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An Evaluation of the Scope and Importance of Judicial Discretion from 1750-1850

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Abstract

This paper offers a journey back to the period 1750-1850 investigating the demise of judicial discretion resulting in the rise of the adversary trial and the role discretion played in the reforms at that time. Judicial discretion was far reaching in 1750, both during the trial itself and in post-trial proceedings. Much of what the jury heard was controlled by the judge and the use of the Royal Pardon was considered tyrannical and promoted a system of selective terror. The arrival of counsel and the discretion of the jury limited the discretion of the judge in the court room somewhat and the use of the Royal Pardon was restricted following the collapse of the 'bloody code'. This essay argues that the reformers of the time exaggerated the arbitrariness of discretionary power and used this to push through the reforms which removed the death penalty from many offenses. It is arguable that discretion was actually exercised in a more principled manner than was represented by the reformers and the core of the debate lay in the transforming notion of justice. Discretion was no longer viewed as an adequate vehicle for the administration of the reformers' enlightened idea of justice, showing the importance of judicial discretion to the changes in the law in this period. However, considerable judicial discretion remained in 1850 showing how the change in scope was in fact relatively slight and the move towards the adversary trial was gradual.

I. Introduction

The period 1750-1850 was arguably one of change with respect to trial and punishment of felonies in England; this is evident through the movement towards a more adversary trial and the collapse of the 'Bloody Code'. A fundamental factor contributing to this change was the differing opinions regarding the amount of discretion available to and exercised by the bench. According to McGowan, 'the judges were the

bedrock upon which the institution of justice rested'[1] but there was much controversy as to whether this was a satisfactory system of administering justice. This essay will investigate the scope of judicial discretion from 1750-1850 and examine its importance, in particular the role it played in the reforms of the 1830s and whether this really was the end of the 'golden age of discretion'[2].

II. Scope of Judicial Discretion from 1750-1850

i The Arrival of Counsel

During the second half of the 18th century, the scope of judicial discretion appears to be wide; this is evident through the clear dominance of the judge over the trial proceedings. Beattie attributes this dominance partly to the result of the role the judge played in the absence of counsel, giving him opportunity to comment on evidence to deduce testimonies from witnesses, acting as counsel for the accused[3]. At the start of the period in question, lawyers were used occasionally by the accuser, if they were wealthy, and very rarely by the defence. Langbein has termed the largely lawyer-free proceedings as the 'accused speaks' trial in which the accused conducted his own defence as a running bicker with the accusers[4]. The judge would ask questions in order to fill in gaps in the testimony that was volunteered to the court, providing the judge with some discretion over what the jury heard. This meant that each case was tried on its merits, as judicial discretion provided no reliable guidelines[5]. Moreover, the workload of the judiciary was very heavy so there was a desire to end the trial as quickly as possible, although by cutting the trial short the judge was potentially depriving the accused of a thorough examination of their

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[1] Randall McGowan, 'The Image of Justice and Reform in Early Nineteenth Century England' 32 Buffalo Law Review 89 (1983), 89-125.
[2] Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford, 2000), 353-373.
[3] John Beattie, *Crime and the Courts in England 1660-1800* (Princeton, 1986), 406-436.
[4] John Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), 291-343.
[5] Beattie (n3)

case. At this time there was no right to appeal but the judge did possess discretion to reserve any point of law at his will, which was viewed as a sufficient safe-guard against potential injustice[6].

The increasing presence of counsel from the late 18th to the early 19th century began to impose some parameters on the discretion of the judge. At first, the bench placed severe restrictions on the scope of the counsel's activity; however this failed to contain the slow transformation into a more adversary procedure. Langbein points out that the reason that this occurred was down to the gradual nature of the process[7]. By 1836, defence counsel were even permitted to address the jury, resulting in a reduction in the judge's influence by breaking down the relationship with the jury. Lawyerisation also limited judicial discretion by establishing of rules of evidence, which had previously been at the will of the judge, as well as causing more recognition of judicial precedent as lawyers would ensure the judge exercised their discretionary power in a manner consistent with previous decisions.[8]

ii Discretion of the Jury

Prior to the arrival of counsel, an issue of debate had been how much influence the judge was able to exercise over the jury and influence their decision. For example, when 'summing up' the trial and directing the jury, the judge often expressed their own opinion on how the case should be decided. Hay articulated a rather radical view that 'all men of property knew that judges, justices and juries had to be chosen from their own ranks'[9] and argued that the propertied

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[6] Phil Handler, 'Judges and the Criminal Law in England 1808-1861' in P. Brand [et al] *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge, 2012)

[7] Langbein (n4)

[8] William Cornish, *Law and Society in England 1750-1950* (Sweet & Maxwell 1989), 567-587

[9] Douglas Hay, 'Property, Authority and the Criminal Law' in Hay [et al] *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Penguin, 1976), 17-63.

and elite judges used their discretion in the criminal law as a mechanism to enforce their 'ruling class conspiracy'[10]. He stated that the conspiracy was not necessarily discussed; it was more of a subconscious understanding between the aristocratic elite that they would use the criminal law to oppress the working class and protect their property. On the other hand, Langbein found Hay's account of jurors 'baffling' as they were not drawn from the ranks of the justices and judges but represented every segment of the community[11]. Furthermore, King tells us that juries were made up of mostly from the middling group or below[12]. It is hard to argue with Langbein's claim that 'if I were going to organise a ruling class conspiracy to use the criminal law to terrorise the lower orders, I would not interpose autonomous bodies of non-conspirators like the petty juries'[13]. It is possible to state that Hay did not sufficiently recognise the discretion of the jury in decision making which ultimately took away from that of the judge. Additionally, if the jurors thought that the judges were trying to use their discretion to serve interests of the aristocratic elite then the jurors would have been more disinclined to follow their direction[14].

The extensive use of partial verdicts by the jury to reduce the offence to one that was not capital or to make the offence clergyable reflects a desire to avoid committing what could be seen as judicial murder. Jury discretion goes hand in hand with limiting judicial discretion as even if the judge directed the jury to sentence to death, if they returned a partial verdict, the judge was compelled to enforce it. Thus the jury showed considerable independence from judicial influence by in exercising these powers[15]. This is also helpful in departing from Hay's theory as the jury often used their discretionary powers to be lenient towards woman and

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[10] Ibid
[11] John Langbein, 'Albion's Fatal Flaws' 98(1) Past and Present (1983), 98-120.
[12] Peter King, 'Decision Makers and Decision Making in the English Criminal Law 1750-1800' 27(1) The Historical Journal (1984), 25-58.
[13] Langbein (n11)
[14] Ibid
[15] King (n12)

younger defendants, imposing their own notions of justice[16], showing how judicial discretion may not have been as wide as appears at first glance. The relationship between the judge and jury was crucial as both had the discretionary power to manipulate the law with the view of achieving an appropriate outcome, which it seems they mostly agreed upon[17].

iii The Royal Pardon

The scope of judicial discretion in the second half of the 18th century is arguably more concentrated in the post-trial proceedings, Langbein claims this was to make up for the lack of direct judicial discretion in other areas[18]. If the accused was condemned to death, themselves or their friends and family would often petition the Crown for mercy and at the end of a session the judiciary would decide who was to be pardoned and who was to be hanged. The system came to be viewed as inhumane and potentially tyrannical as the amount of capital statutes was at its highest, yet so was the use of the royal pardon. Popular opinion among historians was that judges were choosing objects of terror rather than the occasional object of mercy and this process was dictated by prejudice and 'capricious whim', rather than by set principles or rules[19]. Hay classified this system as one of 'selective terror' and claimed that the raw material of authority coupled with the structure of the law and class interest made discretion an effective tool of power for the elite to serve their interests in property and oppression of the lower classes[20]. McGowan highlights how advocates of reform shared this view: 'Judicial discretion had grown ominously; Romilly feared that justice had come to seem the product of individual will'[21].

However, it is possible to state that Hay's thesis gives insufficient weight to the central issues considered by judges when distributing pardons as class interest was, in reality, only

[16] Ibid
[17] Beattie (n3)
[18] Langbein (n11)
[19] King (n2)
[20] Hay (n9)
[21] McGowan (n1)

a peripheral concern[22]. Empirical data analysed by King shows how youth was often a mitigating factor due to a belief in reformability. Also, softer sentences appear to have been given to those between the ages of 30 and 40 which can be explained by this age group being likely to have a family to support[23]. Petitions and reports compiled during the pardoning process show many references to good character and previous conduct of the accused[24]. Also, judges tended to lean towards the accused where they could claim poverty, the evidence in the trial was questionable, the prosecution seemed malicious or if the character of the offence did not warrant the death penalty. Despite the limitations of sources resulting in difficulty in coming to a clear conclusion, King's evidence portrays that, despite popular belief, most sentencing and pardoning decisions were in fact based on universal and widely agreed criteria rather than on class favouritism[25]. Thus, even though there was not a lot to go on, the approach was not wholly haphazard[26]. These principles acted as constraints on the scope of the discretion of judges in post-trial proceedings showing that it was perhaps exercised in a more ethical and less arbitrary manner than was believed, or represented by the reformers of the time.

iv Remaining Discretion in 1850

Judicial discretion retained some scope even after the collapse of the 'Bloody Code'. Judicial attitude to discretion remained the same; this is illustrated by their opposition to the establishment of the Court of Crown Cases Reserved (CCCR) in 1848. It was believed that this undermined the finality, certainty and authority of the trial judge's decision. The existing ability of the judges to choose whether to reserve points of law was viewed by the judges as sufficient in ensuring that no injustice occurred[27]. However, the CCCR

[22] Langbein (n11)
[23] King (n12)
[24] Ibid
[25] Ibid
[26] Cornish (n8)
[27] Handler (n6)

did reflect movement towards the reformer's image of justice as transparent and formal. Also, after the removal of the death penalty from most offences, the judiciary were left with wide powers of discretion in determining the mode and length of the less severe punishments of imprisonment and transportation. Additionally, despite the limits the arrival of counsel imposed on judicial discretion, they were still largely absent in 1850 as many victims and defendants could not afford representation, showing that the development of the adversary trial in 1850 was still a work in progress and some judicial dominance still remained.

Having investigated the scope of judicial discretion in the period of 1750-1850 it is possible to state that it was not as extensive as it would seem at first glance and was still present to some extent at the end of the period. The debate surrounding judicial discretion was instrumental to the collapse of the 'Bloody Code' in the 1830s which narrowed its remit. However, it is arguable that the abuse of the wide discretion possessed by the judges was exaggerated by advocates of reform and the core of the debate lies deeper, in different and transforming notions of justice[28].

III. Importance of Judicial Discretion to the Reforms of the 1830s

i Supporters of Discretionary Power

The judges were keen to retain their discretion as they believed that the power to grant mercy and discretion were what made the system humane as they could ensure that the law was applied in a moral manner and that only the most deserving suffered its full severity. Hay attributed this desire to the self-serving attitude of the propertied elite utilising the ideas of mercy, justice and majesty to create the law as an ideology to the lower classes, compelling them to adopt a positive image of the law. However, Langbein points out how Hay legitimates his argument by dismissing factors that go against his thesis as 'sub-plots', such as seemingly justified

[28] McGowan (n1)

acquittals or the granting of mercy, showing possible weakness to his thesis[29].

The oppositions to reform were not only the judges but the conservatives of the time. Although few defended the severity of the law, many took the standpoint that the discretion of the judiciary was of great importance as it incorporated wisdom, knowledge and experience into existing practice which was both desirable and necessary in the administration of justice. The judiciary were well educated and experienced in the law so it was argued that there was no better place to vest the discretionary power than with them, 'it was a system based on experience and history, not speculation' [30]. Reform would result in mechanical certainty as laws could never be perfect and account for every shade of circumstance in a case, but personal judgement and discretion could compensate for this imperfection [31]. Moreover, it was argued that taking away discretion within the trial would leave the accused without the 'protective benevolence' of the judge as well as lead to more inequality as only the wealthy would afford legal representation[32].

ii The View of the Reformers

On the contrary, advocates of reform argued that judicial discretion was not important to the administration of justice and was actually creating injustice. It was claimed that there was no certainty and equality in the law and therefore no real lesson of deference or discipline to the populace. Punishment was distributed in a 'lottery of justice'[33] meaning citizens could not make the link between an offence and a particular punishment. Furthermore, the fact that there had to be so much recourse to discretionary power to grant mercy was viewed as evidence of the disorganisation of the inhumanity and disorganisation of the system. According to

[29] Langbein (n11)
[30] McGowan (n1)
[31] Ibid
[32] Ibid
[33] Ibid

McGowan, the reformers were successful in their quest for change through the reinterpretation of aristocratic judicial practice in order to create the appearance of injustice[34]. The scope and nature of judicial discretion were arguably exaggerated and linked to 'discredited principles of aristocratic government' which assisted in pushing through the reforms of the 1830s[35].

It is clear that both sides of the debate agreed that judicial discretion was the operative principle of the administration of justice[36]. Additionally, both sides shared the aim of creating an image of justice which was satisfactory in the eyes of the populace; it was how to achieve this that was in disagreement[37]. According to McGowan judicial discretion was not rejected, it was more that claims about its nature were no longer understood due to a transforming image of justice; as King stated, 'Justice was not brilliant in this period but it does not mean that it was an empty word'[38].

IV. Conclusion

In conclusion, in the late 18th century the scope of the judges' powers of discretion were most prevalent in their dominance over the trial, post-trial proceedings and the punishment of offenders. However, King's research has illustrated that these powers were exercised in a more principled manner than the reformers believed and represented. The importance of judicial discretion to the collapse of the 'Bloody Code' is highlighted in the self-serving and arbitrary aims attached to the prerogative of mercy and discretion possessed by the aristocratic elite, utilised by the reformers to give an inhumane image which arguably did not completely reflect reality. Therefore, it is possible to state that this amplified image of discretion was used as a tool to push through reforms to remove the death penalty from many offences in

[34] Ibid
[35] Ibid
[36] Ibid
[37] Ibid
[38] King (n2)

the 1830s, in accordance with the transforming image of justice at the time. The judiciary and conservatives of the time believed the prerogative of mercy was what made the system humane and prevented mechanical justice. This attitude of the judiciary towards the retention of their discretion did not change and considerable discretionary power remained in 1850. Thus, in this period judicial discretion underwent some small reductions in scope but its importance in the changes to trial and punishment, albeit exaggerated, cannot be denied.

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