Forensic psychiatry symposium

The mandatory sentence and Section 2

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Author's abstract

Sentencing in homicide depends on how psychiatrists view the issues of Section 2. In most killings that do not involve clear-cut mental disorder, strong emotions and stress play a part. Both can be cited in aid of diminished responsibility. If doctors cite them, however tentatively, it becomes feasible for the court to review any mitigating factors and to choose an appropriate penalty. Otherwise, the mandatory penalty is imposed. Thus doctors, by opining not on the medical but on the legal and moral aspects of Section 2, decide who shall automatically get a life sentence and who shall not. Anomaly and injustice are the results. They would be remedied by the abolition of the mandatory sentence for murder.

I have been asked to talk about the anomalies in Section 2 of the Homicide Act, 1957; and of course the fundamental anomaly is the very existence of the Section. It exists only to provide a means of escape from the mandatory penalty for murder. If we could get rid of that, we could get rid of the diminished defence, and of the provocation one too. Murder could then be treated like every other crime. A jury could determine whether it had been committed, and a judge, having heard the evidence and the mitigation, including any psychiatric material, could decide what sentence was appropriate. Diminished responsibility could be laid to rest.

But for the time being, we have to live with it, and its cause, the mandatory penalty. So perhaps I should begin with that, the greatest anomaly of all. We have it as the result of a historical accident (because murder remained capital long after other offences did) and there seems little prospect of getting rid of it. Presumably this is because politicians believe that anyone who proposes this course would be regarded as 'going soft' on, and thereby encouraging, murder. It is certainly interesting and depressing that despite a series of major and well argued reports (1) favouring abolition – Butler, the Advisory Council, and the Law

Commission – there seems to be very little interest in the idea in Parliament.

So what are the arguments in favour of the mandatory sentence? Its defenders maintain that it represents a unique and therefore uniquely deterrent penalty. But it has I think been impossible to sustain this argument ever since the news got out that mandatory life imprisonment does not mean mandatory imprisonment for life. The public who are to be deterred from murder know that life means something like eight or nine years. Such a sentence is not widely regarded as uniquely terrifying or deterrent, even if Home Office statisticians do periodically issue bulletins to remind us that some murderers serve a lot longer.

The second major argument for the mandatory sentence is perhaps more serious. It is argued that judges cannot at the time of sentencing a murderer predict when it will be safe to release him or her. Therefore, the argument goes, an indeterminate sentence should be given in each case, so that the experts can then decide when each person is safe for release.

This argument has really been demolished, as Butler pointed out, by the fact that the most unpredictable group of killers, the mentally disordered diminished responsibility cases, are not subject to a mandatory indeterminate sentence. In respect of these offenders the judges are free to decide when indeterminacy is or is not needed; and there has been no dissatisfaction with, or questioning of, the way they have for the past 25 years carried out this task. If we are content to let the judiciary decide when mentally abnormal murderers need indeterminate sentences, we can hardly argue that they should not do the same in normal cases.

The argument in favour of giving the judges discretion in sentencing murderers has been increased further, I think, by the recent changes in arrangements for the release of life prisoners (2). These were announced at the end of 1983. Under them, the Home Secretary will within the first three years of every lifer's sentence, obtain from the Lord Chief Justice and the trial judge, their view of how long the prisoner should serve in order to satisfy 'the requirements of retribution and deterrence'. The prisoner will then be told that his first local parole review will start three

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years before that date. So he, and everybody else, will know how much time the judiciary thought the offence merited. The function of the parole board will then be to determine, when the allotted date approaches, whether the prisoner can be safely released, or whether in the interests of public safety he should be held longer. In the words of the Home Secretary's statement 'The parole board will concentrate on risk; the judiciary will advise on retribution and deterrence'.

Thus what we now have, in effect, is the judiciary giving determinate sentences to lifers, and the parole board having the power to delay release beyond the date given, on the grounds of risk to the public. The sentencing role that was performed by the parole board under the old system has been handed over to the judiciary, where it certainly more properly belongs. But as far as homicide is concerned the Home Secretary has failed to take this process to its logical conclusion. This would have been to abolish the mandatory sentence for murder, and to give to the judiciary in homicide cases the same sentencing freedom as they have in all others. The judge himself would then be able to decide when an indeterminate sentence was necessary.

Does it matter that the Home Secretary has failed to take this step? I think it does. In the first place, under this system judges are sentencing, but doing it in secret instead of openly. That is undesirable: why should we not know what tariffs are being used in different types of murder cases? But it is especially undesirable for the offender, because he is given a minimum sentence length – a parole review date set at, say, 10 or 14 years – and he cannot appeal against it.

Secondly, it will be impossible for the judiciary to develop a consistent and equitable tariff for lifers who have committed homicide, so long as this crime continues to be divided by the special defences into murder and manslaughter. For the thing that distinguishes the offenders on one side of this division from those on the other may relate not to their offences, but to their psychiatrists. Yet the tariff for those on the murder side is bound to be higher.

Thirdly, if from the point of view of public safety some murderers do not need indeterminate sentences, then they should not be imposed. Enough is known about the disadvantages of indeterminacy for us to know that it should not be used unnecessarily. In diminished cases judges consider indeterminacy to be unnecessary in some 40 per cent of cases. In the last three years for which figures are available (1981–3), 40 per cent of men and 54 per cent of women convicted of Section 2 manslaughter were given sentences other than hospital orders and life imprisonment. It is therefore likely that the proportion of determinate sentences given in ordinary murder cases would be at least as high, and probably much higher.

By leaving the law relating to murder untouched, the Home Secretary has ensured that the achievement of appropriate sentencing in homicide will remain dependent on the willingness of lawyers and

psychiatrists to engage in efforts to circumvent the mandatory penalty. This is not just undesirable: it is unfair, because psychiatrists take very different views about Section 2.

Here, I exclude one area where there is a large measure of agreement; namely that frankly psychotic people should not be convicted of murder, but should go to hospital. The area where differences of approach occur, and matter, is in the middle ground, for example in the cases of people who are emotionally disturbed, who are not candidates for hospital orders, and where the circumstances of the offence do not give rise to fears about repetition. Here the fact that one psychiatrist's murderer is another's Section 2 becomes of critical importance. For it is only through the Section 2 process that the judge is enabled to use his sentencing discretion. When such cases are dealt with as diminished, the majority get sentences of five years or less. But if Section 2 is not raised, life imprisonment is mandatory.

In my research sample, and indeed subsequently, I came across cases of this sort that were so like each other as to be almost identical; in some the Section 2 defence was apparently never mooted by the defence, in others it was raised successfully. The latter group got short sentences, the others got life. Thus sentencing parity in homicide comes to depend on parity among defence lawyers and psychiatrists in their attitude to Section 2. And that we do not have.

Perhaps I may illustrate this with an example. The defendant was a youth who had been brought up in Northern Ireland. He came from a good background, and there was no history of deviance, maladjustment or psychiatric disorder of any kind. He killed, with some premeditation, a person whose behaviour was causing much unhappiness in the family.

The psychiatric reports from the prison doctor, from the independent psychiatrist and from the defence were very similar; all gave the same account of the youth and his background, all noted the absence of mental disorder, and all mentioned the relevance of the fact that he had grown up in a society where violence was an everyday response to conflict. However, it was only the defence psychiatrist who suggested that these facts added up to a defence under Section 2. He said that because of his constant exposure to sectarian violence, the boy had not yet attained a mature regard for the sanctity of life; and that this constituted a 'significant abnormality . . . amounting to an incomplete development of the moral aspects of the mind'. Since the other doctors did not consider that Section 2 applied, the case went to a jury, which brought in a verdict of manslaughter.

The point I want to make here is not, of course, about whether one set of doctors was right or wrong, but about the arbitrary and therefore irrational nature of the system. The facts, the psychiatric findings and the mitigating circumstances of this case were not disputed. The judge evidently thought they merited a three-year sentence. But he would have had to impose

life imprisonment, but for a chance happening. Namely that one unusually minded psychiatrist came onto the scene and thought that it was worth trying to free the judge from his sentencing fetters. Only by courtesy of that initiative was the judge empowered to give the sentence he thought right.

The case demonstrates another major anomaly about Section 2. The mandatory sentence can only be circumvented with the help of psychiatrists, but the help they give may have nothing at all to do with psychiatry. In this case for example, there was no disagreement about psychiatric matters, nor about the social background. The disagreement was about whether the agreed findings of all the doctors could amount to a defence under Section 2. And that, as Butler and others have pointed out, is a legal or, more accurately, a moral question; certainly not a psychiatric one.

It is of course true that psychiatrists do not *have* to testify or report on the moral aspects of Section 2. In their reports, they could describe and discuss the mental state of the offender, but refrain from commenting on whether they thought his responsibility to be substantially impaired. It would then be for the defence lawyers to draw their own legal and moral conclusions from the psychiatric data, and to decide whether to raise the Section 2 defence.

In practice however, things happen the other way round. The defence will not raise Section 2 unless they have received the green light on its moral aspects from one and preferably two psychiatrists. In my sample of two years' cases (3) in which the defence was raised, there was not I think one in which the defence lawyers were without a pre-trial report in which a psychiatrist said he thought responsibility was substantially diminished. So in practice it is the doctors who decide whether the defence can be attempted. And what they decide is the non-psychiatric question of whether the defendant should be given the chance of sanctuary from the mandatory sentence.

The arbitrary nature of decisions like this does not need to be stressed. In my study I looked, among other things, at cases where doctors disagreed with each other in court on the issue of diminished responsibility. I found that in over half of them, the disagreement was on the moral and not on the psychiatric aspects of the case. In other words, the doctors agreed on the mental abnormality, but disagreed on whether it added up to a defence under Section 2. In one case, the defendant was described by two psychiatrists in almost identical terms, as suffering from hysterical psychopathy. One of them went on to say 'I see no indication to raise a consideration of diminished responsibility', while the other wrote 'I would be prepared to say that his responsibility was substantially diminished'. There were even cases where the doctors agreed on the presence of the same abnormality of mind, and that it impaired responsibility, but then disagreed as to whether the impairment was substantial. For example, a brain-damaged psychopath who killed in the course

of a robbery was regarded by the defence as being substantially diminished, whereas the prison medical officer thought that responsibility was diminished, but not substantially.

What the doctors in these cases were really disagreeing about, was whether the mentally disordered people concerned *deserved* to escape the mandatory sentence. Another set of cases was the obverse of this coin. These were the cases where the defendant was so deserving that it made up for the total absence of mental disorder. I refer to the cases of family mercy killing: people who killed a loved member of their family in order to put an end to suffering. Here not only the defence and the doctors, but the judge and prosecution, are anxious to avoid the mandatory sentence. In my sample, there were cases where the doctors were unable to find any signs of disorder in such defendants, but where they nevertheless unanimously reported that they inferred from the circumstances that abnormality must have been present at the time of the offence. The prosecution and judge were glad to accept such reports without challenge, so that appropriate sentences could be imposed.

Thus sentencing in homicide comes to depend on how psychiatrists view the issues of Section 2. In most killings, strong emotions, unhappiness and stress play a part. All can be cited in aid of Section 2. If a doctor cites them, then – however tentative his language – he gives the court the opportunity to consider mitigating factors. If he does not, life imprisonment is mandatory. Whether by commission or by omission, his role is decisive.

If we are talking of anomaly, could there be one more bizarre, than for medical people to have been manoeuvred into performing this sentencing function? And recently the story has taken another twist. Now it is not only sentences, but also parole that is determined by the attitudes psychiatrists take on Section 2. You may remember that the Home Secretary announced to the Conservative Party Conference in 1983 that he would in future use his discretion in the matter of parole to ensure that certain types of murderer would normally spend at least twenty years in custody. Among the people in this category, he named the sexual and sadistic murderers of children. Now this is a type of homicide which quite often leads to convictions under Section 2. But whether the conviction is for diminished responsibility manslaughter, or for murder, the sentence is frequently life imprisonment. Since 1983, lifers of this sort who are convicted of murder will not be considered for parole until they have served 20 years; whereas those convicted of manslaughter under Section 2 will be considered in the normal way.

I have talked about differences of view among doctors on Section 2. But one of the remarkable aspects of the way the Section operates in practice, is how seldom these emerge in public. In defence of the present law it could be argued, I suppose, that as long

as the question of diminished responsibility is raised in every conceivable murder case, then juries, representing the public interest, can decide the morality issue for us in each case. But that is not what happens. In the great majority of cases, the diminished responsibility question is decided privately between doctors, prosecution and judges: juries are not involved. Cases like Sutcliffe and Nilssen are exceptional. In my sample of two years' cases (1976 and 1977), I found that in over 80 per cent of murder proceedings in which the Section 2 defence was raised, the prosecution and judge were prepared on the basis of the medical reports to accept a plea of guilty; no jury was required.

In 13 per cent of cases in the sample, a trial took place because medical opinion was divided on the question of whether Section 2 applied. In half of these cases the disagreement was about psychiatric questions – for example, whether a defendant's unhappiness about marital desertion could be characterised as depression. In the other half of cases, the disagreement was on the moral issue which I referred to earlier. Overall, when doctors disagreed, the jury convicted of murder in just half the cases.

There was a handful of cases – only three in my two years' survey – where trial by jury took place even though the medical reports all supported diminished responsibility. These were cases where either the judge or the prosecution thought it right that a jury should decide the issue, despite the unanimous medical view. One might call them the Peter Sutcliffe kind of cases (though the sample was taken before Sutcliffe). In one of them, the doctors had expressed themselves rather hesitantly in their reports, and the judge said he was unwilling to accept a plea; he thought a jury should decide. In the two other cases, the Director of Public Prosecutions (DPP) suspected that the defendants had successfully misled the doctors. Both cases turned on whether the defendants were to be regarded as psychopathic and diminished (which was the medical view) or simply as guilty of murder. The jury decided on murder.

Now obviously if juries are brought into these cases, they will, as is their privilege, make their decisions in their own way. In the days of the death penalty, the jury's mind would have concentrated less on the law than on whether the defendant should be hanged. Today, though life is no longer at stake, the process is similar. The jury's verdict, ostensibly made in response to expert psychiatric and legal argument, will essentially be about whether the defendant is seen as deserving or not. So in the rare cases they are asked to decide, juries tend to convict unpleasant psychopaths of murder, whereas family men and unhappy lovers get Section 2 and the possibility of shortish sentences.

Finally, there is one other small group of cases that went to trial that I think is worth a mention, because they represent one of Section 2's worst anomalies. It is

an anomaly that I think may also be the reason why the defence is sometimes not raised, even though the doctors say that it applies. Because of the mandatory sentence for murder, peculiar difficulties face the mentally disordered person who is charged with murder but denies any connection with the crime – for example, because he has an alibi. His position is unlike that of a mentally disordered defendant in any other case. A mentally ill man who denies a charge of attempted murder, for example, can plead not guilty and then wait to see whether the prosecution can prove him otherwise. If he is convicted, he can then produce medical evidence about his illness, and the judge will sentence him taking this into account. But the mentally ill man charged with a murder he denies cannot wait until after the verdict before revealing his disorder. If he wants to raise the issue of diminished responsibility, he has to do so before the jury that is to decide whether or not he killed. The law forces him into an impossible dilemma. He needs to persuade the jury that he has had no connection with the offence, yet his case will obviously be undermined if he has at the same time to persuade them that he is seriously mentally ill. If he says nothing about his mental illness before the verdict, he cannot raise the issue of diminished responsibility after it; should the jury find him guilty, he will be convicted of murder and receive the mandatory sentence of life imprisonment, however ill he may be.

The problems of these defendants, like the problems in the other areas I have discussed, would be remedied if the mandatory sentence and diminished responsibility defence were abolished. Until then, anomaly and injustice will continue to dominate criminal proceedings for homicide.

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