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## Review of 'Justice, Mercy, and Caprice: Clemency and the Death Penalty in Ireland'

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“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases”, declares para.3 of art.6 of the International Covenant on Civil and Political Rights. The provision is more hortatory than judicial in nature. It has rarely been invoked in litigation. Nevertheless, it underscores the importance of clemency in the implementation of capital punishment where it is still practised.

Clemency was quite central to the death penalty regime in Ireland during the 20th century. The legal framework was of course a legacy of British rule. To this day, the tenacity of the death penalty in Britain's former colonies stands in stark contrast to that of other European imperialist states like France, Belgium and Portugal, where abolition is the rule. Within the British empire, the Dominions and the Irish Free State were the exceptions. Capital punishment lost momentum and by the 1950s had virtually disappeared. In these countries, a significant period of *de facto* abolition concluded with legislative changes and, in the case of Ireland, constitutional amendment.

Professor Ian O'Donnell, of University College Dublin, has produced a masterful study of one aspect of the death penalty in Ireland, starting with the founding of the Free State and concluding with the final act of executive intervention into the judicial realm: the posthumous pardon granted by President Higgins to Harry Gleeson on 19 December 2015. Gleeson was hanged on 23 April 1941. Séan MacBride, then at the beginning of his new career as a barrister, was his junior counsel. A few weeks before Gleeson's pardon, Noel Callan and Michael McHugh were released from detention. They were among the last men to benefit from clemency, their sentences for murder of a member of the Garda Síochána having been commuted to a 40-year term of imprisonment.

Despite the seemingly narrow focus of Professor O'Donnell's study, in a more general sense it provides a fine overview of the law and practice of capital punishment over the past century. There are many fascinating details about such things as the small black hat worn by judges when sentence of death was pronounced. The book is richly supplemented with tables and statistics that reveal the conduct of individual ministers, regional patterns and the application of the death penalty to specific types of offences.

The author has diligently mined the National Archives of Ireland for much of his information, locating the individual case files as well as records of meetings and correspondence at the governmental level. He has also taken the trouble to look for leads at the British National Archives where, astonishingly, he encountered an obstacle. Professor O'Donnell was pursuing a request for the services of an executioner made in 1976 by the Garda Síochána to the Home Office in London. This was 18 years after the last execution, indeed the only one ever conducted in the Republic of Ireland. The Home Office file

remains sealed, in part, and the author's Freedom of Information application was unsuccessful. He was told that disclosure of the correspondence would necessitate a diplomatic damage-limitation exercise.

Clemency is defined as a reduction, by politicians, in the severity of punishments lawfully imposed by judges. Death sentences for murder were mandatory and it might therefore be argued that clemency was nothing more than politicians addressing what they themselves had wrought. That does not mean that judge or jury had no real role in the process. Both, in different forms, made recommendations to the government about whether to implement the sentence of death.

Professor O'Donnell's study distinguishes between three dimensions of the practice of clemency: justice, mercy, and caprice. Each of these makes its own distinct contribution to the mitigation of capital punishment. In the more reflective and theoretical parts of the book, the role that clemency plays as a counterweight to "justice" is considered. He makes the interesting observation that "clemency facilitates legislative inertia".

Some writers have described clemency as a "lottery", but Ian O'Donnell disagrees. His research shows consistent patterns and predictability. A few of these seem peculiarly Irish, related to beliefs and traditions that sometimes set the country apart. A lengthy discussion is entitled "the burden of an unwanted child". It notes the consistently merciful attitude taken by juries in cases of infanticide. It was a form of recognition, Professor O'Donnell suggests, that the mothers (and a grandmother in one case) were "following the rules of an intolerant and stigmatizing society".

Capital punishment remains on the statute books in about one-third of the more than 160 countries where the death penalty appears to be abolished. In these so-called *de facto* abolitionist states, capital sentences often continue to be imposed but executive clemency prevents their implementation. Only very rarely will a country that has passed a decade without an execution return to the practice. The phenomenon is extremely important but poorly understood, sometimes because governments do not trumpet the development out of fear this may be exploited by demagogic politicians. Necessarily, then, a full grasp of the forces and influences that contribute to *de facto* abolition of capital punishment is very desirable. In this respect, aside from its undoubted interest to our knowledge of the history of criminal justice in Ireland, Ian O'Donnell's study is a compelling, thoughtful and extremely well-researched contribution with the potential to influence debates elsewhere in the world.

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