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The Whole Life Order

Its genesis; the challenges it both poses and faces; and its uncertain future

Grainger, Katherine Jane

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**The Whole Life Order:
its genesis; the challenges it both poses and faces; and
its uncertain future**

Katherine J Grainger

**The Dickson Poon School of Law
King's College
University of London**

Submitted for the degree of Doctor Of Philosophy

ABSTRACT

The whole life order was introduced in the Criminal Justice Act 2003 as the most severe penalty available to the judiciary in England and Wales. It is imposed on very few offenders: only those convicted of crimes of 'exceptionally high seriousness'. Uniquely, on the grounds of retribution and deterrence alone, those sentenced face life-long incarceration, with no review and therefore no possibility of release.

In the study, written sources, primary and secondary, are complemented by interviews with key elite respondents. The sentence's genesis and the challenges it poses both to those serving it and to prison authorities are explored. The context, mainly the 1980s and 1990s, reflects a changing landscape in criminal justice: increasing stress on crime control, public safety, victims' rights and on the interaction of the media, the public and politicians. The period also witnesses continuing judicial-executive tension and the growing reliance on the ECHR by defence counsel.

The study examines the many challenges to the whole life order's legitimacy, culminating in the most serious: *Vinter, Bamber and Moore* at the ECtHR. The sentence's survival is at risk and the issues involved in the potential broadening of the penological justifications to take into account proportionality, public safety or rehabilitation are considered. Any of which, it is argued, would require a review mechanism. The legal and political constraints the government would face in identifying any necessary replacement are examined.

Hope emerges as a significant issue, both in court appeals and to many respondents. Indeed, the whole life order is a sentence apart in removing not only liberty but also hope from those serving it. Despite the sentence being the country's 'ultimate' legal punishment, there is surprisingly limited evidence of academic or political scrutiny of public understanding of its penological justification or of the practical and ethical issues surrounding it.

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CONTENTS

1 Introduction and methodology

1.1	Introduction	9
1.2	Research questions and research design	12
1.3	The research journey	
1.3.1	Initial stages: historical research	13
1.3.2	The necessity to 'adapt' and 'adjust'	17
1.3.3	Interviewing throughout the research process	19
1.3.4	The research questions revisited	23
1.4	The study outline	24
1.5	Conclusion	26

2 The state penalty for murder to 1997

2.1	Introduction	27
2.2	The death penalty	
2.2.1	Changes to the death penalty to 1931	29
2.2.2	Parliamentary moves to abolish the death penalty	30
2.3	The mandatory life sentence	36
2.4	The role of the Home Secretary to 1983	41
2.5	Effects of Brittan's Statement 1983-1990	44
2.6	The Criminal Justice Act 1991	47
2.7	Reaction against the Criminal Justice Act 1991	49

3 Decisive challenges to the Home Secretary's powers

3.1	New Labour and the power of the media	52
3.2	Steps to restrict the powers of the Home Secretary	56
3.3	Detention during Her Majesty's Pleasure: <i>V & T</i> [1997] UKHL 25; [1999] ECHR 171	60
3.4	The power of the Home Secretary to increase tariffs: <i>Pierson</i> [1997] UKHL 37	62
3.5	Ministerial response	63
3.6	<i>Hindley</i> [2000] UKHL 21	64
3.7	<i>Stafford</i> [1998] UKHL 30; [2002] ECHR 470	66
3.8	<i>Anderson</i> [2002] UKHL 46	69

4 The Criminal Justice Act 2003

4.1	The penological context	72
4.2	Context and origins of the Criminal Justice Bill 2002	76
4.3	Passage of the Criminal Justice Bill through Parliament	
4.3.1	The House of Commons	80
4.3.2	The House of Lords	84
4.4	The rush to pass the Act and initial reaction	88
4.5	Commentary on the Act	90
4.6	The effects of the Act relating to the whole life order	92

5	Punishing those convicted of crimes of high seriousness	
5.1	Introduction	94
5.2	The approach of other jurisdictions to offenders convicted of the most heinous crimes	
5.2.1	The rest of the United Kingdom: Northern Ireland and Scotland	94
5.2.2	Jurisdictions influenced by the English legal tradition	96
5.2.3	The International Criminal Court and Tribunals	100
5.2.4	Europe	101
5.3	Prisoners serving whole life orders	105
5.4	Imprisonment for those serving a whole life sentence	108
5.4.1	The development of secure imprisonment for the most serious offenders	108
5.4.2	Imprisonment: increasing numbers and costs	114
5.4.3	Treatment of prisoners with whole life or very long sentences	121
5.4.4	Challenges posed by the elderly and the dying in prison	126
6	Developments 2003 – 2010	
6.1	The law, politics and the constitution	130
6.2	The Constitutional Reform Act 2005	132
6.3	The inevitability of tension between the executive and the judiciary	137
6.4	Human Rights Act 1998 and the ECHR	138
6.5	Judicial interpretations of the whole life order	
6.5.1	Introduction	139
6.5.2	The relevant cases at the ECtHR	140
6.5.3	Appeal cases	144
6.5.4	Crimes with the potential to attract the whole life order	161
6.6	Conclusion	165
7	Critical challenges to the whole life order	
7.1	Introduction	166
7.2	Vinter, Bamber and Moore trials in the domestic courts	166
7.3	Minority opinions at the ECtHR	168
7.4	<i>Vinter, Bamber and Moore</i> at the ECtHR	
7.4.1	The Sectional Chamber [2011] ECHR 324; [2012] ECHR 61	169
7.4.2	Appeal to the Grand Chamber	171
7.5	<i>Oakes</i> [2012] EWCA Crim 2435	172
7.6	Awaiting the <i>Vinter, Bamber and Moore</i> ruling: public attitudes	175
7.7	Attitudes to Europe	180
7.8	Respondents comments on the whole life order	184
7.9	Legal options	188
8	Conclusions	
8.1	Introduction	197
8.2	The changing criminal justice context	198
8.3	The continuing judicial-executive context	200
8.4	Penological justification of imprisonment for the whole life order	203
8.5	A sentence apart: a step beyond the continuum	205
8.6	A sentence apart: serving the sentence	207
8.7	The Legal Aid, Sentencing and Punishment of Offenders Bill	209
8.8	Endnote	211

Tables

1	Number of prisoners with whole life orders as given to parliament	106
2	Schedule 21 (4) Categories of Murder	107
3	Age of prisoners when sentenced to whole life order	108

Bibliography	213
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Appendices:

A	Criminal Justice Act 2003: s269 & 270 and Schedule 21	223
B	European Convention on Human Rights: Relevant Articles	226
C	Sentencing Purposes	229
D	Practice Directions	232
E	Reduction in sentence for exceptional progress in prisons: <i>Caines</i> [2006] EWCA Crim 2915	234
F	Cases referred to by the ECtHR in <i>Vinter, Bamber and Moore</i>	235
G	ECtHR rejection of alleged breaches of Articles 5.4, 6 and 7, in <i>Vinter, Bamber and Moore</i>	236
H	The Prerogative of Mercy	238
I	Compassionate Release	240
J	The Legal Aid, Sentencing and Punishment of Offenders Bill 2012 Amendment 178A	242

ABBREVIATIONS USED IN THE STUDY

CJA	Criminal Justice Act
CRA	Constitutional Reform Act
CSC	Close Supervision Centre
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HMIP	Her Majesty's Inspectorate of Prisons
HMCIP	Her Majesty's Chief Inspector of Prisons
HC	House of Commons
HL	House of Lords
HRA	Human Rights Act
ICC	International Criminal Court
ICTY	International Criminal Tribunal of the former Yugoslavia
ICTR	International Criminal Tribunal of Rwanda
IMB	Independent Monitoring Board
IPP	Imprisonment for Public Protection
LJ	Lord Justice
LCJ	Lord Chief Justice
NOMS	National Offender Management Service
PGA	Prison Governors Association

1 INTRODUCTION AND METHODOLOGY

1.1 Introduction

One could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base. This is not so in the law of England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning¹

Since Lord Mustill's much quoted statement, the law on homicide has been variously described as 'piecemeal',² having boundaries 'frozen in tradition',³ and having 'little claim to a sound and rational base.'⁴ In 2006, the Law Commission, reporting on murder, manslaughter and infanticide, added its criticism. The Commission claimed that the law governing homicide in England and Wales was 'a rickety structure set upon shaky foundations.'⁵ It claimed that some of the rules had remained unaltered since the seventeenth century, even though it had long been acknowledged that they were in dire need of reform and that other rules were of uncertain content, often because they had been constantly changed to the point that they could no longer be stated with any certainty or clarity.

The next year Lord Phillips, the then Lord Chief Justice, expressed his opinions on why the law of murder posed so many problems: 'Murder remains a common law offence, although Parliament has been nibbling at the edges. And because murder is such a serious offence it has been the subject of frequent sorties to the House of Lords, where their Lordships have not hesitated to attempt to improve the law – and more often than not succeeded in making confusion more confounded.'⁶

It is not surprising that Lord Phillips, in the same speech, described the law of murder as 'a political hot potato', appearing to hold members of both parliament and the judiciary responsible for the problems.⁷ Part of the problem, as identified by many who have criticised the law, is the scope of the offence. Almost sixty years ago, the Gowers

¹ Lord Mustill in [1997] UKHL 31

² Ashworth and Mitchell (2000):2

³ Ashworth (2003):257

⁴ Blom-Cooper and Morris (2004):12

⁵ Law Commission (2006): at 1.8.

⁶ Phillips (2007b)

⁷ *ibid*

Commission drew attention to how vast this scope was.⁸ Thirty years later the same point was being made in *Howe* when Lord Hailsham commented:

Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists of a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so-called Moors murders to the almost venial, if objectively immoral, “mercy killing” of a beloved partner.⁹

The Gowers Commission describing its attempt to classify the offence, concluded with regret that ‘the object of our quest is chimerical and that it must be abandoned’.¹⁰ Nevertheless, the subsequent Homicide Act of 1957 did attempt classification, identifying five capital crimes, but it enjoyed only a brief existence.¹¹ The attempt at classification was returned to in the Criminal Justice Act (CJA) 2003. A range of ‘starting points’ was identified, culminating in whole life, together with examples of the types of murder for which judges should consider a whole life order. Such crimes may be few in number but rarely is there debate over where they belong in any scale of proportionality.

Van Zyl Smit has argued that unlike the death penalty, which is always hugely controversial, life imprisonment only occasionally surfaces as a headline-making issue of criminal policy. A primary reason is that not only in the public mind, but also in the specialist understanding of penologists, there is often considerable ambiguity about what life imprisonment means.¹² Despite van Zyl Smit’s assertion, there is no ambiguity over one particular life sentence: the whole life order. It is an extreme sentence for an extreme crime, yet one which has attracted surprisingly little academic interest. True, it is, perhaps reassuringly, a sentence that is not frequently required. Before 2003, offenders could be retained in prison for the remainder of their natural life by means of a whole life tariff. The use of this was in the hands of a member of the executive - the Home Secretary - and was imposed in circumstances that lacked openness and transparency, even to those receiving the penalty. It took until the Freedom of Information Act 2005, for example, for names and details of those serving this sentence to be available to the public and, even after this, lists are disputable.¹³ Since the CJA 2003, the penalty has been judicially imposed.

It can be argued that this is a critical time for the whole life order and therefore an appropriate time for an in-depth study on the sentence. Since its introduction in 2003, it has faced regular legal challenges.¹⁴ In January 2012 the fundamental legitimacy of the sentence survived its

⁸ para 534

⁹ [1987] 2 WLR 568:581

¹⁰ para 534

¹¹ The Act will be discussed more fully in Chapter 4.

¹² van Zyl Smit (2006):405

¹³ The questions of the lack of openness before 2003 and the disputed figures of offenders serving a whole life tariff/order are discussed in Chapter 5.

¹⁴ The various legal challenges will be considered in Chapters 6 and 7.

most serious challenge to date. An application ¹⁵ to the European Court of Human Rights (ECtHR) alleging breach of the European Convention on Human Rights (ECHR) was dismissed. The ruling was, however, a majority ruling of 4 to 3 and an appeal to the Grand Chamber of the Court has been heard. This appeal follows others to the ECtHR ¹⁶ on the question of the legality of irreducible life sentences. The time is, therefore, particularly apposite to look not only at the genesis and application of the whole life order but also on what grounds the latest appeal might be successful, what the legal consequences could be of the sentence not being available to the judiciary, and what options would be available to the government if the Strasbourg court ruled against the order.

Before 1965, the most heinous of offences could have attracted the death penalty, a sentence that increasingly was the focus of controversy and criticism. It has been suggested that a significant flaw in many abolitionist campaigns was the lack of attention given to what would replace the death penalty. ¹⁷ In English law the replacement was the mandatory life sentence, which in turn has been subject to much debate. Having a mandatory life sentence that has the potential to be just that - a sentence which means an offender is imprisoned for the rest of his natural life - might well be expected to attract some debate. Bedau, as well as opposing the death penalty, has stated his opposition to any replacement which results in life-long imprisonment, calling such a penalty 'itself a morally unacceptable deprivation of freedom.' ¹⁸ Certainly it poses practical challenges to the prison service and these challenges are another pertinent aspect of this current study.

Two comments perhaps exemplify the approach taken. Lacey and Wells have written, when discussing violence, that 'legal definitions do not capture neatly the areas over which the net of legal enforcement is cast. Social and cultural forces exercise as strong and pervasive an influence.' ¹⁹ Ashworth has stated that 'reform of the criminal law is unavoidably political and reform of homicide law is essentially political.'²⁰ It was indeed impossible to explain the origins and application of the whole life order without examining its political, social and constitutional background. One important element was the role of the Home Secretary, which was an on-going focus of tension between the executive and the judiciary.

Downes and Morgan contest that 'at the beginning of the twenty first century we think of law and order as emotive, fundamentally political issues: we have got used to the fact that they arouse passionate political debate'. They add that this was a relatively recent development and that, until the 1960s, law and order was almost absent from contentious party political

¹⁵ Vinter, Bamber & Moore v the United Kingdom [2012] ECHR 61

¹⁶ Principally *Kafkaris* [2008] ECHR 143

¹⁷ Hodginson, Gyllenstein & Peel (2010):20

¹⁸ Bedau (1997):87

¹⁹ Lacey and Wells (1998):601

²⁰ Ashworth (2007):342

discourse.²¹ As will be seen, the issues surrounding the CJA 2003 undoubtedly reflect the increasing politicisation of law and order and its increasing interweaving with public and media opinion.

1.2 Research questions and research design

It was reassuring to read that Noakes and Wincup believe, for the qualitative researcher, the process of designing a project to pursue specific research questions, and then managing and analysing emerging data, is not a static or inflexible process and that best practice incorporates a willingness to adapt and adjust accordingly.²² This study on the whole life order involved more than one occasion when adjustment and adaptation were required. It is a qualitative research project that reflects an inductive approach, owing much to the grounded theory of Glaser and Strauss.²³ Although the topic arose from an existing interest, it was approached with an openness that allowed a degree of flexibility to respond receptively to emerging data. Initial ongoing analysis of data encouraged re-examination of the research questions and helped direct future, and at times revised, avenues of data collection. The process was iterative in nature with ongoing interaction between data collection, analysis and the research questions.

The original research questions, which were later to be refined rather than greatly altered, were:

1. Why, within the Criminal Justice Act 2003, was a judicially imposed whole life order introduced as the most severe penalty in English law?
2. In its application, in what ways does this sentence pose practical challenges to those serving the sentence and to those charged with their care and security?
3. In its application, does the sentence itself face deontological challenges?

Bryman suggests various stimuli which lead to the choice of research area: personal interest; desire to test a particular theory; solving a puzzle; examination of a new development; the impact of a particular social problem.²⁴ The current study first appealed because the researcher, aware of the introduction of a new 'ultimate' penalty, wanted to know both why it had been introduced and also why its introduction seemed to be of such little interest to academic researchers and, indeed also, to the world outside academia. Such an extreme sentence surely posed challenges to those serving it, to the authorities required to imprison such offenders and also, perhaps, to those charged with imposing it. Similarly, such an

²¹ Downes & Morgan (2006):201

²² Noakes and Wincup (2004):122

²³ Glaser and Strauss (1967) Glaser (1992)

²⁴ Bryman (2012):88

extreme sentence surely would attract deontological challenges, most typically in the form of legal appeals. Dey argues that the researcher requires an open mind but not necessarily an empty mind.²⁵ Prior knowledge is not a disadvantage as long as the researcher remains sensitive to the data and does not come with predetermined ideas. The researcher of this study came with an open, if questioning mind, and welcomed the flexibility of an approach that allowed the development of theory whilst grounding the account in the emerging data.

The research design was straightforward. Data would be collected from scrutinising documentary sources, insights gained from secondary sources, and from interviewing key elite individuals with experience and knowledge of politics, the law and prisons. Ongoing data analysis would identify relevant themes that would direct the next stage of the study to allow research questions to be answered. Throughout the process there would be awareness of the need for rigour and for ensuring validity and reliability of data. The basic research design outlined was followed, although flexibility was required as the journey became much more wide-ranging than anticipated and, on encountering potential dead ends, there was indeed a need to be able 'to adapt and adjust'. A boring journey it never was.

1.3 The research journey

1.3.1 Initial stages: historical research

The central focus of study is Sections 269 and 270 and Schedules 21 and 22 of the CJA 2003, and an obvious place to start was an examination of what these comprised and both the 'how' and 'why' they came into being. The first two - the 'what' and the 'how' were relatively straightforward. The 'why' was anything but straightforward as it encompassed the analysis of many different interwoven themes and issues.

Many of the initial primary sources examined related to statutes and executive decision-making. These included White Papers, public consultation documents, Bills, Acts, ministerial statements, Hansard reports from both Houses and from parliamentary committees, and selected Cabinet minutes. These were complemented by reports from non-governmental bodies relating to law and order issues, party political statements, media coverage and statements by public figures.

Scrutiny of the sources identified themes which were to be revisited and reassessed throughout the research process. These included:

²⁵ Dey (1993):63

- the separation of powers between the executive, the legislature and the judiciary, including how far parliament should legislate on sentencing matters;
- the limits of judicial discretion in sentencing, especially in relation to the mandatory life sentence for murder;
- the provision of an appropriate sentence for crimes considered the most heinous and most serious;
- the change from secrecy to transparency in the 'sentencing' of offenders to imprisonment for the remainder of their natural life;
- the varying emphasis on different sentencing purposes in different decades, and even within decades;
- the increasing influence of human rights, especially in the form of the ECHR and the ECtHR, in the sentencing of offenders and the treatment of prisoners;
- political debate on issues of law and order and the growing influence of public opinion and the media on that debate.

It became obvious very early that any analysis of the 2003 Act could only be completed when previous relevant legal and political data had been examined in order to consider its genesis. The immediate reasons for the introduction of the whole life order were rulings in appeal cases, both domestic and European, which required a suppression of the Home Secretary's powers to decide on the length of time offenders serving sentences for murder could be detained, including the decision that for some this would mean imprisonment for the remainder of their natural life. Such decision-making had been performed within the Home Office, far from the public's gaze. Recognition of the importance of the appeals which had necessitated the change, led the researcher to realise that analysis of judicial rulings would be a major element of the study. This resulted in extensive study of court cases, mostly appeals, both prior to the CJA 2003 and since, a period in which the whole life order faced increasingly serious challenges.

When examining the court cases for the period before 2003, a historical approach, which identified the successive steps in the restriction of the Home Secretary's powers, was thought the best means of making the developments clear. Much more consideration was needed on how to present the significant points of cases post-2003. Structuring by means of a thematic approach had a strong claim to being the logical means of proceeding. For instance, to classify cases where Schedule 22 applied (ie where a tariff needed to be set or reset for crimes committed before the Act took effect) and where Schedule 21 applied (ie for crimes committed after the Act took effect), and then considering sub-themes within each of these. However, this logical way of proceeding came up against the reality of the cases. It might have been supposed that Schedule 22 'transitional' cases would be clustered in the period immediately following the Act. This proved not to be the case. For example, the hearing that finally determined the whole life order for Peter Coonan/Sutcliffe did not take place until

2010. This means that Schedule 21 and 22 cases were interwoven over the period, and precedents were set which applied not only to cases relating to one, but also to the other. Moreover, another disadvantage of a thematic approach was that many of the cases involved more than one theme.²⁶ The final concern was how to allow sufficient focus on the Vinter, Bamber and Moore cases²⁷ and to explore why they felt it necessary to apply to the ECtHR. The cases involving these appellants are of central importance to this study because of the strength of their appeal against the whole life order and the possibility that the ruling in the Grand Chamber will either confirm the legitimacy of the whole life order or require changes, which would mean legislation. It was, therefore, decided to follow a historical ordering when analysing cases rather than discussing them on a thematic basis.

Much of the early research including the case analysis was, therefore, historical in nature. It has been suggested that for some researchers, historical research has a contemporary significance in providing an important baseline for the measurement of both continuity and change with regard to criminal justice matters; while for others, the precursors to our current criminal justice process are worthy of study for their own sake.²⁸ Both approaches proved true for this study. The extensive historical research was indeed interesting in its own right, but it was also crucial in understanding why the whole life order emerged when, why and how it did. Every state in every period has had to find ways to punish those who have committed what are deemed the most serious and heinous crimes. To understand why the current most severe penalty took the form that it did, it was necessary to examine what it replaced and the reasons why its replacement was necessary. The need for verification of the authenticity and veracity of historical documentary sources was borne in mind. Most of the sources were primary, sourced from official origins. Within these sources a particular slant or bias may be expressed by individuals, but the sources themselves are objective and credible and their analysis was carefully handled to avoid any researcher bias.

However, emerging themes deemed legitimate did necessitate an ever-widening range of sources to be identified and analysed. The growing importance of public opinion led to the scrutiny of valuable related surveys, opinion polls and statements by pressure groups as well as an examination of media coverage. The recognition of the interweaving of the views of the media, the public and politicians and the media's disproportionate and sometimes skewed focus on violent crime, led to a limited examination of this interweaving. The changing emphasis on law and order as a central focus for debate in English politics led to scrutiny of party political approaches and to the subject of party manifestos and speeches. Tension between the judiciary and the executive over roles played in 'sentencing' led to the search for

²⁶ Perhaps the best example of this is the little known *Sawoniuk* [2001] ECHR 895. This case looked, among other grounds, at whether a mandatory life sentence was arbitrary or disproportionate; whether imprisonment in old age or poor health would breach Article 3; whether a long period between committing the crime and trial could be unjust.

²⁷ These cases are dealt with in Chapter 7.

²⁸ Noakes & Wincup (2004):110

judicial statements on the subject, sometimes found in speeches made by members of the judiciary, sometimes in their personal writing and sometimes in judgments. The increasing importance of human rights and of the influence of the ECHR and the ECtHR necessitated the study of the Human Rights Act (HRA) and the scope of the ECHR and the decisions of the ECtHR.

Most of the gathering and examination of data at this stage was unproblematic. One particular element of data gathering proved more difficult. Until very recently the Home Office, and later the Department of Justice, ensured that information about numbers and placements of offenders serving a whole life order was not publicly available.²⁹ Prisons, their staff and inmates are protected from the public knowing where high profile murderers are serving their sentence. Information is often published in the media but, even since the Freedom of Information Act, this is inconsistent and sometimes wrong. More accurate information was sought from examination of the answers to the occasional written questions in parliament – although even these answers are guarded and limited - and from the examination of the judgments in appeal cases, especially those relating to the transition arrangements in Schedule 22 of the CJA 2003. Two government ministers and the Attorney General in interview for the study were also asked for accurate information.

All the initial data collecting was complemented by literature searches for academic debate on the core themes, in books and legal journals, research findings and in reports of lectures and conferences. Academic debate was sought on historic 'ultimate' state penalties particularly relating to the death penalty and its abolition and to the mandatory life sentence. Disappointingly little was identified on the whole life order, although much has been published on the related penalty in the USA of life without parole. Valuable academic debate was identified on the philosophy and purposes of punishment, on sentencing laws and the philosophical principles behind them and the challenges to criminal justice in the last decades of the 20th century with the increasing stress on crime control.

Finding and assessing historical data has often been likened to an exercise in detective work, and this proved apposite as the process encompassed picking up clues in the data collected which led to searching for further sources of information. The lengthy 'starting process' at times seemed confusing and lacking in focus. Glaser writes of a researcher initially feeling lost and seeing the data as sometimes recalcitrant. He argues that the grounded theory researcher bypasses this problem by simply studying, with no preconception of what should be studied in advance of its emergence.³⁰ Adopting such an approach permitted unforeseen but valuable information and themes to emerge.

²⁹ Since early 2012 the total numbers of prisoners serving a whole life have been included in quarterly figures published by the Ministry of Justice, but no further details apart from total numbers are given. This is considered in Chapter 5.

³⁰ Glaser (1992):25-26

1.3.2 The necessity to 'adapt' and 'adjust'

When the initial period of data collection was well established, the next step was to study the working of the whole life order. In particular, to explore what challenges it posed and what challenges it faced.

It was decided to concentrate first on any practical problems the whole life order posed. The most obvious challenges identified were those facing offenders serving the sentence. With no review available, these prisoners are aware they will be incarcerated for the remainder of their natural life. The immediate responsibility of dealing with this group belongs to the prison authorities: from day-to-day supervision at prison level to the overall national responsibility held by the National Offender Management Service (NOMS). It was decided that this study would benefit from fieldwork in the prison sector, comprising interviews with relevant prisoners, and staff members both from within prisons and within NOMS. The aim was to discover how the authorities identified and met the needs of those serving a full life in prison and how the prisoners themselves viewed their punishment. It was always going to be a sensitive area.

An initial enquiry to NOMS made it clear that no research in prison would be considered without clearance first from the King's College Ethics Committee. Being aware of the sensitivity of interviewing prisoners serving a whole life order, who potentially could be both vulnerable and dangerous, a great deal of thought was given to preparing questions and information sheets for participants, all with extensive safeguards and reassurances in relation to confidentiality and anonymity, including how any information would be stored, accessed and used. Similar care was taken with information sheets and potential questions for prison officials. After a very lengthy process and many revisions and refinements, the Ethics Committee granted permission. NOMS then provided request forms for seeking research access. The process was frustrating at many levels. Having completed and submitted the forms, it was discovered a new system had been introduced and different forms were now required. This meant a missed 'window' available for submission and further delay ensued. When the decision was conveyed, it was disappointing. NOMS refused access to prisoners serving a whole life order on the grounds the research would be dealing with vulnerable prisoners. Reluctantly accepting the decision, a follow up approach was made requesting access to prison governors and key staff working with these prisoners. Detailed explanation was provided, including how the research could be of benefit to the prison service. This access was again refused on the grounds that refusal of any research application meant a total blanket refusal and no further consideration of separate parts could be given.

Perhaps it was naïve to assume that fieldwork would be allowed. More than thirty years ago, Cohen and Taylor commented on the difficulties of gaining access for research in prisons, saying that such requests are 'trapped in a complex web of social and political restrictions'

and complained of the authorities exercising a high degree of control over such research.³¹

This appears to be an on-going problem, as almost twenty years later Lee asserted that such research could be surrounded by political and moral controversy in that it 'illuminates the dark corners of society'.³² More recently, Hughes supported this and maintained 'not least among our society's 'dark corners' are the institutions of the criminal justice system itself'.³³

Radzinowitz had asserted that the Home Office set a customer-contractor relationship for deciding an agenda for research, with the agenda being set in relation to the administrator's (and ultimately the minister's) conception of what knowledge was needed.³⁴ Although the researcher was aware of these comments, it was hoped that with the advent of NOMS these difficulties belonged to the past. Sadly, in the case of this study, this was not so.

As exploring the challenges posed by the sentence was so crucial to the research, different strategies were explored and adopted. Although the methodology had to be changed, ironically the alternative sources of data proved extremely enlightening and the enforced change arguably gave more depth as well as breadth of response. Instead of interviewing prisoners and prison staff, it was decided to extend the range of respondents and also to explore a similarly wide range of pertinent written sources. Much has been written in praise of different forms of triangulation and methodological pluralism, and in this current study using more than one method and more than one main source of data encouraged and facilitated both increased depth and accuracy.

The choice of respondents was not one of random sampling. It was a strategic and purposive selection of respondents, chosen after a refocusing of the research questions had identified key areas requiring elucidation and key people capable of doing this. Gaining access to the respondents relied upon some personal networking, some limited snowballing and some more traditional 'cold' approaches.

To gain data on life inside a prison and the challenges a whole life order poses, Dame Anne Owers, recently retired Chief Inspector of Prisons was interviewed, as was Phil Wheatley, former Director General of NOMS and former Director General of HM Prison Service. Two representatives of the Prison Governors Association (PGA) were also interviewed, as was Frances Crook, the Chief Executive of the Howard League for Penal Reform. Contact was made with a Home Office official who worked in the field of prisons and prisoners and who provided interesting information about prison life for some of those serving sentences for the most heinous of crimes. Because of her position, she did not wish to be identified.

³¹ Cohen and Taylor (1977):77

³² Lee (1993):2

³³ Hughes (2000):238

³⁴ Radzinowitz (1994):101

Interviews in prison had been refused by NOMS, but a former life prisoner, released after serving a sentence of more than 30 years, was interviewed. An offender serving a whole life order, Jeremy Bamber, was contacted by mail and a long-standing regular written correspondence ensued. This proved particularly valuable, partly because of his willingness to discuss his prison life and partly because his appeal case is pivotal in the legal challenge facing the sentence. He very generously gave access, among other things, to his legal team's submissions.³⁵

As part of the triangulation approach, in addition to these contacts, data about life in prison for those serving either long life sentences or, in the USA, sentences of life without parole was gained by reading first-person accounts of prison life published in book form. Another former lifer, Erwin James had written, both while in prison and after release, a book and also a regular column in a newspaper and this also added to the width of data examined. The monthly newspaper for prisoners, *Inside Time*, also provided valuable articles. Also illuminative were the extensive writings of a notable former HM Chief Inspector of Prisons, Lord Ramsbotham, as well as his contributions to debates in the House of Lords.

Another form of pluralistic approach when collecting data was extensive reading of academic comment on prisons and prison life and conditions. Relevant material was found on issues arising from conditions of maximum security; the problems of ageing and dying in prison; facilities specifically for long term prisoners; safeguards for fellow offenders and staff when faced with dangerous inmates; and therapeutic approaches within prisons. As mentioned, very little was identified specifically on the whole life order.

All the interviews and written data analysis were used to seek information on the particular range of challenges and issues facing those prisoners who have to face a future of life with no possibility of review or release. The data was used to identify the parallel challenges faced by those whose job it is to supervise and care for such prisoners.

1.3.3 Interviewing throughout the research process

The respondents with knowledge of prison life, mentioned in the previous section, were only one group interviewed for the study. Another group comprised members of parliament. Within this group, two sub-groups were identified. Firstly, it was important to ask politicians involved in the passing of the CJA 2003, or in the period leading to it, of their memories and views on

³⁵ As he is currently involved in appeals both in domestic and European courts, he asked that some of his information should be used by the researcher as background information to gain understanding but should not be included in the study as appeals are on-going.

the principles of the Act. Secondly, it was deemed important to ask key, current politicians about their attitude to the whole life order, whether they thought it would survive the challenges it faces in European courts and what, in their opinion, would happen if it was compromised as a legitimate sentence.

Of the MPs involved in the passing of the CJA 2003, three key individuals were identified and an interview with each was achieved. David Blunkett, the Home Secretary who introduced the Bill, was interviewed, as was Dominic Grieve, who was the Opposition main spokesman in the debates, and Simon Hughes, who was the main Liberal Democrat spokesman. It was thought of interest to interview John Bercow, because of his contribution to the debates on the proposed whole life order as he was one of the very few wanting to discuss the *principle* of the sentence. When approached, his office responded that because of his current position of Speaker of the House of Commons, he could not participate.

By happy chance, Dominic Grieve when interviewed was by then the current Attorney General and he generously answered questions relating both to 2003 and to current appeals concerning the whole life order. However, he explained that his current post precluded his commenting openly on any legal matter so all his views, for example, on the possible outcome and consequences of the Vinter, Bamber and Moore appeal, would be strictly off the record and could be used only as a way of helping the researcher understand principles and practice and could not be quoted in the study. A previous Home Secretary, Michael Howard, who played an important part in the genesis of the whole life order and its predecessor the whole life tariff, could not give an interview but provided written answers to questions. The current Home Secretary, Theresa May, was also interviewed. The then Justice Secretary declined an interview but a member of the Justice Department, Lord McNally, agreed to be interviewed and answered questions both as a government minister and as a spokesman for his Liberal Democrat party. A former Justice Minister in the Scottish Parliament, Lord Wallace, was approached and agreed to an interview and, when a suitable date could not be arranged, submitted a very detailed and useful response to questions based on Scotland's statutory position in relation to the penalty for the most heinous of crimes. The current Justice Minister of the Scottish Parliament was approached but after an initial favourable response, the promised contribution was not forthcoming.

Those who participated were extremely generous both in their time and in the openness of their responses. The major disappointment was the current Labour Party front bench, who would not supply anyone to be interviewed. The Shadow Justice Secretary was approached by letter and by email three times but no response at all was received. The Deputy Leader of the Party, Harriet Harman, was then approached, not only as Deputy but also in her role as spokesperson for Human Rights, but her secretary responded saying she did not have time for an interview.

A selection of lawyers and judges with experience of trials or appeals which involved whole life orders – or involved particularly serious crimes which did not result in the sentence – was interviewed in respect of legal and ethical issues surrounding potential whole life orders and their attitude to them. Direct contact was made and an interview given by Lord Phillips, in light not only of his experience as former Lord Chief Justice (LCJ) and as former President of the Supreme Court but, in particular, of his determination in *Bieber*³⁶ and *Jones*.³⁷ A personal friend provided an introduction to a barrister who was also a part time judge, who had been the prosecutor in a trial that resulted in a whole life order being imposed. The friend also provided an introduction to a member of a set of successful chambers that led to further introductions to two experienced criminal law barristers, one of whom facilitated access to a Lord Justice. He, as well as giving very generously of his time for two interviews, enabled attendance of the researcher at the Court of Appeal when it considered in detail crimes ‘of exceptionally high seriousness’ in a key appeal case.³⁸ He also provided an introduction to a fellow Lord Justice who also agreed to an interview. The senior judges interviewed were liberal with their time and their views but asked for their contributions to be non-identifiable because of their positions. In the study they are identified simply as ‘a senior judge’ and referred to as ‘he’ to avoid speculation over gender. Networking also provided an introduction to Edward Fitzgerald QC, considered of particular importance for his role as defence counsel in appeals against whole life orders. To balance this legal perspective, Lord Pannick was interviewed in his role as QC for the government, in many cases opposing Mr Fitzgerald. Although not in interview form, further data on the judiciary’s views was gathered by reading numerous speeches given by senior judges. A book written by Lord Bingham, the former LCJ, also added insight.

The Probation Service was not approached because those serving a whole life order would never be considered for probation but it was felt of interest to interview members of the police who had been involved in cases of high seriousness. Their views would be sought on their perceptions of the whole life order and the justification for it and also of relevant attitudes of the public with whom they were in contact. A personal contact provided an introduction to Janet Williams, Metropolitan Police Deputy Assistant Commissioner, who in turn provided an introduction to her colleague, Commander Simon Foy. Both had areas of responsibility that involved serious violent crime, including murder. They gave long, full and valuable interviews. A retired senior detective officer, Russell Allen, volunteered to facilitate the circulation of a questionnaire to a number of his retired colleagues, which included questions relevant to this study. Although only individual interviews had been planned, the offer of a greater breadth of responses was welcomed. Fifty former detectives completed the questionnaire.

³⁶ *Bieber* [2008] EWCA Crim 1601

³⁷ *Jones* [2005] EWCA Crim 3115

³⁸ *Oakes* [2012] EWCA Crim 2435

As withdrawing from prisoners any hope of release raises difficult moral and ethical questions, it was decided that faith groups would be approached. Their views on the sentence and its justification were sought, as were their views on punishment and long term imprisonment. The Church of England Bishop for Prisons, the head of the Catholic Church in England, the Chief Rabbi and the leader of the Hindu Forum were contacted by letter and asked their views on the role of punishment and whether imprisoning offenders for the remainder of their lives could be justified. The Humanist Society was also invited to participate. All these groups responded generously. The Muslim League was contacted, but wanted oversight of not only what was being written about the Muslim faith but also the research as a whole. This was courteously declined.

All interviews and questionnaires were used to explore key themes that had emerged from analysing the documentary sources. On looking at the list of people interviewed, the selection could arguably fit the methodological process of elite interviewing, where people who are influential, prominent and well informed are selected. This form of interviewing has been recommended by Tansey as being able to shed light on the hidden elements of action that are not necessarily clear from analysis of political or legal outcomes or from primary sources. This allows the interviewer to seek information at first-hand from participants of the processes under investigation, obtaining accounts from direct witnesses to the events in question.³⁹ Certainly, every interview for this study provided such insights and undoubtedly supplied details of underlying contexts that were of pertinent interest and could not have been gained in other ways. The information was used partly as background for the researcher to allow a deeper understanding of the subject and partly to illustrate elements of the study itself. The researcher was always aware that respondents could deliberately or instinctively slant their accounts because of their personal involvement or their political views, but close scrutiny of the recorded interviews produced no evidence of this. On occasions, politicians differentiated between what was party policy and what were their own views, but there never appeared to be any attempt to be anything but straightforward and honest in response. The quality of the knowledge and experience demonstrated and the willingness to answer everything asked – even if some comments were ‘off the record’ – was a particularly striking aspect of the interviewing process.

The face-to-face interviews with respondents were semi-structured and, with their permission, all were recorded. The average length was 40 minutes, with the shortest being 30 minutes and the longest 90 minutes. The recordings were not fully transcribed but extensive notes were taken from each recording to allow for identification and highlighting of key topics and key responses. Questions varied for each respondent because their experience differed and the particular area of focus to be probed varied. The semi-structured approach was planned round a series of pre-selected, open-ended questions that allowed follow-up questions and the

³⁹ Tansey (2007):24

expansion of points raised. Open-ended flexible questioning ensured the researcher was actively engaged in listening and probing more deeply where needed. Glaser writes of the importance of an interviewer not preconceiving the emergence of data but maximising the acquisition of non-forced data.⁴⁰ Beardsworth and Keill recommend open-ended discursive questions to permit an iterative process of refinement so that a line of thought identified by earlier respondents can be taken up and presented for further comment.⁴¹ Both aspects proved effective in the interviews for this study. The experience of interviewing was exceptionally worthwhile, vastly surpassing any expectation held, with the respondents providing in virtually every case intelligent, thoughtful, pertinent and original views on the subjects broached.

1.3.4 The research questions revisited

Having analysed how the whole life order *posed* challenges, researching whether the sentence itself *faced* any challenges proved more straightforward. Most challenges were court based. Appeals against the sentence, or the transitional arrangements in Schedule 22, were identified and transcripts of court determinations were studied. For approximately five years after its introduction, most appeals were used by the judiciary to clarify the sentence and its application. Increasingly, however, the appeals in both domestic and European courts reflected a more serious challenge to the very legitimacy of the sentence itself.

The emphasis in the original research question as to whether the sentence faced challenges had changed to whether the sentence could survive such challenges in its current form. Subsidiary questions then arose relating to what changes the ECtHR could demand and what the likely response would be to any such reform. By reflecting on the data collected, both documentary and oral, it became clear that any changes in the sentencing of those convicted of the most heinous, and invariably high-profile murders, would lead to politicians, the public and the media expressing strong views.

Public and political acceptance is required for reform of the law of homicide to succeed, and social and cultural forces exercise a strong influence on the subject. Hudson, writing on research methodology, also suggests that as crime and punishment are both intensely political and moral issues, an awareness is needed of the political and moral stances taken on crime and punishment by particular societies at particular times.⁴² Although attention had been paid earlier in the research to the public and the media's attitudes to crime, especially murder, and to how these attitudes interweave with politicians' stances, more investigation was carried out on this area with fuller examination of recent surveys of public attitudes on the subject.

⁴⁰ Glaser (1992):25

⁴¹ Beardsworth and Keil (1992):261-2 cited in Bryman (2012):472

⁴² Hudson (2000):175

With even a possibility of the ECtHR ruling now or in the future that the whole life order as it stands could not be sustained, research attention was paid to the possibility of those serving the sentence being awarded a review mechanism and how this might be provided. Any review could bring into play the concept of risk and dangerousness, currently irrelevant as the whole life order is imposed purely on a retributive and deterrence basis. The theory and academic views of risk and dangerousness were, therefore, examined.

Sometimes serendipity plays a part in research, and it did so in this study. The completion of the thesis was delayed for professional reasons and, during the delay, a domestic appeal⁴³ of core importance to the study was heard. The researcher was able to attend to hear the arguments put forward and subsequently to analyse the judgment. This ruling, given by no fewer than five Lord/Lady Justices, reinforced the judicial view that the whole life order was a valid and legitimate sentence. The delay allowed this important judgment to be integrated into this current study.

Another case, however, has not been able to be included. Six months before the deadline for submission, the Grand Chamber of the ECtHR heard a case that could have major implications for the whole life order. It was announced that the ruling would be published any time between three and nine months from the hearing. Because of the determination's potential importance, the announcement has been awaited with impatience to see if it could be included in this study. Senior lawyers with experience of the ECtHR suggested to the researcher that because of the sensitivity of the appeal, the Court might well take longer than nine months to give the ruling, citing other cases which had taken up to two years for a determination to be given. Despite initial disappointment, it is apparent on reflection that even if the ruling had been given in time for inclusion, no immediate action could have or would have been taken by the government in response. One has only to look at the government's pattern of response to some ECtHR rulings to appreciate that any response takes time. In light of the ruling not having been available, Chapter Seven looks at how the rulings may be received and examines potential responses.

1.4 The study outline

In order to understand the genesis of the whole life order, **Chapter Two** examines past penalties for the most serious crimes. The history of the death penalty in Britain is analysed, concentrating on the parliamentary debates that chart the slow process of the restriction in its use and its abolition. Thereafter the study concentrates on the legal position in England and Wales. The introduction of the mandatory life sentence and the on-going controversy surrounding it is discussed. The period following the abolition of the death penalty up until the

⁴³ *Oakes* [2012] EWCA Crim 2435

New Labour Government being elected in 1997 is examined, concentrating in particular on: the role of the Home Secretary in tariff setting and the attempts to restrict his powers; and the 1991 Criminal Justice Act with its focus on 'just deserts' in sentencing and the subsequent retreat from it. Particular appeals which affected the powers of the Home Secretary are scrutinised and themes which begin to emerge as central to this study are noted.

Chapter Three is concerned with the period 1997 to 2003, which saw the Home Secretary losing his power to set tariffs. A succession of court cases was followed, not by legislation, but by ministerial statements giving his response to each restriction of his powers. The increasing importance of public opinion and media attitudes to law and order, and the influence they have on political views, provides a rolling background.

Chapter Four discusses the passage of the CJA through parliament. The societal and political background was discussed in the previous chapter and now the academic penological context and debate is examined. The Act reshaped the sentencing framework established by CJA 1991. The late introduction of the Sections related to the whole life order, and the lack of controversy over these, is considered, as is the reaction to the Act.

Having looked in these early chapters at how those found guilty of the most heinous of crimes are dealt with in England and Wales, **Chapter Five** first considers how these crimes are punished in other jurisdictions. The whole life order poses challenges to those offenders who are given the sentence, as well as to the prison authorities that have to keep them secure. This chapter reflects mainly on prisoners and prisons in this context. It looks at the numbers of lifers involved and the nature of the crimes for which their whole life sentence has been awarded. The development of maximum security prisons is noted and the implications of rising prison costs and numbers considered. The treatment of those serving whole life sentences is examined as are issues that particularly affect them, such as challenges related to the elderly and the dying in prison.

Following on from the challenges the whole life order poses, the study in **Chapter Six** looks at the challenges it has faced. After discussing relevant constitutional and political developments in the period after the introduction of the whole life order, in particular the tensions between the judiciary and the executive, the chapter concentrates on court cases which featured appeals against the whole life sentence and scrutinises the determinations made by the judiciary to clarify the sentence.

Chapter Seven examines in depth the most serious challenge faced by the whole life order to date. The possible future of the sentence is discussed, using the information and analysis of pertinent issues from the earlier chapters. These include: the attitude of the media and public to the sentencing of murder; the influence of these on political views; attitudes in Britain to

decisions of the ECtHR; the potential need to introduce a review system for those sentenced to whole life; the issues surrounding the need to assess future risk and dangerousness.

Chapter Eight presents conclusions, which are drawn from the study, with an emphasis on the importance of hope and how far the whole life order is a sentence apart.

1.5 Conclusion

It has been said that research is 'the art of the feasible' and to a large extent what was desired for this research proved to be feasible. There were disappointments and enforced diversions, largely the refusal of access to prisons by NOMS and the lack of co-operation by the current Labour Front Bench. The latter had to be accepted as regrettable. The former could be accommodated by adopting a pluralistic methodological approach. The alternative methods adopted to gather data ironically turned out to be extremely rewarding for the study.

The research questions were adapted as part of a legitimate process of ongoing analysis of the emerging data. Indeed the work not originally planned added value by allowing additional depth to the work.

At the beginning of the research journey, the whole life order had been thought of as an important topic to investigate because of its role as the state's ultimate penalty. Those sentenced were often high profile offenders but the sentence itself had not attracted academic attention. The researcher felt it of value to undertake a study, which for the first time gathered together the wide range of elements of the subject, most notably: the circumstances which necessitated the whole life order's introduction and the debate surrounding that reform; the application and clarification of the sentence by the judiciary, through the identification and examination of appeals; the practical implications of the sentence for those serving it and on those responsible for them during their sentence; consideration of the possible future of the sentence and possible enforced alternatives; the implication and influence of political and societal views on how to punish those who commit the most heinous crimes.

2 THE STATE PENALTY FOR MURDER TO 1997

2.1 Introduction

Schedule 21 of the CJA 2003 introduced into English law the judicially imposed whole life order:⁴⁴

- If (a) the court considers that the seriousness of the offence ... is exceptionally high
- and (b) the offender was aged 21 or over when he committed the offence, the appropriate starting point is a whole life order.⁴⁵

This was the first time a hierarchy of sentences for different murders was laid down by statute. The crimes for which the sentence of whole life would be imposed are those at the apex of the hierarchy. While the variety of sentencing purposes in the Act have been criticised for being wide ranging and potentially in conflict with one another in individual cases,⁴⁶ the whole life order unambiguously aims to achieve retribution and deterrence. Preventative sentencing, which gives rise to risk assessment and the protection of the public from future dangerousness, plays no part in the judicial reasoning and, in consequence, there are no review mechanisms available to those serving the whole life sentence.

During the 2002 Commons debate on the Criminal Justice Bill, the Home Secretary David Blunkett was asked about his justification for the whole life sentence.⁴⁷ He replied:

I am motivated, as is indicated by the sentencing framework and the new purposes of sentencing, by the desire to show those who are engaged in such actions that there will be clear and unequivocal consequences. ... I am also engaged with the need to punish. Punishment means that there is an element of retribution on behalf of society. These aims are not the least contradictory and that is why we were careful to ensure they were not contradictory in the provisions on the purposes of sentences.⁴⁸

Blunkett's defence, stressing the need for retribution and deterrence, is perhaps unsurprising in light of the gravity of the particular crimes he was discussing. Eight years earlier, another politician, Ann Widdecombe, when a Home Office Minister, had stressed that punishment for criminal behaviour is morally appropriate in its own right and by punishing the offender society expresses its condemnation of his or her wrongdoing.⁴⁹ This idea of sentencing reflecting a legitimate expression of society's condemnation has also been acknowledged by academics.

⁴⁴ See Appendix A for the relevant sections of the Act: Sections 269 & 270 and Schedule 21.

⁴⁵ CJA 2003 Schedule 21 4 (1)

⁴⁶ Ashworth (2005):74

⁴⁷ Hansard HC 20 May 2003 col 868 (John Bercow)

⁴⁸ *ibid* col 867-8

⁴⁹ Widdecombe (1995):2

Wasik argued for desert based punishment, saying its defining feature is 'the formal and official imposition of blame and censure' and citing von Hirsch, who stated that punishment is 'a blaming institution which reflects the widely understood and widely endorsed moral practice of blaming.'⁵⁰ The concept of condemnation and blaming is perhaps particularly apposite when considering those being punished for crimes leading to a whole life order. It echoes the belief expressed by Lord Denning forty years earlier, when he stated that the ultimate justification of punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime.⁵¹ In the same period, in debates on the abolition of the death penalty, Lord Goddard had pointed out that there were certain offenders who demonstrate the basest level of depravity human nature can sink to.⁵²

The group of offenders receiving the whole life order is very small in number yet often it is the focus of such denunciation by the public and media, who treat these offenders with particular abhorrence. Cullen and Newell wrote of the tendency of the public to consider some offenders as a class apart, one requiring very particular, perhaps unique, punishment: 'There seems an instinct in man to create a distance between those of us who live (relatively) law-abiding lives and those who commit terrible crimes, particularly those who kill.'⁵³ Von Hirsch has warned against such an attitude, arguing that any sanctioning system should not be seen as one which 'we' devise to prevent 'them' from offending.⁵⁴ The idea that there should be no 'them', in the form of offenders likely to be given a whole life order and 'us' in the form of the public, would, it is suspected, gain little support. The public might accept that there is a possibility of overlap between the victim population and the offender population in the case of petty crime and even some violent offences. However, few are likely to consider an overlap in relation to crimes at the pinnacle of any scale of heinousness.

Denunciation is, of course, not the only rationale for the punishment of offenders. Hirst has argued that the punishments that are commonly available at any given time mainly prevail not because they are chosen as the most efficacious means to an end, but because they are the consequences of the prevailing mode of social organisation.⁵⁵ He concludes his treatise with 'how and why we punish is a political issue.'⁵⁶ To understand why, in 2003, the judicially imposed whole life order was introduced, it is necessary to consider the political, legal and societal issues, not only at the start of the 21st century, but also how these issues came to prominence.

⁵⁰ Wasik (1995):5

⁵¹ Gowers (1953) para 53.177

⁵² Hansard HL 28 April 1948 col 491-493

⁵³ Cullen E & Newell T (1999):164

⁵⁴ von Hirsch (1993):5

⁵⁵ Hirst (1994):265

⁵⁶ *ibid* 278

2.2. The death penalty

2.2.1 Changes in the death penalty to 1931

In the 1950s and 1960s the 'political issue' that dominated debate on punishment was the state penalty in its most severe form, the death penalty, and on what would replace it. This was a debate that would continue and ultimately lead to the introduction of the whole life order. By 1960, the death penalty was primarily limited not just to murder, but also to particular categories of murder.⁵⁷ Earlier, in the 18th century, the number of offences punishable by death had numbered over 200. In the second half of that century when the so called Bloody Code was at its height, murder and piracy were perhaps predictably included in the list, but so too were stealing linen, maiming cattle, cutting down a tree, destroying a fishpond causing the loss of fish and sending threatening letters.⁵⁸ Although it is tempting to think of this Bloody Code as demonstrating a bloodthirsty desire for punishment, Gatrell argues⁵⁹ that in an era with neither a police force nor a proper penal or prison system, it was understandable that politicians would wish to preserve such a sentence.

The extent of punishment by death had reached its peak, however, and the first call for reform came in 1810 from Samuel Romilly, an ex Solicitor-General, who argued that hanging should be reserved for only the most serious of offences. As a result of his work, the death penalty was removed for those found guilty of pick-pocketing and other similar minor offences. Even over such offences, Romilly had to fight against vehement opposition in parliamentary debates, twice having Bills defeated when attempting to abolish capital punishment for theft of at least 40 shillings and shoplifting of goods to the value of five shillings. Lord Ellenborough, for example, felt that such moves were 'pregnant with danger' and claimed, 'Such will be the consequence of the repeal of this statute that I am certain that depredations to an unlimited extent would immediately be committed'. He claimed that if anyone left his home for an hour 'every vestige of his property will be swept off by the hardened robber.'⁶⁰ This form of scaremongering was still to be used the following century during the debates on the abolition of the death penalty.

Despite entrenched attitudes, reductions in the number of capital crimes were achieved little by little during the first half of the 19th century, many during Robert Peel's time as Home Secretary.⁶¹ By 1861, murder along with the far less frequent crimes of treason, arson in royal dockyards and piracy were the only capital crimes. The 1861 Offences Against The

⁵⁷ Detailed discussion of the 'categories' existing then, is discussed below

⁵⁸ See Jones (1992) for fuller details of the Bloody Code

⁵⁹ Gatrell (1996):279

⁶⁰ Cited in Phillips (2006b)

⁶¹ The capital crimes removed during Peel's time as Home Secretary included horse stealing (1832), sacrilege and escaping from transportation (1834), forgery (1836), burglary and certain arsons (1837) and rape (1841).

Person Act stated for the first time in a statute that the penalty for murder was death, with judges and juries having the right to recommend mercy. This prerogative of mercy was in the power of the Home Secretary, acting on behalf of the Crown, whereby the death sentence could be commuted to a life sentence. By 1861, murder was, therefore, well on its way to becoming 'a crime apart'.⁶²

The erosion of capital punishment, even for murder, continued with the Children Act 1908 finally ending the possibility of juveniles under 16 being hanged. Instead, any juvenile of this age found guilty of murder would serve a period of detention at His Majesty's Pleasure. It took until the Children and Young Persons Act 1933 for juveniles between the ages of 16 and 18 to escape the possibility of hanging. By then the offence of infanticide had been introduced in 1922⁶³ to replace a murder charge for any mother killing her child under the age of twelve months. Pregnant women found guilty of murder also were exempt from the death penalty after 1931⁶⁴ with a mandatory life sentence being substituted instead. The stage was now set for the very existence of the death penalty to be challenged seriously, and for demands for a wider debate on the justification of the penalty.

2.2.2 Parliamentary moves to abolish the death penalty

Although the abolition of the death penalty is most commonly associated with Sydney Silverman's Bill of 1965, some parliamentarians had been advocating the action over the previous three decades. As early as 1927, the Labour Party had published its *Manifesto on Capital Punishment*. Although the Manifesto was strongly supported by leading members of the Party, when Labour formed the government in 1929, no action was taken, as Labour did not have an overall majority in the House of Commons. In 1938, the issue was finally debated in parliament with a clause within the Criminal Justice Bill recommending a five year suspension of the death penalty. Before the Bill could be fully debated and passed into law, World War II was declared. The Bill was postponed and the first serious opportunity to abolish capital punishment was lost.

In 1947, the Bill was reintroduced with a five year suspension of the death penalty at its centre. The result was the Criminal Justice Act 1948, which was deeply disappointing to abolitionists. Although the House of Commons passed the clause on a free vote with a tight majority of 245 to 222, the House of Lords immediately defeated the clause and the Labour Government did

⁶² The same decade saw the end of public executions. This may appear a move to a more dignified and civilised process of capital punishment but one of the main reasons was to stop the public from making a mockery of the process and undermining the authority of the state and damaging the effectiveness of the punishment. It also served to fend off calls for the abolition of capital punishment. The subject is dealt with in Gatrell (1996):590

⁶³ Infanticide Act 1922

⁶⁴ Sentence of Death (Expectant Mothers) Act 1931

not seek to re-introduce it, perhaps aware of its unpopularity in the country at large, and wary of the prospect of having to use the Parliament Act to overcome the opposition in the Lords. Bailey describes the passage through parliament as 'a tortuous journey marked by ironies, dilemmas, embarrassments and recriminations'.⁶⁵ The Attlee government which, despite a huge majority and a media which were surprisingly abolitionist,⁶⁶ deferred to the House of Lords which was predominately Conservative and retentionist. The then Lord Chief Justice, Lord Goddard, as seen, was particularly outspoken in his defence of the death penalty,⁶⁷ arguing that the perpetrators of certain crimes which had made him feel physical nausea were incapable of reform and deserved the death penalty. He backed his argument with the claim that public opinion ('public conscience' as he said he preferred to call it) was on his side and the public would have no respect for the criminal law if it weakened on this issue.

The following year, the Labour Government, presumably aware of the strength of feeling of many Members who had backed the Bill, set up a Royal Commission chaired by Sir Ernest Gowers. An examination of the relevant Cabinet minutes reflects the rather reluctant approach of the government. The minute reports: 'Most Ministers thought it inevitable that the question (of abolition) would be raised in one way or other during the course of the current Session and they feared that it would give the impression of weakness if the Government took no action until forced by public pressure.... The Cabinet therefore concluded that some form of enquiry ought to be set on foot.'⁶⁸ This early example of a government feeling the need to acknowledge the force of public opinion is noteworthy.

Perhaps unsurprisingly, the remit of the Commission was less focused on the desirability of abolishing the death penalty than on examining 'whether the liability to suffer capital punishment should be limited or modified.' The stress was therefore not on the abolition of the death penalty, but how to ease the physical suffering during the act. In a subsequent debate in the House of Commons it was pointed out that it took the Royal Commission four years to reach a conclusion after which it took the government two further years to make up their minds about it.⁶⁹ Even with its restricted remit, the Commission's Report was clearly considered contentious. In line with its remit, the Royal Commission concentrated on methods of capital punishment and made recommendations mainly related to the process rather than the existence of the death penalty itself. It concluded that it was difficult to say if the death penalty was a successful deterrent or not, having inconclusively compared homicide rates in American states which had abolished the death penalty with those which had not.⁷⁰ By the time the

⁶⁵ Bailey (2000):347

⁶⁶ Bailey shows that the following newspapers supported abolition in 1948: *The Times*, *Manchester Guardian*, *Herald*, *Mirror*, *News Chronicle* as well as the weekly *Observer*, *Spectator*, *Economist*, and *New Statesman*

⁶⁷ Hansard HL 28 April 1948 col 492-493

⁶⁸ Cabinet Papers 8 November 1948

⁶⁹ Sydney Silverman Hansard HC 15 November 1955 col 208

⁷⁰ Quoted by Gwilym Lloyd-George Hansard HC 16 February 1956 col 2539

Commission reported, a Conservative government had been elected. With the government appearing reluctant even to debate the Commission's findings, it seemed the status quo would remain.

One of the recurring themes in this study is how the force of public opinion and of the media can at times influence political decisions. This occurred during the years of legislative inactivity after the Commission's Report. The event that drew unprecedented public and media attention was the execution of Derek Bentley in 1953. Bentley was hanged, despite a mental age of ten and despite doubts over his role in the crime, the murder of a policeman shot, not by Bentley, but by his co-defendant, Christopher Craig. Although there were public demonstrations and 200 members of parliament signed a motion requesting mercy for Bentley, the then Home Secretary Sir David Maxwell Fyfe rejected the appeal. Bentley was executed and the death penalty continued. However, a turning point had been reached and a more confident anti-hanging lobby emerged. In the same year, significant public concern and frustration was expressed when an enquiry, set up by the Home Secretary, reported that the conviction and execution of Timothy Evans was safe.⁷¹ This attracted wide criticism from the public and the media. Strength was further added to the lobby when the public expressed sympathy towards Ruth Ellis, a mother of two, hanged in 1955 for the murder of her lover.⁷²

Roy Greenslade, has claimed that how the media treated Bentley, Ellis and Evans was a catalyst for the abolition campaign.⁷³ This was, of course, before the days of televised debate. Then, Britain had a vast newspaper readership and editors ensured public debate was kept alive, holding their own polls on the subject and encouraging their readers to participate in national Gallup polls. *The Mirror*, for example, had major headlines on the day Ellis was due to hang, asking 'Should Hanging Be Stopped?'⁷⁴ Despite this, Gallup polls continued to show that the majority of the public was still opposed to abolition. Greenslade, while acknowledging the influence of newspapers, accepts that the abolitionist movement mainly reflected liberal opinion which failed to persuade the majority of the population and that it was 'primarily, as is often the case, the liberal elite speaking to the liberal elite.'^{75 76}

Public sympathy for Ellis, however, encouraged Sydney Silverman, in 1955, to introduce another abolition bill that, as in 1948, was passed by the Commons but heavily defeated in the Lords. Many Members, during the earlier attempt to abolish capital punishment in 1948, had

⁷¹ Evans had been hanged for murder, but a subsequent conviction raised major doubts about the rightness of his execution in most people's minds.

⁷² The previous woman hanged was Styliou Christofi on 13 December 1954 and, according to the public hangman Albert Pierrepoint, there was a total lack of public interest. Details available www.capitalpunishment.org/femhang.html

⁷³ In interview on Timeshift (2011)

⁷⁴ *The Mirror* 14 July 1955 The columnist Cassandra wrote in the newspaper 'The one thing that brings stature and dignity to mankind and raises us above the beasts will be denied to her: pity and the hope of ultimate redemption.' Blackhall (2009):90

⁷⁵ In interview on Timeshift (2011)

⁷⁶ The publishing by Victor Gollanz of works by Koestler and Camus supports this view.

been swayed by the strong conviction expressed by Sir David Maxwell Fyfe that no miscarriage of justice relating to the death penalty could ever take place. Members were now aware that two years later Timothy Evans had been executed, shortly before evidence had come to light seriously questioning his guilt.⁷⁷ The government itself introduced a Bill designed to appease the abolitionists by limiting the instances when the penalty could be imposed. This Bill would lead to the 1957 Homicide Act that would classify murders into capital and non-capital offences. The Commission had argued against the classification of murder into capital and non-capital crimes, stating that although they had made a determined effort to discover an effective measure to classify murders, 'We conclude with regret that the object of our quest - that is, a compromise - is chimerical and that it must be abandoned.'⁷⁸

Despite the Commission's concerns, the 1957 Act in Section 5 retained the death penalty for specific categories of murder:

- murder done in the course or furtherance of theft;
- murder done by shooting or causing an explosion;
- murder done in resisting lawful arrest or helping someone to escape from custody;
- murder of a police officer acting in the course of duty;
- murder of a prison officer by a prisoner.

The Homicide Act 1957, with its categories selected specifically to deter professional crime, would come in for serious criticism. Blom-Cooper and Morris state that it 'must rank as the most unsatisfactory examples of legislation affecting criminal justice in the twentieth century. Instrumentally reactive rather than constructively proactive, it began its working life with few friends and the number of its critics grew with the passage of time.'⁷⁹ Certainly, in the 1965 parliamentary debate on the abolition of the death penalty, it was variously described as being 'a terrible thing full of anomalies,⁸⁰ 'a tissue of anachronisms'⁸¹ and requiring the replacement of its 'illogicalities and ineffectiveness.'⁸² The Act's classification of murders into capital and non-capital murders particularly comes in for criticism and in some instances, mockery.⁸³ This classification was also criticised by the then Lord Chief Justice in 1962 as a 'hopeless muddle'.⁸⁴ Despite the criticism, the 1957 Act resulted in fewer death penalties being imposed,⁸⁵ but hanging as a penalty continued until the 1960s. By this time Britain and France were the only two Western European countries to retain capital punishment. Other

⁷⁷ Evans was finally pardoned in 1966

⁷⁸ Quoted by Sydney Silverman Hansard HC 15 November 1955 col 263

⁷⁹ Blom-Cooper & Morris (2004): 63

⁸⁰ Earl of Haddington, Hansard HL 20 July 1965 col 602

⁸¹ Baroness Asquith *ibid* col 670

⁸² Lord Colyton *ibid* col 651

⁸³ See Baroness Asquith *ibid* col 670

⁸⁴ Lord Parker July 1962 Cited by Shute (2004): 875

⁸⁵ It is worth remembering that, even before 1957, many offenders sentenced to death did not hang. The Royal Commission on Capital Punishment gave statistics to show that between 1900 -1949 (when no defence of diminished responsibility was available) 91% of women and 39% of men were reprieved. Of those reprieved, twice as many served terms of imprisonment of less than 5 years as served terms of over 15 years. p316-317, 326.

countries had abandoned the death penalty over the previous half-century⁸⁶ and statistics showed that in these countries where the ultimate punishment had been removed, no increase in murder had taken place.⁸⁷

A new Labour Government in 1964 allowed a Private Member's Bill proposing the abolition of the death penalty, again presented by Sydney Silverman. An important clause was inserted, proposing abolition to be not permanent, but for a five year trial period. Unlike earlier attempts at abolition, the government seemed to be more proactive in its support. The Cabinet papers show that, on condition Sydney Silverman withdrew his amendment,⁸⁸ the government would allow sufficient time for the debates. The minutes also show that although it was a free vote, any Minister who supported retention was asked to abstain rather than vote against the Bill.⁸⁹ Despite the concerns expressed, both Houses voted through the Bill⁹⁰ to suspend capital punishment for five years, replacing the death penalty with a mandatory life sentence.⁹¹ Parliament did not wait the full five years to reassess the situation. In December 1969, the Labour Government introduced a proposal to abolish the death penalty permanently, with the then Home Secretary James Callaghan quoting figures showing that the murder rate had remained stable since the abolition of the death penalty. Both Houses voted for the final abolition.⁹²

In both the 1965 and 1969 debates similar themes emerged. Abolitionists refuted the deterrent value of capital punishment, claimed that public protection could be safeguarded by the use of life sentences and argued that giving offenders an opportunity for redemption⁹³ was more important than using the death penalty as a display of condemnation. They also widely used the moral argument that capital punishment was a 'gruesome obscene procedure'⁹⁴ and that it lowered the moral standard of the whole community.⁹⁵ Public opinion polls, however, demonstrated that abolition would be against the preferences of the public. More than one Member quoted Gallup Poll figures showing that 70% of the public were in favour of retaining the death penalty and Lord Tenby argued that parliamentarians could not bring forward legislation on behalf of the people as there was no proof at all that this is what the people wanted.⁹⁶

⁸⁶ Norway in 1905; Sweden in 1921; Denmark in 1930; Switzerland in 1942; Italy in 1948; Finland and West Germany in 1949; Austria in 1950.

⁸⁷ Quoted by Phillips (2006b)

⁸⁸ A Clause 3 amendment proposing not to restrict abolition to a trial five years

⁸⁹ Cabinet Minutes 15 December 1964

⁹⁰ Commons voted in favour 200 to 98 and the Lords in favour 204 to 104

⁹¹ See below Chapter 2.3

⁹² Commons voted in favour 343 to 185 and Lords in favour 220 to 174

⁹³ Although the term 'rehabilitation' was to be used increasingly later in the century, in these debates terms used were redemption, reformation and penitence.

⁹⁴ Lord Stowhill Hansard HL 17 December 1969 col 1197

⁹⁵ James Callaghan Hansard HC 16 December 1969 col 1168

⁹⁶ Viscount Tenby HL 20 July 1965 col 624

Sandbrook has commented that abolition could be successful in the 1960s but would not be so today because then there was no 'populist political culture'.⁹⁷ It is, indeed, of interest to note that the governments of the day in 1965 and 1969 allowed a free vote and felt no compulsion to follow public opinion in the matter.⁹⁸ This contrasts with governments' actions in the decades leading to the CJA 2003, which this study will examine in detail later, where pressure from the public and the media appeared to play an undeniable part in politicians' approach to legislation.

An examination of the debates on capital punishment from 1948 to 1969 show deeply entrenched attitudes. On such an emotive issue perhaps this is not surprising. Both sides produced statistics on public opinion and on crime levels, and conflicting claims were made about the levels of crime in general, but especially for murder. Although the main debate on capital punishment ended in 1965, it revived during Margaret Thatcher's time as prime minister when IRA terrorist atrocities occurred in England. Thatcher was the first prime minister since 1969 to support the return of capital punishment. Ironically, however, trials associated with IRA terrorism changed the opinions of some parliamentarians: the cases involving the Birmingham Six and the Guildford Four. The defendants had been found guilty, sentenced and then later cleared of charges when their convictions were held to be miscarriages of justice.⁹⁹ These ten people would have hanged if capital punishment had been in force. Michael Howard was one politician who has stated in interview that this alone changed him from being a supporter of the reintroduction of capital punishment to being an opponent.¹⁰⁰

The death penalty was retained after 1969 for piracy, arson in royal dockyards and treason. These grounds for capital punishment were abolished in 1998, and finally in 1999 parliament ratified the 6th Protocol of the European Convention on Human Rights (ECHR) prohibiting capital punishment except for certain circumstances in wartime. The wartime exceptions were also abolished with the ratification of the 13th Protocol in 2002. Previously Bills to reinstate the death penalty had been presented unsuccessfully in the House of Commons.¹⁰¹ Britain can now only restore the death penalty if it withdraws from the Council of Europe.¹⁰²

⁹⁷ Timeshift (2011)

⁹⁸ During this debate on the reintroduction of the death penalty, unlike in earlier debates, the possibility of a national referendum was raised but was rejected by Members who again felt their judgment should be sufficient.

⁹⁹ The Birmingham Six served 16 years before release and the Guildford Four, 15 years.

¹⁰⁰ Timeshift (2011)

¹⁰¹ Between the abolition in 1964 and 1994, thirteen Bills were presented in Parliament, all rejected on free votes by substantial majorities.

¹⁰² It would also require withdrawal from the ECHR as its Protocol 13 outlaws the use of capital punishment.

2.3 The mandatory life sentence

Another important development in the genesis of the whole life tariff and the whole life order was the introduction of the mandatory life sentence. In the 1957 Act the offence of non-capital murder attracted the penalty of a mandatory life sentence. In the debates leading to the Murder (Abolition of the Death Penalty) Act 1965 Section 1(1) proposals were made to replace this sentence with a discretionary sentence of life imprisonment, but this was defeated in parliament and the mandatory life sentence for all murders became law. This is still in place today. Despite ongoing criticism, successive Home Secretaries, and more recently Secretaries of State for Justice, have stressed that there is no plan to replace the mandatory aspect of the sanction.

Lord Mustill in *Doody* commented at length on the uniqueness of the mandatory life sentence and continued 'in truth the mandatory life sentence for murder is symbolic'.¹⁰³ In large measure this symbolism is linked to the sentence being the replacement for the death penalty. There is certainly a widely accepted belief that the abolition of the death penalty was made more acceptable to politicians and the public because of assurances given that murder would always be treated as an exceptional crime with a corresponding exceptional penalty. An examination of parliamentary debates relating to criminal justice in the following forty years and of related literature over the same period - whether in the media, in statements from members of the judiciary, in academic papers, in campaigning reports - reflects an overriding suggestion that the mandatory life sentence for murder was introduced as a *quid pro quo* for the ending of hanging. The assertion is frequently made that almost as a way to get the legislation through parliament - against, after all, public opinion and against right wing political opposition - an agreement was made that those who were convicted of murder would always receive a life sentence.

In 1996, for example, the all-party organisation Justice wrote confidently that, despite the considerable lobby in parliament to remove the mandatory aspect of sentencing, 'in order to achieve the passage of the Murder (Abolition of the Death Penalty) Act 1965 it was necessary to reach a compromise that life sentences should be mandatory for all murders.'¹⁰⁴ Two years earlier Lord Mustill, giving judgement in the House of Lords, talked of the mandatory life sentence and of it representing the assurances given in 1965 to those nervous of losing the death penalty.¹⁰⁵ In 1991, during an oral question in parliament to the then Home Secretary, Ivan Lawrence spoke of the assurances given when capital punishment was abolished for it to be replaced by a mandatory life sentence and of the dangers of undermining public trust.¹⁰⁶ In 1995 the influential Home Affairs Committee also echoed this implication, stating that

¹⁰³ [1993] UKHL 8

¹⁰⁴ Justice (1996):4

¹⁰⁵ *Doody* [1994] UKHL 8

¹⁰⁶ Hansard 25 April 1991 HC col 1200

abandoning the mandatory life sentence would betray those who had voted to abolish the death penalty on the understanding that the life sentence for murder would continue to be mandatory.¹⁰⁷ In 2002 the Court of Appeal (Criminal Division) commented that the first section of the 1965 Act was made in order to assuage public concern about the possible release date of those convicted of murder who would probably have been sentenced to death.¹⁰⁸ This view has persisted and has been expressed by a wide variety of interested people. In the parliamentary debate leading to the CJA 2003, the Home Secretary referred to the presumption by the public that the abolition of the death penalty would mean that those who would previously have hanged would face a mandatory life sentence and 'going down for life.'¹⁰⁹ In 2004, the Director of Victims against Crime also argued that when the death penalty was abolished, mandatory life sentences were henceforth to mean life imprisonment 'to stabilise public fears'.¹¹⁰ In 2007, Simon Heffer, writing in *The Telegraph*, stated that 'The only way the liberal establishment of the 1960s sold the abolition of the death penalty was that the life sentence for murder that would replace it would be mandatory, and in some cases would mean life.'¹¹¹

During the interviews undertaken for this present study, although not raised in questions, various respondents referred to this concept of a *quid pro quo*. David Blunkett, the former Home Secretary, used this actual expression and talked of how, as a civilised country, we no longer take a life literally, but instead ensure that certain offenders can be kept out of harm's way for life. He spoke of a 'contract' with the British people whereby those who committed the most heinous crimes, who would have been hanged previously, had to be dealt with harshly and never be given a second chance. The word 'compact' was also used by another political respondent in interview, when he said that removing the mandatory aspect of a life sentence would break the compact made with the public in the 1960s at the abolition of the death penalty. A current Minister of Justice, Lord McNally, also recalled the days of the death penalty and referred to the understanding that after its abolition, for some people committing 'horrific' crimes, a life sentence would be mandatory and could mean whole life. Simon Hughes, the deputy leader of the Liberal Democrats, talked of the uncertainty people felt over a sentence of life not really meaning life and that after the abolition of the death penalty, the public assumed that the mandatory life sentence was there to bring permanent certainty and clarity. One of the senior judges interviewed also expressed the opinion that in view of the public understanding that the mandatory life sentence was introduced to ease the abolition of the death sentence, any move to replace it would be politically difficult.

¹⁰⁷ House of Commons. Session 1995-96, 111. Home Affairs Committee, *Murder: The Mandatory Life Sentence*, First Report, 13 December, 1995, para 53.

¹⁰⁸ Lord Justice Clarke in *Mason and Sellars* [2002] 2 Cr App Rep 497 at 500-01.

¹⁰⁹ Hansard HC 20 May 2003 col 867

¹¹⁰ BBC News 4 December 2004 <http://news.bbc.co.uk/1/hi/uk/4066947.stm>

¹¹¹ *The Telegraph* 10 March 2007

However, a detailed examination of all the parliamentary debates in the Commons and the Lords, which lead to the Murder (Abolition of the Death Penalty) Act 1965, and of relevant Cabinet papers, produces no evidence of any formal agreement by any member of the government to gain backing for the Bill by giving assurances of a mandatory sentence. Morris and Blom-Cooper, who studied the question, came to the same conclusion and claimed that there was no evidence to suggest that any deal had been struck in public or private in respect of replacing the death penalty by a 'mandatory life sentence'.¹¹² S1(1) of the Murder (Abolition of Death Penalty) Act 1965, simply substituted the mandatory sentence of life imprisonment for the penalty of death. Importantly, the Act did not formally define the term mandatory life sentence.

With this unwritten but apparently implicit and widely shared perception, it is of little surprise that no politician would lightly take a decision to alter it, partly to stay true to the alleged agreement to appease retentionists, but also to give ongoing assurance to the general public. During the debates on the abolition of the death penalty there was discussion about the possibility of allowing judges discretion when sentencing offenders convicted of murder. The opposition to the mandatory sentence was led by the then Lord Chief Justice, who moved an amendment at the Committee Stage to make the sentence discretionary. His amendment was accepted but, in the face of government opposition, he subsequently withdrew it.¹¹³

It was not only in the Lords that the debate had raged. In the Commons, Richard Glyn argued that, as murders ranged widely in quality and in different degrees of criminality, to use 'a parrot formula of words' would be 'absolutely inappropriate'.¹¹⁴ John Hobson also argued against the introduction of a mandatory life sentence for all murders and against the Home Secretary, alone, being allowed to exhibit discretion: 'The quality of mercy is not strained' was not intended to apply to the exercise only of the Home Secretary's powers. Surely it is the great tradition of this country that the judges hold the balance between mercy and justice, and it is right that they should continue to do so in all cases.'¹¹⁵ Hobson's concern was an early sign of the disquiet that the judiciary would later take up.

In 1989, the Nathan Committee¹¹⁶ recommended the replacement of the mandatory life sentence with a discretionary one. In the ensuing parliamentary debate on the Committee's report, perhaps not too surprisingly, the Law Lords strongly argued for the end of the mandatory life sentence. Lord Irvine was one of those arguing for more judicial discretion, describing the mandatory life sentence as a blunt instrument, and stating that he believed sentences should be modulated according to the gravity of each individual case.¹¹⁷ Lord Lane,

¹¹² Morris & Blom-Cooper (1996):707-717

¹¹³ Information given in *Report of the Select Committee on Murder and Life Imprisonment* HL (1989):32

¹¹⁴ Hansard HC 13 July 1965 col 393

¹¹⁵ *ibid* col 372

¹¹⁶ Nathan (1989)

¹¹⁷ Hansard HL 6 November 1989 col 521

who four years later would chair an influential commission funded by the Prison Reform Trust which recommended the end of mandatory life sentences, also backed its abolition in this debate. As too did Lord Ackner, who would still be arguing the case fourteen years later in the 2003 debates when, interestingly, he also referred to the 'often thought' ¹¹⁸ notion that the introduction of the mandatory life sentence was a compromise to induce the legislature to drop the death penalty.

Lord Nathan's proposals were defeated but he continued to argue the case, stating in 1991 that the mandatory life sentence had caused distortions, due to the wide scope of the crime, and that he had no doubt that 'public confidence in the administration of justice would be greatly enhanced' by the end of the sentence. ¹¹⁹ Between 1965 and 2003, however, each time the subject of the mandatory life sentence was debated, the government of the day rejected any call for its abolition with, for example, Kenneth Baker adopting what became the standard Home Secretary's response saying 'the argument for retaining the life sentence for murder still seems very strong'. ¹²⁰ Being in government, in fact, seemed to determine politicians' responses on the subject. In 1989, as seen, Lord Irvine had argued eloquently for the removal of the 'blunt instrument' but eight years later, as Lord Chancellor, while acknowledging that he was aware of both sides of the argument, he referred to the 'balance and the wisdom of current arrangements'. ¹²¹ If Lord Irvine was uncomfortable with his apparent change of view, his position may have become worse when Lord Hunt reminded him during the 2003 debates that at one time he had said that 'To put legislative straight-jackets on the judge's discretion to sentence for serious crimes is almost always a mistake'. ¹²²

Although, as will be seen later in the study, the CJA 2003 changed sentencing guidelines for murder, there was never any question of the government considering the possibility of removing the mandatory life sentence, despite very strong argument, particularly in the House of Lords. ¹²³ It came as no surprise, therefore, when the Law Commission was asked by the government to review the law of murder in 2004, that the terms of reference included the continuing existence of the mandatory life sentence. The Law Commission published a consultation paper in December 2005 and its final report in November 2006. ¹²⁴ It proposed that the mandatory life sentence should be more restricted, and recommended a three-tier offence structure. The government proceeded in 2008 with its consultation but, significantly, it chose not to consult on the Commission's proposals for a three-tier offence structure. ¹²⁵

¹¹⁸ Hansard HL 14 October 2003 col 831

¹¹⁹ Hansard HL 18 April 1991 col 1584.

¹²⁰ Hansard HC 25 April 1991 col 1200

¹²¹ Hansard HL 24 June 1997 col 1462.

¹²² Hansard HL 16 June 2003 col 646

¹²³ This will be discussed later.

¹²⁴ *Murder, Manslaughter and Infanticide*

¹²⁵ The consultation only looked at the partial defences to murder of provocation and diminished responsibility; infanticide; and complicity.

Interestingly, although the government did not ask in their consultation for comments on the mandatory life sentence, some of the respondents to the consultation did raise the issue. In the published summary of responses it is acknowledged that criticism had been made about the government's unwillingness to allow the mandatory nature of the sentence to be included in the review, mentioning particularly the lobby groups Liberty and Justice, with the former claiming that the sentence 'cannot be justified', ¹²⁶ and the latter stating that it presents 'a very difficult problem.' ¹²⁷ The government, however, retained its defence of the sentence, partly on the ground of the need for public confidence in the criminal justice system.

Since then a significant piece of research in 2010 by Barry Mitchell and Julian Roberts ¹²⁸ found that 'there is cause to doubt the assumption that the overwhelming majority of the public support the current law that *all* convicted murderers should *automatically* be sentenced to life imprisonment.' They concluded that since the level of public support for the mandatory life sentence was greater for the more serious murder scenarios, an argument could be made for more research to determine whether there is a sufficient degree of public consensus that the mandatory sentence should be retained for a narrower and particularly serious group of murders. ¹²⁹ Two months later, the Ministry of Justice published a Green Paper looking, among other things, to simplify the sentencing framework but using the opportunity once again to state that the government had no intention of abolishing the mandatory life sentence. ¹³⁰ This was underlined in parliament when Lord McNally, Minister of State for Justice, argued that 'the time is not right to take forward such a substantial reform of our criminal law'. ¹³¹

Further pressure was directed at the government with the publication in December 2011 of *Public Opinion and the Penalty for Murder*, ¹³² which used the research by Mitchell and Roberts to rebut the main justification for retaining the mandatory life sentence often cited by politicians, ¹³³ namely that the public would not accept any lessening of the penalty. The argument was made for a major rethink on the mandatory life sentence. However, politicians remain extremely wary of anything that could be seen as watering down any determination to tackle law and order issues. ¹³⁴

¹²⁶ Liberty (2008)para 6

¹²⁷ Justice (2008)para 5 The 'difficult problem' was described as: On the one hand the mandatory life sentence is regarded as very difficult to repeal; on the other, the law and actors in the criminal justice system have to develop creative ways of preventing injustice through the application of that sentence.

¹²⁸ Mitchell & Roberts (2010):6 This piece of research will be discussed more fully in Chapter Seven.

¹²⁹ *ibid* p6

¹³⁰ Ministry of Justice (2010):para 170

¹³¹ Hansard HL 24 January 2011 col 674

¹³² HomRAG (2011)

¹³³ Among others, for example, Kenneth Baker in June 1991

¹³⁴ Later in this study there will be examination of occasions when strident sections of the public and the media have reacted with fear or suspicion over perceived lack of a sufficiently hardline approach being taken in law and order issues.

2.4 The role of the Home Secretary to 1983

The issue of judicial discretion, or lack of it, in relation to the life sentence is an important element of the present study on the whole life order. Central to this controversy is the role of the Home Secretary. He had historically been responsible for authorising release of an offender sentenced to life imprisonment or commuting a capital sentence. Before 1948, this was carried out under the Royal Prerogative of Mercy. In 1948 the Home Secretary's role was made statutory: he could authorise release and determine the conditions of release.¹³⁵ A life sentence was regarded as a complete life sentence, in the sense that release was on licence. If any just cause arose, an offender could be recalled to prison any time until his death.

Until the abolition of the death penalty, therefore, the Home Secretary had sole discretion over substituting a life sentence for a death penalty, along with determining the conditions and timing of any subsequent release. The Murder (Abolition of the Death Penalty) Act 1965 introduced changes. Section 1(2) allowed the trial judge the discretion, when imposing a life sentence for murder, to recommend to the Home Secretary the minimum time to be served before release was considered.¹³⁶ Under Section 2, the Home Secretary was required to seek the views of the Lord Chief Justice and also the trial judge, if available, before releasing mandatory life prisoners. This restriction was altered two years later when, as part of the Criminal Justice Act 1967, the Parole Board was established. The 1967 Act created a framework for considering the early release of prisoners. The Home Secretary still had to consult relevant judges. The Parole Board reviewed cases, if (but notably only if) referred to them by the Home Secretary. If, and only if, the Parole Board recommended it, the Home Secretary could order release. However, he retained the right to reject any recommendation and to refuse release. This system remained in place for the next decade. During this time the severest state penalty for the most heinous murders remained the mandatory life sentence, with the possibility of release under licence. At this point the whole life tariff was not a concept that had been publically discussed, with no offenders known to have been specifically sentenced to spend the rest of their natural lives in prison. Nevertheless, Roy Jenkins, the Home Secretary, in December 1966 in the course of a debate on the Crime Justice Bill had acknowledged that there would be 'a few killers for whom a life sentence means exactly what it says.'¹³⁷

In this study of the genesis of the whole life tariff, one of the most crucial dates undoubtedly is 30 November 1983. The then Home Secretary, Leon Brittan, announced changes to the administration of life sentences. This was pivotal for two reasons: the actual changes

¹³⁵ The Criminal Justice Act 1948 Section 57 (later replaced by the Prisons Act 1952 section 27)

¹³⁶ However, from 1966-1989, according to evidence given to the Nathan Committee, this was rarely used and judges only made recommendations 270 times out of 2900 convictions. (Cited in Justice (1996):10)

¹³⁷ Hansard HC12 December 1966 col 70

themselves were fundamental, but equally important was the fact that, important as they were, they were created not by statute but by ministerial statement under discretion granted by statute. It was the beginning of a process whereby legal challenges would result in further ministerial statements, then further legal appeals – not only in domestic courts but also in the increasingly influential European Court of Human Rights (ECtHR). The process, many judgments later, would lead directly, in the Criminal Justice Act 2003, to the judicially imposed whole life order.

Before looking at the details of Brittan's tariff system, it is interesting to note the social and political background that contextualised the Home Secretary's statement. The statement came in the same year as the Conservatives had been returned to office with a huge majority in June 1983. The Labour Party, led by Michael Foot, polled its lowest number of votes since 1918. Much of Prime Minister Margaret Thatcher's popularity was thought to have come from the decisive victory in the Falklands. Leon Brittan was appointed Home Secretary and, with such a large majority in the election, it might appear that there was little pressure for change. There were, however, multiple pressures. The public felt that crime was increasing and, in the years before the election, there had been much public disquiet. Counter-terrorist activities centred on Northern Ireland were continuing: soldiers were being killed and, in 1979, Lord Mountbatten, the Queen's cousin, had been murdered while on holiday in Ireland. Republican prisoners had died on hunger strike in the Maze prison. The siege at the Iranian Embassy in 1980 had seen armed forces authorised to use lethal force on the mainland for the first time in seventy years. High unemployment - the highest since World War II - and racial tension had contributed to the 1981 Brixton riots. The public had continued to be confronted with the crimes of Hindley and Brady, whose cases were still in the media because of the continuing efforts of two of the victims' families to find the still-missing bodies of their children. The public had also witnessed the trial of Peter Sutcliffe, the Yorkshire Ripper, and in the same year as the election, Dennis Nilsen, another notorious serial killer, had been tried and found guilty. Brittan, as the new Home Secretary of a party traditionally associated with a tough approach to tackling crime, was under pressure to reassure the public that the government was in control and understood their need to have confidence in the criminal justice system. His response was his ministerial statement in November 1983.

In his statement – first flagged up in a speech to the Conservative Party Conference two months earlier – Brittan made it clear he was acting 'to take account of the general public's concern about the increase in violent crime and the growing criticism of the gap between the length of sentences passed and the length of sentences actually served.'¹³⁸ Fundamental change to the release of offenders, especially those in the category this study relates to, were introduced:

¹³⁸ Hansard HC 30 November 1983 col 506

- For the first time, life sentences would be considered in two parts: firstly, the tariff – a determinate sentence, to reflect the period felt necessary to meet the needs of retribution and deterrence.
- For terrorist murder, murder of police or prison officers, sexual or sadistic murders of children; murders by firearm in the course of a robbery the tariff would be at least twenty years.¹³⁹
- After serving the first punitive stage, offenders would face an indeterminate stage when they would only be considered for release once the possible risk to the public had been assessed. Brittan stated that risk to the public ‘always has been, and will continue to be, the pre-eminent factor determining release.’¹⁴⁰
- For the first period of imprisonment the Home Secretary would ask the judiciary for advice on length of sentence. For the second period – the risk stage – the Home Secretary would depend on the Parole Board for advice.
- The statement made no reference to juvenile offenders sentenced under Section 53 of the Children and Young Persons Act.

Some aspects of the statement are noteworthy and would later be challenged in litigation. The Home Secretary retained the power to reject judicial advice on the penal tariff. He retained not only the power to reject the advice from the Parole Board but also to decide which cases were to be referred to the Board. For the first time, he separated the deterrent and retributive purpose of imprisonment (with the judiciary advising on an appropriate tariff) from the question of public protection and the possible future risk posed by the offender (to be decided upon by the Parole Board). Lord Mustill expresses in *Doody*, with perhaps a certain irony, that ‘Whereas at the outset the power of the trial judge to recommend a minimum term, and the duty of the Home Secretary to consult the judges before release had been a protection against a foreseen risk of excessive leniency by the Executive, the new regime was intended to forestall excessive leniency by the judges, or the Parole Board or both’.¹⁴¹

The seeds of many contentious issues which dominate this study can be traced to Brittan’s statement: the role of the Home Secretary, the separation of powers between the judiciary and the executive and the political desire to take into account public concern about crime. The question of whether the Home Secretary was taking an administrative decision or adopting a sentencing role – and thereby straying into judicial territory – would be considered in future legal challenges. The Home Secretary’s sole discretion in deciding the length of imprisonment in cases of murder, sometimes overriding previous sentencing decisions, would also be challenged in appeal courts. The practice of ministerial statement driving the law would be alluded to by the judiciary years later, with Lord Hope in 1997 saying of the process started by Brittan in 1983 that changes in policy had had a marked effect on the way in which,

¹³⁹ It should be noted that this represents another attempt at categorisation.

¹⁴⁰ Hansard HC 30 November 1983 col 507

¹⁴¹ [1993] UKHL 8

in practice, mandatory life sentences were administered. These changes, he noted, had not been introduced by parliament, and indeed parliament had been remarkably inactive in this field.¹⁴²

Twenty years later Lord Woolf would speak of the 'geological fault' between the judiciary and the Home Office, which he had hoped to see bridged during his time as Lord Chief Justice, but admitted that his optimism had been dashed.¹⁴³ Brittan's statement in 1983, if not the start of this 'geological fault', certainly contributed to it.

2.5 Effects of Brittan's Statement 1983 – 1990

The lawfulness of Brittan's new policy was challenged in the House of Lords quite promptly. In *Findlay*¹⁴⁴ four prisoners challenged the policy on the grounds that they had suffered loss of expectation of parole; the Home Secretary could not change the policy without consulting the Parole Board; and classifying offences as Brittan had done was inconsistent with each case being considered individually on its own merits. The appeal was dismissed, although there was perhaps implied criticism of the lack of relevant legislation in Lord Scarman's comment, 'The duty of the Secretary of State is, as I have already shown, a very complex one. Indeed, the complexities are such that an approach based on a carefully formulated policy could be said to be called for.'¹⁴⁵ The judges upheld the Home Secretary's right to make final decisions on release and they rejected the idea of the prisoners having suffered loss of expectation of parole. They said that the most that a convicted prisoner could legitimately expect was that his case would be examined individually in the light of whatever policy the Secretary of State saw fit to adopt, provided always that the adopted policy was a lawful exercise of the discretion conferred upon him by the statute.¹⁴⁶

It was, however, Lord Scarman's comments on the role of the Home Secretary in relation to his need to take public confidence into consideration that was to have an important effect on future developments:

But neither the board nor the judiciary can be as close, or as sensitive, to public opinion as a minister responsible to Parliament and the electorate. He has to judge the public acceptability of early release and to determine the policies needed to maintain public confidence in the system of criminal justice.¹⁴⁷

¹⁴² *Pierson* [1997] UKHL 37

¹⁴³ Cited in Allen (2008)

¹⁴⁴ [1985] 1 AC 318

¹⁴⁵ *ibid* at 335

¹⁴⁶ *ibid* at 338 Lord Scarman

¹⁴⁷ *ibid* at 333

Lord Scarman confirmed, therefore, the Home Secretary's right to introduce new *policies*, justifiable on the basis that they were required to ensure the public had confidence in the criminal justice system. Public acceptability was not a new issue but, as will be seen, ministerial statements would increasingly reflect the perceived need for strong executive involvement in order to retain public confidence. In the shorter term, the effect of the *Findlay* appeal was a simple statement by Brittan on 1st March 1985 amending his policy on when the first formal review date should be set.¹⁴⁸

The next litigation against Brittan's policy came with the *Handscomb* appeal¹⁴⁹ which claimed that the Home Secretary was acting unlawfully by delaying until three years after sentencing his consultation with the judiciary to fix the first review date; and secondly that he was bound to set the first review date strictly in accordance with the penal element recommended by the judges. The appeal was successful. What is particularly interesting for the present study is that, although the appeal judges did not differentiate in their ruling between discretionary and mandatory life sentences, the Home Secretary – by then, Douglas Hurd – issued a ministerial statement on 23 July 1987. In it, he accepted the ruling about the first formal review taking place as soon as practical for both mandatory and discretionary life prisoners, but stated that in all other matters, the original details of the policy would remain in force for mandatory life prisoners. Hurd differentiated between life prisoners in an important way: he would accept the judicial view on tariff for discretionary prisoners but not in the case of mandatory life prisoners. The justification was to ensure 'the worst offences of violence fully reflects public concern about violent crime.' and to recognise 'the need to maintain public confidence in the system of justice.'¹⁵⁰ The Home Secretary also stressed that in the case of mandatory life prisoners, release would be 'solely at his discretion'.¹⁵¹

The Home Secretary, therefore, retained power to determine both the penal and risk element of the mandatory life sentence, referring to the need for politicians to ensure public confidence in the justice system in relation to violent crime. The public's view of the rigour of the government's stance on crime was obviously important, as was, perhaps, the view of members of parliament: both Brittan in 1983 and Hurd in 1987 made their hard-line ministerial statements very close to a parliamentary vote on the reintroduction of the death penalty.

Before the decade ended, the Nathan Committee¹⁵² shone a valuable light on the Home Secretaries' decisions on the imposition of tariffs. These decisions since 1983, if not official secrets, were certainly not publicised. The Committee asked the Home Office for figures relating to tariffs set by the Home Secretary and how these compared to the tariffs proposed and submitted to him by the judiciary. The Committee was given figures for the years 1983 to

¹⁴⁸ Hansard HC 01 March 1985 col 309

¹⁴⁹ [1988] 86 Cr App Rep 59

¹⁵⁰ Hansard HC 23 July 1987 col 349

¹⁵¹ *ibid*

¹⁵² Nathan (1989)

1988 which showed the trial judges' recommendation, the Lord Chief Justice's recommendation and the actual tariff set by the Home Secretary.¹⁵³ In 1984, from a total of 159 cases, the Lord Chief Justice recommended a higher tariff than that of the trial judge in 12 cases, while the Home Secretary set a higher tariff in 80 cases – almost 50% of the total. In 1988 the Home Secretary set a higher tariff in almost 60% of the cases: 63 cases out of 106, while the Lord Chief Justice had recommended a higher tariff in 16 cases. Overall, the figures show that although the Home Secretary did set a lower tariff than the trial judge's recommendation in some cases – in almost every case following the Lord Chief Justice's recommendation for a lower tariff – the pattern was one of the Home Secretary setting a harsher tariff than recommended by the judiciary. The organisation Justice, when analysing the figures, claimed that the process remained 'slow and secretive' and the figures 'give a picture of disturbingly inconsistent and potentially arbitrary system of tariff increases.'¹⁵⁴

Justice may have been arguing from a campaigning organisation's point of view, but any disinterested analysis of the 1980s reveals a system where the executive appeared determined to demonstrate to the public that the government was taking public fears of violent crime seriously and was willing if necessary to counter any perceived leniency on the judiciary's part. In the next decade this process would be repeated, whereby life prisoners would continue to appeal against a system that lacked openness and fairness. Both the lack of openness and disquiet over the Home Secretary's powers had been highlighted during the debates on the Nathan Committee Report. One concern raised in the debate was that while the trial judge and the Lord Chief Justice reported to the Home Secretary, their views on the length of time which the particular prisoner should serve on grounds of deterrence and punishment 'are not communicated to the prisoner by the judge - except perhaps at the end of the trial - or by the Lord Chief Justice. Indeed he (the Home Secretary) never hears any representations from the prisoner. That cannot be right.'¹⁵⁵ Lord Nathan, in the debate, speaking on behalf of the Committee, expressed its disquiet not only at the secretive nature of the process but also at the Home Secretary's powers:

We were gravely concerned that the present system for administering a life sentence gives Ministers inappropriate powers to determine the length of time actually to be served in prison by lifers. It is unnecessarily secretive and has grown up piecemeal over many years. It represents a confusion between the proper functions of Ministers and the judiciary and has led to devaluation of the life sentence. Effectively, the Executive - the Minister - has the power to decide the term of detention in life imprisonment cases, with consequent risks of political influences in sentencing. Sentencing in all other aspects of criminal law is a judicial function. Our recommendations are designed to bring the administration of a life sentence for murder into an entirely judicial context.¹⁵⁶

¹⁵³ *ibid* p 560

¹⁵⁴ Justice (1996):17

¹⁵⁵ Lord Lane Hansard HL 6 November 1989 col 478

¹⁵⁶ *ibid* col 451

These issues - the Home Secretary's role impinging on a judicial role and the overall secrecy, including the fact that prisoners were not involved in the process of considering tariffs - as will be seen, would play an important role in litigation in the following decade but would not be resolved fully until 2003. The debate on the Nathan Committee's Report is of particular importance to this present study as it foreshadows *Anderson* and *Stafford* and the resultant clauses in the CJA 2003, all central features of the study.

2.6 The Criminal Justice Act 1991

This growing concern with the powers of the Home Secretary in respect of prisoners serving life sentences for murder needs to be set into the context of the sentencing purpose clearly articulated in the 1990 White Paper *Crime, Justice and Protecting the Public*,¹⁵⁷ and in the subsequent CJA 1991. Over the decade this coherent philosophy was to be 'modified' both by judicial decision and legislation. Part of the explanation for this lies in the changing views of politicians of both main parties and their attitudes to the media and the public.

Criticism of the criminal justice system was not limited to the role of the Home Secretary. There was concern over the lack of a clear rationale for sentencing, forcibly expressed by academics, with Ashworth commenting in 2000: 'Freedom (of judges) to select from among the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts.'¹⁵⁸ Wasik and von Hirsch were even more critical of the situation: 'Allowing sentencers to pick and choose at will amongst the diversity of sentencing aims is, of course, a recipe for disparity and injustice.'¹⁵⁹ However, this issue was addressed in the 1990 White Paper. Its central proposal was the creation of a statute to provide for sentencing 'a coherent framework for the use of financial, community and custodial punishments.'¹⁶⁰ The White Paper explicitly rejected that sentencing 'policy', for constitutional reasons, should be left to the judiciary.

Sentences should be based primarily, the White Paper said, on the principle of proportionality: the more serious the crime, the more severe the punishment. It was believed that the best way to achieve this was by extending the use of the rationale of 'just deserts'. Punishment should be given for the crime currently before the court rather than for past crimes or possible future ones. It was further argued that there should be less use made of imprisonment and greater use of non-custodial sentences. Imprisonment was memorably declared to be 'an expensive way of making bad people worse'.¹⁶¹ General deterrence as a purpose of sentencing was decried: 'It is unrealistic to construct sentencing arrangements on the

¹⁵⁷ Home Office (1990)

¹⁵⁸ Ashworth (2000):72-73

¹⁵⁹ Wasik & von Hirsch (1990):508-509

¹⁶⁰ Home Office (1990) para 1.15

¹⁶¹ *ibid* para 2.7

assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation'.¹⁶²

Before turning to the relevant sections of the Criminal Justice Act 1991, it is worth considering the concept of 'just deserts' and its concomitant principle of proportionality because of its relevance not only to the 1991 Act but also to the CJA 2003. Ashworth has asserted that the strength of desert theory may be recognised in its basis in everyday conceptions of crime and punishment and its close links with modern liberal political theory: the insistence that state power be subject to limitations; its model of individuals as autonomous choosing beings; and its protagonists' insistence that sentencing systems should have coherent aims and predictable sentences.¹⁶³ 'Just deserts' carries the requirement that only those who have been proved to have committed an offence should be punished. This differentiates it from the theory of deterrence in particular, and utilitarianism in general. To the question of 'how much to punish?' desert theorists answer that sentences should be proportionate in their severity to the seriousness of the criminal conduct. For proportionality to be a powerful concept, it is necessary to have, or create, an ordinal scale: a hierarchy of crimes ranked according to their seriousness. While this may be problematic for crimes ranked as of moderate or minor seriousness, it is generally not so for murder. Or rather, while it has been discussed above that murder includes both mercy killing and sadistic or sexual murder of children or vulnerable people, there is nonetheless a broad consensus that the latter grouping would be placed at the top or very near the top of any ordinal scale.¹⁶⁴ However, while ordinal proportionality provides the rank ordering of crimes, it does not directly address the question of how severe a sentence should be. It does not, for example, say how long the sentence for murder should be compared with that, say, for armed robbery.

Lord Justice Lawton essayed in *Turner*¹⁶⁵ an attempt at cardinal proportionality when he related the sentences, or rather the time served, for armed robbery to that served for murder. This judgment, however, appears to stand alone. Von Hirsch has asserted that desert theory does not assist in creating cardinal proportionality since it provides little guidance on anchoring points or on maximum and minimum punishments.¹⁶⁶ However, attempts have been made in statute to provide a limited degree of cardinal proportionality. The distinction was made between capital and non-capital murder in the Homicide Act 1957. Another attempt was made when Schedule 21 of the CJA 2003 provided three starting points when considering the sentences for adults convicted of murder.

¹⁶² *ibid* para 2.8

¹⁶³ von Hirsch & Ashworth (1998):147-148

¹⁶⁴ See for example, Mitchell & Roberts (2012):141ff

¹⁶⁵ 1975 61 Cr APP R67 para 89-91 Lord Lawton began by calculating that a case of murder with no mitigating circumstances would result in the offender serving 15 years (this equalled a determinate sentence of 22 and a half years allowing for the standard remission.) It followed that other crimes of high seriousness should be ranged below 22 years: - bomb outrages, acts of political terrorism and political kidnapping would attract 20-22 years. Armed robbery would attract 15 years and two such offences 18 years. Quoted in Ashworth (2000):115

¹⁶⁶ von Hirsch (1998a):174

The 1990 White Paper was widely, if cautiously, welcomed by academics but less so by the judiciary, some of whom believed it infringed the separation of powers.¹⁶⁷ The CJA 1991 enacted the main principles of the White Paper. It is Part 1 of the Act that is of relevance to this study.¹⁶⁸ It stated that sentences were to be commensurate with the seriousness of offences, reflecting desert theory and proportionality. Exception was made, however, in respect of violent or sexual offences where there could be longer sentences for public protection, that is, incapacitation. Later Ashworth declared that the twin track of 'just desert' and incapacitation is both practical and consistent with the rule of law: a primary rationale is declared but in certain types of cases another rationale might be given priority.¹⁶⁹ However, there was no change to the mandatory life sentence for murder and consequently no attempt in statute to provide ordinal proportionality for different types of murder, let alone cardinal proportionality. Power remained with the Secretary of State to determine whether, and when, life sentenced prisoners would be released. In terms of this study then, the CJA 1991 was a missed opportunity to bring clarity to determining what a life sentence meant.

2.7 Reaction against the Criminal Justice Act 1991

This missed opportunity was of less significance than might have been thought at the time, as the 1991 Act quickly became a 'non-Act'. Ashworth has drawn attention to the Lord Chief Justice subverting the 'just deserts' philosophy when he stated that 'commensurate with the seriousness of the offence'¹⁷⁰ should be interpreted to mean 'commensurate with the punishment *and deterrence* which the seriousness of the offence requires'.¹⁷¹ Ashworth averred: 'This set the tone for a reading-down of many parts of the 1991 Act in which the judges made sure it affected their daily sentencing as little as possible.'¹⁷²

Moreover, in 1993, Michael Howard's speech at the Conservative Party Conference reflected a further shift in public policy. The 1990 White Paper had regarded prison as 'an expensive way of making bad people worse', but Howard now declared that 'prison works'. As attempts at rehabilitation in prison were widely regarded as ineffective, it would seem that this was largely on the grounds of incapacitation: if offenders were removed from society then they could not commit crimes in society during the time they were incarcerated. 1993 may indeed be regarded as a pivotal year: a year in which the mood of the government and the judiciary coincided, although this was not to last. In 1991 when the CJA was passed, the judiciary had

¹⁶⁷ As Lacey (1994):538 said: 'The judiciary's vociferous defence of its autonomy in the area of sentencing is premised on the assumption that sentencing is, constitutionally speaking, a judicial decision with which executive interference is, in effect, a violation of the separation of powers.'

¹⁶⁸ The other parts reformed the system of early release; changed how children and young people were treated in court; was concerned with the provision of services and financial matters.

¹⁶⁹ Ashworth (2000):73

¹⁷⁰ CJA 1991 Section 2 (2)

¹⁷¹ *Cunningham* (1993) 14 Cr App R (S) 44

¹⁷² Ashworth (1998):231

complained about the fettering of their powers to deal condignly with certain types of offender, the government appeared relatively liberal and the press paid little attention. Since 1993, it has been the senior judiciary who have appeared liberal in policies, for example when they criticised government proposals in the 1996 White Paper - widely supported in the media - for mandatory minimum sentences.¹⁷³ It is also pertinent to note that the same year, 1993, witnessed the political, media and public outrage at the murder of three year old James Bulger.¹⁷⁴ This outrage was directed, not only at the two ten year old children convicted of this murder, but also at what had happened to a society which allowed such a crime to take place, and how best to remedy the situation. As Ashworth has put it 'When Mr Howard began to weave his web at the end of 1993 – or perhaps I should say, began his journey into the night - it quickly became apparent that he would mostly be introducing restrictions on sentences.'¹⁷⁵

Woodhouse has chronicled the resulting deteriorating relations between the government and the judiciary in the period April 1995 - March 1996.¹⁷⁶ At the 1995 Conservative Party Conference, Michael Howard announced his proposal to increase the severity of sentences for particular crimes. The senior judges had not been consulted and Lord Chief Justice, Lord Taylor, publically condemned the proposals, which would reduce judicial discretion. Woodhouse noted that Howard's proposal did little for judicial-executive relations and brought to the fore the dispute over whether sentencing is a judicial or an executive function. In January 1996 Lord Donaldson, former Master of the Rolls, said he considered that Howard's statement that there were a number of prisoners who would spend the rest of their lives in jail not only prejudiced his consideration of the Hindley case but also appeared to tie the hands of Howard's successors. Finally, in March 1996, Lord Taylor returned to the attack in a lecture at King's College London, repeating his criticism, this time more stridently. Woodhouse concluded that the confrontation between the judges and the government arose from a number of issues including: the increase in judicial review cases, the dispute over sentencing discretion, a lack of mutual respect between government and judges and a blurring of boundaries between the 'political' and 'judicial'.¹⁷⁷

Despite the confrontation, Howard moved forward with the Crime (Sentences) Bill 1996, two proposals of which were: serious violent and sexual offenders would receive, for a second offence, an automatic life sentence with the tariff, based on retribution and deterrence, set by the trial judge; and there would be mandatory minimum sentences for persistent drug dealers and burglars.

¹⁷³ Hough & Ashworth (1996):776ff

¹⁷⁴ See below

¹⁷⁵ Ashworth (1997)

¹⁷⁶ Woodhouse (1996) The information in this paragraph is drawn from Woodhouse's article; extensive searches have failed to identify her sources.

¹⁷⁷ *ibid* p439

A great deal had changed between the CJA 1991 and the 1996 legislation. An explanation of why the Conservative government first introduced the 1991 Act and then readily moved away from it has been provided by Lacey.¹⁷⁸ She has argued that in the context of the 1980s the 'law and order issue' became embroiled with government concerns for the '3 Es' - economy, efficiency and effectiveness - in, for instance, the Rayner Inquiries, with the government presenting itself as an efficient 'manager' of the law and order issue. From the perspective of the Home Office, and the government more generally, the criminal justice system was 'just one more hopelessly inefficient and chaotic part of the public sector'.¹⁷⁹ More particularly, Part 1 of the 1991 Act could be seen as an attempt to impose, in the face of the interest group involved, a coherent system on an inefficient area of public administration. The dual track approach - more severe sentences for more serious offences, less use of prison for relatively minor offences - would satisfy the economy goal by having fewer offenders in prison.¹⁸⁰ But Lacey argued this managerialist approach 'provides a highly unstable framework for the maintenance of given policies.'¹⁸¹ In this analysis when 'consumers' were critical there were no strong grounds of principle on which to stand. On this account, the weakness of the government and a resurgent Labour Party playing the law and order card explains the retreat from the Criminal Justice Act 1991 to the Crime (Sentences) Act 1997.

It might have been thought that the Crime (Sentences) Bill of 1996 would show clear water between the two main political parties. This did not prove to be the case. The Labour opposition joined with the government to support the automatic life sentence and mandatory minimum sentence provisions, making passage through the Commons relatively smooth. This was not true for the Lords. Lord Chief Justice Taylor referred to the government's figures on the expected effects of the Act as 'shallow and untested' and continued 'never in the history of the criminal law have such far reaching proposals been put forward on such flimsy and dubious evidence.'¹⁸² Lord Bingham, however, in an article written that year, signalled what was to be the ending of the 'judicial independence argument' and concluded decisively that the Bill raised 'policy' issues: 'This is, in the widest sense, a political question - a question of what is beneficial for the polity - not a constitutional question.'¹⁸³ In the end, because of pressure of parliamentary time, and despite Labour's support for the Bill, an alliance in the House of Lords of Law Lords, bishops and Liberal Democrat peers forced the government to accept an amendment, which inserted a broad power for courts to avoid imposing a minimum sentence if it would be 'unjust in all the circumstances' to do so.

¹⁷⁸ Lacey (1994):534ff

¹⁷⁹ *ibid* p 540

¹⁸⁰ This in fact was the case. When the 1991 Act came into effect the prison population fell from 45, 835 in September 1992 to 40,606 in December 1992. Home Office Prison Statistics England and Wales 1992 Cm2582 tables 1.2 and 1.3

¹⁸¹ Lacey (1994):535

¹⁸² Hansard HL 23 May 1996 cited by Ashworth (1997)

¹⁸³ Bingham (1996)

3 DECISIVE CHALLENGES TO THE HOME SECRETARY'S POWERS

3.1 New Labour and the power of the media

In the same year as the Crime (Sentences) Act 1997 received the Royal Assent, New Labour was elected. Earlier, just as 1993 represented a turning point in the Conservative Party's approach to law and order, the same year had also proved pivotal to the Labour Party. Labour had been out of government since 1979 and in the process had suffered a series of electoral disasters. It appeared that certain elements in the parliamentary party would do anything to gain power, including outflanking the Conservatives on what had been their 'banker' - law and order. At the beginning of 1993 Tony Blair and Gordon Brown travelled to the USA to witness for themselves the secrets of the Democrats' success. According to Anderson and Mann, Blair was particularly impressed by the way President Clinton had managed to overcome the Democrats' long-standing vulnerability to attack from the Republicans, for being "soft" on crime, welfare dependency and family values, by taking aggressively populist anti-liberal stances.¹⁸⁴ Clinton was far from the traditional left wing liberal. By 2000, drug prosecutions had increased from 15,000 in the middle of President Reagan's second term to 60,000, and offenders were getting longer sentences.¹⁸⁵ Clinton supported the expansion of the death penalty and encouraged the growth in prison construction to cope with a massive increase in incarceration in the USA following 1992 when the Democrats came to power.

While there, Blair was almost certainly made aware of the William Horton case five years earlier which illustrated the dramatic effect on politicians of the interplay of crime, the media and the public. Horton was a convicted murderer who committed further violent attacks and rape while on a weekend furlough from prison. George Bush, at the time, was trailing Michael Dukakis in the opinion polls for the presidential election. Dukakis, as State Governor, had previously vetoed a bill that would have made inmates convicted of first-degree murder ineligible for furloughs, saying it would 'cut the heart out of inmate rehabilitation'. Supporters of Bush relentlessly used the Horton case as an example of Dukakis being soft on crime, pointing out that he did not support the death penalty and allowed prison furloughs to first-degree murderers not eligible for parole. In July, 23% of people in polls said Bush was 'tough enough' on crime but by late October - after the publicity over Horton - this had risen to 60%. On the other hand, during the same period the percentage of those feeling Dukakis was 'not tough enough' on crime rose from 36% to 49%. There were obviously other issues raised during the campaign but it was the crime issue that was played to devastating effect. By the

¹⁸⁴ Anderson & Mann (1997):22

¹⁸⁵ Heymann (2000)

end of the campaign the public would usher in a surprise winner, and George Bush moved into the White House.¹⁸⁶ Blair returned to Britain convinced that elections could be the occasion for particularly brutal crimes to be picked up by the media, affecting public opinion and forcing - or enabling - politicians to respond.

Public opinion and media attitudes and the influence these can exert on political decision-making is one of the themes running through the present study. The response of government and politicians to this has varied over time and, in future, pressure from the public and the media may well be significant if the current appeal of *Vinter, Bamber and Moore* to the ECtHR about the whole life order is successful.

In the debates on the Bills to abolish capital punishment, many members of parliament, mostly abolitionists, declared that they would vote with their consciences despite public opinion, as they were representatives not delegates.¹⁸⁷ Almost twenty years later, when an attempt was made to reintroduce capital punishment, Edward Heath echoed the earlier arguments by defending Members' sustained position of voting against the public's wishes on the death penalty, claiming that a politician should have the 'courage and responsibility to form his own judgment and own views and then act upon them in the Division Lobby'.¹⁸⁸ Silverman argues that a change occurred in the 1990s, after which politicians went over the heads of their civil servants, using the media to project populist policies.¹⁸⁹ Certainly by the 1990s, even the Home Secretary was to regard himself as bound to follow the public mood, rather than lead public opinion. This, however, was potentially problematic because evidence from the 1996 British Crime Survey¹⁹⁰ and the 2001 Halliday Report¹⁹¹ pointed out that public perception of crime varied widely from the reality. There were also widespread misperceptions about sentencing.¹⁹² In respect of homicides, an article by academics from Lancaster University¹⁹³ examined the contribution of newspapers to the social construction of homicide. They concluded that, although newspapers selected material on the basis of what would entertain their readership, this selection was usually unchallenged. No alternative information was made available to the readers, giving the newspapers' selection criteria 'an astonishing level of social and political power,' and over time 'the odd becomes the public construction of what homicide is'.¹⁹⁴ It was not newspapers alone among the media that appeared to distort perceptions of crime, especially homicide. Gruesome crimes were also brought into homes by

¹⁸⁶ More information on this can be found at Independent Ads: The National security Political Action Committee 'Willie Horton' (<http://www.insidepolitics.org/ps111/independentads.html>) and 'How Bush Won', Newsweek, November 21 1988, p117, Martin Schram, 'The Making Of Willie Horton', The New Republic, May 28 1990, p17, Marjorie Hershey, 'The Campaign and the Media' in *The Election of 1988*, ed Gerlad M. Pomper, Chatham, New Jersey: Chatham House, 1989, pp95-96.

¹⁸⁷ Silverman and Bessell Hansard HC 13 July 1965 col 459

¹⁸⁸ Hansard HC 11 May 1982 col 621

¹⁸⁹ Silverman (2012)

¹⁹⁰ See Hough & Roberts (1998)

¹⁹¹ Halliday (2001)

¹⁹² See for instance Hough (1996); Hough & Roberts (1998); Hough and Roberts (1999)

¹⁹³ Peelo et al (2004)

¹⁹⁴ *ibid* p23 and 24

television so that, as it has been colourfully portrayed, 'the unruly mass at the gallows are now the voyeurs on the sofa'.¹⁹⁵ It is understandable how a politician could gain popularity and support by offering to protect the innocent and come down hard on the guilty few.

This may have been particularly true when the country was faced with an exceptionally horrific crime: the murder of a child, for example. Following the conviction of Thompson and Venables for the murder of James Bulger, most of the media were baying for blood. *The Sun* handed in a petition of 278,300 signatures to the Home Secretary asking for a life sentence.¹⁹⁶ Almost 6,000 petitions wanted their tariff increased to 25 years. *The Sun* also published a preprinted form asking the public to send them direct to the Home Secretary demanding that he concur with the parents of James Bulger that his murderers should be held in prison for the rest of their lives. Over 20,000 people sent these forms to the Home Secretary. When he increased the recommended tariff of Venables and Thompson, the extent to which Howard was reacting to media coverage and public demand is, of course, unknown, but the importance of public acceptability was presumably on his mind. *The Guardian* was one of the few newspapers to caution restraint: on the morning after the guilty verdict, its leader warned that Bulger's death should not be 'an excuse for reversing ten years of criminal justice policy. A system designed to deal with five million crimes must not be steered by one' and referred to the 'misguided response of ministers in the midst of February's moral panic.'¹⁹⁷ Lord Donaldson criticised Howard's intervention, describing the increased tariff imposed on Venables and Thompson as 'institutionalized vengeance ...by a politician playing to the gallery'.¹⁹⁸

One issue in Venables and Thompson's appeal was whether the Home Secretary should have taken heed of the public outcry surrounding the trial and conviction. The Law Lords were divided in their response. Lord Goff was critical of the public clamour and ruled that the Home Secretary should have ignored it. He felt that events such as Bulger's murder tended to provoke a desire for revenge and to call for the infliction of the severest punishment upon the perpetrators of the crime. Although this could be a natural reaction, there was a tendency for it 'to be whipped up and exploited by the media'.¹⁹⁹ Lord Browne-Wilkinson took the view that a Home Secretary was entitled to have regard to broader considerations of a public character and argued that he would only get such information from the media and from petitions. Lord Lloyd felt that parliament had entrusted to the Home Secretary the task of maintaining public confidence in the criminal justice system and so he was entitled to gauge public concern. However, the Law Lords by a majority of 3 to 2 supported Lord Goff's view:

¹⁹⁵ Mason (1995):203

¹⁹⁶ Details of *The Sun's* campaign was noted in *V & T* [1997] UKHL 25

¹⁹⁷ *The Guardian* 25 November 1993

¹⁹⁸ Quoted in *The Independent* 10 March 2010 Terence Blacker: *Jon Venables and a case of mob morality*

¹⁹⁹ *V & T* [1997] UKHL 25

If the Secretary of State implements a policy of fixing a penal element of the sentence...he is to this extent exercising a function which is closely analogous to a sentencing function with the effect that, when so doing, he is under a duty to act within the same constraints as a judge will act when exercising the same function. In particular, should he take into account public clamour directed towards the decision in the particular case which he has under consideration, he will be having regard to an irrelevant consideration which will render the exercise of his discretion unlawful.²⁰⁰

These measured tones of the Law Lords may be contrasted with Hay's words that the Bulger case represented 'the judicial internalization of the discourse of moral panic.' He thought it was in part at least a consequence of the media's presentation of each moral panic as a trial, not so much of those charged, as of British justice per se.²⁰¹

It could be argued that the trial judge in *Venables and Thompson* had allowed, if not encouraged, the public's attitude by referring to the crime as 'an act of unspeakable evil' and by allowing the boys to be named. The judge's phrase was used as the headline in the following day's *Daily Express* while the *Daily Mirror* used 'Freaks of Nature' as a heading beside the photographs of the boys who had killed Bulger. The photographs also were used in the *Daily Star* with the headline 'How Do You Feel Now, You Little Bastards?' Referring back to the incident almost twenty years later, a newspaper article sums up the effect of this crime: 'To say that the murder of James Bulger horrified the nation, risks understating the impact it had on the country and the way society perceives children.'²⁰²

Following Bulger's murder, John Major, the then Prime Minister, was quoted as saying 'I would like the public to have a crusade against crime and change from being forgiving of crime to being considerate of the victim. Society needs to condemn a little more and understand a little less'.²⁰³ His words were similar in sentiment to those expressed by Blair at the time, and interestingly, were to be echoed very closely by Blair almost exactly ten years later in the run up to the CJA 2003.

Then a party in opposition, Labour used the Bulger murder as a way of claiming that under successive Conservative Governments society had broken down. Tony Blair, then Shadow Home Secretary, was particularly outspoken, tackling the subject with vigour and warning of a 'descent into moral chaos.'²⁰⁴ In a speech within days of the Bulger murder, Blair said: 'We hear of crimes so horrific they provoke anger and disbelief in equal proportions' and he talked of the crime as 'a hammer-blow against the sleeping conscience of the country, urging us to wake up and look unflinchingly at what we see'.²⁰⁵ Perhaps it was an early example of Blair's 'spin' on an event and, if so, it was successful. Blair's more colourful and forceful language

²⁰⁰ *ibid*

²⁰¹ Hay (1995):200

²⁰² Haroon Siddique *The Guardian* 3 March 2010

²⁰³ *The Mail on Sunday*, 21 February 1993.

²⁰⁴ *The Guardian* 20 February 1993

²⁰⁵ Speech in Wellingborough, Northamptonshire 19 February 1993

when he talked of the Bulger murder seemed to be more in tune with the public's sense of abhorrence than Major's comments. One biographer of Blair has said that his attitude to the Bulger killing showed that Labour 'had taken the issues of law and order away from the Conservatives and made it part of Labour's agenda;' and that suddenly Blair was seen as someone who could bring Labour back to power.²⁰⁶ Interestingly, when Blair wrote his autobiography in 2010 he admitted that his analysis of society in his post-Bulger speeches was 'faulty' and that he regretted his frank outspoken views.²⁰⁷

Some Conservatives did not believe that Blair's new enthusiasm for tough action on crime would last. Kenneth Clarke, the then Home Secretary, is reported to have noted that Blair had been inspired by the success of Clinton, who had proved he was a credible contender for the White House by ordering the execution of a mentally handicapped black convict. Clarke did not think the conversion to 'Clintonite viciousness' would last.²⁰⁸ However, Blair's interest in criminal justice reform did indeed last. After the landslide election success in 1997, one of the first White Papers issued by New Labour was targeted at youth crime and was entitled '*No More Excuses*,'²⁰⁹ demonstrating a more accusatory and morally blaming viewpoint.

3.2 Steps to restrict the powers of the Home Secretary

The first five years of New Labour were to see the introduction of no fewer than fourteen criminal justice Bills. More significantly for this study, these years also saw the Home Secretary finally losing his remaining tariff-setting powers. This process did not begin, however, in 1997 with Jack Straw. It is necessary to go back to the beginning of the decade to put into context the developments by which the Home Secretary would be stripped of his powers. A significant decision came in 1990 in *Thynne, Wilson and Gunnell*.²¹⁰ The three men applied to Strasbourg, alleging their rights under Article 5(4) had been breached: the right to take proceedings by which the lawfulness of detention shall be decided speedily by a court. All three were serving discretionary life sentences and, the tariff part of their sentences having been completed, were being detained on the orders of the Home Secretary because of their perceived risk to the public. The appeal was successful. As a result of the ruling all such prisoners, after the expiry of the retributive element of their sentence, would be able to take proceedings at reasonable intervals to have their continuing detention decided by a tribunal. That is, by the Parole Board, not the Home Secretary. The CJA 1991 Section 34 incorporated the ECtHR determination into UK law.

²⁰⁶ Collins (2005) cited in *spiked-online.com* 11 March 2010.

²⁰⁷ Blair (2011):57

²⁰⁸ Nick Cohen *The New Statesman* 16 December 2001

²⁰⁹ Home Office (1997b)

²¹⁰ [1990] ECHR 29

Section 35 of this Act, however, restated the position in respect of mandatory life prisoners. It confirmed that the Home Secretary had the power to release such prisoners if recommended by the Parole Board and after consultation with the judiciary. Sub-section 3, however, prohibited the Parole Board from making a recommendation for release unless the Home Secretary had first referred the case to the Board, and there was nothing in the Act that required the Home Secretary to refer any particular case. For those prisoners who had committed the most serious crimes, the crimes the public might well have strong opinions about, the Home Secretary retained the right to determine when, and even if, they should be released as, without his referral, the Parole Board could not consider their cases.

To clarify and reaffirm the government's position, Angela Rumbold, a Minister in the Home Office, made a statement acknowledging that, in the case of discretionary life prisoners, they should be released if they had served their tariff and were considered no danger to the public. However, in the case of a mandatory life sentenced prisoner, he could be detained for life without the necessity for subsequent judicial intervention. The presumption was, therefore, that the offender should remain in custody until and unless the Home Secretary concluded that the public interest would be better served by the prisoner's release than by his continued detention.²¹¹ This concept that those who had been convicted of such crimes forfeited their whole life to the state, might have reflected the position in 1965, but deviated from the then current executive and judicial positions. Mrs Rumbold's statement was belatedly given short shrift in *Doody*, when Lord Mustill ruled that it was at odds with the practice established by Leon Brittan in 1983. After examining the two incompatible statements, Lord Mustill - accepting that the earlier statement by Brittan had been the one followed by successive Home Secretaries - decided that it was 'essential not to cloud the discussion by introducing the inconsistent theory enunciated by the Minister of State.'²¹²

The secretive nature of the sentencing and of the release process for mandatory life prisoners was attracting criticism. This included the fact that they had no information given to them about the judiciary's view of their tariff or the reasons for the Home Secretary's refusal to release. This was challenged in 1992 when two mandatory life prisoners, Creamer and Scholey, sought the right to have access to information about their parole review and access to the Home Secretary's reasons for refusing their release. The application was denied by Lord Justice Rose in the High Court. However, he stated that a prisoner's right to make representations was valueless unless he knew the case against him. Secret, unchallenged reports which might contain damaging inaccuracies and which resulted in continuing loss of liberty were, or should be, anathema in a civilized, democratic society.²¹³ In the light of this judgment, breaking with the policy of his predecessors, Kenneth Clarke, the then Home

²¹¹ Hansard HC 16 July 1991 col 309 -10

²¹² [1993] UKHL 8

²¹³ The only record available is contained in *The Independent* 23 October 1992.

Secretary, revised the policy before the Court of Appeal could hear the case. He stated that the process relating to release for mandatory life prisoners would now follow more closely that of discretionary life prisoners.

The concession was not enough, however, to deter a more pivotal legal appeal: that of *Doody*.²¹⁴ The Law Lords, led by Lord Mustill, in this case declared that:

- The Secretary of State is required to afford to a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period he should serve for the purposes of retribution and deterrence before the Secretary of State sets the date of the first review of the prisoner's sentence.
- Before giving the prisoner the opportunity to make such representations, the Secretary of State is required to inform him of the period recommended by the judiciary as the period he should serve for the purposes of retribution and deterrence, and of any other opinion expressed by the judiciary which is relevant to the Secretary of State's decision as to the appropriate period to be served for these purposes.
- The Secretary of State is obliged to give reasons for departing from the period recommended by the judiciary as the time that he should serve for the purposes of retribution and deterrence.

In his speech, Lord Mustill drew attention to the fact that:

(The prisoner with a mandatory life sentence) never sees the Home Secretary; he has no dialogue with him: he cannot fathom how his mind is working. There is no true tariff, or at least no tariff exposed to public view which might give the prisoner an idea of what to expect. The announcement of his first review date arrives out of thin air, wholly without explanation. The distant oracle has spoken, and that is that.²¹⁵

Similar criticism was made by Lord Lane in evidence to a Commons Select Committee when he declared it 'unsatisfactory, to say the least, that the length of a prisoner's stay in prison should be determined, or partially determined, behind the scenes by someone who had not heard any representation by, or on behalf of, the prisoner, on grounds the prisoner does not know.'²¹⁶ While giving the *Doody* ruling, Lord Mustill included some outspoken criticism of the system in force at the time, contrasting the mandatory sentence with discretionary life and determinate sentences:

The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed, rather the reverse. This being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation that it is not. ... My Lords, I am not aware that there still exists anywhere else in the penal system a procedure remotely resembling this.²¹⁷

²¹⁴ [1993] UKHL 8

²¹⁵ Lord Mustill in *Doody* [1993] UKHL 8

²¹⁶ Cited in Lord Lane's obituary *The Guardian* 23 August 2005

²¹⁷ *Doody* [1993] UKHL 8

Within a very short time the new Home Secretary, Michael Howard, made his response. Perhaps predictably, it took the form of a ministerial statement, the first of three he would make on the subject between 1993 and 1995. In this statement he accepted the necessity of complying with the ruling to give mandatory life prisoners more information but, importantly, he included an additional element to the release process which would affect all those convicted of heinous crimes: he would consider not merely the requirements for retribution and deterrence and the consideration of risk to the public but also 'the public acceptability of early release'.²¹⁸

This phrase had been used, as has been seen, by Lord Scarman eight years earlier in *Findlay*. Lord Scarman, however, while accepting that the Home Secretary was the most suitable person to judge public acceptability of early release in individual cases, had also implicitly argued that a sense of fairness to prisoners was important and should be taken into consideration. Howard, however, appears to have used the phrase as a means to confirm and retain the Home Secretary's right to be the sole arbiter of when a prisoner convicted of the most serious crimes should be released.

Howard made two further ministerial statements.²¹⁹ In the first of these, the Home Secretary stated that prisoners with a mandatory life sentence would continue to have a review after ten years to consider the public acceptability of early release. Those serving a whole life tariff would have a ministerial review after 25 years, and subsequently every five years, to consider whether to convert the tariff to a determinate period. The review would be confined to a consideration of retribution and deterrence.²²⁰ A similar statement was made in the House of Lords.²²¹ In answer to an oral question, Baroness Blatch stated that those serving a mandatory life sentence could ask for a review of their tariff at any time. It would be up to the Home Secretary to consider this.²²² This review process for those serving whole life tariffs has been regarded as an important procedural safeguard: 'The process provided hope to those facing whole life imprisonment and ensured that offenders would not be kept in custody for the rest of their lives without justification.'²²³ The 1995 statement pointed out that the system was now 'fair, open and sensible' while, importantly, stressing that any recommendation made to him by the judiciary was 'just that - a recommendation - the role of the judiciary in a mandatory life sentence case is purely advisory. The final decision is mine...'.²²⁴ The decision was indeed solely his but the next seven years would see that position fundamentally altered.

²¹⁸ Hansard HC 23 July 1993 col 864

²¹⁹ 7 December 1994 and 17 July 1995

²²⁰ Hansard HC 7 December 1994 col 234w

²²¹ Hansard HL 7 December 1994 col 8 w

²²² *ibid* col 917

²²³ Kandelina (2011):77

²²⁴ Hansard HC 17 July col 1354

However it is noteworthy that Michael's Howard's statement in December 1994 was radical in one specific way that is particularly relevant to this study: it was the first public admission that certain prisoners had been given a whole life tariff.

At the time of Howard's first ministerial statement, the government was already under siege on the subject of serious crime, especially murder. It was being attacked on various fronts. The judiciary had kept up pressure on the Home Secretary, criticising his role in relation to the release of mandatory life prisoners and on the lack of discretion the judiciary had when sentencing convicted murderers. An influential committee - the Committee on the Penalty for Homicide 1993 - had also been particularly critical. The Lane Committee, as it became known, upheld the earlier Nathan Committee's position on mandatory life sentences and in a triple attack stated that 'logically, jurisprudentially and constitutionally decisions on imposing punishment should be made by the judiciary and in open court.'²²⁵ The Committee also argued that the mandatory life sentence for murder was founded on the assumption that murder is a crime of such unique heinousness that the offender forfeits for the rest of his existence the right to be set free. But 'that assumption is a fallacy. It arises from the divergence between the legal definition of murder and that which the lay public believes to be murder.'²²⁶

Politicians were increasingly being influenced by public perception of crime, and the role of the media was progressively more significant. Public interest, for example, in the Moors Murders had continued throughout the 1980s, kept alive when more information was given by Hindley about the remaining undiscovered bodies of the victims. However, as seen, an even stronger public reaction had occurred following the murder of James Bulger, and the ensuing trial was to lead to further restrictions on the Home Secretary's powers.

3.3 Detention during Her Majesty's Pleasure: V & T [1997] UKHL 25; [1999] ECHR 171

The trial of two children, Jon Venables and Robert Thompson, for the murder of James Bulger was held in a Crown Court. Lesser charges would have been held in the less formal setting and procedures of a Youth Court. Some adaptations were made to procedure to cater for the youth of the accused. For instance, social workers took the boys to the court before the trial and its procedures were explained to them; the boys were seated with their social workers; the hearing times were shortened, and during adjournments the boys were allowed to spend time with their parents and social workers in a play area. However, the formality and solemnity of the process was maintained, symbolised by the judge and counsel wearing wigs and gowns.

²²⁵ Lane (1993) Conclusion (7)

²²⁶ *ibid* Conclusion (3)

The boys were sentenced to be detained during Her Majesty's Pleasure. The trial judge recommended a tariff of eight years and the Lord Chief Justice, Lord Taylor, ten years. Amidst a public and media 'moral panic,'²²⁷ the Home Secretary set a tariff of fifteen years. There was a judicial review to examine whether the Home Secretary had the power to impose a penal tariff. The decision was referred to the Court of Appeal in 1996 and finally the case went to the House of Lords in 1997. By a majority, the Law Lords determined

- That it was unlawful for the Secretary of State to adopt a policy in the context of applying the tariff system which even in exceptional circumstances treated as irrelevant the progress and development of a child who was detained during Her Majesty's Pleasure.
- That the Secretary of State was required to remain detached from the pressures of public opinion as he was exercising a power equivalent to a judge's sentencing powers.²²⁸

It should be noted, that Lord Steyn criticised the Home Secretary's role and stated clearly his opinion that:

In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of the separation of powers between the executive and the judiciary, a classic judicial function. Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy and fix a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power.²²⁹

The House of Lords quashed the tariff set by the Home Secretary. The government referred the case to the ECtHR where it was heard in the Grand Chamber. The Court determined that there had been breaches of Article 6 (1) relating to the boys' understanding of the proceedings in the trial; of Article 5 (4), the boys having been deprived of the opportunity to have the lawfulness of their detention reviewed by a judicial body; and of Article 6, that the fixing of their tariff had amounted to a sentencing exercise and should therefore have been carried out by a judge.²³⁰

The determination is relevant to this study in that, following *Thynne, Wilson and Gunnell*, which resulted in the Home Secretary losing his power to set tariff for discretionary life prisoners, *V & T* similarly stripped the Home Secretary of his powers in determining the tariff of young people convicted of murder and sentenced to detention during Her Majesty's Pleasure.

²²⁷ *The Guardian* 25 November 1993

²²⁸ [1997] UKHL 25

²²⁹ *ibid*

²³⁰ Details of relevant ECHR Articles are given in Appendix B

3.4 The power of the Home Secretary to increase tariffs: *Pierson* [1997] UKHL 37

While Venables and Thompson caught the public eye, an equally significant legal ruling was made in *Pierson*, although the public in this case paid little attention. *Pierson*, a double murderer, had been one of the successful applicants in *Doody*. As a result of the earlier appeal, *Pierson* was informed of the Home Secretary's reasons for imposing a tariff of 20 years, five years longer than the judiciary had recommended. The Home Secretary's reasons were based on the fact that *Pierson* had been convicted for a double premeditated murder. *Pierson* had sought and successfully gained a judicial review on the basis that the murders were not premeditated and had been committed at a single event, and that the Home Secretary had unlawfully increased an existing tariff. This, in turn, was appealed by the Home Secretary and Sir Thomas Bingham, then Master of the Rolls, found in favour of the Home Secretary saying: 'If, by way of exception to the general rule that a penal term once fixed remains fixed, the Home Secretary revises upwards a term fixed by his predecessor on the grounds that it does not adequately meet the requirements of retribution and deterrence, there is nothing in law to stop him'. He added, perhaps with a measure of implied criticism, 'If this practice is seen as unacceptable, and one can well understand the despair of a prisoner serving a long sentence of imprisonment as a date of expiry of his penal term recedes before him, the remedy must lie elsewhere'.²³¹

Pierson appealed the decision and the Law Lords gave judgment on 24 July 1997. Two Lords found in favour of the Home Secretary but both expressed their misgivings, with Lord Brown-Wilkinson saying: 'Much as I personally dislike the effective increase in tariff of this applicant, I can find no ground on which such an increase can be held unlawful.'²³² The other three Lords allowed the appeal and, in doing so, delivered scathing criticism of the Home Secretary's policy. Its relevancy to the ongoing process of change relating to mandatory life sentences, which would result in the CJA 2003, justifies a lengthy extract:

The critical factor is that a general power to increase tariffs duly fixed is in disharmony with the deep-rooted principle of not retrospectively increasing lawfully pronounced sentences. It must be presumed that Parliament entrusted the wide power to make decisions on the release of mandatory life sentence prisoners on the supposition that the Home Secretary would not act contrary to such a fundamental principle of our law.... What Parliament did not know in 1991 was that in 1993 a new Home Secretary would assert a general power to increase the punishment of prisoners convicted of murder whenever he considered it right to do so. It would be wrong to assume that Parliament would have been prepared to give to the Home Secretary such an unprecedented power, alien to the principles of our law.²³³

This outspoken criticism suggested that Parliament itself gave no approval to the successive Home Secretaries' powers to increase 'duly set' tariffs and it might well not have given

²³¹ (1996) 3 WLR 547 p 559

²³² Section 3

²³³ Lord Steyn Section 5

‘unprecedented power’ if it had known what was to happen. Lord Hope was also critical, stating: ‘the root of the problem ... seems to me to lie in the tariff system as it has now developed and in the absence of any regulation of it by Parliament.’²³⁴ Lord Steyn’s criticism makes very clear his reservations about the practice of ministerial statements driving the law. The case also raised the question of whether the Home Secretary, in setting a tariff, was carrying out a judicial function. Lord Steyn asserted:

This case should also not be decided on a semantic quibble about whether the Home Secretary’s function is strictly ‘a sentencing exercise’. The undeniable fact is that in fixing a tariff in an individual case the Home Secretary is making a decision about the punishment of the convicted man.²³⁵

He noted that Lord Goff in *V & T* held that the Home Secretary is ‘exercising a function which is closely analogous to a sentencing function.’ In that case a majority of the Law Lords agreed. The issue of whether the Home Secretary was acting judicially when setting a tariff would lead later to determinations in the courts.

3.5 Ministerial response

Following New Labour success in 1997, Jack Straw, now as Home Secretary, had to take account of the ECtHR’s determination in respect of Jon Venables and Robert Thompson. Straw found himself following in his predecessors’ footsteps in making a ministerial statement.²³⁶ He introduced a new procedure based on his receiving annual reports of progress and development of young people sentenced under Section 53(1) of the Children and Young Person’s Act 1933. He did still, however, stress the need to pay regard to public opinion, although not in respect of individual cases: ‘The public properly expects the unique crime of murder to attract an appropriate punishment, regardless of the age or circumstances of the offender.’ Public confidence in the sentence would not be maintained if that initial tariff was curtailed lightly.²³⁷

In the same ministerial statement dealing with Venables and Thompson, Straw referred to *Pierson*.²³⁸ A prisoner would now be allowed to make representations to the Home Secretary if the former was informed that his tariff might be increased, or indeed, reduced. The Home Secretary would also take into consideration any exceptional progress made by prisoners while serving their tariff. Straw used the statement to make the situation the same for whole life tariff prisoners:

²³⁴ Lord Hope Section 6

²³⁵ Lord Steyn Section 5

²³⁶ Hansard HC 10 November 1997 col 420

²³⁷ *ibid* col 421

²³⁸ Hansard HC 10 November 1997 col 420

I shall have this possibility in mind when reviewing at the 25 year point the cases of prisoners given a whole life tariff and in that respect will consider issues beyond the sole criteria of retribution and deterrence.... Prisoners will continue to be given the opportunity to make representations and to have access to the material before me.²³⁹

Straw drew attention to the fact that the position of mandatory life prisoners remained distinct from that of discretionary life prisoners, who could have their final release decided by the Parole Board. Mandatory life prisoners, including those with whole life tariffs, would continue to have their release decided by the Home Secretary alone.

Nowhere in the ministerial statement, did Straw refer to, let alone take into account, the judicial criticism in both *V & T* and *Pierson* of the Home Secretary acting judicially. However, by the ruling in respect of *V & T*, the Strasbourg court had made clear its support for the domestic judicial concerns about the powers of the Home Secretary. These powers in respect of discretionary life prisoners and in determining, without any review, the duration of detention during Her Majesty's Pleasure had been successfully challenged. The remaining battleground was therefore the powers of the Home Secretary in respect of the mandatory life sentence for murder.

3.6 *Hindley* [2000] UKHL 21

Straw's statement on 10 November 1997 was followed nine days later by another statement, this time definitely very much less public. At the beginning of the year his predecessor, Michael Howard, had communicated to Myra Hindley that in her case the tariff necessary to meet the requirements of retribution and deterrence would be whole life. On 19 November 1997 Straw decided that, despite the progress she had made in prison, he saw no reason to depart from Howard's decision and confirmed her tariff as whole life. Hindley contested the tariff the following month and the Divisional Court dismissed her application. This dismissal was followed by a rejection in the Court of Appeal, but she was given leave to apply to the House of Lords. The High Court had found that Hindley's original whole life tariff, imposed by the then Home Secretary David Waddington in July 1990, was unlawful but that it had become lawful as a result of the ministerial statements of Howard and Straw.²⁴⁰

The appeals Hindley made are of particular relevance to this study as the basis of these was that the whole life tariff was unlawful and that the imposition of such a tariff was unlawful on various public law grounds. As this appears to be the first time the lawfulness of the whole life tariff is discussed and ruled on by the House of Lords, the views expressed are worth detailed consideration.

²³⁹ *ibid* col 420 It is of interest to note that this 25 year review would disappear in the CJA 2003.

²⁴⁰ See [1997] EWHC 1159 paras 62 - 74

Lord Steyn identified the Prison Act 1952 (Section 27) and the Murder (Abolition of the Death Penalty) Act 1965 Section 1 as the pertinent laws in question. His ruling was that neither excluded the possibility of life to mean the whole of natural life because, 'as a matter of law, a sentence of life imprisonment was understood to authorise the detention of a person sentenced to life imprisonment for an indeterminate period which is only brought to an end by the death of the prisoner or if and when the Secretary of State in the exercise of his discretion decides to release him or her.'²⁴¹ Later legislation, he argued, including the CJA 1967 and the CJA 1991 and the Criminal (Sentences) Act 1997 had not changed the position.

Straw's November 1997 statement - following the ruling relating to Venables and Thompson - was examined by Lord Steyn in the light of Straw's remark within the statement that in exceptional circumstances, including for example exceptional progress, a review and reduction of tariff could be appropriate. Lord Steyn noted that counsel for the Home Secretary had confirmed that this included whole life tariff prisoners and confirmed also that the Home Secretary was 'prepared to reconsider and review any whole life tariff decision from time to time even in the absence of exceptional progress'.²⁴² Lord Steyn said that the Parole Board had recommended the transfer of Hindley to an open prison in 1997 and that the Home Secretary had rejected this, as was his right.

Lord Steyn dismissed Hindley's argument on all four aspects of the appeal:

- the whole life tariff being unlawful;
- the whole life tariff unlawfully fettering the Home Secretary's discretion;
- the exclusion of the Parole Board in reviewing whole life tariffs; and
- the inconsistency of whole life tariffs with the concept of a tariff being expressed in terms of years to be served.

While the powers of the Home Secretary were to disappear, the first, third and fourth points were still relevant post 2003.

For the part of her appeal relating to the claim that the Home Secretary had unlawfully increased her tariff from that set in 1985, Hindley depended on *Pierson*, examined above, relating to what information had been released to the prisoner at the time and whether a Home Secretary could retrospectively increase a tariff. This was dismissed on the basis that the earlier ruling did not apply to Hindley's case. Lord Steyn ended by stating that Hindley, with her partner Brady, had committed crimes which were 'uniquely evil' and that 'if it be right, as I have held it to be, that life-long incarceration for the purposes of punishment is competent where the crime or crimes are sufficiently heinous, it is difficult to argue that this case is not in this category'.²⁴³

²⁴¹ Lord Steyn Section 1.

²⁴² *ibid*

²⁴³ *ibid*

The decision of the Law Lords was unanimous, with Lord Hobson reconfirming the Home Secretary's position of being under no obligation to direct the release of any person who had been sentenced to life imprisonment as a convicted murderer. He was under no statutory obligation to refer any case to the Parole Board nor was he under any statutory obligation to accept a recommendation of the Parole Board. 'The discretion is his alone.'²⁴⁴ The Home Secretary must have sighed with relief that the appeal had confirmed his status so unambiguously and did not necessitate another ministerial statement.

Straw must also have been relieved that the Law Lords had not focused at all on the point made in the earlier High Court hearing when the Lord Chief Justice, Lord Bingham, had stated

There is room for serious debate whether the task of determining how long convicted murderers should serve in prison as punishment for their crimes should be undertaken by the judiciary (as in the case of discretionary life prisoners) or, as now, by the executive. That is, in large measure, a political and constitutional question. It is not a question for decision by this court.²⁴⁵

Although he had not thought it a decision for the court, in March 1998 in a lecture to the Police Staff College he returned to the subject. A new government might be in place with a new Home Secretary but Lord Bingham had not altered his position. He stressed that 'the sentencing of criminals is not ... a political matter. It is a job for judges, not politicians or officials.... If such a system had been operated in Stalin's Soviet Union, Hitler's Germany or Amin's Uganda, we would have been quick to condemn it as a glaring violation of democratic principle.'²⁴⁶ Lord Bingham had made this criticism before but this time, in 1998, he saw hope: 'But we live in a time of change. Bold certainties are being questioned. Old orthodoxies challenged.'²⁴⁷

This question of the balance between judiciary and executive power in sentencing may not have been tackled by the House of Lords in *Hindley* and was certainly still not resolved. It would soon re-emerge as a contentious issue awaiting a final decision.

3.7 *Stafford* [1998] UKHL 30; [2002] ECHR 470

Two names were to feature in legal appeals that would lead to clarification of the whole life tariff and would finally resolve the tension between the judiciary and the Home Secretary over roles in sentencing and prisoner release. Ironically, the names featured were not those the public had grown used to seeing in headlines over the years: Hindley, Brady, Sutcliffe, Nilson,

²⁴⁴ Lord Hobson *ibid*

²⁴⁵ Lord Bingham [1997] EWHC Admin 1159 para 75

²⁴⁶ Bingham (1998)

²⁴⁷ *ibid*

West. The names that were to have major repercussions for the Home Secretary's powers were Stafford and Anderson.

Originally convicted of murder in 1967, Stafford was released on licence in 1979. In breach of the terms of his licence he moved to South Africa and was re-arrested in the UK when he returned ten years later. Over the following 12 years Stafford was convicted of non-violent offences relating to forging travellers' cheques and passports, and was imprisoned when convicted. When the Parole Board recommended release in November 1996, the Home Secretary rejected the recommendation on the ground that Stafford was at risk of committing serious non-violent offences, but allowed a transfer to open prison with a review to be held two years later. Stafford appealed the lawfulness of the Home Secretary's actions.

In *Doody*²⁴⁸, *Wynne*²⁴⁹ and *Raja*²⁵⁰ the courts accepted that the setting of tariffs for murderers was an administrative, not a judicial function. When Anderson's case came before first the High Court, and then the Court of Appeal, judges believed that tariff setting imposed a sentence and so was subject to the ECHR Article 6(1).²⁵¹ However, they were constrained by precedent and therefore rejected the appeal.

A further appeal by Stafford to the House of Lords in 1998 also found in favour of the Home Secretary. Two important points, however, were raised. Lord Steyn expressed his concern that the Home Secretary's submission had referred to 'the wider political consideration' of release. Lord Steyn felt that this could be held to include party political considerations and recommended a rephrasing of the expression. He also echoed the concerns expressed by Lord Bingham at the earlier appeal and ended by re-quoting them: 'The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law'.²⁵²

Stafford had lost his appeal in the domestic courts but he applied to Strasbourg. The ECtHR reconsidered its determination in respect of *Wynne*²⁵³ in the light of views expressed in domestic courts. Because of the central importance of the final ruling in *Stafford*, it is worth examining it in some detail. It referred to relevant UK judgments including the *V and T* appeal,²⁵⁴ citing Lord Steyn's finding:

²⁴⁸ [1993] UKHL 8

²⁴⁹ [1994] ECHR 24

²⁵⁰ [1998] EHCR Application No 39047/97

²⁵¹ See Appendix B for details of relevant ECHR Articles

²⁵² [1998] 3 WLR 372

²⁵³ In this case ECtHR had accepted that the setting of tariffs for murderers was an administrative not a judicial function.

²⁵⁴ This, and subsequent cases mentioned in the paragraph are considered elsewhere in the study.

In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of the separation of powers between the executive and the judiciary, a classic judicial function. Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy and fix a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power.²⁵⁵

It also referred to *Pierson* and to *Hindley*, including Lord Steyn's ruling that 'life-long incarceration for the purposes of punishment is competent where the crime or crimes are sufficiently heinous'.²⁵⁶ *Doody* and *Lichniak and Pyrah* were also cited as was *Anderson and Taylor*.

In its consideration, the ECtHR recognised that parts of the UK had already changed their legislation relating to mandatory life sentences. In Scotland, the Convention Rights (Compliance) (Scotland) Act 2001 now provided that in the case of mandatory life sentences the trial judge fixes the punishment part of the sentence, on the expiry of which the Parole Board decides on possible release on licence.²⁵⁷ In Northern Ireland, the Life Sentences (Northern Ireland) Order SI no. 2564 provided that the trial judge decides on the tariff for a mandatory life prisoner and that release post-tariff is determined by Life Sentence Review Commissioners (with a status and functions very similar to those of the Parole Board operating in England and Wales).²⁵⁸

In its ruling, the Court tackled the contentious issue of the separation of powers, noting that the abolition of the death penalty in 1965, and the conferring on the Home Secretary the power to release convicted murderers, had represented a major and progressive reform. It further noted that now, however, the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, had become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary.²⁵⁹ The Court considered that the mandatory life sentence did not impose imprisonment for life as a punishment.²⁶⁰ The tariff, which reflected the individual circumstances of the offence and the offender, represented the element of punishment.²⁶¹ This distinction between the sentence - mandatory life - and the punishment - the tariff, which is individualised - was to prove to be significant later.²⁶²

²⁵⁵ [2002] UKHL 2046 para 34

²⁵⁶ para 37 In para 79 ECtHR said that a whole life tariff may, in exceptional cases, be imposed by the gravity of the particular offence. It is not clear whether this is merely noting the practice in England or whether it is an endorsement of that practice. What is clear is that there is no criticism expressed of the whole life tariff.

²⁵⁷ para 48

²⁵⁸ para 49

²⁵⁹ para 78

²⁶⁰ para 79

²⁶¹ para 79

²⁶² See below ECtHR ruling in *Vinter, Bamber and Moore*

The Court ruled that as *Stafford* had served the punishment element of his sentence for murder - illustrated by his release in 1979 - this could not be used by the Home Secretary as grounds for further detention. Article 5 (4) of the Convention had therefore been breached²⁶³ as had Article 5 (1).²⁶⁴

A statement was made in parliament on 17 October 2002 on behalf of the Home Secretary, now David Blunkett, in which he accepted that *Stafford* had to be accommodated and announced new 'interim' measures.²⁶⁵ These measures would mean that Parole Board recommendations favouring release of a mandatory life sentence prisoner whose minimum term had been served would 'normally' be accepted by the Home Secretary. He confirmed that once again an exception was being made over offenders with a whole life tariff, who would continue not to have their cases referred to the Parole Board.

On the basis of *Stafford*, lawyers for Myra Hindley lodged an application with the ECtHR to have her whole life tariff overturned. Before it came to the Court, she died in November 2002, and the application lapsed.

3.8 *Anderson* [2002] UKHL 46

Within a month of the *Stafford* ruling another judgment, this time in the House of Lords, would cement *Stafford* and would have far reaching effects, leading directly to changing fundamental aspects of the Home Secretary's role. *Anderson* had been convicted of two murders in 1988. The trial judge and the Lord Chief Justice had both recommended a 15 year tariff. The Home Secretary rejected the recommendation and imposed a tariff of 20 years. The judicially recommended tariff was coming to an end and *Anderson* sought a ruling that the Home Secretary's power to impose a higher tariff than the judicially recommended one was unlawful and sought a more immediate review and release.

The purpose of the appeal was clearly stated: 'This appeal concerns the sentencing, punishment and detention of adults convicted of murder in England and Wales and, in particular, the power now exercised by the Home Secretary to decide how long they should spend in prison for purposes of punishment.'²⁶⁶ Edward Fitzgerald for *Anderson* made perhaps his simplest and yet most effective speech in his role as a defence QC. He argued:

²⁶³ para 87 See Appendix B for details of relevant ECHR Articles

²⁶⁴ para 89

²⁶⁵ Hansard HC 17 October 2002 col 915-916 (Hilary Benn)

²⁶⁶ *Anderson* para 1 Lord Bingham

1. Under Article 6(1) of the Convention a criminal defendant has a right to a fair trial by an independent and impartial tribunal.
2. The imposition of sentence is part of the trial.
3. Therefore sentence should be imposed by an independent and impartial tribunal.
4. The fixing of the tariff of a convicted murderer is legally indistinguishable from the imposition of sentence.
5. Therefore the tariff should be fixed by an independent and impartial tribunal.
6. The Home Secretary is not an independent and impartial tribunal.
7. Therefore the Home Secretary should not fix the tariff of a convicted murderer.

Giving the leading judgment, Lord Bingham accepted this argument for all seven steps. He also made reference to other cases to bolster his determination, including *Benjamin and Wilson*²⁶⁷ where the ECtHR had ruled that it was not sufficient for the Home Secretary to show he had always acted in accordance with the recommendation of the Mental Health Review Tribunal: 'This is not a matter of form, but impinges on the fundamental principle of separation of powers and detracts from a necessary guarantee against the possibility of abuse.'²⁶⁸

Lord Bingham covered in more detail much of what had been dealt with in *Stafford*. He found in favour of Anderson and echoed much of what had been said in the European ruling. He argued that ensuring the Home Secretary should play no part in the fixing of convicted murderers' tariffs made for much greater uniformity of treatment, as already his role in tariff setting for discretionary life sentence prisoners and for young murderers had been withdrawn.²⁶⁹ He retained power only in respect of mandatory life prisoners.

Lord Steyn was critical of the Home Secretary's powers but accepted that the judiciary must accept parliament's decision on the matter. He questioned, however, if the powers were compatible with the ECHR, especially Article 6 (1).²⁷⁰ Lord Nicholls interpreted the Article as there being a requirement for judicial and executive powers to be separate and for judicial functions only to occur in courts of law.²⁷¹ He went on to state that it was clear from Article 6(1) that only a court could decide the guilt of an accused person and only a court could decide on punishment for anyone convicted in a court. He continued: 'The power of the Home Secretary in England and Wales to decide on the tariff to be served by mandatory life sentence prisoners is a striking anomaly in our legal system,'²⁷² and on the Home Secretary's arguments against previous *Anderson* appeals: 'The persuasiveness of the advocacy of counsel for the Home Secretary cannot hide the fragility of the argument presented.'²⁷³ Acknowledging the ECtHR ruling on *Stafford* as 'a coherent and inescapable one,' Lord Nichols also found against the Home Secretary. Reflecting the importance of the appeal,

²⁶⁷ ECtHR 212/95 in 2002

²⁶⁸ para 36

²⁶⁹ para 29

²⁷⁰ See Appendix B for details of the ECHR Articles

²⁷¹ para 40

²⁷² para 51

²⁷³ para 52

seven Law Lords heard the case and all declared the Crime (Sentences) Act 1997 Section 29²⁷⁴ was incompatible with a Convention right.

Before leaving the judgment, however, one other argument, particularly pertinent to this study, should be noted. Lord Steyn was at pains to point out that, if the appeal succeeded, it would be important to avoid misunderstanding in one respect:

If the role of the executive in setting the tariff should cease it does not follow that life imprisonment for murder may never, even in the worst cases imaginable, literally mean detention for life. ... In *Stafford* the ECHR observed, "that a whole life tariff may, in exceptional cases, be imposed where justified by the gravity of the particular offence": p 21, para 79. If in future the judiciary and the Parole Board are given the sole responsibility for the system there may still be cases where the requirements of retribution and deterrence will require life-long detention.²⁷⁵

The ultimate punishment available in the UK for the most heinous crime was, therefore, acknowledged as the whole life tariff, whether set by the Home Secretary as then was the case or, in the future, by the judiciary.

After the *Anderson* ruling there was no ministerial statement. Instead, a Criminal Justice Bill was brought forward, with Tony Blair declaring at the time of its introduction that it was necessary to change the legal system as it was 'a nineteenth century system trying to solve twenty-first-century crimes.'²⁷⁶

²⁷⁴ This had confirmed the Home Secretary's powers in relation to the Parole Board.

²⁷⁵ para 47

²⁷⁶ *My Vision For Britain* Quoted in *The Observer* 10 November 2002

4 THE CRIMINAL JUSTICE ACT 2003

4.1 The penological context

As seen, in the decade before the CJA 2003, increasing emphasis was placed on law and order issues by both main political parties, with competing rhetoric employed to persuade the public that one could be trusted more than the other to tackle crime. Perhaps in response to the growing pressure from the media and the public on the subject - and the awareness of the need to address these concerns in order to be elected - both parties strove to demonstrate their ability to control crime. In this study, such criminal justice developments have been principally examined in terms of their political and social context. However, valuable additional insight can be gained by examining these developments in the light of relevant penological theories.

David Garland's study ²⁷⁷ charts the changes that society underwent in the last third of the 20th century, mainly in the USA and the UK, and the resultant changes in penology. He asserts that a pervasive culture of control emerged, demonstrated through retributive and restrictive penal policy. He explains the change by exploring how governments were reacting to fundamental changes in society, which had led to new levels of crime, disorder and public insecurity. Garland argues that governments felt the need to reassure the public that they could be trusted: by establishing their ability to control crime, by punishing offenders forcefully and by protecting communities from wrongdoers. Garland has further written ²⁷⁸ of how the protection of the public became not simply one objective of criminal justice but became 'the alpha to omega' of penal policy. He argues that the emotional tone of penal discourse shifted 'from cool to hot', ²⁷⁹ contributing to the emergence of the victim as a central focus. ²⁸⁰

It is easy to see echoes of Garland's view in the changes in criminal justice in the UK towards the end of the 20th century, especially in the Conservative change of position on the value of imprisonment, or Michael Howard's retreat from the principles of the CJA 1991. It can also be seen in New Labour's rhetoric after James Bulger's murder or their frequently stated stress on victims' rights over offenders' rights. Within both parties, attitudes to criminal justice did indeed appear to move from 'cool to hot'. Traditionally, it might have been expected that there would be a difference between the Conservative and Labour parties over law and order issues but, as a senior judge said in interview for this study, in criminal justice matters 'there was not a cigarette paper between them in the 1990s'.

²⁷⁷ Garland (2001) Changes include: post-war economic growth; consumer capitalism; family and household structure; relaxation in social control; emergence of the mass media; social groupings.

²⁷⁸ Garland (2006)

²⁷⁹ Garland (2001):11

²⁸⁰ *ibid*:143

This view is similar to one expressed by Jonathon Simon, who has argued that 'New Labour embraced crime as a defining domestic policy problem, proving that (the) right has no particular advantage in governing through crime, but, linked to right rhetoric ('tough on crime, tough on the causes of crime'), it is fully consistent with efforts by left of centre politics to manage problems of governance and legitimacy.'²⁸¹ Writing earlier,²⁸² Simon discussed the last decades of the 20th century in terms similar to Garland. He considered that concern for crime permeated all public life: schools must be so safe that they become custodial institutions; welfare so averse to fraud that recipients should be treated as potential criminals; and the public square must be so safe that it is relocated into an enclosed shopping mall.²⁸³ Crime policy, Simon asserted, was the one area government could not surrender. Most UK politicians were also only too aware of the importance of the subject to the electorate. Tony Blair reportedly commented that 'A leader never loses votes by being tough on crime'.²⁸⁴ This accords with the attention given by both Conservative and New Labour to the issue of law and order. There was not only a tendency for prisoner numbers to rise after 1990, with the resultant escalation in costs of the prison service, but also an inclination for politicians, like Jack Straw, to take pride in prisoner numbers, on the basis that it made the public safer.²⁸⁵

In New Labour's time in government, the multiple criminal justice bills that were introduced demonstrated the increasing stress on bolstering statutory powers to ensure public protection and the conviction of offenders. It has been argued that the increasingly heightened rhetoric on the need to tackle crime, along with the skewed coverage of crime by sections of the mass media, encouraged insecurity and anxiety in the public.²⁸⁶ Barak has said that 'The contemporary mass media seem to have almost single-handedly raised the phantom of the predator criminal from a minor character to a customary, ever-present icon'.²⁸⁷ With the mass media's 'predator criminal' appearing to be an increasingly serious threat, public concern mounted. Simon reflects on this, stating: 'When a problem for 10% becomes a paradigm for all, it is the mark of the hold of crime over our contemporary political imagination.'²⁸⁸ This seems an apposite comment on the UK in the 1980s and 1990s, when the perceived risk of crime was high, although not reflecting the actual statistics of crime. The *perception* of risk was great enough to ensure that politicians felt the need to respond by trying to prove how effectively, efficiently and robustly they could control the problem.

Feeley and Simon's 'new penology'²⁸⁹ sits very comfortably with this concern for efficiency in the control of crime. The imperative of the new penology was managing a permanently

²⁸¹ Simon (2010):8

²⁸² Simon (1997)

²⁸³ This concurs with statistics given by Garland that in the UK in 1974, 80% of eight year olds made their way to school unaccompanied by an adult; by 1990, the figure had dropped to 9%. Garland (2006)

²⁸⁴ Cited in *The Guardian's* leader 23 October 2012

²⁸⁵ Comments made by Jack Straw on Radio 4 *Today* Quoted by Brownlee (1998):317

²⁸⁶ See, for example, Tonry (2010)

²⁸⁷ Barak (1997):135

²⁸⁸ Simon (2007):213

²⁸⁹ Feeley & Simon (1992):449-470

dangerous population while maintaining the system at a minimum cost. They identified that rehabilitation was no longer at the heart of the criminal justice process, given the perceived failures of systems promoting rehabilitation. This was replaced as the central tenet of the criminal justice system by incapacitation, which promised to reduce the effects of crime in society, not by altering either offenders or the social context, but by 'rearranging the distribution of offenders in society'.²⁹⁰ The length of imprisonment should, it was felt, reflect the offenders' risk factors. The terms of the Crime Sentences Act 1997, which provided for life sentences for a second serious sexual or violent offence, can be interpreted as considering such offenders to be a high risk group who should, on the grounds of public safety, be imprisoned for a long time. Michael Howard's main justification for his view that 'prison works' was that incarceration removes people from the streets.

According to Feeley and Simon, in place of the traditional emphasis on treatment (of offenders) and eradication (of crime), the central elements of the new penology are statistical predictions, the danger that identifiable groups pose, and management strategies. Concern for efficient management was not limited to the USA in this period. As discussed earlier in the study, Lacey has drawn attention to Margaret Thatcher's concern for efficiency. Many considered that the drive for efficiency helped create a segment of society viewed as permanently excluded from social mobility and economic integration. This group was seen as dangerous and posing a constant, irritating threat.

The New Labour government's social policy was based on the premise that Thatcherism had created such an underclass. In 1997, the Social Exclusion Unit was set up in the Cabinet Office with social exclusion defined²⁹¹ in similar terms to Feeley and Simon's description of the underclass in the USA. However, the effectiveness of the Unit's policies has been questioned, for example in the House of Commons Home Affairs Committee Reports.²⁹²

Despite this policy initiative by New Labour, an examination of the proposals in the Criminal Justice Bill 2002 identifies preventative sentencing, aimed at controlling risk posed by the 'dangerous' in society. These, and other New Labour initiatives, seem to accord with Feeley and Simon's analysis of New Labour widening the concept of an underclass, to include those who indulge in what was seen as anti-social behaviour. Tonry has pointed out that not even right-wing Republican governments in the USA tried 'to enact Anti-social Behaviour Orders, threaten parents of wayward children with criminal convictions and maintain DNA from innocent people in police databases.'²⁹³ He argues that, by introducing such measures, New Labour not only was encouraging increased public discontent and intolerance, but helping

²⁹⁰ *ibid*:458

²⁹¹ 'A shorthand label for what can happen when individuals or areas suffer from a combination of linked problems, such as unemployment, poor skills, low incomes, poor housing, high crime environments, bad health and family breakdown.' Social Exclusion Unit (2004) Ref:04SEU02049

²⁹² For example, Home Affairs Committee 2004 (First Report) Printed 21 December 2004

²⁹³ Tonry (2010):388

create social cleavages between 'the comfortable haves and the unruly and awkward have-nots', ²⁹⁴ again echoing Feeley and Simon's concept of a deprived underclass viewed with suspicion and distrust.

Perhaps the clearest study of the effects of developments in penological thinking in relation to Britain is Brownlee's 1998 paper ²⁹⁵ which examined the criminological steps taken by the Labour Party retreating from its position at the 1983 election regarding the social causes of crime, to New Labour's concern for individual responsibility. He argued that a radical agenda on crime and punishment tackling social issues was gradually dismantled and replaced by 'here-and-now' policies of Left Realist criminologists. The increasing costs of 'welfarism' from the cradle to the grave made it difficult to sustain, and this led to an emphasis on personal responsibility in policy areas including crime and sentencing. Brownlee asserted: 'How short is the step... from a position, which maintains that people are individually responsible for their own wrongdoing, to another which asserts that punishment in itself is a sufficient response to that wrongdoing, being the just desert for such free-willed choices'. ²⁹⁶ Such a position is, perhaps, not even that short step away from the first half at least of Blair and New Labour's mantra 'tough on crime and tough on the causes of crime'. Just desert can be seen as a reference back to the 1990 White Paper and the subsequent CJA 2001. It also, however, looks forward to the Halliday Report, the White Paper of 2002 and the CJA 2003.

When turning to examine the CJA 2003, another model of penology is of value. Packer's distinction ²⁹⁷ between two models - due process and crime control - provides insights into the different value systems within the criminal justice of New Labour. While crime control and due process may be regarded as theoretical ideal models, they can be used as tools ²⁹⁸ to provide another approach when considering the Auld Review and the three Law Commission Reports that were the foundation of the CJA 2003. The two models are also relevant when considering the clash between the executive and the judiciary over, for instance, anti-terrorism measures. ²⁹⁹ It should not be thought, however, that the two models are irrelevant to developments before the time of the New Labour government. For instance, the Criminal Justice and Public Order Act 1994 modified the police caution by the insertion of 'but it may harm your defence if you do not mention when questioned something which you later rely on in court'. This can be regarded both as a weakening of due process, by its impact on the right to silence, ³⁰⁰ and a strengthening of crime control or, as Duff prefers to refer to it, 'efficiency'. ³⁰¹

²⁹⁴ *ibid*:403

²⁹⁵ Brownlee (1998):313-335

²⁹⁶ *ibid* 321

²⁹⁷ Packer (1968) :150-172

²⁹⁸ Packer's ideas have been criticised but Henham, in discussing the criticism accepts their value as exploratory tools and are used here in that capacity. See Henham (1998):593

²⁹⁹ This will be considered in Chapter 6.

³⁰⁰ It should be noted that the ECtHR has held that 'the right to remain silent under police questioning and the privilege against self incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6'. *Murray* [1996] ECHR 3 para 45

³⁰¹ Duff (1998):611-615

4.2 Context and origins of the Criminal Justice Bill 2002

On the day in 2002 when the ECtHR announced its determination on *Stafford*, David Blunkett, the Home Secretary, declared that protecting the public was his top priority so he would fight any attempt by offenders with a whole life tariff to use the ruling to their advantage. He continued 'If this judgment were to be used to support a legal process to achieve this, I would seek to use domestic legislation to enshrine the power of Parliament to provide adequate punishment for the guilty - including life meaning life'.³⁰² As has been seen, the *Anderson* ruling by the House of Lords further circumscribed the Home Secretary's powers. Therefore it was entirely predictable that the issue of sentencing for murder would be a part of the forthcoming Criminal Justice Bill. However, it should not be thought that the *Anderson* and *Stafford* determinations provided the motivation for the Act. The gestation of the Bill was much lengthier than the time between these judgments and its publication, and its content, was far more wide-ranging. It was intended to be a comprehensive and far-reaching piece of legislation that was central to the Government's programme for that parliamentary year. However, as published, it contained no reference to the mandatory life sentence for murder, nor to tariffs for murders of differing heinousness.

The Bill, introduced in November 2002, was based on several documents: three Law Commission Reports,³⁰³ Sir Robin Auld's *Review of the Criminal Courts of England and Wales*,³⁰⁴ John Halliday's Report *Making Punishment Work*³⁰⁵, and the White Paper *Justice For All*³⁰⁶. Although the Halliday Report's recommendations are most relevant to this study, it was the proposals made in the Law Commission reports and in the Auld Review that would cause most controversy.

The 1997 Law Commission Report's recommendations included making it easier to put in evidence statements of witnesses who were afraid to testify or who were absent from court. The first 2001 Report recommended reform of the rule against double jeopardy and the rules relating to prosecution appeals. Although the Report recognised the fundamental importance of the general rule against double jeopardy, it recommended limited exceptions. The third Law Commission report made recommendations relating to evidence of bad character in criminal proceedings.

Lord Justice Auld had been commissioned to review the criminal courts of England and Wales and he reported in September 2001. Some of his recommendations when incorporated into the White Paper and the Bill, were to provoke the most intense opposition from lawyers and

³⁰² Blunkett's response was widely reported in the media on 28/29 May 2002, for example in *BBC News online* and the *Daily Mail*.

³⁰³ Law Commission Reports (1997) (2001a) (2001b)

³⁰⁴ Auld (2001)

³⁰⁵ Halliday Report (2001)

³⁰⁶ Home Office (2002)

others in both Houses of Parliament, and frequently dominated the debates. These recommendations, which echoed elements in the Law Commission reports, included: the ending of the double jeopardy rule; the ending of trial by jury in complex fraud cases; and putting the criminal record of the accused before the jury.

Many of these recommendations were included in the White Paper and the Bill. Because they were deemed to be challenging both due process and the protection of individual rights that had been long established, this led to heated debate in parliament and outside parliament. Some recommendations reflect Packer's crime control model with its stress on efficiency. The Bar Council, however, argued³⁰⁷ that the recommendations, rather than easing the process, would cause inefficiency. They maintained that restricting the double jeopardy rule would result in 'sloppy investigations and the police being given a second bite of the cherry.' They further claimed the justice system had seen too many trials fall apart because of such inadequacies and the Bill would only make things worse. A more typical criticism has been made by Tonry who pointed out just how illiberal the recommendations were: the abrogation of the eight-century old double jeopardy rule, incursions into jury trial rights and the weakening of evidentiary and procedural rules designed to protect against wrongful convictions.³⁰⁸

Apart from the areas criticised for threatening due process, a further group of recommendations, based on 'crime control' at the possible expense of individual rights, invoked strong reaction: the introduction of the concept of 'dangerousness' and the proposals for preventative sentencing designed to limit risk to the public. Proposals were for indeterminate sentences of imprisonment for public protection and extended (determinate) sentences for dangerous sexual or violent offenders. Feeley and Simon noted that in the USA dangerous individuals were being identified as being an 'underclass'. New Labour can be seen as following in the USA's footsteps by appearing to create a group of offenders destined to have extended incarceration on the grounds of potential future risk.

Underlying the Act, and also open to criticism, was Tony Blair's frequently expressed policy of rebalancing the criminal justice system in favour of victims, which was referred to in the Queen's Speech when the Bill was introduced to parliament.³⁰⁹ This had been a theme expressed not only by Blair but also by his Home Secretaries, both Jack Straw and David Blunkett.³¹⁰ Although this focus was welcomed by some, for example the Director of The

³⁰⁷ In interview with the Daily Mail. Available: <http://www.dailymail.co.uk/news/article-174836/Barristers-fight-criminal-justice-bill.html>

³⁰⁸ Tonry (2010) 389

³⁰⁹ Queen's Speech 13 November 2002

³¹⁰ Hansard HC Questions to Prime Minister, 4 December 2002 col 904

Victims of Crime Trust³¹¹ and the then Metropolitan Police Commissioner,³¹² more commentators were wary of the concept of rebalancing justice in victims' favour. At the time, *The Guardian* wrote:

The implication is that the system currently favours offenders. He (Blair) ought to know better. The founding principles of a criminal justice system must be independence, objectivity and neutrality. A system favouring victims is as unacceptable, dangerous and potentially corrupting, as one favouring offenders. MPs must restore the fundamental principles.³¹³

More recently, writing of Blair's wish to promote victims' justice, David Faulkner questioned its legitimacy arguing that 'convicting the guilty and protecting the public became not just as important, but perhaps more important, than acquitting the innocent.'³¹⁴ Perhaps predictably, Tonry's criticism is even more scathing, criticising the notion that the criminal justice system is 'a zero-sum game in which every gain for one player is a loss for another'. The ultimate question, he argues, must be whether a defendant committed a crime, not whether a victim has been wronged and has a greater claim for sympathy.³¹⁵

These criticisms, mainly based on proposals first suggested in the Law Commission Reports and the Auld Review, were to re-emerge during the debate in parliament. However, of the documents influencing the Bill, the most central for this present study was the Halliday Report. This fundamental review of sentencing and its impact on reoffending had been announced by the then Home Secretary, Jack Straw, in May 2000 when he stated that the key question to be considered was whether a different legal framework to that established by the CJA 1991 would facilitate better results.³¹⁶ Straw specified that by 'better results' he meant preventing more crimes, causing fewer victims and creating greater public safety. These criteria would, for the government, be the key tests for any changes.³¹⁷

Halliday's committee consulted widely. Its findings reaffirmed the central importance of sentencing to criminal justice, with the Report stating that sentencing contributed to good order by dealing appropriately with those who breached the norms and standards of society. The goal was to achieve punishments that worked as well as they could in terms of crime reduction and the satisfaction of victims and communities. Equally important was the goal of achieving punishments that were just, and were seen to be just. Halliday considered the various aims of sentencing. On reviewing the evidence on deterrence and incapacitation he concluded there was insufficient evidence of either leading to crime reduction. He put forward

³¹¹ Who welcomed the White Paper in interview on BBC News 17 July 2002 saying what was needed was 'justice for victims not for criminals'.

³¹² Sir John Stevens who said the proposals would 'provide the justice that victims deserve'. In interview in the Daily Mail 22 November 2002

³¹³ 22 November 2002

³¹⁴ Faulkner (2007):140

³¹⁵ Tonry (2010):391

³¹⁶ It will be recalled that the 1991 Act had sought to base sentencing policy on 'just deserts' and proportionality.

³¹⁷ Home Office press release, *Home Secretary Announces Sentencing Framework Review*, 16 May 2000 <http://www.homeoffice.gov.uk/media-centre/press-releases>

a modified form of proportionality: that sentences should be proportionate to the seriousness of the offence and to the seriousness of the criminal record. As Ashworth noted, this latter point met the government's concern about persistent offenders.³¹⁸

On the whole, the Halliday Report was quietly received. Justice was concerned about taking the seriousness of the criminal record into account.³¹⁹ The Howard League in its response to Halliday's Report, supported the idea that proportionality should be a key principle of the criminal justice system. It asserted that by tying the penalty to the seriousness of the offence, the court made it clear that offenders are sentenced not on the basis of *who* they are but *what* they have done. The Howard League saw proportionality as an essential guarantee of fairness and public confidence.³²⁰

Halliday's views on purposes and principles of sentencing clearly influenced the White Paper, *Justice For All*.³²¹ It stated that, for the first time, the purposes of sentencing would be set out in legislation. Sentences should: first and foremost protect the public; act as a punishment and ensure the punishment fits the crime; reduce crime; deter; incapacitate; reform and rehabilitate; and promote reparation.³²² This was despite Halliday's reservations about insufficient evidence on the effectiveness of incapacitation and deterrence. This all-embracing list is followed in the White Paper by a statement that sentencers would be required to consider these purposes when sentencing, and to consider how the sentence they imposed would provide the 'right balance'.³²³ However, the White Paper signally failed to provide guidance on how the 'right balance' was to be achieved.³²⁴

This was not the first criminal justice Bill introduced by the Blair Government. Tackling crime was an on-going theme: this was the fourteenth anti-crime bill since the 1997 election and was the clearest sign yet that its pledge to be 'tough on crime' was still central to the politics of New Labour.³²⁵ In interview for this study, David Blunkett reinforced this, saying he felt the introduction of the Bill in 2002 was important not only to show those who committed the worst crimes that they would be treated severely but also to show the public that New Labour could be trusted on law and order.

³¹⁸ Ashworth (2005): 99

³¹⁹ www.justice.org.uk/parliamentary_press.html December 2001

³²⁰ Howard League (2001)

³²¹ Home Office (2002)

³²² *ibid* para 5.8

³²³ *ibid* para 5.9

³²⁴ The purposes of sentencing as finalised in the CJA 2003, along with those in Halliday and the White Paper are in Appendix C to allow comparison.

³²⁵ Almost ten years later, in 2006, Nick Clegg, then the Liberal Democrat Home Affairs spokesman, identified more than 3000 new criminal offences that the Blair government had created, one for almost every day in power. Quoted in *The Independent* 16 August 2006

4.3 Passage of the Criminal Justice Bill through Parliament

4.3.1 The House of Commons

The resultant Act would introduce the judicially imposed whole life order. However, just as in the debate outside parliament, this sentence was not the main focus of attention in parliament. The main areas for debate illustrate the conflict in penological ideas, and were concerned with the recommendations of the Auld Review and also the concept of rebalancing the criminal justice system in favour of victims. The latter was attacked almost immediately in parliament, not on the grounds that victims and witnesses should not be treated better, but that changes here would lead to defendants losing their rights and legal protection. Simon Hughes, the then Home Affairs spokesman for the Liberal Democrats, expressed his concern:

The prime minister sometimes says that the greatest miscarriage of justice is when the guilty go free, not when the innocent are convicted.... The price of a decent justice system is that, occasionally, the guilty go free ... and it is wrong to think that in trying to deal with that very small number is a price worth paying if, as a result, we end up with a criminal justice system that convicts more people unjustly or treats them unfairly.³²⁶

Many Members were concerned about the threat to legal safeguards and to due process, deriving mainly from the proposals first laid out in the Auld Review. However, the Conservatives seemed reluctant to appear soft on crime and their main home affairs spokesman, Oliver Letwin, accepted many of the proposals, including the changes to the rule of double jeopardy.

At the end of almost seven hours of debate, the Second Reading was completed with barely a mention of sentencing. When the Commons considered the Criminal Justice Bill in Committee, there were 32 sittings; predictably, there were long discussions on drug misuse, on the disclosure of evidence by the defence, on trials without juries, on double jeopardy, and on the evidence of bad character. Less time was found for discussion on sentencing and its purposes, and on imprisonment for public protection.

On the Report and Third Reading stage in the Commons, a large number of additional clauses were introduced. On the first day of this stage, eight new clauses were introduced, and on the second day 21 new clauses were introduced, plus 3 new schedules. New Clause 30 concerned the mandatory life sentence and starting points for murders of differing heinousness. New Schedule 2 proposed starting points including the whole life order.³²⁷ In one sitting, however, the House of Commons had to debate all the clauses relating to sentences for murder, to death by dangerous driving and to firearm offences. The amount of

³²⁶ Hansard HC 4 December 2002 col 914

³²⁷ These were to become Section 269 and Schedule 21 of the Act.

new material and the shortage of time for debate was remarked on by Members, with David Heath criticising the extent of the Bill and the numerous new clauses, and claiming what was being held up as the flagship Criminal Justice Bill of the parliament would not receive the scrutiny it required because of lack of time.³²⁸ Many other Members raised their concern over the lack of time to debate such important issues, especially that of sentencing for murder. Dominic Grieve pointed out that the government had tried 'to squeeze the quart into the pint pot, but the truth is that the quart will not go into the pint pot. There is insufficient time to do justice to the legislation.'³²⁹ John Bercow noted that 'even if we were to have six and a half hours uninterrupted debate without a single vote, which is wholly implausible, there would be under two minutes to debate each of the almost 200 amendments and new clauses today'.³³⁰ Another Member complained that the late introduction of important clauses was putting 'the Commons in a straightjacket'.³³¹

Nonetheless, David Blunkett started the debate by referring to the issue of the whole life tariff.³³²

There is no question but that the public are bewildered by how sentences can be reached when they know that the crime that has been committed was so heinous that there could be only one sentence: life should mean life. When the death penalty was abolished it was presumed that those who committed such an act against their fellow human beings would go down for the rest of their lives. ... Successive Home Secretaries of all political persuasions have intended that we should not only send a signal to, but deal decisively with, those who threaten the life and limb of others, by saying that such people should be given life sentences that would literally put them away for the rest of their lives.³³³

In the debate that followed there was almost unanimous agreement that in some cases life should mean life. Although there were few arguing against the whole life tariff, some issues relating to the tariff were raised. The question of how prisons would cope with prisoners having to spend their extreme old age in custody was mentioned and the consequences of the likely increase in numbers of prisoners with whole life tariffs as a result of the proposals.³³⁴

Several Members questioned the different starting points of the tariffs for murder and how they would relate to the, non-disputed, whole life sentence. The official Conservative spokesman in the debate, Dominic Grieve, queried some of the starting points for particular categories of murder but again stated his support for the proposed whole life order: '(The) new schedule ... appears to have been properly drafted to respond to public anxiety on the topic. The criteria

³²⁸ Hansard HC 19 May 2003 col 690

³²⁹ *ibid* col 689

³³⁰ *ibid* col 691

³³¹ *ibid* col 693 Patrick Cormack

³³² David Blunkett said he would speak to new clauses 30 to 38, with regard to sentencing for murder, new clause 39 on increasing penalties for driving offences causing death, and new clauses 46 to 51 relating to firearms offences.

³³³ Hansard HC 20 May 2003 col 867

³³⁴ *ibid* col 869, 875

that the Government have set appear clearly set out. There is also the possibility of making an exception if necessary. The guidelines therefore strike us as sensible.’³³⁵

Only two significant dissenting notes were introduced. John Bercow questioned the morality of abolishing hope of possible release for offenders sentenced to whole life. He believed that those who commit the most bestial murders but who, over a period, show sustained evidence of repentance and rehabilitation should always have the hope that they might be released.³³⁶ Bercow’s view echoed that of Simon Hughes who, in the earlier debate, had stated that he did not accept the Home Secretary’s view that there could never be redemption or rehabilitation, however terrible the crime. He added that people could commit crimes ‘that make them reviled as the scum of the earth’ but the eventuality had to be allowed for that even some of those individuals could later come good and be safe to be released.³³⁷ Both Hughes and Bercow, therefore, implied the need for a review mechanism.

Blunkett, however, rejected Bercow’s request, both on the basis of the whole life prisoner being a threat to the public and that the public, in the shape of vigilante retribution, could be a danger to such a prisoner if released.³³⁸ Lady Hermon also argued for life to mean life, pointing out that when some life prisoners were accorded early release in Northern Ireland, huge damage was caused to the community’s confidence in the Belfast agreement.³³⁹ Interestingly Hughes, despite his reservations, accepted that for some people life would in fact mean life but insisted that a whole life order would only be legitimate if it was imposed for the protection of the public and not for the purposes of retribution and deterrence. He argued that where there was uncertainty about how long was necessary before it was safe to release someone, the power should be reserved to a court, not the Parole Board. Unless it was safe to release someone, he would have to remain in prison.³⁴⁰

The Liberal Democrats as a party chose to vote against the sentencing clause, not because of their stated objection to the whole life order specifically but because they believed that, although parliament should set the principles, it should not prescribe the minimum number of years to be served for particular offences.³⁴¹ Parliament should, they argued, provide guidance on sentencing and even set the maximum sentence, but specific sentences should be left to the discretion of the court.³⁴²

The proposed tariffs for murder ratcheted-up the length of imprisonment compared to previous and current practice, and this proved more contentious. Various Members pointed out that

³³⁵ *ibid* col 881

³³⁶ *ibid* col 873

³³⁷ Hansard HC 4 December 2002 col 950

³³⁸ Hansard HC 20 May 2003 col 874

³³⁹ *ibid* col 894

³⁴⁰ *ibid* col 895

³⁴¹ This view was to be echoed by Lord Phillips in interview for this study.

³⁴² *ibid* col 892 Simon Hughes

what was being proposed exceeded the guidelines set out in Practice Directions by the Lord Chief Justice in the previous year.³⁴³ Simon Hughes queried the ‘jump’ in sentence length, pointing out that the Sentencing Advisory Panel’s advice to the Court of Appeal the previous year suggested that the starting point for murder should be 14 years, the higher level about four years above that, and the lower level about four years below it. The advice had also indicated that the 30-year tariff should be applied only in exceptional circumstances and that whole life tariffs were not to be recommended.³⁴⁴ The Conservative MP, Douglas Hogg, echoed Hughes’ question, querying why the House was being asked to approve a range of life sentence tariffs that were greatly in excess of the range set out in the Practice Direction.³⁴⁵ Dominic Grieve was concerned that, in seeking properly to address public disquiet about the most serious murderers, parliament should not simply introduce an escalation of tariffs for every murderer, including those who could properly be rehabilitated and safely released.³⁴⁶

Dominic Grieve also warned about the speed with which the government was making change. He worried about hastily prepared reforms because they often failed to bear close scrutiny, and, above all, tended to prove unworkable when implemented. Nevertheless, he agreed with the Home Secretary’s message that those who committed the more serious murders should go to prison for a long time and that those who committed the most serious offences should never be released. However, he felt that if the guidelines which were being established, particularly those specifying 30 and 15 years, bore no relation to the reality of sentencing practice or to the diversity of the criminals to be sentenced, parliament could be straying down the wrong road.³⁴⁷

The Home Secretary, however, remained firm declaring that it was up to parliament to lay down a framework that responded to the wishes of the people, adding that strengthening public confidence in the justice system would also strengthen liberty, freedom and democracy. He further argued that ‘If we have clarity, consistency and confidence, we also have a better debate about the way in which we deal with the underlying issues of prevention and bring other forces of social policy to bear so that we have a safer, more sustained and desirable community in which to live.’³⁴⁸

In summing up the debate for the Government, Paul Goggins, Under Secretary of State, also stressed the need for the public to have confidence in the criminal justice system, claiming that ‘mob rule’ had to be avoided and that constituents demanded severity in sentencing. He argued that if parliament got the balance right, with a robust framework in which the judges

³⁴³ See Appendix D

³⁴⁴ *ibid* col 870

³⁴⁵ *ibid* col 871

³⁴⁶ *ibid* col 884

³⁴⁷ *ibid* col 881

³⁴⁸ *ibid* col 879

had the final say, not only would parliament's credibility be strengthened, but so too would the credibility of the judges and the wider criminal justice system.³⁴⁹

The debate in the Commons reveals that there was little evidence of politicians arguing against the whole life order in principle. Bercow and Hughes were the only two Members to raise the question of possible rehabilitation for those serving the sentence, but both accepted, in principle, the possibility of certain offenders serving whole life for public protection. In common with Blunkett, they acknowledged the need for sentences to act as punishment and deterrence, but also for incapacitation and the protection of the public. They did not think that a whole life term could be justified on the grounds of retribution alone. They accepted it only if there was a continuing danger to the public.

Blunkett had stated early in the debate 'We are talking, thank God, about a small number of people, but we are also dealing with the nature of the impact that they have.'³⁵⁰ This seemed to have been accepted in the House with even those who were uncomfortable with the principle accepting, as in the case of Hughes, that for certain people the judges should rule that they remain in prison on grounds of incapacitation.

The House of Commons approved the Criminal Justice Bill after the Third Reading on 20 May 2003. Clause 30 of the Bill, which contained sentencing proposals for murder, including the whole life order, was passed decisively: Ayes 325; Noes 52. Having passed through the Commons, the Bill went to the House of Lords.

4.3.2 The House of Lords

The Bill was introduced by Lord Falconer, the Lord Chancellor. As in the Commons, the exceptionally large number of clauses in the Bill was criticised, as was the speed required to try to debate them all. One Member noted that Lord Falconer had sped through the introduction, covering 26 clauses within one minute.³⁵¹ Immediately, the same concerns that had initiated the debate in the House of Commons were repeated here: the need for the public to have confidence in the criminal justice system and the need to protect civil liberties.

One of New Labour's own Members, Baroness Kennedy was one of the strongest critics of the moves to attack due process: the weakening of the rule on double jeopardy; the introduction of evidence of bad character; and the restriction of trial by jury. She implied these were crime control measures:

³⁴⁹ *ibid* col 902

³⁵⁰ *ibid* col 874

³⁵¹ Hansard HL 16 June 2003 col 644 Lord Hunt

Law matters. Liberty matters. When the government talk about rebalancing the system... we are not talking of rebalancing in favour of the victims, we are talking about rebalancing in favour of the state. The Bill gives huge increased powers to the state, which is why it is so pernicious.³⁵²

Sentencing was more widely debated in the Lords than in the Commons. Lord Woolf, Lord Chief Justice, spoke on behalf of the judiciary, voicing concerns particularly about the restrictions on judicial discretion. In a paper that he circulated to all Members of the Lords,³⁵³ he accepted that there was no constitutional principle preventing statutory guidelines. However, he questioned their advisability at that time, given that the government was setting up a new expert independent body specifically to develop sentencing guidelines utilising the expert advice of the Sentencing Advisory Panel.³⁵⁴ He drew attention to the fact that the Bill proposed tariffs for murder that were out of line with the guidance he had issued in the Practice Direction the previous year. Furthermore, the proposed tariffs for murder would mean that sentences for other offences would also have to be increased to take account of this.³⁵⁵ Pointing to the heterogeneous nature of murder cases before the courts, he argued that the judiciary was the institution best placed to decide on tariffs. He did not, however, dispute the possibility that some murderers would never be released³⁵⁶ and conceded that there were a few cases of exceptional gravity where the judge could state that no minimum sentence could properly be set, resulting, of course, in a whole life order.³⁵⁷

Lord Ackner supported Lord Woolf and felt that the intended effect of the Bill was to drive life sentence tariffs up and to constrain the judiciary.³⁵⁸ He produced data about the number of life sentence prisoners who had been imprisoned for longer than their judicial tariff, and maintained that these argued against the Home Secretary's claim that the judiciary was under-sentencing.³⁵⁹ He claimed that the courts in England and Wales already imposed the longest sentences of any country in the European Union, with - in 2001 - the number of lifers in England and Wales being equal to the total population serving life sentences in the rest of the European Union.

Lord Donaldson also supported his fellow judges. He said that the Home Secretary appeared to assume that parliament is omnipotent and could dictate to the judges, in detail, how they should perform their constitutional duties. 'Indeed, in the context of mandatory life sentences, Schedule 17³⁶⁰ assumes that the judges are mere bean counters: think of a starting point for

³⁵² *ibid* col 623

³⁵³ Lord Woolf's paper was unpublished but Zander (2003) outlines the points made in the paper.

³⁵⁴ *ibid* para 34

³⁵⁵ *ibid* para 37

³⁵⁶ Hansard HL 16 June 2003 col 575

³⁵⁷ Zander (2003) para 52

³⁵⁸ *ibid* col 898

³⁵⁹ An analysis of 1,257 tariffs in new cases between 1st April 1997 and 30th June 2002, indicated that 87 per cent of those were set in line with judicial recommendation. Of the remainder, the Secretary of State set a tariff higher than the judicial recommendations in 6 per cent of the cases, and a lower tariff in 7 per cent of the cases *ibid* col 589

³⁶⁰ In the Act, this would become Schedule 21

the minimum time which the accused should stay in prison, and then add or subtract in accordance with what are virtually statutory formulae.’³⁶¹ Lord Donaldson’s position was perhaps not too surprising, being a former Master of the Rolls. It reflected the long-standing judicial stance on the separation of powers: that legislation on sentencing infringed the judicial sphere. It ignored, however, the central constitutional position that parliament is sovereign.

Most of the debate in the Second Reading, as in the Commons, concentrated not on the whole life order, or even on mandatory sentencing, but on the double jeopardy proposal and the possibility of future trials without jury. However, more time than in the Commons was spent on sentencing. The influence of the Law Lords made sure that the role of the judiciary was debated with vigour and that their views on the mandatory life sentence was well documented and debated. Possibly as a result of this, more Lords than MPs expressed concerns about the possible restrictions on judges when sentencing in murder cases.

Lord Dholakia was one of the few to discuss at any length the whole life order and was vehemently opposed to it:

In the case of whole-life tariffs, Parliament will require judges to deprive offenders of any possible hope of release, whatever changes they may go through by way of remorse, repentance, personal change, the influence of other people or the ageing process. They will condemn the Prison Service to cope with a growing number of prisoners deprived of all hope and with little to lose.³⁶²

Lord Dholakia was, however, an exception and, as in the Commons, the majority of the Lords who addressed the subject accepted the whole life order as being a required part of the sentencing armoury. The session closed with Baroness Scotland, Minister of State for the Home Office, stressing that the Bill was not designed as a sentencing ‘straightjacket’ and that the ‘Herculean task’ of getting agreement about the Bill would continue. That ‘Herculean task’ continued in the Lords at the Committee Stage and Third Reading of the Bill.

The Third Reading was spent examining the wording of the many amendments, the debate dealing with sentences for murder being the most pertinent to this study. Most of this again concerned the question of mandatory and discretionary life sentences. Baroness Anelay, Conservative Home Affairs spokesman, introducing - but not supporting - an amendment which would provide for discretionary sentences for murder, discussed at length whether victims and the general public understood the differences between the wide range of categories of murder and the differences in sentencing. She referred to the Nathan Report’s claim that the fact that the life sentence was mandatory, actually reduced any deterrent value a life sentence might have. It diluted what should be the awe-inspiring nature of the life sentence. Because many murderers received unnecessary life sentences, the average time

³⁶¹ Hansard HL 16 June 2003 col 598

³⁶² *ibid* col 640-641

served was reduced, giving credence to the common belief that 'life' means nine years. If the life sentence became discretionary, the average time served by lifers would be substantially increased.³⁶³

Summing up for the Government, Baroness Scotland adopted the classic interpretation of a life sentence:

A "life sentence" means just that: it extends to the whole of the defendant's life. There is a misunderstanding about the fact that part of the life sentence will be spent in custody and the remainder in the community. It is possible for a person, for the duration of their life, until the day on which they die, to be recalled to prison, if they breach the undertakings or conditions on which they remain in the community on licence.³⁶⁴

Baroness Scotland's statement was, of course, technically correct in that offenders sentenced to life imprisonment and released on parole can be recalled to prison at any time for the rest of their natural life - but only for 'just cause'. There is, of course, a wide difference between her definition of a life sentence and a whole life order.

The passage of the Criminal Justice Bill through Parliament had taken a full year. Simon Hughes had stated that Members would 'do a service to no one by having a histrionic and aggressive debate'.³⁶⁵ Histrionics and aggression were avoided on the whole,³⁶⁶ with the most spirited debate being concerned with the general question of where the balance should lie between victims' rights and offenders' rights. In his response to the White Paper, David Etherington had raised concerns about the way forward for the Bill, complaining of the government's 'dangerous habit of raising public expectation beyond that which can be truly achieved' and its tendency to underestimate the need for judicial independence in a free, democratic and civilised society. He hoped that the scrutiny of both Houses of Parliament would enforce the good and ameliorate the bad in these proposals.³⁶⁷ The issues that had caused most controversy were undoubtedly the proposals for trial without jury, the abolition of the double jeopardy rule and the changes proposed to the rules of evidence. These highlight the crime control emphasis of the Bill, at the expense of due process. Members in both Houses had expressed concern that the government was perhaps too concerned with public opinion and party political influences. This concern was expressed most colourfully by Baroness Kennedy who described the government's proposals as 'some kind of swaggering

³⁶³ Hansard HL 17 November 2003 col 1802

³⁶⁴ *ibid* col 1807

³⁶⁵ Hansard HC 20 May 2003 col 891

³⁶⁶ So much so that when politicians were contacted for this study, Lord McNally had no strong memories of the debates and Theresa May did not remember the whole life order causing 'a huge debate'. Obviously David Blunkett, Dominic Grieve and Simon Hughes had stronger memories on the Bill's passage and the whole life order in particular.

³⁶⁷ Etherington (2003):23

machismo', dictating law reform to demonstrate that it could be tough on crime. She continued, 'That reminds me of nothing more than men who boast about size to mask uncertainty about their masculinity, and my God, we have a big Bill here.'³⁶⁸

The introduction of a judicially imposed whole life sentence had proved less contentious than might have been expected. Perhaps this was because, unlike much of the rest of the Bill, the whole life order strengthened due process since the Home Secretary had lost his tariff-setting powers. Perpetrators of particularly heinous crimes had in the past, of course, served 'natural life' sentences on the basis of a Home Secretary's judgement that the crime committed was considered too heinous for the offender ever to be released. Virtually unanimously, the Members of both Houses agreed that, although the practice of the Home Secretary making that decision had gone, the option should still exist, but now in the hands of the judiciary. The government had argued that it was crucial that the Bill got the balance right to ensure public confidence, not only in the criminal justice system but also in parliament itself.³⁶⁹ Most Members in the House of Commons seemed to agree that the difficult balance was achieved, with the Liberal Democrats the only party to vote against the central clauses related to sentencing. More dissent was demonstrated in the Lords particularly, perhaps, in respect of the mandatory life sentence for murder and the role of the judiciary.

Having guided the Bill through all the necessary stages of parliamentary procedure, the government had a very tight timescale for it to receive Royal Assent before the end of the parliamentary session. Other amendments were returned to the Commons, which used its power to override the Lords amendments, and the Bill was given Royal Assent on 20 November 2003.

4.4 The rush to pass the Act and initial reaction to the Act

To ensure that the Bill could be passed in the last few minutes before the end of the parliamentary year, the Home Secretary had to offer concessions both to the Commons and the Lords on a number of contentious crime control measures. The range of fraud trials that could be tried without a jury was reduced from the original proposals after particularly strong opposition in the Lords. The proposal to allow defendants to waive their right to a jury trial was dropped. Civil liberty groups were relieved that the admissibility of 'bad character' had been curtailed, as had the plan to retain DNA samples from suspects never charged with an offence.

³⁶⁸ Hansard HL 16 June 2003 col 621

³⁶⁹ Hansard HC 20 May 2003 col 902

Members of the both Houses had criticised the lack of time available to spend on so many important clauses in the Bill, and there did appear to be a certain sprint in the later stages, perhaps as a result of the insertion of a large number of significant new clauses and schedules at Report stage, when they could be given little scrutiny and they could only be accepted or rejected, not amended. Indeed, as pointed out by Lady Anelay on two occasions on Report in the Commons, government ministers ran out of time before they could even finish introducing their own amendments. She felt that such procedures were unacceptable and that the guillotine had been wielded with perhaps too much vigour.³⁷⁰

Any coverage in the media the morning after the Royal Assent tended to concentrate on the last minute concessions, with newspapers such as the *Independent* and the *Daily Mail* sharing the word 'climbdown' within their headline.³⁷¹ Newspapers speculated on whether Tony Blair was determined that his government would not suffer an embarrassing defeat so soon after the newly appointed Leader of the Conservative Party, Michael Howard, had taken up his position.

Although the Bill had taken the full year to pass through parliament, it had generally attracted little public attention during its passage. 2003 was the year British headlines were dominated by the Iraq war. During the early stages of the debates on the Bill, the public opposition to the war culminated in February with a march in London of almost a million people objecting to Britain's military involvement. As the debate on the Bill continued, parliament was also involved with debates over the 'rights and wrongs' of the war, and the government was forced to answer questions about so called 'dodgy dossiers' and 'sexed up evidence.'³⁷² By July, media attention was focused on David Kelly's 'suicide,'³⁷³ and Iraq continued to dominate the news until Saddam Hussein's capture in December.

It was not, however, only the war that kept the Criminal Justice Bill out of the headlines. On the day it was given Royal Assent, President George Bush was in Britain on a state visit. The measures taken to avoid his coming into contact with anti-war protesters made much more tempting headlines for the newspapers than the final passage of the Criminal Justice Bill. Where politics did attract news coverage, media headlines were more likely to feature controversies surrounding the introduction of the congestion charge in London or the installation of the first gay Anglican bishop in the United States than they were to focus on the escalation of life sentences for convicted murderers. Without this coverage, therefore, the Act was passed with little public awareness and, for the first time in English Law, a whole life order to be imposed by the judiciary had been established.

³⁷⁰ Hansard HL 16 June 2003 col 56

³⁷¹ *The Independent* 'Blunkett saves flagship legislation with climbdown in trial by jury' 21 November 2003
'Blunkett's jury trial climbdown' *Daily Mail* 21 November 2003

³⁷² These were concerned with possible evidence of weapons of mass destruction in Iraq.

³⁷³ A British expert on biological warfare, employed by the Ministry of Defence, and formerly a United Nations weapons inspector in Iraq.

4.5 Commentary on the Act

It is not surprising that an Act of such length and complexity and dealing with so many key issues in the criminal justice system should attract widespread comment from both academics and judges. Much of the commentary is not relevant to this study - for instance, the thresholds for fines and for custody, or the provisions relating to risk and dangerousness. Comment, however, on the purposes of sentencing, given in the Act in s142(1) does have relevance. In 2005 Ashworth declared that far from this being the great advance that the government claimed, it was 'vacuous' since it was simply a list that provided no means of resolving the inevitable conflict between purposes, and nor did it establish any order of priority. Contrary to the Council of Europe resolution of 1992 and the Charter of Fundamental Rights of the European Union, it also failed to ensure proportionality.³⁷⁴ Ashworth and Player refer to the 2003 Act as presenting 'a confused and inconsistent articulation of purposes' and continue:

It is as plain as a pikestaff that these purposes may conflict in their application to any case. While the Home Secretary incomprehensibly claimed the Act's statement of sentencing purposes is a major step forward, it is actually a major step backwards. If courts really did have regard to all five purposes in every case, and then chose among them (why else 'have regard?') this would undermine the point of having guidelines and lead to chaos.³⁷⁵

This multiplicity of sentencing purposes could mean that the court might not regard proportionality as its main concern. However, Jacobson and Hough, in their study examining the role of personal mitigation in sentencing, asserted that the 2003 Act left the principle of proportionality in place by making it clear that offence seriousness should be the overriding consideration in passing sentence, except in cases of repeat offenders and issues of dangerousness.³⁷⁶ In addition, Dingwall has drawn attention to the accepted view among academic commentators that the CJA 2003 reduced the importance of proportionality in sentencing, but he argues that this is not necessarily the case.³⁷⁷ Dingwall believes that a degree of cynicism is called for in respect of the role to be played by proportionality in sentencing, given its interpretation in the CJA 1991, and despite its declared primacy as a sentencing rationale. For this to be effectively reasserted under the 2003 legislation, he believed that the Court of Appeal would have to give clear guidance (which, in fact, was to be provided in *Sullivan*³⁷⁸) and the courts would have to adhere to any overarching principles set out by the Sentencing Guidelines Council, which had been established by s167 of the CJA 2003 to give authoritative guidance on sentencing.³⁷⁹

³⁷⁴ Ashworth (2005):99

³⁷⁵ Ashworth & Player (2005):835

³⁷⁶ Jacobson & Hough (2007):53

³⁷⁷ Dingwall (2008):400-410

³⁷⁸ [2004] EWCA Crim 1762

³⁷⁹ This was replaced by the Sentencing Council in 2010.

On examining the Act itself, however, it should be remembered that s143 states: 'In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.' This is, of course, the Halliday Report's view of the centrality of proportionality in determining the severity of a sentence.³⁸⁰ In addition, the issue of seriousness was thought sufficiently important by the Sentencing Guidelines Council for one of its first guidelines to be on this subject.³⁸¹ The Guideline started by saying the court must have regard to the five principles of sentencing in s142(1). It noted that the Act did not indicate that any purpose should be more important than any other. It then continued:

The sentencer must start by considering the seriousness of the offence³⁸²
A court is required to pass a sentence that is commensurate with the
seriousness of the offence. The *seriousness* of an offence is determined
by two main parameters; the culpability of the offender and the harm
caused or risked being caused by the offence.³⁸³

In consequence, it can be argued that by reading s143 of the Act along with the Guideline, 'just deserts' or proportionality is reasserted as the dominant factor in sentencing. This is in accord with Jacobson and Hough's view that proportionality has long been established as the fundamental guiding principle of English sentencing law³⁸⁴ and answers Dingwall's need for clear guidance on the subject.

In respect of the mandatory life sentence, there can be no question of any lack of guidance on proportionality if s269 and Schedule 21 are considered. Section 269 of the Act is explicit. Subsection 3 states that if the early release provisions are to apply, the court should determine the sentence according to the *seriousness* of the offence. Subsection 4 states that if the court is of the opinion that because of the *seriousness* of the offence no order should be made under subsection 2, the court must order that the early release provisions are not to apply to the offender.³⁸⁵ No other sentencing rationale is mentioned.

This detailed sentencing framework caused Ashworth to write of the increasing forays made into the area previously left to judicial discretion. He asserts that the 'high water mark' of this is s269 and Schedule 21 of the Act.³⁸⁶ Later, he described the attitudes of the government and the judiciary as a 'struggle for the upper hand in sentencing policy'.³⁸⁷ Certainly, judges, in interviews reported by Jacobson and Hough, thought the legislation would never be able to take account of the full range of circumstances of offenders coming before them, and that mandatory sentences and similar statutory provisions risked driving the humanity and justice

³⁸⁰ paras 2.6 and 2.8

³⁸¹ Sentencing Guidelines Council (2004)

³⁸² *ibid* para1.3

³⁸³ *ibid* para1.4

³⁸⁴ Jacobson and Hough (2007):4

³⁸⁵ Emphasis added

³⁸⁶ Ashworth (2000):32

³⁸⁷ *ibid*:66

out of sentencing.³⁸⁸ One particular focus for criticism by judges was Schedule 22 of the Act, which deals with transitional arrangements resulting from *Anderson, Stafford* and the 2003 Act. This Schedule is concerned with whole life tariffs/orders, and appeal cases concerning such offenders will be discussed as part of Chapter 6.

As has been seen, aspects of the Act came in for almost immediate critical comment. Lord Bingham quotes³⁸⁹ comments made by Lord Justice Rose describing the provisions of the Act in one case as 'labyrinthine' and 'astonishingly complex' and in another case as 'deeply confusing'. Part of the problem may lie, he believed, in what a parliamentary committee described as 'the tendency of all governments to rush too much weighty legislation through Parliament in too short a time'.³⁹⁰

4.6 The effects of the Act relating to the whole life order

How the Act is judged depends on viewpoint. In interview for this study, David Blunkett talked passionately of the necessity of providing the clear, logical and robust sentencing structure that the public deserved. Democracy and free speech were important so, he continued, debate was crucial, and democratically elected politicians should and must decide on sensitive issues like law and order. Others may have sympathy with Garland's view³⁹¹ that governments, when unable to control crime easily or wishing to appeal to particular sectional interests, fall back on 'acting out,' by adopting particularly robust measures which will be popular with the electorate.³⁹² He writes of the vigorous use of the state's power to punish; a power that declares 'the state is in charge, something is being done, crime will not be tolerated.' The elements of the CJA 2003, which challenged both due process and individual rights in the cause of efficient crime control and public protection, could be seen as an example of Garland's 'acting out'. Simon may have preferred this reading of the Act when he writes: 'Like Robert Kennedy and Bill Clinton, Tony Blair combined the kind of moralistic and muscular liberalism, with a religious streak...that finds in a tough, punitive, prosecutorial approach to wrong doers just the right tonic for self and society.'³⁹³

Whatever the interpretation put on the Act, its clearest impact pertinent to this study was that, following *Anderson* and *Stafford*, the power to set tariffs in the case of mandatory life sentences, had been transferred from the Secretary of State to the judiciary. This applied to all mandatory life sentences including those with a whole life tariff. The secrecy surrounding

³⁸⁸ Jacobson & Hough (2007):56ff

³⁸⁹ Bingham (2011):41

³⁹⁰ *ibid*:41 quoting the *Renton Report* on the Preparation of Legislation 1975

³⁹¹ Garland (2001) Chapter 5 but especially p131-135

³⁹² As demonstrated perhaps by Theresa May, the Home Secretary, announcing to the Police Federation on 15 May 2013 that the whole life order would be extended to include the murder of police or prison officers in the line of duty.

³⁹³ Simon (2010):8

tariffs and their setting disappeared, since trial judges would now be required to give the period to be served, including whole life, in open court and in ordinary language.³⁹⁴ The sentence imposed by the trial judge, subject of course to any appeal, meant that whole life was exactly that. The practice of Home Secretaries reviewing whole life tariffs after 25 years, and subsequently every five years, ended: there was now no machinery for review. It is true that the powers of the Home Secretary to order release on compassionate grounds still existed, but in extremely restricted form. The grounds for imposing a whole life order were that the murder had to be judged as being one of exceptionally high seriousness. The criteria were exemplified in Schedule 21.

All those who had previously been given a whole life tariff would have the opportunity to seek a judicial review of this 'sentence'. All those convicted and given a mandatory life sentence but whose tariff had not been set would have their case reviewed and a term applied by a judge.

The so called 'Blunkett's revenge' had effectively inflated sentences for murder: the three starting points meant that sentences were significantly higher than those exemplified in Lord Chief Justice Woolf's Practice Direction of 2002, where he had recognised in passing that some crimes should attract a whole life sentence. However, it should be remembered that whole life, 30 years and 15 years were 'starting points,' and the lists of mitigating and aggravating factors meant that a wide range of terms were likely to be served.

Lord Phillips, in interview for this study, still believed that the judiciary had flexibility post-2003, but agreed that sentences had lengthened. Other members of the judiciary and of the legal profession, also in interview, were strongly of the view that it was not only sentences for murder that had been inflated. They felt that sentences for manslaughter, grievous bodily harm and other violent crimes had increased sharply in order to maintain the gradation of sentencing, that is, proportionality, both ordinal and cardinal. Tension had been exhibited between the judiciary and the executive in the debates, particularly in the House of Lords, and the tension was not fully resolved. Many of the judiciary were not convinced of the legitimacy of parliament legislating on sentencing and, in particular, the setting of minimum terms.

The overarching question was whether the latest legislation, in the CJA 2003, would satisfy Blair and New Labour or whether there was still mileage in making changes to the criminal justice system in order to 'rebalance' it, and to allay the public's fears by demonstrating the government's resolution to control crime.

³⁹⁴ s270

5 PUNISHING THOSE CONVICTED OF CRIMES OF HIGH SERIOUSNESS

5.1 Introduction

The 2003 Act, as has been seen, established a statutory framework for the retribution and deterrent element of sentences for murder, within which judicial discretion is allowed.

In interview for this study, Edward Fitzgerald QC, confirmed that the ECtHR takes into account the position in jurisdictions other than the one of the applicant. The decision pending from the Grand Chamber of *Vinter, Bamber and Moore* is likely to compare the whole life order in England with punishment for the most heinous of crimes elsewhere. Issues likely to be of concern include proportionality, the penological justification for continued imprisonment and the existence and scope of review mechanisms. Consideration, therefore, in this chapter of punishment in other jurisdictions will focus on these questions.

However other jurisdictions differ from England and Wales, they all have one thing in common: those convicted of crimes of high seriousness will be sentenced to very long terms in prison. England and Wales, however, is one of the few jurisdictions where certain prisoners face not simply long terms but the whole of life terms in prison. These pose challenges to the prisoners themselves and to prison authorities. This chapter, therefore, will look at the challenges facing such prisoners especially in the light of the fact that they will grow old and, probably, die in prison. It will also consider challenges faced by prison authorities, especially in balancing the needs of the prisoners with the necessary strict security, all in the context of national policy on prisoner management and containment.

5.2 The approach of other jurisdictions to offenders convicted of the most heinous crimes

5.2.1 The rest of the United Kingdom: Northern Ireland and Scotland

In **Northern Ireland** there is power to make whole life orders coming from the Life Sentences (Northern Ireland) Order 2001 which in 5.3 states 'If the Court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, no order should be made under paragraph (1) (early release provisions) the Court shall order that ... the release provisions shall not apply to the offender.' The similarity between the provisions relating to whole life orders in the Order and in the CJA 2003 is striking.

On conviction for murder, a mandatory life sentence is imposed. The Order continues that there is no set period of custody but that the term recognises the need to punish the offender, to deter others and to protect the public, and that the court will set a life sentence tariff. The Judicial Studies Board for Northern Ireland on its website has a section concerned with Life Sentence Tariff Rulings up to and including 2008. There the longest tariff is for 30 years in *Irwin* [2008] NILST 5, for multiple counts of terrorist murder by firearms, and showing meticulous planning.

In the trial in Northern Ireland of Robert Black for yet another child murder,³⁹⁵ on conviction the prosecutor sought a whole life order. The judge, however, took as his sentencing framework Practice Direction 2002 (Crime – Life Sentences) and he refused to make a whole life order on the grounds that this crime was committed before the ones for which he had been sentenced in Scotland and England.³⁹⁶ Instead, Black was sentenced to a minimum of 25 years. In the sentencing, no mention was made of the ECHR.

The position in **Scotland** changed with the Convention Rights (Compliance) (Scotland) Act 2001.³⁹⁷ The explanatory notes to the Bill stated in para 35 that it was open to a judge in sentencing a designated life prisoner not to set a minimum term to be served as punishment where he considered that the prisoner should remain in prison for the remainder of his natural life. In the ensuing Act, it was made clear that there should be a punishment element of a life sentence intended to ‘satisfy the requirements of retribution and deterrence’ (section 1(3)). The Act ended the freedom of judges not to set a punishment tariff. It made clear that the judicial order determining the punishment should, firstly, specify the period that the court considered appropriate in years and months; and, secondly, could specify any period, even if it was likely that such a term would exceed the remainder of the prisoner’s natural life. The then Justice Minister certified that the Bill was within the competence of the Scottish Parliament.³⁹⁸ He noted, in correspondence for this study, that he had power to order release on compassionate grounds (as, of course, his successor did for the Lockerbie Bomber, Al Megrahi) and he did so on six occasions: one where the Parole Board had already recommended release and the others where the prisoner was in the very final stages of a terminal disease or was so incapacitated that he could not move from a hospital or hospice bed.

Al Megrahi, after a trial in the Netherlands under Scots law and before Scots judges, was sentenced to 30 years. There consequently grew up a belief in Scotland generally, but more particularly in the Scottish legal profession, that there was in effect a maximum term of 30 years for murder. The Lord Advocate sought clarification of this from the judges in the Court of

³⁹⁵ He had previously been convicted of one child murder in Scotland and three in England.

³⁹⁶ [2011] NICC 40

³⁹⁷ It should be noted that unlike in Westminster, Bills in Holyrood must be compliant with the ECHR, otherwise they will (and must) be struck down by Scottish courts.

³⁹⁸ Information from the former Justice Minister contained in personal correspondence for this study.

Criminal Appeal.³⁹⁹ In the opinion of the Court, provided by the Lord Justice General, new guidelines were issued. These restated the position in the 2001 Act and continued:

In our view there may well be cases (for example, mass murders by terrorist action) for which a punishment part of more than 30 years may, subject to any mitigating considerations, be appropriate. Insofar as ... *Al Megrahi* may suggest that 30 years is a virtual maximum punishment part, that suggestion is disapproved.⁴⁰⁰ ⁴⁰¹

Despite the legal differences, from the perspective of the prisoner convicted (to use the terminology of the CJA 2003) of a crime of 'exceptionally high seriousness', the situation in all jurisdictions of the United Kingdom is essentially the same: imprisonment for the rest of his natural life whether by means of a whole life order or by a term of imprisonment in excess of his life expectancy; and with no machinery for the review of sentences.⁴⁰²

5.2.2 Jurisdictions influenced by the English legal tradition

In the **USA**, the decision of the Supreme Court in 1972 in *Forman v Georgia*⁴⁰³ appeared to have abolished the death penalty. Its replacement was imprisonment for life without parole (LWOP). By 2009 there was only one state, Alaska, which did not have LWOP as a sentencing option.⁴⁰⁴ The sentence is available not only in respect of murder, but a range of other crimes, especially those involving drug trafficking. However, there is a major difficulty with the expansion of the range of crimes for which LWOP is a possible sentence: that of the inability to maintain proportionality between the seriousness of the crime and the severity of the sentence. Or, that the use of such sentences may be regarded as grossly disproportionate.

In 1983, in *Solem v Helm*⁴⁰⁵ the Supreme Court adopted a tripartite test when considering if a life sentence was disproportionate: the nature of the offence; the sentence imposed for the commission of the same crime in other jurisdictions; and the sentence imposed for other crimes in the same jurisdiction. It concluded that a LWOP sentence imposed on a petty and alcoholic fraudster for repeated offences was unconstitutionally disproportionate, in terms of the Eighth Amendment: 'a cruel and unusual sentence'. In 1991, however, in *Harmelin v*

³⁹⁹ <http://news.stv.tv/scotland/121541>

⁴⁰⁰ [2009] HCJAC 89 para 13

⁴⁰¹ Applying the court's opinion, in April 2013 two men were sentenced to a minimum of 33 years and 30 years for the abduction, torture and murder of a woman.

⁴⁰² In Scotland the court still sets a minimum term specified in years. This sets a finite limit and may be regarded as proportionate. The whole life term without a minimum period of retribution may raise questions about proportionality when the term served will vary considerably depending on whether the offender is 22 years of age or 62 years, on conviction. See below for further consideration of this point.

⁴⁰³ 408 US 238

⁴⁰⁴ In www.deathpenaltyinfo.org

⁴⁰⁵ 463 US 277

Michigan⁴⁰⁶ the same Supreme Court, failing to use the tripartite test, declared that LWOP for possession of illegal drugs was constitutional. The broader effect of *Harmelin* was to emasculate consideration of proportionality in life sentence cases.

In **Australia**, the New South Wales Law Reform Commission asserted the importance of the common law principle of proportionality against what it viewed as American use of 'just deserts,' which was criticised for focusing on the objective gravity of the offence to the exclusion of the individual circumstances of the offenders and their prospects of rehabilitation.⁴⁰⁷ Following the abolition of capital punishment in Australia's states, the most severe sentence was life imprisonment, but for most of those convicted, 'there is the possibility of release at some date.'⁴⁰⁸ A judge, however, could recommend that a particular prisoner sentenced to penal servitude for life should never be released. In 1987 in New South Wales a judge, after the conviction of the murderers of Anita Cobby, said that each of the prisoners' official files would be marked "Never to be released,' but this was a recommendation⁴⁰⁹ and very unusual because, at that time, courts did not have the power to set minimum terms. Anderson in his paper⁴¹⁰ comments that this implicitly acknowledged that a life sentence did not ordinarily involve imprisonment for the rest of life. It was noted, however, that this could not bind the Royal Prerogative.

In 1988, a coalition government was elected which had campaigned on 'truth in sentences'. The aim was to ensure that the length of time specified by judges should be the sentence served in practice, without political 'interference'. In an amendment to the Crimes Act 1900 (NSW) s19A (2) a life sentence was prescribed as the sentence to be served 'for the term of the person's natural life'. However, the Act provided at s 19A (6) that nothing in the section affected the Prerogative of Mercy. The Crimes Act was further amended in 1995 when s 431B provided for a mandatory sentence of penal servitude for life in cases of murder where 'the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence'.

While attention has been paid to developments in New South Wales, most other states have instituted sentencing regimes where imprisonment for the whole of the prisoner's natural life is possible: Victoria, South Australia, Western Australia, Tasmania and Northern Territory.⁴¹¹

New Zealand, perhaps not unsurprisingly given its proximity to Australia, has a similar regime. The Sentencing Act 2002 Section 103 2 A provides 'If the court that sentences an offender

⁴⁰⁶ 501 US 957

⁴⁰⁷ New South Wales Law Reform Commission Discussion Paper 33: *Sentencing* (1996)

⁴⁰⁸ Freiberg A & Biles D (1975): 22 *The Meaning of Life: A Study of Life Sentences in Australia* Australian Institute of Criminology Canberra

⁴⁰⁹ Made to the Executive which could, in due course, consider release.

⁴¹⁰ Anderson (1999) Information on the trial of the murderers of Cobby is taken from this paper as the New South Wales court data base gives no details.

⁴¹¹ See Anderson (1999) for fuller details.

convicted of murder to imprisonment for life is satisfied that no minimum term of imprisonment will be sufficient to satisfy one or more of the purposes (holding the offender accountable, denouncing the conduct, deterring the offender or others or protecting the community) the court may order that the offender serve the sentence without parole'. Section 9 provides a list of mitigating and aggravating factors to be taken into account in all sentencing; and Section 8, Principles of Sentencing, requires proportionality.

In **Canada**, in 1976, capital punishment was abolished and replaced with a mandatory life sentence for high treason and first and second degree murder. At the same time, eligibility for parole was determined: for first degree murder there is an automatic 25 year period of parole ineligibility. This, however, is subject to judicial review - 'the faint hope clause' - after 15 years, except in the case of multiple murders. If the reviewing judge assesses there is a substantial prospect of success, the application then goes to a judge and jury, who decide whether the prisoner should be able to make an early application to the Parole Board (Section 741 of the Criminal Code). When the prisoner is eligible to apply for parole, the Parole Board may decide not to grant it if it considers the risk to the public of his release is too great.⁴¹² In short, imprisonment for the whole of life is possible but it is not a sentencing option for judges, but depends on assessment by the Parole Board. Moreover, Section 12 of the Canadian Charter states that punishment must not be grossly disproportionate to the offence:

The court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender. ... This does not mean that the judge nor the legislator cannot consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.

There is, therefore, striking clarity in the constitutional and legal position regarding proportionality, or at the very least the avoidance of gross disproportionality.

The position in **South Africa** is less clear-cut. The death penalty had been found to be unconstitutional under the 1993 Bill of Rights: the Constitutional Court found that the death penalty breached rights such as the right to life, dignity and not to be punished in a cruel, inhuman or degrading way. Courts can impose a life sentence for certain specifically described aggravated forms of murder, for example cases showing premeditation or combined with rape or robbery. The sentence, however, does not mean the whole of natural life: the Correctional Sentences Act of 1998 provides for the possibility of parole after serving a term of 25 years.⁴¹³ Moreover, the question of release is considered by the court that imposed the

⁴¹² Library of Canadian Parliament Research Publications Available: http://www.parl.gc.ca/about/parliament/legislativesummaries/bills_is.asp?language=e&is=s6&source=library_prb&parl=40&ses=3#

⁴¹³ Professor Terblanche (2008) 'Sentencing Murder,' Speech delivered in Dublin July 2008 Available: <http://www.isrcl.org/Papers/2008/Terblanche.pdf>

original sentence and has the power to extend the term beyond 25 years. A Law Commission discussion paper recommended that the sentence be limited to cases of extreme gravity, citing the Rome Statute establishing the International Criminal Court (ICC)⁴¹⁴

Finally, two cases illustrate the South African courts' respect for the principle of proportionality or at least the need to avoid disproportionality. In *S v Malgas*,⁴¹⁵ the Supreme Court of Appeal in March 2001 considered the meaning of 'substantial and compelling circumstances' referred to in Section 51 (3) (a) of the 1997 Criminal Law Amendment Act. The court's opinion was that any court was entitled to impose a lesser sentence where, in all the circumstances of the particular case, it is satisfied that the prescribed sentence would be unjust in that it would be disproportionate to the crime, the criminal and the needs of society.⁴¹⁶ In *S v Dodo*⁴¹⁷ in the South African Constitutional Court in 2001, Judge Ackerman, giving his opinion, stated that human beings ought to be treated as ends in themselves, never merely as means to an end. Disproportionality between the offence and the period of imprisonment would tend to treat the offender as a means to an end thereby denying the offender's humanity.⁴¹⁸

Given that **Namibia** was governed after World War I by South Africa, it may be appropriate to consider it here. In 1991, in the High Court (*S v Nehenia Tjijo* – unreported but quoted in *Tcoeib*⁴¹⁹) it was argued that life imprisonment was a cruel, inhuman and degrading punishment and therefore contrary to the Constitution of Namibia: 'When a term of years is imposed the prisoner looks forward to the expiry of that term when he shall walk out of jail a free person who has paid his debt to society. Life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living.'⁴²⁰

In *Tcoeib*, the issue again was whether a life sentence breached the Constitution. On this issue the Constitution is very close to German law.⁴²¹ Chief Justice Mahomed explained

... there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view it cannot be justified if it effectively amounts to a sentence which locks the gate of the prison irreversibly for the offender without any prospect whatsoever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise.⁴²²

⁴¹⁴ South African Law Commission Discussion paper 91 Project 82 directed by Professor van Zyl Smit

⁴¹⁵ [2001] (2) SA 1222 (SCA)

⁴¹⁶ Cilliers (2002)

⁴¹⁷ [2001] (1) SACR 594 (CC)

⁴¹⁸ van Zyl Smit (2006)

⁴¹⁹ [1996] (1) SACR 390 (NMS)

⁴²⁰ Quoted in van Zyl Smit (2005)

⁴²¹ See below

⁴²² [1996] (1) SACR 390 (NMS)

What is less often referred to is his conclusion that life imprisonment was not unconstitutional because provision had been made for a life prisoner to be released on parole in appropriate circumstances.⁴²³

These jurisdictions have all excluded members of the executive from sentencing in individual cases, with the exception of the power to exercise the prerogative of mercy. The judiciary in all these countries, except USA, are concerned that sentences should be proportionate, or at least do not display gross disproportionality. The countries do, however, differ over whether life sentences should be subject to review, and this reflects the penological purposes of the sentences, whether, for instance, they are for punishment or public protection.

5.2.3 The International Criminal Court (ICC) and Tribunals

Some writers, for example Appleton and Grover (2007), when considering life sentences, refer to the ICC and its Rome Statute, drawing attention to the maximum sentence available to the Court. Under Article 77 this is life imprisonment; however, under Article 110 (3), such a sentence must be reviewed after 25 years. Such writers use the Statute of Rome to buttress arguments against sentences of imprisonment for whole of life without procedures for review. The international position, however, is more complex: as well as the ICC there are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These two Tribunals have both imposed irreducible life sentences. It is argued⁴²⁴ that whole life sentences were not provided for under the Statutes but were a judicial invention based on the rule-making power given to the judges under the Statutes. Rule 101 of ICTY's Rules of Procedure and Evidence states that a convicted person may be sentenced to imprisonment of a term up to and including the remainder of the convicted person's life. The wording of Rule 101 of ICTR is virtually identical to this. In the proceedings and judgments, no doubt is expressed that imprisonment for the remainder of a prisoner's life is acceptable in terms of human rights. In 2006, in the *Stakic's* appeal judgment,⁴²⁵ it was held that neither Article 7 (prohibition of torture and cruel, inhuman and degrading treatment) nor Article 10 (the aim of imprisonment being reformation and social rehabilitation of the prisoner) of the UN International Convention on Civil and Political Rights prohibited life imprisonment.⁴²⁶

Scalia⁴²⁷ argues that : 'The imposition of life imprisonment can only comply with the criteria established by the ECtHR if the ICC's case law puts an end to the *irreducibility* that exists

⁴²³ Bohlander (2009): 35

⁴²⁴ Scalia (2011): 669 - 687

⁴²⁵ [2006] IT-97-24-A

⁴²⁶ Bohlander (2009)

⁴²⁷ Scalia (2011)

today in the law and practice of the International Criminal Tribunals concerning life sentences.^{428 429} It is appropriate, therefore, to turn back to some European jurisdictions and consider what is regarded as appropriate punishment for the most heinous of crimes,

5.2.4 Europe

England and Wales may be one of the few jurisdictions in Europe where judges are able to impose a whole life order, but it is not unique. Perhaps surprisingly, the **Netherlands** is included in this number where all life sentences are imposed with no right of the individual to have his sentences reviewed. Since 1986 only one (terminally ill) prisoner serving a life sentence has been released. As in England and Wales, whole life sentences are never mandatory and, again like England and Wales, the number of such prisoners is small: 37 in 2010.⁴³⁰

In **Sweden, Bulgaria, Ukraine** and **Georgia** a whole life order can be imposed. The prisoner in Sweden has the right to petition parliament for pardon, and in Bulgaria and Ukraine to petition their respective presidents. In Georgia, apparently, on abolition of capital punishment the intention was to provide for whole life imprisonment to satisfy the public.⁴³¹

In contrast, some countries do not have a life sentence as a sentencing option. **Spain and Portugal** and also countries that were once part of Spanish or Portuguese empires in the main also do not have a life sentence.⁴³² In Spain the legislature has chosen without direct constitutional compulsion not to make life imprisonment part of the criminal code.⁴³³ **Norway and Croatia** similarly do not provide for life sentences.⁴³⁴

Most of the **other members of the Council of Europe** have replaced the death penalty with a discretionary maximum sentence of life imprisonment. All these countries have systems whereby the prisoner can be considered for early release after serving a minimum term, ranging from 10 years in Belgium; 12 in Denmark; 15 in Austria, Germany, Luxemburg and Switzerland; to 20 years in the Czech Republic, Romania and Turkey; 25 in Poland, Russia, Slovakia and Slovenia; to 26 in Italy and Lithuania; and 30 in Estonia.⁴³⁵

⁴²⁸ *ibid*

⁴²⁹ Emphasis added

⁴³⁰ van Zyl Smit (2010)

⁴³¹ Hodgkinson (2005)

⁴³² This means that in Latin America, with the exception of Argentina and Chile, there is no life sentence, but there is provision for very long finite sentences in the most extreme, 60 years in Colombia.

⁴³³ van Zyl Smit (2006): 404 -21

⁴³⁴ van Zyl Smit (2010)

⁴³⁵ Appleton & Grover (2007) and van Zyl Smit (2010)

As far as the individual prisoner is concerned, what matters is less what the sentencing provision states and more what the sentence will mean to him as an individual. In Eastern European countries, it seems the punishment for heinous crimes is a range of 15-25 years imprisonment, which is considered sufficient and proportionate.⁴³⁶ Moreover, in those countries which have no legislative provision for life imprisonment, prisoners may spend as long or longer in prison as those sentenced to life elsewhere.⁴³⁷

The Code Pénal in **France** sets out crimes that have a maximum sentence of life imprisonment:

- a murder which precedes, accompanies or follows another crime (221.2)
- a murder committed with premeditation (221.3)
- a murder of a minor, a parent, a vulnerable person, a public official, a witness or victim; a murder racially, ethnically or religiously inspired or on account of sexual orientation; acts of torture or barbarity which lead to death (221.4)

There is then a 'safety period' that prevents early release in that time. In the case of life imprisonment this is 18 years but the trial court may extend it to 22 years (Article 132.23).⁴³⁸ Van Zyl Smit referred to a decision of the Conseil Constitutionnel in 1994 which ruled that whole life sentences were 'fundamentally unacceptable'.⁴³⁹ Appleton and Grover make the point differently to similar effect: that those subject to life sentences have a right to be considered for release.⁴⁴⁰

In 1994, the Code Pénal was amended to allow for a sentence of life imprisonment with no minimum period in cases of murder of a child, with rape, torture or acts of barbarity. The Conseil Constitutionnel upheld this provision in the same year. When no minimum period has been set, there can be no application for release under licence until 30 years have been served. Since 1994, only three prisoners have been so sentenced and obviously none has completed 30 years so there is no indication of how such an application would be approached.⁴⁴¹ It is, however, suggested that imprisonment for the whole of life was abolished by the Constituent Assembly in 1789 because it was considered to be worse than death.⁴⁴²

⁴³⁶ Albrecht H (2001) 'Post Adjudication Dispositions in Comparative Perspectives' quoted in Appleton and Grover (2007)

⁴³⁷ Newcomen (2005)

⁴³⁸ Spencer (2007)

⁴³⁹ van Zyl Smit (2006):28

⁴⁴⁰ Appleton & Grover (2007)

⁴⁴¹ van Zyl Smit (2010)

⁴⁴² Scalia (2011)

The position in **Germany** regarding the punishment of the most heinous crimes has been widely discussed, in particular interpretation of the Basic Law in respect of murder. Article 1 of the Basic Law declares that human dignity shall be inviolable. Sections 211 and 212 of the Criminal Code provide for the imposition of life imprisonment in cases of intentional homicide. The Verden District Court made a finding of incompatibility with the Constitution and referred the case to the Constitutional Court. The conclusion of the Court in June 1977 was that life imprisonment was not inherently unconstitutional.⁴⁴³ It welcomed the Prison Act with its focus on a treatment regime during imprisonment. The judgment stated:

The threat of life imprisonment is complemented, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment to strive towards their re-socialisation, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes that go with it. The task that is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in Article 1 (1) of the Basic Law.⁴⁴⁴

The Court held that the legislature was entitled to prescribe the heaviest penalty at its disposal for murder, because murder denied the citizen's right to life, the highest legal interest of all. However the Court held that life imprisonment could only be regarded as compatible with human dignity if the prisoner retained a concrete and realistic expectation of eventually being released.⁴⁴⁵

After the 1977 Constitutional Court judgment, the Criminal Code was amended. The new Section 57a provides that the court should grant conditional early release from a sentence of life imprisonment on probation if 15 years of the sentence has been served, and if the particular seriousness of the prisoner's guilt does not require its continued enforcement. Parts of Section 57 - Conditional Early Release Fixed Term Imprisonment - also apply to life sentenced prisoners. The release has to be considered appropriate in terms of public security interests: the decision shall particularly consider the personality of the prisoner, his previous history, the circumstances of his offence, the importance of 'legal interest' should he reoffend, the conduct of the prisoner while serving his sentence, his circumstances and the effects an early release are expected to have on him.⁴⁴⁶

The effect of the change in German criminal law is that there are no whole life orders at the time of sentence, but there is a mandatory 15-year minimum term. After the 15 years, a case is reviewed by a panel of three judges: the effect of this could, in theory, mean that a whole

⁴⁴³ B Verf GE 45 187 Translations are by van Zyl Smit (2005)

⁴⁴⁴ *ibid* 238

⁴⁴⁵ *ibid* 228

⁴⁴⁶ Translation provided by Bohlander (2009)

life sentence will still be served if either the guilt is so great or the prognosis for the prisoner is negative, but this is regularly reviewed by a court.

A judgment of the Constitutional Court of 1992 held that establishing the facts that would lead to a view of the seriousness of the person's guilt had to be made by the trial court not by the court considering parole. The task of the Parole Court is whether there is a continued need for imprisonment. The German Constitutional Court has routinely upheld life sentences extended beyond the 15-year review.⁴⁴⁷ Bohlander notes that the elements that are routinely considered by trial courts overlap considerably with those used in England and Wales in making a whole life order.⁴⁴⁸

Also of relevance is the view of the European Committee for the Prevention of Torture, in the course of its report on a visit to Hungary in 2007, which stated its serious reservation about the very concept according to which 'lifer' prisoners, once they are sentenced, were considered to be a permanent threat to the community and were deprived of any hope of being granted conditional release.⁴⁴⁹

As has been seen, most other jurisdictions either rule out the whole life sentence or carefully circumscribe it. There is a consensus, excluding the USA, that sentencing courts must ensure that punishments inflicted are proportionate to the crimes committed, or perhaps, more precisely not grossly disproportionate. Sentences for the whole of natural life are legal in the Netherlands and in some of the states influenced by English criminal law. Most countries allow appeals for clemency. In the majority of countries there is a review mechanism to consider whether continued imprisonment is penologically justified. The grounds for such reviews are not always clearly stated. There is explicitly, or implicitly, most often consideration of the risk and dangerousness to the public that such prisoners pose. However, consideration of the seriousness of the crime is frequently present. (The views of the judge in New South Wales in the trial of the murderers of Anita Cobby are perhaps the most pointed.) The issue of the continued penological justification of imprisonment will be considered more fully later in this study in respect of ECtHR ruling on *Vinter, Bamber and Moore*.

⁴⁴⁷ van Zyl Smit (2010)

⁴⁴⁸ Bohlander (2009)

⁴⁴⁹ Para 33 www.cpt.coe.int/documents/hun/2007-24-inf-eng.pdf

5.3 Prisoners serving a whole life order

The group of offenders sentenced to whole life is small in number, but they are unique within the prison system. They are the only prisoners who have been sentenced to remain within the prison system until they die. There are other prisoners who will spend the rest of their lives in prison, but they will do so after the Parole Board takes a decision that they are too dangerous to release. Those offenders will face periodic reviews to assess future dangerousness and continued incapacitation where necessary. For the whole life order offenders, the judgment has been made that on the grounds of retribution and deterrence alone, a just and proportionate sentence is life-long incarceration. In prisons, in general, the regime is geared to progression towards release. With no release possible, questions arise over the challenges faced by the prisoners themselves, and by the prison authorities over appropriate regimes for those with no natural progression to release within a system geared primarily for that.

Accurate details of those serving a whole life sentence have traditionally been difficult to access. Since the CJA 2003 was implemented, sentences have been imposed in open court so names and details have been available to all. One of the effects of the Freedom of Information Act 2000, when it came into effect, was a requirement for the Home Office to provide information on such matters on request, which allowed information about whole life prisoner numbers to be available. Since January 2012, the Ministry of Justice in its *Offender Management Statistics Quarterly Bulletin* provides such information quarterly.⁴⁵⁰ Historically, the position was different in that the Home Office released no information. This may be seen as part of the secretiveness of the Department, previously discussed in relation to tariff setting. After notorious trials, the media immediately sought to compile a list of names and give overall numbers of those sentenced to remain in prison until their deaths. These details, however, were unreliable – differing from one another despite similar dates⁴⁵¹ – and by inaccurately including or omitting names.⁴⁵²

For earlier years, the most accurate information comes from ministerial answers to parliamentary questions. In 2004, the Minister was asked to provide information on the numbers serving whole life orders in each of the previous ten years.⁴⁵³ In 2008, a Minister provided an answer for the numbers of those with whole life orders in the previous year.⁴⁵⁴ The only information provided for which category of prisons these offenders were held in, was given in a parliamentary answer in 2009, but here care was taken, so that for categories with small numbers of such prisoners, the exact figure was not given.⁴⁵⁵ Instead they were listed

⁴⁵⁰ Available: <http://www.justice.gov.uk/statistics/prisons-and-probation/oms-quarterly>

⁴⁵¹ For instance on 16 July 2010, *The Telegraph* gave a figure of 35 and *The Daily Mail* gave a figure of 39.

⁴⁵² For instance a number of sources wrongly said Robert Black, sentenced for a total of four child abductions and murders, was serving a whole life order.

⁴⁵³ Hansard HC 19 April 2004 col 101w

⁴⁵⁴ Hansard HC 5 February 2008 col 1115w

⁴⁵⁵ Hansard HC 12 May 2009 col 735w

as 'Between 1 and 5'. Similarly, in 2009, the exact number of female prisoners serving a whole life order was not given. Instead it was given as 'Fewer than five'. This information was accompanied by a footnote: 'We have withheld exact numbers because to provide the information at this level could identify individuals'.⁴⁵⁶ The numbers of prisoners serving whole life orders in each of the years 1997 – 2007 was provided in a parliamentary answer.⁴⁵⁷ The only source of information on names and the accumulative totals of those given whole life orders appears in determinations in *Hindley*⁴⁵⁸ and *Coonan*.⁴⁵⁹

From the information given to parliament, it is possible to gain some impression of how the numbers of whole life order prisoners have increased. This would be expected as, so far, more have been sentenced than have died.

	Total number of WLO prisoners			Total number of WLO prisoners
1994	31		2004	20
1995	32		2005	
1996	32		2006	
1997	31		2007	35
1998	23		2008	
1999	23		2009	34-46
2000	23		2010	
2001	22		2011	42
2002	22		2012	43
2003	21			

Table 1 Number of prisoners with whole life orders as given to parliament

NOMS provided information to Kandelina⁴⁶⁰ that eight whole life tariff prisoners were repatriated to the Republic of Ireland under the Good Friday Agreement. This accounts for the decline in numbers between 1997 and 1998. The increase between 2004 and 2007, as will be seen in the next chapter, is due to the High Court setting a tariff in terms of the transitional arrangements of Schedule 22 of the CJA 2003, with the High Court deciding whether whole life orders or minimum terms were appropriate. The range given in 2009 is due to the lack of exact numbers given in a parliamentary answer to avoid identification of individual prisoners. That year there were 26-34 Category A prisoners; 7, Category B; and less than 5, Category C. Another consideration is whether or not figures for any year include

⁴⁵⁶ *ibid*

⁴⁵⁷ Hansard HC 24 October 2007 col 364w

⁴⁵⁸ [2000] UKHL 21

⁴⁵⁹ [2011] EWCA Crim 5

⁴⁶⁰ Kandelina (2011): 84

those of prisoners with whole life orders who were in secure mental hospitals. The only clear statement relates to 2011, when there were five such prisoners in secure mental hospitals and 42 in prisons.⁴⁶¹

Given the quality of the data, it would be foolhardy to attempt to analyse whether the prevalence of committing such heinous crimes has varied over time. Even where there is information on the date of sentence, there is great variation in the time elapsed between committing the crime and trial. This varies from months to decades.⁴⁶²

While it is believed that the figures do not enable comment to be made on any changes in frequency of crimes resulting in whole life orders, it is possible to consider the nature of the crimes in terms of Schedule 21 (4):

Murder(s) by someone aged 21+	
(a) Two or more murders, where each involves any of	
i a substantial degree of premeditation or planning	16
ii abduction of the victims	0
iii sexual or sadistic conduct	17
(b) The murder of a child involving abduction, or sexual or sadistic motivation	14
(c) Murders to advance political, religious, racial or ideological causes	8
(d) Murder by an offender previously convicted of murder	18

Table 2 Schedule 21 (4) Categories of Murder

Men almost exclusively commit the crimes of ‘exceptionally high seriousness’: Myra Hindley and Rosemary West are the only females who have been sentenced to whole life.

⁴⁶¹ Given in interview by the Home Secretary.

⁴⁶² See for example *Sawoniuk* [2000] EWCA Crim 9, below

Lord Ramsbotham, in a 2012 debate in the House of Lords, drew attention to the youth of prisoners in jail: one in three of those sentenced were aged 18 to 24.⁴⁶³ The statistics available for prisoners with whole life orders do enable a view to be taken on the age at which offenders were sentenced and hence whether this population is significantly different from the age of the general population of prisoners.

Up to 25	4		40-49	18
25-29	4		50-59	11
30-39	19		60+	6

Table 3 Age of prisoners when sentenced to whole life order

Clearly the age of most prisoners when sentenced to whole life orders is significantly greater than that of the general prison population. The age of prisoners with whole life tariffs/orders is an issue for the prison service. Self evidently, such prisoners will grow old and (probably) die in prison, some serving decades there. By the definition of the prison service, which classifies elderly as 50+, 17 offenders would be classified as elderly on conviction. The highest numbers of prisoners in any age band (30-39 on conviction) face 40 or more years in prison if their life expectancy were to be the same as the male population at large; even if their life expectancy were only 70 years it would mean more than 30 years in prison. This consideration of the age of prisoners illustrates the challenges that such offenders pose for the prison service.

5.4 Imprisonment for those serving a whole life sentence

5.4.1 The development of secure imprisonment for the most serious offenders

As we have seen, the numbers of those in England sentenced to spend the remainder of their lives in prison is small. For prison authorities, however, they pose particular challenges. It would be remiss to undertake a study on the whole life order without including an examination of these challenges and also the associated challenges facing the offenders serving the sentence. Many academics have commented on the fact that the move to abolish the death penalty was not necessarily accompanied by clear policies on its replacement. Newcomen has argued that the abolition or suspension of the death penalty is the start of a penal journey not the end, and that penal administrators need imagination and humanity when dealing with

⁴⁶³ Hansard HL 20 March 2012 col 825

the group of offenders who could face long term or life-long imprisonment.⁴⁶⁴ Hodgkinson, referring specifically to the European situation, also concluded that the alternatives to capital punishment emerged with little or no informed debate. Developing penological strategies and discussion on resource implications came after negotiating the abolition of the death penalty, rather than being an integral and contemporaneous part of the negotiations.⁴⁶⁵

The Council of Europe has been criticised by Coyle for, at the time of underlining its commitment to end capital punishment, omitting to give directions as to conditions and standards relating to subsequent life imprisonment.⁴⁶⁶ Yet, the debate over such conditions and standards was not new. Bedau had long argued for a severe, but not intolerably cruel, punishment for those committing the gravest crimes, and that any punitive policy should be humane, feasible and effective. He put practical flesh on the bones of his ideals by recommending a seven-stage process of reviews and judgments, with only those prisoners 'failing' the review process serving a natural life sentence. His proposals differentiated between life without the *possibility* of parole and life without the *probability* of parole.⁴⁶⁷ He felt such a system, even allowing for an eventual life-long imprisonment, was still preferable to the death penalty. On that basis, he answered Sheleff's argument that 'if a person has no prospect of being released, (he) has no scintilla of hope ... his punishment is tantamount to a delayed death penalty.'⁴⁶⁸

Sheleff is not alone in equating whole life imprisonment with a form of living death. Blom-Cooper and Morris have written of 'entombment for life' and of an 'immuring within prison walls' and life within 'an iron cage of vengeance'.⁴⁶⁹ An American former lifer, referred to it as 'a death sentence by incarceration' and wrote that anyone who escaped the death penalty but was given life without parole merely traded a faster form of death for a slower form of death.⁴⁷⁰ An English prisoner, currently serving a whole life order, in personal correspondence for this study also wrote in terms of the sentence being a death sentence. He argued that a whole life sentence is 'a death penalty by the back door' using old age and infirmity as the instrument of termination.

Perhaps these views echo those within a Howard League for Penal Reform publication that claimed that England and Wales had become a jurisdiction that punishes excessively and harshly.⁴⁷¹ It claimed that prison had become the defining tool of punishment with little attention paid to the relationship between legislation and the increasing number of people being imprisoned. It appealed for a revised system based on the philosophy of penal

⁴⁶⁴ Newcomen (2005): 278

⁴⁶⁵ Hodgkinson (2005): 260-261

⁴⁶⁶ Coyle (2005) : 279

⁴⁶⁷ Bedau (1990): 494

⁴⁶⁸ Cited *ibid*: 493

⁴⁶⁹ Blom-Cooper & Morris (2004):132 & 8

⁴⁷⁰ Paul Wright in interview with Adam Liptak *The New York Times* 5 October 2005

⁴⁷¹ Howard League (2009)

moderation. Others have made the same appeal. Snacken argued that penal moderation places a stronger emphasis on human rights and, as many people cherish these rights, governments should be required to explain and defend any penal policy that appears harsh or disproportionate.⁴⁷² Duff also wrote of the harsh and destructive way punishment is imposed, pointing out that imprisonment, in effect if not by design, can be inhuman, oppressive and unduly severe. He wrote of the apparently inexhaustible appetite for penal harshness in Britain and USA.⁴⁷³ Garland also felt that the two countries could be discussed together as both now treat imprisonment as a mechanism of exclusion and control.⁴⁷⁴ However, the way in which the two countries tackle the challenge of imprisoning those offenders who have committed the most serious crimes is different in more than one respect. Because the prisoners on whom this study is centred are frequently considered the most dangerous to the general public and their management poses challenges to prison authorities, it is of interest to examine how the present methods of secure containment have evolved since the abolition of the death penalty, and how they differ from regimes operating in the USA.

The system in the USA is based on segregation, typified by the prisons commonly and widely termed supermax facilities. The first supermax is recognised as Marion County Jail in Illinois, but as Ward and Werlich point out, the strategy can be dated back to 1829 and a Pennsylvanian penitentiary which had an architectural design specifically chosen to ensure that no prisoner could have contact with any fellow prisoner.⁴⁷⁵ A century later came the decision to concentrate the most dangerous and unruly prisoners on Alcatraz Island. The prison established there had many of the features of the modern supermax: segregation and isolation used as punishment, with emphasis on containment. When Alcatraz was closed in 1963, it was considered a relic of outdated penal philosophy and when Marion was opened in the same year social workers, psychologists, educators and counsellors were employed. Within a decade things altered and the prison reverted to an institution of maximum security with human interaction virtually eliminated.⁴⁷⁶ The pattern was copied by other states and 34 states now depend on supermax facilities to detain around 25,000 offenders who are deemed the most dangerous. King points out the supreme irony that despite the nature of the inmates, staff find working in these establishments to be relatively stress free because of the 'lock down' conditions and the high staff ratio.⁴⁷⁷ Although the staff may be relaxed about life in a supermax, academic comment demonstrates concern. Ward and Werlich argue that when governments exercise their maximum coercive authority, as in the supermax system, that is when legal, journalistic, legislative and research oversight is needed most.⁴⁷⁸ Simon also argues that, with the penological shift towards punishment and incarceration, there is an

⁴⁷² Snacken (2010):287

⁴⁷³ Duff (2010):294

⁴⁷⁴ Garland (2001):177

⁴⁷⁵ Ward & Werlich (2003): 55

⁴⁷⁶ *ibid*: 56

⁴⁷⁷ King (2007)343

⁴⁷⁸ Ward & Werlich (2003): 69

increased need for sources of knowledge of workings of prisons. However, he notes that under these conditions, the social scientist often becomes less rather than more welcome.⁴⁷⁹

The supermax philosophy is summed up by Feeley and Simon as being a part of the new penology: neither about punishment nor rehabilitation, but about the efficient management of unruly groups with the emphasis now purely on incapacitation. Risk profiles of prisoners become more important than crimes committed.⁴⁸⁰ England and Wales undoubtedly also have unruly groups of prisoners, some of whom may well be serving whole life orders but, as King points out, the USA idea of super-maximum security has fallen largely on stony ground in England and in Europe as a whole.⁴⁸¹ Ward and Werlich also stress how USA penal policy puzzles and disturbs criminologists, academics and prison reform leaders in the UK.⁴⁸² This is reflected in Coyle's view that it is reasonable to conclude that prisoners in supermax facilities are likely to be damaged by years of near isolation in such an environment. Coyle accepts that every country faces the challenge of dealing with the small group of very violent prisoners who refuse to conform to legitimate expectations. The manner in which these societies respond to human beings who have little or no respect for other human beings presents a real test of these societies' own humanity.⁴⁸³

As early as 1968 in England, some of the criteria for Coyle's 'test of humanity' might have been met in the Radzinowicz Report.⁴⁸⁴ The report was to lead England's prison service on a different road from the one embarked upon by the USA. It rejected the findings of the Mountbatten Report⁴⁸⁵ two years earlier, which stated that England required a new purpose-built maximum security facility in which to concentrate all prisoners posing a threat to prison security and safety. Radzinowicz rejected the suggestion of concentration, recommending the opposite: the dispersal of the most challenging prisoners throughout the prison system. Reading the two Reports, the earlier can appear punitive and harsh and the later can appear forward thinking and reformatory. Interestingly, King argues that, in retrospect, it is possible to see the two reports as not so very different except in regard to the choice of concentration versus dispersal. They certainly did not come from radically different discourses of punishment: Radzinowicz recommended observation towers with armed guards while Mountbatten advocated a liberal rehabilitative regime within maximum security boundaries.⁴⁸⁶

Prisoners who were deemed an escape risk or who had committed the most heinous of crimes were, as a result of Radzinowicz, dispersed throughout the system. Prisoners, as a result of

⁴⁷⁹ Simon (2000): 303

⁴⁸⁰ Feeley & Simon (1992): 458

⁴⁸¹ King (1999): 182

⁴⁸² Ward & Werlich (2003): 53

⁴⁸³ Coyle (2005): 284

⁴⁸⁴ Home Office (1968)

⁴⁸⁵ Home Office (1966) The Commission was set up after a series of prison escapes including those of Ronnie Biggs, Charles Wilson, and George Blake.

⁴⁸⁶ King (2007): 331

Mountbatten were now categorised. The four categories - A, B, C, D - remain today. Price has argued that the security categorisation is perhaps the most important internal procedure the prison service has: it structures the use of the prison estate, acting as its first line of defence against escapes, determining living conditions and the allocation to prisons of prisoners. Yet, Price maintains, it operates in 'relative obscurity, opacity and with quiet power.'⁴⁸⁷ ⁴⁸⁸

The dispersal policy, with the use of control units within eight prisons, appeared to create more problems than it solved during its first 25 years. Prison riots and industrial action by prison staff led to further changes to the system, but the major stimulus for change was the Woolf Committee Report in 1990, set up as a direct result of the Strangeways Riots.⁴⁸⁹ Woolf argued that a challenging, constructive and worthwhile role for the prison service would be to strike a balance between three elements of prison - security, control and justice – a balance that would mean the end of the over-reliance on security and control. The prison should be more than merely a form of physical containment and should do more than simply try to prevent re-offending in the future. Prisoners should be treated with justice, not merely humanity.⁴⁹⁰ Although initially the Report appeared to be well received by the government - with the subsequent White Paper ⁴⁹¹ adopting the recommendations, stressing the importance of custody, care and justice - a new Home Secretary changed the dynamics. The growing gap between Lord Woolf's recommendations and government policy expanded when Michael Howard informed the 1993 Conservative Party Conference that prisons should be 'decent but severe.' Woolf had warned that intolerable conditions, harsh procedures, excessive security and antagonistic staff would only fuel the feeling of dissatisfaction, unite prisoners in their sense of being oppressed and most likely cause even greater problems of security and control. Indeed, it was soon argued that there was mounting research evidence that the best way to create legitimacy with inmates, and encourage them to behave better, was to treat prisoners justly, respecting their dignity and their rights.⁴⁹²

An escape from Parkhurst dispersal prison in 1995 led to a further report.⁴⁹³ Its recommendation for a single new maximum-security prison was again rejected, but a new system using Close Supervision Centres (CSCs) within prisons was adopted soon after. Like the dispersal policy, the CSCs had a troubled initial period, but changes were made after an influential Inspectorate report ⁴⁹⁴ which reduced the level of imposed segregation and recommended that CSCs be used more sparingly. Security, however, had become of central importance to the Prison Service. Drake writes of the move from an approach where prison

⁴⁸⁷ Price (2000)

⁴⁸⁸ Categorisation in respect of whole life order prisoners will be discussed later in this chapter.

⁴⁸⁹ Home Office (1991a)

⁴⁹⁰ *ibid* para 43

⁴⁹¹ Home Office (1991b)

⁴⁹² Cavadino & Dignam (2002): 213 See also Cooke (1989); Sparks & Bottoms (1995)

⁴⁹³ Home Office (1995)

⁴⁹⁴ HMIP (2000)

governors foregrounded the humane treatment of prisoners to one where the liberal discourses gave way to security based ones and where security became dominant. This brought, she argues, a different perception of prisoners.⁴⁹⁵ Drake cites Morgan, who argues that earlier enquiries had seen prisoners as 'real people', but later enquiries such as Learmont saw prisoners as 'dangerous phantoms who must be exiled or controlled.'⁴⁹⁶ This perception is restated by Drake, who argues that it appears safer and less emotionally troubling for staff to detach themselves from prisoners.⁴⁹⁷ Recently, the Prison Ombudsman Nigel Newcomen, talking of the increasing number of elderly and dying in prisons, has commented on how prisons still struggle to balance security with humane and dignified treatment.⁴⁹⁸

If the impression is given that English prisons have undoubtedly become more security conscious and more risk averse when dealing with prisoners, it would be difficult not to accept that they still differ greatly from those in the USA in their treatment of perceived dangerous offenders. A century ago, in 1910, Winston Churchill had commented that the treatment of criminals was one of the most unfailing tests of the civilisation of any country.⁴⁹⁹ Perhaps the English prison inspectorate and bodies such as the Independent Monitoring Boards (IMBs) are aware of this 'test' as they play a critical role in ensuring an element of fairness and justice exists in prisons. In the 1990s, Lord Ramsbotham, when HMCIP, had introduced the concept of 'healthy prisons', where everyone could feel safe and is treated with respect.⁵⁰⁰

This is still echoed in a current Prison Service objective: to treat prisoners humanely, decently and lawfully. The Service also has the guidance of the United Nations' recommendations which state that prison authorities should provide life-sentenced prisoners with opportunities for communications and social interaction and opportunities for work with remuneration, study and religious, cultural, sports and other leisure activities.⁵⁰¹ The Council of Europe has very similar recommendations for the conditions for life-sentence prisoners in order to provide purposeful use of time.⁵⁰² The Council stresses the particular challenges raised by those serving life-long sentences: detention of persons who have no hope of release poses severe management problems in terms of creating incentives to cooperate and address disruptive behaviour, the delivery of personal development programmes, the organisations of service plans and security.⁵⁰³ The close monitoring by HMIP and IMBs and the awareness of guidelines from the UN and the Council of Europe play a protective role in inhibiting the development of super-max equivalents in the UK.

⁴⁹⁵ Drake (2011): 376

⁴⁹⁶ *ibid*: 377

⁴⁹⁷ *ibid*: 380

⁴⁹⁸ Newcomen (2013)

⁴⁹⁹ Hansard HC 20 July 1910 col 1354

⁵⁰⁰ Ramsbotham (2005): 66

⁵⁰¹ United Nations (1994) *Life Imprisonment* Vienna Cited in Coyle (2009)

⁵⁰² Council of Europe (2003) Recommendation Rec (2003) 23 of the Committee of Ministers Council of Europe Strasbourg Cited in Coyle (2009) : 130

⁵⁰³ In A Report on Prison Conditions in Hungary Para 33 Available: www.cpt.coe.int/documents/hun/2007-24-inf-eng.pdf

5.4.2 Imprisonment: increasing numbers and costs

In 1967, during a period of austerity, members of the House of Commons discussed major cuts to the prison building programme amidst the background of rising prison numbers, with the resultant overcrowding and worsening conditions.⁵⁰⁴ Since then, the issues and consequences of increasing prison numbers have been of concern, and not only in parliament. In 1991, Lord Woolf, examining the state of England's prisons, commented on the perils of overcrowding, and ten years later, delivered a lecture at the Law Society on what had happened since his Report. He was very aware of the relentless increase in prison numbers, and felt that overcrowding was the most destructive element to an effective prison, with educational and training opportunities hit heavily. He described overcrowding as an AID's virus: debilitating the whole system and with any cure dependent upon vast expenditure.⁵⁰⁵ Two years later, in parliamentary debates leading to the CJA 2003, similar prison issues were again raised.⁵⁰⁶ A decade later, the issues are unchanged. In 2011, Geoff Dobson of the Prison Reform Trust (PRT) wrote that the increase in prison numbers meant that 'the prison estate is becoming human warehouses, with regimes which are hard pressed to offer any employment or education'.⁵⁰⁷ Later that year in parliament, a Minister of State in the Justice Department disclosed that almost 25% of prisoners were held in overcrowded accommodation, with 19,268 prisoners doubling up in cells designed for one occupant.⁵⁰⁸

The question of increasing prison numbers and the resultant pressure on resources affects all prisoners. It can be argued that it has particular relevance to those whose natural life will be spent in prison. As will be discussed later in this chapter, those with knowledge of prison management agree that this group, more than any other, require the amenities of well-resourced prisons, be it work, social or educational facilities or a sense of dignity gained from having a space of their own. Coyle also argues that, given the length of time that they have to spend in prison, long-term prisoners should be given priority for work, education and cultural activities when resources are scarce.⁵⁰⁹ This group of people includes those on whom this study is centred: those who have committed heinous crimes and who face life-long sentences. Thirty years ago, Leon Brittan, when Home Secretary, talked of needing to address the needs of 'very violent prisoners serving life sentences who might take the view that they have nothing

⁵⁰⁴ Hansard HC 26 January 1967 col 1756 – 8

⁵⁰⁵ Woolf (2001)

⁵⁰⁶ See for example Hansard HL 16 June 2003 col 640-641; HL 17 November 2003 col 1805; HC 4 December 2002 col 947-948

⁵⁰⁷ Geoff Dobson, Deputy Director Prison Reform Trust commenting on new record high prison numbers announced 19 August 2011 (Prison Reform Trust website)

⁵⁰⁸ Hansard HL 3 October 2011 col 135 Lord McNally

⁵⁰⁹ Coyle (2005)

to lose by violent and recalcitrant behaviour'.⁵¹⁰ In the CJA 2003 debate Lord Dholakia talked of the challenge to prison management of the growing number of prisoners who had been deprived of hope and who had nothing to lose.⁵¹¹

This issue of prisoners who have nothing to lose posing a particular challenge to prison staff, was raised by members of the Prison Governors Association (PGA) in interview for this study. They suggested that such offenders could murder with impunity and probably not even face trial. They stressed the fact that prison officers are unarmed: that their ultimate protection lay in outnumbering violent prisoners. They talked of the concern of being taken hostage by a prisoner with a whole life order who had nothing to lose: 'You would really be in trouble'. This accorded with what a Home Office official said for this study, when she recounted seeing staff on duty guarding a notoriously violent prisoner serving a whole life order: although he had seven officers guarding him when out of his cell, what struck her was how scared the officers looked. To her it seemed as if it was a question of power: the prison had the power to dictate his daily timetable and his every move, so perhaps his only demonstration of power was to be threatening.

The needs and appropriate regime of such prisoners is not straightforward for prison authorities to address. One of Scotland's most famous convicted murderers, Jimmy Boyle, has written of the group, whose crimes range from unacceptable domestic murder to more complex sadistic killing, as needing a highly skilled and specialised regime; one that can help unravel their deep needs and problems.⁵¹² Another Scottish convicted murderer, Thomas Campbell, has also talked of prisoners like himself with very special needs, requiring very special facilities and resources.⁵¹³

The 'very special facility', which both Boyle and Campbell had experienced and benefited from, was the Barlinnie Special Unit that had held a small group of Scotland's most recalcitrant and violent offenders from 1973-1995. The Unit had been a brave and controversial experiment, dealing with small numbers of the most difficult prisoners in the system. It was a relatively relaxed and well resourced regime, staffed to a high level with specially selected and trained officers to allow more interaction between prisoners and staff, and having access to psychiatrists, therapists and educational art specialists. Perhaps predictably, the Unit attracted mixed reactions. One journalist wrote of it being a target of public hostility, and labelled 'a soft home for hard men generously funded by the tax payer'. He wrote how the 'pub talk' was of five star luxury.⁵¹⁴ A parliamentary debate on the Unit in 1980⁵¹⁵ also drew attention to the public's view of the regime as being 'bizarre'. Particular elements that attracted attention were

⁵¹⁰ Hansard HC 12 February 1980 col 1297

⁵¹¹ Hansard HL 16 June 2003 col 640

⁵¹² Boyle (1985)

⁵¹³ *The Glasgow Herald* 10 January 1995

⁵¹⁴ *The Daily Record* 3 October 2009 Tom Hamilton

⁵¹⁵ Hansard HC 12 February 1980 col 1494 ff

the lack of restrictions on mail and phone calls, and freedom to move in and out of cells, each decorated and furnished individually. This was to encourage the concept of prisoners being first and foremost human beings, not stripped of humanity on entering prison. Such 'new fangled ideas,' one parliamentarian pointed out, seemed always to raise suspicion, 'particularly those that appeared to run counter to the philosophy set out in the Old Testament about crime and punishment and such like notions beloved of our Victorian grandparents'.⁵¹⁶ The Barlinnie Special Unit was not replicated in England. The Home Secretary, Leon Brittan, drew attention in the debate to the 'heavy staffing' commitment required and that the decision not to set up additional similar units elsewhere was partly a matter of the costs involved.⁵¹⁷

Brittan used the debate to draw attention to Grendon Prison which had pre-dated the Barlinnie Unit and which, he explained, was set up to investigate and treat offenders suffering from disorders requiring a psychiatric approach, and to explore the problem of the psychopath. Brittan praised the continuing work of Grendon and its important role in treating psychopathic offenders who had the motivation and intelligence to benefit from group therapy. While Barlinnie was closed after adverse public opinion, Grendon has continued, although it also has faced criticism. The academic David Wilson, a former governor of Grendon, has talked of how the prison has never been without its detractors. Pointing out that although for most of the residents life is harder than being locked up in a cell, 'to the 'bang 'em up brigade' it sounds like a soft touch'.⁵¹⁸ Wilson has also written of the risk that cuts in Grendon's budget could put the prison's successful psycho-dynamic approach in danger.⁵¹⁹ Such budgetary cuts at the prison were referred to in 2010 by Genders and Player, who wrote⁵²⁰ of revisiting Grendon 20 years after they had conducted an ethnographic study of the prison. They found that, 20 years on, it operated in a very different political, economic and social context. In contrast to many penal regimes, Genders and Player found that inherent optimism, with a strong belief in individual change being possible, was still functioning. They did, however, identify how budgetary cuts had undermined important aspects of the regime, with more financial belt-tightening to come.

Concern over potential cuts does not only affect Grendon. As seen above, the prison system is overcrowded and the increasing numbers of prisoners incur increasing costs. Anne Owers, speaking on her retirement after nine years as Chief Inspector of Prisons,⁵²¹ stressed how frighteningly easy it is to increase the prison population and how much more difficult it is to reverse the trend. She talked of how there were all kinds of levers within government and within society that all too swiftly jerk into action, resulting in increasing incarceration. She

⁵¹⁶ Russell Kerr *ibid* col1495

⁵¹⁷ *ibid* col 1499

⁵¹⁸ In interview to the BBC 16 November 2011. Available: <http://www.bbc.co.uk/news/uk-11947481>

⁵¹⁹ 'Grendon: A prison in danger' in *Inside time* November 2010 Available:

<http://www.insidetime.org/articleview.asp?a=843>

⁵²⁰ Genders & Player (2010): 431- 450

⁵²¹ Valedictory Lecture, Westminster Central Hall 13 July 2010 Addressed to the Prison Reform Trust

highlighted tougher sentencing policy as one of the major factors contributing to overcrowding, specifically mentioning the CJA 2003's starting points for mandatory life. The increase in length of sentences for serious crime as a result of the Act has been examined earlier in the study. Also introduced in the 2003 Act (s224 – 236) was the expansion of indeterminate sentences for sexual and violent offenders. This wider use of life imprisonment with the introduction of indeterminate sentences for public protection contributed to increased prison numbers. Her comments echoed the findings of Hough, Jacobson and Millie⁵²² who found that the prison population had grown because of sentencers imposing longer sentences for serious crimes and also imposing custodial sentences on offenders who previously would have received non-custodial sentences. Tougher sentencing in turn, they found, came about through an increasingly punitive climate of political and media debate, legislative changes with new guidelines and sentencers' perceptions of changes in patterns of offending. Six years after these findings, Hough and Jacobson reiterated their belief that the uncontrolled growth of the prison population was first and foremost a political problem, with the interaction between politicians and the media and the public a critical factor.⁵²³

Both Garland and Simon have explored the changes in use of prisons by governments, especially in the USA and Britain, and the part played by public opinion. Garland argues⁵²⁴ that prison has changed from a place of reform and rehabilitation to one of incapacitation and punishment, mainly to satisfy popular and political demands for retribution and public safety. This is echoed by Simon who writes⁵²⁵ of prison as a form of exile and 'a space of pure custody, a human warehouse or even a kind of social waste management facility'. He links these changes to societal and political pressures associated with the on-going 'war on crime'. Faulkner, writing specifically about the situation in Britain, contends that the notion of 'positive custody' has been left behind and how, especially since the New Labour government of 1997, prison services have become 'an agency of law enforcement whose function is to protect the public and secure compliance with orders.'⁵²⁶ Lacey points out that an ever-increasing prison population has become an almost inevitable feature of our political world. As governments struggle to establish their credentials, adopting strong law and order policies, this has led to an extreme politicisation of criminal justice policy resulting in soaring prison numbers and inadequate prison capacity. She argues:

The sad fact, however, is that the size and demographic structure of the prison population suggest that the socially exclusionary effects of the 'tough on crime' part of the criminal policy equation have systematically undermined the inclusionary 'tough on the causes of crime' aspirations. The rate of imprisonment has continued to rise inexorably even in a world of declining crime, increasing by 60% since the inception of the downturn in crime in the mid 1990s.⁵²⁷

⁵²² Hough Jacobson & Millie (2003)

⁵²³ Hough and Jacobson (2009): 31

⁵²⁴ Garland(2001) generally, but especially chapters 7&8

⁵²⁵ Simon(2007):143

⁵²⁶ Faulkner(2007):142

⁵²⁷ Lacey (2009):15-16

Although in Britain the 'tough on crime' approach may be associated with Blair's time as prime minister, there is no indication that the approach has altered since then. Two examples illustrate this. In 2011, the Labour Shadow Justice Secretary, Sadiq Khan, wrote an article which appeared critical of the ever increasing prison numbers and questioned the relationship between prison population and crime rates.⁵²⁸ Alarm bells appear to have rung when his article was presented in the media as an argument for jailing fewer people. The Shadow Home Secretary, Yvette Cooper, swiftly made a speech stressing that the Labour Party would continue to keep its long-term commitment to be tough on crime and the causes of crime.⁵²⁹ Cooper was probably only too aware of the consternation caused when Kenneth Clarke, as Justice Secretary in the coalition government, expressed his desire to lower the prison population, telling *The Times* in an interview that it is 'loopy' to think you can solve crime by locking everyone up.⁵³⁰ Like Cooper, David Cameron - perhaps having learned of possible public reaction from when he was special adviser to Michael Howard when he was Home Secretary - moved to reassure the public of the commitment of his party to criminal justice.

More recently, perhaps to reinforce this commitment, the government has reignited the debate on size and rationale of prisons. Chris Grayling, as Justice Secretary, has announced plans to close six smaller prisons and build what would be Britain's largest prison, to hold over 2,000 prisoners. David Wilson has suggested that such a project is merely a way for the government to appear tough on crime and that it would do nothing to cut crime nor make prisons a safer place for either prisoners or staff. He recalls that four years earlier David Cameron had, in fact, criticised the idea of larger prisons and the then Shadow Justice Secretary, Nick Herbert, had talked of 'huge prisoner warehouses' and had claimed that what was needed were smaller local prisons.⁵³¹ They had both been responding to the previous government's positive response to Lord Carter's Report,⁵³² in which he recommended the building of three so-called Titan prisons, each to hold 2,500 prisoners. The emphasis in both Grayling's latest proposal and in those in the Carter Report appear to have been on the efficient management of resources: on maximum economy rather than maximum security. After the 2007 Report Jack Straw, then Justice Secretary, had confirmed that Lord Carter had been employed to look 'at the potential economies and benefits from large prisons.'⁵³³ The proposals for Titan prisons were dropped, and whether Grayling's plans suffer the same fate remains to be seen.

⁵²⁸ 'Doing real justice to British criminals and the public' *The Guardian* 6 March 2011

Available: www.guardian.co.uk/commentisfree/2011/mar/06

⁵²⁹ Available: www.guardian.co.uk/politics/wintour-and-watt/2011/mar/10

⁵³⁰ *The Times* Saturday 11 December 2010

⁵³¹ In *Inside Time* February 2013 Available http://www.insidetime.org/articleview.asp?a=1394&c=six_small_prisons_to_close_one_big_one_to_open

For Herbert's comments on 'monstrous warehouses' see HC 17 June 2008 col 871

⁵³² *Securing the Future: Proposals for the Efficient and Sustainable Use of Custody in England and Wales* Ministry of Justice December 2007

⁵³³ Cited in 'Titan Prisons: A gigantic mistake' A Prison Reform Trust Briefing Paper Available: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Titan%20prisons%20-%20a%20gigantic%20mistake.pdf>

Increasing numbers in prison has, of course, financial implications. Costs certainly were a subject readily discussed by respondents for this study. When asked if prison works, the Director of the Howard League instantly replied 'Well, it's expensive.' The former HMCIP, in interview, feared that the improvement in prison care that she had witnessed was endangered by overcrowding and associated costs. An increasing prison population in a non-growing resource situation meant there were limits on what could be done to sustain the improvement of conditions. The political rhetoric leading to ratcheting-up of sentences would be hard to change and would take brave politicians to do it. Some countries, like Finland, she felt had done it but she did not see it happening in this country. Cost implications did not end with restricting the number of offenders going to prison: non-custodial sentences were also expensive.

The former Director General of NOMS, in interview for this study, also raised costs as a crucial factor in prison administration. He felt that the increase in numbers of long-term or life-sentenced prisoners represented a huge financial burden. At a cost of £45,000 a year for each prisoner and a total prison service cost of £3 billion, the figures were huge, especially in a time of economic austerity. He felt that the interaction of the media and the public and politicians was strong, with politicians trying to drive the media agenda but having to live with the media trying to set that agenda. All of this left the media-led public with the belief that prisoners were not being dealt with harshly enough. He felt that perhaps the only thing that might change opinions was the sheer pressure of money. He was not alone in considering that the cost of the prison service might eventually have a sobering effect on media and public expectations of sentencing. Even before the current period of austerity started, Lord Phillips in 2007 raised the question of whether the cost of the consequences of the CJA 2003 had been calculated and considered to be value for money. He suggested that locking one man up for 30 years meant an investment of £1 million in his punishment. He pointed out that that sum would pay for quite a few surgical operations or for a lot of remedial training in schools.⁵³⁴ In interview for this study, Lord Phillips reiterated this point when he suggested that if the cost of prisons was met by a separate tax, it would focus the public's attention very quickly on the actual costs of increasing prison numbers. He expressed his concern over imprisonment, saying that in fifty years time people may well look back and think it was barbaric to lock people up, just as we currently look back and think torture and the stocks were barbaric.

Academics make a similar comparison. Simon argued that David Cameron and Nick Clegg, to survive in government, needed to launch a series of budgetary reforms that would leave little room for largely symbolic anti-crime and terror measures. In considering cuts, Simon suggested that the expensive prison estate was an obvious place to begin deep cuts, rather

⁵³⁴ Lord Phillips (2007a)

than placing the cuts on the backs of Britain's poor and middle classes.⁵³⁵ Loader also argued⁵³⁶ that the world-wide financial crisis is an opportunity to rethink and to temper enthusiasm for punishment. He hoped that prisons could come to be seen as an expensive public resource that should be used more sparingly. Success 'depends on citizens coming to the conversation as taxpayers rather than, say, as fearful victims or potential victims.' Loader accepted that it could be a price the public felt must be paid, preferring instead to cut back even more on in-prison spending such as education, or making prisons even more austere. Lacey argued⁵³⁷ even more strongly for an increased perception by the public about the economic cost of growth in prison numbers. She pointed out that, as high rates of imprisonment make at best a modest difference to crime levels, it is economic irresponsibility to invest an ever-growing proportion of GDP in the prison budget. Given that the government's competence in managing the economy is key to its electability, this gives the opportunity for those who wish it to press home the message that increased prison spending is a form of fiscal mismanagement. Lacey accepted that the public debate would have to become more 'mature' for progress to be made, but does see a glimmer of hope over the beginnings of 'an escape from the cell of penal populism'.

It is not clear whether Lacey's hopes are utopian or achievable. In the three years since she wrote the article the financial situation has become worse, and perhaps with its mind on other matters, there has been less stress on the 'tough on crime' approach from the government. Whenever a law and order issue has been raised however, be it the London riots of 2011, or the Justice Secretary suggesting sending fewer people to prison, or a suspected terrorist 'escaping extradition', or the renewed attention on prisoners' voting rights, a section of the media and the public has been quick to react in a way which suggests punitiveness is more important than financial consequences to a large section of the population.⁵³⁸

However, in the USA the apparently relentless increase of supermax facilities shows signs of being affected by the financial climate. In Mississippi, the state's supermax prison has been closed with estimated savings of \$8 million a year, and Illinois has announced its intention to follow suit.⁵³⁹ With inmates of supermax facilities costing between 50% and 300% more to supervise than ordinary prisoners and with many States facing financial deficits, it is not surprising one commentator has expressed the thought that 'money not morality, may turn out to be the supermax's Achilles heel'.⁵⁴⁰

⁵³⁵ Simon (2010): 9

⁵³⁶ Loader (2010):361-362

⁵³⁷ Lacey (2009):18-19

⁵³⁸ However it should be noted that the numbers in prison has stabilised since 2010 and the Howard League, quoting the Ministry of Justice figures, show a 3.8% decline in the figures for 12 month period up to 15 March 2013. (Available: <http://www.howardleague.org/weekly-prison-watch>)

⁵³⁹ Article in *The Week* 21 April 2012

⁵⁴⁰ *ibid*

5.4.3 Treatment of prisoners with whole life or very long term sentences

Charles Clarke, when Home Secretary, stressed the need not to consider prisoners with a long sentence to be a homogeneous group, drawing attention to their individual needs and aspirations.⁵⁴¹ Coyle has stated that the automatic assumption that all long-term prisoners are dangerous in prison has not been supported by experience. They do not present more disciplinary problems than any other group.⁵⁴² However, Coyle is writing of prisoners who have an investment in possible parole. Prisoners with a whole life order, as discussed earlier in this chapter, do not have this incentive to accept the prison regime. Their reaction to prison varies. Vinter, who is serving a full life sentence, wrote in a letter to the media:

I was involved in a stabbing (not fatal) on the wing. You see how I can admit in a letter to an offence as serious as that. It's because the judge when he sentenced me to natural life, gave me an invisible licence that said I can breach any laws I want, no matter how serious, and the law can't touch me. I'm above the law.⁵⁴³

In contrast, Vinter's co-appellant to Strasbourg, Jeremy Bamber, serving the same sentence, appears to have been a model prisoner for the duration of his incarceration,⁵⁴⁴ concentrating on useful prison employment as a brailist, giving basic literacy support to illiterate prisoners and preparing his appeals against conviction.

Details of the life of prisoners serving the whole life sentence are hard to obtain. Even in parliamentary written answers, rigorous measures are taken to ensure individuals cannot be identified. There is a perception that the whole life order is shrouded in secrecy. Erwin James, a life-sentenced murderer released on licence, wrote in *The Guardian* of how a 'veil of mystery shrouds imprisonment in this country which is a major obstacle to progress. It urgently needs to be lifted.'⁵⁴⁵ Jewkes contends that although the sheer number of media portrayals of incarceration suggests a public fascination with the inner world of prison, it is a world that, for the most part, remains shrouded in mystery and misunderstanding.⁵⁴⁶ Crewe has written optimistically of prison research in Britain undergoing something of a revival.⁵⁴⁷ Certainly however, as discussed above, access to staff and prisoners was not allowed by NOMS for this study.

⁵⁴¹ Charles Clarke (2005) 'Where next for Penal Policy?' Speech to the Prison Reform Trust 19 September 2005 Available: <http://www.prisonreformtrust.org.uk>

⁵⁴² Coyle (2005):280

⁵⁴³ Quoted in *The Guardian* 5 December 2012 Simon Hattenstone & Eric Allison

⁵⁴⁴ Grand Chamber Application on behalf of Vinter, Bamber and Moore para 17

⁵⁴⁵ 'A Life Inside' 18 December 2003

⁵⁴⁶ Jewkes (2007): xxv

⁵⁴⁷ Crewe (2007): 145

In interviews for the study, those with experience of prisons accepted that a sense of secrecy could surround prisons. The former HMCIP, however, argued persuasively against the word 'secrecy,' stressing that there was a need for 'caution'. Many of those serving whole life orders were the focus of tabloid publicity and so the prison service was reluctant to give details, not solely for reasons of security or secrecy but to avoid additional publicity. Any publicity could put more pressure on individual prison staff who had been targeted in the past by the media, and also on prison management who were already doing a difficult job. When it is remembered that a tabloid newspaper reporter went to the length of obtaining a job in prison in order to gain a photograph of Ian Huntley, the need for 'caution' is perhaps justified.⁵⁴⁸

The respondents were also at pains to say that stereotyping this group of prisoners is misleading. Many non-whole life prisoners are much more dangerous and violent. Almost all of those with knowledge of prisons interviewed agreed that the need for security and safety was the main priority in prisons now, with even education and leisure activities being restricted. This affects the relationship between staff and inmates, and the time spent out of cells. Members of the PGA, in interview, said that the prison regime today is essentially security driven, with emphasis on containment to prevent risk to other prisoners as well as to staff. One of the lifers interviewed confirmed this view, saying that during his long imprisonment he was aware of an increasing emphasis on security and containment.

Both the former HMCIP and Director General of NOMS stressed that there was the potential for those serving a whole life to progress from Category A to Categories B and C. They accepted it was less likely, probably unlikely, to progress further because of political concerns. Certainly progressing to any form of semi/open prison would be a political risk too far with the probability, as one respondent said, of 'ministers being crucified' if the public became aware.⁵⁴⁹ Members of the PGA also said that they were aware of certain whole life order prisoners who could, from a security point of view, be reassessed and placed in a lower category, but political reasons stopped this.

This accords with the view of a whole life prisoner who was in personal correspondence for this study and whose appeal to ECtHR is central to it. He said he has been a model prisoner for 27 years, yet remains in Category A. If he had been an 'ordinary' offender he could have expected to be in Category C or even in an open prison but his whole life tariff appears to have stopped that. If after 27 years this is the case, it does make one speculate that those who are now, according to the parliamentary answer, in Categories B and C could be limited to the very elderly prisoners who are known to be serving a whole life order.

⁵⁴⁸ David McGee *The News of the World* June 2003 (later charged under the 1952 Prisons Act)

⁵⁴⁹ The Parole Board, in response to the consultation paper following *Brooke* (see below Chapter 7) called for its recommendations on moving prisoners to open prison conditions to be made binding on the Secretary of State. (Annual Report 2001-10)

Those involved professionally with prisons frequently stress the need for some form of progress or movement in the lives of those who know they will spend decades in prison. Jewkes wrote of a prison sentence being a journey.⁵⁵⁰ Coyle stressed the needs for short term goals, with a series of targets achievable in a one or two year period, ideally with individual achievements being linked in an integrated manner.⁵⁵¹ The former Director General of NOMS argued that stimulation was essential, especially the opportunity to learn, or learn of, something new in order to experience a sense of movement and progress. He made the significant point that 'hope does not need to be release.' The sense of progress, whether physically to a different prison, intellectually through learning something new or mentally by adjusting positively to circumstances: all could create hope.

A lifer, released after serving 30 years in prison, who was interviewed for this study, stressed the need for some form of stimulation to avoid stagnation or depression. He made the point that this is easier for the more intelligent offender. He spent his years in prison studying for a PhD and campaigning for penal reform. However, he felt the system of lifer management did not make this easy and he had to fight for long-term educational objectives as the system only planned ahead on a yearly basis. Studying did allow him to retain a sense of progress and control in a positive way. He reflected that too often, for offenders, control could only be displayed in a negative way through lack of cooperation with the authorities. This was also mentioned by the Home Office official, who in correspondence for the study, wrote that a prisoner's sense of control could be a positive thing (choosing to study or be compliant in order to get better prison jobs) or could be negative.

The need for whole life prisoners to be transferred periodically to a different prison is also a way for the prison service to fight institutionalisation and ward off stagnation. Respondents stressed the desirability of prisoners facing new situations and new people to maintain this important sense of movement. The same concept was highlighted by the former HMCIP who contended that those in prison for decades need 'milestones' and 'horizons' to give them something worth living for. The question of moving from prison to prison was discussed with both the released lifer and the prisoner currently serving a whole life order. Both could see the positive side: new surroundings, new faces, and new challenges. The released lifer especially also pointed out the negative aspect: losing your mates; having to rebuild relationships with fellow prisoners and staff; and re-establish your reputation and persona. Both reflected on the lack of psychological support targeted at long term prisoners. Both benefited from hope to keep them from despair. One had the hope of eventual release after his tariff was served. The other, the hope that he can finally have his innocence accepted and gain release. Without hope, prisoners could become despondent, depressed or dangerous. The Director of the Howard League, in interview for this study, also emphasised that when

⁵⁵⁰ Jewkes (2007): xxiv

⁵⁵¹ Coyle (2005):48

people have no hope they can behave violently, and underlined the need for support in prisons through education, work, contact with families and the community or entertainment. However, Kenneth Clarke, when Justice Secretary, drew attention to the fact that increasing prison numbers, when the prison service's budget has been cut, may mean fewer opportunities for prisoners to have time out of their cells, participating in activities or work. One particular example he cited was the end of farming and agricultural activities. He acknowledged there were exceptions, but accepted that for large numbers of the prison population, the regime was one of 'bored idleness'.⁵⁵² This echoes the description of prison given by Hassine, serving life without parole in the USA, as 'crushing boredom, endless routine, mindless amusement and occasional gripping fear'.⁵⁵³

Escalating costs and the growth of prison numbers has made the concept of 'bored idleness' more likely, as have the changes in staff practice. The HMIP report *Time out of Cell*⁵⁵⁴ had recommended increased time out of cell to counteract institutionalisation, which would benefit prisoners through more personal interaction and exercise. The Report stressed that the lack of social interaction and mental stimulation, associated with confinement in cell, could be detrimental. This apparently vital social interaction appears to have become more restricted since the Report because of the cuts referred to by the Justice Secretary. In their study of Grendon, Genders and Player commented on the increasingly limited opportunities for peer influences and social learning in that prison. They highlighted as causes, the adoption of a 'core day' regime by the staff; restrictions permitting prisoners only to smoke in their own cells; and the introduction of packed cold meals which allowed meals to be eaten in rooms rather than communally.⁵⁵⁵

Simon Hattenstone, *The Guardian* journalist, corresponded with three prisoners with whole life orders in 2010 and some of their experiences seem to accord with this picture.⁵⁵⁶ They write of 'moving along each day completely numb' and of 'being warehoused' and of 'the consolation of being closer to death than birth'. One of the prisoners, because of his history of serious violence in prison, had spent the previous twelve years in a non-contact segregation unit, locked up for 23 hours a day. Progress for him was when only three guards supervised him when out of cell rather than the seven previously. Robert Maudsley, one of Britain's most notorious prisoners, in an interview in *The Times*, described his life in Wakefield Prison, confined 23 hours a day in a small cage enclosed in thick perspex with a slot to allow food to be passed through. The former HMCIP acknowledged in interview that in 'extreme parts' of the prison population there are dangerous psychopaths who have to be treated differently. Their experience was very different from the average prisoner, even the life sentenced prisoner, and that their numbers were very, very small. Coyle also recognises that these

⁵⁵² Kenneth Clarke (2011)

⁵⁵³ Hassine (1999);161

⁵⁵⁴ HMIP (2007)

⁵⁵⁵ Genders and Player (2010)

⁵⁵⁶ 'Letters From Lifers' *The Guardian* 30 October 2010

prisoners generate the need for special facilities in English and Welsh prisons but contrasts them unfavourably with those previously provided in the Barlinnie Special Unit with its freedom of movement and regular family visits.

The discussion on suitable prison regimes for those serving extremely long or full term sentences is not new. In 1996, in a House of Lords debate, Lord McIntosh had raised the question of possible implementation of recommendations, specifically relating to constructive regimes for those serving a whole life, made in a HMIP Report on Durham Prison.⁵⁵⁷ Among the recommendations was increased autonomy over their lives in prison, as much privacy as feasible, work opportunities, improved visiting arrangements and increased access to telephones. In response for the government, Baroness Blatch stressed that as the numbers of those serving whole life were so small – she quoted 18 at that time – they could not merit any separate regime and that they would be dealt with as other prisoners on the basis of assessment of individual needs, grounded in the particular regimes of the prisons in which they were held. Although Lord McIntosh had specifically asked about those serving whole life, Baroness Blatch preferred to discuss how the needs of all ageing prisoners were to be met and expressed no acknowledgment of any particular needs of those who would never be released, instead pointing out that their victims had no chances for any kind of reconsideration of their conditions.⁵⁵⁸ In response to a plea for her to consider the despair of whole life prisoners, she invited consideration to be given instead to ‘the despair of the husbands, wives, mothers, fathers, sisters and brothers of the people whose lives have been snuffed out by those people.’⁵⁵⁹ There is scant evidence that any of the recommendations from the 1996 Report on regimes for those serving whole life were ever implemented, and regrettably the budget restrictions will mean even less chance of any enhanced provision for the long term or whole life sentenced prisoners.

The realistic picture of life in prison for most offenders serving long-term sentences is neither Barlinnie nor a supermax. It is also not what the tabloid media like to present as a home from home with all mod cons. Hassine in his book about his life in prison says ‘prison confines, punishes and hopefully deters. It is neither designed nor inclined to foster or cure’.⁵⁶⁰ Those who conduct research in prisons also paint a harsh picture, with Jewkes writing of the ‘shock of entering an austere and depersonalised environment’.⁵⁶¹ She argues that newspapers rarely cover issues such as overcrowding, racism, drug addiction, mental illness and suicide, concentrating instead on concepts of pampered prisoners and on the most notorious prisoners, notorious either for their heinous crimes or because they were already celebrities.⁵⁶² Jewkes was not alone in her criticism. Twice in 2006, Lord Phillips, then Lord Chief Justice,

⁵⁵⁷ Hansard HL 11 March 1996 col 683 - 692

⁵⁵⁸ *ibid* col 691

⁵⁵⁹ *ibid* col 692

⁵⁶⁰ Hassine (1995): 40

⁵⁶¹ Jewkes (2007): 451

⁵⁶² *ibid*: 450

criticised the media for 'making light' of sentences of imprisonment when using expressions such as 'walking free after only five years'. He detected 'an incitement to the public to exact vengeance from offenders which is not dissimilar from the emotions of those who thronged to witness public executions in the 18th century'. He was particularly critical of an article which had appeared in *The Times*, feeling that it exemplified the low standard of much of the debate in the media about the merits of prison, and typified the misconceptions under which so many of the public laboured.⁵⁶³

The depiction of prison depends on who is viewing it. An interesting juxtaposing of views occurred when a relative of someone in a CSC wrote of visiting it, describing no physical contact, prison officers listening to every word and visits being monitored by cameras. She maintained the prisoners in the CSC had only caged pens in which to exercise, with no direct view of the sky, and were locked up for 23 hours a day.⁵⁶⁴ In response, the NOMS Director of High Security disputed the depiction and wrote of multidisciplinary teams engaging with the prisoners, who had access to a gymnasium, library and educational facilities.⁵⁶⁵ Whichever picture is accurate, no one with knowledge or experience ever denies prison life is harsh. One academic has written on the concept of 'time' in prison:

Time in prison is something which is lived through but not in the real sense lived. Of course days come and go, but they do not pass as they do on the outside. It is not just the division of time which concerns those incarcerated but the rate at which time passes. The experience of waiting gives monotony the upper hand, joined by its inevitable constant companion, fatigue.⁵⁶⁶

Trying to combat this fatigue and monotony is a particular challenge to prisoners with no hope of release. It also poses serious challenges to the prison service, especially in a time of severe financial restraint. The former HMCIP summed it up by saying that cuts in prison budgets can bring demotivated staff, frustrated prisoners and barely usable buildings.

5.4.4 Challenges posed by the elderly and the dying in prison

'Barely useable buildings' are an especial challenge to a particular group of prisoners. One certainty facing those with a whole life order is that they will grow old in prison. They are a small group of offenders and they are not alone in facing old age in prison. The age used when officially quoting figures for the elderly in prison is 50. This may seem relatively young to be classed as 'elderly' but people age early in prison. At the end of June 2012 there were 6,460 prisoners in the 50-59 age range. 2,449 prisoners were aged between 60 and 69 and

⁵⁶³ Phillips (2006a and 2006b)

⁵⁶⁴ Barbara Davis 'Great well of psychiatric morbidity' *Inside Time* June 2010 Available: http://www.insidetime.org/articleview.asp?a=748&c=great_well_of_psychiatric_morbidity

⁵⁶⁵ *ibid* Danny McAllister

⁵⁶⁶ Wahidin (2006) para 7.3

there were 730 aged 70 – 79. 88 were aged over 80, with one of those aged over 90.⁵⁶⁷ In 2011, the fastest growing age sector of the prison population was the 60-69 age bracket.⁵⁶⁸ The number of prisoners aged 60 or more when sentenced rose by 119% between 1999 and 2009. Harsher sentencing practice contributes to this but so too have advances in DNA profiling leading to conviction and imprisonment for crimes committed decades earlier. Many of these offenders will not be given whole life orders but the combination of their age and the number of years imposed as a tariff will mean that some will serve time in prison to an advanced old age and possibly face death in custody.

A publication by *Age UK* funded by the Department of Health gave evidence that many prisoners in their 50s have a physical health status ten years greater than their contemporaries in the community.⁵⁶⁹ Obvious reasons include poor diet, lack of exercise, lack of fresh air, lack of regular screening and medical attention. Everyone interviewed with knowledge of prisons commented that prison is a hard place to be when growing old. Physically it is a difficult environment, often in old buildings with, for example, many stairs. It is also noisy. In 2004 an HMIP report on the elderly acknowledged the problem and stated, 'Prisons are primarily designed for and inhabited by young and able bodied people; in general the needs of the old and infirm are not met'.⁵⁷⁰ The report made multiple recommendations but, when a follow-up report was published four years later, it was found that eight key proposals for change had not been implemented by NOMS. The follow up report stated that there was still far too much reliance on the unsupported initiative of particularly committed officers, and too great an assumption that the care of elderly prisoners was a matter for the health service not for the whole prison.⁵⁷¹ A 2013 report by the Prison Inspectorate indicates that problems still exist: two elderly disabled prisoners were found to have been locked in a cell designed for a single inmate for almost 24 hours a day. They had not showered for months and relied on fellow inmates to bring them meals. The report commented on staff efforts being 'haphazard, inconsistent and badly co-ordinated'.⁵⁷² This accords with statements made in interview for the study by PGA members who talked of 'patchy' facilities and of older prisoners often depending on the kindness of individual staff members or fellow prisoners. Jeremy Bamber, the whole life order prisoner, wrote vividly of his fear of growing old in prison:

The prospect of the onset of dementia; having my canteen purchases bullied off me 'cos I would be too old to stick up for myself and too forgetful to remember that someone has robbed me. I don't want to endure really old age in a maximum security prison with nobody to help me make my bed or dress me or help me eat, and not being able to take care of myself – living many harrowing years of shuffling about not even knowing where I am or how I ended up in here.⁵⁷³

⁵⁶⁷ Ministry of Justice figures given under the Freedom of Information Act Ref 78192

⁵⁶⁸ Ministry of Justice (2011): 19

⁵⁶⁹ Le Mesurier (2011)

⁵⁷⁰ HMIP (2004) Introduction p v

⁵⁷¹ HMIP (2008): 5

⁵⁷² The Report, on HMP Winchester, was featured in the media including The Independent of 20 March 2013.

⁵⁷³ Bambercampaigner.blogspot.co.uk

One of the recommendations (2.11) in the 2008 HMIP follow up report, repeated from the first report, was that NOMS should have a national strategy for older prisoners. A month after the second report was published, the Prison Minister, David Hanson, made a speech stating that the older prison population had complex and diverse needs. He defended NOMS on the basis that it addressed the needs of the individual rather than trying to address the needs of a whole group. This is despite the development of actuarial assessment, associated with the new penology, concerned with identifying risk potential in specific groups. The Minister did announce that the Department of Health was working with NOMS to develop an end of life strategy and that the Department of Health would also initiate and improve services for prisoners with dementia and Alzheimer's disease.⁵⁷⁴

The lack of a national policy for the elderly prisoner at the time of the Report in 2008 seems surprising. More than a decade before, in a parliamentary debate on the whole life tariff and the implications for the prison service for elderly prisoners discussed above, Baroness Blatch announced that the Prison Service's Director of Health Care was compiling a health strategy and was particularly identifying the needs of the elderly prisoner. Baroness Blatch appeared confident that the needs of the elderly and of the disabled in prison were being well addressed.⁵⁷⁵ As seen earlier, the Prison Ombudsman has raised concerns over the current treatment of the elderly and, especially, those dying in prisons. He cites the use of restraints and includes an example of a prisoner being restrained despite being in a medically induced coma, prior to death. He concluded that the balance between security and decency is not being achieved, with frail, immobile and even unconscious prisoners being restrained.⁵⁷⁶

Some respondents for the study quoted the view, first expressed almost a century ago that 'men come to prison as punishment, not for punishment'.⁵⁷⁷ Academics and interest groups who have conducted research on the subject have expressed similar concern. Crawley and Sparks found that there was a systemic inability for the elderly in prison to protest and register complaint in an effective manner. The conditions generally fell below the horizon of attention of both their custodians and the wider research and policy communities.⁵⁷⁸ Skellington argues that all services for the elderly in prison fall behind the care of those outside prison. Being old, alone and without care-benefits appears to be part of the punishment.⁵⁷⁹ This idea was echoed by the Director of the Prison Reform Trust who saw the conditions for the elderly in prison as a 'double punishment'.⁵⁸⁰ Crawley lists the needs and predicaments of elderly prisoners: the high incidence of ill health, psychiatric morbidity, a fear of dying in prison or of

⁵⁷⁴ Hanson (2008)

⁵⁷⁵ Hansard HL 11 March 1996 col 688

⁵⁷⁶ Newcomen (2013)

⁵⁷⁷ Expressed by Alexander Paterson (a Prison Commissioner 1922-46) Cited by Faulkner(2007):140

⁵⁷⁸ Crawley & Sparks (2005):345-356

⁵⁷⁹ Skellington (2011)

⁵⁸⁰ Juliet Lyon Available: <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/21>

being finally released into insecurity and isolation, and a sense of being irrevocably cut off from the past.⁵⁸¹ A radio programme on dying in prison⁵⁸² highlighted examples of older prisoners being 'slapped about' by younger offenders and having their 'baccy' stolen. Frustrations were also featured, such as the prison that provided electric wheel chairs which could not, however, be used in the wings because of fire regulations.

However, the number of elderly and dying prisoners in English prisons, although growing, is still relatively small, and special facilities and hospices within the prison estate are slowly emerging to try to address these needs.⁵⁸³ In the USA this has been an issue for longer and now many large high security prisons have hospice facilities. In 2005 in one prison alone - Angola, Louisiana - of the 5100 prisoners, 3000 were serving life without parole. One hundred and fifty had died in the previous five years and the prison had found it necessary to open a second cemetery.⁵⁸⁴

The challenge for NOMS and prison staff is not on the scale of that in the USA but it is a distinct and acute challenge for the prison service if it is to alleviate the profound sense of hopelessness and distress identified by Crawley. The Lord Chief Justice in 2007 had commented that the result of the CJA 2003 would be that in 30 years time prisons would be full of 'geriatric lifers'.⁵⁸⁵ It is likely it will not take 30 years for his vision to become reality.

⁵⁸¹ Crawley (2007): 239

⁵⁸² 'Dying Inside' BBC Radio 4 10 January 2012 Available www.bbc.co.uk/programmes/b0194n0q

⁵⁸³ For example the unit for elderly lifers in Norwich Prison and the unit for elderly prisoners in Wymott Prison

⁵⁸⁴ Liptak (2005)

⁵⁸⁵ Phillips (2007b)

6 DEVELOPMENTS 2003 – 2010

6.1 The law, politics and the constitution

Given both the size and scope of the Criminal Justice Act 2003 - '339 sections and 38 schedules and runs to 453 pages. It is, in pre-metric terms, an inch thick'⁵⁸⁶ - and the extensive parliamentary time devoted to it, it might be thought there would be a period of quiet following its passing into law. This turned out to be far from the case. Over the following eight years significant appeals were made relating to the whole life order, leading to clarification and interpretation of that sentence within the Act. Also, in the remainder of Blair's premiership, the government was active on two fronts: first, a continuing concern about the balance between the rights of offenders and the rights of victims, which challenged the balance between due process and crime control; and second, a new concern for constitutional reform. While neither of these impacted directly on the whole life order, it can be argued that they affected the climate for sentencing and the relationship between the judiciary and the executive. Therefore these issues warrant examination and provided a focus for questioning during interviews for the study.

In July 2004, the Prime Minister, Tony Blair, returned to familiar themes in a major speech, '*The Five Year Crime Strategy*'.⁵⁸⁷ The government's proposed measures included a community policy to tackle anti-social behaviour, along with a shift from targeting the offence to targeting the offender. The purpose of these reforms, he said, was to 're-balance the system radically in favour of the victims.' Two years later, in a speech made on 23 June 2006, '*Our Nation's Future*',⁵⁸⁸ Blair struck at the 'political and legal establishment' stating that 'they believe we are on a populist bandwagon, the media whips everything up into a frenzy, and if only everyone calmed down and behaved properly the issue would go away'. These speeches can be regarded as typical Blair - strong on rhetoric, imprecise on detail and with a continuing concern about justice for victims.

Criticism began to be directed towards the government's criminal justice record from many directions. In 2006, Nick Clegg, the then Liberal Democrat home affairs spokesman, blamed Tony Blair for the failures of the system:

(He) has presided over a wholesale degeneration in our criminal justice system. We have grotesquely overcrowded prisons, a Probation Service demoralised by Government interference, re-offending rates amongst the highest in the Western world, and conviction rates for serious crimes, such

⁵⁸⁶ Lord Justice Rose in *Bradley* [2005]EWCA Crim 20.

⁵⁸⁷ Available: www.number10.gov.uk page 6129

⁵⁸⁸ Available: www.number10.gov.uk page 9737

as rape, as low as 1 per cent. Who does Mr Blair think he's kidding when he now claims he is the man to restore confidence in our criminal justice system, after such a lamentable nine-year record? ⁵⁸⁹

The following month in parliament, the Leader of the Opposition, David Cameron, launched an attack on John Reid, the new Home Secretary, pointing out that in his first 40 days in the post: 'He's shelved his own anti-crime campaign at the last minute; he's misled the public over the employment of illegal immigrants in his own Department and he has criticised judges for their implementation of New Labour Law.' ⁵⁹⁰ When the possibility of more legislation was discussed two months later, *The Independent* focused on the criminal offences created by the Blair Government: 3,023 in nine years. The newspaper itemised a 'surreal list' of the new offences: these ranged from creating a nuclear explosion, to selling grey squirrels, to importing Polish potatoes into England. In a feature in the same issue, Professor David Wilson commented that 'New Labour's new 3023 offences demonstrate just how deeply they have been seduced by the politics of penal populism. ... For what matters most to them is not to carefully assess the evidence that they have, but rather to be seen to have "done something" - anything - in the face of each new moral panic that bubbles up in the red-top papers.' ⁵⁹¹

Some, at least, of the judges were just as critical of the government. Lord Justice Rose, Vice President of the Court of Appeal Criminal Division, was a particularly prominent critic, although in cases not concerned with whole life orders. He attacked both the quality and quantity of legislation. In a judgment in the Court of Appeal he complained: 'It is more than a decade since the late Lord Taylor of Gosforth CJ called for a reduction in the torrent of legislation affecting criminal justice. Regrettably, that call has gone unheeded by successive governments. Indeed the quantity of such legislation has increased and its quality has, if anything, diminished.' ⁵⁹² In respect of the Criminal Justice Act 2003, he was just as critical. In the same case he asserted that it was in the public interest that the criminal law and its procedures, so far as possible, be clear and straightforward so that all those directly concerned, professional and lay, should be readily able to understand it.

Sadly the provisions of the Criminal Justice Act 2003, which we have had to consider on this appeal, are, as is apparent, conspicuously unclear in circumstance where clarity could easily have been achieved.... because the Crown have advanced to this Court a construction of the statute which is completely contrary to that suggested by the Home Office press release on the day the provisions came into force. ⁵⁹³

⁵⁸⁹ Quoted in *The Times* 15 May 2006

⁵⁹⁰ Hansard HC 14 June 2006 col 761

⁵⁹¹ *The Independent* 16 August 2006

⁵⁹² *Bradley* [2005] EWCA Crim 20 para 39

⁵⁹³ *ibid* para 38

In another case he returned to the same point, arguing that if a history of criminal legislation ever came to be written, it was unlikely that 2003 would be identified as a year 'of exemplary skills in the annals of parliamentary drafting' and that in recent months the courts had been taxed with a number of perplexing provisions in the Criminal Justice Act.⁵⁹⁴

Although apparently not well received, one focus of the government's attention continued to be the addressing of the perceived problems with criminal justice, especially in light of public perception of crime and the need to be seen to be doing something about crime - 'the elephant in the room.'⁵⁹⁵ Another, perhaps less predicted, focus was on constitutional reform. As Adrian Turner, consultant editor of *Justice of the Peace* and co-editor of *Stone's Justices Manual*, put it: 'With its (the government's) heavy-handed attacks and criticism, aimed solely at staying ahead in the game of spin, it has done great harm to its relationship with the judiciary. The Constitutional Reform Act was meant to change that and herald a new era.'⁵⁹⁶ The introduction of the Constitutional Reform act (CRA), however, was to be anything but straightforward for the government.

6.2 The Constitutional Reform Act 2005

The CRA 2005 derived from the announcement in June 2003 - during a Cabinet reshuffle - that the office of Lord Chancellor was to be abolished and that a Supreme Court of the United Kingdom was to be set up. That announcement took place without any apparent understanding of the legal status of the Lord Chancellor and without consultation with the judiciary (or anyone else outside government).⁵⁹⁷ The underlying tension between the executive and the judiciary, so apparent in the debates leading to the CJA 2003, obviously had not dissipated. Four years later, in his 2007 Judicial Studies Board Annual Lecture, the Lord Chief Justice, Lord Phillips, was to refer to a 'prominent Member of the House of Lords (who) described the proposed changes 'as cobbled together on the back of an envelope.'⁵⁹⁸ After the first unheralded announcement, there followed six months of negotiations between Lord Woolf, the then Lord Chief Justice, and Lord Falconer, the Lord Chancellor, which resulted in the 'Concordat', which formed the basis of the CRA 2005.

An important purpose of this legislation was to clarify and strengthen the separation of powers. As a consequence, the Lord Chief Justice replaced the Lord Chancellor as the head of the judiciary, and a United Kingdom Supreme Court was established, replacing the Appellate Committee of the House of Lords. One of the results of this was that Supreme

⁵⁹⁴ C [2005] EWCA Crim 3533 para 1-2

⁵⁹⁵ *The Independent* 16 August 2006

⁵⁹⁶ Available: www.newlawjournal.co.uk/rhj/content/re-balancing-justice

⁵⁹⁷ House of Lords Report (2007) para. 12

⁵⁹⁸ Phillips (2007c)

Court Justices did not sit in the House of Lords. Much of the detail of the Act ⁵⁹⁹ is not pertinent to this study but the main principles are of relevance because of their importance to sentencing and their impact on the relationship between the judiciary and the executive. Section 1 provides that the Act does not adversely affect the existing constitutional principle of the Rule of Law or the Lord Chancellor's existing constitutional role in relation to that principle. Section 3 in its sub-sections, provides that

(1) The Lord Chancellor and other Ministers of the Crown ... must uphold the continued independence of the judiciary....

(5) The Lord Chancellor and Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

By implication, therefore, bolstering due process.

The 2007 Report of House of Lords Select Committee on the Constitution ⁶⁰⁰ is invaluable in giving a detailed account of the introduction of the CRA and of the strength of feelings surrounding this. It is clear on the intention of the Act, stating that 'The CRA was intended to represent a move away from the "fusion" model of the British Constitution'. The Lord Chief Justice had told the Committee: 'We, as judges, are now patently freestanding. The division of powers is quite clear.' The Committee concluded its commentary on the CRA 2005 presciently: 'It would not be unreasonable to expect that such profound structural changes, with the judiciary assuming a more distinct identity, would lead to increased tensions between these two branches of the state.' ⁶⁰¹

Before considering examples of these 'increased tensions', it is appropriate to consider briefly the establishment of the Ministry of Justice. There had been rumours of such a possibility for much of Blair's premiership. What brought matters to a head was less concern about the criminal justice system, rather the (perceived) failures of the Home Office. ⁶⁰² The new Home Secretary, John Reid, famously described his new department as 'not fit for purpose'. The news of the proposal to establish a separate Ministry of Justice appeared in the *Sunday Telegraph* of 21 January 2007, which was news to both the Lord Chancellor and the Lord Chief Justice. ⁶⁰³ Once again Blair regarded it, like the proposal to abolish the Lord Chancellorship, as a 'machinery of government change,' not one with constitutional implications. The Lord Chief Justice went public with his concerns. There followed

⁵⁹⁹ Despite Blair's intention, the office of Lord Chancellor was not abolished in the Act.

⁶⁰⁰ House of Lords Report (2007)

⁶⁰¹ *ibid* para 31

⁶⁰² In particular, in losing track of foreign nationals once they had served their sentences.

⁶⁰³ Phillips (2008)

negotiations between him and the new Lord Chancellor, Jack Straw, which resulted in a partnership agreement 'founded on a firm and shared commitment to the delivery of an efficient and effective justice system, and upholding the independence of the judiciary.'⁶⁰⁴ Language that can be interpreted as supporting both Packer's crime control and due process.

Both the lead up to the CRA 2005 and the creation of the Ministry of Justice helps validate critics of the Blair regime, who regarded it as being obsessed by top-down reform with lack of pertinent consultation.⁶⁰⁵ However tendentious that view might be, it seems reasonable to conclude that tensions would continue between the judiciary and the executive. The executive's concerns over the judiciary's independence can best be illustrated by its response to the courts' actions in respect of anti-terrorism measures and 'lenient' sentences in particular cases. These concerns both reflected, and were reflected by, the attitude of the media, in particular the 'red-top' papers. Following the 9/11 attacks on the USA, the government derogated from Article 5 of the ECHR to allow the detention of foreign nationals suspected of involvement in terrorism.⁶⁰⁶ Nine foreign nationals challenged their detention, and the Law Lords ruled that the Anti-terrorism Act unjustifiably discriminated against foreign nationals on the grounds of their nationality. Lord Hoffman declared: 'The real threat to the life of the nation...comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve'.⁶⁰⁷ The government's response was the Prevention of Terrorism Act 2005, giving the Home Secretary power to issue control orders in respect of persons suspected of terrorist activities.⁶⁰⁸ A number of the control orders were challenged and the House of Lords held that, in one case, it did deprive the subject of his liberty.⁶⁰⁹

The 2007 House of Lords Select Committee Report again gives insight, citing the then Home Secretary, Charles Clarke's response: 'More than five years after 9/11, the legal and parliamentary circus still moves on.' He further stated: 'This is a ludicrous way of proceeding, which dangerously undermines confidence in every aspect of the police and criminal justice system....You could end up with a state of affairs where we end up leaving the European Convention as a result of public pressure.'⁶¹⁰ Clarke's main concern, according to the Select Committee, was that 'The judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security'.⁶¹¹

⁶⁰⁴ *ibid*

⁶⁰⁵ See for instance Turner Available: [www.newLawjournal.co.uk/rlj/content/re-balancing-justice](http://www.newlawjournal.co.uk/rlj/content/re-balancing-justice)

⁶⁰⁶ Anti-terrorism, Crime and Security Act 2001

⁶⁰⁷ [2004] UKHL 56

⁶⁰⁸ Prevention of Terrorism Act 2005 Section 1 Control orders restricted the freedom of those subject to the order. Such restrictions could include house arrest, limiting access to mobile phones and the internet, and any visitors to be named in advance.

⁶⁰⁹ [2007] UKHL 45

⁶¹⁰ House of Lords Report (2007) para. 93

⁶¹¹ *ibid* para 94

Commenting directly on this quotation, Lord Phillips in his *Gresham Lecture 2010* said 'Charles Clarke failed to appreciate that it is for the judiciary to apply the laws that have been enacted in Parliament.'⁶¹² The previous year, Lord Judge had made the same point: 'We do not apply the Convention on a judicial whim, or to spite those who disagree with its provisions. We apply it because Parliament enacted that we should do so.'⁶¹³ Clarke went on to suggest a meeting with the Law Lords to discuss the issue and said, 'The idea that their independence would be corrupted by such discussions is risible.'⁶¹⁴ The judges, however, declined to meet him.⁶¹⁵

The Select Committee, in concluding this section of its Report stated:

Whilst we have sympathy with the difficulties experienced by Charles Clarke in relation to the Human Rights Act, his call for meetings between the Law Lords and the Home Secretary risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the court of last resort, should not ever be perceived to have prejudged an issue as a result of communication with the executive.⁶¹⁶

Senior judges, in interviews for this study, were of the same mind.

The change of Home Secretary did not change the Home Office's attitude. Reid described the European Court's judgment in *Chahal*⁶¹⁷ (forbidding the deportation of a foreign national, even if he is a security risk, to a country where he stands a real risk of being tortured) as 'outrageously disproportionate', and suggesting that MPs who defended the decision 'just don't get it.'⁶¹⁸ There seems little doubt that the words of government ministers reflected genuine resentment at the independence of the judiciary, despite having restated and reinforced it in the Constitutional Reform Act of 2005. There seems equally little doubt that the government, as before, was spurred on by the media, especially the 'red-tops'. However, one case in particular, that of *Sweeney*, provides an even clearer illustration of the attitude of newspapers - and with them, the government - to the sentencing of heinous crimes.

Craig Sweeney in January 2006 had kidnapped a girl from her home in South Wales, committed serious sexual offences against her and then was apprehended after a police chase. He had previously been convicted of indecently assaulting a six year old girl. After pleading guilty, the judge sentenced him to life imprisonment, with a tariff of 18 years, reduced to 12 years in return for pleading guilty. Sweeney was told he would normally be considered for parole after half the term (ie 6 years). The judge added, that he would only be released

⁶¹² Phillips (2010)

⁶¹³ Lecture 'Public Protection' at KCL 20 November 2006

⁶¹⁴ House of Lords Report (2007) para. 95

⁶¹⁵ This seems a restrictive reading of CRA 2005 Section 3(5) See above

⁶¹⁶ *ibid* para. 97

⁶¹⁷ [1996] ECHR 54

⁶¹⁸ Hansard H.C. 24 May 2007, col.1433; quoted in Bingham (2011):154

when and if there was no risk of him committing a serious offence as per the CJA 2003. It should be remembered, in the light of what followed, that the CRA required all ministers to uphold the independence of the judiciary. Lord Falconer explained to the House of Lords Select Committee how this duty applied to the question of ministers commenting on individual cases:

If you disagree with a decision, say what you are going to do: if you are going to appeal, say you are going to appeal; if you are going to change the law, say you will change the law. If you cannot appeal and cannot change the law then my advice would be to keep quiet.⁶¹⁹

Despite the Lord Chancellor's advice, Reid, as Home Secretary, on 12 June 2006, launched an attack on the sentence and asked the Attorney General to examine the case as the tariff did not reflect the seriousness of the offence. The following day, the 'red-tops' gave the judge's ruling a hostile reception. For instance, *The Sun* criticised 'The arrogance of judges in their mink-lined ivory towers' and *The Daily Express* branded the judiciary as 'deluded, out-of-touch and frankly deranged' and 'combining arrogance with downright wickedness'. The same day, the Prime Minister's spokesman and Straw, as Leader of the House, defended Reid's intervention. On 15 June, the Lord Chancellor, on BBC's *Question Time* defended Reid, and claimed that he had not attacked the judge. The following day, Vera Baird QC, a Minister in the Department of Constitutional Affairs, appearing on BBC Radio 4's *Any Questions*, was critical of the judge, claiming he had got the formula wrong. On 19 June, Baird was forced to apologise. Finally, on 10 July, the Attorney General concluded that the sentence was not unduly lenient.⁶²⁰

The Report of the Select Committee concluded that the Sweeney case had been the first big test of whether the new relationship between the Lord Chancellor and the judiciary was working properly, and it was clear that 'there was a systemic failure'. It asserted that ensuring that ministers do not impugn individual judges, and restraining and reprimanding those who do, was one of the most important duties of the Lord Chancellor. In this case, 'Lord Falconer did not fulfill this duty in a satisfactory manner.'⁶²¹

Lord Chief Justice, Lord Phillips, in his High Sherriff of Oxford's lecture in 2006 said, 'Such is the atmosphere that sentencers are criticised (by the media) for failing to lock up offenders for longer Media pressure such as this cannot fail to have effect on the public, on politicians and on judges'.⁶²² It would seem that ministers were at great pains to ensure they appeared in line with public opinion, as characterised by the tabloid press. This was despite the CRA 2005, which had so clearly asserted the independence of the judiciary and the duty of the Lord Chancellor, government ministers and others to respect and ensure this independence.

⁶¹⁹ House of Lords Report (2007) para. 40

⁶²⁰ The information is given in House of Lords Report (2007) Table 1

⁶²¹ para 49

⁶²² Phillips (2006b)

6.3 The inevitability of tension between the executive and the judiciary

The views expressed by respondents for this study about the tension between the judiciary and the executive acknowledged the continuing tension. Lord Howard, the former Home Secretary, expressed the view:

There has, for a long time, been tension between the Judiciary and the Executive on many matters, including their role in sentencing for murder. Obviously the tension was, to some extent, relieved by the 2003 Act but I think the potential for it will always remain.

One ground for this tension was the increasing focus given to the doctrine of the separation of powers, and on what rightly lay with the executive and legislature and what with the judiciary. As was considered earlier, one of the concerns lying behind the CJA 2003 had been that the judiciary had been eroding sentences.⁶²³ In interviews for this study Lord Pannick felt that perhaps ministers had not trusted the judges. In interview, David Blunkett said that the whole life order provision (rather than a minimum term of, say, fifty years) was to prevent the inevitable erosion of the sentence by the judiciary. He talked of the strength of criticism from the judiciary on the 2003 Bill and drew attention to the 'terrific backing' that Tony Blair had given him. However, he stated his respect for the judiciary and said he would have welcomed dialogue and interchange of views with it at the preparation stage of the Bill. From a reading of Hansard and the debates surrounding the Bill, a perception can be gained of the judiciary, or elements of it, being sullen and antagonistic over the Bill but in interview, senior judges said they did not recognise this image of themselves either in 2002 or subsequently. Senior judges, perhaps unsurprisingly, were unwilling to comment on the question of continuing tension. They did however, strongly point out that the formal separation of powers precluded any 'dialogue or interchange of views'. One senior judge, in interview for the study, commented on the separation of powers in the past, that in England 'We blurred this and it worked'. However, there was little evidence of any current acknowledgment of 'blurring' in their standard constitutional standpoint of the necessity for the judiciary and the executive to remain firmly separate: with the judiciary 'doing parliament's will and using only the discretion given to us' and 'having always to obey the law' and 'just doing our job according to the law'.

The senior judges were prepared to say that their colleagues found constant change unsettling, and that there were complaints about the difficulty in applying complex statutes. They also stressed that judicial decisions in England were bound by parliamentary statute and by precedent in domestic courts. Whatever happened as a result of a ECtHR ruling would be the government's responsibility alone.

⁶²³ Interestingly, in interview, a senior judge said that Blunkett's complaint over sentence erosion 'had some merit'.

One politician commented, perhaps wryly, about the separation of powers that the judiciary supported fully the separation of powers and the necessity for the judiciary to stay out of politics yet the irony was that at the time of the passing of the 2003 Act, the House of Lords was 'stuffed full' with lawyers and judges who felt very free to comment on legal issues in debate.

The concerns expressed in the process of passing the CRA and the establishment of the Ministry of Justice, together with views expressed in interview for this study support Lord McNally's conclusion in interview that tensions between parliament and judiciary 'ebb and flow'. This ebb and flow presumably will continue.

6.4 Human Rights Act 1998 and the ECHR

The rights and freedoms embodied in the ECHR 'are in truth 'fundamental' in the sense they are guarantees which no one living in a free democratic society such as the UK should be required to forego'.⁶²⁴ It is not surprising that the Convention is both wide ranging, and that its Articles are quite general. There is a logical need, therefore, for a body to determine whether human rights guaranteed by the ECHR have been breached: this body is, of course, the ECtHR. The rights protected range from the right to life (Article 2), freedom from slavery and forced labour (Article 4), respect for private and family life (Article 8) to freedom of thought, conscience and religion (Article 9).

While these Articles give an impression of the scope of the ECHR, they do not identify rights that are relevant (or are argued to be relevant) to the whole life order. Some Articles became of great importance in cases taken to appeal in domestic courts and, self-evidently, to the ECtHR. Article 3, the prohibition of torture, inhuman and degrading treatment or punishment, is central to a number of cases culminating in *Vinter, Bamber and Moore* in Strasbourg. Article 5 is concerned with the right to liberty and security: 5.1 states that no one shall be deprived of liberty except in carefully identified circumstances; 5.4 states that the lawfulness of detention shall be speedily decided by a court. Article 6 asserts the right to a fair trial. Article 7 protects against retrospectivity: no one shall be found guilty of any criminal offence if it was not an offence when it was committed; and no one shall be punished more severely than the law allowed when the offence was committed.⁶²⁵

It was not until 1966 that UK citizens as individuals had the right to petition the ECtHR. However, as the ECHR had not been adopted into domestic law, anyone successfully appealing to the ECtHR did not have their rights under the Convention enforced by UK courts.

⁶²⁴ Bingham (2011):68

⁶²⁵ The full text of these Articles is given in Appendix B.

One of the early actions of the New Labour government, in 1997, was a proposal to remedy this situation: *Rights Brought Home: The Human Rights Bill*.⁶²⁶ In a lecture in 1996, Blair said he believed it made sense to end the cumbersome practice of forcing people to go to Strasbourg to hold their government to account. Some people had said the system took power away from Parliament and placed it in the hands of judges but as Britain was already a signatory to the Convention, he felt it merely meant allowing British judges rather than European judges to pass judgment.⁶²⁷ Beloff and Mountfield suggest that the judiciary engaged in 'the infusion of the substance of the European Convention into English law' and they talked of the 'backdoor incorporation of its text'.⁶²⁸ Certainly changes in UK law had been made as a result of the ECtHR rulings.⁶²⁹

The resulting HRA 1998 incorporated the ECHR into UK Law, stating so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights.⁶³⁰ If a court is satisfied that a legislative provision is not compatible with a Convention right, it may make a declaration of incompatibility.⁶³¹ Such a declaration does not affect the validity of the provision,⁶³² nor was it binding on the parties to the provision. There is, however, the question of interpretation of Section 2: 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account: (a) judgment, decision, declaration or advisory opinion of the ECtHR'. Klug and Wildbore have argued that Section 2 was drafted to avoid the domestic courts from being bound by Strasbourg jurisprudence, whilst still requiring them to take it into account.⁶³³ Courts must follow existing statutes but an individual can appeal the decision to the ECtHR. As Lord Steyn put it in *Anderson*, 'In this way Parliamentary sovereignty was preserved.'⁶³⁴

6.5 Judicial interpretation of the whole life order

6.5.1 Introduction

The HRA 1998, which took effect in October 2000, and the CJA 2003 had combined to change the legal framework within which offenders were sentenced to a whole life term, and in particular the grounds for any appeals which might be made. The court cases considered earlier, which culminated in *Stafford* and *Anderson*, were concerned with criticism of, and appeals against, the power of the Secretary of State to set tariffs for mandatory life sentences.

⁶²⁶ Home Office (1997a)

⁶²⁷ John Smith Memorial Lecture 7 February 1996

⁶²⁸ Beloff & Mountfield (1996):467

⁶²⁹ Areas of law affected had included prisoners' correspondence; immigration rules; telephone tapping; homosexuality in Northern Ireland; contempt of court; parental access to children.

⁶³⁰ Section 3 (1)

⁶³¹ Section 4 (2) but this is limited to the higher courts

⁶³² Section 6 a and b

⁶³³ Klug & Wildbore (2010):621

⁶³⁴ [2002] UKHL 46

The cases after the Criminal Justice Act 2003 took effect could have been regarded at the time as interpreting and clarifying the Act. In retrospect, it can be argued the pre- and post-2003 cases are part of an attempt not simply to constrain the whole life tariff/order, but to get rid of it altogether. If this is so, *Vinter, Bamber, and Moore*, currently before the European Court,⁶³⁵ can be regarded as the potential culmination of this struggle. That case - which could alter the whole life order fundamentally or even end it - will be considered later, along with the possible political and media reactions in Britain. In this chapter, cases in English courts which sought to constrain or challenge the whole life order will be considered, cases which, through their challenges, served to give legal clarification to this sentence.

6.5.2 Relevant cases at the ECtHR

There are four European Court cases that have relevance to whole life orders in England and Wales as they were subsequently cited in cases either in the Court of Appeal or the House of Lords. Two, *Nivette* and *Einhorn*, while in connection with extradition to the USA, raised questions about whether life without parole was an irreducible sentence and, if so, whether it breached Article 3. The other two, *Léger* and *Kafkaris*, were focused on whether life sentences in national jurisdictions in Europe were irreducible.

***Nivette v France* [2001] ECHR 892**

In 2001, Nivette applied to the European Court claiming that his extradition by France to the USA to stand trial for the murder of his girl friend in California, would breach Article 3.⁶³⁶ The Court noted that the District Attorney in California had given an undertaking that the State of California would not seek the death penalty or a sentence of life imprisonment without any possibility of early release. This undertaking bound her successors and the State of California.

That being so, the Court considers that the assurances obtained by the French Government are such as to avert the danger of the applicant being sentenced to life imprisonment without any possibility of early release. His extradition therefore cannot expose him to a serious risk of treatment or punishment prohibited by Article 3 of the Convention.

On this basis the application was declared inadmissible.

⁶³⁵ The case, which will be discussed below, went before the Section Court which gave its ruling in January 2012. An appeal was made to the Grand Chamber and the oral hearing was heard on 28 November 2012.

⁶³⁶ And Article 6, but this will not be considered as the particular aspect of it is not of relevance to whole life terms.

***Einhorn v France* [2001] ECHR 893**

Einhorn applied to the European Court claiming similarly that his extradition by France to the USA to stand trial for the murder of his girl friend in Pennsylvania would breach Article 3.⁶³⁷ The applicant submitted that his extradition had been granted in breach of Article 3 in that there were substantial grounds for believing he faced a real risk of being sentenced to death 'and hence of being exposed to the "death row phenomenon", a source of inhuman or degrading treatment or punishment'. In any event, he argued that he was 'likely to have to serve a life sentence without any real possibility of remission or parole'. The Court stated it 'does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the Convention', therefore the extradition to a state where there is the possibility of a life sentence without parole may raise an issue. It noted, however, that the Governor of Pennsylvania may commute a life sentence to another one of a duration that affords the possibility of parole. An attachment from the Philadelphia District Attorney's office showed that such commuting was *de facto* as well as *de jure* - in the past 25 years 284 prisoners serving life sentences had their sentences commuted. The Court similarly declared the application inadmissible.

***Léger v France* [2006]⁶³⁸**

Léger had been imprisoned for the abduction and murder of a boy. Léger sought judgment against France arguing that Article 3 of the Convention had been breached, and again the issue was whether a life sentence was irreducible. The applicant had been sentenced to life imprisonment with no minimum term set, and he had been released after 41 years in prison. The European Court determined:

In the case of adults the Court has not ruled out the possibility that in special circumstances an irreducible life sentence might also raise an issue under the Convention where there is no hope of entitlement to such a measure as parole.

After spending 15 years in prison, Léger had been able at regular intervals to apply for release on licence:

In those circumstances, the Court considers that the applicant cannot maintain he was deprived of all hope of obtaining an adjustment of his sentence, which was not irreducible *de jure* or *de facto*. It concludes that his continued detention as such, long though it was, did not constitute inhuman or degrading treatment or punishment.

The application was therefore rejected.

⁶³⁷ As in previous footnote: Article 6, but this will not be considered as the particular aspect of it is not of relevance to whole life terms.

⁶³⁸ Cited by Lord Brown in *Wellington*. The decision by Section 2 of the Court does not seem to be available, although the decision by the Grand Chamber in 2009 is available where it was decided to strike the application following Léger's death. The dissenting opinion is more appropriately considered in the final chapter of this study.

***Kafkaris v Cyprus* [2008] ECHR 143**

The three cases at the European Court considered so far have been cited subsequently in the English courts, but they have been overshadowed by consideration given to *Kafkaris*. In making their determination, the European Judges refer extensively to Council of Europe texts, which will be noted before turning to the determination in *Kafkaris*:

- 1) In Resolution (76) 2 of 17 February 1976, the Committee of Ministers recommended that a review... of the life sentence should take place, if not done before, after 8 to 14 years of detention and be repeated at regular intervals.
- 2) The Sub-Committee Responsible for Drafting the Resolution in its general report stated: 'It is inhuman to imprison a person for life without any hope of release.... Nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis.'
- 3) The European Union's decision on the European Arrest Warrant stated: 'If the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law.'⁶³⁹

The Court was asked by *Kafkaris* to determine, in a case of premeditated murder, whether the sentence of life imprisonment in Cyprus (equivalent to a whole life order) in his particular circumstances had removed any prospect of his release. The Court stated that the imposition of a sentence of life imprisonment on an adult offender,

Is not in itself prohibited by, or incompatible with, Article 3 or any other Article of the Convention....At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3.⁶⁴⁰

It noted from the Court case law that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this would be sufficient to satisfy Article 3.⁶⁴¹ The determination then clarified what it meant by 'irreducible':

A life sentence does not become 'irreducible' by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is de jure and de facto reducible.⁶⁴²

⁶³⁹ Council Framework Decision 2002/584/JHA Article 5.2.

⁶⁴⁰ para. 97

⁶⁴¹ para 48

⁶⁴² para.98

The Court noted that in Cyprus the offence of premeditated murder carries a mandatory sentence of life imprisonment that is 'tantamount to imprisonment for the rest of the convicted person's life'.⁶⁴³ However, the President of Cyprus, on the recommendation of the Attorney General, has the authority under the constitution to 'suspend, remit or commute any sentence passed by a court'.⁶⁴⁴ The European Court concluded it: 'does not find that life sentences in Cyprus are irreducible with no possibility of release; on the contrary, it is clear that in Cyprus such sentences are both de jure and de facto reducible.'⁶⁴⁵

The Court observed that: A state's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the supervision the Court carries out at European level.⁶⁴⁶

Furthermore, the Court added that a sentence without a minimum term necessarily entails anxiety and uncertainty related to prison life, but this does not 'warrant a conclusion of inhuman or degrading treatment under Article 3'.⁶⁴⁷ The Court held by 10 votes to 7 that there had been no breach of Article 3 of the Convention. The dissenting opinions appended to the main determination raise issues which will be considered later in this study as they are of direct relevance to *Vinter, Bamber and Moore*.

These determinations of the European Court of Human Rights show great concern over whether a whole life term was in breach of the Convention or not. *Nivette* and *Einhorn* turned on whether there was the possibility of potential sentences being reduced or commuted. In *Léger*, the French Government was able to show that Léger had been able to apply for release on licence at regular intervals. In *Kafkaris*, the Court noted the power of the President of Cyprus to 'suspend, remit or commute' any sentence. However, *Kafkaris* lacked clarity, in particular in its statement that 'the imposition of an irreducible life sentence on an adult *may raise an issue* under Article 3'.⁶⁴⁸ Lord Phillips supported this view when, in his interview for this study, he stated that the Court 'fudged' the issue in *Kafkaris*. The impact of these European judgments on cases in England would depend greatly on judicial interpretation.

⁶⁴³ para 102

⁶⁴⁴ *ibid.*

⁶⁴⁵ para 103

⁶⁴⁶ This was to be quoted verbatim in *Wellington*.

⁶⁴⁷ para 107

⁶⁴⁸ Emphasis added

6.5.3 Appeal cases

The first two cases considered in this section did not involve whole life tariffs but in the grounds for appeal they did cite Articles of the ECHR and the determinations were to be referred to in later whole life order cases. The two cases, *Offen* and *Lichniak and Pyrah*, clarified and redefined the imposition of life sentences in English law before the 2003 Act took effect.

***Offen* [2000] EWCA Crim 96**

This case considered the compatibility of the Crime (Sentences) Act 1997 with the Convention. In *Offen* the Court of Appeal considered a number of cases where it was alleged that Section 2 of the Crime Sentences Act 1997⁶⁴⁹ was incompatible with Articles 3, 5 and 7 of the Convention. It was argued in respect of Article 7 that following conviction for a first serious offence, if a conviction for a second serious offence followed, the imposition of a discretionary life sentence breached that part of Article 7 (1) which declared 'nor shall a heavier penalty be imposed than one that was applicable at the time the criminal offence was committed'. The Court of Appeal determined:

The fact that the previous record influenced the court into imposing a life sentence would not mean that the offender was being sentenced, or having his sentence increased, for the earlier offence. Here, the first offence and the penalty imposed for it remain the same after the coming into force of the 1997 Act; it is the penalty for the 'trigger offence', which Section 2 changes.⁶⁵⁰

In respect of Articles 3 and 5, the Court considered that Section 2 of the 1997 Act established a norm: 'That those who commit two serious offences are a danger or risk to the public.'⁶⁵¹ The Court concluded:

In our judgment, Section 2 will not contravene Convention rights if courts apply the Section so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public.⁶⁵²

This is relevant to CJA 2003 Schedule 21 (4) where one of the grounds for making a whole life order is that the prisoner had been sentenced previously to mandatory life for a previous murder.

⁶⁴⁹ Which provided for an automatic life sentence for a second serious offence. The Court noted the following features of the Crime (Sentences) Act. It refers to two offences having been committed by the offender. When the second offence is committed, the offender is required to be over 18. The proviso of 'exceptional circumstances' applies to both offences. The exceptional circumstances can relate to the offences or to the offender, but what constitutes 'exceptional circumstances' is not defined. All sentences identified as serious are offences for which life imprisonment could be imposed. See *Offen* para 8

⁶⁵⁰ para 101

⁶⁵¹ para 109

⁶⁵² para 97

Lichniak and Pyrah [2002] UKHL 47

The cases of Lichniak and of Pyrah reached the House of Lords in 2002 as a consolidated appeal. The issue was whether the Murder (Abolition of the Death Penalty) Act 1965 was incompatible with Articles 3 and 5 of the Convention. Section 1(1) of the 1965 Act provides that adults convicted of murder should receive a mandatory life sentence. The appellants considered that Section 1(1) was *arbitrary and disproportionate*⁶⁵³ because it required the same life sentence to be passed on all convicted murderers, whatever the facts of the case or the circumstances of the offender, and irrespective of whether they are thought to be a danger to the public or not.⁶⁵⁴

In his opinion, Lord Bingham made a statement that judges in some subsequent appeals have had to interpret:

If the House had concluded that on imposition of a mandatory life sentence for murder, the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate Articles 3 and 5 of the European Convention on Human Rights as being *arbitrary and disproportionate*.^{655 656 657}

Lord Bingham continued that ‘such is not the effect of the sentence’.⁶⁵⁸ Counsel for the appellants cited *Offen* (see above), and maintained that convicted murderers should not be sentenced to imprisonment for life unless they appeared to be a threat to the public. Lord Bingham rejected these arguments:

First, sitting Judicially, the House is concerned to decide not whether the mandatory life sentence is desirable or necessary but whether it is lawful. Secondly, the House must note that Section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965 represents the settled will of Parliament. Criticism of the sub-section has been raised in many expert and authoritative quarters over the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment. The fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled.... It may be accepted that the mandatory life sentence has a denunciatory value, expressing society’s view of a crime which has long been regarded with particular abhorrence.⁶⁵⁹

⁶⁵³ Emphasis added

⁶⁵⁴ *Anderson* was being heard at the same time and the Law Lords noted that the nature and operation of the mandatory life sentence was described in that judgment. See above.

⁶⁵⁵ Emphasis added

⁶⁵⁶ para 8

⁶⁵⁷ This was a somewhat belated response to Angela Rumbold’s comment. See above.

⁶⁵⁸ This statement has been interpreted as meaning that very few of those convicted of murder will remain in prison for the rest of their life, and this is in line with his judgment in *Hindley* [1998] QB 751

⁶⁵⁹ para 14

Finally, Lord Bingham noted that the European Court, in *V v United Kingdom*, held that detention of juveniles during Her Majesty's Pleasure was not incompatible with Articles 3 and 5 of the Convention and that this sentence was 'almost indistinguishable in substance from the mandatory life sentence for murder by adults.'⁶⁶⁰

The appeals were unanimously rejected.

The decisions in these two cases were important as they established that the mandatory life sentence for murder was not arbitrary and disproportionate, nor should it only be imposed if offenders were regarded as dangerous. There had been no breach of the Articles of the Convention.

***Sullivan* [2004] EWCA Crim 1762**

After these cases, following the implementation of the relevant parts of the CJA 2003, it is perhaps not surprising that the Lord Chief Justice saw a need to provide 'general assistance as to the approach that courts should adopt' when applying the provisions of the Act in respect of life sentences for murder, especially in the transitional arrangements.⁶⁶¹ The 'general assistance' was provided in this case by a strengthened bench consisting of the Lord Chief Justice and three other justices, and took into account the 2004 Practice Direction.⁶⁶²

The judgment restated the decision of the House of Lords in *Anderson* that the involvement of the Secretary of State in determining the minimum period to be served by those sentenced to a mandatory life sentence contravened Article 6 of the European Convention, in that determining a minimum term was indistinguishable from that of determining a sentence. Both tasks had to be performed by a judge. The 2003 Act transferred the role of the Secretary of State in determining the minimum term to the trial judge.

The Lord Chief Justice remarked that, in the period before *Anderson*, lord chief justices had provided general guidance to judges to assist in making recommendations to the Home Secretary and to encourage greater consistency. The 2003 Act, for the first time in an Act of Parliament, included guidance in the form of general sentencing principles.

In considering the sentencing provisions in determining a minimum term in respect of a mandatory life sentence, the Lord Chief Justice noted the discretion given to trial judges. Of particular relevance to this study is s 269(4) of the Act:

⁶⁶⁰ para 17

⁶⁶¹ para 1 of *Sullivan*

⁶⁶² See Appendix D

If the offender was 21 or over when he committed the offence *and the court is of the opinion*⁶⁶³ that, because of the seriousness of the offence no order should be made under subsection (2), the court must order that the early release provisions are not to apply to the offender. This results in the offender serving a whole life term.

Attention is drawn to the point that the judge complies with s 269 if he has 'regard' to the principles set out in the schedule: 'As long as he bears them in mind he is not bound to follow them. However if he does not follow the principles he should explain why he has not done so.'⁶⁶⁴

The Lord Chief Justice then turned to consider Schedule 21:

The Schedule sets out a well-established approach to sentencing. It makes clear (in paragraph 9) that despite the starting points the judge has a discretion to determine any term of any length as being appropriate because of the particular aggravating and mitigating circumstances that exist in that case. The discretion must, however, be exercised lawfully and this requires the judge to have regard to the guidance set out in Schedule 21, though he is free not to follow the guidance if in his opinion this will not result in an *appropriate* term for reasons he identifies. His decision is subject to appeal by either the offender or on Attorney General's Reference.⁶⁶⁵

The Lord Chief Justice then turned to consider Schedule 22 of the Act that provided for transition arrangements. These were necessary to avoid breaching ECHR Article 5 - the right to liberty and the security of the person - and Article 7.1 - prohibiting the imposition of a heavier penalty than the one that was applicable at the time the criminal offence was committed. Three situations had to be catered for:

- 1) existing prisoners who in respect of a life sentence, had, prior to 18 December 2003 (ie when the Act took effect) been informed by the Secretary of State of the minimum term they were to serve;
- 2) existing prisoners who on that date had not been informed of their minimum term;
- 3) offenders (for offences committed before 18 December 2003) who had not been sentenced before 18 December 2003.

For prisoners in the first situation, they could apply to the High Court for review of the minimum term notified by the Secretary of State or his decision they should never be released.⁶⁶⁶ For the second group of prisoners, the Secretary of State must refer the case to the High Court for an order to be made under sub-section (2) (early release provisions) or sub-section (4) (early release provisions should not apply) of s 269 of the Act. In both circumstances appeals from High Court decisions could be made to the Court of Appeal.

⁶⁶³ Emphasis added by the Lord Chief Justice

⁶⁶⁴ para. 12

⁶⁶⁵ para. 16

⁶⁶⁶ Schedule 22 paras 2-4

In all three situations there was the need to be compliant with ECHR Article 7 (1). Schedule 22 para 10 stated with reference to potential whole life terms:

The Court...may not make an order under subsection (4) of Section 269 unless the court is of the opinion that, under the practice followed by the Secretary of State before December 2002, the Secretary of State would have been likely to give the prisoner a notification falling within paragraph 2(b) (ie a whole life term)

But, as the Lord Chief Justice rhetorically asked:

What was the *practice* of Home Secretaries prior to (December 2002)? Neither the recommendations made by the judiciary nor the determination of the Secretary of State were usually made public. The Secretary of State took into account information that was not made available to the public or the judiciary.... The best guide to what would have been the *practice* of the Secretary of State is the Practice Directions.... This is because it can reasonably be assumed that the judiciary and in particular the Chief Justice will have applied the relevant Practice Direction while it was in force and in a high percentage of the cases it was their recommendations that the Secretary of State followed.⁶⁶⁷

This would be defensible if the small number of cases where the decision of the Secretary of State differed were spread evenly across the range of mandatory life sentences. But this was not the case: 'As has been made clear by the Secretary of State, in the most serious cases he tended to select a higher figure than that indicated by the judiciary.'⁶⁶⁸

Later, in 2010, detail in respect of some of these 'most serious' cases was to be given in *Coonan* at the High Court. The court was provided by the Home Office with a schedule of 28 offenders 'for most of whom a whole life tariff had been set between 1966 and 2002.' In the case of 19 still alive (in 2010) a whole life tariff 'was undoubtedly set'. In three cases the Home Secretary set a whole life tariff despite both the trial judge and the Lord Chief Justice recommending a finite term; in nine cases the Home Secretary set a whole life tariff when either the trial judge or the Lord Chief Justice recommended a finite term; and in only seven cases the Home Secretary set a whole life tariff when recommended by both the trial judge and the Lord Chief Justice.⁶⁶⁹

Jones [2005] EWCA Crim 3115

The 'general assistance' provided in *Sullivan* was complemented later by what the Lord Chief Justice said in respect of the appeal by Hobson,⁶⁷⁰ but cited as *Jones*. In this judgment Lord Phillips stated that a whole life order was not to be made lightly, or when there was a doubt in the mind of the trial judge. He wrote:

⁶⁶⁷ para 26

⁶⁶⁸ para 27

⁶⁶⁹ [2010] EWHC 1741 (QB) para 25

⁶⁷⁰ Details below

Often, perhaps usually, where such a (whole life) order is called for the case will not be on the borderline. The facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. Indeed if the judge is in doubt this may well be an indication that a finite minimum term which leaves open the possibility that the offender may be released for the final years of his or her life is the appropriate disposal.

The 'general assistance' these cases provided may have been designed to be of use to trial judges, but it was also helpful for this study. The key relevant points made were:

- The difficulty in discovering, because of the secrecy of the Home Office, why Home Secretaries acted as they did;
- The lack of congruence between advice of Lord Chief Justices and trial judges and tariffs set by the Home Secretary;
- Schedule 21 figures were starting points and trial judges were only to be guided by them in determining sentences;
- *Jones* taken with *Sullivan* expressed concern that Schedule 21's effect could be an undue ratcheting-up of sentences for murder that should be restrained.

The cases to be considered next clarified and interpreted the CJA 2003 in respect of whole life orders. Three cases turned on the compatibility of the whole life order with the Convention, especially Article 3: *Bieber*, *Wellington* and *Hutchinson*. Other cases were concerned with the interpretation of Schedule 22 (transitional arrangements) and the need to take account of the Secretary of State's policy: *Pitchfork*, *Coonan* and *Sweeney*.

The next two cases set some parameters to the whole life order: whether or not a guilty plea was a mitigating factor and what counted as a crime of exceptionally high seriousness.

Hobson [2005] EWCA Crim 3115

In 2005 Mark Hobson sought leave to appeal in respect of the imposition of a whole life order. He had pleaded guilty to the murders of his girlfriend, her sister (involving acts of a sexual and sadistic nature), and an elderly couple killed in the course of a burglary. Hobson had made it clear at the earliest opportunity that he would plead guilty. His QC argued he should be given credit for this and should not have had an order for a whole life term imposed. The Lord Chief Justice, giving the Court's decision, was clear and emphatic: 'The facts of these four murders are so horrific that a whole life order was inevitable, guilty plea or no'.⁶⁷¹ Earlier he had noted that the Guidelines state expressly that: 'Where a Court determines that there should be a

⁶⁷¹ para 76

whole life minimum term, there will be no reduction for a guilty plea.’⁶⁷² This was to be restated in the Sentencing Guidelines Council Revised ‘Reduction in Sentences for Guilty Pleas’ Definitive Guidelines 2007.

The application for leave to appeal was refused.

***Randall* [2007] EWCA Crim 2257**

In 2007 the Court of Appeal heard the case of Andrew Randall, who had received a whole life order for the murder of his baby daughter. In the judgment, Lord Chief Justice Phillips’ statement in *Jones*⁶⁷³ was quoted. All three judges felt considerable unease about the trial judge’s conclusion that the case warranted a whole life order. Lord Justice Gage continued ‘As *Jones* makes clear, the imposition of such a sentence (ie a whole life order) should be reserved for those cases where the need for it is clear cut’.⁶⁷⁴ The Court substituted a minimum term of 30 years for the whole life order.

***Bieber* [2008] EWCA Crim 1601**

This case was concerned with the legitimacy of the whole life order. Bieber had been tried for the murder of one police officer, and the attempted murder of two other officers by shooting and it raised two issues: the first, whether a whole life order was appropriate; and the second, whether the whole life order infringed Article 3 of the European Convention. Bieber had been found guilty at Newcastle Crown Court in 2004, and in 2006 the Court of Appeal rejected his appeal against conviction.

In considering whether a whole life order was lawful in domestic law and whether it breached Article 3 of the Convention, the QC for the appellant submitted that the decision of the European Court in *Kafkaris* strongly supported this ground for appeal. For the Crown it was argued that a whole life order had been held to be lawful by the House of Lords; that the European Court had held only that a whole life order ‘may’ raise an issue under Article 3; and finally, that a whole life order was not irreducible since the prisoner might be released under Section 30 of the Crime (Sentences) Act 1997.⁶⁷⁵

The Appeal Court in its decision cited the precedent in the Divisional Court of *Hindley* [1998] QB 751, where the appellant had argued that to impose a whole life tariff was unlawful. Lord Chief Justice, Lord Bingham had observed:

⁶⁷² para 13

⁶⁷³ See above

⁶⁷⁴ para 27

⁶⁷⁵ See Appendix I

One can readily accept that in requiring a sentence of imprisonment for life on those convicted of murder, Parliament did not intend the sentence to mean what it said in all, or even in a majority, of cases, but there is nothing to suggest that Parliament intended that it should never (even leaving risk calculations aside) mean what it said.⁶⁷⁶

This decision was appealed unsuccessfully by Hindley to the Court of Appeal and the House of Lords.⁶⁷⁷ Citing this as precedent, the Court of Appeal in *Bieber* reaffirmed that the whole life order was a lawful sentence in English law.

The Court then turned to issues in European and other jurisprudence. The appellant's counsel drew attention to a decision of the German Constitutional Court: at issue was whether the imposition of life imprisonment breached Article 1.1 of the Basic Law, which requires the State to 'respect and protect human dignity'. The Constitutional Court stated that 'a humane execution of lifetime imprisonment can only be assured if the sentenced criminal has a concrete and principally attainable possibility to regain freedom at a later point in time.'⁶⁷⁸

A similar conclusion was quoted from a judgment in the Supreme Court of Namibia, where the Chief Justice had stated that a life sentence 'cannot be justified if it locks the gates of the prison irreversibly for the offender.'⁶⁷⁹

Just as the European Court in *Kafkaris* quoted from the Committee of Ministers of the Council of Europe, so too did the appellant's counsel in this case:

In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life sentence prisoners.⁶⁸⁰

He also cited from the Framework Document of the European Arrest Warrant.⁶⁸¹

The Appeal Court commented that the recommendation of the Committee of Ministers appeared to proceed on the basis that, however heinous the crime, an offender should not be denied the prospect of conditional release. However, the court inferred from the Framework document that sentences for life or for very lengthy periods do not, of themselves, amount to inhuman or degrading treatment or punishment: 'were that not so, an embargo on such punishment would surely be a mandatory, rather than an optional, condition of extradition.'⁶⁸²

⁶⁷⁶ para 37

⁶⁷⁷ The detail of this was discussed above.

⁶⁷⁸ quoted in para 17. See Chapter 5 for more detail.

⁶⁷⁹ *State v Tcoeib* (1997) quoted in para 19 A fuller consideration of this case is given in Chapter 5.

⁶⁸⁰ Recommendation 2003: 22

⁶⁸¹ Quoted above under *Kafkaris*

⁶⁸² para 23

The Court then turned to consider relevant determinations of the European Court in *Nivette*, *Einhorn* and especially *Kafkaris*.⁶⁸³ It was confident that:

- The imposition of a sentence of life imprisonment will not involve a violation of Article 3 if the sentence is reducible;
- The fact that the offender may be detained for the whole of his life does not involve a violation of Article 3;
- The imposition of a life sentence that is irreducible may raise an issue under Article 3.⁶⁸⁴

The focus was on the third of these. The issue, it was thought, would be raised if the offender were ‘detained beyond the term dictated by the *legitimate purposes of punishment*.’⁶⁸⁵ The determination continued that the essential requirement appeared to be the possibility of a review that would determine whether imprisonment remained justified.⁶⁸⁶ However, the Court went on:

We do not consider that it follows from the decision of the majority of the Grand Chamber (of the European Court in *Kafkaris*) that an irreducible life sentence, imposed by a judge to reflect the *appropriate punishment and deterrence*⁶⁸⁷ for a very serious offence is in potential conflict with Article 3.⁶⁸⁸

The Court then answered a question it itself had posed: Is it the sentence or the consequent detention that is capable of being in breach of Article 3? ‘We believe it is the latter.’⁶⁸⁹

Attention was turned to what counted as a reducible sentence, the division within the Grand Chamber was noted, as was the authority of the President of Cyprus to order an early release.

The Court drew together these reasonings. The mandatory life sentence was not normally irreducible. When a whole life term was ordered it was because the judge considered that for punishment and deterrence the offender must remain in prison for the whole of his or her life. The European Court had not ruled that an irreducible life sentence, deliberately imposed by a judge in particular circumstances, would result in a breach of Article 3. Prior to the 2003 Act, the Secretary of State reviewed all prisoners serving a whole life tariff after they had served 25 years. At the time of this appeal (ie in 2008), the Secretary of State had limited powers to release a life prisoner under Section 30 of the Crimes (Sentences) Act 1997 on compassionate grounds. But, perhaps surprisingly, the judgment continued:

⁶⁸³ See above

⁶⁸⁴ para 37

⁶⁸⁵ Emphasis added

⁶⁸⁶ para 39

⁶⁸⁷ Emphasis added

⁶⁸⁸ para 42

⁶⁸⁹ para 43

If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner.^{690 691}

In conclusion, the Court of Appeal, applying the European Court's determination in *Kafkaris*, did not consider that a whole life term should be regarded as a sentence that is irreducible. Any Article 3 challenge should be made not when the sentence is imposed, but when the prisoner can bring evidence to bear that any further detention will constitute degrading or inhuman treatment.

The question of Bieber's whole life order was quickly dealt with: 'There is a degree of illogicality⁶⁹² in having concluded that the appellant's offences made it appropriate to take 30 years as the starting point for the minimum term then to conclude that, after weighing the aggravating features, a whole life order should be imposed.'⁶⁹³

Furthermore, the Court reiterated its view previously in *Jones* that a whole life term should only be given in cases which fell well within the guidelines given in Schedule 21 of the 2003 Act.

The Court, therefore, set aside the whole life order and set the starting point at 30 years for two reasons: the murder of a police officer in the course of his duty, and the use of a firearm. When added to this the attempted murder of two other police officers, the Court concluded that a minimum sentence of 37 years was appropriate.

This judgment made a number of key points:

- The whole life order should not be regarded as irreducible, given the powers of the Home Secretary to release prisoners.
- The powers of the Home Secretary were not confined to releasing prisoners at death's door.
- It was not the sentence itself, but continued detention that may occasion a breach of Article 3.
- The trial judge should not impose a whole life order unless the crime was well within Schedule 21 (4).

⁶⁹⁰ para 48 This paragraph was to be cited by the government in its submission to the ECtHR Grand Chamber in *Vinter, Bamber and Moore* in 2012.

⁶⁹¹ Under the Humans Rights Act, government ministers were bound to act in accordance with the ECHR. Therefore the Home Secretary was bound to release a prisoner if continued detention was not penologically justified.

⁶⁹² The illogicality is not spelt out. However, if a crime is not of exceptionally high seriousness the trial judge should therefore take as his starting point 30 years (as he did), but the aggravating factors do not make the crime one of 'exceptionally high seriousness' and therefore the sentence should be less than whole life.

⁶⁹³ para 52

Hutchinson 2008 ⁶⁹⁴

In 1984 Hutchinson was found guilty of murdering three members of a family and raping the daughter. At the trial the judge recommended a minimum term of 18 years but added 'it was a genuine life case'. This recommendation was disregarded by the Secretary of State, who set a whole life tariff. The case was reviewed in 2008 in the High Court (in accordance with the 2003 Act Schedule 22), where it was argued that a whole life term violated his human rights and that the trial judge's recommendation of an 18 year minimum term was the correct sentence. The reviewing judge concluded 'there is no reason at all for departing from the decision of the Home Secretary'. Later in 2008, the Court of Appeal heard an application for leave to appeal the sentence, Lord Justice Dyson said it was a truly shocking case and there was no substance in his application: 'In our judgment Mr Justice Tugendhat was plainly correct in saying that this applicant should spend the rest of his life in custody without the prospect of release'. From the sketchy details available, it is not possible to be certain what the challenge in terms of the European Convention was.

Wellington [2008] UKHL 72

Late in the same year, The House of Lords heard the appeal of Wellington from a decision to extradite him to the USA to stand trial in Missouri on a charge of first degree murder. There the prescribed penalties are death or life imprisonment without parole or release, except by the act of the Governor. The ground of appeal was that the Home Secretary's decision to allow the extradition would breach Wellington's Convention Rights under Article 3.

Lord Hoffman began by considering the argument put forward by Lord Justice Laws in the Divisional Court that life imprisonment without parole is inhuman and degrading. He quoted the Lord Justice that the abolition of the death penalty must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. Lord Hoffman disputed this, saying that opposition to the death penalty may be based on the grounds that it is irreversible when justice has miscarried and that there was little evidence of its deterrent effect. He rejected Lord Justice Laws' view that the whole life tariff was arbitrary - that it could be measured in days or decades depending on how long the prisoner lived - and therefore was liable to be disproportionate. He ended the consideration of this point by quoting Lord Bingham's statement in *Lichniak and Pyrah* that the mandatory life sentence represented the settled will of Parliament.⁶⁹⁵ Turning to the law, Lord Hoffman discussed *Kafkaris*, drawing attention to the majority decision that in Cyprus the sentence of life imprisonment was not irreducible. This led to *Bieber* in the Court of Appeal, and Lord Hoffman agreed with the Lord Chief Justice's view in that case.

⁶⁹⁴ The information regarding the case is taken from accounts on the BBC News website of 16 May and 6 October 2008. No record of the case exists on the BAILLI website.

⁶⁹⁵ See above

Lord Scott, in his concurring opinion, went further, stating that the mandatory nature of an irreducible full life sentence would be inhuman and degrading ‘if the sentence were to appear so grossly *disproportionate*⁶⁹⁶ to the circumstances of the crime as to offend ordinary notions of fairness and justice.’⁶⁹⁷ He continued:

It has been suggested, also, that an irreducible life sentence is ‘inhuman and degrading’ for Article 3 purposes because it denies the prisoner the possibility of atonement and redemption If a whole life sentence of imprisonment without parole is a *just punishment*⁶⁹⁸ for the crime, the prisoner atones by serving his sentence. Redemption, a matter between him and his Maker, may well be achieved during the currency of the sentence, but I do not follow why it is said to require a reduction of the length of the just punishment sentence.⁶⁹⁹

Lord Carswell agreed that a whole life sentence was not a breach of Article 3 in every case. As authorities for his view, in addition to *Kafkaris*, he cited *Nivette*, *Einhorn* and *Léger* in the European Court.⁷⁰⁰ He went on that continued detention may infringe Article 3 but this could not be determined at the sentencing stage.

Lord Brown also cited *Nivette*, *Einhorn* and *Léger* in brief and considered *Kafkaris* in more detail. He thought:

It is apparent that widely differing views are held by the judges in Strasbourg as to whether mandatory life sentences (and perhaps even discretionary life sentences) are compatible with Article 3. The judgment of the majority appears to consider life sentences as a category and to ask whether generically they are ‘de facto and de jure’ reducible, only regarding them as irreducible if the law precludes all possibility of release or the facts demonstrate that no one ever is released. And even if the sentence is to be regarded as irreducible, the majority appears to conclude no more than that it *may* raise an issue under Article 3 (not that it should be held ‘in principle’ inconsistent with Article 3).⁷⁰¹

Lord Brown went on to consider whether the whole life term in England was irreducible. He noted the Court of Appeal’s reliance in *Bieber* on the powers of the Secretary of State to order release on compassionate grounds,⁷⁰² but thought this power was used only sparingly. More compellingly, he thought that the whole life term should not be regarded as irreducible ‘or at any rate not objectionably so’ since:

when originally the whole life term was fixed, the prisoner’s individual circumstances (including naturally the circumstances of his particular offending) *will* have been considered and will have been thought by the judge (or the Court of Appeal) to merit that degree of punishment, draconian though that undoubtedly is.⁷⁰³

⁶⁹⁶ Emphasis added

⁶⁹⁷ para 45

⁶⁹⁸ Emphasis added

⁶⁹⁹ para 46

⁷⁰⁰ See above

⁷⁰¹ para 72

⁷⁰² See above

⁷⁰³ para 78

To stress the point - and this was to be of significance in *Vinter, Bamber and Moore* at the ECtHR⁷⁰⁴ - he later defined an irreducible life sentence, based on the Kafkaris ruling to mean :

a mandatory life sentence to be served in full without there ever being proper consideration of the individual circumstances of the defendant's case.⁷⁰⁵

Further, in agreement with Lord Phillips in *Bieber*,⁷⁰⁶ he believed any violation of Article 3 would only occur when further imprisonment could not be justified on any ground.

The Lords of Appeal did not allow Wellington's appeal, despite concern about whether there was a realistic likelihood of parole or commutation by the Governor of Missouri. More relevant to this study is the position taken by the House of Lords in relation to whether the whole life order breached Article 3. The decision of the Court of Appeal in *Bieber* was confirmed, including the argument that the whole life order was reducible - a majority of the Law Lords saying that it was the Secretary of State's powers under statute to exercise clemency that made it so; while Lord Brown's opinion was that the sentencing judge taking individual circumstances into account made it so.

The judgment determined:

- The mandatory life sentence was reducible and the Lords of Appeal regarded it as a class of sentence, while the whole life order was tailored to the circumstances of the crime and of the offender.
- The whole life order was reducible due to the Home Secretary's power to exercise clemency.
- The whole life order could be considered a just punishment: it was proportionate to a particular heinous offence.
- The position in *Bieber* was confirmed that any Article 3 breach occurs not when the sentence is imposed but only (possibly) in the course of imprisonment.

***Pitchfork* [2009] EWCA Crim 963**

In 1988 Pitchfork pleaded guilty to the rape and murder of two young girls, conspiracy to pervert the course of justice and two further offences of indecent assault. He was sentenced to life imprisonment for the murders. The Secretary of State set the tariff at 30 years. After the 2003 Act came into force, Pitchfork sought a review of the minimum term. In 2008 the

⁷⁰⁴ See Chapter 7

⁷⁰⁵ para 81

⁷⁰⁶ See above

reviewing judge specified a minimum term of 30 years. It was noted the case raised issues which were also considered in *Bamber*, and which had been fully discussed in that case.⁷⁰⁷

The sentencing judge in 1988 stated to the Home Secretary that the offender 'should only be released when the authorities are satisfied that he is no longer a danger to women. In any event, in view of all the serious, callous and cunning conduct the actual length should not be less than 20 years.' Lord Chief Justice Lane said '25 years minimum, but from the point of view of the safety of the public I doubt if he should ever be released.' The Secretary of State determined that 'the heinous nature of the offences warranted a significantly higher tariff than that which had been recommended by the judiciary.' The tariff was set at 30 years. In 2001 the Secretary of State reconsidered the tariff but left it at 30 years.⁷⁰⁸

After the 2003 Act took effect, Pitchfork applied for a judicial review of the tariff. The reviewing judge concluded that the trial judge had meant a whole life sentence. The Court of Appeal rejected this, saying that if the trial judge or the Lord Chief Justice had intended a whole life order, this would have been clearly stated.⁷⁰⁹

As a result, the Court of Appeal conducted its own review and assessed the minimum term in the light of the 2003 Act Schedule 21. The applicant's QC submitted that this action constituted a breach of Articles 6 and 7(1) of the Convention, and the starting point should be the recommendation made by the Lord Chief Justice. The Court disagreed:

This (the legislation) requires the judge conducting the review to have regard to the recommendations of the trial judge and the Lord Chief Justice and to the considerations contained in Schedule 21 of the 2003 Act. In reaching his conclusion he must also have regard to the order made by the Secretary of State, not as a consideration influencing his decision on the review, but for the purpose of ensuring that the result of the review will not produce any increase in the length of the prisoner's incarceration beyond the period already fixed by the Secretary of State's order.⁷¹⁰

This last point was designed to avoid the imposition of a retrospective sentence, deemed to breach Article 7 (1) of the Convention.

In the light of Schedule 21, the applicant's counsel accepted that the murder fell into the exceptionally high category of seriousness for which, post 2003, the starting point would be the whole life term. However, this was not the statutory test, so the Court of Appeal decided that the sentence could not be higher than 30 years, and that it should be 30 years.

⁷⁰⁷ See below
⁷⁰⁸ paras 14-18
⁷⁰⁹ para 20
⁷¹⁰ para 24

The Court then turned to whether progress made in prison - in terms of addressing the reasons for his past behaviour, education to degree level and a specialism in translating music into Braille - was exceptional, and should result in a reduction in the sentence. The Court over-ruled the reviewing judge and reduced the sentence by two years.

Although not a case involving a whole life order, *Pitchfork* clarified a number of points relevant to the whole life order:

- Reports made by judges to the Secretary of State prior to the 2003 Act had to have been unequivocal in recommending a whole life tariff;
- Reviews undertaken as part of the transitional arrangements following the 2003 Act were determined neither by the original recommendations nor by Schedule 21. 'Neither original judicial recommendations nor the Schedule enjoys some kind of hidden primacy.'⁷¹¹
- Review decisions were, bound by Article 7 (1) of the Convention, not to exceed the tariff ordered by the Secretary of State;
- Where the term was finite, allowance could and should be made for exceptional progress in prison. The two cases that follow consider this point in respect of whole life orders.

Hardy [2010] EWHC 1064 QB

Hardy had been sentenced in November 2003 (ie before the 2003 Act had received the royal assent) for the murder of three women. Hardy had pleaded guilty on the day of the trial. The defence had asserted that the only defence would be diminished responsibility. Psychiatric reports revealed a personality disorder. 'However, by his pleas of guilty, Hardy accepted that his abnormality of mind had not been such as to impair substantially his mental responsibility for what he had done.'⁷¹² The judge noted that cases which normally fall within those for which the appropriate starting point is a whole life order includes the murder of two or more persons, where each murder involves a sexual or sadistic conduct:

This is undoubtedly such a case. Indeed, this case is one of the utmost gravity, in which exceptionally Hardy's early acceptance of responsibility for his victims' death, his personality disorder at the time, his eventual pleas of guilty and such remorse as he expressed through his Counsel carry little weight.⁷¹³

Accordingly, a whole life order was made.

⁷¹¹ para 27

⁷¹² para 10

⁷¹³ para 12

This judgment showed that if offences fall well within the range of those for which a whole life order is recommended, then pleas of personal mitigation will have little effect, ie the position for whole life order prisoners is different to the opinion in *Pitchfork*.

Coonan [2010] EWHC Crim 1741 (QB); [2011] EWCA Crim 5

On trial in 1981 for 13 murders, Sutcliffe (as he was then known) claimed that his responsibility was diminished by mental abnormality. The jury, by its verdict, rejected the account given by psychiatrists and found him guilty of the 13 murders. The sentencing judge said he did not believe he had the power to recommend a whole life tariff to the Secretary of State. He recommended a tariff of 30 years. In 1997 in a letter to Lord Chief Justice Lord Bingham, he said:

I now think that it would have been better to have made no minimum recommendation....I have no doubt that this is one of the rare cases where the offences were so heinous and the perpetrator so dangerous that life should mean life.⁷¹⁴

Lord Bingham recommended 35 years to the Secretary of State, but no tariff was set.

In due course, the case was referred to the High Court. It was suggested for Coonan that greater regard should be given to the recommendations of the trial judge and the Lord Chief Justice than should be given to the practice of the Secretary of State before the 2003 Act. The judge disagreed, citing as precedent *Pitchfork* in particular paragraph 24.⁷¹⁵ He also rejected counsel's argument that the starting point was 30 years: the number of victims and intended victims took it beyond the 30 years starting point, as did the brutality and gravity of the offences, the fact that the crimes were pre-planned, with evidence of sexual or sadistic conduct.

The judge rejected Coonan's argument that the report of the psychiatrists should be used as a mitigating factor:

As a matter of principle, it is for the jury and not the judge to decide whether a person's responsibility for killing is diminished by reason of mental abnormality. The burden of proof is on the defendant. It is not, in my opinion, open to a judge, setting a minimum term to go behind the jury.⁷¹⁶

The judge considered whether the effective treatment of Coonan's mental abnormality and good behaviour in detention should result in his serving less than a whole life term. He thought not, as:

⁷¹⁴ QB para 9

⁷¹⁵ See above

⁷¹⁶ para 18 It should be noted that this does not distinguish responsibility from culpability.

- It did not meet the high threshold explained in *Caines*⁷¹⁷
- It is 'in any event impossible rationally in the case of a prisoner for whom otherwise a whole life term is appropriate...an order cannot be made for 'whole life less one year.'⁷¹⁸ This makes explicit the difference between the whole life order and imprisonment for a minimum term which was alluded to in *Pitchfork*.

He directed that the early release provisions were not to apply to Coonan. That is, he would serve a whole life sentence. This judgment draws attention to the significance of the Court of Appeal ruling in *Pitchfork*: that a reviewing judge should take into account both the original judicial recommendations and Schedule 21 of the Act, but neither had primacy. The judgment clearly states that Coonan's crimes fell within those for which the starting point was the whole life order; and that it was for the jury to decide whether or not to accept a plea of diminished responsibility. The judge finally drew attention to problems in considering a remission of sentence in cases where a whole life order had been made.

Late in 2010 Coonan sought leave to appeal. In the Court of Appeal, the Lord Chief Justice stressed that this application:

Is not and never could constitute an appeal in which the verdict of the jury might be called into question.... Its (the verdict's) correctness was not and is not open to argument. Judges making the assessments under Schedule 22 of the 2003 Act cannot impose a sentence which would reflect a defence which was not established when, as a matter of law, it should have been established by the defendant, or superimpose their own judgments on issues of provocation or self defence, contrary to the verdicts of the jury.⁷¹⁹

In conclusion, Lord Judge stated:

Even accepting that an element of mental disturbance was intrinsic to the commission of these crimes, the interests of justice require nothing less than a whole life order. That is the only available punishment *proportionate*⁷²⁰ to these crimes.⁷²¹

The application for leave to appeal was dismissed. Nothing in the Court of Appeal's analysis and determination impugned the decision of the reviewing judge. There is no reference in the Court of Appeal's decision in *Pitchfork*, of which such extensive use was made by the reviewing judge and it can therefore be assumed that his application of the judgment was accepted by the Court of Appeal. Similarly, the Court acknowledged that it was the responsibility of the trial jury to accept or not the evidence led by the defence to support diminished responsibility.

⁷¹⁷ *Caines* [2008] EWCA Crim 2915 quoted in Appendix E

⁷¹⁸ para 24

⁷¹⁹ para 8

⁷²⁰ Emphasis added

⁷²¹ para 38

6.5.4 Crimes with the potential to attract a whole life order

Before ending this section on court cases that clarified the sentencing of those found guilty of the most heinous of murders, it is thought that brief mention should be made of five cases illustrating differing aspects of sentencing in respect of potential whole life orders.

Sawoniuk [2000] EWCA Crim 9; [2001] ECHR 895

Sawoniuk, a naturalized British citizen, was charged with murder under the 1991 War Crimes Act, apparently the only person to be charged under the Act. The Act gave jurisdiction to British courts for alleged war crimes committed in Nazi Germany or its occupied territories by residents now in Britain. He was found guilty in 1999 of murder on two counts that were 'violations of the laws and customs of war' and received the mandatory life sentence. The trial judge recommended that 'the offender should never see the light of day'. Lord Chief Justice Bingham recommended five years. Sawoniuk challenged the convictions with leave granted by the Court of Appeal. There were eight grounds in the appeal, all critical of the trial judge. In its determination, the Court of Appeal considered all grounds in great detail, quoting the trial judge in his instructions to the jury and in his summing up. All eight grounds were rejected. Leave to appeal to the House of Lords was rejected.

An application was made to the European Court, where it was noted that the Secretary of State had yet to make a decision on the tariff. The application alleged breaches of Article 3, 5 and 6. In respect of Article 6, it was maintained in particular that the time between the committing of the alleged offences and the trial meant that he would not receive a fair hearing. The European Court rejected this. In respect of Article 5, it was argued that bail was arbitrarily revoked and reinstated. Again this was rejected, because the complaint had not been made within the time allowed. In respect of Articles 3 and 5 it was alleged that the mandatory life sentence was arbitrary and disproportionate and that his advanced years and medical conditions meant that detention caused exceptional hardship. The Court noted there was nothing in the Convention against imprisonment at an advanced age, but there was a duty to provide medical care. Moreover, as he had not exhausted domestic remedies, a question of a breach of Article 3 could not be considered. Further, 'given the seriousness of the offences, a sentence of life imprisonment (cannot) be regarded as *arbitrary or disproportionate*⁷²² in the context of Article 5 (1)'. In respect of the setting of a tariff any decision could be subject to a judicial review, and release on compassionate grounds was possible. Therefore, the European Court determined that the application was inadmissible. There is no evidence as to whether the Secretary of State set a tariff but Sawoniuk died in prison in 2004.

⁷²² Emphasis added

In declaring the application inadmissible, the ECtHR made a number of significant points:

- A mandatory life sentence was not intrinsically arbitrary or disproportionate.
- Old age or ill health while imprisoned did not constitute a breach of Article 3 providing the prisoner's needs were met.
- The time elapsed between the crimes and the trials did not breach the ECHR.
- Any tariff set could be subject to judicial review and compassionate release was possible.

The next two cases are those where it might have been expected that a whole life order would be made in view of the number of victims and the sadistic nature of the crimes, but the orders were not made on the grounds of mitigating factors.

***Copeland* [2007] EWHC 368 (QB)**

In 2000 Copeland, 'the London nail bomber', had been convicted of three counts of murder and three counts of causing explosions to endanger life. The jury had rejected a plea of diminished responsibility. He was sentenced to life imprisonment on each of the counts. The Recorder reported that his avowed aim with the first two explosions was to kill, maim and terrorise people in the Black and Asian community. The third bomb was targeted at the homosexual community. The Recorder concluded there were no mitigating factors; aggravating factors comprised his aim, motivated by hatred, to kill, maim and terrorise, and the making and planting of explosives showed premeditation. Such a crime, if committed after 2003, would have fallen well within Schedule 21 (4). The trial judge and the Lord Chief Justice both recommended 30 years, but the Secretary of State did not consider the case, hence the referral to the High Court.

The reviewing judge regarded it as a case of exceptional gravity on the grounds of what the trial judge had written to the Secretary of State. He had no doubt that the appropriate starting point would be a whole life order. However, as this was part of the transitional arrangements of the 2003 Act, he had first to consider what sentence the Secretary of State was likely to have imposed, and not to exceed that figure (to avoid any breach of Article 7 (1) of the Convention).⁷²³ He noted the advice in *Sullivan* that the best guide to what would have been the practice of the Secretary of State was the Practice Directions.⁷²⁴ He, however, also quoted Lord Chief Justice Woolf's observation: 'As has been made clear by the Secretary of State, in the most serious cases he tended to select a higher figure than that indicated by the judiciary.'⁷²⁵

⁷²³ This view is in contrast to earlier judgements when prisoners, if informed of their tariff, could not have them subsequently increased to avoid a breach of Article 7 (1) .

⁷²⁴ See Appendix D

⁷²⁵ *Sullivan* para 27, quoted in para 13

He had no difficulty in applying Schedule 22 to this case, concluding, that in the light of these precedents, he was able to take as the starting point a whole life order. He regarded Copeland's age (22) as a mitigating factor, but did not refer to the aggravating factors given to the Home Secretary. Instead of a whole life order, he imposed a minimum term of 50 years.

In this case the prisoner's age when the offences were committed was regarded as a factor in the selection of the 'starting point'. This is in contrast to the decision in *Coonan*, that a whole life order could not be reduced to take account of exceptional behaviour in prison.

Allitt [2007] EWHC 2845 (QB)

The same judge, Mr Justice Burnton, who had set Copeland's term at 50 years, conducted the review of *Allitt*. Allitt had been convicted in 1993 of the murder of four children, the attempted murder of three others and grievous bodily harm with intent of six other children in the hospital where she was a nurse. She received life sentences on all counts, but the Secretary of State had not set the tariff before the 2003 Act took effect.

Allitt at her trial had pleaded not guilty, and so the defence of diminished responsibility was not practicable. The reviewing judge, however, having considered all the medical evidence provided for the trial and subsequently (which included evidence of a sadistic nature), was satisfied that Allitt was suffering from an abnormality of mind at the time the crimes were committed. In contrast to *Coonan*, he thought it right not to consider a whole life order that would otherwise be appropriate.

Controversially, he continued 'Since the Home Secretary, having had a lengthy opportunity to do so, did not determine that Ms Allitt should have a whole life tariff, for the purposes of paragraph 8(b) of Schedule 22 I find it impossible to arrive at the position he would have been likely to do so.'⁷²⁶ This is an unusual, if not unique, interpretation of that part of the statute. As has been seen, the High Court in 2010 did, in fact, impose a whole life order for Coonan/Sutcliffe despite his conviction being in 1981 and despite the fact that the Secretary of State had not then set a tariff.⁷²⁷

The Practice Directions⁷²⁸ are then referred to, including Lord Woolf's observation that the Secretary of State in the most serious cases had, on a number of occasions, set a higher tariff than that recommended by the judiciary. Mr Justice Burnton considered that if the Home Secretary had made a determination it would have been 40 years. He rejected that to increase the term beyond the 30 years recommended by the trial judge and the Lord Chief

⁷²⁶ para 49

⁷²⁷ See above p28

⁷²⁸ See Appendix D

Justice would breach Article 7(1). He said that the progress made by the offender since her imprisonment was not exceptional, and therefore the term could not be reduced on that ground. In the end, he accepted the submission made for Allitt that it would be wrong to increase the recommendation of the 'experienced trial judge who heard the evidence in the case and was in the best position to assess the seriousness of her offences and that of the eminent Lord Chief Justice.'⁷²⁹

Therefore he ordered that the early release provisions were to apply after 30 years.

Ayre 2010⁷³⁰

There is no record of this case on the database. The information is derived from his QC's Chambers' website.

In 2006, Ayre pleaded guilty to serious sexual offences against a 10 year old boy. At the time he had been released on licence, following a mandatory life sentence for a murder in 1985. The judge sentenced him to a discretionary life sentence and declined to set a minimum term. This meant, of course, that there would be no Parole Board review and that he would serve a whole life term.

The Court of Appeal quashed the sentence on the grounds that it had been imposed not only for punishment and deterrence but also because of the risk he posed. The assessment of risk, of course, is the responsibility of the Parole Board. The Court of Appeal substituted a discretionary life sentence with a minimum term of 10 years.

Ayre was the only prisoner at that time serving a whole life order upon a discretionary life sentence. Ayre's QC commented on his Chambers' website 'it will be more difficult in the future for judges to pass whole life tariffs in discretionary cases'.⁷³¹

Certainly, the Court of Appeal determined that the trial judge's refusal to set a minimum term was wrong in that he had taken risk and dangerousness into account. However, the decision also reinforced the position that whole life orders were only to be made in regard of crimes of exceptionally high seriousness.

⁷²⁹ para 56

⁷³⁰ www.gcnchambers.co.uk

⁷³¹ See also Chapter 8: *Oakes*

6.6 Conclusion

This chapter began with a consideration of the political context in which judges were applying those sections and schedules of the CJA 2003 concerned with the whole life order. It illustrated how the flood of legislation concerning criminal justice, which created a large number of new offences, did not abate. Nor did Blair's criticism of the criminal justice system. It was suggested that the CRA 2005 and the creation of the Ministry of Justice were examples of the prime minister's obsession with top down reform. Certainly, it was clear that the judiciary were not involved in the early stages of either change. However, most commentaries regard the HRA 1998 and the CRA 2005 as significant, positive developments.

The executive's concern with the attitude of the media continued and led, for instance, to clashes with the judiciary over comments on the judge in *Sweeney*, despite the Constitutional Reform Act. More significant was the long running disquiet between the government and the judiciary concerning anti-terrorism legislation, with the judiciary upholding due process. This resulted in even greater tension between the judiciary and the executive. However, judicial concerns about losing discretion in respect of sentencing must have been allayed by the Lord Chief Justice's statements that Schedule 21's Guidelines were exactly that: guidelines. Their concerns were probably further allayed by Mr Justice Burnton's sentencing decisions.

It was in this context that cases concerned with the compatibility of the whole life order with both the Murder (Abolition of the Death Penalty) Act 1965 and the ECHR, especially Article 3, but also Articles 5 and 7, were decided. By 2010 there was considerable clarity. In a series of appeals, the Court of Appeal and the House of Lords had rejected claims that the whole life order breached the European Convention. They reiterated that they did not like the mandatory life sentence for murder; but that it was not an irreducible life sentence. Further, they upheld the view that for the most heinous of crimes a whole life order (ie a sentence with no minimum term) could be justified on the grounds of punishment and deterrence.

The cases illustrate the care which judges, especially at appeal, considered the degree of seriousness in cases. For a whole life order, the offence had to be of 'exceptionally high seriousness,'⁷³² There was a care, therefore, that there should be proportionality in setting the minimum term of imprisonment, following the imposition of a mandatory life sentence, and that disproportionality must be avoided.⁷³³

⁷³² CJA 2003 Schedule 21 4 (1) a.

⁷³³ For example in *Wellington* para 45

7 CRITICAL CHALLENGES TO THE WHOLE LIFE ORDER

7.1 Introduction

In 2010, there was a widespread belief that the whole life order was facing its final challenge. Since 2003, a series of cases had clarified the terms of the sentence and a series of challenges had been seen off. It was evident by 2010 that the only recourse for those with whole life orders was application to the ECtHR with a view to the Court determining that a whole life order breached Article 3 of the ECHR. This chapter is concerned with the key application of *Vinter, Bamber and Moore* to the ECtHR and with a significant domestic case, *Oakes*.⁷³⁴ If the Strasbourg ruling requires a review mechanism, then the form of that mechanism will be of concern. Any review mechanism will raise, among other issues, how to predict, with any confidence, the risk posed to the public by any released offender. This issue will also be examined.

The attitude to the ECtHR and ECHR of the judiciary, politicians, the media and the public will also be explored as this would affect the context of any government action necessitated by an unfavourable determination in *Vinter, Bamber and Moore*. Respondents' views on the sentence are considered, views which raise the question of the understanding and acceptability of the whole life order's sentencing purposes: retribution and deterrence.

7.2 Vinter, Bamber and Moore trials in the domestic courts

These three men were tried, sentenced and had their sentences considered by the Court of Appeal for separate crimes; then all three applied to Strasbourg. The ECtHR accepted and conjoined their applications. It, therefore, seems appropriate to treat the domestic cases together.

***Vinter* [2009] EWCA Crim 1399**

Douglas Vinter was tried in 2008 for the murder of his wife, and found guilty. There was no submission in mitigation and the trial judge imposed the mandatory life sentence. He concluded that a whole life order was appropriate as Vinter had been found guilty of a murder

⁷³⁴ [2012] EWCA Crim 2435

in 1996 and had served nine years of a life sentence. The Court of Appeal noted the evidence of premeditation, kidnapping and the intention to cause death, and dismissed the appeal.

***Bamber* [2008] EWHC 862 (QB) and [2009] EWCA Crim 962**

Jeremy Bamber is probably the best known of the three men and not simply because of his conviction in 1986 for the killing, for financial gain, of five members of his family, including two small boys. Uniquely among those serving a whole life order, he has continued to maintain his innocence, building a wide network of support. His case has been kept before the public by his application to ECtHR over access to the media and by his three applications to the Criminal Case Review Commission.

In 1988, the Home Secretary set a whole life tariff, after the trial judge had recommended a 25 year minimum and the LCJ had said he would never release him. In 2008, Bamber sought judicial review of his tariff. The judge noted the recommendations made to the Home Secretary and Schedule 21 (4)'s lists of crimes of exceptionally high seriousness, and imposed a whole life order.

The first ground of appeal was the interpretation of the LCJ's recommendation. The Court of Appeal determined that the LCJ had indeed recommended a whole life tariff. The second ground of appeal was that the imposition of a whole life order breached rights under ECHR Article 3, in that no court had the power to review a whole life sentence and, therefore, it was reducible neither *de jure* nor *de facto*. It was maintained that the power of compassionate release of the Secretary of State under the Crime (Sentences) Act 1997 section 30 was extremely limited, and that no prisoner with a whole life tariff had been released under this power. *Kafkaris* was cited by the applicant, but the court asserted that in Cyprus the mandatory order (of life imprisonment) was not subject to any form of judicial discretion and the sentences did not, and could not, reflect the differing levels of culpability of those convicted of murder and the varying levels of gravity of all such cases.⁷³⁵ In other words, the Court of Appeal was drawing attention to the potential lack of proportionality in such sentences in Cyprus.

The court considered that a whole life order was 'not the consequences of an inexorable statute but a judicial decision, subject to review in this court, that the circumstances in a particular case are so grave that a whole life order should be imposed'.⁷³⁶ It went on to quote Lord Phillips in *Bieber*. In respect of *Wellington*, attention was drawn to the opinion of the Law Lords that an irreducible life sentence, imposed to reflect the requirements of punishment and

⁷³⁵ para 29
⁷³⁶ para 32

deterrence for a particularly heinous crime, did not conflict with Article 3. It was asserted 'These decisions bind us. The Grand Chamber does not.'⁷³⁷ Therefore, the appeal, on the grounds of infringement of Article 3, was rejected.

Finally, it was contended for Bamber that the review procedure created by the CJA 2003 constituted a breach of his rights under Article 7 (prohibiting retrospectivity). This ground of appeal was rejected, as the Act explicitly prohibited the review process from increasing the sentence.⁷³⁸ The judgment, therefore, concluded that punishment and retribution in the form of a whole life order was fully justified.⁷³⁹ The court did not consider a point of law of general public importance was involved and application to the House of Lords was refused.⁷⁴⁰

Moore [2008] EWHC 1163 (QB)

In 2002, the Home Secretary set a whole life tariff for Peter Moore, who had been convicted of four murders in 1996. Moore applied for judicial review in the terms of Schedule 22. The applicant's arguments that Article 7's principle of non- retrospectivity had been breached was rejected, as this was prohibited in Schedule 22; and the claim under Article 6, that the Home Secretary lacked independence, was rejected as the current hearing was to determine whether the early release provision would apply. The challenge in respect of Article 3 and/or 5 on grounds of arbitrariness and disproportionality was rejected: the tariff could be increased or decreased having regard to the aggravating or mitigating features in the case. The judge imposed a whole life order. Moore appealed the judgment, which was dismissed by the Court of Appeal, and so no application to the House of Lords on a point of law could be made.⁷⁴¹

7.3 Minority opinions at the ECtHR

Earlier in this study, it was noted that there were minority opinions in *Kafkaris* and *Léger*. In *Kafkaris*, the minority asserted:

It is commonly accepted nowadays ... that beside the punitive purpose of sentences, they must also encourage the social reintegration of prisoners Most legal systems provide for the possibility of reviewing life sentences and of granting release after a certain number of years.⁷⁴²

⁷³⁷ para 31

⁷³⁸ para 37

⁷³⁹ para 40

⁷⁴⁰ [2012] ECHR 61 para 21 In interview, Edward Fitzgerald drew attention to the Court of Appeal Criminal Division's reluctance to grant such certificates and as a result, the only recourse was to apply to the ECtHR.

⁷⁴¹ This information is derived from ECtHR judgment [2012] ECHR 61 paras 27-28 and appears to be the only record of the case.

⁷⁴² This minority opinion regretted the lack of references to comparative law. Chapter 5.2 of this study considered the position in other jurisdictions.

Clearly, this opinion raises the question, if only by implication, whether imprisonment for the whole of life is a legitimate sentence. In a concurring opinion, the British judge wrote that he considered that the time had come for the court to affirm clearly that the imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with Article 3 of the Convention.

In the opinion dissenting from the striking out of Léger's application to the Grand Chamber following his death, the minority highlighted what they felt was a missed opportunity to consider, under Article 5, the difficult question of the lawfulness of the applicant's continued detention after 40 years of imprisonment, taking into account reintegration into the community.⁷⁴³

7.4 Vinter, Bamber and Moore at the ECtHR

7.4.1 The Sectional Chamber: [2011] ECHR 324 (Statement of Facts); [2012] ECHR 61 (Judgment)

The applications of Vinter, Bamber and Moore were conjoined and the parties were asked a series of questions:⁷⁴⁴

Article 3

- Does the imposition of an irreducible life sentence violate Article 3 or does any violation only occur later?
- Is a whole life order an irreducible life sentence within the meaning of *Kafkaris*?
- Does *de facto* reducibility require the possibility of both compassionate and conditional release?

Article 5 (4)

- Is the possibility of release for a prisoner with a whole life order only at the discretion of the Secretary of State compatible with this Article?

Article 7

- In respect of Bamber and Moore, did the making of whole life orders by the High Court violate the principle of non-retrospectivity protected by this Article?

The judgment of the Chamber recounted the trials and appeals in English courts of the three men; the law in England; decisions in English courts relevant to the application; and then considered the situation in other jurisdictions with a special focus on proportionality.⁷⁴⁵ In the judgment, the question of whether a whole life order breaches Article 3 is central to this study.

⁷⁴³ 19324/02 para 7

⁷⁴⁴ Listed at conclusion of [2011] ECHR 324

⁷⁴⁵ Information on five cases, mentioned by ECtHR but not previously considered in this study, is given in Appendix F

The ECtHR found the complaints in terms of Articles 5(4), 6 and 7 'manifestly ill-founded'.⁷⁴⁶ They did, however, consider whether a whole life order breached Article 3. Having paid particular attention to *Bieber* and *Wellington*, the Chamber considered whether a grossly *disproportionate* sentence would violate Article 3, and at what point an Article 3 breach might arise. The Chamber accepted that, in principle, matters of appropriate sentencing largely fell outside the scope of the ECtHR, but a grossly disproportionate sentence could breach Article 3 when it was imposed. It considered, however, that following the comparative materials, gross disproportionality was a strict test.

On the second issue, the Chamber distinguished three types of sentence: first, in terms of a life sentence with eligibility for release after a minimum term, it considered that such a sentence was reducible and so no issue arose under Article 3; second, a mandatory sentence of life imprisonment without the possibility of parole;⁷⁴⁷ third, a discretionary sentence of life imprisonment without parole. The Chamber considered an Article 3 issue could not arise when this third sentence is imposed, and agreed with *Bieber* and *Wellington* that an Article 3 issue will only arise when it can be shown:

- i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and
- ii) as the Grand Chamber stated in *Kafkaris* ...the sentence is irreducible *de facto* and *de jure*.

Discretionary whole life orders, the Chamber noted, were not subject to later review: release could only be obtained on compassionate grounds. The Secretary of State's power on compassionate release was narrower than that available in Cyprus, and could conceivably mean that a prisoner could be kept in prison even if it could not be justified on any legitimate penological grounds. It was noted that the earlier practice of review after 25 years was not included in the CJA 2003. Such a review would enable the Secretary of State to satisfy himself whether imprisonment continued to be justified on legitimate penological grounds. Finally, the Chamber doubted whether compassionate release close to death could be considered release at all.

Turning to *de facto* reducibility, the Chamber believed the issue did not arise in these cases: 'The Court notes that the applicants have not sought to argue that their whole life orders were disproportionate in their case. Given the gravity of the murders for which they were convicted, the Court does not find they were'.⁷⁴⁸

⁷⁴⁶ The reasoning of this is discussed in Appendix G

⁷⁴⁷ This sentence does not exist in England.

⁷⁴⁸ para 95

The judgment in respect of Article 3 was a majority one: 4 to 3. The point at issue for the minority was whether the need for a possibility of revisiting a whole life order required that there should be in place a 'suitable mechanism ...so as to lend credence to the existence of such a possibility, and thus offer a measure of hope to the convicted person'.⁷⁴⁹ The minority disagreed with the determinations in *Bieber* and *Wellington* that an irreducible life sentence can be upheld as compatible with Article 3. They were, therefore, unable to accept that 'the absence of an Article 3 problem' justified the lack of a release mechanism. They continued:

The Article 3 problem does not consist merely in keeping the prisoner in detention longer than would be justified ... *Kafkaris* shows that it consists, equally importantly, of depriving him of any hope for the future, however tenuous that hope may be.

The minority found that Article 3 had been breached.

Perhaps the most striking part of the determination was the concurring opinion of Judge de Gaetano, who expressed surprise that the government had not relied on the Royal Prerogative of Mercy. He referred to *Shields* and the Report of the Ministry of Justice,⁷⁵⁰ and thought that the residual Prerogative Power of Mercy, 'much wider and more flexible than the Presidential power ... of the Constitution of Cyprus,' was applicable. 'That being so ... one cannot speak of an irreducible life sentence or a life sentence without any prospect of release as understood in *Kafkaris*.'

In essence, the disagreement within the Chamber comes down to this question: are there some crimes that are of such a high degree of seriousness that the only just sentence is imprisonment for the whole of life, or should everyone, no matter what they have done, have the hope that at some time in the future they may be released? This is clearly a vital question in the interpretation of the ECHR and it is therefore not surprising that the decision was then subject to an appeal to the Grand Chamber.

7.4.2 Appeal to the Grand Chamber

In April 2012, lawyers for the applicants applied for the case to be referred to the Grand Chamber, limited to the Article 3 arguments. It was submitted that there were issues relating to whether:

⁷⁴⁹ The dissenting opinion is not paragraphed numerically.

⁷⁵⁰ See Appendix H

- there was a need for a mechanism for review of sentences in place at the time of the imposition of sentences;
- the availability of a mechanism to determine the continuing proportionality of detention was necessary to render the sentence reducible;
- the UK (sic) position was out of step with Europe.⁷⁵¹

The application was granted and in a letter of August 2012⁷⁵² the parties were asked to address the questions:

- Was the Chamber correct to conclude that there had been no violation of Article 3?

In particular:

- Was the Chamber correct to distinguish a life sentence with eligibility for release, a discretionary sentence of life imprisonment and mandatory life sentence without parole?
- Whether an issue cannot arise when such a sentence is imposed but only when continued imprisonment cannot be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and the sentence is irreducible *de facto* and *de jure*.⁷⁵³

7.5 **Oakes [2012] EWCA Crim 2435**

Although the Strasbourg decision is expected to be critical to the future of the whole life order, unexpectedly, a domestic appeal, heard in December 2012, proved to be extremely germane to the European appeal.

This case consisted of appeals by five men given life sentences on conviction. Four of the appellants had mandatory or discretionary life sentences with whole life orders. The fifth had been sentenced to mandatory life with a minimum term of 30 years. Clearly, it is unusual for appeals from five men for different offences to be heard together. Equally unusual was the composition of the Bench: the Lord Chief Justice; Lady Justice Hallett, Vice President of the Queen's Bench Division; Lord Justice Hughes, Vice President of the Court of Appeal Criminal Division; Lord Justice Leveson; and Lady Justice Rafferty. The determination noted that this

⁷⁵¹ Letter from solicitors to ECtHR 12 April 2012

⁷⁵² Letter from ECtHR 7 August 2012

⁷⁵³ Some of the issues raised in answer to these questions are considered later in this chapter 7.9

was a 'special constitution' of the Court of Appeal Criminal Division.⁷⁵⁴ There was, however, no explanation for this. Legal reporters in the media expressed the view that the grouping of these cases, and the bench of five senior judges, was intended to 'signal to Europe that this country's courts are satisfied with the validity of "life-means-life" terms'⁷⁵⁵ and 'to clarify the sentencing of the most serious criminals before Strasbourg examined the issue'.⁷⁵⁶ Edward Fitzgerald, who represented one of the applicants, said in interview for the study that he thought the judges wanted an opportunity to give a definitive ruling made by senior judges so that Strasbourg would understand the reasoning.

Three of the appellants had been convicted of murder and two of multiple rapes and associated crimes. The court emphasized that each man was dangerous, and likely to remain so for the indefinite future, but that the appeals were concerned solely with the judicial assessment of the minimum term to be served as 'punishment and retribution'.

On behalf of one of the appellants, it was argued that, despite previous determinations, his whole life order breached Article 3. The court asserted that every civilised country accepted just and proportionate punishment and continued: 'The assessment of what should be deemed to constitute just punishment or inhuman or degrading punishment in a particular circumstance can legitimately produce different answers in different countries'.⁷⁵⁷ The court noted that, however judicial views differed, the whole life minimum term was incorporated 'in express legislative terms in the 2003 Act. This statutory provision reflects the settled will of Parliament.'⁷⁵⁸

The court then considered the judgment in two cases in Strasbourg: *Harkins and Edwards*⁷⁵⁹ and *Babar Ahmed*.⁷⁶⁰ Strasbourg had accepted in principle that matters of appropriate sentencing largely fell outside the scope of the Convention, but that a grossly disproportionate sentence could amount to ill treatment contrary to Article 3 at the moment of its imposition. However, gross disproportionality would only be met on 'rare and unique occasions'.

From this examination of case law, the Court of Appeal concluded that:

The whole life order, the product of primary legislation, is reserved for the few exceptionally serious offences in which, after reflecting on all the features of aggravation and mitigation, the judge is satisfied that the element of just punishment and retribution requires the imposition of a whole life order. If that conclusion is justified, the whole life order is appropriate: but only then. It is not a mandatory or automatic or minimum sentence.⁷⁶¹

⁷⁵⁴ para 1

⁷⁵⁵ *The Independent* 22 November 2012

⁷⁵⁶ BBC Online 21 November 2012

⁷⁵⁷ para 6

⁷⁵⁸ para 12

⁷⁵⁹ Application number 9146/07

⁷⁶⁰ Application number 32650/07

⁷⁶¹ para 29

The individual appeals can be considered more briefly.

David Oakes had been found guilty of the torture and murder of his former partner, and the murder of his daughter after she had been forced to watch the torturing of her mother. The trial judge, in terms of Schedule 21(4), made a whole life order. The appeal was dismissed.

Kieran Mark Stapleton had been found guilty of the murder of a total stranger on a public street. The trial judge imposed a 30 year minimum sentence. Stapleton's lawyer criticised the judge for taking account of aggravating factors - that the killing took place in a public place and an element of planning was involved - and of failing to take account of mitigating factors of youth and a psychological condition. The appeal was dismissed.

Danilo Restivo was found guilty of murder and given a whole life order. Leave to appeal against conviction was refused. He had been found guilty of murdering a neighbour, then mutilating her body, knowing that her teenage children would find her. Restivo had been found guilty, in his absence, of a murder of a girl in Italy, with similar mutilation. The trial judge took this into account when making a whole life order. The Court of Appeal did not regard trial in absentia as equivalent to trial and conviction by a jury. The trial judge should, therefore, not have taken into account the Italian trial. Restivo had to be sentenced in accordance with the transitional arrangements of Schedule 22. The court took account of the same aggravating factors as the trial judge and substituted a minimum term of 40 years for the whole life order.

Michael John Roberts had many previous convictions before he was found guilty of burglary, rape and grievous bodily harm in respect of three elderly women. He was given a discretionary life sentence and a whole life order made. The crown accepted that a whole life order was inappropriate. The court substituted a minimum term of 25 years.

David Martin Simmons had been found guilty of rape and false imprisonment, after earlier convictions for indecent assault and robbery. He was sentenced to life imprisonment, but the judge did not specify any minimum term. The crown agreed that a whole life order was inappropriate. A minimum term of 10 years was substituted. This judgment concluded, as with previous ones, 'we suspect that his release is most unlikely'.⁷⁶²

The determination also reaffirmed:

The whole life order is reserved for the most exceptional cases. Without suggesting that the court is prohibited from making a whole life order unless the defendant is convicted of at least one murder, such an order will, inevitably, be a very rare event indeed.⁷⁶³

⁷⁶² para 112
⁷⁶³ para 102

The Court of Appeal accepted that a whole life order could be made following a discretionary sentence of life imprisonment but, not only did they say that such a sentence would be a very rare event indeed, in *Oakes* they quashed the whole life orders on the two men given discretionary life. Earlier, Ayre had had his whole life order on his discretionary life sentence similarly quashed.⁷⁶⁴ These would appear to be the only instances of discretionary life sentences with a whole life order taken to the Court of Appeal.

As has been seen, the Court of Appeal paid considerable attention to the appropriateness of whole life orders before considering the five appeals. All five men were regarded as dangerous, and their release could not be contemplated unless and until they were assessed as posing no serious risk to the public. Such a determination was not for the judiciary. The Appeal Court's task was focused on whether the sentences imposed by the trial judges were proportionate (or at least not grossly disproportionate) to the crimes committed, and whether they were in accord with the principles of Schedule 21 of the Act. Once again, the Court of Appeal affirmed that a whole life order was only appropriate in the very rare cases identified in Schedule 21 (4).

One newspaper interpreted the determination as a message to the European Court: 'Butt out of our business; if we want to bang people up for life, that's our choice.'⁷⁶⁵ Whatever the accuracy of this interpretation, the Court of Appeal used *Oakes* to reinforce the legitimacy of the whole life order and to ensure that the order would be applied only in the very few cases falling clearly within the definition of exceptionally high seriousness.

7.6 Awaiting the *Vinter, Bamber and Moore* ruling: public attitudes

If any successful challenge puts the future legitimacy of the whole life order in serious doubt, it will be up to politicians to decide on the way forward to meet Strasbourg's requirements. They will do this whilst being very aware of the need to reassure a public considered fearful of crime. Academics have discussed the concept of contemporary public anxiety. Hutton uses the expression 'narrative of insecurity', whereby people talking of street crime, being anxious over drug use or the risk of random violence by strangers, create the feeling that crime is a problem. As a result, they want law, order and security as a necessary part of their culture.⁷⁶⁶ King and Maruna have studied social aspects that affect public punitive attitudes and the implications of wider insecurities about a nation's future. Their findings bolster social research that associates punitiveness with reactions to social change.⁷⁶⁷ Faulkner writes of the fear,

⁷⁶⁴ See above Chapter 6.5.4

⁷⁶⁵ *The Guardian* 5 December 2012 Hattenstone and Allison

⁷⁶⁶ Hutton (2005):250

⁷⁶⁷ King & Maruna (2009):65

and sometimes anger, often focused on crime, felt by the British public, and reflecting a society that has become less tolerant of risk and more suspicious of difference.⁷⁶⁸

Several respondents for the study, unprompted, raised this issue. The former Director General of NOMS believes that Britain no longer feels cohesive and safe. He sees the country as urban and very mixed and, having lost faith in religion, citizens turn instead to tough criminal justice decisions to keep them safe. He contrasted Britain with France and Italy, which he feels still retain social cohesion. The Chief Executive of the Howard League, contrasted Britain with Norway, especially how Norwegians and their media cope better with high profile killers, citing the example of Anders Breivik and of an earlier killing by two young boys that closely resembled the killing of James Bulger. In both cases, in Norway there was neither public frenzy nor media demands for vengeance. Coincidentally, members of the Prison Governors' Association also contrasted Britain with Norway, saying that, unlike the civilised way in which Breivik's murderous episode was treated in the media and by the public, in Britain you would have had hysteria in the media and demands for the death penalty by the public. The only respondents for the present study who were specifically asked about how secure the public feel, were the group of retired police detectives, because of their regular interaction with the public. A minority, less than a third, thought the public felt more secure and had more faith in the criminal justice system because of, they believed, improved forensic technology and because of increased transparency in the system. The large majority thought that the public felt less secure and had less confidence in the criminal justice system. They gave examples of the public claiming that the EU had eroded English laws; the HRA seeming to favour the offender not the victim; the judiciary being too soft; and crime always increasing. These respondents felt the public were ill informed, and many mentioned the part played by the media's inaccurate reporting of crime rates in encouraging fear.

This view of the media's influence echoes Snacken, who wrote⁷⁶⁹ of how criminological literature over the previous decade has drawn attention to increased or new punitiveness in western countries during the past 20 or 30 years, with many examples of increasing imprisonment rates, harsher sentencing and expressive forms of punishment. She acknowledges the link between increased levels of punitiveness and an increased influence of tabloid views and public emotion. The reporting of homicide in the media and its effect on the public has been well documented.⁷⁷⁰ Earlier in this study it was seen how reaction to the Bulger murder demonstrated the interaction of the media, the public and politicians. Little appears to have changed, as an examination of more recent events shows. Such an examination helps to predict how the public and media would react to any attempt to 'soften' the whole life order.

⁷⁶⁸ Faulkner (2007):136

⁷⁶⁹ Snacken (2010):273-4

⁷⁷⁰ For example, Peelo et al (2002); Peelo et al (2004); Reiner (2007)

When Venables, convicted of child murder, breached his parole in 2010 and was returned to prison, fevered speculation in the media about his whereabouts risked his safety and his anonymity. The Director of the Prison Reform Trust talked of shrill headlines and the whipping up of public fear over mere presumptions. She claimed these benefited no one: neither the victims, the offenders nor those working in criminal justice.⁷⁷¹ The media and public uproar was very similar to the original reaction when Venables was on trial.

The media coverage of the riots in English cities in summer 2011 can also be seen as an example where apparent lack of social cohesion and civil unrest can increase public anxieties. Again, striking visual images in the media played their part. Just as the images of a blond Myra Hindley or a young James Bulger being led to his death became icons of evil, the image of a woman having to jump for survival from a building set alight deliberately in the riots was used by the media to project an image of social disorder and peril. *The Guardian* worked with researchers from the LSE to analyse the sentences imposed on the rioters.⁷⁷² The Report raised concerns about the harshness of sentencing, which had been lauded in many tabloids. Later research by Roberts and Hough⁷⁷³ found that the public had a perhaps surprisingly mixed reaction to the sentencing. In the case of non-violent offending during the riots, for example, they found the courts were much more punitive than the public would have been. In some cases, the respondents had viewed non-custodial sentences as appropriate, when the courts had imposed custodial sentences. Politicians however, appeared to feel the need to reassure the public, with Eric Pickles, the Communities Secretary, saying that tougher sentences deservedly showed that there are consequences to disorder. He felt that the public would be alarmed if rioters got off with 'just a slap on the wrist'.⁷⁷⁴ The MP Gavin Barwell also defended the sentences, saying that he was sure his constituents wanted courts to 'get tough on rioters'.⁷⁷⁵

Some members of the judiciary appeared to confirm that harsher than usual sentences would prevail, with Judge Gilbert stating that such outbursts of criminal behaviour must be met with sentences longer than they would have been in a non-rioting situation.⁷⁷⁶ Six months after the riots, the Chairman of the Sentencing Council for England and Wales told the House of Commons Justice Committee that judges were fully within their rights to impose tough punishment on rioters. He acknowledged that judges might have been influenced by TV footage of the riots.⁷⁷⁷ Unusually, the attitudes of the press and the judiciary appeared to coincide.

⁷⁷¹ Reported in *The Independent* 6 March 2010 under the headline 'Media gets blame for Venables 'witch-hunt'.

⁷⁷² *Reading the Riots* Supported by Joseph Rowntree Foundation and the Open Society Foundations. It was based on a similar survey conducted after the Detroit riots of 1967. Its final report was published in July 2012

⁷⁷³ Roberts & Hough (2013)

⁷⁷⁴ In interview on Radio 4's *Today* Programme 17 August 2011

⁷⁷⁵ Reported in *The Guardian* 30 January 2012

⁷⁷⁶ 'While sitting in Manchester Crown Court.' Reported in *The Guardian* 30 January 2011

⁷⁷⁷ Reported in *The Guardian* 13 December 2011

The two examples - the August 2011 street riots and the recall to prison of John Venables - demonstrate that the pattern of the past appears still to exist, with media headlines and emotive images seeking to influence the public. Reiner cites Simon Lee, who argued that 'the media are no longer, if ever they were, observers of the scene, they are players in the game'.⁷⁷⁸ Reiner argues that media representation exaggerates the threat of crime and promotes policing and punishment as the antidote.⁷⁷⁹ Tonry has blamed the Labour Government led by Tony Blair for having encouraged this, accusing them of playing a dangerous game by increasing public anxieties and fears through repeatedly talking of crime levels requiring radical responses even when, in reality, crime rates were falling.⁷⁸⁰ As this present study has shown, this approach did not start with New Labour, as previous Conservative governments in the 1980s and 1990s had prioritised law and order issues, but it cannot be denied that New Labour's series of criminal justice Acts and its stress on the right of victims' justice over offenders' justice, raised the emphasis on law and order issues to a new height.⁷⁸¹

Certainly, the results appeared to be an increasing wariness of crime and a hostility to anything that appeared to be a weakening of approach to offenders. An additional interesting example of this relates to an Irish-English comparison. Griffin and O'Donnell, while examining life sentences and parole in the Republic of Ireland, comment that the popular punitiveness that characterises politics and media in the UK is largely absent from the politico-media in Ireland.⁷⁸² This is echoed by O'Donnell and Jewkes, who contrast the reaction in Irish media with that in the UK over the temporary release of prisoners during the Christmas period. They find that Irish reporting is sympathetic to the interests of the prisoners whilst in Britain, the media concentrate on the risk of recidivism by pampered prisoners, and promote notions of victims and offenders: the 'deserving' and the 'undeserving' citizens.⁷⁸³

The examples of media coverage point to the likelihood of a negative reaction to an ECtHR ruling that the whole life order breaches the human rights of those serving the sentence. It takes little effort to imagine headlines of 'Mass murderers to walk free' or 'Europe unlocks prison doors for child murderers.'

Gauging potential public reaction to any indication of a perceived weakening of sentencing in the case of the whole life order is also helped by examining formal surveys of public opinion. Over the past two decades, surveys⁷⁸⁴ have found the public to be both critical of sentencing and ill informed on sentencing policy, sometimes as a result of being misinformed by the media. When the public is more knowledgeable of the process, opinions are more nuanced

⁷⁷⁸ Reiner (2007):27

⁷⁷⁹ *ibid* p 326

⁷⁸⁰ Tonry (2010):387

⁷⁸¹ For figures see *ibid* p 396 ff

⁷⁸² Griffin & O'Donnell (2012):623

⁷⁸³ O'Donnell & Jewkes (2011)

⁷⁸⁴ See for example, Hough (1996); Roberts & Hough (2005); Roberts et al (2009)

and less punitive in nature. Most surveys over the period have concluded that the public deserves to be given access to more accurate information about sentencing. Indermaur et al, however, found that any change in public opinion as a result of additional information was short lived.⁷⁸⁵ There is evidence, nevertheless, that the public, even with misconceptions of sentencing, differentiate between crimes of varying seriousness and decide what constitute the 'worst' crimes.⁷⁸⁶

A recent study sought to ascertain whether the public was opposed to any alternative to the mandatory life sentence for murder and, specifically, if the public accurately understood its operation.⁷⁸⁷ The findings echoed those of previous surveys: a large majority erroneously believed that the murder rate had risen in recent years; perceptions were systematically biased towards seeing sentencing practice as more lenient than it is; and there existed a lack of accurate and detailed knowledge of release mechanisms for convicted murderers. The conclusion was that the public's misunderstanding and lack of knowledge about murder and the mandatory life sentence were significant. However, of specific relevance to this study was the finding that the public differentiated between degrees of seriousness of murder.⁷⁸⁸ When presented with nine different murder scenarios, the public was offered five sentencing options, including imprisonment for the offender's natural life. The authors of the research found it significant that in eight of the nine scenarios approximately *only* one third of the respondents believed that a natural life sentence was appropriate. For this current study on the whole life order, the statistics should be considered differently. In one scenario, just over half of the respondents felt a natural life sentence was appropriate and in four other scenarios approximately a third felt it appropriate. In three further scenarios, between 14 % and 24% felt it an appropriate sentence. It is striking, therefore, that in the eight scenarios, significant numbers (14% to 52%) of the respondents judged that a sentence with no release nor review was appropriate, yet, on examination of the scenarios, none of the crimes outlined would be given a whole life order if taken to court. Under Schedule 21's guidelines the most likely terms would have starting points of 15 or 30 years. This provides further evidence that, for what are deemed heinous crimes, the public, although more nuanced than commonly thought, still prefers harsh punishments and feels that the whole life order is not only acceptable, but appropriate. When the crime is even more heinous than those used as scenarios in the above-mentioned research, the public's reaction is even stronger. For example, in a YouGov survey following the trial of Ian Huntley, found guilty of murdering two schoolgirls in Soham, 91% of respondents expressed the view he should receive a whole life order and never be released.⁷⁸⁹

⁷⁸⁵ Indermaur, Roberts et al (2012)

⁷⁸⁶ See for example Mitchell (1998):467ff

⁷⁸⁷ Mitchell & Roberts (2010)

⁷⁸⁸ *ibid* p 30

⁷⁸⁹ Conducted December 2003 Available at http://cdn.yougov.com/today_uk_import/YG-Archives-lif-mos-IanHuntleyMaxineCarr-031223.pdf Huntley's crime did not in fact warrant a whole life order under Schedule 21 (4). He was sentenced to a minimum term of 40 years.

The conclusion can surely be drawn that, in general, the media and the public would be suspicious and probably hostile to the idea of offenders with whole life orders being successful in any appeal against the sentence on human rights grounds. Some of the respondents for this study commented on likely public reaction. A part time judge thought the 'public outrage would be huge'. Michael Howard, the former Home Secretary, echoed this and said there would be 'outrage at such a European intervention'. The current Home Secretary said there would be a 'public outcry' and David Blunkett, the former Home Secretary, felt there would be a 'major reaction.' Lord Pannick felt it would lead to 'a major row.' Simon Hughes agreed that there would be strong resistance to Europe interfering, and that elements of the media would predictably 'shout' but predicted that parliamentary reaction would be tempered, and with sensible advice from Law Officers and parliamentary committees, the issue could be resolved well. Lord McNally, speaking as a Justice Minister, said that the official position was that the government would 'argue strongly and fight vigorously,' and in due time would make a decision about action.

7.7 Attitudes to Europe

The *Vinter, Bamber and Moore* appeal against the whole life order has an additional dimension which might well prove significant when assessing the likely public, media and political reaction to a successful appeal: the decision will be made by a *European Court*. The hostility to 'Europe,' evinced by elements of political parties, the media and the public, is reflected in reactions to court interpretations of the ECHR that they regard as inimical to their perception of UK interest.

In 2005, the ECtHR ruled that the disenfranchisement of prisoners breached ECHR Article 3 of Protocol No 1. Recognising, but also stimulating, public reaction, the Labour government set up a public consultation exercise that seems to have been a delaying tactic. No action was taken before the 2010 General Election, and David Cameron, now prime minister, expressed hostility to the court decision and said it made him 'physically ill to contemplate giving the vote to anyone in prison,' but pointed out that if the law was not changed prisoners could seek compensation.⁷⁹⁰ In November 2012, it was announced that the government would put forward options for scrutiny by a committee of both Houses. The three options were a ban on voting: for prisoners serving a sentence of four years or more; for prisoners sentenced to more than six months imprisonment; for all convicted prisoners. The last is a restatement of the existing ban. The government will consider the recommendations and introduce a Bill as soon as possible thereafter.⁷⁹¹ Appeals by prisoners are pending in both domestic courts and at the ECtHR.⁷⁹²

⁷⁹⁰ Hansard HC 3 November 2010 col 921

⁷⁹¹ Introduction to Voting Eligibility (Prisoners) Draft Bill November 2012

⁷⁹² Details available: www.echrblog.blogspot.co.uk 03/2013 and www.guardian.co.uk/law/2013/mar/05/lord-neuberger-deportation-terror-suspects

When the prime minister commented on the ‘strange decisions’ and ‘very odd and perverse judgments handed down by Strasbourg’⁷⁹³ and restated his determination not to succumb to the ‘dictat’ of the ECtHR,⁷⁹⁴ this was greeted with delight by the *Daily Mail*, which claimed his approach would work wonders to restore his battered fortunes.⁷⁹⁵ The newspaper had earlier called for MPs to regain control of ‘OUR laws’,⁷⁹⁶ and *The Sun* expressed constitutional concern about ‘barmy human rights laws and rulings from unaccountable judges at ECtHR’.⁷⁹⁷

In 2010, the UK Supreme Court determined that the human rights of convicted sex offenders were breached if their names were kept on the Sex Offenders Register without the possibility of review.⁷⁹⁸ The government moved to modify the procedure, despite the uproar of the ‘red top’ papers, with, for example, *The Sun* using the headline ‘Perverts’ Charter,’ and quoting the Home Secretary’s comment during an emergency debate that the decision ‘places the rights of sex offenders above the rights of the public to be protected’.⁷⁹⁹

The Economist in the same month cited the *Daily Mail*’s usage of ‘unelected judges from small countries’ to describe those making decisions in Europe, and said that the problem facing the government was that ‘the tiger of anti-European populism has been well and truly unleashed and may prove hard to re-tether’.⁸⁰⁰ Certainly, similar issues have emerged with other ECtHR decisions. In January 2012, the Court ruled that the radical Islamic cleric Abu Qatada should not be deported by Britain to his native Jordan.⁸⁰¹ The *Daily Express* published an article headlined ‘Ignore European Court and Deport Abu Qatada Now,’ which stated, ‘The only people who want Abu Qatada belong to a court outside this country whose wonky judgment should make us wonder whether they are any more desirable than the terrorists to whom they give hope’.⁸⁰²

Perhaps in response to the anti-European feelings,⁸⁰³ the government raised the possibility of a British Bill of Rights, and repealing or amending the HRA which enshrines ECHR in domestic law. The Commission on the Bill of Rights was set up in 2011 to consider this.⁸⁰⁴ When the Commission reported in December 2012, two members wanted withdrawal from the Convention; two wanted the status quo; the remaining five members wanted change but came to no agreement on the form it would take. It was decided unanimously that any decisions

⁷⁹³ *The Guardian* 26 November 2011

⁷⁹⁴ Hansard HC 23 May 2012 col 1127

⁷⁹⁵ *Daily Mail* 24 May 2012

⁷⁹⁶ *Daily Mail* 10 February 2012

⁷⁹⁷ *The Sun* 24 May 2012

⁷⁹⁸ [2010] UKSC 17

⁷⁹⁹ *The Sun* 17 February 2011

⁸⁰⁰ *The Economist* 10 February 2012

⁸⁰¹ [2012] ECHR 817; [2012] ECHR 56

⁸⁰² Douglas Murray, political commentator 18 January 2012

⁸⁰³ Mawby & Gisby’s (2009) provide another contribution to the study of anti-European feelings in the UK, examining media and popular reaction to the potential movement of large numbers of immigrants to the UK from the expanded European Union. The researchers found the way some tabloid papers reported perceived crime risk encouraged a ‘moral panic’.

⁸⁰⁴ 18 March 2011 Details available on www.justice.gov.uk/about/cbr

should be postponed until after the Scottish referendum on independence in September 2014.⁸⁰⁵ In the House of Commons, when discussing the Commission's Report, Chris Grayling, Justice Secretary, said that although the original Convention was laudable, the ECtHR had 'moved further and further away from the goals of its creators'.⁸⁰⁶ He believed this was an issue which had to be addressed. In reply to a question over the government's commitment to 'defending the House from the creeping usurpation of the democratic power by the Strasbourg Court,' Grayling responded he could give 'an absolute commitment.'⁸⁰⁷

Although anti-European feeling in Britain is not new,⁸⁰⁸ the polarisation of opinion on the question of the HRA and ECHR has deepened with, for example, the Deputy Prime Minister saying that the HRA 'in words of one syllable is here to stay,' and the Home Secretary having said she wanted it to go.⁸⁰⁹ However, in interview for this study, her concern was about the respect for the sovereignty of parliament, and with the way, in her view, some judicial decisions appeared effectively to make law, and not simply interpret it. In the light of increasingly hostile comments by Conservative MPs and the attitude of the 'populist press' and 'the angry popular reaction to rulings of ECtHR',⁸¹⁰ it is perhaps not too surprising that the British president of the ECtHR very unusually wrote an article publicly defending the Court and the ECHR.⁸¹¹

The attitude to Europe, expressed in relation to the terms of the ECHR and the ECtHR, of members of the legal profession and of those in the government with legal responsibilities has been in the main much more tempered than that of elements of the media and backbench Conservative MPs. The attitude of the Attorney General, Dominic Grieve, at least in his address to Lincoln's Inn on 24 October 2011,⁸¹² was more positive. He asserted that there is no question of the UK withdrawing from the Convention: 'The United Kingdom was the first country to ratify the Convention The United Kingdom will not be the first country to leave the Convention'. He then referred to the first of the terms of reference of the Commission, and continued that the government was not intending to limit or erode the application of any of the rights or freedoms in the ECHR, including the right of respect for family life. He continued, however, that the Home Secretary had pointed out that Article 8 is not an absolute right. This, he said, was the classic balancing exercise inherent in many of the Articles in the ECHR. Drawing attention to the language of HRA Section 2, he stated that the British courts must

⁸⁰⁵ Information available: <http://www.justice.gov.uk/about/cbr>

⁸⁰⁶ HC 13 December 2012 col 701-2

⁸⁰⁷ *ibid* 702 Question asked by Dominic Raab

⁸⁰⁸ For example: in March 1988, 3 terrorists were shot in Gibraltar by members of the British security forces. ECtHR ruled the killings violated the right to life guaranteed by Article 2 of ECHR and required the British government to pay compensation. In an analysis of the ruling, Woodhouse (1996):427 points out there was talk of Britain withdrawing from ECHR. Examining other cases, Woodhouse argues that nothing inflames anti-Europeans more than decisions taken by ECtHR or the European Court of Justice.

⁸⁰⁹ Reported in *The Telegraph* 2 October 2011

⁸¹⁰ *The Independent* leader 5 March 2011

⁸¹¹ Sir Nicolas Bratza *The Independent* 21 January 2012

⁸¹² www.attorneygeneral.gov.uk/NewsCentre/speeches/pages/AttorneyGeneralEurope

'take into account' the jurisprudence of the ECtHR; they are not bound by it.⁸¹³ He quoted with approval the evidence of the LCJ to the House of Lords Constitutional Committee: 'I myself think it at least arguable that, having taken account of the decisions of the court in Strasbourg, our courts are not bound by them. ... In most cases we would follow them, but not, I think, necessarily'.

Prior to the establishment of the Commission on the Bill of Rights, judges were expressing views on the ECHR and ECtHR to colleagues in the legal profession. The most outspoken criticism was Lord Hoffman's lecture to the Judicial Studies Board in 2009.⁸¹⁴ He thought that at the level of abstraction, human rights might be universal, but at the level of application, these rights are national. Their application, he felt, required trade-offs and compromises, exercises of judgment that could only be made in the context of a given society and its legal system. It seemed to him 'perfectly acceptable' to adopt the text of the ECHR as a UK constitutional instrument. However, he attacked the ECtHR with its right of individual petition and did not believe that the margin of appreciation went far enough. In contrast, Lady Justice Arden, in her address to Lincoln's Inn the same year, took a more measured approach.⁸¹⁵ She asserted that a European court was needed, with ultimate authority to interpret ECHR, and this had considerable advantages for UK as it subjected the institutions of the state to outside scrutiny. This was particularly important because of the strong doctrine of parliamentary sovereignty. There was a problem, however, in the way the HRA Section 2, with its obligation to 'take into account' the ECtHR jurisprudence, had been interpreted. She believed that English courts should not in any event be expected to apply jurisprudence from another source without having investigated its reasoning. There was an opinion, she thought, that the majority of courts in the other contracting states did not take the view that they were effectively bound by Strasbourg jurisprudence.

In evidence to the parliamentary Joint Committee on Human Rights on 15 November 2011, the then President of the Supreme Court, Lord Phillips, along with the LCJ, responded to a question whether UK courts had been too strict in following ECtHR case law. Lord Phillips expressed the view that the courts had been too strict and Lord Judge agreed vehemently.⁸¹⁶ The latter continued that most of the decisions of the ECtHR dealt not with principles, but with facts, and he regarded that as not a precedent for anything. As a means of reducing the number of applications to the ECtHR they both thought that the Court should only deal with points of broad principle, and that individuals should require permission to make an application.⁸¹⁷

⁸¹³ Article 46 of ECHR requires states (presumably governments but not necessarily courts) to comply with ECtHR rulings, requiring the Council of Ministers to oversee this.

⁸¹⁴ www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman

⁸¹⁵ 'Peaceful or Problematic: the relationship between national supreme courts and supranational courts in Europe' www.judiciary.gov.uk/media/speeches/2009/speeches-arden-lj

⁸¹⁶ The context of the question and the replies can be seen in Klug and Wildbore (2010)

⁸¹⁷ HC 873-ii Q 63 – 135 Especially replies to questions 63 and 64

In general, then, among the legal profession there is little criticism of the ECHR, but the ECtHR has received criticism. Some of this, as has been seen, is of a technical/administrative nature but there are concerns about the reach of the court, and a view that the principles of subsidiarity and margin of appreciation should be extended.⁸¹⁸

However, it is hard to come to any view other than that, as far as the general public and many politicians are concerned - certainly when examining the more recent cases, such as those relating to Abu Qatada and prisoners' votes - *The Economist's* 'tiger of anti-European populism' has existed for some time and remains un-tethered. Any successful appeal against the UK government, relating to the whole life order would, almost certainly, be greeted with outrage by a large section of the media and the public.

7.8 Respondents' comments on the whole life order

One area of inquiry was felt to be central to the study, so was discussed at most interviews: the acceptability and the justification of the whole life order. As detailed in Chapter 1, the respondents fell into distinct groups: prisoners and those with professional knowledge of prisons; the police; members of the judiciary and lawyers; and politicians. Because a sentence with no hope of release for the remainder of life can be considered to have moral or ethical implications, views were also sought from faith groups and the Humanist Society.

Of those with knowledge of prisons, the former Chief Inspector of Prisons acknowledged that sentencing was all about punishment, but argued strongly that hope should not be removed. She accepted, however, that the question of public protection meant that certain offenders would remain in prison indefinitely, until death if necessary. The former Director General of NOMS, felt the 'rightness' of the sentence was a moral question and not one for prison authorities to address: prisons cannot refuse admission to anyone. He did feel that, to some extent, a whole life sentence was little different from a sentence of 30, 40 or 50 years: no one, in or out of prison, can think or plan that far ahead. He thought it was possible to judge when a prisoner was no longer a risk to society and so safe to be released, but that it was an issue influenced by the public and politicians. Two members of the Prison Governors' Association agreed with this view. They felt that politicians wanted the public to know they took society's abhorrence of certain crimes seriously. The whole life order itself might not be necessary, with very long sentences available, but they regarded any decisions related to it as political.

⁸¹⁸ These are discussed in Chapter 7.9

A released lifer argued against the whole life order on the basis of the unfairness of a sentence meaning very different things to a 25 year old and to someone many decades older. He accepted that some prisoners would have to remain in prison because of their dangerousness and the risk to public safety, but thought that they were a very small group and most offenders could, in fact, be contained safely in the community. Jeremy Bamber, who is serving a whole life sentence, was opposed to the sentence's retributive justification ('revenge justice is never good justice'), but acknowledged that continuing dangerousness could mean some offenders would remain in prison for the rest of their lives. He stressed that hope should never be removed, as it is an essential dimension of human dignity and underpins the protection of human rights. Removing hope could lead to despair and depression. Frances Crook, Chief Executive of the Howard League for Penal Reform, also argued strongly for compassion to be shown, especially at the end of life, but did accept that on the grounds of dangerousness a few people would have to spend 'pretty much' the rest of their life in custody in order to protect the public.

As seen, most of this group stressed the importance and need for all prisoners to retain a sense of hope of release. All these respondents talked of dangerousness and the need for continuing detention, until death if necessary, for prisoners who posed a danger to the public. No one differentiated a retributive justification from that of public protection.

A group of almost 50 retired police detective officers answered written questions on the whole life order. All but one felt the sentence was a legitimate and acceptable sentence. The one who disagreed did so because the sentence could cause security issues for prison authorities. When asked about the justification, many gave multiple answers, citing retribution, deterrence and public safety. Of those who only gave one justification: public abhorrence was given by one; retribution by four; and public safety by twenty-two. Two senior members of the Metropolitan Police were interviewed. Both supported the whole life order, but from different perspectives. The Deputy Assistant Commissioner supported it on retributive grounds. The nature of the crime and the nature of the offender were sufficient to justify imprisonment for life. Rehabilitation was important but, for some, this would have to be within prison. She added that most of this group of offenders were not just bad, but also dangerous, and she would not like public safety to be at risk. Her colleague, a Commander, supported the sentence on the grounds of public protection. Although retribution for crime was obviously needed, life-long detention could only be justified by a continuing risk to public safety. Periodic review might be possible, but any continued dangerousness ruled out release.

All but one of the 50 retired detective officers, and both the serving officers, agreed on the need for the whole life order. The Deputy Assistant Commissioner was clear in supporting a retributive justification for the sentence but, like all the other officers, felt public protection was vital. Almost all of the others felt public protection was the major justification.

A part time judge defended the whole life order for some offenders, on the grounds not only of retribution, but also public safety. He accepted that there was undoubtedly an issue about the difference in time served by a 25 year old and a 55 year old who received the sentence, but felt that, primarily, the evil nature of the crime had to be addressed. The senior judges interviewed, understandably, acknowledged the statutory justification of retribution and deterrence. All judges were 'comfortable' imposing the sentence as long as the crime fell clearly within the guidelines. They accepted there was statutory legitimacy for the whole life order, and the judicial role was to apply it. Lord Phillips felt that judges were the right people to decide on retributive sentences because of their experience, knowledge and objectivity. Certain crimes of extreme wickedness justified the whole life order, as long as the crimes were not on the margins of the guidelines, but were crimes where no one could consider anything but a 'sledgehammer' sentence.

A group of three lawyers, interviewed together, thought that public safety was the justification for retaining people in prison with no hope of release. In their view, this was the main justification, more so than punishment or deterrence. This was despite the respondents acknowledging that these two elements are the only statutory justification. Two QCs, with extensive experience of cases involving whole life sentences, both disapproved of such sentences. Lord Pannick felt there has to be an acceptance that people can change, even those who commit 'grisly' murders. He saw no justification in a whole life order. He admitted that occasionally there is a case where it is difficult to think that release would ever be possible, but for the sake of fairness and justice, everyone should have the right to a review after a period of time. He was aware at times of public confusion over sentencing, but felt the public could be far more flexible on sentencing than politicians gave them credit for. Edward Fitzgerald also disagreed with whole life orders. He felt strongly that there must be an allowance for the fact that people can change over a period of imprisonment. The prospect of a review would act as motivation for prisoners to reform and to make exceptional progress in prison. He returned to this later in the interview, when he stressed that character can change over time and such a change was more likely to occur in those convicted of politically motivated crimes. He argued that the whole life order was not illogical or immoral; rather it was a humanitarian issue.

Although the groups related to prisons and the police appeared on the whole to have similar views to each other, the judges and the lawyers differed significantly. There was no indication that the judges were critical of the whole life order, either on legal or other grounds. On the other hand, all the lawyers were much less comfortable with the sentence while accepting that there would be some people who, on public protection grounds, would never be released. The two QCs strongly believed that every prisoner deserved the right to a review.

So far, the respondents whose views have been considered are from groups with a professional or direct concern with criminal justice. It might be expected any opposition to the whole life order would have its core in ethical or faith groups, because of their belief in the powers of remorse and redemption. The Church of England's Bishop for Prisons accepted that a penalty had to be paid as punishment for crime, but that evidence of remorse, redemption and repentance must be rewarded with release, unless there was an element of public endangerment. The leader of the Catholic Church in England, through his spokesman, said that for the common good, legitimate proportionate punishment was acceptable. Punishment could have a successful 'medicinal effect' and the offender could be 'corrected'. If, however, the crime was so grave that it warranted whole life detention and, importantly, if society could only be protected by this sentence, then a whole life order was acceptable. The Hindu Forum felt that any form of punishment or imprisonment was a form of reformation, but also stated that, as long as a person constituted a risk of serious harm to others, it was in society's interest to continue to confine them. The spokesman for the Humanist Society justified any punishment only on the basis of deterrence. No hope of release, as in a whole life order, was felt to be retributive and should be suppressed. Offenders convicted of heinous crimes, however, if not mentally ill, should be confined to protect the public and only considered for release when no longer dangerous.

All faith groups stressed the need to encourage rehabilitation and redemption, but as with the prison and police groups, the respondents stressed the importance of the need for public protection as a justification for the need for any continued incarceration. It is perhaps surprising that the faith groups did not oppose the whole life order more forcefully on ethical grounds.

In the main, politicians supported the whole life order. Not unexpectedly, the current Home Secretary, Theresa May; Lord McNally, a Minister for Justice; and the Attorney General, Dominic Grieve, all accepted the sentence as a legitimate penalty on the basis of retribution and deterrence. Lord McNally had full confidence that the judiciary would ensure the right people would be given a whole life order. He was aware of the importance of the sentence's role in promoting deterrence and retribution, but in addition felt it should also aim to achieve public protection and public reassurance. The public had to have confidence in the criminal justice system and so certain offenders needed to be kept incarcerated. The current Home Secretary also stressed the retributive nature of the sentence but, like Lord McNally, said that the public deserved to feel safe, and that was an important role for the government. The former Home Secretary, David Blunkett, felt strongly that the vast majority of offenders deserved a second chance, but for those committing the most heinous crimes a whole life sentence was justified on the grounds of retribution. He felt the sentence was necessary in order to provide clear, logical and consistent penalties. It was important for democracy that

those who were elected should be allowed to decide sensitive issues like the whole life order. He saw it as part of a pact with the public that strong law and order provision would safeguard their security. Like Lord McNally, Simon Hughes expressed confidence in the judiciary in their sentencing of crimes of high seriousness. He stressed the need for due process and objectivity and the need for tabloid pressure to be ignored. He accepted that there would be a small number of cases - perhaps ten to twenty - when crimes were so horrible there could be no mitigation, and these offenders should remain in prison for life on the grounds of retribution and deterrence. They had to be, for him, the exceptions.

The group of politicians interviewed, in contrast to the other groups, indicated support for the whole life order on the grounds of retribution and deterrence. The politicians acknowledged the need for public confidence in the criminal justice system, so argued that there should be a clear, enforceable, judicially-led system that the public could have faith in.

All respondents, across the groups, accepted that a very few offenders would never be released. The politicians and the judiciary were firm in their acceptance of the whole life order's justification in terms of retribution and deterrence. Both groups recognised the importance of maintaining public confidence in the criminal justice system. From the context in which these remarks were made, it seems that the whole life order was regarded as a necessary element in retaining public confidence. All other respondents were less supportive of the sentence. They acknowledged that some people would undoubtedly remain in prison for the remainder of their lives. This was, however, justified primarily on the grounds of public safety. Indeed, all groups emphasised the importance of public protection, whether expressed in these terms or in terms of public confidence in the criminal justice system. The unexpected response was the frequent stress on dangerousness and the need to keep prisoners who were a continued risk to the public incapacitated, if necessary for the rest of their lives.

7.9 Legal options

In interview for this study in February 2013, a QC with extensive experience of ECtHR believed that the decision of the ECtHR Grand Chamber on Vinter, Bamber and Moore's appeal would not be imminent because of the importance and sensitivity of the subject. Moreover, he felt that if the Grand Chamber was going to overturn the Sectional Court's decision, the interval between the oral hearing (November 2012) and the decision could be a year or more.

It must be presumed that the Grand Chamber will determine whether or not the whole life order is a legitimate sentence in relation to the ECHR. Predictions are varied. All politicians

interviewed for this study appeared optimistic about the result. The lawyers and judges interviewed were more cautious about the outcome. A leading QC, for example, thought the Grand Chamber would agree with the previous minority opinion. The group of three lawyers believed the lack of review would 'probably kill the sentence,' while senior judges would be 'slightly surprised' if Vinter, Bamber and Moore won.

It is possible to regard the Grand Chamber as having in essence two options: first, to rule that the whole life order, as it currently stands, does not breach Article 3; and second, that on the grounds that hope should not be denied to any prisoner, a sentence of imprisonment for the whole of life with no review breaches the Article. The position could be complicated if the decision is not clear-cut. *Kafkaris*, for example, has been described by Lord Phillips, in interview for the study, as a 'fudge' and he regarded the issue as having been dodged. As a result, *Kafkaris*, when it has been deployed in appeal cases in England, has caused difficulties for the judges, as has been seen earlier in this study. If the final judgment is heavily qualified, there is a real possibility of further court cases.

Another uncertainty is that there is a 'margin of appreciation' in the application of the ECHR:

It is to a certain extent for the states to determine which measures they take to make sure that the convention rights are respected. If different rights guaranteed by the ECHR collide, the member states have a degree of discretion when deciding which of the rights they prioritize. This margin is given both to the domestic legislator and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force. The margin of appreciation doctrine does not, however, give states free hand to do as they please. The European Court of Human Rights scrutinizes whether they have exceeded the limits of their discretion and whether it is still ensured that the rights enshrined in the Convention are protected effectively.⁸¹⁹

There is also the principle of subsidiarity: that national authorities of member states have the principle responsibility for guaranteeing and protecting human rights at a national level.

It would seem that in *Oakes*, the statement 'what constitutes just punishment or inhuman or degrading punishment in a particular circumstance can legitimately produce different answers in different countries'⁸²⁰ is an assertion that the whole life order is, or should be, regarded as within the margin of appreciation. This interpretation gathers credence from the case made by the government to the Grand Chamber:

The domestic courts have consistently held that the provisions in relation to whole life orders are compatible with the Convention and the Court's case law. It is submitted that this is an area of penal policy which justifies a margin of appreciation.⁸²¹

⁸¹⁹ ECHR Introduction Section 2 www.echr-online.com

⁸²⁰ [2012] EWCA Crim 2435 para 6

⁸²¹ para 59

A clear-cut opinion favouring the government would mean there is no need for legislation. It might not, however, resolve the issue in the long term. The ECHR is regarded as 'a living instrument': 'The rights enshrined in the Convention have to be interpreted in the light of present day conditions so as to be practical and effective. Sociological, technological and scientific changes, evolving standards in the field of human rights and altering views on morals and ethics have to be considered when applying the Convention.'⁸²² The effect of this on the ECtHR can be seen in the judgment in *Stafford*, which overturned the *Wynne*⁸²³ judgment: 'While the Court is not formally bound to follow any of its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.'⁸²⁴ A clear statement from the court, favouring the government, might not, therefore, bring the controversy of whole life sentences to a final conclusion.

If the Grand Chamber's decision is against the government, it may well be based on the position adopted by the minority in the Sectional Chamber. That is, that all prisoners should have *hope*, however tenuous, that they might in the future be released. If they are to have hope, it follows there must be a mechanism to consider their possible release. It is of interest to consider what form this could take and what measures the government would adopt to comply with the ruling.

The question of who should consider release can be approached under two heads: as a function of the executive or as a function of the judiciary. In respect of the former, the Secretary of State for Justice has powers to release a prisoner on compassionate grounds.⁸²⁵ This has been narrowly interpreted.⁸²⁶ The second executive power that would enable release of a prisoner is the Royal Prerogative of Mercy. As has been seen in the consideration of the Sectional Chamber's findings, one judge expressed surprise at the lack of reliance of the government on this power. As Appendix H shows, there is both still a residual power and a court case that exemplifies it. Despite the positive view expressed by this judge, the government made no reference to the power in the submission to the Grand Chamber. The conclusion seems inescapable, therefore, that the Law Officers have no intention of making further use of it.

In interview, Lord Phillips did not believe that either the Crime (Sentences) Act 1997 Section 30 or the Royal Prerogative provided a long term solution to the issue of a review mechanism, not only because they are executive powers, but also because their application is too narrow. However, in *Bieber*⁸²⁷ he had argued that, since the Secretary of State, as a government

⁸²² ECHR Introduction Section 4 www.echr-online.com

⁸²³ [1994] ECHR 24

⁸²⁴ [2002] ECHR 470 para 68

⁸²⁵ Crime (Sentences) Act 1997 Section 30 (1) See Appendix I

⁸²⁶ Prison Service Order 4,700

⁸²⁷ [2008] EWCA Crim 1601

minister, was required to comply with the Convention, there was nothing to prevent a prisoner from seeking judicial review if he considered that the Secretary of State had not used his power to release if continued imprisonment constituted cruel and inhuman punishment. While there is no known application of this point, the government, in its observations to the Grand Chamber, drew attention repeatedly to this in order to argue that the whole life order is reducible:

As a matter of English law, when exercising his power, the Secretary of State must act compatibly with the Convention. As the Court of Appeal observed in *Bieber*, if continued detention is held to amount to inhuman or degrading treatment, there is no reason why the Secretary of State should not exercise his power to release the prisoner. Moreover, the decision of the Secretary of State may be challenged by way of judicial review and on Convention grounds.⁸²⁸

There is no reference here to the power of the Secretary of State being circumscribed by the Crime (Sentences) Act 1997 Section 30. Instead, the government asserts that, under the Human Rights Act 1998, the Secretary of State must act in accordance with the Convention. If, therefore, the Grand Chamber were to accept the government's argument, it might, of course, provide a long-term solution.

The second approach to the question of who should consider the release of prisoners is that it is akin to a sentencing role and therefore should be carried out by a 'tribunal'⁸²⁹ which could be judicial or quasi-judicial (the Parole Board), but independent from the executive. For the minority in the Chamber, the prisoner should always have hope of release. This position, as has been seen earlier, is a requirement in jurisdictions as widespread as Germany and Namibia. The minority gave no indication of what criteria should be used to assess whether hope of release could be realised. However, in *Oakes*, the determination noted that the Sectional Chamber, when considering a discretionary life sentence without parole, had stated that an Article 3 issue would only arise when continued imprisonment could no longer be justified 'on any penological grounds (such as punishment, deterrence, public protection or rehabilitation).'⁸³⁰

These grounds, however, raise further questions for any review system.⁸³¹ The whole life order is seen as just punishment in terms of retribution and deterrence for crimes of exceptionally high seriousness. The task of the trial judge is to assess the relative seriousness of the offence. The youth, if relevant, of the offender is taken into account in the selection of a starting point.⁸³² However, the likely life expectancy of the offender is not regarded as a

⁸²⁸ para 68. Also referred to in paras 6, 35 and 66

⁸²⁹ ECHR Article 5(4)

⁸³⁰ [2012] EWCA Crim 2435 para 16

⁸³¹ But it may be recalled that the German criminal justice system does provide for such wide ranging reviews.

⁸³² CJA 2003 Schedule 21

relevant consideration. There is no reference to this factor in either the Act or in any of the guidelines produced by the Sentencing Council. As a senior judge put it, when asked in interview, if there was a problem in sentencing a 30 year old to a whole order compared to a 60 year old, 'No, it is the characteristics of the crime that matter and these are permanent'. It has been argued in the papers submitted to the Grand Chamber for Vinter, Bamber and Moore that:

If it be the case that a whole life sentence can be appropriate for retribution and deterrence because of the seriousness of the offending, it is difficult to see how the element for retribution could change. It is the *balance* of penological justifications for and against continued detention which must be in issue. Other issues of deterrence, public protection and rehabilitation *are* prone to change and may ultimately outweigh the original retributive tariff.⁸³³

It follows from this argument that if the balance of penological justifications may change over time leading to possible gross disproportionality, there is therefore a need for some form of review. However, in the government's paper to the Grand Chamber, it was asserted that reviews were discontinued in the 2003 Act, as one of its objectives was to 'judicialise decisions on appropriate terms of imprisonment. The decision is made by the judge at the time of sentencing'.⁸³⁴

Life-long imprisonment, on the basis of retribution and deterrence alone, has been criticised by academics. Van Zyl Smit has argued that, in Europe, irreducible life sentences are unacceptable because they deny the possibility of prisoners to reform sufficiently to enable them to become responsible members of society. He refers to an emerging European consensus that the human rights of individuals sentenced to life imprisonment require that they, too, be prepared for release. The rules governing release should, he thinks, be sufficiently flexible to allow release on the grounds that the offender is now 'demonstrably capable of living in a free society without posing a danger to others'.⁸³⁵ Hodgkinson noted that neither the Council of Europe nor the United Nations conceded the possibility of whole life sentences, but they agreed that 'some life sentenced prisoners may never be deemed safe for release'.⁸³⁶

While the whole life order as established in the 2003 Act remains, the question of risk to public safety is not an issue: with the sentence having no review or release, no assessment of future risk is required. If changes to the sentence are proposed, for whatever reason, then

⁸³³ para 96

⁸³⁴ para 22

⁸³⁵ van Zyl Smit (2010):46

⁸³⁶ Hodgkinson, Gyllensten and Peel (2010)

the issue of possible future offending will have to be faced.⁸³⁷ The concern for public protection was reflected in s225 in CJA 2003 when sentences of Imprisonment for Public Protection (IPP) were introduced.⁸³⁸ Although IPPs are not in themselves within the scope of this study, the practical, ethical and political issues relating to them, and to the assessment of future risk, would be relevant if assessment of dangerousness becomes an aspect of any replacement for, or amendment to, the whole life order. It has long been a controversial subject. One contentious aspect is the extent to which accurate, reliable assessments of future dangerousness can be achieved. The other main contentious aspect is whether it is morally or ethically right to incarcerate on the basis of predicted *possible* future crimes.

The broad categories of assessment used – clinical and actuarial – have come under scrutiny. Jacobson and Hough state that actuarial methods are proven to be superior to clinical methods of risk assessment, although there are various well documented shortcomings related to the former.⁸³⁹ Ansbro, while concluding that actuarial outperforms clinical assessment, also states that there are caveats. Actuarial tools can be transparent, consistent and unbiased but are not sensitive to the infinite range of individual idiosyncrasies, and do not identify the rarer, but often graver, risks. Clinical assessment, he argues, can use knowledge, skill and wisdom but can also be biased and prejudiced.⁸⁴⁰ Lippke acknowledges the increasing accuracy of actuarial assessment, but argues its limitation on the basis of the focus on historical or sociological characteristics of offenders, and that it does not consider offenders' moral capacities or their action when faced with specific choice.⁸⁴¹

Von Hirsch, over the years, has modified his views on predictive assessment. He accepts that methods of assessing future risk have become more accurate and reliable, but still argues that whereas earlier predictive studies showed rates of eight false positives for every true one, later studies still show two false positives for every true one.⁸⁴² Other academics accept the two in three chance of false positives but argue, as Morris does, that it is still ethically and socially desirable to take such predictions into consideration in judicial and legislative decisions, as long as clinical predictions have actuarial back up.⁸⁴³ Although optimism does appear to exist over the increasing accuracy of predictive assessment of dangerousness, risk assessment might never be more than a 'judgment of probabilities,'⁸⁴⁴ and concerns expressed over 30

⁸³⁷ This has a long history: The Prevention of Crime Act 1908 (based largely on the Gladstone Committee's finding) introduced a term of up to ten years to be added to the imposed sentence on the grounds of preventing future reoffending. This was replaced in the Criminal Justice Act 1948 by an extended – rather than an additional – term as a form of preventative detention. Later legislation, Criminal Justice Act 1967, allowed the judiciary to extend a sentence in view of an offender's record.

⁸³⁸ The provisions were amended in S13-18 of the Criminal Justice and Immigration Act 2008 and finally the Legal Aid, Sentencing and Punishment of Offenders Act 2012 declared that IPPs could only be imposed on offenders convicted before 3 December 2012.

⁸³⁹ Jacobson & Hough (2010)

⁸⁴⁰ Ansbro (2010):253f

⁸⁴¹ Lippke (2008)

⁸⁴² von Hirsch (1998b)

⁸⁴³ Morris (1998)

⁸⁴⁴ Faulkner (2007):135ff

years ago in the Floud Report⁸⁴⁵ remain relevant. Among the concerns raised was the difficulty in defining dangerousness and the problems of the accuracy of instruments by which future dangerousness could be assessed. It also raised the issue of the political notion of public alarm and the political identification of certain kinds of actions as being dangerous.

Holmes and Soothill argue that, despite the Floud Report raising doubts, these issues were not resolved in CJA 1991, which permitted preventative sentences in certain cases.⁸⁴⁶ Ashworth and von Hirsch, in their criticism of the sections of the Act relating to dangerousness, argue that proportionality is at risk, as proportionate sentences are designed to reflect the offender's blameworthiness, whereas sentences based on prediction have no such foundation. They feel that only within tightly circumscribed limits could prescriptive restraint be considered fair, and they discuss Bottoms and Brownsword's concept of 'vivid danger' as a basis of such restraint.⁸⁴⁷ They believe that the degree of seriousness of any potential crime has to be taken into consideration, along with its potential frequency and immediacy. Of importance is also the certainty that such crimes might take place.

In addition to all the concerns expressed about assessment instruments, an additional problem when dealing with those with a whole life order is the very small number involved. Jacobson and Hough point out: 'The application of group level data to individuals - especially when the group data relate to very rare occurrences, such as incidents of serious violence - necessarily gives rise to errors including both false negatives and false positives.' Few groups of dangerous offenders are likely to be as small in number as those who have attracted a whole life order.

While many of these issues relate to the sentencing stage, they also have a relevance to the Parole Board's role. A panel of the Parole Board, in addition to risk assessments, have available to them detailed reports from prison staff and in-depth assessments of responses to offender behaviour programmes. The ECtHR, in reviewing case law in England, noted that in *Jones* the Court of Appeal had stated that it was the task of the Parole Board to ensure that the offender was not released after serving the minimum term 'unless this presented no danger to the public'.⁸⁴⁸ The Parole Board has to assess 'whether the lifer's level of risk to life and limb is considered to be more than minimal'.⁸⁴⁹ The number of prisoners sentenced to a whole life order because they had been convicted of a previous murder conviction⁸⁵⁰ raises questions about the accuracy of the Parole Board's assessments, which would be of greater significance if it was given responsibility for conducting reviews of notorious whole life order

⁸⁴⁵ Floud & Young (1981) See also: Bottoms & Brownsword (1982)

⁸⁴⁶ Holmes & Southill (2007):589 ff

⁸⁴⁷ Ashworth & von Hirsch (1996):176

⁸⁴⁸ [2012] ECHR 61 para 42

⁸⁴⁹ Directions to the Parole Board under Section 32(6) of the CJA 1991 Introduction (4)

⁸⁵⁰ See Chapter 5

prisoners. Sir David Latham, the then chairman of the Parole Board, in an interview with the *Guardian*⁸⁵¹ on the eve of Jon Venables' hearing in 2010, said:

Society needs to realise that we can't create a world that is free of risk. What society has to determine, is what level it is prepared to accept. I'm concerned that the society we're presently living in, is becoming too risk averse.

The interview concluded by Sir David saying that if Parole Board members felt they were being pilloried if they made a mistake, their decision making was bound to change. Whether in the light of these views, it would be acceptable to the public, sections of the media, and politicians for the Parole Board to be given the task of conducting reviews of whole life order prisoners is a moot point.

Of possible future concern, with regard to ECHR Article 5, is whether the Parole Board is an 'independent tribunal'. Technically it is an Executive Non Departmental Public Body, but it is not immune from government influence. Under section 32(6) of the Criminal Justice Act 1991, the Secretary of State has the power to issue Directions to the Board. In 2006 John Reid, then Home Secretary, addressed the Parole Board. Frances Crook of the Howard League was present, and in her blog was scathing about his attitude.⁸⁵² In interview, she said she believed this was responsible for the drop in the percentage of prisoners getting parole. Latham, in *The Guardian* interview, also confirmed that Reid's 2006 intervention had a significant effect on release rates. However, the issue of whether the Parole Board is an 'independent tribunal' was raised in *Brooke*.⁸⁵³ The judgment declared that the 'present (organisational) arrangements...do not demonstrate its objective independence of the Secretary of State as required both by both English common law and Article 5(4) ECHR'.⁸⁵⁴ The Court of Appeal dismissed an appeal by the Secretary of State. The government response was to set out a consultation document⁸⁵⁵ to consider how best to meet the criticism in the judgment. The Parole Board called for it to remain an independent body, but with sponsorship transferred to HM Courts Service. Following the 2010 General Election, Kenneth Clarke, as Justice Secretary, said that any decision on the Board's future would not be taken in isolation, but would be 'in the broader context of the sentencing review'.⁸⁵⁶

In light of the potential problems with these mechanisms of review, an alternative approach to the whole life order would be to give judges power to set minimum terms to reflect the seriousness of the crime, with no upper limit. Kenneth Clarke, while Secretary State for Justice, introduced a Green Paper in which he regarded the provision of Schedule 21 as being

⁸⁵¹ Reported 31 March 2010

⁸⁵² 'Most open ended sentences in Europe' March 12 2009 Available:

<http://www.howardleague.org/francescrookblog/most-open-ended-sentences-in-europe>

⁸⁵³ [2007] EWHC 2036(Admin) and [2008] EWCA Civ 29

⁸⁵⁴ [2007] EWHC 2036(Admin) para 64

⁸⁵⁵ It took the 'form of a long overdue review of the Board's function power and status'. Parole Board Annual Report 2010-11

⁸⁵⁶ Parole Board Report 2011-12 The government's proposals following the review are still awaited.

unnecessarily prescriptive.⁸⁵⁷ ⁸⁵⁸ There is, however, no indication of what he, or his successor, would propose. Even within the provisions of Schedule 21, judges have been able to impose extremely long minimum terms: for instance Restivo's whole life order was replaced on appeal by a minimum term of 40 years, and Copeland received 50 years rather than a whole life order because of his youth.⁸⁵⁹ Such judicial discretion, with no upper limit, if formalised, would bring England into line with Scotland where, as discussed earlier, it was declared that not only could a minimum term in excess of 30 years be imposed if justifiable, but also that there was no bar to setting a minimum term in excess of the offender's life expectancy. Such a change would enable judges to focus on the circumstances of the crime and the offender, including his age. This would preclude appeals on the grounds of gross disproportionality of continuing imprisonment after many years.

Vinter, Bamber and Moore, as this chapter has shown, highlights issues regarding the justification for the punishment of crimes of exceptionally high seriousness, and the pressures the government will be under from the public, the media and groups of their own members of parliament in the event of an unfavorable decision by the ECtHR. The case at the Grand Chamber will not lead to any automatic unlocking of the prison doors for Vinter, Bamber and Moore, even if the decision favours them.⁸⁶⁰ Indeed, it may be some time before questions over the whole life order are fully resolved.

⁸⁵⁷ Ministry of Justice (2010) Para 170

⁸⁵⁸ This is despite ECtHR's comment that Schedule 21 'provides a comprehensive and carefully constructed framework for assessing the seriousness of a particular murder or murders and thus determining what minimum term is justified for the purposes of punishment and deterrence. All of the factors set out in it are commonly accepted factors for assessing the seriousness of murder'.

[2012] ECHR 61 para 109

⁸⁵⁹ See above: *Oakes* and *Copeland*.

⁸⁶⁰ In communication, Jeremy Bamber is quite realistic about this.

8 CONCLUSIONS

8.1 Introduction

The research questions for this study seemed straightforward: the whole life order's genesis; the challenges its application both faced and posed; and whether the sentence has a future. Much of the data collection involved analysis of parliamentary debate, examination of court cases both domestic and in Strasbourg, sentencing guidelines, sentencing practice in other jurisdictions, and prison policies. These are familiar territory for research but for this study they were examined with particular focus on the whole life order. What became apparent very quickly was that, although the core focus was narrow and specific, the scope of inquiry was wide, as the whole life order's genesis and subsequent application not only, unsurprisingly, touched on different political, legal and societal issues but was fundamentally affected by these issues.

This concluding chapter will not revisit the examination of the crucial appeal of *Oakes*, where the determination expressed with the greatest clarity, the domestic interpretation of the legitimacy and the appropriateness of the whole life order. The crucial *Vinter, Bamber and Moore* appeal, awaiting judgment at Strasbourg, will take a view on the legitimacy of the sentence in terms of the ECHR. The implications of this were dealt with in the previous chapter.

Instead, the conclusion will summarise the political-societal and judicial-executive context awaiting this ECtHR decision, before turning to key issues that have emerged from the study. The whole life order sentence is examined in the light of penological justifications. A consideration of the extent to which the sentence is a sentence apart is followed by the discussion of issues that arise from the serving of a life-long sentence. The scrutiny, or lack of scrutiny, of these issues by politicians and by academics is reflected on.

Most discussion of respondents' views has been incorporated in earlier chapters, however in view of David Blunkett's role as the architect of the CJA 2003, it was felt appropriate to give further attention to his views in the conclusion.

The chapter ends with an examination of a 2012 parliamentary debate in which most of the core issues in this study were raised.

8.2 The changing criminal justice context

I believe there is a great danger at the present time that we show too much concern for criminals and too little concern for the victims and too little care for the protection of society.⁸⁶¹

Why we should not allow the judges (in sentencing those convicted of murder) to exercise discretion and mercy which they do in all other cases I find difficult to understand.⁸⁶²

I hope that for murders ... we shall move to a position in which a review body of some sort or another deals with all life sentences of, say, more than ten years.⁸⁶³

If it is necessary for the security of society to keep a man there (in prison) for the rest of his life, he will have... to be there for the rest of his life.⁸⁶⁴

Even with the worst type of prisoner, I would always be loath... wholly to extinguish all hope in the mind of any human being that he would ever be allowed to walk outside the prison walls ... I would try to replace the loss of that hope by at least the hope that he would have inside the prison confines such amenities, activities and human contacts as would make his life a civilised one and enable him to endure the penalty which, unfortunately, the interests of the community require that he undergo.⁸⁶⁵

The arguments over the stress on victims', as opposed to offenders' rights; judicial discretion; the possibility of review for *all* serving long sentences for murder; the need for public safety; the question of hope and of appropriate prison regimes relating to those serving a whole of life sentence: all are issues discussed in the debates leading to the CJA 2003. Yet these statements were all made almost fifty years ago, during the parliamentary debates leading to the abolition of the death penalty. Indeed, all remain issues in 2013.

As shown earlier in the study, the decision to suspend capital punishment in 1965 was made against allegedly hostile public opinion. However, there had been scenes of sympathetic support for Ruth Ellis, outside the prison where she was to be hanged, and there was a coherent liberal elite in favour of abolition. The liberal views were based not only on the inalienable value of life, but also on the irreversibility of miscarriages of justice, a lack of evidence of a deterrent effect and the 'ghastly ceremony of execution'.⁸⁶⁶ Members in the parliamentary debates, talked of their duty to vote with their consciences on the principle of abolition, and to act as representatives not delegates. The decision was accepted with no significant outpouring of public dissent, and, although initially the abolition was limited to a five year trial period, the sentence was permanently abolished before the five years had passed and with limited resistance.

⁸⁶¹ Lord Molson Hansard HL 20 July 1965 col 593

⁸⁶² John Hobson, former Solicitor General Hansard HC 13 July 1965 col 376

⁸⁶³ *ibid*

⁸⁶⁴ Lord Chancellor Hansard HL 20 July 1965 col 622

⁸⁶⁵ Sir Frank Soskice Home Secretary Hansard HC 21 December 1964 col 928

⁸⁶⁶ This summary of the abolitionists' views was made by Lord Hoffman in *Wellington* [2008] UKHL 72 para 6-7

Given the effectiveness of moral arguments in the campaign to abolish capital punishment, it might have been expected that campaigns in favour of supporting the human rights of those serving a whole life sentence would adopt similar moral arguments. While organisations like Liberty, the Howard League and Justice have sought to develop such arguments, they have not resonated with the public. The Human Rights Act and the ECHR have not succeeded in making human rights a major moral issue in the punishment of such offenders. Conversely, in fact, these measures and the court cases resulting from them, as seen in the study, have resulted in outspoken criticism of human rights by much of the media, by sections of the public and by some politicians.

By the time the whole life order was introduced, with limited debate on the issues it raised, it was within a very different criminal justice landscape from that of 1965. Greater importance was attached to the maintenance of public confidence and the need to take account of public opinion. There was more societal insecurity and fear of crime, driven to an extent by sensational reporting of crime in sections of the media, which, since the 1980s, led to political parties vying to be seen as the party of law and order. With this has come the tendency for politicians increasingly to take account of victims' interests and give priority to public protection and retribution in penal policy. This move has brought its own unease, with disquiet expressed that the 'sanctification' of the victims also tends to nullify the concern for the offenders.⁸⁶⁷ All these changes have obviously been a gradual process, but to the extent there was a critical watershed, it could be argued that it was the murder of James Bulger in 1993 and the reaction to it by politicians. All the elements which had changed in the previous decade are apparent: the sensational and relentless reporting of the murder in the media; the public's desire for 'revenge' even although the offenders themselves were children; the public's increased fearfulness over risk of crime; and politicians use of the murder stridently, and competitively, to present their case for increased crime control.

In the 20 years since James Bulger's murder, the media and the public's reaction to any perceived government weakness on law and order issues has not lessened. David Blunkett, the architect of the 2003 Act, was vividly aware of public feeling and considered a clear message had to be sent that the government was taking criminal justice seriously. In his interview he stated,

You don't whip up emotional popular feeling but you hear it when it occurs and listen to it in a rational reasonable fashion and then cool and dampen the most heated cries for action and do something sensible.

The 'something sensible' in 2003 was to let criminals know they would be dealt with harshly and to let the public know they were being listened to. The whole life order was striking in its

⁸⁶⁷ Garland (2001):143

simplicity and it satisfied Blunkett's desire for robustness and reassurance. It would send the message that when the crime was serious enough, a sentence was available whereby the offender would have no possibility of release.

The change that occurred in the decades leading to the 2003 Act accords with the views of academics such as David Garland and Jonathan Simon. They have persuasively argued that fundamental social, cultural and economic changes in the second half of the twentieth century made a significant impact on criminal justice issues. The societal changes for a time brought increased crime levels and a resultant fear of crime. A pervasive culture of crime control emerged, with governments increasingly aware of the electoral importance of acknowledging and addressing the public's fears of victimisation. One example of this commitment was Jack Straw's statement in 1998 that the government's priority had to be protecting the public by 'assessing risk, reducing risk and managing risk'.⁸⁶⁸ Both Garland and Simon comment on how, in the USA and Britain, levels of public fear do not accurately reflect the actual incidence of crime, but still result in an angry public, tired of living in fear and demanding strong punitive and protective measures.⁸⁶⁹

In 2002, when the Criminal Justice Bill was progressing through parliament, the reaction in the media and the public to Ian Huntley, after he was convicted of the murder of two schoolgirls in Soham, illustrated the abhorrence felt by sections of society towards certain murderers. In this climate, it would be surprising if any judgment, made by a European court, upholding the rights of a small group of prisoners convicted of the most heinous crimes would be met with anything other than fierce resistance. This, significantly, is the context in which possible legislative change, necessitated by an ECtHR ruling in *Vinter, Bamber and Moore*, will occur.

8.3 The continuing judicial-executive context

In interview, Lord McNally spoke of how the tension between the judiciary and the executive would always 'ebb and flow', and this has been highlighted in the study. David Blunkett, also in interview, provided a further example of such tension. He explained the need for the CJA 2003 to set sentences for murder 'to put back sentencing to where it should be'. He felt 'the minute you pull back from life meaning life, the judiciary starts to reduce the sentences'. One of his predecessors, Michael Howard, had similar views and hence introduced what became the Crime (Sentences) Act 1997. The judicial response was uncompromising. Lord Chief Justice, Lord Taylor who in *Cunningham*⁸⁷⁰ had 'reinterpreted' the CJA 1991, then attacked

⁸⁶⁸ Cited in Garland(2001):270

⁸⁶⁹ Simon (2007):213

⁸⁷⁰ See above

the Criminal Justice Bill 1997: 'The criminal law should not be subject to arbitrary change by the powers that be, or the vagaries of fashion'.⁸⁷¹ Despite this opposition, Howard persisted with the Bill.

In 2002, during debates in the House of Lords on the Criminal Justice Bill, this tension was illustrated when sentencing for murder was being discussed. Lord Chief Justice, Lord Woolf, was critical of the restrictions on judicial discretion, and the consequent escalation in the length of sentences. Lord Ackner supported him in his views. Lord Donaldson went further, and asserted that the Home Secretary appeared to assume that parliament was omnipotent and could dictate to the judges how, in detail, they should perform their duties. This tension continued in respect of the Constitutional Reform Act 2005 and the establishment of the Ministry of Justice. The politicians in this period believed that the judges were under-sentencing and the most public expression of this was in the Sweeney affair, discussed earlier. More serious, were the conflicts after the 9/11 terrorist attacks in New York, when state control versus due process was clearly highlighted in respect of government legislation, struck down by the courts.⁸⁷²

This then, is the background to the court cases in the study. Those considered before 2003 are concerned with the legitimacy of the Home Secretary's powers to set a tariff. The judiciary asserted that setting a tariff was a sentencing exercise and therefore a judicial not an executive function. If this was so, the setting of tariffs by the executive infringed the separation of powers. Lord Pannick, in interview, suggested this series of cases exhibited clever tactics, with one after another of the Home Secretary's powers in turn being attacked.

Post-2003, defence counsel sought to set limits on the whole life order, mostly without success, and in the end moved from questioning its scope to questioning its legitimacy. There has been no judicial criticism, however, of the *principle* of the whole life order. Senior judges, in interview, asserted their task was to apply the law as established by parliament.. Certainly, the law in s269 and Schedule 21 is unambiguous and it is, of course, primary legislation. Presumably, pre-2003 the judiciary regarded as legitimate the criticism of executive action undertaken, not as a result of primary legislation, but under delegated discretionary powers.

Whether judicial criticism of explicit statutory provision is appropriate, or even whether it is constitutionally legitimate, is a question of importance. So too, is the question whether the judiciary should play a role in examining the principles of the whole life order. Historically, it has been accepted that parliament is sovereign. This principle has been reasserted as recently as 2011 by Lord Bingham⁸⁷³ when he dismissed the view that the sovereignty of parliament was a common law construct that was thereby liable to be defined by judges. However, the

⁸⁷¹ In a lecture at King's College London 1996 quoted by Jack Straw HC 19 June 1996 col 897

⁸⁷² See above Chapter 6.2

⁸⁷³ Bingham (2011): 160-170

Judicial Studies Project⁸⁷⁴ asserted in its introduction that Britain's constitution is changing: 'It is evolving from a *political* constitution⁸⁷⁵ towards a *legal* constitution.'⁸⁷⁶

Lord Phillips, in a lecture in 2011,⁸⁷⁷ quoted Michael Howard's remarks made in a radio programme:

The power of the judges, as opposed to the power of elected politicians has increased, is increasing, and ought to be diminished.

Howard had continued that more and more decisions were being made by unelected, unaccountable judges, instead of accountable, elected Members of Parliament, who had to answer to the electorate for what had happened. Lord Phillips also quoted Kenneth Clarke's astonishment at the way judicial review sits over every decision that anyone in government and the administration makes. In his speech, Lord Phillips both rejected Howard's remarks and defended the expansion of judicial review.

The recent development of judicial review has, however, been criticised by the Supreme Court Justices, Lord Sumption and Lord Neuberger. The former has asserted that too often judicial reviews deal with matters that in a democracy are the proper function of parliament.⁸⁷⁸ Lord Neuberger asserted that it was not for UK courts to take a *policy* decision.⁸⁷⁹ This suggests that while judicial review could be used, for instance, to challenge the continuing detention of particular prisoners, (as Lord Phillips argued in *Bieber*), it could not be used to challenge the legitimacy of the primary legislation concerned, ie s269 and Schedule 21 of the CJA 2003.

The drafting of the Human Rights Act, as has been seen, whilst incorporating the ECHR into English law, preserved the principle of the sovereignty of parliament. If such care has been taken to preserve parliamentary sovereignty, any questioning by the judiciary of the sentencing principles enshrined in the whole life order, could be perceived as unconstitutional. Parliament enacted that the whole life order be imposed for the penologically justifiable purposes of retribution and deterrence: for cases of exceptionally high seriousness, it is the just and legitimate punishment. This is not to argue that the whole life order cannot be questioned on the grounds of principle; but that the bench, when judges are dealing with particular cases, may not be the place to voice such questioning.

⁸⁷⁴ 'The Politics of Judicial Independence in Britain's Changing Constitution' A three year project, begun January 2011 Available: <http://www.ucl.ac.uk/constitution-unit/research/judicial-independence>

⁸⁷⁵ 'Where those who exercise power are held to account mainly through political process and in political institutions.'

⁸⁷⁶ 'Where they are increasingly held to account by courts through judicial review'.

⁸⁷⁷ Available: <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/launch>

⁸⁷⁸ In his F A Mann Lecture 9 November 2011

Available: http://www.legalweek.com/digital_assets/3704/MANNLECTURE_final.pdf

⁸⁷⁹ In his lecture 'Protecting Human Rights in the Age of Austerity' 7 February 2011 Available: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-cla-07022011.pdf>

8.4 Penological justification of imprisonment for the whole life order

Both the Court of Appeal in *Oakes* and the ECtHR Chamber in *Vinter, Bamber and Moore* noted the four penological justifications for imprisonment: retribution, deterrence, public safety and rehabilitation. As was stressed in *Oakes*, the CJA 2003 stated that the whole life order should be imposed as retribution and deterrence for a crime, or crimes, of exceptionally high seriousness. Public safety and rehabilitation are not mentioned. All the judicial respondents declared they were comfortable with this. If retribution is accepted as penological justification for an imprisonment for the whole of life, then it is difficult to argue the need for a review mechanism since the trial judge assesses the seriousness of the crime that has been committed. Many respondents were less comfortable with these justifications. Frances Crook of the Howard League admitted that the whole life order had not been raised as an issue at the League, but she personally was hostile to retribution, thinking it was too close to vengeance, and, on reflection, could not accept a whole life order based on retribution and deterrence.

Other respondents, while well aware of the penological justification in the Act for the whole life order, did not support it in these terms. The police, for example, accepted the whole life order, but most argued it was justified by the protection it provided to the public; that is, on grounds of incapacitation. Faith groups, unsurprisingly, believed that imprisonment for even the most heinous crimes, should allow for rehabilitation and redemption, and hope should never be extinguished. They accepted, however, that some people would have to be kept in prison for the rest of their lives because of the risk they posed to the public. A group of lawyers interviewed, also said they felt public safety should be the main justification for the sentence. Indeed, for a surprising number of respondents in this survey, the whole life order was justified on the grounds of dangerousness and public safety. Ironically, David Blunkett also seemed, in parliament, to acknowledge this, even as he introduced the sentence justified on the grounds of retribution and deterrence alone. In answer to a question about the need to consider a review to address possible redemption or repentance he said:

The kind of multiple and sadistic murders that warrant a life sentence, meaning life, are such that we could not have confidence whatever the psychiatric appraisal may be, that those people would be safe in the community or safe to the community.⁸⁸⁰

Perhaps this emphasis on dangerousness and public safety helps explain the general lack of emotional reaction to the whole life order. If it is thought of in terms of keeping dangerous offenders away from the public, it is 'easier' to accept that these offenders should not have the hope or expectation of release. David Blunkett and many other respondents appeared to believe that past actions could display a level of dangerousness that means that a whole life order is justified for public safety.

⁸⁸⁰ Hansard HC 20 May 2003 col 874

This position is difficult to sustain as dangerousness may well be considered to be open to change over time. The Council of Europe Commissioner for Human Rights noted:

Life-life sentences negate the human principle that people can change....Court decisions assuming that someone constitutes a permanent threat to society are therefore misplaced. The vision of rehabilitation should be protected, not undermined.⁸⁸¹

If there was to be any question of rehabilitation or question of assessing dangerousness, then a need for a system of review becomes inescapable. What is not self-evident, however, are the grounds for any review. There is the well-established review mechanism of the Parole Board, which considers whether or not to order the release of a prisoner sentenced to mandatory life after the minimum term has expired. The grounds for release are assessed purely in terms of the risk of future offending the prisoner poses if released. If a review body was required to consider not solely risk but the broader justifications identified by the Court of Appeal and the ECtHR in respect of continued imprisonment - retribution, deterrence, public safety and rehabilitation - it is probable that a new, fully judicial, body would be required. This could be based on the German model, where after fifteen years of a life sentence, cases are reviewed: considering the seriousness of the crime and public security as well as re-socialisation.⁸⁸² The lawyers for Vinter, Bamber and Moore have argued in papers to the Grand Chamber that the *balance* of penological justifications can change over time.⁸⁸³ So, for instance, rehabilitation may become more salient than retribution.⁸⁸⁴

Another argument for the need for a review mechanism is the concern expressed over proportionality in whole life orders. The overarching aspect of the principle is clear. As Lord Phillips said in interview, judges have a duty in common law to be proportionate in their sentencing. Attention has been drawn to Lord Chief Justice Woolf relying in *Offen* (2) on Articles 3 and 5 of the ECHR 'to establish a 'constitutional' requirement that sentences must not be disproportionate'.⁸⁸⁵ The CJA 2003 requires that sentences for murder should be proportionate to the seriousness of the offence. The general duty is clear, but there are aspects that are not self-evident. For example, whether a whole life order imposed on, say, a 25 year old is, or becomes with the passage of time, disproportionate compared to the same sentence imposed on a 55 year old. It follows from this that it is legitimate to ask whether a sentence that will inevitably vary in length, possibly very substantially, can ever be proportionate. The severity of the sentence will, in effect, vary according to arbitrary factors

⁸⁸¹ T Hammarberg Available: http://www.coe.int/t/commissioner/viewpoints/071112_en.asp

⁸⁸² More details are above, Chapter 5.2

⁸⁸³ This is again drawing on German practice.

⁸⁸⁴ James (2003):75 has drawn attention in the UK of the paradox in society's expectation of wanting rehabilitation but also demanding retribution.

⁸⁸⁵ Van Zyl Smit & Ashworth (2004): 543

associated with the timing of the person's death. This view, however, is in conflict with Lord Steyn's declaration in *Hindley*:

There are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies, it will not exhaust the requirements of retribution and deterrence.⁸⁸⁶

If it is conceded, however, that concerns about the proportionality of one whole life order compared to another, have some justification, a remedy would be needed. As Edward Fitzgerald pointed out in interview, Lord Hailsham advocated gradation with the seriousness of crimes being reflected in sentences expressed in terms of years. This, as has been seen, is already the position in Scotland.⁸⁸⁷ The adoption of such a sentencing regime would explicitly end the whole life order, while the adoption of any form of a review mechanism would implicitly end it. Although, however, such a change would restore the concept of hope for prisoners it could conflict with concern expressed by politicians such as David Blunkett, fearful of judicial erosion of sentences.

8.5 A sentence apart: a step beyond the continuum

David Blunkett, in interview said he felt strongly that, for 'a very few' offenders, a life sentence should mean exactly that. For those few there would be no minimum term set and no possibility of release or review. A very long determinate sentence was not sufficient, he thought, as it would be undermined over time by the judiciary. At first glance the whole life order might appear to be the extreme point on the sentencing continuum, but it can be argued that the sentence is much more than that. It is different in its nature, not only because of its potential to contradict the principle of proportionality but also, unlike every other sentence, it removes from prisoners serving the sentence any form of hope of release.

Historically, the sentence apart was the death penalty. Bailey wrote that although capital punishment could be considered merely as one level of the country's penal system, to do that would be to ignore the fact that the subject 'touched the deepest fears and values', with few people without an opinion and with governments having to remain vigilant regarding public opinion on such a sensitive issue.⁸⁸⁸ Clearly, in Bailey's view therefore, the death penalty was a sentence apart from all others. This too was reflected in judicial practice, with the symbolic placing of the black cap on the trial judge's head before he pronounced the sentence. Since 2003 the equivalent sentence has been the whole life order. Neither the United Nations nor the Council of Europe concede the need for such a sentence. Its use distinguishes

⁸⁸⁶ Quoted in *Oakes* [2012] EWCA Crim 2435 para 10

⁸⁸⁷ See Chapter 5

⁸⁸⁸ Bailey (2000):347

England and Wales from the rest of Europe, except for the Netherlands. For whole life order prisoners, being in such an exceptional situation, combined with the exhaustion of domestic remedies, makes an application to Strasbourg an attractive option.

The judicial minority at Strasbourg's Sectional Chamber ruling in *Vinter, Bamber and Moore* spoke of the requirement for hope: 'however tenuous that hope might be'.⁸⁸⁹ The government in its argument to the Grand Chamber, however, said that it did not appear that Article 3 requires penal systems to be arranged so as 'to give a tenuous (and the government would add, wholly unrealistic) hope'.⁸⁹⁰ At the subsequent Grand Chamber hearing, the QC for *Vinter* understandably raised the question of loss of hope:

The imposition of the whole life order crushes human dignity from the outset, as it removes any chance, and therefore any hope, of release in the future. The individual is left in a position of hopelessness whereby he cannot progress whatever occurs.⁸⁹¹

The argument was countered on behalf of the government by the statement that some crimes are so serious that they require a proportionate response, namely life-long incarceration. This was echoed by politicians in interview for the study when, although acknowledging the sentence as being unique in removing all prospect of release at time of sentencing, they accepted the uniqueness as a necessity to demonstrate to the public that serious crimes would attract serious punishment. Other respondents supported the certainty of the whole life order. The police respondents, for example, drew attention to the uniqueness of the whole life order, in that it was absolutely transparent. This was particularly appreciated by family support officers, who found it easy to explain the significance of the sentence to victims' families and friends. A life sentence with a whole life order, meant exactly that: there was no need to try to explain minimum terms, the concept of risk and the role of the Parole Board.

A sentence that is apart from others because of the withdrawal of hope would be expected to attract controversy and debate. However, there has been little emotional reaction to the whole life order and little discussion, or public campaign, on the ethical or moral foundations on which it rests. To the extent that emotion has been demonstrated publicly, it has been demands from the media and the public, to impose the sentence on those they consider to have committed particularly evil acts. The emotional and moral questioning surrounding another 'sentence apart,' the death penalty, far outweighs any involving the whole life order. Almost fifty years ago, the ethical issue was an important element in the public debate on the abolition of capital punishment. In *Ruth Ellis's* case, it was asked if it was morally right for a mother of two, with an abusive background to be hanged. And in relation to *Derek Bentley*, if it was right for a

⁸⁸⁹ [2012] ECHR 61

⁸⁹⁰ para 5(2)

⁸⁹¹ Quoted in *The Independent* 28 November 2012

young man with learning difficulties to be hanged when he had not fired the fatal shot. Crucially, following the wrongful execution of Timothy Evans, it was questioned whether it could ever be morally, ethically or judicially right to risk a miscarriage of justice.

Perhaps the lower level of attention paid to the whole life order is understandable: the whole life order has no specific act of life-taking and any miscarriage of justice is reversible. The fact that offenders serving the sentence, uniquely, are deprived of hope of any release and will be removed from society until they die – not because of any continuing dangerousness but as punishment for their crimes of exceptionally high seriousness – certainly does not appear to be an issue engaging the emotions of many.

Murder is often described as a heinous offence and the crimes that attract the whole life order are at the apex of any hierarchy of heinousness. It is accepted almost universally that the worst crimes should attract the most severe sentences. However, this does not preclude discussion on what that penalty should be, and on whether it demands a sentence that is unique in its requirement to remove from the prisoner all hope of release or any opportunity for rehabilitation in society. Hope has been seen as the essence of humanity whether it is Dostoevsky declaring ‘to live without hope is to cease to live’ or W.C. Fields stating that ‘when we have lost everything, including hope, life becomes a disgrace, and death a duty’. By virtue of being the only sentence to close the prison doors permanently, the whole life order is indeed a sentence apart and deserves scrutiny.

8.6 A sentence apart: serving the sentence

With the acceptance that the whole life order is different from any other sentence, the issue arises of the extent to which *serving* the sentence also is different from others, and the attention that deserves. Much has been written on subjects that are *related* to those serving a whole life. There is a wealth of debate and writing on the death penalty and on the USA penalty of life without parole. There is also much commentary on international approaches to considering which punishments are legitimate and acceptable, following the abolition of the death penalty, and on how different jurisdictions have tackled this challenge. In this commentary, England often receives little attention and is dealt with as an exception, being one of the few jurisdictions in western democracies to adopt a whole of life penalty based on retribution and deterrence, with no review mechanism. The numbers serving the sentence are extremely small; however the infrequency of the imposition of the sentence should not inhibit detailed consideration being given to it.

One particular aspect has lacked such attention: the appropriate prison regime for those serving a whole life sentence. It can be argued that prison-based issues relevant to this cohort are no less relevant to many other prisoners: the exhibition of dangerous behaviour in prison; facing old age and death while incarcerated; sufficient and appropriate out of cell activities, both social and educational; access to therapy and counselling; continuing contact with friends and family; and retaining a sense of purpose and progress. Certainly these issues affect prisoners other than those serving a life-long sentence. It can also be argued that whilst the prisoners this study is focused on constitute a discrete group, it is not homogeneous. They have in common that they have been convicted of crimes of exceptionally high seriousness, but in prison they are reported to exhibit different behaviour patterns. Some are amongst the most dangerous and violent prisoners, requiring up to seven prison officers to be present when out of cell. Others are reputed to be model prisoners.⁸⁹² The age range is also wide, from early middle age to elderly and, reportedly, frail. They may, therefore, both face and pose similar challenges to other prisoners.

Crucially, however, they are a unique group in being aware that, on the grounds of retribution, a life-long sentence with no possibility of release for them has been judged proportionate and just. In the submissions to the Grand Chamber in *Vinter, Bamber and Moore*, different consultants in clinical, forensic and neuro psychology have written of how the whole life order can affect prisoners in different ways. One such prisoner is described as reacting with a mixture of fury and despair, causing a loss of moral compass, as he faces a sentence that is 'akin to a death sentence albeit a slow and intolerable one.'⁸⁹³ The fact that the sentence virtually precludes the possibility of movement out of Category A, puts another of the appellants increasingly in danger of depression.⁸⁹⁴

It is surprising that no study has been undertaken to explore, for example, to what extent the prison authorities take this unique sentence into consideration when deciding on individual regimes to accommodate the needs for those involved; to what extent the sentence affects prison behaviour; and whether allocating an enhanced regime, with elements of those employed many years ago in Barlinnie or currently in Grendon, could modify violent behaviour in this particular group where necessary or, if required, alleviate depression. In the interview with the released lifer for this study he commented 'When the whole life tariffs began to trickle through I was waiting for a strategy document to come down. I was 'Right how are you going to deal with these guys?' It still hasn't appeared to the best of my knowledge. Slightly worrying'. As seen earlier, when government ministers have been asked about prison regimes specifically focused on the needs of the whole life order group, the response has been that the emphasis is on assessing and meeting the individual needs of all prisoners and not on

⁸⁹² Grand Chamber Application on behalf of *Vinter, Bamber and Moore* para 17

⁸⁹³ *ibid* para 16

⁸⁹⁴ *ibid* para 17

any particular grouping of prisoners. This is perhaps surprising given that much of the new penology is concerned with actuarial assessment to identify and regulate the risk posed by specific groups of offenders.

The lack of attention paid by politicians to the subject is perhaps reflected in the apparent reluctance of NOMS to allow external inquiry, certainly in the case of the application for this study to interview relevant prison staff and prisoners. NOMS also seems remarkably slow in implementing a national policy for older prisoners, a question, particularly relevant to those serving a whole life order. The 2004 Prison Inspectorate Report and its follow up report in 2008, discussed above, both strongly recommended such a policy. Yet, nothing has been put in place. However, in January 2013, a Select Committee⁸⁹⁵ launched a new inquiry into older prisoners and has sought views on whether a national strategy for the treatment of prisoners aged 60 and over, should be established. Her Majesty's Chief Inspector of Prisons, Nick Hardwick, submitted evidence to the Committee in March 2013, reiterating the case for a national NOMS strategy. Although not specifically about those serving a whole life order, the inquiry and possible subsequent national strategy for the elderly in prison, would hopefully direct attention to this group.

However, there is no sign of any scrutiny on the central issue of whether those serving a whole life have unique challenges worthy of attention. The argument that prisoners with very long sentences share the same issues as those serving a whole life has not stopped significant attention and research on the sentence of life without parole in the USA. Although the numbers, and the crimes and ages of those involved, are significantly different from those in England and Wales, the key issue of no review and no release is the same. No academic study in the UK, however, has explored empirically whether the issues relating to long imprisonment and life-long imprisonment are indeed the same.

8.7 The Legal Aid, Sentencing and Punishment of Offenders Bill

This study consistently has sought, mostly in vain, to find any extensive, informed public debate on the principles of the whole life order sentence. However, under the unprepossessing title of the Legal Aid, Sentencing and Punishment of Offenders Bill 2012, an attempt was identified to raise issues very similar to those that had emerged from this study.⁸⁹⁶ An amendment was proposed in the House of Lords to introduce a review for those who would have served 30 years of a whole life order.⁸⁹⁷ The proposer was Lord Lloyd, a former Lord of Appeal, who speak out about the need to address the lack of hope experienced by those serving the sentence.

⁸⁹⁵ House of Commons Justice Committee, chaired by Sir Alan Beith

⁸⁹⁶ Hansard HL 9 February 2012 col 390-401

⁸⁹⁷ The text of the amendment is in Appendix J

The consequence of this proposed amendment being successful would, of course, have been the removal of the whole life order from the CJA 2003, placing the prisoner in the same position as someone with a 30 year minimum term, and in fact, in a better position than anyone sentenced to a minimum term of longer than 30 years.⁸⁹⁸ In proposing the amendment, Lord Lloyd asserted that it was an attempt to undo some of the harm that was done by the CJA 2003. He argued for the amendment on two grounds: first, that a review by the Home Secretary of a whole life tariff was 'settled practice' before 2003, but such a review had found no place in the Criminal Justice Act; second, that an adverse decision by Strasbourg in *Vinter, Bamber and Moore* would require primary legislation anyway. In the debate, the contributions, except for that of the government minister, were unanimously in favour of the amendment. The points raised directly relate to the themes considered in this study.

Lord Lloyd believed the amendment would restore hope to whole life order prisoners. Lord Clinton-Davis also spoke of the need for prisoners 'to look forward with some hope'. Five other Lords spoke of the importance of hope. Amongst those was Lord Ramsbotham, who referred with approval to the view of a prison education officer, who had worked closely with Nilsen, a prisoner serving a whole life order, and who stressed the importance of providing such prisoners with hope. Lord Ramsbotham continued that he had been 'enormously disturbed when that hope was removed by the 2003 Act'. Lord Judd and Baroness Stern argued for the importance of the goal of rehabilitation that would be an empty ambition if there was no prospect of release. Lord Pannick regarded the sentence as very damaging to prison order, and was supported in this by Baroness Mallalieu.

Lord Judd, Lord Pannick and Baroness Stern felt the whole life order was a betrayal of civilised values and humanitarian concerns. Baroness Mallalieu urged the government to show courage and accept the amendment. However, Lord McNally stubbornly defended the government's position: he referred to the 'pact' from the time of the abolition of the death penalty; he spoke of the Justice Secretary's powers of compassionate release; and, in tones reminiscent of Tony Blair, declared:

Penal reform is always a balance between humane treatment of those who are in prison, concern for the victims of crime and the retention of public confidence in our system of justice.⁸⁹⁹

But, for this last point, he was taken to task by Lord Pannick who asked why the public should not have confidence in the Parole Board and in its role in protecting the public.

⁸⁹⁸ Indeed, this point was made by Lord McNally, when opposing the amendment for the government.
⁸⁹⁹ *ibid* col 398

In seeking to draw the debate to a conclusion, Lord McNally argued

...the position as it is now is best in retaining public confidence. It is a matter of political judgment, and the political judgment is that to move on this point, at this point, would not retain public confidence.⁹⁰⁰

However Lord Judd intervened, in what might be seen as an attempt to return to the situation in the 1960s, asserting:

It is not a matter of accepting as inevitable the existing state of public opinion. We have to be very careful that we are not, in effect, running scared of the sensationalist media. We really should be not only respecting public opinion and public confidence but helping to shape public confidence by putting forward the positive argument for change. That is essential to successful democracy. If we have become convinced that this is the right thing to do, we have to speak up for it.⁹⁰¹

The campaign to abolish the death penalty was led by the liberal elite of the day stimulating debate. This amendment debate is the only one identified which equates the whole life order with a lack of civilised values and lack of humanitarian concerns. The amendment was withdrawn in view of opposition from the government, but it did raise issues of principle relating to the sentence and in the event of it being under examination because of any ECtHR ruling, it could serve as a stimulus for further debate in parliament and beyond.

8.8 Endnote

This chapter began by noting that issues raised in the 1965 debates in parliament were still issues in 2002 at the time of the Criminal Justice Bill. Furthermore, the 2012 Amendment debate drew attention to their continuing currency. The need for hope was emphasised in the debate and also features strongly in the *Vinter, Bamber and Moore* application to the ECtHR. In this, implicitly the need and justification for a sentence apart was raised, and explicitly the implications for prisoners of such a sentence was stressed.

In the submission to Strasbourg, Vinter's counsel said: 'We don't say that these applicants should necessarily ever be released, just that they should not have all prospect of future release taken away at the outset of their sentence.' The first half of his statement accords with views of the respondents of this study. Everyone, without fail, agreed that there were certain offenders who would never be released. What was at issue and what resulted in differing opinions from respondents, was whether the continued imprisonment, until end of life, should

⁹⁰⁰ *ibid* col 400

⁹⁰¹ *ibid*

be as a result of the crime, or crimes, committed being judged so heinous that the sentence of life-long imprisonment was justified at the time of trial; or whether it should be decided upon at reviews years, probably decades, into the sentence. The latter would retain a sense of hope of release for the prisoners involved; the former would remove hope.

It is this issue that divides opinion. And the division is deep. Most politicians stated in interview that for some offenders, a second chance should never be available. Members of the judiciary in court have made clear that the question of hope or redemption is not a relevant one for them. Earlier in the chapter Lord Steyn's determination in *Hindley* that, for some crimes, even death does not exhaust the requirements of retribution, was quoted. Lord Hoffman has rejected the idea that redemption has to be taken into consideration:

If a whole life sentence of imprisonment without parole is a just punishment for the crime, the prisoner atones by serving his sentence. Redemption, a matter between him and his Maker, may well be achieved during the currency of the sentence, but I do not follow why it is said to require a reduction of the length of the just punishment sentence.⁹⁰²

Others hold different views. David Rhodes has written of how, if the only hope available to a whole life order prisoner is release if terminally ill, then that is no hope at all.⁹⁰³ Rod Morgan, also views redemption differently from the judiciary:

In my view the essential core of humanity is that everyone is redeemable. A life sentence without parole removes any prospect of reward for change and is therefore fundamentally inhumane. If society is going to announce baldly that we don't care what you do, we don't care what programmes you engage in, you are never going to be released, it's the equivalent of providing a death sentence.⁹⁰⁴

Lord Judd in the Amendment debate discussed above, said:

If we do not always strive to try to enable someone who has done a dreadful thing to become a better person and to rejoin society as a better person, I think that we demonstrate a lack of self-confidence in our own civilised values.

At the start of this study, the views of Downes and Morgan were referred to: that in the twenty-first century we are used to law and order arousing emotive issues and provoking passionate political debate.⁹⁰⁵ The whole life order has defied this view. What is lacking and is needed more than anything else is cool, critical scrutiny of the subject in order to stimulate passionate political debate.

⁹⁰² para 46

⁹⁰³ Barrister at Doughty Street Chambers. 'When all hope is gone' 9 September 2008

Available www.solicitorsjournal.com

⁹⁰⁴ In personal correspondence, cited in Appleton and Grover (2007):611

⁹⁰⁵ Downes & Morgan (2006):201

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APPENDIX A

Criminal Justice Act 2003: s269 & 270 and Schedule 21

Section 269 is concerned with the determination of minimum term in relation to mandatory life sentence, with the relevant parts stating:

- (2) The court must, unless it makes an order under subsection (4), order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this Chapter as “the early release provisions”) are to apply to the offender as soon as he has served the part of his sentence which is specified in the order.
- (3a) The part of his sentence is to be such as the court considers appropriate taking into account the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it.
- (4) If the offender was 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, no order should be made under subsection (2), the court must order that the early release provisions are not to apply to the offender.
- (5) In considering under subsection (3) or (4) the seriousness of an offence (or of the combination of an offence and one or more offences associated with it), the court must have regard to
 - (a) the general principles set out in Schedule 21, and
 - (b) any guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21.

Section 270 concerns the duty to give reasons in sentencing:

- (1) Any court making an order under subsection (2) or (4) of section 269 must state in open court, in ordinary language, its reasons for deciding on the order made.
- (2) In stating its reasons the court must, in particular
 - (a) state which of the starting points in Schedule 21 it has chosen and its reasons for doing so, and
 - (b) state its reasons for any departure from that starting point.

Schedule 21 comprises the determination of minimum term in relation to the mandatory life sentence:

Starting Points:

- 4 (1) If –
- (a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and
 - (b) the offender was aged 21 or over when he committed the offence, the appropriate starting point is a whole life order.
- (2) Cases that would normally fall within sub-paragraph (1)(a) include
- (a) the murder of two or more persons, where each murder involves any of the following—
 - (i) a substantial degree of premeditation or planning
 - (ii) the abduction of the victim, or
 - (iii) sexual or sadistic conduct,
 - (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
 - (c) a murder done for the purpose of advancing a political, religious, racial,⁹⁰⁶ or ideological cause, or
 - (d) a murder by an offender previously convicted of murder.
- 5 (1) If –
- (a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and
 - (b) the offender was aged 18 or over when he committed the offence, the appropriate starting point, in determining the minimum term is 30 years.
- (2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph (1)(a) include
- (a) the murder of a police officer or prison officer in the course of his duty,
 - (b) a murder involving the use of a firearm or explosive,
 - (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),
 - (d) a murder intended to obstruct or interfere with the course of justice,
 - (e) a murder involving sexual or sadistic conduct,
 - (f) the murder of two or more persons,
 - (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or
 - (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

⁹⁰⁶ The word 'racial' inserted (16.2.2009) by Counter-Terrorism Act 2008

All other murders have a 15-year starting point ⁹⁰⁷ (changed by statutory instrument in 2010 to 25 years for murder involving the use of a knife ⁹⁰⁸). Those offenders aged 17 or under are subject only to a twelve year starting point ⁹⁰⁹ and those offenders aged 18 -20 are subject to the 15 or 30 year starting point, but not the whole life tariff.

Once the trial judges have determined the starting point they must consider aggravating or mitigating factors set out in the Act in order to decide the appropriate minimum term. This represents the number of years that must be served before the Parole Board can grant release.

- 8 Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.
- 9 Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.
- 10 Aggravating factors (additional to those mentioned in paragraph 4(2)) that may be relevant to the offence of murder include—
 - (a) a significant degree of planning or premeditation;
 - (b) the victim being particularly vulnerable because of age or disability;
 - (c) mental or physical suffering inflicted on the victim before death;
 - (d) the abuse of a position of trust;
 - (e) the use of duress or threats against another person to facilitate the commission of the offence;
 - (f) the fact that the victim was providing a public service or performing a public duty;
 - (g) concealment, destruction or dismemberment of the body.
- 11 Mitigating factors that may be relevant to the offence of murder include—
 - (a) an intention to cause bodily harm rather than kill;
 - (b) a lack of premeditation;
 - (c) the fact that the offender suffered from any mental disorder or mental disability which would lower his degree of culpability (although not falling within section 2(1) of the Homicide Act 1957);
 - (d) the fact that the offender was provoked – for example by prolonged stress – in a way not amounting to a defence of provocation;
 - (e) acting to any extent in self-defence;
 - (f) the belief that the murder was an act of mercy and
 - (g) the age of the offender.

The list of aggravating and mitigating factors in the statute is not exhaustive.

Schedule 22, is concerned with transitional arrangements. The Lord Chief Justice delivering the deliberation in *Sullivan* in the Court of Appeal rehearsed the content of the Schedule and gave guidelines on how it should be applied.

⁹⁰⁷ Schedule 21 6

⁹⁰⁸ si2010/197

⁹⁰⁹ Schedule 21 7

APPENDIX B

European Convention on Human Rights: Relevant Articles

ARTICLE 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 5 Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7 No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

APPENDIX C

Sentencing Purposes

(1)

The Halliday Report July 2001

- 1.3 At its roots, sentencing contributes to good order in society. It does so by visibly upholding society's norms and standards; dealing appropriately with those who breach them; and enabling the public to have confidence in its outcomes. The public, as a result, can legitimately be expected to uphold and observe the law, and not to take it into their own hands. To achieve this, there must be confidence in the justice of the outcomes, as well as in their effectiveness. Achieving a satisfactory level of public confidence is therefore an important goal of sentencing, and the framework for sentencing needs to support that goal.
- 1.4 The review has found widespread agreement that sentencing serves three other more specific purposes, those of:
- punishment
 - crime reduction and
 - reparation.
- 1.5 Opinions differ as to whether punishment is a goal in its own right or is, rather, a means of achieving the other two goals. Crime reduction includes:
- deterrence (specific deterrence of those actually sentenced, and general deterrence of others put off from offending for fear of the sentencing consequences);
 - incapacitation (being excluded from society through imprisonment for a period during which offending in the community is therefore not possible);
 - reform and rehabilitation (measures to change the way offenders think and behave, and to enable them to develop in ways that reduce risks of re-offending).

Punishment - meaning the loss of liberty, property or other rights and freedoms – is necessary in order to achieve any of the three aspects of crime reduction, as well as reparation. Perhaps above all, the goal is to achieve punishments that work as well as they can, in terms of crime reduction and the satisfaction of victims and communities. Equally important is the goal of achieving punishments that are just, and are seen to be just.

(2)

White Paper Justice For All July 2002

Purposes and principles of sentencing

5.8 For the first time, we will set out in legislation the purposes of sentencing. Sentences should:

- first and foremost protect the public. This is paramount;
- act as a punishment and ensure the punishment fits the crime;
- reduce crime. Sentencing must be an effective tool which leads to fewer crimes;
- deter (this includes both the general effect on the population at large and the specific effect on the offender);
- incapacitate, where offenders are physically prevented from committing crimes by removing them partly or entirely from society;
- reform and rehabilitate, so that the offender can learn new skills and attitudes which make him or her less likely to re-offend; and
- promote reparation. We must actively encourage offenders to make amends for the crimes they have committed.

5.9 Sentencers will be required to consider these purposes when sentencing and how the sentence they impose will provide the right balance between the purposes set out above, given the circumstance of the offence and the offender. Legislation will make it clear that custody should be used only when no other sentence would be adequate to protect the public or in relation to the seriousness or persistence of the offence or offences.

5.10 The severity of the sentence should be governed by the following principles:

- it should reflect the seriousness of the offence;
- the seriousness of the offence should reflect its degree of harmfulness or risked harmfulness, and the offender's culpability in committing the offence; and
- persistent offending should also justify a more severe view and more intensive efforts at preventing reoffending. Increased punishment will be the outcome for those offenders who have consistently failed to respond to previous sentences. We will ensure that such an outcome is explicit in the statutory framework for sentencing.

(3)

Criminal Justice Act November 2003

Section 142

Purposes of sentencing

(1)

Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

(2)

Subsection (1) does not apply—

- (a) in relation to an offender who is aged under 18 at the time of conviction,
- (b) to an offence the sentence for which is fixed by law,

Section 143

Determining the seriousness of an offence

(1)

In considering the seriousness of an offence, the court must consider the offender's culpability in committing the offence and the harm, or risk of harm, which the offence caused, or was intended to cause.

(2) (6)

The court must treat each previous conviction as an aggravating factor.

APPENDIX D

Practice Directions

The Lord Chief Justice referred to four documents, variously called Practice Directions and Practice Statements.

- A letter of 10 February 1997 sent by Lord Chief Justice Bingham to trial judges, where he stated his current practice was to take 14 years as the period actually to be served for an ‘average’ murder. He noted that this was longer than the 12 years that Lord Lane took as his norm a decade earlier. He then listed mitigating and aggravating factors. He continued:

while a recommendation of a term longer than say 30 years will be very rare indeed, I do not think one should set any upper limit. Some crimes will certainly call for terms very well in excess of the norm.⁹¹⁰

- Lord Chief Justice Woolf’s Practice Statement of 27 July 2000, while concerned principally with juvenile offenders, reiterated Lord Bingham’s view of 14 years for the ‘average’ murder committed by an adult.
- Advice of the Sentencing Advisory Panel of 15 March 2002 implemented in the Practice Statement (Crime, Life Sentences). This set three starting points, the highest of which was 15/16 years. It continued:

a substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which offers little or no hope of the offender’s eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set.⁹¹¹

⁹¹⁰ quoted in *Sullivan* para. 28

⁹¹¹ quoted in *Sullivan* para 32

- Practice Direction of 18 May 2004 included the statement:

The only area where the Secretary of State tended to differ from the guidance in Lord Bingham's letter and the Practice Statement of 27 July 2000 was in relation to the gravest murders. In cases involving multiple or serial murders, where there are aggravating circumstances and no compelling mitigating factors, the Secretary of State has set minimum terms considerably higher than judicial recommendations. In such cases, the minimum terms have generally fallen between 30 years and whole life.⁹¹²

This account suggests that the term to be served for murder had increased - from the 12 year norm of Lord Lane, through the 14 year figure of Lord Bingham to the 15 year lowest starting point of the 2003 Act. What is also striking is the relative lack of advice in the Practice Directions to sentencing in respect of the most heinous murders (and what counts as the most heinous murders). Lord Bingham wrote of the 30 year tariff as being 'very rare indeed' and said that he did not think there should be an upper limit (but no reference to a whole life tariff); the Sentencing Advisory Panel wrote that in especially grave cases the judge can state that no minimum time should be set. In contrast, of course, the 2003 Act spelt out in detail guidance regarding the 30 year minimum term and the whole life term.

⁹¹² *ibid* para 38

APPENDIX E

Reduction in sentence for exceptional progress in prison:

***Caines* [2006] EWCA Crim 2915**

51. Finally we must consider the ambit of exceptional progress in prison. The policy adopted by the Secretary of State was described in *Cole*.

- Para 5..... The Secretary of State remains open to the possibility that he would review an existing tariff where wholly exceptional circumstances are shown. Such exceptional circumstances might include, for example, a prisoner whose tariff has not long to run who displays exceptional bravery in preventing the death or serious injury of a member of staff or fellow prisoner, or in preventing the spread of fire which would have otherwise caused extensive damage or loss of life....
- Para10... The Secretary of State has never issued a definition of what constitutes progress in prison. Cases are considered on an individual basis and exceptional progress has to stand out clearly from the good progress in prison that is expected in prison of all mandatory life sentence prisoners. In broad terms the Secretary of State would look for an exemplary work and disciplinary record in prison, genuine remorse, and successful engagement in work (including offence - related courses) that has resulted in substantial reduction in areas of risk. All these have to be sustained over a lengthy period and in at least two prisons. To reach the threshold of exceptional progress there would also need to be some extra element to show that the lifer had done good works for the benefit of others. Examples would be acting as a Listener, helping disabled people to use prison facilities, raising money for charity, and helping to deter young people from crime. Again there would need to be evidence of sustained involvement in at least two prisons over a lengthy period.

52. From this statement, it is possible to discern some clear features. Good behaviour is not enough to constitute exceptional progress. We agree that the standard should be very high: the progress must be exceptional, outstanding, and bearing in mind that it provides the basis for a reduction in a period fixed for the purposes of punishment and deterrence, so it should be. Even where the necessary high standard is reached, the impact on the total tariff period is likely to be very modest. The longest reduction so far has not exceeded two years, and in the significant majority of cases where exceptional progress has been established, the reduction has been for one year. It also appears, and logically it is plain, that such progress falls to be considered when the minimum period is coming towards its end. Finally, it is a prerequisite to any reduction that the risk assessment should be favourable.

APPENDIX F

Cases referred to by the ECtHR in *Vinter, Bamber and Moore*

There are two cases not reported in England:

2008 R v Wilson (para 43)

An application by the Attorney General. Despite this citing it is not clear how this clarifies Schedules 21 and 22.

2005 R v Leigers (para 44)

The Court of Appeal held that Schedule 22-10 meant that the punishment was compatible with Articles 5 and 7 of ECHR.

Two cases came before the Privy Council in London. Both, *Reyes*⁹¹³ and *de Boucherville*⁹¹⁴ (paras 68 and 69), addressed the issue of disproportionality. In the latter case mandatory life imprisonment did not allow for the facts to be taken into account, and the sentence was manifestly disproportionate and arbitrary. In the former the mandatory death penalty was similarly disproportionate.

The final case referred to was *Lau Cheong v Hong Kong Special Administrative Region*⁹¹⁵ (para 72) where the HK Court of Final Appeal rejected a challenge to the mandatory life sentence for murder. It found that the possibility of regular review by an independent board meant that the sentence was neither arbitrary nor grossly disproportionate.

⁹¹³ [2002] UKPC 11

⁹¹⁴ [2008] UKPC 37

⁹¹⁵ [2002] 2 HKLRD 612; reported in doj.gov.hk/eng/public/pub20030002_i4.htm

APPENDIX G

ECtHR rejection of alleged breaches of Articles 5.4, 6 and 7, in *Vinter, Bamber and Moore*

The application central to this thesis was that Article 3 had been breached by the whole life order. In addition, there were complaints of breaches of other Articles.

Articles 5.4 and 6

The Applicants complained that the imposition of a whole life order without the possibility of regular review violated Article 5.4 or alternatively Article 6. The Chamber took the view that the complaint fell to be considered under Article 5.4. The Chamber further considered that the issue had been dealt with in *Kafkaris (2)*.⁹¹⁶ That application in respect of Article 5.4 was declared inadmissible. The Court had declared that when someone is deprived of his liberty by a judicial decision, the 'supervision required by Article 5.4 is incorporated by the decision of the Court'.⁹¹⁷ No further review was required. This applied to mandatory life sentences which were purely punishment in nature because of the gravity of the offence.

This declaration of inadmissibility was due to *Iorgov (2)*.⁹¹⁸ Iorgov had been convicted in Bulgarian courts of the murder of three children and the rape of one of them and he was sentenced to death. Before this could take place, a moratorium on capital punishment took effect and his sentence was commuted to life imprisonment without parole. He challenged the lawfulness of his detention under Article 5.4. The domestic courts had found the seriousness of the crimes warranted the harshest penalty. ECtHR accepted that the determination of the need for the sentence imposed on the applicant did not depend on any circumstance that was likely to change in time (unlike in the *Stafford* judgment).⁹¹⁹ In conclusion, ECtHR found that the review of the lawfulness of the applicant's detention was incorporated in the court's conviction. His application was therefore declared inadmissible.

Similarly, therefore, the application of Vinter, Bamber and Moore was declared inadmissible unanimously.

⁹¹⁶ [2011] ECHR 1089

⁹¹⁷ *ibid* para 58

⁹¹⁸ [2010] ECHR 1269

⁹¹⁹ [2012] ECHR 61 Para 75

Article 7

For Bamber it was argued that as the trial judge had recommended a minimum term of 25 years, the High Court review should not have resulted in a sentence greater than this, in order to be compatible with Article 7. For Moore it was argued that in 1996 it was very exceptional indeed for a whole life order to be imposed: the whole life order for his type of crime had not been introduced until Schedule 21 in 2003.

The Chamber accepted that setting a minimum term of imprisonment was a sentencing exercise and attracted the protection of Article 7. However, it was unable to accept that the process by which these whole life orders were imposed had infringed Article 7. Schedule 22 expressly protects against the imposition of a longer minimum term than was originally imposed. Accordingly the applicants' complaints were found to be manifestly ill founded. This was again a unanimous decision.

APPENDIX H

The Prerogative of Mercy

***Shields* [2008] EWHC 302 (Admin)**

Shields was a football supporter who travelled to Bulgaria and who was arrested, tried and sentenced to imprisonment for a serious assault. After failing to get his conviction quashed in Bulgaria's appeal courts he was returned to England to serve his sentence. The Secretary of State maintained that he had no powers to quash the conviction because of the terms of the Convention On The Transfer Of Sentenced Persons 1983. Much of the case before the High Court was concerned with the nature of the Secretary of State's powers. What is of relevance to this study are the comments made by the Court on pardons: a pardon is a common law extra-judicial power exercised by the Crown under the Royal Prerogative of Mercy, and is exercised by the Secretary of State for Justice as the minister responsible for those in detention. In 'modern times' it has been exercised in three situations: special remission where the prison authorities miscalculate a release date; conditional pardon e.g. *Bentley* where the penalty was recognised not to be commensurate with the offending; and a free pardon which may relate to a miscarriage of justice. This last possibility has rarely been exercised since the Criminal Appeal Act 1907 and more particularly with the establishment of CCRC in 1995. The court concluded however:

The prerogative to grant a free pardon undoubtedly remains, as was made plain in *Bentley* - and see also section 16 of the 1995 Act, which provides for the Commission to give assistance to the Secretary of State in connection with the Prerogative of Mercy.⁹²⁰

***Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice 2009)**

In the section dealing with the Royal Prerogative of Mercy, the Report notes that the power is exercised by the Sovereign on ministerial advice. The power of pardon falls into two parts.

In the first, free and conditional pardons were used to address miscarriages of justice. The High Court's ruling in *Shields* emphasised 'the breadth and flexibility of the Royal Prerogative of Mercy, together with the Secretary of State's right to formulate appropriate policies and

⁹²⁰ para 19

criteria for its application'.⁹²¹ The Report asserted it would be inappropriate to grant a free pardon where a statutory remedy was available. The Criminal Appeals Act 1995 Section 16 (1) provides that CCRC must consider any matter referred to it by the Secretary of State in his consideration of whether to recommend the exercise of the Royal Prerogative of Mercy; CCRC must provide a statement of its conclusions and the Secretary of State must treat CCRC's statement as conclusive. At the date of the Report this provision had never been used.

The second part of the power of pardon is remission pardons that fall into four groups:

- Compassionate grounds: this has been constrained by the statutory provision in the Crime Sentences Act 1997 Section 30.
- Information helping to bring others to justice: the scope of this has been narrowed statutorily by the Serious Organised Crime and Police Act 2005.
- The prevention of escape, injury or death by a serving prisoner: this power has not been affected by statute.
- Mistakes surrounding a prisoner's release date: there is no remedy except the use of the Royal Prerogative.

The section of the Report dealing with the Prerogative of Mercy concludes:

Use of the prerogative powers to grant free, conditional and remission pardons has been largely, but not entirely, superseded by statutory provisions. Residual prerogative powers may still be relied on, however, in exceptional cases.⁹²²

⁹²¹ para 61
⁹²² para 65

APPENDIX I

Compassionate Release

Crime (Sentences) Act 1997

s30 Power to release life prisoners on compassionate grounds.

(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist that justify the prisoner's release on compassionate grounds.

(2) Before releasing a life prisoner under subsection (1) above, the Secretary of State shall consult the Parole Board, unless the circumstances are such as to render such consultation impracticable.

Prison Service Order 4700

Chapter 12. Indeterminate sentence prisoners compassionate release on medical grounds

12.1 General

12.1.1 Under section 30 of the Crime (Sentences) Act 1997, the Secretary of State may at any time release a prisoner on licence if he or she is satisfied that exceptional circumstances exist which justify early release on compassionate grounds. Before exercising this power, the Secretary of State is required to consult the Parole Board, unless the circumstances make such consultation impracticable. Each case is considered on its own individual merits. Compassionate release must be approved personally by a Minister; it is not a decision which is delegated to officials.

12.2 Criteria for release on compassionate grounds

12.2.1 The criteria for compassionate release on medical grounds for all indeterminate sentence prisoners (ISP) are as follows: -

The prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]), or the ISP is

bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke;

and

The risk of re-offending (particularly of a sexual or violent nature) is minimal; further imprisonment would reduce the prisoner's life expectancy;

and

there are adequate arrangements for the prisoner's care and treatment outside prison;

and

early release will bring some significant benefit to the prisoner or his/her family.

12.2.2 However, the resource and cost implications of maintaining staff on bed-watch duties at an outside hospital/hospice are not grounds to justify release on compassionate grounds if the criteria set out above are not met. Other examples of cases not meeting the criteria are where conditions are self-induced, for example: following a hunger strike or where a prisoner refuses treatment.

APPENDIX J

The Legal Aid, Sentencing and Punishment of Offenders Bill 2012: Amendment 178A

(1) In the case of a life prisoner who has been made subject to a whole life order, and has served 30 years of his sentence, it shall be the duty of the Secretary of State, with the consent of the Lord Chief Justice and the trial judge if available, to refer the case to the Parole Board.

(2) If the Parole Board is satisfied-

(a) that it is no longer necessary for the protection of the public that the prisoner should be confined, and

(b) that in all the circumstances the release of the prisoner on licence would be in the interests of justice,

the Parole Board may direct his release under this section.

(3) Where the Parole Board has directed a prisoner's release under this section, it shall be the duty of the Secretary of State to release him on licence.