

COMMENTARY

CAPITAL PUNISHMENT

A Review of the Fraser Report

By Pamela E. Benka-Coker

The incidence of violent crime in Jamaica has increased dramatically over the last twenty years. Concomitantly, so has the incidence of murder. In fact, the provisions of Section 13 of the Constitution of Jamaica, which seek to protect our right to "life, liberty, security of the person, enjoyment of property and the protection of the Law" have been eroded by the criminal element among us who terrorize us night and day, who send us scurrying for safety behind our grilled cages by dusk while they roam free, and who by their very numbers have so undermined the forces of law and order as to drastically reduce their effectiveness and ability to protect the rights of our citizens as enshrined in the Constitution.

It is against this background that the writer seeks to analyze the proposals made in the Fraser Report, its recommendations for changes in our penal systems as they relate to capital punishment and to consider their feasibility in the light of the prevailing social conditions.

On conviction of the offence of murder the sentence prescribed by the law is death. So states Section 3 of the Offences Against the Person Act. In Jamaica, the execution is carried out by process of hanging. Over the past ten to twenty years, a very vocal minority within our midst has been agitating for the abolition of capital punishment. However, as shown by the recent poll conducted by Professor Carl Stone, the silent majority favours the retention of the sentence of death on conviction for the offence of murder.

In 1979, the then Minister of Justice, the Honourable Carl Rattray, Q.C., nominated a committee to consider death as a penalty for murder in Jamaica. In the light of the renewed public interest in the subject, and the revived calls for the abolition of the death penalty, the writer considered it apposite to examine the findings of the

Fraser Report. Incidentally, this report has never been formally adopted by the Jamaican parliament.

The committee, which was mandated to look into the question of capital punishment, was headed by the late Mr. H. Aubrey Fraser, the eminent West Indian jurist and scholar. Its terms of reference were "to consider and report within a period of 18 months whether liability under the Criminal Law in Jamaica to suffer death as a penalty for murder should be abolished, limited or modified and if so, to what extent, by what means and or how long and under what conditions persons who would otherwise have been made to suffer capital punishment should be detained and what changes in the existing law and penal system would be required."

The committee based its findings on four principal areas of enquiry:

- (a) Research conducted by the research director and his team;
- (b) Submissions made during public and private sittings;
- (c) An extensive body of material sent in by individuals and published material which was made available to the members;
- (d) A visit to the condemned cells during which members inspected the facilities and spoke with the condemned men. The committee also included in their study a sample of 40 men who were under sentence of death. They also examined the patterns of murder during the past 20 years, and examined and assessed the statistics of murder over the period 1960-1978.

In short, the committee did an in-depth and comprehensive study of the rates of murders committed in the society, the socio-economic background from which con-

victed murderers originated, the circumstances which caused or contributed to the commission of the offence of murder, the conditions under which condemned men were incarcerated and indeed considered all relevant data available to it to assist it in arriving at its findings as charged by its terms of reference.

In making its recommendations the committee prefaced its findings with the following observation: "The evidence led by the committee has shown that a proposal that capital punishment be wholly abolished in Jamaica could not now be generally acceptable to the Jamaican public having regard to the violent crimes perpetrated in the society." The writer thinks it pertinent to comment here that this is still the case in 1989. There has been no perceptible change in the attitude of the Jamaican public with regard to the abolition of capital punishment, nor has there been any decline in the rate of violent crime.

Having introduced its findings with the statement quoted above, set out below is a summary of the committee's findings numbered sequentially. The writer will also comment on each recommendation made by the committee. It must be noted here that the members of the committee were in favour of the total abolition of capital punishment, but made the following recommendations for its partial abolition in the light of the majority of the members of the Jamaican public being in favour of capital punishment, and in the light of the high incidence of violent crime in the society. The committee was also of the opinion that the entire question of penal reform should be undertaken as a comprehensive project in order to produce the most efficacious results.

The interim measures proposed were:

1. All the sentences of death imposed prior to December 31, 1980, which was the date originally prescribed for submitting the committee's report, or alternatively, prior to March 31, 1981, to which that time was extended, should be statutorily commuted to sentences of life imprisonment.
2. As an interim measure for a period of five years the circumstances under which capital punishment is imposed as a penalty for murder should be modified so as to statutorily retain that form of punishment with respect only to the offence of murder committed by use of a firearm or explosives.
3. A sentence of capital punishment should be imposed only on the accused person or persons who actually used or possessed the firearm or explosive and should not be imposed on unarmed accomplices.
4. A statutory fund, with necessary regulations, should be established forthwith for the purpose of provid-

ing compensation to the dependents of the victims of homicide.

5. All persons committed to prison for any period, including life imprisonment, for the offence of murder should be required to work in a productive capacity for a specified period of their sentence in order to contribute to any compensation which may be awarded to the dependents of the victim of murder.
6. A committee should be established as early as possible to undertake, as a matter of urgency, a thoroughgoing investigation into the regulation, management, maintenance and operations of all the penal institutions and associated agencies with a view to re-organizing them, specifically to provide wherever possible for useful and gainful occupation, productive and remunerative work of economic value, and for the rehabilitation of the prisoners with a view to facilitating the re-absorption of prisoners into the national labour force and, possibly, reducing the incidence of recidivism.
7. In the event the foregoing recommendations, or any of them, are implemented, parliament should reconsider the whole question of capital punishment in five years' time in order to ascertain:
 - (a) Whether or not partial abolition as hereby recommended has affected the incidence of murder in the society; and
 - (b) Whether or not total abolition of capital punishment is at that time more generally acceptable by the public.

The proposal in (1) was clearly motivated by humanitarian considerations. The problem here is that those who were sentenced to death prior to the cut-off date of reprieve, namely March 31, 1981, would secure a clear advantage over those persons sentenced to death after March 31, 1981 and who were found guilty of having committed murder by the use of a firearm or explosive. This would mean that the convicted murderer sentenced prior to March 31, 1981 but who had used a gun or explosive to commit the murder would definitely be better off than the person convicted of murder with the use of a firearm or explosive after March 31, 1981. One would survive, the other would be hanged. This comment is made by preempting the proposals made in (2).

The proposal in (2) whereby for a period of five years the sentence of death would be imposed against those convicted of murder in which a firearm or explosive is used is illogical. Many vicious murders are committed by the

use of other offensive weapons or even inoffensive weapons. Why single out the murder committed by the use of a firearm or explosive? The writer sees no sound reasoning behind this distinction.

The writer does not pretend to understand the rationale behind the recommendation in paragraph (3). Is the committee saying that only the person who pulled the trigger or ignited the explosive should be sentenced to death? If so, are the long-established rules of law as they relate to principals in a crime and as so lucidly set out in the Judgements in the Supreme Court Criminal Appeals Nos. 22, 23, 24 of 1980, *R. v Beverley Champagnie et al.* to be altered so as to exclude those who plan the crime or those who may be present at the crime, aiding and abetting it, but who do not actually effect the killing by pulling the trigger or igniting the explosive? If this is what this paragraph recommends then one would be introducing a degree of culpability that really cannot be discerned. At common law, aiders and abettors, that is those who are present instigating the commission of the crime, or accessories before the fact, those who participate in the planning of the crime are considered principals in the first degree, and are subject to the same sentence as those who actually effect the murder.

The writer agrees with the proposal in paragraph (4), as it is an eminently worthy objective. The major problem is, being a poor country, Jamaica can never allocate the money necessary to fund such projects no matter how worthy. The committee's recommendations in paragraphs (5) and (6) also commend themselves to the writer. Any observations made with respect to paragraph (4) are repeated in relation to paragraphs (5) and (6). As a country we lack the infrastructure to properly and effectively promote projects that may arise as a consequence of these recommendations.

It is fair to say, however, that the merits of these proposals in paragraphs (4), (5) and (6) are such that we should not be defeated by our constant carping on our lack of funds and should not use such lack as an excuse to shelve any plans for the improvement of our penal system, but we should work towards achieving such improvements even if they can only be structured over a protracted

period of time. There is no doubt that the most inhumane and degrading conditions now exist in our prisons. There is no doubt that they dehumanize the prisoners. There is also no doubt that if the opportunity for gainful employment were open to the prisoners, this would not only assist the victims of violent crime but would give the convicted person a chance to develop his own self-respect, thereby enhancing his image of himself and as a consequence enabling him to place more value on the lives and rights of his fellow human beings.

The proposal in paragraph (7) would be most material if the committee's proposals in paragraphs (1) to (6) were adopted, as it would assist parliament in determining the failure or success of the committee's recommendations as they relate to capital punishment.

The committee performed a sterling task in very difficult circumstances. Those who support the abolition of capital punishment do so with the help of a number of sound arguments. Those who support its retention also put forward solid reasons for the basis of their opinion. In the final analysis, whether as members of the Bar, parliament, or the Jamaican public, this difficult question, fraught with emotionalism on both sides, is left to our individual consciences. Parliament has the responsibility to make the decision. The writer cautions, however, that the life of the victim is no less important than the life of the convicted murderer. Human rights ought to extend to all and cannot be selectively applied. There lies the concept of justice.

The writer does not think the interim measures feasible or practicable as they relate to the abolition of capital punishment in relation to all murders except those committed by the use of the firearm or explosive. Capital punishment should either be retained on conviction for the offence or murder, or it should be abolished in relation to all murders. The fact is that the extent of violent crime in Jamaica is still so pervasive that any attempt to abolish capital punishment would be resisted by the majority of the Jamaican public. Of course, the dilemma would be resolved if mankind could live in peace and harmony, unfortunately an impossible dream!