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CHANGES IN CAPITAL PUNISHMENT POLICY SINCE 1939

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Now that the war is over, the question arises as to what has happened to the use of capital punishment as a civil policy. The Nuremburg trials and the execution of collaborators in Belgium, Norway, and The Netherlands, where no one had been executed for many a decade, gives a quick impression that abolition may be one of the casualties of the late war. A somewhat popular theory is that revival of capital punishment, even as a civil policy, is a natural aftermath of the wholesale life-taking which occurs in war. The trend toward revival in the United States which began in 1918, and has reduced the number of abolition states from twelve to six, is cited as evidence. However, a survey of present capital punishment policy and of changes since 1939, shows that thus far the opposite is true. More jurisdictions now are without the death penalty for murder and other heinous civil offenses than before the war.

Policy of the various nations regarding application of the death penalty for civil offenses was ascertained by making inquiry at twenty consulate offices and eight official information bureaus in New York City. The libraries in New York City were consulted, also. The Consulate Generals who were consulted represented Finland, Iceland, Lithuania, Norway, Portugal, Spain, Sweden, Switzerland, and the U.S.S.R. The information services which provided data or gave access to data about European countries were the American-Russian Institute, the Belgian Government Information Center, the British Information Services, the Danish Information Office, and The Netherlands Information Bureau. Consuls in New York customarily refer inquiries to these services where they exist.

No check at official sources was made regarding some countries—France, for example. Check on countries which have always had the death penalty was limited to scrutiny of the *New York Times* Index and other American sources.

However inquiries were made at all consular offices representing South American countries and a few from Central America,

including Costa Rica. In some cases the only question asked of the counsuls was whether or not the country allowed capital punishment for civil offenses. The Brazilian Government Trade Bureau, the Puerto Rico Government Information Office, and the Australian Government News and Information Center also were of service.

Since we are concerned here with change in policy regarding capital offenses in civil life, the terms, "capital punishment" and "death penalty," do not have reference to treason or military offense, unless otherwise stated. In some situations this distinction unavoidably blurs the picture. In Soviet Russia the concept of offense against the regime, which may be punishable by death, is interpreted in a manner so radically different from the usual concept of treason that their reply that they enforce capital punishment, seems correct.¹ On the other hand, there may be an unknown degree of misrepresentation in listing some South American countries as being without capital punishment since, on occasion, civil law is abrogated in favor of martial law rather easily. This problem could be met only by having access to statistical data regarding all executions. It is impossible to obtain data of that nature. In the following report on findings, this limitation will be pointed out as it arises.

Europe

Ten nations of Europe do not impose the death penalty in civil cases at the present time. Nine nations were without the death penalty at the beginning of the war and the number now is nine, plus Iceland which retained abolition upon becoming a republic in 1944. However, as will be discussed later with reference to the United Kingdom, a possible change of great importance may be in process. The nations without capital punishment for civil offenses are Belgium, Denmark, Iceland, Norway, Portugal, Rumania, Sweden, Switzerland, and The Netherlands. Dates of abolition or of last execution where abolition is traditional but not statutory, are shown in Table I.

In eight countries the death penalty is abolished by law and in two by what the sociologists call, the mores in this case by established tradition well over a century old. Belgium and The Netherlands are in the latter category. Rumania, which had

¹ Since this article was submitted for publication the U.S.S.R. announced abolition of the death penalty. Also the new constitution promulgated in Italy specified that there shall be no death penalty except for treason or military offenses in time of war. Correction should be made in the text accordingly. The number of European nations without the death penalty is now twelve instead of ten. Both changes occurred in 1947, in Italy after a short prior period of abolition by decree.

capital punishment during and through the war, is reported as having abolished it in 1946 for civil offenses.² How extensively military law operates in Rumania at present is not known to the writer. It may be significant that Rumania was without the death penalty for civil offenses from 1865 to the advent of Fascist influence in the late nineteen thirties.

All European countries now have legislation making the death penalty applicable in case of treason in time of war. As will be seen, three countries enacted special legislation to this effect during and after the last war.

In Belgium, execution by guillotine is occasionally ordered by the court for "murder, parricide, poisoning, or high treason," but by long-established tradition the King is expected to commute the sentence to life imprisonment, and he does so. A few who were found guilty of collaboration during the recent war were shot, under a special law of September 14, 1918, which provides for capital punishment by shooting in cases of high treason and military offenses. Otherwise the death penalty has not been imposed since 1817.³

In Denmark the death penalty was abolished in 1930 and this remains in effect with the exception that on June 1, 1945 a law was passed providing for execution of collaborators.⁴ The *New York Times* of June 9, 1945 (4:3) carried the headlines, "Danes seek executioner; Swede only applicant."

In Finland, the Criminal Code dating from 1889 fixes the death penalty for high treason, treason, and murder. However no executions have occurred under it nor any before it since 1824 when Alexander I, Emperor of Russia and Grand Duke of Finland, issued a declaration recommending that it be not enforced. Under the Military Criminal Law there were some executions during the War of Independence in 1918, and during the last war an unknown number were executed under this code, one of them being for murder. No Finnish war criminals of the recent war, tried by a Finnish court, were sentenced to death.⁵

Iceland has been without the death penalty since 1930 and, as an independent nation, since 1944.

Norway, which abolished capital punishment in 1905, made special provision for dealing with collaborators. The Government in Exile while in London, deviated from tradition in this

² *New York Times* July, 17, 1946, 7:2.

³ Nico Gunzburg, *A Democracy in Action*, Belgian Government Information Center, 630 Fifth Avenue, N. Y., 1945, 40 pp., p. 33. The author is Dean of the Law Faculty of the University of Ghent.

⁴ Based on data from the Danish Information Office.

⁵ Based on a letter to the writer from Kurt Linden, Vice Consul, Consulate General Offices, 53 Broadway, New York, Nov. 19, 1946.

case to announce special legislation providing for execution of collaborators, and this was sustained by the Senate in 1945. Information from the office of the Consulate General in New York is to the effect, that this is to apply only to those who were traitors during the period of occupation by the Nazis. At the time of passage by the Senate, repeal was expected after war criminals were punished.⁶

Portugal made no change during the war. Treason has been an exception in Portuguese law since abolition of capital punishment in 1867. The last war brought no occasion to apply it.

Sweden, which since abolition in 1921 has made treason an exception, has not had occasion to alter its law regarding capital punishment.

The Swiss federal penal code of 1874 abolished the death penalty but it was revised in 1879 to permit legislation by cantons, fifteen of the twenty-one cantons abolishing. The new federal penal code which went into effect January 3, 1942, abolished the death penalty in all cantons.

The Netherlands, which abolished the death penalty in 1870 during a liberal political trend, made an exception in 1944 to permit execution of those who were collaborators during the last war. A decree to this effect by the Government in Exile in London was affirmed later by the legislative body. Citizens are sensitive about the capital punishment issue and regard this deviation as war-defined. In effect abolition applies in the colonies. The Governor General has the authority to impose the death penalty in The Netherland East Indies but has not done so for at least sixty years.

Of the other European countries, the one which most concerns us here is England, since a change of policy may be in process. Since 1930 when The Select Committee on Capital Punishment recommended abolition of capital punishment,⁷ Conservative opposition has decreased and Socialist support is reported to have grown stronger. The Labor Government has plans for wide reforms in criminal justice and as late as the autumn of 1946 abolition of capital punishment and flogging were included.⁸ During the summer of 1946 Mr. J. Chuter Ede, Secretary of State for Home Affairs, announced that he had a bill drawn to introduce at a coming session of Parliament. Introduction has

⁶ *New York Times*, July 4, 1945, 4:4.

⁷ This JOURNAL, 36, p. 195 (Sept.-Oct., 1945).

⁸ *Christian Science Monitor*, September 23, 1946; *London Times*, (editorial) July 23, 1946. A number of references to this bill made in the British press during the summer and autumn of 1946 may be found in the clipping file of the British Library, New York.

been postponed, but according to the writer's private sources of information abolition of the death penalty is a live issue in England. It is reported that one reason for postponing introduction of the bill is the increase in crime which occurred in the United Kingdom the latter part of the war.⁹ Indictable offenses increased from 78,858 in 1939 to 106,550 in 1944 to 116,896 in 1945. "Non-Indictable Offenses Akin to Indictable" increased much more.¹⁰ However, murders known to the police show a decrease through 1943 and 1944. The data are not available as yet for 1945. In the United Kingdom the number of murders known to the police in 1942, a high peak year, was 290 while in 1943 it was 174 and in 1944 it was 166. During the pre-war decade, 1929 through 1938, the average per year was approximately 129. Executions during the three years, 1942 through 1944, were 18, 15, and 10, as compared with a 9.3 average per year during the pre-war decade.¹¹ While accurate comparison with the United States cannot be made, the crime situation in the United Kingdom does not seem alarming when viewed from this side, especially when war dislocations, then existing, are kept in mind.

Prior to the war, and for some time since its close, application of the death penalty in Soviet Russia seems to have been restricted largely, if not altogether, to those who are regarded as serious enemies of the regime—a concept which encompasses much more than what is ordinarily treated as treason in other countries. The death penalty, when enforced, was less for punishment than for extermination. Murder, while ranking among the most serious offenses, was not regarded as necessarily the most heinous. The murderer who did not act for political reasons was viewed in Soviet theory as a fit subject for re-education and treatment. Official reports giving the yearly number of capital offenses and executions are not made available. Official data about treatment of the political offender is scarce.¹²

It is now officially confirmed that Cuba has abolished capital punishment. Travacore, India, is in the same category, and the years.¹³

⁹ *Christian Science Monitor*, Op. cit.

¹⁰ *Hansard's Parliamentary Debates*, House of Commons, Written Answers, April 1, 1946, p. 137.

¹¹ *Hansard's Parliamentary Debates*, House of Commons, Written Answers, Nov. 29, 1945, pp. 1752-4, and July 18, 1946, p. 242. All references to the *Parliamentary Debates* are to answers by the Home Secretary. The figure representing executions in 1944 was taken from the latter of the two sources. The former stated it as 13.

¹² Sources: Rudolph Schlesinger, *Soviet Legal Theory*, New York, 1945, pp. 115-119, and John Hazard, "Trends in Soviet Treatment of Crime," *American Sociological Review*, 5:566-576, (Aug. 1940).

¹³ Bulletin of the National Council for the Abolition of the Death Penalty, London, England, No. 25, November, 1947.

Channel Islands have had no executions during the past eighty

Czechoslovakia, which under less extraordinary circumstances might be expected to abolish capital punishment, has not done so.

During a period of political liberalism, Spain abolished capital punishment in 1932 but restored it about a year later.

Italy had been without the death penalty for nearly forty years, when it was revived in 1928 as a Fascist policy.

The death sentence was an important part of Nazi policy and use of it was extensive accordingly, both as a means of punishment and as a political device for extermination. The Howard League for Penal Reform is quoted as saying that Germany was prevented from abolishing capital punishment only by Hitler's coming to power.¹⁴ Austria had been without capital punishment for fifteen years when it was revived in 1934. There is little probability that either country will abolish the death penalty in the immediate future. The allied nations which now guide the destinies of these countries are not prepared to associate abolition with the denazification process.

South and Central America, Mexico

Most of the population and most of the land area of South America is in jurisdictions which have abolished capital punishment as a civil measure.¹⁵ The countries without it are: Argentina, Brazil, Colombia, Ecuador, Peru, Surinam, Uruguay, and Venezuela. In at least two countries, Ecuador and Uruguay, abolition is absolute in the law, there being no death penalty provided for treason or military offenses.

Brazil had abolished capital punishment in 1891 but revived it in 1938 for murder involving extreme perversity and for offenses against the nation.¹⁶ The new constitution which went into effect September 15, 1946, described as assuring democratic processes, abolished the death penalty and banishment for all but military offenses in time of war, in which case it may be imposed only by military tribunals.¹⁷ On the other hand, life imprisonment in Brazil is imprisonment for life.

British and French Guiana, with capital punishment, and Surinam, without it, reflect colonial policies. It was reliably

¹⁴ This JOURNAL, Op. cit., p. 195.

¹⁵ Approximately eighty-seven per cent of the population and eight per cent of the land area is in the eight countries which have abolished capital punishment.

¹⁶ *New York Times*, May 18, 1938, 7:3.

¹⁷ "New Constitution of Brazil," *Brazilian Bulletin*, published by the Brazilian Government Trade Bureau of the Ministry of Labor, Industry, and Commerce, 551 Fifth Ave., N. Y., Vol. 3, No. 68, (Oct. 15, 1946), pp. 1-6, p. 6. The writer is also indebted to the Bureau for information although not all data given here is from that source.

ascertained that Bolivia and Chile have the death penalty. Paraguay has not been listed in the American literature as being without capital punishment.¹⁸ The method of execution in Chile is by shooting. A news item in 1939 described Bolivia as extending the death penalty to include fraud, embezzlement, and perjury.¹⁹

Moving north from South America, jurisdictions without capital punishment for civil offenses are Costa Rica, Puerto Rico, most of Mexico, six states of the United States, and Greenland. Costa Rica is widely regarded as the most advanced of the Central American countries. In 1938 the executive government in Puerto Rico attempted to restore capital punishment but it was blocked by the local legislature.²⁰ Honduras in 1938 had its first execution under a new law.²¹

Capital punishment for civil offenses has been abolished in the Federal District of Mexico since 1929, and in most of the Mexican states. The 579 square miles of the Federal District include all of Mexico City. News items report executions in Mexico.²² In the past, at least before the present non-military administration, the distinction between civil and military has varied considerably and has not always been meaningful where capital punishment is concerned.

United States

Since the war started in Europe in 1939, no state has abolished capital punishment and one has been in process of reviving it. Discussion is thus limited to one state, namely South Dakota.

Upon request of the governor, the legislature of South Dakota voted early in 1939 to restore the death penalty and specified electrocution as the means.²³ However, the biennial session, known at the time as the "economy legislature," ended without making an appropriation for an electric chair and its installa-

¹⁸ The writer could not get information on the subject either from the consulate in New York or the embassy in Washington, D. C. Informants from countries without capital punishment gave the data with alacrity. The matter did not seem sufficiently doubtful to merit search in the law libraries.

¹⁹ *New York Times*, April 25, 1939, 14:1.

²⁰ *New York Times*, Feb. 16, 1938, 42:5, and Aug. 13, 28:6.

²¹ *New York Times*, March 10, 1938, 14:6.

²² *New York Times*, July 24, 1937, 6:7; Feb. 18, 1938, 8:3; Dec. 12, 1938, 8:3; Jan. 19, 1944, 2:4.

The latter is described as the first legal execution since 1929. As recently as February, 1948, the Consul General for Honduras has confirmed the writer's information that his country still retains the death penalty, contrary to other advices that have been circulated.

²³ The writer was present when the governor, Harlan Bushfield, made the request in his inaugural address and later listened to the legislators discussing the issue. Much of the discussion consisted of reference to shocking murders which had occurred during the preceding biennium.

tion. This was estimated at \$40,000. Various methods of economy were suggested at the time including speculation about the possibility of purchase of a second-hand chair and of renting services from Iowa should such be necessary. The next legislature voted the necessary appropriation but war priorities prevented construction. In the summer of 1942 an electric chair was borrowed from the state of Illinois to perform an electrocution.²⁴ In 1943 the state was able to install a chair of its own. One person was executed in April, 1937.

Earlier, capital punishment had been in effect in South Dakota from the time of entering statehood in 1889 until abolished by the Sessions Laws of 1915. For the ten year period prior to January 1, 1915, the number of criminal homicides reported in the state was 118, and during the ten year period after that date, when capital punishment was not in effect, the number was 91. The population increase in the state was about ten per cent in the latter decade. During the years, 1913, 1914, and 1915 the number of criminal homicides reported were 13, 16, and 17 respectively, and for the subsequent three years, after abolition, they were 8, 4, and 8.²⁵

Up to the present time ten persons, at least four of whom were non-white, have been executed during statehood, six following sentence by state courts and three by sentence of the United States District Court under state law.²⁶ The first execution in territorial days, three of which are recorded, was the hanging of Jack McCall in Yankton for the shooting of Wild Bill Hickok in Deadwood the previous year. The latter part of the episode is re-enacted annually in Deadwood as part of its colorful celebration of "The Days of '76."

The revival of capital punishment in South Dakota continued a trend in the United States which began at the end of the first World War. In 1918 the number of states without the death penalty was twelve and now it is six. No state has abolished the death penalty since 1917. The states without capital punishment are, Michigan, Rhode Island, Wisconsin, Maine, Minnesota, and North Dakota. There has been no execution in Michigan or Rhode Island for over one hundred years.²⁷

²⁴ Report of the South Dakota State Board of Charities and Corrections, 1944.

²⁵ "Capital Punishment Statistics, South Dakota," compiled by Leg. Ref. Dept., 1940. State Department of History, Pierre. pp. 3-5.

²⁶ *Ibid.*, p. 1. A person listed only as "Victor" was executed in 1909.

²⁷ Lewis E. Lawes, *A Brief History of Capital Punishment*, American League to Abolish Capital Punishment, Inc., N. Y. (now 342 Douglas Building, Los Angeles 12, Calif.) 1940. There has been no change in these two states since 1940.

South Pacific

In the South Pacific the jurisdictions without capital punishment are Queensland in Australia, and New Zealand. Queensland abolished the death penalty in 1922²⁸ and New Zealand in 1941.

The following table includes a list of jurisdictions without capital punishment for civil offenses. Dates refer to years, of abolition or, where use of the death penalty has been abolished by tradition but not by law, to year of last execution. Belgium and Finland are in the latter category. Where more than one date is given (Switzerland and Brazil), progressive change is indicated—for which see the text above. The dates for Rumania and Maine indicate the year of last abolition.²⁹

TABLE I
JURISDICTIONS WITHOUT USE OF THE DEATH PENALTY FOR
CIVIL OFFENSES

<i>Europe</i>		<i>South and Central America</i>	
Belgium	1817	Argentina	1922
Denmark	1930	Brazil	1891, 1946
Finland	1824	Colombia	1910
Iceland	1930	Ecuador	1895
Italy	1947	Peru	1926
Norway	1905	Surinam	1870
Portugal	1867	Uruguay	1926
Rumania	1946	Venezuela	1926
Sweden	1921		
Switzerland	1874, 1942	Costa Rica	1926
The Netherlands	1870	Cuba	1940
U.S.S.R.	1947		
<i>North America</i>		<i>South Pacific</i>	
Greenland	1930	New Zealand	1941
Mexico	1929	Queensland	1922
Puerto Rico			
United States			
Michigan	1847		
Rhode Island	1852		
Wisconsin	1853		
Maine	1887		
Minnesota	1911		
North Dakota	1915		

²⁸ Australian News and Information Center, 630 Fifth Ave., N. Y.

²⁹ For some of the dates given, the writer is indebted to the work of Lewis E. Lawes previously cited.

Summary and Conclusions

Since the beginning of the last war the trend has been toward increased abolition of capital punishment. New Zealand abolished the death penalty in 1941 and Rumania in 1946 although the full import of the latter is not clear. Brazil liberalized its capital punishment law in 1946 by limiting the death penalty to military offenses in time of war.³⁰ Switzerland, in 1942, made a constitutional change which extends abolition of capital punishment to all cantons. The death penalty is in effect for military offenses extremely dangerous to the state but in Swiss democracy the distinction between civil and military is meaningful. The British Labor Government in the summer of 1946 announced capital punishment and the introduction of broad reforms in criminal justice as on the post-war agenda. Lastly, and perhaps most significant, the spread of capital punishment by Fascist governments has been terminated.

On the other side of the ledger, the only jurisdiction positively known to have revived the death penalty for civil offenses is South Dakota. What has happened in Lithuania could not be ascertained but it also has probably adopted the death penalty.

Three countries which were invaded or under Nazi control during the war have joined the long list of countries, possibly temporarily, which make major treason in time of war an exception. Since these three have democratic roots this is no present threat of invasion of civil law.

In Europe and affiliated countries the chief factor in the trend toward abolition of capital punishment has been the operation of popular or democratic government. The New Zealand law was promoted by the Labor Government as is the present proposal to abolish capital punishment in the United Kingdom. The legislative action of the Swiss in 1942 reaffirms a position taken in 1874 in this stabilized democracy. The point is brought into sharper relief by noting trends in Europe before the war when the death penalty was not only revived in countries hitherto without it but used far more extensively, both for punitive and exterminative purposes. The immediate cause was the growth of anti-democratic forms of government in which the individual was regarded as subservient to the state, readily to be sacrificed to the state or to unsubstantiated theories of the state, including theories of crime repression. To the Fascist military mind all democracy was "cream puff."

In South America where democracy is less well rooted, al-

³⁰ This has some significance for Brazil is less inclined to abrogate civil law than some of the other South American countries.

though varying by country, the meaning of the data which has been presented here depends upon the extent to which, country by country, martial law abrogates civil law. In some countries at various times the abolition of capital punishment has not had anything like the significance it has in the European democracies. The action taken by Brazil is part of a change toward a more democratic, less military, form of government.

In the United States the issue of capital punishment, and in fact the far more important issue of reform of criminal justice procedure, has not been thrown into the hopper of the democratic process. No popular political movement has questioned penal theory, least of all capital punishment.³¹ In our present stage of development where organized group pressures call "the shots" no powerful group has thrown penal reform into the public forum. High school debate is not enough to make an issue come alive. As a result a few influentially placed individuals and groups who identify security with maintenance of traditional theory have a free field with little opposition. As long as the issue of capital punishment and the more important issue of reform of our sub-rational theory of punishment lie dormant without organized voice to stimulate the court of public opinion, the best explanations of the trend in the United States will continue to come from the psychiatrist.³²

³¹ The competition of prison labor has got attention of both "capital" and "labor."

³² Karl Menninger, *Why We Kill*, American League to Abolish Capital Punishment, New York, 1940.