

LETTING GO OF THE LASH: THE EXTRAORDINARY TENACITY AND PROLONGED DECLINE OF JUDICIAL CORPORAL PUNISHMENT IN BRITAIN AND ITS FORMER COLONIES IN AFRICA: PART 1

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SUMMARY

Judicial corporal punishment is still widely used in many countries in Africa. Even those African countries which have abolished the practice have only done so relatively recently, following protracted struggles in the courts. In Britain, which was one of the major colonial powers in Africa, calls for a return to judicial corporal punishment continue to be made, more than half a century after its abolition in that country. The idea that the lash is the only form of punishment that is able to curb rampant criminality continues to exert a powerful hold over the public imagination in both Britain and its ex-colonies in Africa. This article focuses on both Britain and its former colonies in Africa and seeks to address the question as to why a method of punishment which, in theory, was becoming outmoded during the nineteenth century, continues to be used in certain countries in Africa and, even where it is not used, took an inordinately long time to be abolished. The extraordinary and continuing popularity of the idea of judicial corporal punishment, in the African context is examined and explained.

1 INTRODUCTION

In many parts of the world today, the whipping of offenders is considered an antiquated form of punishment. Many will regard judicial corporal

punishment as being of some historical interest, but as having very little relevance to current penal practice. In many countries in Africa, however, this form of punishment is still widely used. Even in those African countries which have abolished this brutal practice, in many cases this has been achieved only relatively recently, following protracted struggles in the courts. The idea that the lash is the only form of punishment that is able to curb rampant criminality, continues to exert a powerful hold over the public imagination in Africa, as well as in other parts of the world. Even in the so-called advanced democracies of the West, calls for the return of this particular form of punishment are made at regular intervals. In Britain, for example, strident calls for the return of whipping continue to be made both in parliament and in the press, although judicial corporal punishment in that country was abandoned over half a century ago. At the level of public and political debate, the idea that particularly vicious criminals should be subjected to a good lashing continues to attract support, particularly from amongst the ranks of conservative politicians.

This article focuses on both Britain and its former colonies in Africa. It seeks to address the question as to why a method of punishment which, in theory, was becoming outmoded during the nineteenth century, continues to be used in certain countries in Africa, and even where it is not used, took an inordinately long time to be abolished. Moreover, this article will examine and attempt to explain the extraordinary and continuing popularity of the idea of judicial corporal punishment.

2 THE SHIFT AWAY FROM PUNISHMENT OF THE BODY IN EUROPE

Towards the end of the eighteenth and the beginning of the nineteenth centuries, Europe was undergoing a period of rapid political, social and economic change. It was a period of transition during which European societies were being reconstructed on a new basis. The industrial revolution was gaining momentum and the capitalist middle class was becoming increasingly dominant. As the old order grew weaker, the power of the aristocracy declined. It was at this time that a new philosophy of punishment emerged in Britain, which favoured imprisonment over the existing forms of punishment which were directed mainly at the body, such as whipping, branding, the stocks and public hanging.

The old order was based on a series of strict hierarchical relationships, with ultimate power and authority being vested in the person of the monarch. An act which breached the law was a direct challenge to the sovereignty of the monarch and to the whole fixed social order. The punishment of criminals was a public affair, a political ritual designed to demonstrate royal power and reassert the majesty of the law. The body of the criminal was often subjected to overwhelming violence, but the force used was not indiscriminate. The punishments meted out were often finely calculated to prolong pain and suffering, a demonstration of the controlled anger and

infinite power of the monarch. The ritual only had meaning if it took place in public, but the presence of large numbers of people at such “events” increased the dangers of resistance, either from the crowd itself, or from the accused. Thus the ritual could serve not only to manifest the power of the monarch, but also to illustrate the limits of that power. Ignatieff sums up as follows:

“With the eighteenth century system of punishment, heavily reliant as it was upon public ritual rather than confinement, ruling authorities expressed complacent content ... Hanging was a just terror to the poor; yet its rigor could be mitigated in particular instances through the interventions of prosecutor, patron, judge, and jury. The rituals of pillory, whipping, and execution day carried the message of the law right into the market square ... Banishment rid the mother country of its incorrigibles and enriched the colonies with needed cheap labor.”¹

Towards the end of the eighteenth century, humanist reformers such as Jeremy Bentham, began to express the dissatisfaction of the rising middle class with the existing methods of punishment. The power of the monarch was exercised in an irregular and wasteful manner, and served not to deter crime, but to incite violent resistance and further illegality. As commerce and industry expanded it became increasingly important to find effective means of deterring crimes against property. The reformers condemned the existing punishments as cruel and excessive, and called for a more efficient penal system. In a society based on formal legal equality, social order should rest on consensus rather than coercion. No longer should crime be seen as an attack on the monarch, but as a breach of the social contract. The criminal was not an enemy to be destroyed, but a fellow citizen to be restored to a useful place in society. Ignatieff notes that: “The reformatory ideal had deep appeal for an anxious middle class because it implied that the punisher and the punished could be brought back together in a shared moral universe.”²

Imprisonment became increasingly popular at this time, and eventually all but eclipsed the other forms of punishment. It presented itself as an “egalitarian” punishment, depriving both rich and poor offenders of a fixed measure of their liberty. Further it held out the hope that offenders could be reformed and returned to society.

According to Foucault, the rise of the prison was also inextricably linked to the growth of “discipline”, a new form of “power/knowledge” which developed at this time. The target of discipline was the body, but not the body of an enemy to be marked with the destructive power of the monarch. Rather the body was to be invested by a more positive form of power which would render it more productive and at the same time more obedient. Whereas the power of the monarch was exercised in a spectacular and highly visible manner, the power of discipline lay in its virtual invisibility. Those who exercised discipline remained in the shadows while those who were

¹ Ignatieff *A Just Measure of Pain – The Penitentiary in the Industrial Revolution, 1750-1850* (1978) 42-43.

² Ignatieff 213.

subjected to its power were rendered visible and “known”. It was a restrained and economical form of power, which concentrated on the precise way in which the body performed its actions. It subjected each small action to continuous control, using simple techniques of surveillance (“hierarchical observation”) and a system of petty rules and regulations (“normalizing judgment”). Foucault termed this new technology a “micro-physics” of power, since its essence lay in its meticulous attention to detail.³

With the increasing importance of imprisonment as a form of punishment, restrictions began to be placed on judicial corporal punishment in Britain. Interestingly, however a “counter trend” began to emerge which became apparent in the middle of the nineteenth century and may still be observed today. During times of crisis, judicial corporal punishment came to be seen as a weapon of last resort. As punishment of the body declined in practice, calls were made for its reintroduction in response to what were perceived as especially heinous offences. This “counter trend” had more to do with public discourse about corporal punishment (that is, its “form”) than with its actual implementation or effects (that is, its “content”). Usually, calls for the return of corporal punishment were linked to what Cohen terms a “moral panic”. Cohen describes this phenomenon as follows:

“Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition disappears, submerges or deteriorates and becomes more visible.”⁴

We submit that calls for judicial corporal punishment during times of moral panic, may be understood as political and ideological “ways of coping”. These calls continue to be made more than a century after the Whipping Act of 1861 virtually abolished the whipping of adult offenders in Britain, and over forty years after the practice was completely abolished in 1948. We submit that the special public appeal of corporal punishment as a means of dealing with a “folk devil” (to use another of Cohen’s terms), lies in the fact that its origins predate the present “humane” and reform-orientated system of punishment. With the development of the “modern” penal system, the power to punish retreated behind the walls of disciplinary institutions, and became hidden deep within the technology of discipline itself. Calls for corporal punishment in times of crisis, perhaps express a certain public and political desire for the power which punishes, to become more visible. In the public mind, the idea of corporal punishment perhaps still resonates with the power and authority of the monarch.

³ Foucault *Discipline and Punish – The Birth of the Prison* (1977) 170-194.

⁴ Cohen *Folk Devils and Moral Panics – The Creation of the Mods and the Rockers* (1973) 9.

3 THE EVOLUTION OF JUDICIAL CORPORAL PUNISHMENT IN BRITAIN

Corporal punishments of various kinds played a central role in the judicial systems of England, Wales and Scotland before the industrial revolution. In 1530, for example, the notorious "Whipping Act" was passed, which was designed to combat vagrancy. In terms of this Act, vagrants were to be taken to the nearest town with a market place "and there tied to the end of a cart naked, and beaten with whips throughout each market town, or other place, till the body shall be bloody by reason of such whipping".⁵ After the whipping a pass or testimonial would be issued, allowing the vagrant to return to his or her county of birth. Apart from demonstrating the power and authority of the king, the whip was thus an important instrument by means of which the movement of people was restricted, and the rigid social structure of feudalism maintained. Whipping was only one of a number of different forms of corporal punishment employed in Britain before the industrial revolution. Ignatieff notes that before 1775, "major crimes were punished with banishment, whipping, hanging, or the pillory rather than confinement".⁶

Towards the end of the eighteenth century, corporal punishment increasingly came under attack from the judicial reformers of the time, as being excessive and unjust. As factory production advanced and the crafts were deskilled, labour went through a process of homogenization. The developing capitalist economic system required a "free" labour force, rather than a "fixed" rural population which was held in place by fear of the whip. It was essential that the institutions of social control attain a measure of legitimacy in the eyes of the people, and the reformers emphasized the need to make judicial punishments more humane. As the prison rose to prominence within the British penal system of the nineteenth century, the harsh corporal punishments of earlier times became more circumscribed and restrained. It was not possible to abolish corporal punishment altogether, but it was argued that in those cases where it was absolutely necessary, it should be imposed in a fair and humane manner. For example, the famous utilitarian reformer Bentham suggested the construction of a "whipping machine" consisting of a "rotary flail made of canes and whalebone", which would ensure that each stroke was delivered with equal severity.⁷

During the course of the nineteenth century the power of the courts to impose corporal punishment increasingly became restricted by various Acts of Parliament. The whipping of females in public was abolished in 1817, and in 1820 the Whipping of Female Offenders Abolition Act prohibited the flogging of women altogether. In 1824 the Vagrancy Act stipulated that vagrants could only be whipped for a second or subsequent offence, and the

⁵ Scott *The History of Corporal Punishment – A Survey of Flagellation in its Historical Anthropological and Sociological Aspects* (1938) 38; and Pettifer *Punishments of Former Days* (1939 republished 1992) 108.

⁶ Ignatieff 24.

⁷ Ignatieff 75.

power to order a whipping was removed from the summary jurisdiction of Justices and vested in Quarter Sessions. The use of the pillory as a means of judicial punishment was abolished in 1837. In 1861 a number of criminal statutes were passed which codified and consolidated the English criminal law to a significant extent. Apart from four exceptions, these statutes in effect abolished whipping as a penalty for adult offenders in England, since they did not provide for the imposition of corporal punishment on persons over sixteen years old. The Whipping Act of 1862 similarly restricted corporal punishment of adult offenders in Scotland, and also provided that no offender should be whipped more than once for the same offence. In those limited instances in which the legislation still permitted the imposition of corporal punishment, it was stipulated that whipping should take place in private.⁸

While judicial corporal punishment of adults was greatly limited, the whipping of juvenile offenders was seen as an alternative to imprisonment. Statutes were enacted in both England and Scotland which gave courts the power to order juveniles to be whipped rather than sentenced to imprisonment. Within the prison itself, corporal punishment retained a firm foothold as a quasi-judicial punishment for offences by inmates against prison discipline.⁹

4 JUDICIAL CORPORAL PUNISHMENT AND MORAL PANICS IN BRITAIN BEFORE ABOLITION

By the middle of the nineteenth century it was accepted that corporal punishment was unsuitable for adult offenders and should be used only in exceptional cases. It was to become a feature of penal policy in both the nineteenth and twentieth centuries that these “exceptional cases” were often defined by “moral panics”.¹⁰

The first such “moral panic” which is worthy of mention concerned Queen Victoria herself. In 1842 there was a public outcry following incidents on two consecutive days in which a young man by the name of John Francis pointed a pistol at Queen Victoria. Francis was probably motivated by exhibitionism, since his pistol was not loaded, and the Queen’s life was not in actual danger. Following the outcry, the Treason Act of 1842 was passed, which made it a statutory offence to aim or discharge a firearm at or near the Sovereign. In addition to transportation or imprisonment for up to seven years, the Act provided that an offender could be “publicly or privately whipped, as often and in such manner and form as the court may order and

⁸ Home Office, Command 5684, Chairman – The Honourable Cadogan CB, JP London: HMSO *Report of the Departmental Committee on Corporal Punishment* (1938) par 1-3; and Pettifer 95.

⁹ Home Office (1938) par 4-6.

¹⁰ Cohen 5.

direct, not exceeding thrice".¹¹ This provision was welcomed in Parliament as "a measure calculated to mark with the contemptuous execration of the whole nation those brutal attempts on Her Majesty's life".¹² The power of the courts to order corporal punishment in terms of this provision was never utilized. By the middle of the nineteenth century, corporal punishment was more a means to denote public anger, than a central instrument of penal policy.

A further "moral panic" erupted in 1862 following a series of violent robberies in London, which involved the strangulation or "garroting" of the victim. The public became increasingly alarmed until, finally, a Member of Parliament was attacked. A Bill was introduced which proposed that whipping be added to the penalties already applicable to the offences of garroting and robbery with violence. The Bill was passed into law as the "Garroters Act" of 1863 and, despite the fact that the "Whipping Act" of 1862 had prohibited repeated whippings, it provided that offenders could be "once, twice or thrice privately whipped".¹³ The Act was to apply to England and Wales but not to Scotland. As in the case of the moral panic of 1842, the public alarm caused by "garroting" was probably out of proportion to the actual threat posed by this type of offence. In 1938, the Cadogan Committee of enquiry concluded that the "crime wave" of 1862 had in fact passed before the "Garroters Act" became law, and found no evidence that the Act had resulted in a decrease in "garroting". Nevertheless, the belief that whipping had effectively stamped out "garroting" was still held firmly by witnesses who gave evidence before the Committee over seventy years later.¹⁴ This illustrates the ideological role which corporal punishment began to play in the British penal system in the latter half of the nineteenth century. It was seen as an exceptional punishment capable of stamping out crimes which were believed to be particularly threatening to the community, but it is doubtful whether it performed this function in practice.

Yet another moral panic swept through Britain in the early part of the twentieth century. The panic arose in 1912 as the result of the public's perception that British women and girls were being taken out of the country and introduced into foreign brothels. As in the case of the previous moral panics, the public's perception of the threat posed was greatly exaggerated. Once again, however, unjustified public alarm was to result in legislation providing for the corporal punishment of offenders. The Criminal Law Amendment Act of 1912 was passed at the height of concern over the so called "White Slave Traffic". The Act provided that male persons who were convicted of procuring women or girls for immoral purposes, could be sentenced to a private whipping in addition to imprisonment. It further extended to Scotland a provision of the English law that repeat offenders convicted of living on the earnings of prostitution, or of importuning for

¹¹ Home Office (1938) par 46.

¹² *Ibid.*

¹³ Home Office (1938) par 5.

¹⁴ Home Office (1938) par 56.

immoral purposes, were liable to a whipping in addition to imprisonment.¹⁵ George Bernard Shaw commented as follows:

“As to the flogging from which all our fools expect so much, it will certainly give a lively stimulus to the White Slave traffic. That traffic makes a good deal of money out of flogging, which is a well-established form of vice. White Slaves make money for themselves and their employers by allowing men to flog them.”¹⁶

The great majority of the sentences of whipping passed under the Criminal Law Amendment Act of 1912 were imposed during the period 1912 to 1914, which means that there was less resort to whipping once public concern over the “White Slave Traffic” had died down. The whippings that were imposed under the Act were not inflicted on “White Slave Traffickers”, but rather on homosexual men convicted of importuning for immoral purposes, or pimps found guilty of living on the earnings of prostitutes.¹⁷ The moral panic over the so called “White Slave Traffic” was to mark the last occasion on which public concern was to lead to legislation authorizing judicial corporal punishment for particular offences in Britain. It did not, however, mark the end of the link between moral panics and corporal punishment. To this day, calls for the reintroduction of judicial corporal punishment are made in times of moral panic in Britain.

5 THE CADOGAN COMMITTEE OF ENQUIRY AND THE FACTORS LEADING TO THE ABOLITION OF JUDICIAL CORPORAL PUNISHMENT IN BRITAIN

During the twentieth century, the first major legislative attempt to begin the process of completely abolishing judicial corporal punishment in Britain was made in 1932. A clause was inserted in the Children and Young Persons Bill of that year, to remove the power of magistrates to order juvenile offenders to be birched. The government argued that birching as a punishment for juvenile offenders had largely fallen into disuse, but the clause was vigorously opposed in the House of Lords and was finally dropped from the Bill.¹⁸ In 1937 the Home Secretary appointed a Departmental Committee under the chairmanship of Edward Cadogan to investigate corporal punishment in the penal systems of England and Wales and of Scotland. The committee heard evidence from 72 witnesses, including magistrates, probation officers, chief constables, prison medical officers, police surgeons, doctors, psychologists, and child guidance workers. The law and practice relating to judicial corporal punishment was extensively reviewed, and the

¹⁵ Home Office (1938) par 47-51.

¹⁶ Gibson *The English Vice – Beating, Sex and Shame in Victorian England and After* (1978) 163.

¹⁷ Home Office (1938) par 47-51.

¹⁸ “The Case Against Judicial Beating” March 1982 *The Society of Teachers Opposed to Physical Punishment* (hereinafter “STOPP”) 2-3.

deterrent effects of this form of punishment were assessed. The report of the Committee was submitted in 1938, as the threat of war in Europe became increasingly ominous.¹⁹

At the time of the report, judicial corporal punishment was used rarely in Britain. Although adult male offenders in Scotland were liable to corporal punishment for certain offences under the Treason Act of 1842 and the Criminal Law Amendment Act of 1912, only twelve such sentences were passed between 1912 and 1935. Thus judicial corporal punishment of adult offenders in Scotland during the twentieth century was virtually non-existent. In England and Wales, the Diplomatic Privileges Act of 1708 and the Knackers Act of 1786, provided for corporal punishment, but by the twentieth century these provisions were obsolete. The provisions for whipping in the Treason Act of 1842 were also obsolete, and had in fact never been used. Between 1903 and 1905 a total of 59 sentences of corporal punishment were imposed under the Vagrancy Act of 1824, mostly upon a second conviction for indecent exposure.²⁰ Under the Criminal Law Amendment Act of 1912 and its predecessors 37 such sentences were imposed for the offence of importuning by males, and 46 for the offence of living on immoral earnings, during the period 1904 to 1935. Only five sentences of corporal punishment were imposed for the offence of procuring between 1913 and 1935.²¹ It was for the offence of robbery with violence that most sentences of corporal punishment were imposed on adults during the twentieth century. The provision authorizing corporal punishment for this offence was contained in the "Garrotters Act" of 1863, and was transferred to the "Larceny Act" in 1916. Between 1900 and 1935, 466 adult male offenders were sentenced to corporal punishment for robbery with violence.²²

As for juveniles, the superior courts in England, Wales and Scotland were empowered by statute to impose corporal punishment for certain offences. Such powers were very seldom used during the twentieth century and only 21 such sentences were passed between 1918 and 1935.²³ English and Welsh magistrates' courts were entitled to impose corporal punishment on boys under fourteen convicted of any indictable offence. Between 1900 and 1936, 61,000 birchings of juvenile offenders were ordered by magistrates in England and Wales. There was a steady decline in the number of birchings per year, from 3,385 in 1900 to 166 in 1936. A particularly large decline occurred between 1920 and 1921 (1,380 to 661), following the report of an Inquiry by the Board of Education, which concluded that the birch did not act as a deterrent.²⁴ In Scotland boys under sixteen could be sentenced to corporal punishment for a wide range of common law offences by both superior courts and courts of summary jurisdiction. Between 1900 and 1936,

¹⁹ March 1982 *STOPP* 3.

²⁰ Home Office (1938) par 44-45.

²¹ Home Office (1938) par 47-51.

²² Home Office (1938) par 52-54.

²³ Home Office (1938) par 40-41.

²⁴ Home Office (1938) par 13; March 1982 *STOPP* 2.

14,458 juveniles were birched by order of Scottish courts. There was a decline in the number of birchings per year, from 731 in 1900 to 230 in 1936.²⁵ Ironically, therefore, a punishment which was thought to be suitable for only exceptional crimes in the case of adults was applied to thousands of juvenile offenders in Britain for a wide variety of offences.

As to the manner in which judicial corporal punishment was carried out, by the time of the Cadogan Report the imposition of such punishment was a strictly controlled affair. There were regulations governing the instruments with which judicial beatings were carried out; the number of strokes which it was permissible to inflict; and the precise manner in which the strokes were to be administered. If the law was to inflict physical pain on offenders, it seemed determined to do so in a manner which appeared precise and restrained by the standards of the day.

In most cases juveniles were beaten with a "birch rod", which was described as "a bundle of birch twigs – somewhat similar in appearance to the broom or besom used by a gardener for sweeping up leaves, but less bulky and not having a wooden handle".²⁶ The exact dimensions of the judicial birch were prescribed by regulation. In Scotland, juvenile offenders between fourteen and sixteen were occasionally beaten with the "tawse", which was described as "a leather strap divided at one end into two or more tongues".²⁷ Judicial corporal punishment of juveniles was carried out in private, and care was taken to ensure that the offender was medically fit enough to endure the punishment. In England and Wales a maximum of six strokes with the birch could be imposed on juvenile offenders. In Scotland a maximum of six strokes with the birch could be imposed on boys under fourteen, and 36 strokes with the birch or tawse on boys between fourteen and sixteen. The birch was applied to the bare buttocks of the boy, who was normally held by two police officers while a third delivered the strokes.²⁸ Judicial corporal punishment of adult offenders was inflicted either with the birch or with the "cat-o'-nine-tails". The birch for adults was heavier and longer than the juvenile birch. The cat-o'-nine-tails was described as being "composed of nine lengths of fine whipcord, whipped at the ends to prevent fraying, and attached to a short handle".²⁹ The exact dimensions of this instrument were also specified by regulation. Although certain Acts permitted offenders over sixteen to be sentenced as many as 50 strokes with the birch or the "cat", the Cadogan Committee noted that in the years immediately preceding their report, very few offenders had been sentenced to more than 24 strokes.³⁰

The manner in which the corporal punishment of adult offenders was to be carried out was also specified in great detail. The offender was normally

²⁵ Home Office (1938) par 14.

²⁶ Home Office (1938) par 10.

²⁷ *Ibid.*

²⁸ Home Office (1938) par 8-12.

²⁹ Home Office (1938) par 33.

³⁰ *Ibid.*

examined by a medical officer at least three times before the sentence was carried out. For the infliction of the beating, the offender would be strapped to an apparatus known as a "triangle" which resembled a blackboard easel. If he was to be whipped, a leather belt would be placed around his loins and a leather collar around his neck to protect him from serious injury. Both the Governor and Medical Officer of the prison concerned would be present during the infliction of the punishment, which was supposed to be administered by an officer who could be relied on to do so "dispassionately".³¹ In England and Wales it was stipulated that the officer administering the corporal punishment should be screened from the view of offender. From being a public spectacle of unrestrained power in former times, by the twentieth century judicial corporal punishment in Britain had become a shameful, hidden, and supposedly "dispassionate" affair. The ritual infliction physical pain had become one of "the servile tasks, from which justice averts its gaze, out of the shame it feels in punishing those it condemns ..."³²

In its findings and recommendations, the Cadogan Report distinguished between adults and juveniles. With regard to juveniles, the Committee distinguished between beatings administered by parents or teachers, and those imposed by the courts. In the former case, corporal punishment took place within the context of a close relationship of affection or respect, which would continue after the beating. Judicial corporal punishment was administered in an impersonal manner, and there was often a considerable delay between the offence and the punishment.³³ The Committee placed much emphasis on the reform of juvenile offenders, and expressed concern that corporal punishment might reinforce negative values by making a boy seem like a "hero" to his companions. They referred to the work of Clarke Hall, a pioneer of Juvenile Court work in London, who had found that the abandonment of birching did not lead to an increase in juvenile delinquency.³⁴ They recommended that corporal punishment of juvenile offenders be completely abolished.³⁵

With regard to adult offenders, the Committee argued that corporal punishment could not simply be justified in retributive terms, but should be judged on its ability to reform or deter. Since it clearly did not reform, it could only be justified by its ability to deter.³⁶ The Committee were able to obtain the records of 440 offenders who had been convicted of robbery with violence between 1921 and 1930. They compared the records of those who had been flogged with the records of those who had not been flogged, and found that the latter group was less likely to re-offend than the former. This result was not altered when the two groups were subdivided according to

³¹ *Ibid.*

³² Foucault 255.

³³ Home Office (1938) par 24.

³⁴ Home Office (1938) par 26-27.

³⁵ Home Office (1938) par 85.

³⁶ Home Office (1938) par 39.

their previous records and the subgroups were compared. The Committee concluded that corporal punishment did not deter individuals from offending, and might even produce a negative reaction which would encourage further offending. As for general deterrence, the Committee examined the histories of the various offences for which corporal punishment had been imposed, and could find no evidence that it had exercised a greater deterrent effect on the population at large, than other forms of punishment. The Committee accordingly recommended that corporal punishment for adult offenders be completely abolished.³⁷

The Committee also recommended the abolition of corporal punishment within Borstal Institutions, but declared that it was the only suitable deterrent for serious offences against prison regulations. Corporal punishment continued to be administered in prisons in England and Wales until 1962, and was only abolished legally in 1967.³⁸

6 THE ABOLITION OF JUDICIAL CORPORAL PUNISHMENT IN BRITAIN AND SUBSEQUENT CALLS FOR ITS REINSTATEMENT

The unanimous recommendation of the Cadogan Committee that judicial corporal punishment be abolished for both adult and juvenile offenders received widespread support. The only real criticism of the Committee's report came from those who wanted corporal punishment for offences against prison discipline to be abolished as well.³⁹ The government sought to implement the recommendations of the Report in its Criminal Justice Bill of 1938/1939, but although both government and opposition supported abolition, the Second World War intervened, causing the legislation to be shelved before it could be passed. It was another ten years before the issue again came before Parliament, and in that time 3,002 juveniles and 310 adults were sentenced to corporal punishment by the courts.⁴⁰ Judicial corporal punishment in Britain was finally abolished by the Attlee Labour government in terms of section 2 of the Criminal Justice Act of 1948.⁴¹

No sooner had judicial corporal punishment been abolished in Britain, than a series of moral panics over the apparent increase in the rate of violent crime, resulted in calls for its reintroduction. Fuelled largely by sensational reports in the media, public concern reached a particularly high level in 1952. Magistrates called publicly for the reintroduction of judicial corporal punishment, and in October 1952 the issue was debated in the House of Lords. Although the "pro-flogging" faction commanded much support in the House, it became clear that the tide of Parliamentary opinion was running

³⁷ Home Office (1938) par 55-62.

³⁸ Home Office (1938) par 74; and Gibson 167-168.

³⁹ Craven "Flogging – The Last Chapter But One" 1938 5 *The Howard Journal* 102 106.

⁴⁰ Gibson 181-182.

⁴¹ March 1982 *STOPP* 5.

against the reintroduction of this form of punishment.⁴² The prevailing opinion in Parliament did not prevent the introduction of a Private Member's Bill in the House of Commons calling for the reintroduction of birching as a judicial punishment. The Bill was introduced in November 1952 by Wing Commander Eric Bullus, a Conservative Party Member of Parliament, and set down for debate on 13 February 1953. Public feelings ran high, and on the day of the debate the Magistrates' Association announced that 6,298 magistrates had taken part in a ballot, and that 4,412 were in favour of reintroducing the birch. Despite public pressure of this kind, the Bill was not successful.⁴³

As the 1950s drew to a close, the British public was once more gripped by a moral panic over the apparent increase in crimes of violence. By January 1960, public pressure was strong enough to induce the Home Secretary to request a report on the desirability of reintroducing judicial corporal punishment, from the Advisory Council on the Treatment of Offenders. The Chairman of the Advisory Council, Mr Justice Barry, decided to utilize newspapers and periodicals to call on private individuals and organizations to submit their views on the matter. The extent to which public passions had been aroused by extensive media reporting in the months leading up to the enquiry, was indicated by the enthusiastic response to Justice Barry's request. Almost 3,500 letters and other communications were received by the Council within the space of six months. It appeared from these letters and communications that much public anxiety was focused on crimes of violence "committed by hooligans with no motive ... other than the infliction of pain and suffering on their victims".⁴⁴ Many of the correspondents referred to "young thugs" or "teddy-boys", and it became clear that young offenders between seventeen and twenty one years old were regarded as a particular threat.⁴⁵ It would seem that the threat was less serious than it was perceived to be, and the Council pointed out that the views of many correspondents were motivated by emotion rather than reason.⁴⁶ Clearly, persons who had experienced a particular criminal incident were more likely to be motivated write to the Council than others, and the views of these correspondents could not be taken to represent the opinions of the public as a whole. Public opinion had also been shaped to a certain extent by reports in the media, which probably overstated the problem of youth crime. The influence of the media was evidenced by the fact that certain correspondents "forwarded cuttings from newspapers to illustrate what they had in mind".⁴⁷ Of the 3,500 letters that were received by the Council, 77% were in favour of reintroducing judicial corporal punishment, 17% were against, and 6% were

⁴² Gibson 182-183.

⁴³ Gibson 185-187.

⁴⁴ Home Office, Command 1213, Chairman – The Honourable Mr Justice Barry MC London: HMSO *Corporal Punishment – Report of the Advisory Council on the Treatment of Offenders* (1960) par 42.

⁴⁵ Home Office (1960) par 27-28.

⁴⁶ Home Office (1960) par 32.

⁴⁷ *Ibid*; Cohen 16-19.

undecided.⁴⁸ This closely matched the findings of a public opinion poll conducted in March 1960, which indicated that 74% of the population supported corporal punishment for certain offences.⁴⁹ There was thus considerable public pressure in favour of reintroduction, but the statistical evidence available to the Council showed that flogging did not act as a deterrent.⁵⁰ The Council reached the unanimous conclusion that judicial corporal punishment should not be reintroduced. To reintroduce it for all offences against the person “would mean putting the clock back not twelve years but a hundred years”.⁵¹ It would “militate against the success of reformatory treatment” and damage Britain’s reputation as a “pioneer in the use of enlightened methods of penal treatment”.⁵²

The publication of the “Barry Report” did not bring an end to calls for the reintroduction of judicial corporal punishment in Britain. Over the years, such calls were to be made time and again as conservative politicians engaged in mortal verbal combat with the “folk devils” of the time.⁵³ Towards the end of 1976, for example, the “Football Hooligan” was attracting more media attention than was usual with this ever popular British “folk devil”. As public concern mounted, there were familiar calls for the reintroduction of judicial corporal punishment. The “football birching controversy” reached its height in the first quarter of 1977, and a Private Member’s Bill calling for judicial birching was debated in the House of Commons on 29 April 1977. Parliamentary opinion was firmly against such a step, and the Bill was not successful.⁵⁴

The failed Corporal Punishment Bill of 1977 was not the last attempt to change the law so as to empower the courts to give “folk devils” a “taste of their own medicine”. In March 1982, seven Conservative Party Members of Parliament tabled an amendment to the Criminal Justice Bill of that year in support of the reintroduction of corporal punishment for offenders. Although the amendment was not accepted by Parliament, it put political pressure on the Home Secretary, who was perceived by a certain faction in the Conservative Party as being soft on crime. Mr John Carlisle expressed a view common to the law and order “hard-liners”. He spoke of the need to teach “yobs, hooligans and skinheads” a lesson they would not forget, and stated further that: “We should be able to inflict pain on them ... It would be their just deserts for the pain they very often inflict on others.”⁵⁵

The link between popular “folk devils” and calls for the reintroduction of judicial corporal punishment was to remain apparent throughout the 1980s. Following particularly shocking incidents of violence at the Brussels football

⁴⁸ Home Office (1960) par 24.

⁴⁹ Home Office (1960) par 20.

⁵⁰ Home Office (1960) par 48.

⁵¹ Home Office (1960) par 85.

⁵² Home Office (1960) par 88-86.

⁵³ For more on “folk devils” in general, see Cohen.

⁵⁴ Gibson 190-191.

⁵⁵ 24 March 1982 *The Financial Times*.

stadium in 1985, for example, one Conservative Party Member of Parliament, Terry Dicks, furiously stated that: "Corporal punishment is the only thing these sub humans understand."⁵⁶ Again, in August 1986, following violence by British football supporters in Amsterdam, Carlisle stated that the only way to deal with such incidents was "a good and sound birching and a long stiff sentence in a miserable prison".⁵⁷ In April 1988 a Conservative Party Member of Parliament, Mr Tony Marlow, even claimed that "vandals and soccer hooligans" could be sentenced to spend a day in the stocks, since this form of punishment had never been legally abolished. This was denied by a Home Office spokesman.⁵⁸

As the 1980s drew to a close there were to be further calls for the reintroduction of judicial corporal punishment, but it would seem that political considerations played a major role in motivating these calls. In April 1987, for example, a number of Conservative Party Members of Parliament attempted to introduce a clause into the Criminal Justice Bill of that year, to allow corporal punishment to be used against juvenile offenders for certain offences. Juveniles between fourteen and eighteen were to be subjected to the birch, and those under fourteen to the cane. It is open to question whether those who proposed the new clause actually believed that it would be realistic to reintroduce corporal punishment of offenders almost 40 years after its abolition. Even if they did, it would seem that they also had political motives for making the call. The group was accused by an Opposition spokesman on home affairs of "putting this clause forward without any intention of voting for it because they want to get their names in their local papers to try to pretend that they are getting tough on crime". After a brief debate the clause was rejected by Parliament.⁵⁹

At the Conservative Party conference a few months later in October 1987, there were renewed calls from the delegates for the reintroduction of corporal punishment for offenders. Once again, it would seem that these calls were not only aimed at the reintroduction of corporal punishment in practice, but also at expressing political anger, and at putting pressure on the government to take firm action against crime. More motions were put forward on law and order at the conference than on any other area of concern. Typical of these motions was a request by the Hazel Grove Constituency Association for the government to "lead the party in the House into supporting the re-introduction of corporal and capital punishment ...". The purpose of this motion was clearly to put political pressure on the government to take a firmer stance on law and order. The Hazel Grove Constituency Chairman stated that:

⁵⁶ 1 June 1985 *The Guardian*.

⁵⁷ 12 August 1986 *The Guardian*.

⁵⁸ 22 April 1988 *Today*.

⁵⁹ 1 April 1987 *The Times*.

"We thought an extreme motion might provoke a reaction. Parliament never considers how the grassroots feel about people getting off lightly after the most awful crimes."⁶⁰

Of the 102 motions put forward at the conference, more than one third urged the return of corporal or capital punishment, and there was even a call for the castration of rapists. The *Economist* commented as follows:

"The gentle Mr Douglas Hurd is not likely to introduce the noose, the birch or the knife. Instead he may offer to strengthen police powers at the expense of suspects' rights, by allowing prosecutors and judges to infer guilt from the silence of a suspect during police interrogation."⁶¹

Two years after the events described above, a call was made at the Conservative Women's Conference in May 1989, for a limited return to corporal punishment. The offenders to be targeted were those guilty of crimes of violence against the person. It was made clear that the call was for a limited and temporary return to corporal punishment as an emergency solution to a perceived worsening crime situation.⁶² Even if it was unrealistic to expect corporal punishment to be reintroduced, the call for this drastic measure would serve to allay the fears of constituents, by indicating a firm resolve to overcome the problem by whatever means.

During 1993 Britain experienced yet another moral panic, following the abduction and murder of a young child by two juveniles. Public concern over the level of juvenile crime reached fever pitch, and on 23 February 1993 *The Independent* reported that:

"Mr Clarke faced calls from Tory right-wingers for the readoption of corporal punishment. Calling for the reintroduction of caning, John Townend, a senior Tory who attended the meeting, said: 'Anyone who has dealt with animals knows that a slap at the right time does a lot of good. Children learn by pain.'⁶³

It is clear from the above that calls for the reintroduction of judicial corporal punishment in Britain are usually associated with the reactions of right-wing politicians to the perceived "breakdown" of law and order. Whether or not such "knee-jerk" reactions are, or might become, relevant to mainstream debate on the punishment of offenders, is highly questionable. What is interesting, however, is that calls for the reintroduction of corporal punishment continued to be made in Britain many decades after it had been abolished.

At this point, having traced the evolution of judicial corporal punishment in Britain, let us turn to a discussion of the role of this brutal penal practice in Africa, focusing in particular on the former British colonies, and beginning with a discussion of the role of judicial corporal punishment during the colonial period.

⁶⁰ 3 October 1987 *The Daily Telegraph*.

⁶¹ 26 September 1987 *The Economist*.

⁶² 2 June 1989 *The Independent*.

⁶³ 23 February 1993 *The Independent*.

7 JUDICIAL CORPORAL PUNISHMENT IN AFRICA DURING THE COLONIAL PERIOD

Many scholars have pointed to the significant role played by judicial corporal punishment in Africa during the colonial period. The work of David Killingray, for example, details the extensive use of this brutal form of punishment in British Colonial Africa, while James Read describes the “widespread and frequent use of corporal punishment as a summary punishment” in German East Africa.⁶⁴ In the Colony of Natal, the whipping of black offenders in particular with the notorious “cat-o’-nine-tails” was so extensive that a commission set up in 1906 to reform the penal system of the colony described the prevailing policy as the “cult of the Cat”.⁶⁵ In this same colony in 1909, the Attorney General stated as follows in a debate in the Legislative Assembly: “We have a law for the Kafir in this colony, and the law is to flog him and to flog him severely ...”⁶⁶ The extensive and excessive whipping carried out by the colonial powers left indelible scars on the national psyches of many of Africa’s colonized peoples. For example, Florence Bernault writes of the Belgian Congo that “the famous *chicotte* – whipping administered by agents of the Force Publique – became so widespread that it later remained as an icon of colonial punishment in the memories of contemporary Zairians”.⁶⁷ The Chief Justice of Namibia, in a court judgment which finally outlawed judicial corporal punishment in that country, spoke of the “indelible impression” which this form of punishment left on the people of Namibia, and of the “deep revulsion” which developed in that country towards corporal punishment.⁶⁸ Bernard Mbenga comments as follows on the effects of the flogging of Chief Kgamanyane by Commandant Paul Kruger at Saulspoor in South Africa in 1870:

“The humiliation of the flogging incident became forever embedded in the collective psyche of the Kgatla – perhaps especially as President Kruger came to embody unjust Boer treatment of Africans ... In the 1990s, in both Mochudi and the Pilaesberg, practically all of the older generation of Kgatla men and women still provide graphic accounts of the flogging, although now

⁶⁴ In relation to Killingray’s work see, eg, the following two articles: Killingray “Punishment to Fit the Crime? Penal Policy and Practice in British Colonial Africa” in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 97 106-110; and Killingray “The ‘Rod of Empire’: The Debate Over Corporal Punishment in the British African Colonial Forces, 1888-1946” 1994 35 *Journal of African History* 202-216. In relation to the comment by Read see: Read “Kenya, Tanzania and Uganda” in Milner (ed) *African Penal Systems* (1969) 91 109. Read notes that no fewer than 5,944 official floggings were administered in the colony during the period 1911 to 1912.

⁶⁵ GN 344 *Natal Government Gazette* of 1906-06-05: Report of Prison Reform Commission par 70. See also Peté “Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal” 1986 1 *Natal University Law and Society Review* 99-114; and Peté and Devenish “Flogging, Fear and Food: Punishment and Race in Colonial Natal” 2005 31 *Journal of Southern African Studies* 3-21.

⁶⁶ Attorney General *Natal Legislative Assembly Debates Volume 42* (1909) 381.

⁶⁷ Bernault “The Politics of Enclosure in Colonial and Post-Colonial Africa” in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 1 15.

⁶⁸ Per Berker CJ in *Ex Parte Attorney General, Namibia: In Re Corporal Punishment by Organs of the State* 1991 3 SA 76 (Nm) 94G-H.

with much less bitterness. The fact that, a little over a century later, this event is still so vividly recalled, is a clear indication of how long a traumatic historical episode can survive in a people's collective memory."⁶⁹

The issue to be explained is why an antiquated and brutal form of punishment, with roots in pre-modern times, should have been relied on so heavily in the colonies of Africa. It is submitted that an important reason for this seemingly anomalous situation is to be found in the inarticulate premise which underpinned punishment in the "Colonial" as opposed to the "European" context. With the advent of modernity, punishment in Europe was based upon the belief (in theory at least), that offenders could be reintegrated into a consensus-based society, in which all citizens subscribed equally to the social contract. For this reason, penal discourse in Europe centered on the reform and rehabilitation of the criminal by means of the deprivation of liberty, within an institution designed to achieve this purpose. In the colonies of Africa, however, punishment of the indigenous population was not designed to rehabilitate and reform. The main purpose of punishment in the colonies, in relation to the indigenous population at least, was to dominate and subjugate those who dared to challenge the sovereignty and authority of the colonists. Mere imprisonment was not sufficient for this purpose. A more primitive form of punishment was needed, with sufficient perceived strength to stamp colonial power on a restless and often rebellious mass of people, constantly seeking to usurp the authority of their oppressors. What better instrument to exercise colonial control than the lash, since corporal punishment still resonated with the power and authority of the King of pre-modern times? Bernault explains as follows why archaic forms of punishment, such as corporal punishment, were so at home in colonial Africa:

"In western societies, penal reform emerged at the heart of a large social consensus – in response to the convulsive passage of European economies to industrial capitalism – seeking to resolve the most dangerous social aspects of this economic disruption to the benefit of the dominant classes. In the colonies, by contrast, economic profit depended upon political despotism and the enduring antagonism between different segments of colonial society. The tropical prison did not seek to separate lawful citizens from marginals and delinquents; it aimed to reinforce the social and political separation of the races to the sole benefit of white authority by assigning the mark of illegality to the whole of the dominated population. As such, the colonial prison did not supplant, but rather encouraged penal archaism. This is why the colonial prison did not *replace* physical torture in the colonies; it only *supplemented* it – recycling, far from the European metropolises, the long-forgotten practice of state violence and private vengeance."⁷⁰

As a visible manifestation of power and authority, judicial corporal punishment assumes particular symbolic importance within a racially divided society. For example, in 1933 a local black chief in the British-ruled

⁶⁹ Mbenga "Forced Labour in the Pilaesberg: The Flogging of Chief Kgamanyane by Commandant Paul Kruger, Saulspoort, April 1870" March 1997 23(1) *Journal of Southern African Studies* 127.

⁷⁰ Bernault 16.

Protectorate of Bechuanaland ordered a white man to be whipped. Lieutenant Colonel Charles Ray, the British Resident Commissioner at the time, stated that it was "impossible to exaggerate the effect in the Protectorate and in South Africa generally of the public flogging of a European by natives in a Native Court".⁷¹ As a result of this incident, a force of bluejackets and marines from the warships of the Africa Squadron were dispatched to Bechuanaland in a show of force, and the chief was stripped of his authority in a ceremony designed to re-establish colonial (white) authority.⁷² Simon Coldham notes that in all British territories⁷³ the British almost totally ignored the African concepts of criminality and punishment. Through the Codes and criminal legislation, the colonial authorities established a system of prosecution, sentencing and treatment of offenders that was wielded as a "blunt and generally harsh instrument of social control ..."⁷⁴

Apart from its role in imposing colonial sovereignty and authority, however, we submit that there was another important reason why corporal punishment of the indigenous population was so popular in the colonial context. This reason was bound up with the ideological assumptions of the white colonists. In terms of the racist paternalism which underpinned the colonial project, indigenous peoples were regarded not only as brutal savages capable of unspeakable cruelty, but also as simple childlike creatures, to be assisted on the upward path towards white civilised values.⁷⁵ The colonists did not believe that members of the indigenous population would benefit particularly from reform-oriented punishments such as imprisonment. Corporal punishment was a more direct form of correction which was easier for the "childlike Native" to understand.⁷⁶

To sum up, it is our contention that colonial societies in Africa were motivated by two opposing impulses. The one impulse was fear of the

⁷¹ Crowder *The Flogging of Phinehas McIntosh – A Tale of Colonial Folly and Injustice Bechuanaland 1933* (1988) 49.

⁷² These events are fully described in Crowder; and compare Trennert "Corporal Punishment and the Politics of Indian Reform" 1989 29(4) *History of Education Quarterly* 595-617.

⁷³ Coldham discusses Nigeria, Ghana, Kenya, Tanzania, Uganda, Zambia and Malawi in particular.

⁷⁴ Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects 2000 44 *Journal of African Law* 218 222-223.

⁷⁵ Eg, in the context of colonial Natal, Robert Morrell describes how the White male settlers exhibited a strong paternalistic attitude towards the Black farm labourers, and frequently used corporal punishment to admonish errant workers. See Morrell *From Boys to Gentlemen, Settler Masculinity in Colonial Natal 1880-1920* (2001) 183.

⁷⁶ Eg, the Kenyan Commission on the subject of Native Punishment reported in 1923 that: "The arguments advanced in favour of flogging are that it is inexpensive, that it is summary, that the native is a child and should therefore be punished as a child and that it is effective." See Read 111. For an extensive discussion of the ideology underlying corporal punishment in colonial society see Peté and Devenish (2005) 31 *Journal of Southern African Studies* 3-21. See also Killingray 106-110; Peté "Spare the Rod and Spoil the Nation? Trends in Corporal Punishment Abroad and its Place in the New South Africa" 1994 7 *South African Journal of Criminal Justice* 295 301-303; and Peté "To Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment On Their Children?" 1998 14 *South African Journal on Human Rights* 430 434-437.

surrounding indigenous peoples, who almost always greatly outnumbered the colonists. The other impulse was a racist paternalism which caused the colonists to regard the indigenous peoples as children requiring guidance and correction. When it came to punishment, each of these two opposing impulses reinforced the other in its support for corporal punishment as the ideal form of punishment for African offenders. On the one hand, such offenders were regarded as dangerous savages, who would only respond to physical pain. On the other hand, African offenders were seen as being simple and childlike, and therefore amenable to physical correction. Part 2 of this article will deal with the position of judicial corporal punishment within specific African countries during the post-colonial period.