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Discussion of 'How people argue about abortion and capital punishment in Europe and America and why' by Professor Christie Davies,

by Michael J. Coughlan.

The phenomenon to which Professor Davies draws our attention is that of the simultaneous legitimation of liberal abortion and the aborting of liberal execution, as he phrases it so economically (p.4); a phenomenon common to most of the countries of the western world. The fact that the curtailment of the legalised killing of adults has been accompanied by widespread legalisation of the killing of fetuses might seem purely accidental, or indeed perverse, given that the value placed on human life appears to be at once both raised and lowered. Christie Davies, however, believes that reasons can be identified for the coincidence of these two developments: essentially, his central thesis is that both are consequences or manifestations of a shift from 'moralist' to 'causalist' thinking and argument, i.e., from the view that central to these issues are questions of guilt, innocence, and justice, to the view that what is paramount is the minimising of human suffering. The case is argued mainly on the basis of a scrutiny of the relevant debates in the British Parliament, but evidence from other European states and the United States is also brought to bear. What this evidence shows, it is claimed, is that, broadly speaking, pre-existing laws which traditionally embraced the 'moralist' outlook were successfully reformed by advocates of 'causalism': justice succumbed to utility (see p.57 for the most precise statement of the thesis).

It is recognised that a defence of this thesis faces some difficulties. In particular, it is noted that in the British debate on capital punishment moralists and causalists could be found on both sides, and that in the United States the eventual resolution of the issues was determined on moralist rather than causalist principles. Regarding the first of these difficulties, it is argued that there was a general move from a moralist to a causalist mode of debate in the 1950's, and that the final decisive move was a shift in opinion about the deterrent value of capital punishment, i.e., a causalist consideration, and therefore abolition was a triumph of causalism. (A helpful summary of the complexities of this debate is presented in diagrammatic form on p.33). Concerning the second difficulty, the different character of the argument in the U.S., it is pointed out that before the intervention of the Supreme Court in 1972-3 the debate had tended to be conducted on similar lines to those which operated in Europe, i.e., liberalisation of abortion and abolition of capital punishment had proceeded on the strength of causalist arguments. It was not a sea-change in moral temperament, but the constraints imposed by having to argue the cases in constitutional terms, which accounted for the resurgence of moralist considerations, the American constitution being an essentially moralist document.

Some elements of the argument are more convincing than others. The most persuasive evidence is that which relates to the liberalisation of the abortion laws in Western Europe. But even here a couple of reservations might be appropriate. Firstly, the principle that *'if it turns out that more harm is done by using the law to forbid an activity than by allowing it', then that activity ought to be permitted even if such behaviour is considered to be immoral or wicked*, is identified as a central causalist principle (p.6), and, moreover, one which featured prominently in the debates in France and Italy where it was argued that relaxing the law would end the great evils of illegal abortions (p.19). Furthermore, at several points in the paper Catholic opinion is closely linked to the opposing moralist view: vice must be forbidden, whatever the consequences. It might seem puzzling that a principle which is portrayed, at least implicitly, as un-Catholic should have played such a significant rôle in two countries, both of which are predominantly Catholic, even if it can be argued that they are only nominally so. But in fact there is no great puzzle here, for the principle which has been identified as causalist has been a principle of Catholic thinking on legislation since the time of St. Thomas Aquinas. Indeed Thomas is able to support it with a scriptural quotation: 'if *new wine*, i.e., precepts of a perfect life, is *placed in old bottles*, i.e., into imperfect men, *the bottles will rupture, and the wine will flood out*, i.e., the precepts are deemed contemptible, and men, in their contempt, bring about worse evils.' (*Summa Theol.* I-II, Q.96, Art.2 - quotation ex:Matt. 9:17). For Thomas, the overriding factor in considering legislation is not the prohibition of vice, but the advancement of the common good as a whole. I am not suggesting that Thomas would have agreed with the conclusions drawn by the twentieth century causalists, but he would not have been at a loss to understand their argument, for he would have shared their fundamental premise. Despite all this, I think that Professor Davies is broadly accurate in portraying this principle as one abhorred by leading Roman Catholic disputants in Britain and the U.S.A. during the recent debates, but this is because they have confused moral with legal theory and thus lost sight of the traditional Catholic view, and not because Catholicism is fundamentally opposed to this causalist principle in matters of legislation. On the other hand, reflection on St. Thomas' position should caution us against over-hasty acceptance of the view in the paper that the increasing dominance of causalism in debates on legislation is a corollary of a takeover by causalism in ethical thinking. Thomas was certainly no causalist in his ethical theory.'

The other main point which might be made regarding the abortion debate in Europe is that, although causalism triumphed, moralism was not necessarily vanquished. I do not mean that the old-style moralism might experience a resurgence and reverse the changes which have taken place, although that is not inconceivable, but rather that the changes in legislation are quite compatible with a modified brand of moralism. The moralist does not have to abandon the principle that actions-wrong-in-themselves must be forbidden irrespective of the consequences; nor the attributing of crucial significance to factors such as guilt, innocence, and justice. What will suffice is a revision of the bounds of the moral domain. Briefly and inevitably crudely, what is required is that membership of homo sapiens be replaced by personhood as the

qualification for being a holder of inexchangeable value. Such a move could at once allow one to retain the whole apparatus of moralist thinking whilst endorsing the liberalisation of abortion laws, and at least put into question the practice of capital punishment. Once again, therefore, we must be cautious about assuming that support for laws which are causally justifiable is reliable evidence of causalist *moral* opinion.

Turning to the issue of capital punishment in the European context, it is, as already noted, recognised in the paper that there was a much more complex pattern in the shift from moralist to causalist domination in this debate. Nevertheless, it is concluded that the eventual triumph of the abolitionists was a triumph for causalism. There are grounds for being less than convinced about this. For one thing, we are informed that Denmark, Luxembourg, the Netherlands, Belgium, Norway, and Israel, reintroduced capital punishment as an act of retributive justice following the Second World War (p.27). We ought to enquire here about the reasons for its abolition in these countries before the war. If the main thesis is to be believed, then abolition was primarily a consequence of the domination of causalist over moralist thinking. But if causalist thinking prevailed in these countries before the war, why were their abortion laws not liberalised too?

Also, we are told that the victory of the abolitionists in the British Parliament in 1965 was owed primarily to the retentionists losing the argument about deterrence. But, as the evidence with which we are provided on pp.29-30 shows, a very significant factor was the *injustice* which was perceived to be inherent in the 1957 Act. The 1957 Act imposed the death penalty for certain categories of murder 'because it was postulated that murderers of this kind were the most likely to be deterred from killing by the threat of execution'(p.28). The objection of Sidney Silverman, e.g., was that this Act did not relate the gravity of the punishment to the gravity of the crime. This was a *moralist* objection to an Act (the 1957 Act) which, as Professor Davies quite appropriately describes it, represented 'the full triumph of the causalist ethic' (p.28). The 1965 Act, which was a much more comprehensive abolitionist Act than the 1957 one, could be plausibly portrayed, therefore, as a victory for moralism over causalism, for considerations of justice over those of deterrence.

Finally, on this aspect of the paper, it is a little surprising that what is perhaps the strongest moralist argument against capital punishment receives so little attention, viz., the utter irreparability of mistakenly executing the innocent (cf. p.21). A causalist can accommodate this kind of injustice given sufficient grounds for having capital punishment, but for a thoroughgoing moralist there is no satisfactory way of coming to terms with it. Possibly the point did not carry much weight in the debates but, if so, *that* seems surprising.

The analysis of the debates in the U.S. also raises a number of questions. At first sight it might appear as if the Supreme Court's determination of the issues on moralist ground's constituted counter-evidence to the thesis of the paper. But the argument is that the Supreme Court could do no other: its rôle is confined to interpretation

of the moralist constitution. Support for the paper's thesis is adduced from the fact that the debate at individual state level has tended to be decided on causalist grounds, i.e., the causalist argument comes to the surface when moralist restraints are not operating. But is it not possible to turn this argument on its head? Just as the Supreme Court is obliged to confine itself to moralist issues and leave causalist deliberations to state legislatures, so state legistatures are under a restraint to confine themselves to causalist calculations and leave the moralist issues to the Supreme Court (cf.p.54). It could be argued, therefore, that the fact that state legislatures tended to decide the issues on causalist grounds counts no more for the thesis than the fact that the Supreme Court determined them on moralist grounds counts against it. Thus far, the evidence appears to be wholly ambiguous.

The defence offered on behalf of the advocates of the pro-abortion (or pro-abolition) cause in the Supreme Court against the charge of bad faith (p. 43) is puzzling. I do not wish to enter a discussion about the controversial relativistic thesis about the soundness of arguments here, or to present a view about whether these advocates acted in bad faith. My puzzle is that, while, on the one hand, it is suggested that they acted in good faith, i.e., they probably believed in the validity of their moralist arguments, it is, on the other hand, also suggested that (and the defence of the main thesis requires) that their motivation was causalist, and moralism was resorted to only because of the constraints of the situation. In other words, a defence of their good faith such as that with which we are presented here, irrespective of whether it is merited, appears to weigh <u>against</u> the main thesis of the paper, but this does not seem to be recognised. Alternatively, if we suppose that they acted in bad faith, it still remains the case that moralist grounds proved sufficient for the changes sought, so identifying causalist ascendancy as the key seems unwarranted.

On the whole, the American experience lends little support to the main thesis, and could be construed as counting against it. It is also noteworthy that a recurring theme of the paper, expressed with more circumspection in some places than in others (pp.5,38,57,60, but cf.19), viz., that the old laws which fell in these decades were essentially moralist in nature, is not a view shared by the U.S. Supreme Court. As we are told: 'The Court imputed causalist motives and reasoning to the State legislators who had enacted restrictive laws [regarding abortion] in the latter part of the nineteenth century' (p.46). From the point of view of the Court, the changes enacted in the 1970's were a triumph of moralism over causalism, and not the reverse.

I confess to a prejudicial scepticism about general explanations of human behaviour, especially when the instances of behaviour relate to different issues and occur in different cultural settings. Although the paper offered an interesting challenge to that scepticism, I find in the end that it remains substantially intact.

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[1]Insurance is cited as an example of an institution which nudged us from moralist to causalist thinking, but it also provides us with illustrations of our ability to keep legal and moral issues distinct, e.g. the motorist's awareness that a no-claims bonus is not a no-blame bonus.