CABINET

CRIMINAL JUSTICE BILL: CAPITAL PUNISHMENT

Memorandum by the Home Secretary

The attached draft of a clause to be inserted in the Criminal Justice Bill on the subject of the death penalty has been discussed with members of the Labour Party who represent both sides of the controversy. It appeared from the discussion that the clause as now drafted would be likely to meet with general acceptance and would be regarded as giving effect in a satisfactory manner to the compromise to which agreement was given at the Party meeting.

2. The clause provides that the death penalty shall continue to apply to murders committed with "express malice" if such murders fall into any of the following categories:

(a) murders committed in connection with certain specified crimes (i.e. robbery with violence, burglary and house-breaking, violent affrays by gangs, unlawful use of explosives, rape, sodomy and indecent assaults);

(b) murders of constables acting in the execution of their duty and of persons assisting them;

(c) murders committed by the systematic administration of poison (the word "systematic" has been inserted for the purpose of excluding "mercy" murders);

(d) murders of prison officers acting in the execution of their duty and of persons assisting them;

(e) murders committed by persons who have on a previous occasion committed murder.

3. The effect of the words in the first sentence of the clause "committed with express malice" and of the definition of "express malice" in sub-clause (3) is to exclude from the death penalty "constructive" murders where malice is implied from the fact that the killing occurred in the course of a felonious enterprise, including, for example, such a case as that of a burglar giving the night watchman a mere push with the result that he falls and breaks his skull.
If, however, a murder which falls within one of the specified categories is committed with "express malice", then all accomplices who are parties to that murder (including, for example, the accomplice who keeps watch outside the house) will be subjected to the death penalty by the words in sub-clause (3) "a murder shall be deemed in relation to every person guilty thereof to be committed with express malice etc."

4. The provision relating to a murderer who has committed murder on a previous occasion is open to the objection that if a person who has been convicted of murder is very shortly afterwards put on trial for another murder, the jury who will have read newspaper reports of his previous conviction may be prejudiced. There is, however, no way of avoiding this difficulty. If the provision were confined to cases where the second murder occurs after a conviction for murder, it would be of little value, and would exclude from the death penalty such murderers as Heath or Gordon Cummings, who in 1942 murdered four women within a week and attempted to murder two others.

5. The draft clause has been carefully considered by the four Law Officers for England and Wales and Scotland, and it has been agreed by them.

J.C.E.

Home Office, S.W.1.
2nd July, 1943.
CRIMINAL JUSTICE BILL
Draft Clause

1.—(1) During the continuance in force of this section, no person shall be sentenced by a court to death for murder unless it is charged in the indictment or inquisition and found by the jury that the murder was committed with express malice as defined by this section, and either—

(a) that the murder was committed in the course of, or immediately before or after and in connection with, the commission of an offence described in the Schedule to this Act (Offences involving death penalty for murder), or an attempt to commit such an offence; or

(b) that the murder was committed in the course of or for the purpose of resisting or avoiding or preventing an arrest in course of law or of escaping or assisting an escape from legal custody or for the purpose of obstructing a constable acting in the execution of his duty or any person assisting him; or

(c) that the murder was committed by means of, and in the course of the systematic administration of, poison or any other similar destructive or noxious substance; or

(d) that the murder was committed by a person detained in a prison or other institution to which the Prison Acts, 1865 to 1898 apply, and the person murdered was an officer of any such institution acting in the execution of his duty; or a person assisting him; or

(e) that the accused has been convicted of murder committed on a previous occasion.
and where, by virtue of this subsection, a court is precluded from passing sentence of death for murder, the court shall sentence the offender to imprisonment for life.

(2) If in any indictment or inquisition for murder it is charged that the accused has been convicted of murder, committed on a previous occasion, the accused shall in the first instance be arraigned on so much only of the indictment or inquisition as charges the murder for which he is to be tried; and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to having been previously convicted as aforesaid, be charged to inquire whether he has been so convicted; and in that case it shall not be necessary to swear the jury again.

(3) For the purposes of this section, a murder shall be deemed, in relation to every person guilty thereof, to be committed with express malice if the act causing the death is done with intent to kill or with intent to maim and in the latter case is an act which might reasonably be expected to endanger life.

(4) For the avoidance of doubt it is hereby declared that where a person is charged with murder on an indictment or inquisition charging any of the matters specified in subsection (1) of this section, and the jury are of opinion that those matters are not established by the evidence but that the accused is shown by the evidence to be guilty of murder or any other offence of which a person charged with murder may lawfully be convicted the jury may return a verdict of guilty of murder or of any such other offence as aforesaid.

(5) Nothing in this section shall affect the provisions of section fifty-three of the Children and Young Persons Act, 1955 (which prohibits the passing of sentence of death against a person under the age of eighteen years, and requires the court, in lieu thereof, to sentence him to be detained during His Majesty's Pleasure).
(6) This section shall continue in force for a period of five years beginning with the passing of this Act, and shall then expire, but without prejudice to the validity of anything previously done thereunder:

Provided that if at any time before the expiration of the period aforesaid an Address is presented to His Majesty by each House of Parliament praying that this section be continued in force without limitation of time or for any extended period specified in the Address, His Majesty may by Order in Council make provision for that purpose; and where any such Order in Council continues this section for any such extended period, the provisions of this subsection (including this proviso) shall have effect as if that extended period was substituted for the period of five years aforesaid.

(7) This section shall apply to Scotland, subject to the following modifications:

(a) for the reference in paragraph (a) of subsection (1) to Part I of the Schedule to this Act (offences involving death penalty for murder) there shall be substituted a reference to Part II of the said Schedule;

(b) for any reference to the Prison Acts, 1865 to 1898, there shall be substituted a reference to the Prison (Scotland) Acts, 1860 to 1904, and for any reference to section fifty-three of the Children and Young Persons Act, 1933, there shall be substituted a reference to section fifty-seven of the Children and Young Persons (Scotland) Act, 1937;

(c) any reference to imprisonment for life shall be construed as a reference to penal servitude for life;
(d) for the purpose of establishing that a person charged with murder has been convicted of murder committed on a previous occasion section sixty-six of the Criminal Procedure (Scotland) Act, 1887 shall apply and such conviction shall be deemed to have been found by the jury if it is admitted by the accused or is held to apply to him in pursuance of that section or is proved in accordance with the provisions thereof;

(e) subsections (2) and (4) shall be omitted and the following subsection shall be inserted after subsection (1) -

"(2) During the continuance in force of this section, sections two and three of the Criminal Law (Scotland) Act, 1829 (which make punishable by death certain crimes of violence against His Majesty's subjects) shall be construed as requiring the court to sentence any person convicted of any of the crimes therein set forth to penal servitude for life."
SCHEDULE

Offences involving death penalty for murder

Part I

Offences under law of England

1. An offence under section twenty-three of the Larceny Act, 1916 (which relates to robbery).

2. An offence under section twenty-five, twenty-six or twenty-seven of the Larceny Act, 1916 (which relates to burglary and housebreaking).

3. An offence under section twenty of the Offences against the Person Act, 1861 (which relates to wounding or inflicting grievous bodily harm) committed by three or more persons acting in concert.

4. An offence under section twenty-eight, twenty-nine or thirty of the Offences against the Person Act, 1861, or section two of the Explosive Substances Act, 1883 (which relate to crimes committed by means of explosives and other destructive substances).

5. An offence under section forty-eight or fifty-two of the Offences against the Person Act, 1861 (which relate to rape and indecent assaults on females).

6. An offence under section sixty-one or sixty-two of the Offences against the Person Act, 1861 (which relate to sodomy and indecent assaults on males).

Part II

Offences under law of Scotland

1. Robbery.

2. Theft by housebreaking or housebreaking with intent to steal, or theft by opening lock-fast places or opening lock-fast places with intent to steal.
3. An assault with intent to do grievous bodily harm by three or more persons acting together, or an assault involving the throwing at or applying to another of a corrosive acid or other dangerous substance calculated to burn or injure him.

4. An offence under section two of the Explosive Substances Act, 1883 (which relates to crimes committed by means of explosives).

5. Rape, sodomy or indecent assault.