

Reforming the Homicide Laws of England

Introduction:

“While crime is punished it yet increases. [Lat., Dumque
Punitur scelus, Crescit.]
- Seneca (Lucius Annaeus Seneca), Thyestes (XXXI)

The criminal justice system in the UK is not working. According to the British Crime Survey report for the last quarter of 2003, the percentage of violent crimes reduced by 5 percent during the year 2003 compared to the previous year but the percentage change between October to December of 2003 compared to a year earlier reflected a jump of 11%. The cost of locking up a prisoner for a year is £37,500, but recidivism is on the rise and prison populations are exploding¹, while people do not feel any safer on the streets. Statistics available for 2003-4 indicate that 5629 defendants were prosecuted for racist incidents, 738,000 “stop and searches” were organized in 2003-4 and 2605 homicides were recorded, with a total of 1.33 million notifiable offenses that took place². Minority groups have a higher representation as clients of the criminal justice system. Blacks form the highest percentage of the prison population (15%). General findings in criminal justice indicate a higher incidence of crime among people whose ages range from 14 to 25³. Reasons for the increasing populations of younger criminals in the U.K., especially the black minorities, are believed to be fuelled by the nature of the neighborhoods that they live in. Most neighborhoods which are stricken by poverty and where effective means for economic sustenance and the availability of

¹ “Alternatives to prison” [Online] Available at:
http://www.rethinking.org.uk/facts/docs/alternatives_to_prison.pdf; accessed 1/12/2006.

² “Statistics on race and the criminal justice system-2004.” [Online] Available at:
<http://www.homeoffice.gov.uk/rds/pdfs2/s95race02.pdf>; accessed 1/12/2006

³ “Murder in the U.K.” [Online] Available at:
<http://www.murderuk.com/criminology/black.htm>; accessed 1/12/2006.

jobs are low, people often turn to violent crime out of frustration and as a means to supplement and earn income, which sometimes leads to murder⁴. Similarly, mercy killings also present a peculiar problem from the perspective of enforcement of justice and the kind of punishment to be meted out, since such acts are not committed by hardened criminals .

The need for reform:

The Law Commission reported that courts were experiencing difficulties with the laws regarding murder and it has now been universally accepted that the provisions of the 1957 Homicide Act are inadequate to address the issue of murder and that the criminal justice system in this regard needs substantial reform⁵. A study was carried out by professor David Farrington of the University of Cambridge in association with Patrick Langan of the U.S. department of Justice in order to arrive at comparative estimates of crime and crime prevention in the United States and the U.K between 1981 to 1996⁶. The purpose of this study was to examine the effect of punishment and to determine whether it was a sufficient deterrent to crime or not. This study showed that USA and UK pursued different policies from 1981 to 1995. The United States followed a policy of vigorous imprisonment and longer sentences for criminal activity, especially murder. The study showed that while the murder rate in the United States was nearly six times higher than the U.K., the longer terms of imprisonment had actually caused the overall crime rates, including murder to drop.

In the case of the UK however, in 1981 the difference in murder rates between UK and US was 8.7 times but by 1996, it has reduced to 5.7 times. The UK pursued a different policy

⁴ Innes, Martin, 2003. Investigating Murder: Detective work and the police response to criminal homicide. Oxford University Press (Clarendon studies in criminology)

⁵ Dyer, Clare, 2005. Reforms may let young killers escape life in jail. The Guardian. Special report, December 21. [Online] Available at: <http://www.guardian.co.uk/crime/article/0,2763,1671835,00.html> accessed 1/12/

⁶ Langan, P. and Farrington, D. (1998). Crime and Justice in the United States and in England and Wales, 1981-96, Washington: US Department of Justice

from the United States during the period 1981 to 1996, wherein community sentences were preferred over imprisonment for punishment of criminal activity. During the same period, the U.K. showed a corresponding increase in crime, thereby reducing the percentage difference with the U.S. on murder rates. The study conducted by Dr Farrington and his associate discovered strong support in favor of the relationship that “links falling risk of punishment to rising crime.”⁷

In the U.K., the Criminal law Act of 1977 divides offenses into three categories, of which murder belongs to the category of offences triable only by indictment by the Crown Courts⁸. Since 1995, imprisonment rates in the UK have increased which has produced some reduction in crime rates. However, Sir Roger Toulson of the law Commission points out that most killers come from disturbed backgrounds and the law of diminished responsibility does not take this into account⁹. Decisions of crown courts are almost irreversible, because unless there is a point of law involved, they cannot even be appealed without the permission of the crown Court. According to the Criminal Justice Act of 2003, Section 148, a Crown court is not to pass a community sentence except as a last resort, if the seriousness of the crime merits it¹⁰.

The criminal justice system is also basically flawed in that it allows for magistrates to hear only a portion of taped evidence in order to arrive at a conviction. Interviewing has been acknowledged to be an important aspect of police investigations, however in some instances these interviews are used to secure a forcible admission from a suspected person rather than to

⁷ Langan and Farrington, *Ibid* n.6 at pp 32

⁸ Ashworth, Andrew, 2005. “Sentencing and Criminal Justice, 4th Edition. [Online] Available at: <http://www.cambridge.org/uk/catalogue/catalogue.asp?isbn=0521674050&ss=exc>; accessed 1/12/06

⁹ Dyer, *Ibid* n.5

¹⁰ Ashworth, *Ibid* n.8

uncover the evidence and true facts that surround the criminal activity¹¹. Moreover, tapes produced during hearings are increasingly being used as the basis for conviction. The police often provoke the suspects into saying something that exists in a different context but may be present in quite a different context in the Court through partial taped evidence provided, which results in incriminating statements that produce convictions in about 80% of the guilty pleas¹². Ashworth and Mitchell have also highlighted the crucial need for criminal law reform within the U.K. in order to address the imbalances in the system.¹³

Actus Reus and mens Rea:

According to Lord Bingham, the rising populations in prisons could also be the result of injustice caused by “the imprisonment of those for whom that penalty is not strictly necessary.”¹⁴ According to the Lord Chief Justice, “Today too few community sentences are imposed and too many and too long prison sentences are imposed. The consequences are doubly destructive of society.” The tendency to recidivism by inmates is increasing because it is fuelled and inflamed by the rampant injustice that they face in prisons, under the harshness of a sentence that is out of proportion to the crime and where they have not been treated fairly by being offered other options. Therefore, the ultimate purpose of law enforcement is defeated, i.e. to reduce crime.

Edward Coke first put forth the principle of, “*actus non facit reum nisi mens sit rea*” to determine guilt in the case of murder and this literally means “an act does not make a person

¹¹ Clark-Stapleton, Karen Lesley, No Date. “Injustices within the System: Is the System fundamentally flawed?” [Online] Available at: <http://www.portia.org/chapter13/KarenLCS/system.html>, accessed 1/12/06

¹² Clark-Stapleton, Ibid n.11

¹³ Ashworth, Andrew and Mitchell, Barry (2000) Rethinking English Homicide law. Oxford: Oxford University Press

¹⁴ Alternatives, Ibid, n.1

guilty unless the mind is also guilty.”¹⁵ In effect, what this means is that in order to conclusively prove the guilt of a murderer, it is necessary to show the proof of fault and culpability in both outward behavior and in the mind. When a conviction has been established on the basis of actus reus, it is then necessary to also establish concurrence with the mens rea.¹⁶ However, Duff has expressed reservations about the wisdom of relying solely on the cognitive concept of intention in selecting the worst kind of killing¹⁷. There is also a class of offences that are characterized as strict liability offenses, where the actus reus is sufficient to justify punishment without the need to establish the mens rea – this category of offences are generally the heinous, calculated murders. Fletcher argues that criminal homicide is a unique authority in that it represents a wrong done against a higher authority and therefore merits treatment as a strict liability offense.¹⁸

Actus reus of a crime is often judged within the context of its occurrence. For both common law and statutory offenses, a list of elements that comprise the offense need to be drawn up and the scope of these offences will be a matter of interpretation of the Courts by applying the relevant precedents from case law in conjunction with an interpretation of legislation, which provides for the nature of liability and punishments that are allowed for such offenses. In making such an interpretation, the judgments of courts may reflect the prevailing beliefs existing within a society at a particular time and its attitude towards the particular offense that has been committed. The context within which an offense occurs forms an important part of the sentencing. In judging the context of the outward act, courts will also take into consideration any omissions or negligence in determining the severity of

¹⁵ Coke, Edward. (1797) Institutes Part III, Chapter 1, folio 10

¹⁶ Allen, Michael (2005) “A textbook on Criminal law. Oxford: Oxford University Press.

¹⁷ Duff, R.A., 1990. Intention, Agency and Criminal Liability Oxford: Oxford University Press.

¹⁸ Fletcher, G.P., 1978. Rethinking Criminal Law Boston: Massachusetts, ch 5

the sentence¹⁹. For example, in the case of *R v Dytham*²⁰, a police officer who was off duty, stood by and watched passively as a man was beaten to death outside a nightclub. He was convicted of willful misconduct in public office and as Widgery, CJ put it, “The allegation was not one of mere non feasance but of deliberate failure and willful neglect.”²¹ In this case therefore, the context within which the criminal negligence occurred was an indication of the officer’s mens rea or inner state of mind, which indicated a lack of duty of care. Therefore the defendant was held to be criminally liable for the death of the man, mainly because of the context within which the omission occurred – the fact that he was a law enforcement officer and that the victim had died.

The importance of context as a factor that helps to determine mens rea may also be noted for example in the case of mercy killings vis a vis withdrawal of treatment. In the case of *Re C*²², a person diagnosed as schizophrenic, refused to allow his gangrene foot to be amputated which led to his death. In spite of the patient’s defective mental condition, it was established in this case that he did clearly understand the benefits of the life saving amputation and yet chose to disregard it, therefore the doctor was not held liable. In the case of *Airedale National health Service trust v Bland*²³, treatment was withdrawn by the doctor to a patient who had survived like a vegetable for three years, but he was not held criminally liable. However, those doctors who engage in euthanasia have been deemed to deserve lifetime imprisonment and Lord Goff spelt out this distinction in the case of *Airedale v Bland* as follows:

¹⁹ Innes, Martin, 2003. *Investigating Murder: Detective work and the police response to criminal homicide.* Oxford University Press (Clarendon studies in criminology)

²⁰ *R v Dytham* (1979) QB 722

²¹ *R v Dytham*, Ibid n.19

²² *Re C (Adult: refusal of treatment)*(1994) 1 WLR 290

²³ *Airedale National health Service trust v Bland* (1993)AC 789

“The law draws a crucial distinction between cases in which a doctor decides not to provide..... treatment.... and those in which he decides.... actively to bring his patient's life to an end.” Lord Goff dismissed the humanitarian desire to end suffering as being inadequate justification for the taking of life²⁴.

Mens rea therefore forms a very important part of the motivation for a crime which must be inferred from the context within which the actus reus occurs. When the actus reus has occurred involuntarily, or as an act of self defense, or without a cold blooded intention to cause death, the imposition of a sentence of life imprisonment or the minimum sentence that currently exists in the UK of 15 years, has been argued to be an unduly harsh sentence, which is only likely to produce more hardened criminals. One classic example that may be cited is the case of the abused or mentally disordered person who is pushed into an evil act due to the circumstances in his life that have shaped his actions. While there is no doubt the act of murder should be punished, the moot point is, should a uniform standard be applied to all kinds of murder – whether cold blooded and intentional or inadvertent?

The ladder system:

Guidelines have been issued in November 2005, whereby a person, who has been convicted of manslaughter for which the least term of imprisonment is three years, may be able to avoid a prison sentence altogether if it can be established that his actions were the result of extreme provocation.²⁵ Provisional murder reform proposals put forward by the Law

²⁴ Airedale, Ibid n.23

²⁵ Rozenberg, Joshua (2005). Murder law reforms ‘will restrict life terms’ The Telegraph. December 20. [Online] Available at: <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/12/20/nlaw20.xml&sSheet=/news/2005/12/20/ixnewstop.html>

Reform Commission include the creation of a new framework of first degree and second degree murders with a refined definition of manslaughter²⁶.

The basis upon which this ladder system of murder is designed is that it is only the most serious offences of murder that merit lifetime imprisonment. It is only in cold blooded, intentional murders that the actus reus will be found to match the mens rea and be deserving of such stiff punishment²⁷. But when the mens rea does not match the actus reus, the offender may not have set out on his dastardly act with a concurrent mental framework to kill, thereby reducing culpability for the crime. Moreover, when crimes have been committed out of desperation or out of some disturbed mental framework caused by abuse or poverty, it is believed that some mitigation of sentencing is in order. In fact, mentally disturbed killers for example, are likely to benefit more from treatment rather than imprisonment and their sentences need to be modified accordingly, so that they can accept the punishment for their crime while also receiving treatment for the causal factors that led to the crime in the first place.

Is the ladder system the right course of action to follow?

Undoubtedly, a uniform standard cannot be applied to all crimes. The mens rea is different in every instance, just as the actus reus is also different. However, when imprisonment has been applied for the crime of murder, the minimum term of imprisonment currently available is 15 years. The existing criminal justice system is drastically in need of reform. However, the question is whether the present reforms that have been mooted are likely to achieve the desired ends. In arriving at a decision on this issue, two important factors

²⁶ Sturcke, James, 2005. Murder law reform plans revealed The Guardian, December 20. [Online] Available at: <http://www.guardian.co.uk/crime/article/0,2763,1671425,00.html>

²⁷ Fletcher, Ibid n. 18

need to be borne in mind (a) punishment inhibits crime as demonstrated in the study by Dr Farrington and Langan and therefore reducing punishment is not necessarily going to reduce crime, on the contrary it may increase crime as was the case between 1981 to 1995; (b) Murder rates are likely to shoot up once criminals realize that sentences will be mitigated if they can establish a mens rea different from the actus reus.

In the words of attorney general Dominic Grieve, "...we feel the taking of human life by murder is an extremely serious matter and that the usual sentence should be one of life imprisonment in such cases. We would need to be persuaded as to what exceptional categories should exist that would justify a life sentence not being passed."²⁸ (www.politics.co.uk, Dec 20). The new reform proposals pose a serious threat, because the mitigation of punishment conveys a wrong message to criminals about society's reaction to violence. While sentencing can certainly be decided in proportion to the severity of the crime, the designation of murders occurring as a result of violence – whether intended or unintended – as second tier murders deserving of less punishment sends out a clear message that violence is acceptable and death occurring out of it will not be so severely punished.

The current system that exists does have provision for judges to exercise their discretion in determining sentencing for murder. Baroness Scotland, in rejecting the Law Commission's proposals, stated the existing position as follows: "the Courts retain full flexibility to deal with the wide variation in individual cases."²⁹ In order to reduce crime in society, it is vital that the law and the judicial system send out a clear message about the non acceptability of violence and murder. The minimum period of sentence of 15 years must be

²⁸ [Murder law shake up unveiled](http://www.politics.co.uk/domestic-policy/murder-law-shake-up-unveiled-$15118782.htm) December 20. [Online] Available at: [http://www.politics.co.uk/domestic-policy/murder-law-shake-up-unveiled-\\$15118782.htm](http://www.politics.co.uk/domestic-policy/murder-law-shake-up-unveiled-$15118782.htm); accessed 1/12/2006

²⁹ [Murder law shake up unveiled](http://www.politics.co.uk/domestic-policy/murder-law-shake-up-unveiled-$15118782.htm) December 20. [Online] Available at: [http://www.politics.co.uk/domestic-policy/murder-law-shake-up-unveiled-\\$15118782.htm](http://www.politics.co.uk/domestic-policy/murder-law-shake-up-unveiled-$15118782.htm); accessed 1/12/2006

retained, however judges can be imbued with additional powers through legislation to determine the duration of the sentence upwards from 15 years to a life sentence, while taking into consideration the particular circumstances in individual cases. But the minimum sentence period should be made mandatory, unless extenuating circumstances exist, such as self defense. The fact that offenders are young cannot be a justification to condone the crime of murder by a lesser sentence. Exclusions can be determined and included with new legislation, however the reduction of punishment must be in accordance with the severity of the crime. Murder is a heinous crime and no circumstances could justify condoning taking another's life. A minimum sentence of at least 15 years is mandatory with the flexibility existing in judicial discretion rather than law.

Let the punishment be equal with the offence. [Lat., Noxiae
Poena par esto.]
- Cicero (Marcus Tullius Cicero), De Legibus (bk. III, 20)

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