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EDITORIAL

MOORD EN DIE DOODSTRAF

Is 'n moordenaar die dood skuldig vir sy misdaad? Hierdie eeu-oue vraag het die aandag gevestig van akademici, teoloë en leke in elke geslag en weereens vlam belangstelling daarin op in Wes-Europa, veral in Brittanje, waar 'n debat oor 'n mosie om die doodstraf af te skaf binnekort deur die Parlement gevoer sal word. Baie lande van Europa, asook Portugal met inbegrip van haar gebiede in Afrika, het die doodstraf afgeskaf. In enige moordsaak is die mediese getuienis van lewensbelang—dikwels hang die beskuldigde se lewe (of sy lot) daarvan af. Mediese kringe in Suid-Afrika behoort in hierdie huidige veldtog in Brittanje belang te stel.

Die vraagstuk kan vanuit verskeie oogpunte benader word. In beginsel kan aangevoer word dat 'n beskaafde gemeenskap vergelding vir 'n antisosiale daad—veral vir so 'n afskuwelike een—moet en sal eis. Dit kan beskou word as primitief en nie in volle ooreenstemming met Christelike beginsels nie om vir redes van wraak of vergelding straf toe te pas of om die misdadiger net so te laat ly soos hy sy slagoffer laat ly het. Desnieteenstaande is dit 'n grondgedagte dat die straf deur die misdaad bepaal moet word. (Die geldigheid van hierdie begrip word nie betwis nie wanneer versagende omstandighede aangevoer word om 'n ligter vonnis te verkry). Dit is 'n grondbeginsel van vergelding dat die gemeenskap op plegtige en dramatiese wyse sy afsku aan moord moet betuig deur moordenaars swaar te straf; dit bedoel nie dat die gemeenskap noodwendig moordenaars tot die dood moet veroordeel nie.¹

Alvorens die manier van straf bespreek word is dit nodig om die aard van die misdaad te oorweeg. Moord word beskou as wederregterlike, doelbewuste en opsetlike manslag; dit moet bewys word dat ten tye van die misdaad die moordenaar ten volle beseft het wat hy doen. Kan dit altyd onomstootlik bewys word? Die aantal persone wat elke jaar vir moord tereggestel word is miskien die beste aanduiding dat die houe oortuigende bewyse vind. Elke medikus wat al in die getuiebanc moes staan sal egter getuig dat dit moeilik is om of die opset of die gesondheid van verstand te bewys.

Die kwessie van geestesgesondheid vereis gewoonlik deskundige psigiatriese getuienis en die mening van een geneesheer kan hemelsbreed verskil van 'n ander. Bowendien verskaf die geregtelike maatstaf vir krank-sinnigheid (die eeu-oue McNaughton-reëls, wat dikwels aanleiding gee tot geskille tussen psigiaters en regsgeleerdes) geen tasbaarder hulp aan die regsbank as

MURDER AND THE DEATH PENALTY

Should a murderer forfeit his life for his crime? The age-old controversy has exercised the minds of academicians, theologians and laymen alike in every generation, and it has now once more come to the fore in western Europe, and particularly Britain, where Parliament will shortly debate a motion calling for the abolition of capital punishment. In many European countries, including Portugal, with its African territories, the death penalty no longer exists. The medical evidence in any murder trial is always vital—frequently the accused (or his fate) hangs on the doctor's evidence and the renewed campaign in Britain should evoke interest in South African medical circles.

One can discuss the matter at various levels of thought. Fundamentally it can be said that a civilized society must, and will, demand some sort of retribution for an anti-social act, particularly one so heinous as murder. It is considered primitive and sub-Christian to regard retribution or revenge as a motive for punishment, or to make the criminal suffer what he has inflicted on others. Nevertheless there is an underlying idea that punishment should bear some relation to guilt. (No one doubts the validity of this concept when it is used to justify the reduction of a sentence because of mitigating circumstances.) 'The principle of retribution demands that society shall solemnly and dramatically express its abhorrence of murder by imposing a grave punishment on murderers; it does not necessarily mean that society must kill murderers'.¹

Before discussing the form of the punishment, it is necessary to examine the nature of the crime itself. Murder is taken to be the unlawful killing of another human being, and it has to be shown that the murderer fully intended to kill his victim, and that he knew what he was doing at the time. Can this always be proved convincingly? The number of persons hanged each year for murder is perhaps the best indication that it is proved to the satisfaction of the courts, but any medical man whose duties lead him to the witness box will testify to the difficulties involved in proving either sanity or intent.

die opvattinge van psigiaters nie. As regsdwalinge nie voorkom nie moet dit aan die wysheid van ons regters te danke wees; die mening van 'n skerpsinnige leek kom somtyds meer verstandig voor en nader aan die waarheid as die mening van 'n mediese getuie. Om te bewys dat die beskuldige bedoel het om die misdaad te pleeg is suiwer 'n regs kwessie en tog is dit net so moeilik om dit te bewys as om te bewys dat die beskuldige by sy volle verstand was en regsredenasie is somtyds eienaardig. 'n Gewapende inbreker wat iemand om die lewe bring word gewoonlik as 'n moordenaar beskou en tog word aanranders in die meeste noodlottige skollie-gevegte in Kaapstad slegs aan manslag skuldig bevind—die bevinding lui in sulke gevalle dat die aanrander nie bedoel het om sy teenstander dood te maak nie. Tradisionele geloofsoortuiging mag 'n lewensbelangrike faktor wees, en tog in die geval van rituele moorde wat dikwels in naturelle gebiede in Afrika voorkom word die faktor oënskynlik oor die hoof gesien, ten minste in sekere lande, alhoewel 'n sterk geloof nie die toekuns in Suid-Afrika by die houe aanvaar word as rede om die straf te versag. Dit kan geredeneer word dat die primitiewe naturel nie daarin kon of wou slaag nie om die oppergesag van die blanke se *pax* te aanvaar nie. Oorheers die barbaar se oer-oue drang om die geeste van sy voorvaders tevrede te stel nie alle ander eise nie? Voel hy nie dat dit beter is om sy eie nietige lewe prys te gee nie eerder as om die toorn van sy voorvaders se geeste op homself neer te haal nie? Is 'n aanklag van moord onder sulke omstandighede redelik? Die ondervinding leer dat moord selde 'n onvoorspelbare diagnose is maar die behandeling wel.

Om nou die straf te bespreek; dat die straf in verhouding tot die misdaad moet staan beteken geensins dat die dood met die dood geboet moet word nie. In Suid-Afrika word moordenaars sedert die vroegste tye tot die dood veroordeel, maar die ingang van moderne opvattinge het in baie lande gelei tot die afskaffing van die doodvonnis as 'n vorm van geregtelike straf. Dit is hoofsaaklik te danke aan die oortuiging—wat gestadiglik posgevat het as gevolg van ondervinding en wat beklemtoon is deur die British Royal Commission van 1953 (wat ondersoek ingestel het in die statistiek van lande wat die doodstraf afgeskaf het)—dat hierdie statistiek nie kan bewys nie of daar 'n verhouding tussen doodstraf en moord bestaan of nie. Met ander woorde, die verstandige opvatting dat die vooruitsig van die doodstraf 'n persoon van moord sal afskrik, word nie deur statistiek bewys nie. Daar vind vandag baie moorde plaas onder omstandighede wanneer verstandige denke onwaarskynlik is bv. persoonlike twiste, drank, seks, e.d.m. en die gewig wat aan die doodstraf as afskrikmiddel toegeskryf word, moet buite rekening gelaat word. Die feit bly egter staan dat dit nog nie finaal bewys is nie dat die gedagte aan die doodstraf miskien nie elke jaar moontlike misdadigers van moord afskrik nie. Britse regters is daarvan oortuig dat werklik geharde professionele misdadigers om dié rede geen vuurwapens dra nie.

As doodstraf nie die misdadiger afskrik nie, wat staan andersins die bestaan daarvan? Wraak? As die reaksies van die publiek op sensasiewekkende nuusverhale enige

The problem of sanity usually calls for expert psychiatric evidence, and here the opinion of one doctor may be exactly opposite to that of another. Moreover, the legal yardstick of sanity—the century-old McNaghten rules, which often lead to difference of opinion between lawyers and psychiatrists—offers the bench no more concrete material than the views of psychiatrists. If there are no miscarriages of justice the fact must be attributed to the wisdom of our judges. It sometimes seems as if the opinion of a shrewd layman on the 'sanity' of an individual is more sensible and nearer the mark than that of a medical witness.

The proof of intent is a pure legal matter, yet it is little clearer than that of sanity, and the law may indulge in some strange reasoning. An armed man breaking into premises and killing someone is usually regarded as a murderer, yet the assailants in most fatal skolly-brawls in Cape Town are found guilty of culpable homicide only—the intent to kill is held to be missing. The traditional beliefs of the assailant may be a vital factor, yet in another common type of African murder—the ritual murder of the Native territories—it is apparently ignored, at least in some countries, though now in South Africa a strong belief in witchcraft would serve as an extenuating circumstance, reducing the penalty. Here, it can be argued, the primitive essentially African mind of the accused has failed or refused to accept the supremacy of the white man's *pax*. Does not the primeval urgency of satisfying the tribal gods transcend all other considerations to a savage? Does he not feel, philosophically, that it is better to lose his own puny life than to call up the wrath of his ancestors upon himself? And is it a rational act to indict this individual on a charge of murder? On the basis of experience one may conclude by saying that murder is hardly ever an absolute diagnosis; only the treatment is absolute.

Now to consider the punishment: That the punishment should fit the crime does not necessarily imply that death must be met by death. In South Africa the death penalty has been imposed since the earliest times for the crime of murder, but the spread of modern thought has in many countries led to the abolition of the death penalty as a legal form of punishment. The main reason for this has been the conviction—slowly reached by experience and emphasized by the British Royal Commission of 1953 (which examined statistics from countries where penal killings had been abolished)—that statistics afford no evidence one way or another whether there is a connection between the death penalty and the murder rate. In other words, the common-sense opinion that the prospect of having to die for an action may deter a person from doing it is not statistically proved. Today many murders occur in circumstances where such reflections are unlikely; e.g. personal quarrels, drink, sex, etc.; and the value of the death penalty as a deterrent is to be discounted. The fact remains, however, that it is not finally proved that many potential criminals are not each year discouraged from murder by the prospect of hanging; British judges are convinced that really hardened professional criminals are deterred from carrying firearms for this reason.

If the deterrent value of hanging is removed, what else is there to support it? Revenge? If the public's

aanduiding is, dan is die antwoord ja. Wanneer die besonderhede van 'n grusame moord ontbloot word, hoor mens so dikwels, 'hy behoort net so behandel te word' of 'ophang is te goed vir hom'; dit is in werklikheid suiwer wraakgedagtes. 'n Belangrike praktiese aspek in enige poging om die doodstraf af te skaf is die openbare mening. Daar moet rekening gehou word met die gevaar dat indien die staat weier om die moordenaar tereg te stel die drang na wraak daartoe aanleiding sal gee dat die publiek die wet in hul eie hande sal neem. In 'n gemeenskap van veelvoudige rasse waar 'n rasse moord vlammende haat kan laat oplaai mag dit wel 'n sterk argument ten gunste van die behou van die doodstraf wees. Afgesien van openbare gevoelens egter moet die kwessie of die doodstraf behou moet word beslis word deur die waarde daarvan as afskrikmiddel.

¹ *Daily Telegraph*, Londen. 10 Januarie 1956.

reaction to sensational news stories is any indication, then the answer is Yes. When the details of an atrocious murder are disclosed, how often does one not hear, 'He ought to be treated in the same way', or 'Hanging is too good for him'; which is an attitude of sheer vengeance. An important practical point in any attempt to abolish the death penalty is the question whether public opinion is firmly wedded to it. The danger has to be reckoned with, that, denied its pound of flesh by the State, the public's passion for retribution would find its outlet in lynching. In a multi-racial community where race crimes generate great waves of hate, this might be a potent argument for its retention. Apart from public emotion, however, the question whether the death penalty is to be retained must be decided on its value as a deterrent.

¹ *Daily Telegraph*, London. 10 January 1956.