the ability of the federal cabinet (technically the Governor General in Council) to commute sentences.

The power to grant pardons has always been a jealously guarded prerogative of the executive. Section 686 of the Criminal Code provides that nothing in the Code is to be interpreted as limiting Her Majesty's royal prerogative of mercy. It was used to commute all the death sentences in Canada between 1962, when the last hanging took place in Toronto, and 1967, when the first five year moratorium on capital punishment began.

Should Crosbie introduce a government bill to amend the criminal code, it is certain that it will not contain any restrictions on the cabinet's prerogative to grant clemency. It should also be said that prior to abolition in 1976 "capital murder" included only the murdering of police officers and prison guards. Domm's bill significantly expanded this definition to include the murder of ordinary Canadian citizens. But whether "capital murder" is defined in the pre-1976 narrow sense or Domm's broader sense the terms of the debate are little affected.

Many of the arguments employed for and against the reinstatement of the death penalty involve moral and religious opinions of what is "right." Those for capital punishment have one set of scriptural texts to support their position; those who are opposed counter with another set and can add that the Churches in Canada are united in their opposition to the death penalty.

Those who believe that the death penalty is sanctioned by the principles of natural justice speak of placating the community's anger or upholding the notion that retribution, or vengeance pure and simple, provides society with sufficient justification for the taking of life. On the other side, opponents talk of the barbaric nature of the death penalty, a punishment they claim that ill-becomes a civilized country.

To the argument that the economic cost of maintaining a convicted killer in prison for a good part of his life cannot be justified, it is replied that executions involve a waste of human resources and that through rehabilitation even murderers can be made an asset to society.

As usual, however, much of the debate turns around the supposed deterrent effect of capital punishment. It was said that after witnessing several executions in eighteenth century London, Dr. Johnson was of the opinion that since pickpockets were at their most active in the crowds attending the execution of a fellow pickpocket, hanging did not deter this species of criminal. The deduction may have been accurate but it was certainly unscientific. Today the battle proceeds with both sides able to draw upon a wealth of statistical evidence.

Ever since criminologists began to compile data on criminal activities toward the end of Johnson's century, it has been thought that one way or another the issue of deterrence might be settled and with it the necessity of employing capital punishment. This has proven to be an illusive quest, but the popularity of capital punishment among the Canadian public, in the aftermath of a series of police slayings over the past few years, can be traced to belief in its
deterrent effect.

It is thought that our police officers will be better protected if the death penalty were to be reinstated. Yet numerous studies undertaken over the past twenty-five years in Canada and other countries do not settle the matter either way. When viewed strictly in terms of numbers, these studies manifestly indicate that the threat of death has had little if any influence on the number of murders committed in any one year, either of civilians or of police officers in the course of their duty.

In the United States, thirty-seven of which states today employ capital punishment, no noticeable decrease in murders has occurred after the death penalty was reinstated. Yet the general public still persists in the belief that capital punishment does have a deterrent effect.

David Chandler, whose book Capital Punishment in Canada is still the best study on the subject in the Canadian context, has a warning for politicians who base their views on capital punishment on the data of public opinion polls. After exhaustively analysing and comparing the statistics of capital offences committed during the five years before and after 1967, Chandler concludes: it is a matter of judgement and guesswork when the murky 'facts' of public opinion are subjected to quantitative analysis.

His message is clear: the public perception of the effectiveness of the death penalty in preventing murders is an unreliable guide for the drafting of legislation on capital punishment.

But the committed abolitionist will tell you that this has little bearing on the issue. What matters is the number of murders that would have been prevented if the culprits had faced the prospect of being punished by death instead of life imprisonment: and what matters in those countries where the death penalty is in operation is how many "potential" murderers are dissuaded by the threat of execution. No reliable statistics can be produced to shed light on this view of the issue and it is recognised by the advocates of capital punishment that arguments of this kind are based on an assumption.

But it is an assumption, they will tell you, which is a reasonable and logical one upon which to base a revision of the Criminal Code to reintroduce the death penalty. Opponents of this view generally reply that the assumption is only reasonable to "reasonable" people and that murderers rarely fall into this category, hence the prospect of death will not impede their actions.

Liberal Senator Earl Hastings, regretting it seems that the issue should have to deal with again, has been quoted as saying that since 1976 "nothing has changed. All the arguments are the same." And in many respects, of course, this is true. But there is at least one new element in the dispute. Through the Charter of Rights the opponents of reinstatement have been provided with an argument and a course of action that was not open to them prior to the 1982 patriation of the Constitution. Section 7 of the Charter guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The already notorious Section 1 provides the only limitation of the right to life: all rights contained in the Charter are guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It has been argued that the statements contained in Section 1 mean that before any limitation on our rights is justified (including the right to life) it must be necessary to the maintenance of "a free and democratic society." Hence the state's use of the law, whether it be to enforce morals or to impose punishment, can only be justified when there is a risk of harm to the society. When this is established the rights of the citizen take second place.

Would society be better protected if murderers were executed? If the provisions of the Charter are taken seriously, and one presumes they will be, the burden of proof as to the likely consequences of reinstating the death penalty lies with the advocates. The terms "demonstrably justified" imply that this is the correct reading—if individual rights, including the right to life, are to be infringed or usurped by the legislature, then proof has to be brought to support the view that society will be better protected by such action.

In view of the inconclusive nature of the statistical evidence, it is unlikely that those who support reinstatement can make good this requirement of the Charter. Moreover, we can be fairly certain that groups, such as Amnesty International, who have fought a long battle against capital punishment in countries around the world, will be prepared to challenge in the courts any legislation bringing back the death penalty. The Charter has supplanted them with a persuasive argument against the constitutionality of such legislation, that it involves an unnecessary violation of individual rights.

Nor is it open to legislators to circumvent the Charter as they could the old Bill of Rights. The latter was an ordinary piece of legislation, the provisions of which could be overridden by another statute simply by the inclusion of a "non-obstante" clause declaring the statute operative notwithstanding the Bill of Rights. This tactic is not available in the case of the Charter, which is entrenched in Canada's fundamental law and thus provided with special protection from ordinary acts of legislation.

Even if it were not for the Charter, one is inclined to argue that the demand that the state be given the power to take human life should be supported by very considerable evidence for its necessity. There is always the chance of judicial error in convicting and there is no remedy or compensation for the person who suffers the penalty of death. A recent study revealed that 343 persons have been wrongfully convicted of murder over the past 200 years by the courts of the United States. This should give the advocates of capital punishment reason to pause to give the matter further thought.

The current penalty for premeditated murder is twenty-five years with no parole (ten years for second degree murder). This is the alternative punishment the Canadian legislature substituted for death ten years ago. Is there any reason to suppose that in the intervening years society has suffered as a consequence of abolition? In a century that has witnessed the ravages of several major wars and the recent rise of terrorism, perhaps we can be forgiven if we have become insensitive to legally sanctioned killings, but let us at least have an informed discussion before our legislators decide whether or not to reintroduce what many today perceive to be a relic of barbarism. The government should fulfil its campaign pledge in a responsible manner.

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