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Scoppola v Italy (No. 3): Getting Prisoner Voting Right?
By Natasha Holcroft-Emmss | 13 August 2012

In Scoppola v Italy (No. 3) (app. no. 126/05) the Grand Chamber of the European Court of Human Rights once again engaged with the vexed issue of prisoners’ voting rights. Italian legislation permanently disenfranchised prisoners convicted of specific offences against the State and those serving, or sentenced to, more than five years’ imprisonment. The applicant was disenfranchised as a result of his sentence to life imprisonment and ban from public office. It was argued that this violated his right to vote, which the Court has read into Article 3 Protocol 1 of the European Convention on Human Rights (ECHR). By a majority, the Grand Chamber held that the Italian law did not violate Article 3 Protocol 1 ECHR.

The majority held at [106] that the Italian legal provisions denying the right to vote to those serving a sentence of more than five years’ imprisonment and ban from public office was more faithful to Hirst (no. 2)’s logic. The decision to disenfranchise prisoners ought, however, to be taken by a sentencing judge who will be in the best position to establish and maintain the foundations of an effective and meaningful democracy governed by the rule of law.

However, the majority departed from certain prior jurisprudence, consequently diminishing the protection afforded to prisoners’ voting rights. In Frodl v Austria (2011) [app. no. 20201/04] the Chamber had held at [34] that an ‘essential element in’ establishing the proportionality of a deprivation of a prisoner’s right to vote is that the decision ought to be taken by a judge and accompanied by specific reasoning to explain why disenfranchisement is necessary. The majority in Scoppola, however, departed from this reasoning [in Frodl] and took a broad view of the principles set out in Hirst, which the Grand Chamber does not fully share.

The fact that the applicant was disenfranchised by legislation, and not by the decision of a judge, did not of itself make the measure disproportionate.

The majority in Scoppola justified its deference at [102] as respect for differences in ‘historical development, cultural diversity and political thought within Europe.’ Yet, as Judge Björnsson argued in dissent, where the right of individual prisoners to engage in participatory democracy is concerned, the Court, which, however, they find ways to comply with regularly.

If ‘suffrage is the pivotal right’, then it is only fitting that the issue of prisoners’ voting rights has become the turning point of the UK government’s approach to the European Convention on Human Rights (ECHR).

Prisoners’ Voting Rights: The Gift That Keeps on Giving
By Eirik Bjorge | 9 November 2012

If suffrage is the pivotal right, then it is only fitting that the issue of prisoners’ voting rights has become the turning point of the UK government’s approach to the European Convention on Human Rights (ECHR).

Scoppola v Italy (No. 3): A Step Backwards
By Reuvan (Ruv) Ziegler | 17 August 2012

In her recent post, Natasha Holcroft-Emmss critiques the European Court of Human Rights Grand Chamber (GC) judgment in Scoppola (no. 3) [app. no. 126/05]; she rightly notes that the GC has taken a step backwards in terms of protecting prisoners’ voting rights. Unbound by constraints of Strasbourg jurisprudence, I have made elsewhere ‘the case for letting prisoners vote’, arguing that its use as a punishment should cease. In this post, I would like to suggest that, while the GC was professing to follow its 2005 decision in Hirst (no. 2) [app. no. 45260/01], it was indeed the First Section Chamber judgment in Frodl (app. no. 20201/04) that was more faithful to Hirst (no. 2)’s logic.

In the GC, ‘the right to vote’ represents a proportionality requirement into Article 3 of the (First) Additional Protocol to the European Convention on Human Rights (the right to free elections).’ It then held [82] the UK legislation disenfranchising all prisoners for the duration of their prison sentence to be ‘a blunt instrument’ that ‘applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.’

In Frodl, the Chamber held that Austrian legislation disenfranchising all prisoners serving sentences of over a year violates the right to vote. It interpreted the Hirst ratio to mean that ‘in the case of convicted prisoners’ and that ‘specific reasoning… be given in an individual decision explaining why in the circumstances of each case disenfranchisement was necessary.’ Concomitantly, and indeed logically, the Chamber maintained that individualised assessment can only be made by a judge [33].

In contrast, in Scoppola (no. 3) the GC upheld Italian legislation permanently disenfranchising all persons sentenced to more than five years’ incarceration, and disenfranchising all persons sentenced to three-to-five years for the duration of their prison sentence. The GC maintained [106] that the Italian legislation is not disproportionate because it ‘is not applied… to all individuals sentenced to a term of imprisonment but only to those sentenced to a prison term of three years or more.’ However, Hirst (no. 2)’s ratio logically entails judicial involvement and rules out any form of blanket disenfranchisement; how else can ‘individual circumstances’ and ‘the nature and gravity of the offence properly be taken into account?’

It is hard to reconcile Scoppola (no. 3) with the GC’s rather consistent jurisprudence that ‘prisoners in general continue to enjoy all fundamental rights and freedoms guaranteed under the Convention save the right to liberty’ (applicable, a fortiori, to ex-prisoners affected by the Italian legislation), and that ‘[any] departure from the principle of universal suffrage risks undermining the very purpose of the legislation thus elected and the laws it promulgates.’

One is thus left wondering whether the GC was affected by developments elsewhere, including the strong resistance by the UK government to implementing its Hirst (no. 2) judgment as reflected in a crossbench motion passed by the House of Lords. The Chamber judgment in Greens and M.T. (app. no. 60041/08) Scoppola (no. 3) seems to suggest that setting a threshold of 3 years’ imprisonment (or perhaps even less) will suffice.

Reuvan (Ruv) Ziegler is a Lecturer in Law at the University of Reading Law School. He is a frequent contributor to the OxHRH Blog.

This imbrigo is played out against the backdrop of a deferential Court which seems to have gone to great lengths to accommodate the British position.

In Scoppola (app. no. 126/05), the Grand Chamber deferred so far to the British that it has not to the Grand Chamber’s decision in Hamer v UK (2012) to state that the ruling ‘more or less gutted’ Hirst. Scoppola makes it clear that though a blanket ban on prisoners’ voting is disproportionate, it is not necessary to have individual, not judicial case-by-case determination. As Sir Nicholas Bratza, the outgoing President of the Court, explains in a recent article, ‘the powers have become a sort of hate figure, not just in the popular press, but also in the soundbites of politicians, some of them senior, and, even more disturbingly, judges—again some of them senior.

The latest contribution of Michael Pinto-Duschinsky, former member of the UK Commission on a Bill of Rights, has been to suggest taking away the right in the UK to individual petition of the Court giving national parliaments the ability to override Strasbourg decisions. This suggestion, together with that of the Prime Minister, may seem like little more than what psychoanalysts call passages à l’acte — acts of precipitate violence which betray admissions of impotence and loss of direction. In fact, the government may relish this opportunity to shore up its base at the cost of European institutions — and of those whose rights are being breached.

What will happen if the UK fails to make amends by November? Clearly, all member States of the Council of Europe must comply with the Convention; article 46 of the ECHR requires the States ‘to abide by the final judgment of the Court in any case to which they are parties.’ Joshua Rosenberg has argued that: ‘other States will be taking notes and might follow suit. This could give a novel, and wholly unwanted, twist to Lord Bingham’s ‘Millennium Expostulations to legislators’ in which England ‘never forget her precedence of teaching nations how to live’.

First, non-compliance would spell ‘shame’ — a word often cited in the Houses of Parliament. It would undoubtedly meet with criticism from Germany, France, Italy and many others, at the receiving end of difficult adverse judgments from the Court, which, however, find ways to comply with regularly. Although Germany, for example, still smart from adverse judgments on preventive detention, its response has been to overhaul its system to comply with the ECHR. Secondly, non-compliance has ‘what we might call “Kantian implications”;’ other States will be taking notes and might follow suit. This could give a novel, and wholly unwanted, twist to Lord Bingham’s ‘Millennium Expostulations to legislators’ in which England ‘never forget her precedence of teaching nations how to live’.

Article 3, Protocol 1 of the ECHR provides that ‘the High Contracting Parties shall hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the electors in the choice of their legislators.’ Will the.cumbersome upholding by the Court of the proposition, logical and wholly unobjectionable to many, that this entails a prima facie right for everyone to vote be the end of the Convention as far as the UK is concerned? Surely not. But the pivotal issue of prisoners’ voting will just as likely continue to be, for the current government, the gift that keeps on giving.

Eirik Bjorge is a DPhil Candidate at Corpus Christi College, University of Oxford.

The last time a Strasbourg judgment provoked such a strong response by the UK government was probably the 1996 Grand Chamber ruling in the Murder on the Rock case. Downing Street then responded by declaring that the ruling defied common sense and that the best response might be to leave the Convention altogether. Wiser counsels prevailed; the UK did not quit the Convention. The same will not be the case any more...
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Criminal Justice and Human Rights

Prisoner Voting and the Rule of Law: The Irony of Non-Compliance
By John Hirst | 20 March 2013

Prisoners’ voting rights remain a vexed issue in the United Kingdom. Following the European Court of Human Rights (ECHR) decision in Hirst v UK (No 2)(app. no. 74052/01), the United Kingdom was given until 22 November 2012 to repeal its blanket ban on prisoner voting. The UK failed to comply, resulting in a reprisand from the ECHR, but no sanctions. In this post, John Hirst, the applicant in Hirst (No 2), comments on the failure to comply with the ECHR’s order.

Under the IPP scheme, introduced by s225 of the Criminal Justice Act 2003, those convicted of a second serious violent or sexual offence were mandatorily sentenced to serve imprisonment for a (usually short) tariff period and thence to be detained indefinitely for public protection. A Parole Board would assess their suitability for release, based partly on evidence of their compliance with available rehabilitative courses. The applicants complained that some of the requisite courses were not made available to them, even after the expiration of their tariff periods. Thus they had no real prospect of parole and remained indefinitely detained.

The House of Lords noted that the operation of the IPP scheme had caused severe problems for the UK prison system. The statutory assumption of the risk of commission of a further offence and mandatory imposition of an IPP sentence led to severe overcrowding. Their Lordships vigorously criticized the ‘deplorable’ systemic failure of the Secretary of State to put in place the rehabilitative resources necessary to enable IPP prisoners to progress their sentences. However, they stopped short of holding that IPP prisoners were unlawfully detained. It was held that the purpose of IPP sentences was public protection, not rehabilitation. The Parole Board could still perform its review function. Therefore, in their view, the applicants’ indeterminate imprisonment could not be considered arbitrary.

The European Court, by contrast, unanimously held that the applicants had been subjected to an arbitrary deprivation of liberty. There was a sufficient causal connection between the original sentence and the continuing deprivation of liberty; the deprivation was in compliance with domestic law; and the domestic law had subsequently been changed by legislation to address some of the problems highlighted by the House of Lords (in particular, imposition of an IPP sentence was no longer mandatory). However, the European Court was not content simply to conclude that the purpose of such sentences was exclusively for public protection. The Court recognized that it was a premise of the IPP sentencing scheme that rehabilitative resources would be made available. The government’s failure to do so, with the consequence that the applicants would remain indefinitely detained without prospect of progressing their sentences, meant that the deprivation of liberty was arbitrary.

Reiterating the fundamental importance of the liberty interest involved, especially regarding the indeterminacy of IPP sentences, it is argued that the European Court’s analysis with greater focus on the promotion of the task of available resources with which to progress towards release provides a better foundation for protecting prisoners’ rights. Although provision of rehabilitative courses may be inconvenient for domestic authorities, it is submitted that they are necessary to ensure that those subject to indefinite detention are provided with the means through which to regain their liberty. The UK’s deficiency in this regard signifies a lack of concern for such people. It is hoped that for the 6000+ still indefinitely detained, the finding of unlawfulness of their detention will generate a commitment to remedying the arbitrary deprivation of their liberty. Natasha Holcroft-Emmess is currently studying for the LPC. She recently completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

Political Betrayal
By Clive Stafford Smith | 27 November 2012

I am writing this article in the airport waiting room in Guantánamo Bay, after a week visiting prisoners on this forsaken military base, and prior to returning to the UK for an evening at Wadham College. Back in Oxford, we will discuss the tragic execution of Edward Earl Johnson, a kid I represented all those years ago, gassed to death by Mississippi chamber in 1987. Edward’s final two weeks were captured on a BBC documentary, Fourteen Days in May, and every so often I revisited his execution to remind me of the futility of the act, and the duty I have to ensure that his death was not entirely in vain.

There are links across the years and the waves between Parchman Penitentiary in 1967 and Guantánamo Bay in 2013: one is the danger of untrammelled power, where the United States brings its guns (or, in Edward’s case, its Zodion 8) to bear on an essentially defenceless individual. Another is the politics of fear, where politicians inspire citizens to hate either the young African-American man who is presumed to be a murderer, or the Muslim man who is assumed to be a terrorist.

Edward was tarred as a killer, given a sub-mediocre defence lawyer, convicted by biased (primarily white) jurors, held for eight years in a prison far away from anyone who cared about him, and denied a meaningful appeal, all so he could be and sacrificed on the judicial altar to assuage the gods of violence. Shaker Aamer, who I saw two days ago, has been held without charges for eleven years in a prison far away from anything, detained as proof that “something is being done” in the American ‘War on Terror.’

The ultimate senselessness of these two prisons is the same: not only do they fail to deliver the promised solution, but they ultimately contribute to the original problem. Executing Edwards, who was indubitably innocent, left the true killers to perpetuate their mayhem; the enormous effort Mississippi focused on killing him prevented many other, worthwhile projects from taking shape. Detaining Shaker is an even greater betrayal: like Edward, he cannot be a terrorist because he never did anything in the first place. But now our society accepts the idea that he should face indefinite detention to prevent him from committing a hypothetical future crime. The hypocrisy with which we have jetisoned our principles has provoked many others to turn to extremism in Shaker’s stead.

The ultimate sin of the politicians who birthed the twin projects of death row and Guantánamo is their failure to understand their own duty. It is not the job of the politician to predict and prevent a single, identified future crime from taking place – a real life version of Minority Report. Rather, it is the role of the politician to reduce the overall level of society’s violence. Thus, if a populist project like the ‘War on Terror’ will actually raise the total of violence, by provoking those who were hitherto unprovoked, then it is a folly.

Who can doubt that the policies of Bush, Blair and now Obama have failed this basic test? Who can doubt that the reservoir of goodwill that existed on September 12, 2001, had disappeared by 2003, submerged in Guantánamo Bay, Abu Ghraib, renditions, torture and the Iraq War? Who can doubt that the drone war in Waziristan is the latest example of this madness: hellfire missiles may have killed the occasional militant, but they have inspired 93 percent of all Pakistanis to view America as the ‘enemy’.

It is pointless merely to condemn; the question is what you are going to do about it. That, I hope, will be the subject of our discussion at Wadham College.

Clive Stafford Smith is the Director of Reprieve.

James, Wells and Lee v UK: Indefinite Detention and Arbitrary Deprivations of Liberty
By Natasha Holcroft-Emmess | 27 November 2012

More than 6000 UK prisoners are currently subject to indefinite detention without means of progressing towards parole. In James, Wells and Lee v UK (app. no. 23159/06) the European Court of Human Rights held that prisoners serving indeterminate sentences of imprisonment for public protection (IPP) were arbitrarily deprived of their liberty in violation of Article 5(1) ECHR.

3500 prisoners detained under the imprisonment for public protection scheme have served their time but do not have a release date.
Death Penalty in India: What the Future Holds
By Vrinda Bhandari | 20 February 2013

Constitutionally speaking, the death penalty in India is limited to the ‘rarest of the rare’ cases and should be implemented in a time frame which is not “unjust, unfair and unreasonable”. Over the last two decades, hangings had become somewhat of a rarity. Since 2004, an informal moratorium seemed to have come into existence. In part, this was influenced by the Supreme Court’s admissions that it had failed to evolve a uniform and clear cut sentencing policy in respect of capital punishment and that the death penalty was subjective, arbitrary, influenced by the personal predilection of the judges and in danger of becoming a media spectacle. The recent execution of the two “terrorists”, Ajmal Kasab and Md. Afzal Guru, in complete secrecy, demonstrates that this no longer holds true.

Das’s story is another one of extreme.

He was sentenced to death in 1999, with his mercy petition being rejected only in 2011. No date could be fixed for the execution, despite being rejected only in 2011. No date could be fixed for the execution. Two of the same three judges, with the same result (the majority sentencing him to death and the minority acquitting him of any involvement with the crime). To now execute Bhullar would fly in the face of the Supreme Court’s dictum which limits the application of the death penalty to the “rarest of rare cases when the alternative option is unquestionably foreclosed.”

Further decisions have expounded on this idea as requiring both a vertical (across benches) and horizontal (within the same bench) consensus, so as minimize the arbitrariness inherent in the sentencing process. Clearly, this had no bearing in Bhullar’s case.

Although the Central Government has not spoken in one voice about the reasons underpinning the use of these covert tactics, news reports have given rise to a few dominant theories.

To begin with, secret executions are intended to keep a lid on until the execution takes place, on expected repercussions and protests, and avoid the sensational media coverage that could be associated with executions of high profile prisoners. But most significantly, they foreclose the opportunity of moving a court seeking a stay order on the execution, as was done in Barela’s case.

Nussbaum argues that concerns of fair implementation render the death penalty unacceptable in India. The disquieting series of secret executions highlights one such concern. Although the Supreme Court bench granted a stay on Barela’s execution, it rhetorically asked about whether it was carving out a separate ‘post-mercy [petition] rejection jurisdiction’. This question lies at the crux of a complex problem: is it possible to maintain a criminal justice system that avoids delays and at the same time, accords procedural fairness to defendants facing the gallows? The government’s attempt to carry out secret executions is part of an ongoing cat-and-mouse game between the government and the prisoner, which trivialises the gravity of imposing a sentence of death.

The path of criminal justice for those charged with capital offences is arduous. Trials take years to reach their conclusion and are followed by appeals through to the Supreme Court. A mercy petition to the President follows the Court’s confirmation of a death sentence. The President may take several years to dispose of the mercy petition, and his decision can be subjected to judicial review. Even if at this stage, the court chooses not to interfere with the President’s decision to reject the mercy petition, the prisoner may move a court after the execution date has been finalised but before the execution takes place. Throughout this process, those on death row remain in an ‘agony of suspense’ about their fate.

Secret Executions in India: Another Reason to Rethink the Death Penalty
By Chintan Chandrachud | 3 December 2013

Secret executions of death row prisoners are increasingly becoming the order of the day in India. At least three (two successful, one failed) have been attempted in the last few months. These incidents have been characterised by three kinds of secrecy. First, where the prisoner sentenced to death was not informed in advance about the circumstances surrounding his execution. Second, where the prisoner’s family was not given prior notice of the execution. Third, where the date of execution of a prisoner was kept away from the media and the public at large until after the execution took place. Each of the three cases involved one or more of these different kinds of state secrecy.

The most recent attempt involved Maganti Barela, who was convicted for beheading his five daughters. His mercy petition was rejected by the President in July 2013 and his execution was scheduled soon thereafter. In a dramatic intervention, a senior advocate secured a stay on the execution of the death sentence hours before it was to take place, on the basis that the mercy petition was not dealt with in a fair and transparent way and that Barela was not informed about the rejection of his petition.
Whole life sentences of imprisonment, without the possibility of parole, are a poor guarantee of proportionate punishment and run counter to respect for human dignity.

Firstly, the ECHR has at last granted official recognition that UK law does not in reality satisfy the requirement of de facto reducibility of sentences, established in Kaklikis v Cyprus (app. no. 21968/04). Reducibility requires that prisoners shall be given an opportunity, in law and fact, to have the justification for their continued detention reviewed after a certain amount of time has passed. The UK Court of Appeal in R v Bieber [2008] EWCA Crim 1601 at [46] suggested that a reconsideration of the possibility of pleading for parole. This state of affairs cannot be compatible with the rehabilitative aim of detention in their prison laws and practices. In James, Wells and Lee v UK (app. no. 25191/09), the ECHR established an obligation on States to show commitment to realising the rehabilitative aims of detention in their prison laws and practices. The Court in Vinter noted that there is now clear support in international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of parole Article 3 ECHR – is in principle correct.

Secondly, there has been an international shift in focus relating to the justification for incarceration. Although punishment still plays a legitimate part, there is increasing emphasis on the important rehabilitative purposes of imprisonment. In James, Wells and Lee v UK (app. no. 25191/09), the ECHR established an obligation on States to show commitment to realising the rehabilitative aims of detention in their prison laws and practices.

The Court in Vinter noted that there is now clear support in international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of parole Article 3 ECHR – is in principle correct.
The Crimes of Gambia’s Criminal Justice System

By admin | 6 May 2013

Last Autumn, the world witnessed a fleeting frenzy when The Gambia’s eccentric President Jammeh resumed executions for prisoners condemned to death. These executions were the country’s first in 27 years—were soon halted amidst international protest, but not before nine lives had been lost. Media reports deemed the popular vacation spot, revealing for a moment its more troubled reputation and harrowing human rights record. Months later, however, West Africa’s ‘Little Gem’ remains a celebrated holiday destination, with scant attention to Gambia’s ‘darker’ side, and the nine prisoners who lost their lives only six months ago.

Jammeh’s moratorium may have calmed the temporary global outcry, but his country’s criminal justice system remains deeply problematic. Whilst death row inmates may wonder when, if ever, the next round of executions may resume, human rights groups should still examine the conditions of indefinite detention at Mile Two State Central Prison where they are held, without ignoring just how easy it is to end up there.

From confirmed cases of arbitrary detention to evidence of forced confessions, capital punishment can hardly avoid being a controversial tool beyond the primary debate. However, one issue that has received little attention is the accusation that the Gambian government employs corrupt ‘mercenary judges’. Finally acknowledged by the US Department of State Human Rights reports, these foreign judges oversee ‘sensitive’ cases and are ‘particularly subject to executive pressure’. Senior members of the judiciary are imported from other Commonwealth countries and focus attention their on Chapter VII of Gambia’s criminal code. By broadly defining treatment and sedition, the Gambian legal system has managed to place anyone from missionaries to journalists behind bars under the pretence of treason, a charge that carries the death penalty.

Most commonly targeted, however, are members of security institutions. Consistently at odds with the state structures intended to keep the country safe and intact, the executive regularly clears the top ranks of Gambia’s police force, military branches, and intelligence agencies. Wave after wave of police, military, and intelligence leadership is removed as the President seeks to satisfy paranoia and consolidate power, their right to safe reproductive health services.

At the heart of legal contention on this matter is the fact that Gambia’s existing laws legalise abortion. The Termination of Pregnancy (TOP) Act No. 26 of 1972 (Chapter 304 of the Laws of Gambia) and the Penal Code (Chapter 87 of the Laws of Gambia) make it possible for Zambian women to abort. The TOP Act entitles a woman to seek a termination of pregnancy on health and socio-economic grounds, when her own life and health, or the health of other members of her family, may be put at risk by the pregnancy, or when the foetus may be expected to be damaged or diseased. The Penal Code allows termination of pregnancy in the event a female child is impregnated as a result of raped or defilement. But by stating that “…life begins at conception” Article 28 of the draft constitution pithes these acts against the ‘unborn child’s’ right to life as stipulated in the current and draft constitution’s Bill of Rights. If passed, the draft constitution could render the TOP Act and Penal Code unconstitutional. This would have huge implications for Zambian women and girls who would not be able to legally seek abortion.

The question of the morality of abortion from the perspective of ‘Christian values’ enshrined in Article 2 of the draft constitution has made it hard for Zambians to support the idea that women have the right to decide whether to keep an unwanted pregnancy. Many Zambians have found it difficult to argue for the removal of a major human right that would be seen to publicly rebuff Christian interpretations of the sanctity of life as stated in the Bible. On the other hand, women’s rights organisations are adamant that the draft constitution should be passed as it is, Zambian women’s and girls’ chances of suffering from unsafe abortions would increase and severely compromise their right to safe reproductive health services.

Yalwe Clarke is a lecturer and researcher at the University of Cape Town. Her research interests are feminism, peace and security in African contexts.

Criminal Justice and Human Rights
Chapter eleven

Rendering Abortion Unconstitutional? Article 28 of Zambia’s New Draft Constitution

By Yalwe Clarke | 10 May 2013

Given international gains in legislation that protects women’s right to abortion, it is concerning that Zambia’s current draft constitution has put this matter back into national political debate. Due to the inclusion of Article 28 (1) in the new draft constitution that states that “…life begins at conception,” a new and seemingly unexpected controversy about women’s reproductive right to abortion has hit national television and radio stations. Members of the Non-Governmental Coordinating Council (NGOCC), an umbrella body of women’s organisations, have discussed this matter in their own national consultations with women about the content of the draft constitution.

Recurring themes in previous Zambian constitution review processes included: devolution of the powers of the president; electoral procedures; affirmative action for women; and citizenship. Despite the fact that national statistics reveal that up to 50% of acute gynaecological admissions in Zambia result from abortion complications, women’s reproductive right to safe abortion has never before been a matter of constitutional concern. Contestations about abortion that arose in recent district, provincial and national constitutional hearings speak to a troubling prevalence of patriarchal attitudes towards women’s legal right to safe reproductive health services in general, and abortion in particular.

At the heart of legal contention on this matter is the fact that Zambia’s existing laws legalise abortion. The Termination of Pregnancy (TOP) Act No. 26 of 1972 (Chapter 304 of the Laws of Zambia) and the Penal Code (Chapter 87 of the Laws of Zambia) make it possible for Zambian women to abort. The TOP Act entitles a woman to seek a termination of pregnancy on health and socio-economic grounds, when her own life and health, or the health of other members of her family, may be put at risk by the pregnancy, or when the foetus may be expected to be damaged or diseased. The Penal Code allows termination of pregnancy in the event a female child is impregnated as a result of raped or defilement. But by stating that “…life begins at conception” Article 28 of the draft constitution pithes these acts against the ‘unborn child’s’ right to life as stipulated in the current and draft constitution’s Bill of Rights. If passed, the draft constitution could render the TOP Act and Penal Code unconstitutional. This would have huge implications for Zambian women and girls who would not be able to legally seek abortion.

The question of the morality of abortion from the perspective of ‘Christian values’ enshrined in Article 2 of the draft constitution has made it hard for Zambians to support the idea that women have the right to decide whether to keep an unwanted pregnancy. Many Zambians have found it difficult to argue for the removal of a major human right that would be seen to publicly rebuff Christian interpretations of the sanctity of life as stated in the Bible. On the other hand, women’s rights organisations are adamant that the draft constitution should be passed as it is, Zambian women’s and girls’ chances of suffering from unsafe abortions would increase and severely compromise their right to safe reproductive health services.

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Within this constitutional context it was found in Ex Parte: Attorney-General, In Re Corporal punishment by Organs of State that corporal punishment inflicted at government schools is contrary to the provisions of the Constitution. Mahomed AJA however explicitly reframed from expressing an opinion on disciplinary chastisement pursuant to a delegation by a parent’s guardian. It is profoundly within this context that the act of corporal punishment at private schools has become the centre of re-opened debate.

Contrary to the position in 1991, when the above-named judgement was delivered, The Education Act 16 of 2001 clearly prohibits corporal punishment–whether at state or private schools. No provision is made for parental delegation. Yet, even when only seeking recourses in the Constitution, a private school is a legal person, to whom the respect for others’ human dignity is clearly applicable. Within the context of the fundamental right to education, as delineated in Article 20, all persons have the right to establish private schools, but such schools must maintain standards which are not inferior to the standards maintained in schools funded by the state. Standards of disciplining at schools are evidently capable of falling within the ambit of this provision.

Furthermore, Article 24(3) of the Education Act classifies human dignity as a fundamental right in terms of which the Constitution permits no derogation or suspension. The right not to be subjected to cruel or inhuman punishment is hence a right which is not susceptible to waiver – not even by a parent. The extensive limitations enquiry followed by the South African Constitutional Court when it was called upon to decide a similar issue in Christian Education South Africa v Minister of Education [2000] ZACC 11 is therefore not necessitated. It is thus as Berker CJ finds: “once one has arrived at the conclusion that corporal punishment per se is impinging the dignity of the recipient…it does not on principle matter to what extent [it] is made subject to restrictions and limiting parameters…[because] the actual execution thereof can never be fully controlled”.

In the proceedings this year on disciplinary chastisement administered at private schools, the relevant teachers were in fact found guilty of assault by the Magistrates Court. This ruling is to be welcomed in the light of the clear demands made by the Namibian Constitution, in particular regarding the respect for human rights. It is unfortunate however, that the Magistrates Court was not the appropriate forum to properly canvass the central human rights facets of this debate.

The Namibian Constitution, supported by relevant educational legislation has come a long way in creating certainty on the issue of disciplinary chastisement. Yet, the question remains one embedded in the norms and values of a particular society. It is precisely such divergent sentiments on appropriate and just forms of punishment for disciplinary purposes that still lend validity to Berker’s statement 22 years down the line.

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Mendoza v Argentina: Against the life imprisonment of children
By Nicolás Espejo-Yaksic | 23 July 2013

In Mendoza et al. v. Argentina (14 May 2013, series C no 260), the Inter-American Court of Human Rights (ICHHR) has determined that life sentences against children constitute a breach of the American Convention on Human Rights (ACHHR).

In an historic decision that follows recent developments in children’s rights from Inter-American Human Rights Law, the ICHR found the Government of Argentina guilty of human rights violations for imposing sentences of “perpetual deprivation of freedom” against five people for crimes they committed during childhood. The ICHR also found the State internationally responsible because the criminal procedure codes did not allow a comprehensive review of criminal judgments by a higher court, for the lack of adequate medical care to one of the children referred to above, for having inflicted torture against two of the victims without investigating the facts properly, as well as for failing to properly investigate the death of one of those while in state custody.

Based on the principle of the best interest of the child (Art. 19 of the ACHR in relation to Article 3 of the United Nations Convention on the Rights of the Child), the ICHR held that the life imprisonment sentences, by their nature, do not comply with the purpose of social reintegration of children. On the contrary, for the ICHR, life sentences against children imply their maximum exclusion from society, operating in a purely retributive sense and cancelling all expectations of rehabilitation. As a consequence, life sentences against children are not proportionate to the purpose of criminal punishment of children (Arts. 7.5, 19 and 11.1 of ACHR).

Additionally, the ICHR held that the disproportional character of these types of sentences had provoked a high psychological impact on the victims and constituted cruel, inhuman and degrading treatment (Arts. 5.1, 5.2, 19 and 11.1 of the ACHR).

The ICHR also determined that the lack of access to medical treatment, as well as the existence of a serious criminal investigation of the death of one of the victims and the physical torture suffered by the others, amounted to a violation of the right to personal integrity (Arts. 5.1 and 5.2) and the right to have access to an effective judicial remedy (Arts. 8.1 and 25.1) set forth in the ACHR, as well as the rights recognised by the International Convention Against Torture. In the opinion of the ICHR, the psychological impact of the life imprisonment of the victims also severely affected the right to personal integrity of their family members, which amounted to a violation of Article 5.2 of the ACHR.

Finally, the ICHR determined that Argentinian law did not allow a comprehensive review of criminal judgments by a higher court, including the re-examination of the facts and the evidence discussed in the first instance (Art. 8.2 of the ACHR).

The decision of the ICHR in Mendoza et al. v. Argentina is of utmost importance.

The grave violations of the human rights of the victims in this case, including the irrational imposition of life sentences against children, are not exceptional. As the Inter-American Commission on Human Rights has established, in the Americas young offenders are usually subjected to criminal proceedings that lack the basic guarantees of due process. At the same time, young offenders are massively deprived of their liberty under inhuman and degrading conditions, including torture, without access to an effective system oriented toward their social rehabilitation.

The lack of basic conditions for children in conflict with the law in the administration of juvenile justice implies a serious violation of their rights under the United Nations Convention on the Rights of the Child and requires the development of a comprehensive policy based on the principles of prevention, diversion, due process, specialized justice and effective social reintegration.

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Bugmy v The Queen: Exploring the Significance of Indigenous Background in Sentencing
By Thalia Anthony | 19 September 2013

In 2011, Bugmy pleaded guilty to two counts of assaulting a Corrective Services Officer, which attracts a maximum penalty of five years’ imprisonment, and one count of causing grievous bodily harm with intent which attracts up to 25 years’ imprisonment. The appeal before the High Court focused upon an argument that the court below, the New South Wales Court of Criminal Appeal, erred in holding that the weight attributed to the Fernando principles lessen by virtue of the offender’s lengthy criminal history, the objective seriousness of his offences and the need for deterrence.

At the time of the 2011 offence, Bugmy, a 29-year-old Indigenous man from Wilcannia in north-western New South Wales, was on remand for assaulting police, resisting arrest, escaping from police custody, intimidating police and causing malicious damage by fire. He was exposed to violence and alcohol abuse as a child and by the age of 12 had started using cannabis and alcohol. Bugmy only attended formal education up to year Year 7 (13 years old) and therefore had poor literacy and numeracy skills. He has a history of head injuries and suffered from auditory hallucinations and psychotic symptoms of a schizophrenic type. Since the age of 13 Bugmy had committed numerous offences of break, enter and steal; assault; resist police and damage to property; and had served long terms of imprisonment for these offences. He had never attended a detoxification or rehabilitation facility. Bugmy sought assistance to treat his alcohol abuse on numerous occasions, without success. He has negative attitudes towards authority figures, particularly the police. These attitudes were described in court by an expert witness as attributable to family ‘cultural issues’. Expert evidence also pointed to Bugmy’s need to undergo extended counselling for his issues with drug and alcohol abuse and regular psychiatric review in view of his reported ‘voices’.

In the application for special leave to the High Court, Bugmy’s counsel submitted that the New South Wales Court of Criminal Appeal erred by concluding that the seriousness of Bugmy’s offence minimised the weight that could be put on his history of social deprivation and Indigenous background when sentencing. It was also argued that this error was compounded by comments that a defendant’s substantial offending history diminished the significance of Indigenous factors — a finding that could not be supported in law. Bugmy’s counsel emphasised that these grounds of appeal are a matter of significant and indeed profound importance for the administration of criminal justice and for the sentencing, in particular, of indigenous offenders not only in New South Wales but nationally.

The High Court decision whether the seriousness of the offence should overshadow mitigating circumstances relating to the offender’s background is of crucial importance in addressing increased Indigenous imprisonment. Indeed, if courts are to hand down sentences that will restore and rehabilitate Indigenous offenders, greater emphasis needs to be placed on exploring community circumstances; how the offender may be better reintegrated; and Indigenous communities strengthened. Bugmy is an example of an offender who was calling on the system to provide rehabilitation services, but only found institutional sanction in the prison. By failing to give substantial weight to Indigenous circumstances, the courts will continue to fail back on an imprisonment response when deterrence and community protection could be better served through non-custodial sentencing options and more appropriate community-based remedial services.

Rather than circumstances of Indigenous disadvantage becoming less relevant as the defendant’s criminal history is extended, it becomes more incumbent on courts to consider the effect of imprisonment on Indigenous defendants and whether alternative sentences may be better suited to breaking their cycle of crime. This would fulfil the sentencing objectives of deterrence and community protection while accounting for the offender’s culpability.

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In The Queen v D(R), the judge wrote a thoughtful and detailed set of reasons for his decision which drew heavily on the European Convention on Human Rights framework.

The issue is not a simple one. Trial practices in common law countries (and, indeed, in many other systems) rely at least in part on testing the credibility of different witnesses through their demeanour. There is some evidence that people are not as good at judging the truthfulness of witnesses as they believe themselves to be, and are particularly likely to make errors in cross-cultural contexts. However, the notion of a fair trial at least requires that witnesses generally be treated in the same manner and subject to the same scrutiny.

At the same time, people have a right to religious freedom including women who choose to wear religious clothing that covers the face. HHJ Murphy was rightly concerned to ensure that it was clear that his judgment was not based on stereotypes of Muslim women who wear the veil and that his decision should not be read as a criticism of women for covering their faces for religious reasons. He accepted that D was sincere in her belief that this was a requirement of her religious belief.

HHU Murphy looked to the Equal Treatment Bench Book for guidance on the matter but found very little assistance there other than a call to weigh all factors and to exercise ‘judge craft’. He noted tersely that this is not a matter of judge craft but of law and selected as his legal framework the European Convention on Human Rights and the Human Rights Act.

As a result of a careful analysis of the case-law, he reached a decision with a number of dimensions. First, he makes it clear that the decision applies in the current circumstances where the witness in question is a defendant in a criminal law case where credibility is an issue. It might not apply in family or civil cases and or with a witness in a criminal case whose evidence is uncontested. The issue of a victim in a criminal trial would also raise somewhat different issues.

Second, he sets out his directions for the rest of the trial at paragraph 86:

1. The defendant must comply with all directions given by the Court to enable her to be properly identified at any stage of the proceedings.
2. The defendant is free to wear the niqab during trial, except while giving evidence.
3. The defendant may not give evidence wearing the niqab.
4. The defendant may give evidence from behind a screen shielding her from public view, but not from the view of the judge, the jury, and counsel; or by means of a live TV link.
5. Photographs and filming are never permitted in court.

But in this case, I also order that no drawing, sketch or other image of any kind of the defendant while her face is uncovered be made in court, or disseminated, or published outside court.

The directions, which are similar to compromise positions reached in Canadian (R. v. NS, 2012 SCC 72 and New Zealand (Police v Razempon, (CRN 3004403907) cases, are a good illustration of working through a series of practical steps that protect each right at stake to the maximum degree possible. As with many decisions of the legal system that touches on Islam there are people who see only one set of rights as relevant or credible here – both people who would demand that no woman should ever be allowed to veil in court and those who consider it outrageous that she should ever be asked to show her face. The nuanced position taken in this case, however, better follows human rights analysis.

HHU Murphy anticipates that this issue will soon find itself in the higher courts and he is likely correct. Such courts could do worse than to take this decision as an excellent, nuanced starting point.

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R v D: an Imperfect, yet Promising, Approach to the Treatment of the Niqab in Court
By Claire Overman | 2 October 2013

Debate has recently been ignited in the UK about whether Muslim veils can be accommodated in court, stemming from Judge Peter Murphy’s decision in R v D. [2013] EW Misc 13 (CC) in her post on this blog, Prof Carolyn Evans provides a thorough overview of the judgment. In summary, the defendant, a Muslim woman, had been charged with witness intimidation. The question to be answered was to what extent to which she was permitted to wear the niqab, the black veil which covers the entire face except the eyes, during her trial.

The Judge held that if removal of the defendant would be required to remove her niqab when giving evidence in a criminal trial, in order for the jury to observe her reactions during cross-examination.

The defendant relied on Article 9(1) of the European Convention on Human Rights, which states that ‘everyone has the right to manifest his religion or belief.’ However, it was noted that this right is not unlimited, but rather expressly subject to the restriction in Article 9(2): ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’ In this case, the Judge noted that weighing against the defendant’s right to manifest her religion was not only the other party’s own Convention right (the right to a fair trial under Article 6), but also the court’s interest in ensuring that the principles underlying the judicial process (the rule of law, the principle of open justice, and the principle of an adversarial trial) were respected. The Judge stated that allowing the defendant to impose her religious right on the court amounted to a deprivation of its ability to control its own procedure.

These countervailing interests (the other party’s right to a fair trial and the safeguarding of the judicial procedure) are in principle acceptable reasons for limiting the defendant’s right to wear her niqab, particularly since the right is expressly subject to restrictions in Article 9(2). For instance, it was considered that the defendant would not be required to remove it, in a private room and before a female court officer, for identification purposes, to ensure that it was indeed the defendant standing trial. However, the necessity of these restrictions must be explored thoroughly by the court. For example, the Judge reasons that the removal of the defendant’s niqab is required in order for there to be a fair trial, because if a jury and judge cannot see the defendant’s reaction to cross-examination, then the trial is unfair.

However, in order for a defendant’s face not to be seen. As pointed out in the