20th January, 1956

CABINET

AMENDMENT OF THE LAW RELATING TO MURDER

Memorandum by the Secretary of State for the Home Department and Minister for Welsh Affairs

My colleagues will recall that there are certain secondary recommendations of the Royal Commission on Capital Punishment which would require legislation and on which, since we were not disposed to legislate to give effect to the main recommendations, we have not hitherto thought it necessary to take a decision. The principal recommendations in this category are that:

(a) the doctrine of constructive malice should be abolished subject to a proviso relating to accomplices;

(b) the law relating to provocation should be amended so that provocation by words alone may reduce murder to manslaughter;

(c) a person who aids, abets or instigates suicide should be guilty of that offence and not of murder.

2. There is in my view no objection in principle to these recommendations, but as I said in paragraph 20 of my memorandum of 16th December, 1955 (C.P.(55) 202), I then saw no point and some embarrassment in introducing legislation on these points alone, since we should be pressed to take the opportunity of giving effect to other and more controversial recommendations. Since that paper was circulated, however, the situation has been changed by the publication of a report by a Committee of the Inns of Court Conservative and Unionist Society under the Chairmanship of Sir Lionel Heald. This Committee has recommended the amendment of the law to give effect to recommendations (a) and (b) above and also the introduction in England and Wales of the Scottish doctrine of diminished responsibility.

3. The Committee suggest that if these recommendations were adopted the effect would be that the death sentence would be passed only on those who have committed a heinous crime and the discussion on the desirability of retaining the death penalty would not be confused with extraneous disputes. I do not myself think it is wholly true to say that if the recommendations of the Committee were adopted the sentence of death could be passed only in really heinous cases, but I have little doubt that the Committee's report and the suggestion that the area of disagreement can be narrowed will impress our supporters and particularly those who are with us on the main issue of retention of the death sentence, but are disturbed about its present scope. It seems to me, therefore, that while legislation on this subject may expose us to
some embarrassment the balance of advantage lies in accepting the recommendations on constructive malice and provocation by words alone and giving as clear an indication in the debate as is possible without anticipating The Queen’s Speech that we will introduce legislation in the next Session. I do not think that in doing this we should make it more difficult to adhere to our refusal to implement the recommendations of the Royal Commission which we have rejected. There is wide disagreement on what should be done about the M’Naghten Rules; and on the question of raising to 21 the age of liability to capital punishment, we can point out not only that the Royal Commission itself was divided but that the amount of weight which should be given to youth in assessing a young murderer’s responsibility is eminently a matter for the Prerogative rather than for legislation, while the doctrines on which I now propose that we should legislate are primarily a concept of judge-made law and, therefore, can more appropriately be dealt with by amendment of the law than by the exercise of the Prerogative. The Committee’s recommendation on diminished responsibility raises greater difficulties to which I refer later. The merits of the proposals are discussed in the following paragraphs.

Constructive Malice

4. The present scope of the doctrine of constructive malice is by no means clear. At its widest the doctrine means that a man is guilty of murder if he kills while committing a felony or resisting an officer of justice, even though he had no intention of killing and no reason to think that his action was likely to cause death or serious injury. The practice of the courts has whittled the doctrine down a good deal, but it can still produce the result that an act done while committing a felony or resisting an officer of justice may be murder although if done in other circumstances it would be only manslaughter. (If the act is done with intention to kill or is such that it would be likely to cause death or serious injury it would be murder whatever the circumstances). The witnesses before the Royal Commission were unanimous in thinking that the ancient rule of constructive malice was objectionable. There was some difference of opinion among them on the question whether the doctrine of constructive malice should be retained to a limited extent in order to ensure a conviction of murder where a criminal using a firearm killed accidentally. The Heald Committee would retain the doctrine where death results, albeit accidentally, from the use or threatened use of firearms, explosives or other dangerous weapons. The Royal Commission thought that the doctrine should be abolished altogether and that its abolition would produce no striking change in the practice of the courts.

5. In my view the doctrine needs redefining so as to state clearly the classes of case where the death penalty is appropriate and the classes where most people would agree that the sentence of death should not be passed. For example, there are many who hold that the killing, even accidentally, of a policeman or a citizen who comes to his aid by an armed criminal should be treated as murder and attract the death penalty. On the other hand accidental killing, e.g., of a woman in the course of rape, it is thought should be manslaughter and not murder.

6. The Royal Commission recommended that the abolition of the doctrine of constructive malice should be subject to the proviso that accomplices should remain liable to be convicted of murder if the principal is so liable. The Heald Committee think that accomplices should continue to be liable only if they knew that the principal was armed. This again introduces a difficulty of definition: armed with what? The Royal Commission thought that considerations, both of equity and public
protection, demanded the maintenance of the principle that when two or more persons are parties to a common design for the use of unlawful violence and the victim is killed all parties to the design should be liable to the same punishment. This view seems to me to be preferred to that of the Heald Committee.

7. There is no doctrine of constructive malice in Scottish law and no question of amending the law in Scotland on this point, therefore, arises.

Provocation

8. As the law now stands murder may be reduced to manslaughter if the accused can show -

(a) that he suffered such provocation as might cause a reasonable man to lose his self-control and use violence with fatal results, and

(b) that he was in fact deprived of his self-control and committed the offence while so deprived.

It has long been held that insulting or abusive language cannot by itself be sufficient to reduce murder to manslaughter, but it was also held for a considerable period that words conveying information, e.g. a sudden confession of adultery, could be sufficient. Decisions on this latter point were overruled by the House of Lords in the case of Holmec in 1946 when Lord Simon laid down that "in no case could words alone, save in circumstances of a most extreme and exceptional character" reduce murder to manslaughter.

9. The Royal Commission recommended and the Heald Committee support the recommendation that "where the jury are satisfied that the accused killed the deceased upon provocation, that he was deprived of his self-control as a result of that provocation and that a reasonable man might have been so deprived the nature (as distinct from the degree) of the provocation should be immaterial" (paragraph 151). There is some doubt whether the Holmes judgment would be followed in the Scottish courts and the Royal Commission recommended that since it is desirable that the law on this point should be the same on both sides of the border it should be made clear that any amendment made in England applied also to Scotland.

Diminished responsibility

10. The Heald Committee recommend with one dissentient that on the analogy of Scottish law the jury should be empowered to bring in a verdict of manslaughter if they are satisfied that at the time of the offence the person charged, though not insane, was suffering from mental weakness or abnormality bordering on insanity to such an extent that his responsibility was substantially diminished, and that in such a case the prisoner should be ordered to be detained during Her Majesty's Pleasure. The Royal Commission rejected the proposal that the Scottish doctrine should be adopted in England, not because they thought that juries would be too lenient (although they did so think) but because they thought that if the doctrine of diminished responsibility was to be adopted at all it ought to be adopted for all offences and that so radical a change ought not to be made merely for the purpose of enabling the court to take account of a special category of mitigating circumstances. If the question was to be considered at all they thought it should be after consideration of the question by a body appointed for that purpose, (Paragraph 413).
11. In view of the attitude of the Royal Commission the Heald Committee's recommendation on this point raises difficulties which its other recommendations do not, and much fuller consideration would be required before it could be adopted. I suggest that we should point out that the Royal Commission rejected this proposal and should do no more than undertake to consider it.

Suicide pacts

12. At present if two people agree to commit suicide and only one dies the survivor is guilty of murder. If the survivor has made a genuine attempt to kill himself it is the practice to recommend a reprieve. The Royal Commission considered that if the survivor had himself killed the other party he should be guilty of murder as at present, but recommended that one who only aids, abets or instigates the suicide of another person without killing him should, in future, be guilty of that offence and not of murder and should be liable to life imprisonment.

13. The Heald Committee's report does not discuss suicide pacts but if the law is being amended the opportunity might be taken to implement this recommendation of the Royal Commission which will substantially have the effect of securing by process of the law what is now secured by the exercise of the Prerogative.

14. As suicide is not a crime in Scotland aiding and abetting suicide is not murder and no corresponding amendment of Scottish law is required.

Conclusions

15. I recommend:

(1) that the law should be amended in the following respects:

(a) the doctrine of constructive malice should be abolished with the proviso that accomplices should continue to be liable to be convicted of murder if the principal is so liable;

(b) the doctrine that provocation by words alone cannot, save in the most exceptional circumstances, reduce murder to manslaughter should be abolished; and

(c) aiding and abetting or instigating suicide should cease to be murder and should be punishable by life imprisonment;

(2) that we should announce in the debate that we accept the recommendations of the Royal Commission on these points and that we will take an early opportunity of introducing legislation to give effect to them and that we should say that we are giving further consideration to the problem of mental abnormality and to the suggestion that the Scottish doctrine of diminished responsibility should be adopted in England;
that I should indicate, on lines which I propose
to discuss with those of my colleagues principally
concerned, that in deciding in particular cases
whether to recommend the exercise of the Royal
Prerogative I shall take into account other matters
arising out of the recommendations of the Royal
Commission.

G. LL. -G.

Home Office, S.W.1.

28th January, 1956.