Introduction
By Richard Martin

Subject to the prevailing winds of politics, public sentiment and evidence-based policy, the notion of criminal ‘justice’ was famously said by Herbert Packer (1968) to be found somewhere on the conceptual continuum between due process and crime control. In a climate of penal punitiveness - the decline in rehabilitative ideals, rising prison rates, harsher prison conditions, cuts to legal aid – which extends from the UK and USA to parts of Europe and Australasia, the criminal process may be seen drifting closer to crime control ideals. What role has human rights law played in responding to such punitive trends? Where has it, or could it have, protected of the rights of victims, defendants and offenders? Indeed, how have human rights fared in other penal climates across the globe? Answers to these questions can be found in this eclectic and engaging collection of posts from the last year.

Linking many of the posts is the tension states face in their simultaneous desire to heavily punish the most serious of offenders while fulfilling their domestic and international human/civil rights obligations. Contributors to this chapter demonstrate how rights-based frameworks challenge the courtroom, have continued to loosen the grip of state discretion that cling on to the death penalty. Writing in the context of the USA, Carol Steiker (‘Federal Judge Strikes Down California Death Penalty as Unconstitutional’ p 75) describes how the judgment in Jones v Chappell, which scrutinized the California death penalty system, adds a new critique “to the growing chorus of consternation”. Similarly, Jon Yorke (‘Executing the Intellectually Disabled: A Stronger Prohibition’ p 78) commends the US Supreme Court’s rejection of the appeal court’s decision that would have seen Florida execute those of the most limited intellectual capacity. Yorke draws particular attention to the Court’s implicit recognition of international rights discourse when it emphasised that death penalty is a violation of human dignity. The significance of this international discourse is captured in posts by Roger Hood and Carolyn Hoyle (‘Capital Punishment in China: Room for Cautious Optimism?’ p 72), suggesting cautious optimism for China’s path towards abolitionism, and by Vincent Ploton (‘A New Opportunity for the UN to Move Forward the Global Abolition of Death Penalty?’ p 71), outlining the importance of the UN Human Rights Committee and the challenge it faces in encouraging the ratification of the ICCPR second Optional Protocol. The centrality of the judiciary and rights-based appeals in retentionist countries remains clear though when reading the posts by Gautam Bhatia on India (‘Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation?’ p 73) and Jon Yorke on Sudan (‘Meriam Ibrahim Saved from 100 Lashes and the Death Penalty’ p 74).

Another key exchange between human rights law and punitive sentences of the last year has been the compatibility of whole life sentences with the right to freedom from inhuman and degrading treatment. The judicial dialogue the issue has generated between the European Court of Human Rights (ECtHR) and the Court of Appeal of England and Wales is critically outlined in a series of authoritative posts by Neil Shah (‘Hutchinson v UK – A Change in Direction on Whole Life Orders?’ p 79; ‘Court of Appeal Affirms Ability to Pass Whole Life Tariffs for Murder’ p 82) and Natasha Holcroft-Emmess (‘Whole Life Sentences in Hutchinson v UK – Compromise or Concession?’ p 80; ‘Throwing Away the Key – Whole Life Sentences in the Court of Appeal’ p x81). The contributors explain how this dialogue is set against an important sub-plot concerning the UK’s increasingly contentious relationship with Strasbourg, which, they suggest, may have left the ECtHR reluctant to criticise the Court of Appeal’s inadequate response to its earlier judgment in Vinter [2013] ECHR 66069/09. The cost of this perceived concession by the ECtHR for prisoners is continued uncertainty as to what they must demonstrate in order to be considered for eventual realise and how meaningful such a review, if carried out, would in fact be. In the year ahead, this is an issue contributors and readers of the blog might return to in other jurisdictions. Ravi Amarnath’s post (‘Prisoner Rights at the Forefront of Canadian Debates’ p 85) raises awareness of introduction of indefinite detention of prisoners in Canada and Vishwajith Sadananda (‘Perpetual Life Sentences, Reformation and the Indian Supreme Court’ p 83) describes how indefinite life imprisonment in India is replacing the gap left by the Indian Supreme Court’s tacit abolition of the death penalty.

This increase in the length of sentences for those convicted of serious crimes has also been coupled with a more general deepening of the pains of imprisonment. As discussed Natasha Holcroft- Emmess (‘Restricting Receipt of Rehabilitative Resources: The Prisoner Book Ban’ p 86) the introduction in England and Wales of sweeping of restrictions on the ability of family and friends of prisoners to send them the semblances of normal life – clothing, underwear, books – marks a particular low in the respect shown to the inherent worth of the individual. These pains of imprisonment are particularly severe for certain groups of prisoners, as illustrated by Jo Barker’s post (‘Women in Prison: The Particular Importance of Contact With the Outside World’ p 84) outlining the research on women’s experiences of imprisonment. Similarly, Andrew Wheelhouse’s post (‘Reporting Restrictions in Criminal Cases Involving Juveniles’ p 58), focusing on the High Court’s decision to ‘name and shame’ a child who murdered his teacher, touches on the issue of custodial sentences for younger members of society and the relative moral capacity of children and adults.

Moving on, a series of posts sensitively addressed the issue of criminal liability for persons assisting those who wish to end their lives but cannot do so themselves. Writing in the UK context, where this is an offence, Keir Starmer (‘Prosecuting in the Public Interest: CPS Guidelines from Assisted Suicide to Social Media’ p 65), former Director of Public Prosecutions, outlines his ‘red thread’ – its strands comprised of guidelines, explanations and challenge – which ought to inform prosecutorial discretion. The need for such discretion remains in the UK, after the Supreme Court held it could not declare the prohibition to be incompatible with right to private life in the instant case before it (discussed in Claire Overman’s post ‘Moral Arguments on the Right to Die: Should Courts Intervene?’ p 66). As reported by Jennifer Koshan (‘Supreme Court of Canada Strikes Down Ban on Physician Assisted
Death’ p 68), across the Atlantic the Supreme Court of Canada was faced with a similar question, but instead used domestic human rights provisions to unanimously strike down the prohibition against physician assisted death. It is worth noting both the rights that each Court perceived to be engaged, as well as the difference in the deference shown to the respective legislatures, reflecting the constitutional status of each court. Although a landmark judgment, perhaps, as the title of Ravi Amarnath’s post (p 69) suggests, the ‘Implementation of Carter will be the Ultimate Gauge of Success of the Decision’.

Finally, the police, as the gatekeepers of the criminal justice system who exercise considerable powers under the law, can significantly impact on the fulfillment of human rights. Andrew Wheelhouse (‘The Duty of National Authorities to Investigate Allegations of Torture’ p 61) discusses how the positive duty of the police to investigate serious crime has been interpreted and developed by the Constitutional Court of South Africa to require the South African Police Service to investigate crimes against humanity in Zimbabwe. In contrast, the gross rights violations resulting from abuse of police power, facilitated by systemic immunity before the law, are demonstrated strongly in the accounts of police violence in Brazil by Eloisa Machado de Almeida (‘A Guide to the Perpetuation of Human Rights Violations: Police Violence and Impunity in Brazil’ p 62) and in Colombia by Castellanos-Morales and Castillo-Sanchez (‘Impunity for Police Violence: Nine Years Since Jhonny Silva-Aranguren’s Death’ p 63).

With a particular focus on sentencing and punishment, this collection of posts demonstrates the considerable power that actors of the criminal justice system have to both crucially protect and desperately undermine the value, experience and even existence of human lives. The posts effectively illustrate how human rights law and discourse has proved central in efforts to challenge how this power is used, and remedied when it is abused. Though the collection also hints at how, in interpreting the content and scope of human rights, the judiciary too can be swayed, for better or worse, by the penal climate produced by politics and public sentiment.

Richard Martin is an Editor of the Oxford Human Rights Hub Blog. He is completing his DPhil on human rights law and practice within the police, based at the Law Faculty’s Centre for Criminology, University of Oxford.
On 3 November 2014 Will Cornick was sentenced to a minimum of 20 years imprisonment for the murder of his teacher Ann Maguire, after stabbing her in front of her own class. Aged 15 when he committed the crime, he expressed no remorse and it became clear during the trial that he suffered from a type of personality disorder.

Some commentators have expressed doubts over the appropriateness of imposing such a lengthy custodial sentence on a child. But an interesting aspect of the case of R v Cornick [2014] EWHC 3623 (QB) and one deserving criticism, is the decision of Coulson J to drop the reporting restrictions on Mr Cornick’s identity.

Section 39 of the Children and Young Persons Act 1933 (CYPA) empowers the Court to prohibit newspapers from revealing a child or young person’s identity. Such an order was made a few days after the murder but The Sun newspaper had already flouted what used to be convention by publishing Mr Cornick’s name before the Court had a chance to rule.

After sentencing the defence applied for the s.39 order to be extended. Media organisations, led by The Guardian newspaper contested this. An argument based on the right to life under Article 2 ECHR was rejected on the basis that any risk was either too vague (the risk of attack from other inmates) or insufficient (the defendant was on suicide watch) for the claim to succeed. Of greater interest is the balancing exercise between the offender’s welfare under s.44 CYPA and Article 8 ECHR and the right to freedom of expression under Article 10 ECHR.

The judge noted the principles identified by Simon Brown LJ in R v Winchester Crown Court ex parte B (A Minor)[1999] 1 WLR 788 including that:

- “Considerable weight” is to be given to the age of the offender, in particular the potential damage of a young person being identified as a criminal before they reach adulthood.
- The court must “have regard to the welfare of the child or young person” (under s.44 CYPA).
- Being named in court, with the “accompanying disgrace” is a “powerful deterrent” that it is proper for the Court to pursue.
- There is a “strong public interest in open justice and in the public knowing as much as possible about what happened in court” including the identity of the perpetrator.

In lifting the restrictions Coulson J quoted authority to the effect that s.33 CYPA is not concerned with rehabilitation and rejected the idea that rehabilitation would be made more difficult. He noted that publication had already occurred and that the anonymity order would only last until Mr Cornick turned 18 in 2016. Crucially, on the public interest argument, he said:

“This is an exceptional case. Public interest has been huge. There are wider issues at stake such as the safety of teachers, the possibility of American-style security measures in schools and the dangers of ‘internet loners’ concocting violent fantasies’. It is submitted that here the judge gave in to the worst aspects of media culture. There was no reason why the above could not be
in a recent judgment, Adambhai Sulemanbhai Ajmeri v. State of Gujarat Criminal Appeal Nos. 2295-2296 of 2010, the Supreme Court of India acquitted all six men convicted by the High Court of Gujarat for the attack on the Akshardham temple in Gandhinagar, Gujarat between 24th and 25th of September 2002, which resulted in the death of 33 people, and the injury of more than 85.

The judgment highlighted various peculiarities and deficiencies in the method of investigation, the nature of confessions, the absence of independent evidence etc., but it received traction more so for the strictures passed against the then Home Minister of Gujarat and current Prime Minister of India for granting sanction for prosecution without any application of mind and independent analysis.

The Court emphasized that it could not sit with ‘folded hands’, given the perversity in the conduct of the case, from investigation, to the conviction and awarding of sentence by the Special Court (set up under the Prevention of Terrorism Act 2002), and later confirmation by the High Court. The Court emphasized the need for it to be more proactive when gross violations of fundamental rights of citizens were taking place. Before parting with the judgment, the Court registered anguish about the incompetence of the investigating agency and lamented the fact that the police had booked innocent persons instead of booking the real culprits.

For those acquitted, the past 11 years have been lost, their families have been shattered and the stigma of being a terrorist has been permanently embedded in their lives.

Righting Wrongful Convictions: Is Anguish Enough?
By Siddharth Peter de Souza | 10th June 2014

In a recent judgment, Adambhai Sulemanbhai Ajmeri v. State of Gujarat Criminal Appeal Nos. 2295-2296 of 2010, the Supreme Court of India acquitted all six men convicted by the High Court of Gujarat for the attack on the Akshardham temple in Gandhinagar, Gujarat between 24th and 25th of September 2002, which resulted in the death of 33 people, and the injury of more than 85.

The judgment highlighted various peculiarities and deficiencies in the method of investigation, the nature of confessions, the absence of independent evidence etc., but it received traction more so for the strictures passed against the then Home Minister of Gujarat and current Prime Minister of India for granting sanction for prosecution without any application of mind and independent analysis.

The Court emphasized that it could not sit with ‘folded hands’, given the perversity in the conduct of the case, from investigation, to the conviction and awarding of sentence by the Special Court (set up under the Prevention of Terrorism Act 2002), and later confirmation by the High Court. The Court emphasized the need for it to be more proactive when gross violations of fundamental rights of citizens were taking place. Before parting with the judgment, the Court registered anguish about the incompetence of the investigating agency and lamented the fact that the police had booked innocent persons instead of booking the real culprits.

For those acquitted, the past 11 years have been lost, their families have been shattered and the stigma of being a terrorist has been permanently embedded in their lives.

By merely registering anguish, has the Court abdicated its responsibility of being the custodian of rights and liberties of the most vulnerable, irrespective of precedent or provisions? To quote Justice Bhagwati “Why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty?” (Khatri v State of Bihar).

Given the perversity of conduct, were strictures and adverse comments about actions of organs of the State and the Judiciary sufficient? Would such comments hold weight? More importantly did the Supreme Court administer ‘complete justice’?

These are questions which the Court should have considered.

Article 142 of the Constitution of India provides the Supreme Court with a wide amplitude of power seen as supplementary to the limits of the jurisdiction conferred on the Court by statutes. These inherent powers are in respect of “any cause or matter” especially where provisions of the existing law are inadequate. Moreover these powers are engineered towards ensuring “complete justice” seen as representative of myriad situations and not constrained by procedure or the technicalities of the law.

Interestingly while the Court has used these powers to acquit one of the six convicted in this case, without him even filing an appeal, it has not extended the same powers to provide relief to the six as victims of wrongful conviction.
While there is little data which has mapped out wrongful convictions in India, it is the duty of the Court to use such opportunities, in pursuit of rendering complete justice, to signal to State organs that life and personal liberty cannot be abused on whimsical grounds. Providing relief to victims of wrongful convictions is the first step. Compensatory jurisprudence for violation of personal liberty is not new in India and emerged when the Supreme Court, by invoking the right to constitutional remedies under Article 32 in Rudal Shah v. State of Bihar, awarded compensation to a victim of the erring and arbitrary State. Further the right to compensation for wrongful convictions is provided under Article 14(6) of the International Covenant on Civil and Political Rights as well as under Article 10 of the American Convention on Human Rights and Article 3 of the European Convention on Human Rights. In exploring these provisions the Court should also examine conditions required for smooth transitions of persons back into society like housing, transportation, education, skill development and health care in addition to adequate monetary compensation for the years lost. There must also be an official acknowledgment of wrongdoing by the State as recommended by the Innocence Project – this would facilitate the long battle against social stigma.

If punishment entails responsibility, isn’t there equally responsibility for wrongful convictions?

Siddharth Peter de Souza is a graduate from Campus Law Centre, Faculty of Law, University of Delhi and is a Judicial Clerk at the High Court of Delhi.

Equal Treatment for All… Except the Highest?
By Jordana Adams | 31st January 2014

A recent resolution of Member States of the International Criminal Court (ICC) puts into question their commitment to respect the fundamental right of equality for all embedded within Article 1 of the Universal Declaration of Human Rights.

The ICC, established as the first permanent International Criminal Court in 2002, aspires to provide a model for national jurisdictions throughout the world, mandating that impunity for the most serious crimes of international concern should not be permitted.

In adopting the resolution by consensus during the 12th plenary meeting, Member States made three seemingly innocuous additions to Rule 134, which essentially provide for the Accused to be physically absent during part or parts of the trial process. Concerns have been voiced as to the motivations for adopting this resolution and its compatibility with Article 63 of the Rome Statute (the “Statute”), which contains the requirement that the Accused be present during their trial. It would be difficult to deny that the adoption of this resolution was a direct reaction to calls by the Kenyan delegation, whose President and Deputy President are currently facing charges before the ICC for crimes against humanity.

Yet the impact of amendments 134bis and 134ter, which allow for presence at trial through the use of video technology and permit the Accused to be absent and represented by Counsel for part or parts of their trial, respectively, will probably be negligible to trial proceedings. Moreover, they mitigate the prejudice of subjecting the Accused to a premature sentence in The Hague for the duration of their trial, which is typically significantly longer than national proceedings.

However, by contrast, Rule 134 quarter, which permits excusal from presence at trial due to extraordinary public duties, creates a hierarchy of Accused, which goes beyond the remit of the Rules of Procedure and Evidence (the “Rules”). This rule directly conflicts with Article 27(1) of the Statute and presents a source of real concern. This article embodies one of the core principles of the court, which is that “the statute shall apply equally to all persons without any distinctions based on official capacity.” Thus, the actions of the Member States are in conflict with the Statute and are contrary to its spirit.

Rule 134quarter goes beyond the scope of both Rules 134bis and 134ter, since unlike the previous rules, it makes no mention of the duration of the excusal from trial. This omission potentially allows a certain privileged class of Accused, meeting the necessary requirements, to have a trial in absentia at the Trial Chamber’s discretion. Should this occur, it is uncertain how the Court would reconcile such unequal treatment for those elite Accused with the Statute, since Article 63(1) has been interpreted to prohibit trials in absentia.

The impropriety of Member States seeking to amend the Statute through the Rules and the resultant lack of legal effect will doubtless be the subject of much discussion and a future Appeal Chamber Decision. However, irrespective of its legal effect, their irreverence in adopting a Resolution which so patently affords special treatment to the highest members of States sends a damaging message. That message sorely undermines the establishment of the ICC as a model system for criminal justice. The idea that “we are all equal…except the highest” just doesn’t meet the standards of Article 1 of the Universal Declaration of Human Rights.

Jordana Adams, a Solicitor at BH Solicitors in the UK, holds an LLM in Public International Law from Leiden University and has worked at the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia.
The Duty of National Authorities to Investigate Allegations of Torture
By Andrew Wheelhouse | 8th December 2014

Proponents of universal jurisdiction for international crimes will be gratified by the judgment of the Constitutional Court of South Africa in the case of National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another [2014] ZACC 30 which was handed down on 30 October.

The case concerned allegations that the Zimbabwean Police tortured a number of detained persons following a raid on the headquarters of the opposition Movement for Democratic Change in Harare in March 2007. The raid allegedly occurred under the instructions of the ruling ZANU-PF party of President Robert Mugabe.

SALC and the Zimbabwe Exiles’ Forum compiled a dossier, which included sworn statements alleging acts of torture such as beatings with baseball bats and iron bars, waterboarding, mock executions and electrocution of the genitals of detainees. This was passed onto the National Prosecuting Authority and the South African Police Service (SAPS) in March 2008.

After much delay the National Director of Public Prosecutions eventually refused to initiate an investigation in June 2009 on the curious basis that the matter had been inadequately investigated and that further investigations would be difficult.

SALC and the ZEF turned to litigation, seeking to have the refusal to investigate set aside. The lower courts uniformly found in their favour. By the time the matter reached the Constitutional Court it had sparked huge interest, with no fewer than nine amici curiae piling into court to weigh in on the side of the NGOs.

The question before the court was whether “in the light of South Africa’s international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity committed beyond our borders”. In a unanimous judgment penned by Majeidt AJ, the court ruled that there was a duty to investigate and dismissed the appeal by the SAPS. The Court held that the starting point is the Constitution, which provides for the incorporation of international agreements into South African law by legislation (section 231) and which makes customary international law part of South African law except where inconsistent with the constitution or primary legislation (section 232). Accordingly, the Rome Statute and the Torture Convention became part of South African law when they were incorporated through the ‘ICC Act’ 2002 and the ‘Torture Act’ 2013 respectively.

The Court then moved onto the question of presence. It was argued by the SAPS that presence of a suspect was required in South Africa before an investigation could commence. In rejecting this, Majeidt AJ adopted the comparative analysis of the Supreme
Court of Appeal below and held that while presence may be needed for prosecution to commence, it is not required to launch an investigation. It was noted that requiring presence would rob the ICC framework of its efficacy (the suspects include Zimbabwean cabinet ministers and senior civil servants who, it was intimated at the hearing, periodically visit South Africa for shopping and other activities).

In light of this there was a duty on the SAPS to investigate international crimes, limited by the principles of subsidiarity (not relevant here as the Zimbabwean Police have not shown any interest in investigating the allegations and are unlikely to do so any time soon) and practicability (not relevant here for a number of reasons, not least the proximity of South Africa to Zimbabwe and the fact that SALC had done the “initial spadework” to make further investigation viable). The court was particularly unimpressed with the argument advanced by SAPS that political relations between South Africa and Zimbabwe would be damaged, noting that interstate tensions were the unavoidable consequence of universality:

“The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaires, pirates and their ilk, the so-called hostis humani generis, the enemy of all mankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled.”

The premium that the South African legal system places on conforming with international law certainly assisted the Constitutional Court in deftly negotiating the obstacles that were placed in its way by counsel for the SAPS. By speaking with a unanimous voice the justices were able to hand down a powerful judgment that also has the benefit of according with common sense. However, it remains to be seen whether the ordered investigation bears fruit. It could well be years before the alleged perpetrators stand trial, if any do at all.

Andrew Wheelhouse was called to the Bar Of England & Wales at Middle Temple in 2013. Between January and July 2014 he served as a Foreign Law Clerk to Justices Skweyiya and Madlanga at the Constitutional Court of South Africa. He writes here solely in a personal capacity.

A Guide to the Perpetuation of Human Rights Violations: Police Violence and Impunity in Brazil
By Eloisa Machado de Almeida | 26th August 2014

Police violence in Brazil is endemic. It frequently occurs at the time of arrest and during the collection of evidence, and is embedded in the daily practice of the police institution. Police violence also results in an alarming number of extrajudicial killings – in the State of Rio de Janeiro alone, 3029 people were killed by the police between 2000 and 2010.
More recently, police violence in Brazil was on full display during mass demonstrations demanding better governmental services and benefits, which peaked in June 2013 and are still occurring in several Brazilian cities. The police have reacted to these demonstrations with excessive and disproportionate force, including unlawful arrests and beatings.

The degree of police violence in Brazil is shocking, particularly in light of the 1988 Constitution, which guarantees fundamental rights (such as the right to life and due process), and of the country’s incorporation of the major international and regional human rights instruments. Brazil has laws that prevent police misconduct, criminalize torture, and hold the state accountable for human rights violations. Therefore, Brazil is not a lawless environment; rather, there is an issue of immunity before the law.

The judicial system in Brazil guarantees the police institutions’ immunity, which is illustrated in three structural problems facilitated by its institutional design and its relationship with other national, regional, and international review mechanisms. The first of these problems is “institutional paralysis”. Internal monitoring mechanisms, such as ombudsmen (‘corregedorias’), are inefficient and lack transparency. Moreover, in the case of police violence, investigations lie in the hands of the police themselves. In this context, several justifications for the violent actions of police officers have been used in order to protect them. For instance, legal terms such as “resistance to arrest followed by death” and “contempt of authority” are often used to distort facts to prevent investigations into police misconduct, such as summary executions and arbitrary arrests (as evidenced by the UN).

The second problem, which I call “institutional collusion”, refers to the ineffectiveness of Brazilian external controls of police institutions, such as the Public Attorney’s Office (‘Ministério Público’ or ‘MP’) and the Brazilian judiciary. The MP, whose constitutional function includes the supervision of police activity, has not adequately performed its duties. If the official version of events is that someone was killed in a confrontation with the police, there is no external pressure for the MP to investigate the case, especially as there is no genuine control over its actions. The existing control mechanisms, such as the Internal Ombudsman (‘Corregedoria Interna’) and National Councils (‘Conselhos Nacionais’), are composed of the MP members themselves and therefore fall into the “institutional paralysis” trap described above.

Moreover, on the rare occasions that the judiciary is called to act in these cases, it does not offer appropriate responses to victims of human rights violations, which leads us to the third problem, namely, “monitoring ineffectiveness.” Mechanisms created to step in when the justice system at the state level does not work are inefficient. For example, federalization of serious human rights violations, when – due to failure of the state court system – cases can be transferred to the federal judicial system, was accepted by the federal system in only one case and was requested just five other times. In addition, national institutions treat the international and regional systems of human rights protection, the UN and the OAS, with contempt. Their decisions are invariably disregarded, exemplified by the way in which Brazil dismissed, as merely political with no binding legal effect in the country, the decision of the Inter-American Court of Human Rights ordering an investigation of crimes of the dictatorship.

However, there are rare exceptions. In the Carandiru Massacre case, in which an alleged rebellion of prisoners was violently suppressed by the police and resulted in the 111 deaths in 1992, police officers were convicted twenty-four years later (although no police commander has been convicted). In the May Crimes case, where a police response to gang attacks in São Paulo led to the death of over 450 civilians in 2006, only one officer was convicted, and not until this year. That these convictions are the exception demonstrates the overwhelming immunity of the police before the law.

The structural problems within the Brazilian judicial system facilitate widespread police violence and impunity. Monitoring and accountability mechanisms must be improved in order to stem the tide of human rights violations perpetrated by Brazilian police.

Eloisa Machado de Almeida is a lawyer, a law professor at FGV Law School in São Paulo, Brazil, and a member of the Lawyers’ Collective for Human Rights (CADHu).

Impunity for Police Violence: Nine Years Since Jhonny Silva-Aranguren’s Death
By Ethel Nataly Castellanos-Morales and Camilo Ernesto Castillo-Sánchez | 4th December 2014

Colombia’s critical human rights situation is a result of both political violence, and organized and petty crime. Whilst ongoing peace talks with guerrilla forces bring the country closer to the end of formal armed conflict, the protection of human rights will remain hollow due to the generalization of institutional impunity in all levels. This is harrowingly demonstrated by two historical cases which shocked Colombian public opinion.

Jhonny Silva-Aranguren was a Chemistry student tragically murdered in September 22nd of 2005 in the Universidad del Valle’s campus during a demonstration against the U.S.-Colombia Free Trade Agreement. According to witnesses, a member of ESMAD (anti-riot police) shot Jhonny when he left the library to go home. Although the individual was fully identified, and the testimonies and the ballistic evidence were conclusive, nine years on he has not been brought to justice.

Why the state has not investigated, prosecuted and punished the perpetrator? Three main causes of this institutionalized impunity
have been identified: the attitude of the national government; the negligence of the assigned *Fiscalía* (the prosecutor’s office); and the general state of institutionalized corruption.

As an example, immediately following the murder, the Colombian President reacted by rejecting ESMAD’s responsibility, even though the criminal investigation had not yet begun. Further, the case was in charge of over ten different government prosecutors in two years.

It soon became apparent that the negligence of the assigned prosecutors was affecting the progression of the case, which did not advance for periods of months at a time. To reactivation the case, Jhonny’s parents presented an *Acción de Tutela* in 2007 against the *Fiscalía*. They invoked the violation of their fundamental rights to truth and justice, and sought a judicial order to force the *Fiscalía* to continue with the case. Despite this, the *Fiscalía* took the decision to end the process, on the ground that there was insufficient evidence.

Jhonny’s parents are still fighting for justice. Following the closure of the case in 2007, they brought a claim before the *Tribunal Administrativo del Valle* to obtain a declaration of the Colombian Government’s administrative responsibility for Jhonny’s death, but the case has not been solved. Mr. and Mrs. Silva presented a petition before the Inter American Commission of Human Rights in 2008 but the process has not gone beyond the initial stage.

A further case of police brutality occurred in August 2011. A police officer killed a teenage graffiti artist who refused to comply with a request to stop. The officer involved remains unpunished three years later, although the case remains open in the Proseecutor’s Office.

These cases, characterised by inefficient mechanisms for bringing those responsible to justice, are becoming the norm in a country where institutionalised impunity blights the judicial system.

The Colombian government has continued its efforts towards negotiating a peace process with the main Marxist guerrilla group (FARC – Fuerzas Armadas Revolucionarias de Colombia or the Revolutionary Armed Forces of Colombia). It is hoped that this will lead to lasting peace, but the above cases demonstrate that even formal peace may not be sufficient to protect human rights if institutional impunity remains entrenched. Peace will only be a realistic outcome once the authorities focus on eradicating corruption within the police force, and on educating it on the importance of human rights.

*Ethel Nataly Castellanos-Morales is a Ph. D. Candidate at the Instituto de Investigaciones Jurídicas-UNAM, México.*

*Camilo Ernesto Castillo-Sánchez is a Ph. D. Candidate at the Universidad del Rosario, Bogotá-Colombia.*
ASSISTED DYING

Prosecuting in the Public Interest: CPS Guidelines from Assisted Suicide to Social Media
By Keir Starmer | 23rd January 2014

Although the DPP’s consent is required before a prosecution for assisted suicide can be brought, the discretion whether to prosecute or not exists in all cases. In this post, drawn from a lecture given as the LAG Annual Lecture on 5 December 2013, Sir Keir Starmer KBE QC, DPP, considers how this is, and should, be exercised.

The case of Debbie Purdy
Debbie Purdy suffers from MS for which there is no known cure. Her condition is deteriorating and she expects that there will come a time when her continuing existence will become unbearable. When that happens she wants to end her life, but by that stage she will almost certainly need assistance to do so. Her husband is willing to assist but Ms. Purdy does not want to expose him to the risk of prosecution for assisted suicide.

Before the House of Lords, she accepted that her husband could not be guaranteed immunity from prosecution. Instead she argued that in order to enable her to make an informed decision as to whether or not to ask her husband for assistance, she needed to know the factors that the DPP would take into account in deciding whether a prosecution is required in the public interest.

As a result, the House of Lords required me, as DPP, to “clarify what [his] position is as to the factors that [he regards] as relevant for and against prosecution in this very special and carefully defined class of case”.

I complied with the Judgment by publishing assisted suicide guidelines. The thrust of the guidelines is reasonably clear. Broadly speaking if the ‘victim’ had a clear and settled intent to commit suicide and if the suspect was wholly motivated by compassion and had not persuaded the ‘victim’ to commit suicide, the likelihood of a prosecution was low.

The red thread
But, there are risks attached to the exercise of discretion. Whilst in appropriate circumstances it can be a force for good, poorly exercised discretion can mask corruption and malevolence.

How then can the prosecutor and the system work through the potential for abuse? My answer is very straightforward – and simple. It runs like a red thread through everything I tried to achieve in my five years as DPP. The CPS should:

1. Guidelines: Set out in advance how it intends to approach the exercise of discretion in any given category of case.
2. Explanation: Explain how any given decision has been reached.
3. Challenge: Provide a practical and effective way of allowing prosecutors’ decisions to be challenged.

Guidelines
One of the features of my tenure as DPP has been the publication of publicly facing guidelines, setting out in clear terms how the CPS will approach decision making in difficult and often sensitive areas of the law. Freedom of speech was the thorny issue that I tried to tackle when drawing up guidelines for prosecutors in cases involving offensive messages sent by social media. Here we have the problem of old law and new technology rubbing up against each other.

At the turn of the century and in the early 20th century, telephones were developed. Parliament thought that the staff at telephone exchanges should be protected from exposure to abuse. Accordingly it passed the Post Office (Amendment) Act 1935, making it an offence to communicate any message by telephone which was grossly offensive or of an indecent, obscene or menacing character.

This offence has remained on the statute book ever since. But, given the recent explosion of social media, the need to find a sensible balance between free speech and the reach of the criminal law becomes obvious.

In the guidelines I issued to CPS prosecutors, I sought to find that balance by reminding them that just because the content expressed in a communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, that is not, in itself, sufficient reason to engage the criminal law.

Explanation
Indicating publicly what approach will be taken to the exercise of discretion in difficult or sensitive cases achieves nothing if the prosecution refuses to explain its decisions and to give reasons.

That is why another feature of my tenure as DPP was the more visible prosecutor. I asked my staff to go out and explain their decisions. Neither they, nor I, could properly be held to account unless the public knew what decisions we took and why.
Challenge
Here the principles are very well established. A CPS decision can be challenged if it fails to comply with settled policy, is unreasonable because irrelevant factors were relied upon, or relevant factors were left out of accounts, or the decision is otherwise “perverse”: see R v DPP ex parte Manning ([2001] Q3 330). Where Convention rights are in play, the Human Rights Act 1998 adds further bite because it allows the courts to subject CPS decisions to even greater scrutiny.

Conclusion
The blunt instruments that criminal law statutes necessarily have to be, can be honed into compassionate and appropriate casework decisions by the exercise of the public interest discretion. But the exercise of prosecutorial discretion also calls for strict accountability. And real accountability requires transparency. Hence my red thread: Guidelines; Explanation; and Challenge.

Sir Keir Starmer QC is barrister at Doughty Street Chambers. From 2008 to 2013 he served as Director of Public Prosecutions in England and Wales and was elected as the Labour Member of Parliament for Holborn and St Pancras in the 2015 General Election.

Moral Arguments on the Right to Die: Should Courts Intervene?
By Claire Overman | 27th June 2014

On 25th June 2014, the UK Supreme Court, sitting as a full bench of nine, handed down judgment in the joined cases of R (on the application of Nicklinson and another) v Ministry of Justice, and R (on the application of AM) (AP) v Ministry of Justice and DPP [2014] UKSC 38. The full background to the cases, and the conclusions reached, may be found in the press summary released by the court.

The court was required to consider two broad issues. One was whether the guidance of the Director of Public Prosecutions on when assisted suicide would be prosecuted was sufficiently clear. It was unanimously held that it was. The other, which was whether the court could declare that the present prohibition on assisted suicide was incompatible with the right to private life under Article 8 ECHR, was more controversial.

Two questions predominated the judgment on the latter issue. First, given that the ECHR had previously held that laws on assisted suicide fell within the margin of appreciation of member states, was it nonetheless open to national courts to decide whether there had been an infringement of Convention rights? The court unanimously held that the compatibility of the UK’s assisted suicide laws with Article 8 fell within the state’s margin of appreciation, and was therefore for the UK to decide. It was pointed out that Article 2 of the Human Rights Act requires UK courts to have regard to ECHR jurisprudence, but not to be bound by it.
The more difficult question was whether, given the nature of the issue, it was for the courts rather than Parliament to decide. Five of the nine Justices decided that the court could do so. Lord Neuberger noted, at paragraph 98, that the court has previously had to rule on cases raising important moral issues (for instance, Airedale NHS Trust v Bland [1993] AC 789, involving the withdrawal of medical treatment from an individual in a permanent vegetative state). Further, Parliament had not yet sought to intervene in the present debate with legislative solutions, and in any case, had, by virtue of the Human Rights Act, "cast on the courts the function of deciding whether a statute infringes the Convention."

It was pointed out at paragraph 107 that the court was not being asked to set up a specific scheme for assisted suicide, which would plainly go beyond its mandate. In contrast, it was not forbidden from concluding that there were a number of possible schemes.

Nevertheless, despite deciding that the court could hold that the present state of the law on assisted suicide was incompatible with the applicants’ Article 8 right, the majority of that majority (three of the five) held that the court could not in the instant case. Lord Neuberger, at paragraph 116, outlined four reasons for this finding: (1) the question raised a difficult and controversial issue; (2) the incompatibility was not simple to identify or cure; (3) Parliament had actively considered the issue on a number of occasions; (4) the House of Lords, in the previous case of Pretty v DPP [2002] 1 AC 800, had held that a declaration of incompatibility of the same legislation would be inappropriate.

Interestingly, Lord Sumption, of the minority who held that courts could not make a declaration under any circumstances, relied heavily on precisely the moral arguments that Lord Neuberger had deemed to be of little weight, or in any case, no deterrent to judicial intervention. Lord Sumption goes further, stating that issues involving a choice between fundamental moral values are “inherently legislative in nature.” This appears to fly in the face of cases such as Bland. Indeed, Lady Hale and Lord Kerr, who would have made a declaration of incompatibility in the present case, themselves engage with moral issues in reaching this conclusion.

It is likely that, for pragmatic reasons, the fact that Parliament was currently debating the issue was, in reality, determinative. In particular, both the majority and minority emphasised the fact that the Assisted Dying Bill was presently before Parliament. Given the judiciary’s past willingness to concern itself with thorny moral questions, clear inaction by Parliament in this matter would certainly have led to a different result. Indeed, Lord Clarke would “expect the court to intervene” in such a situation. The majority is therefore clear – difficult moral questions do not of themselves preclude judicial intervention.

Claire is a former Editor and Communications Manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.

---

**Canadian Constitutional Challenge to Prohibition on Assisted-Dying**

By Ravi Amarnath | 21st October 2014

Canada’s top court is once again set to decide on the constitutionality of physician-assisted dying for terminally ill patients.

The Supreme Court of Canada heard oral arguments in Carter v Attorney General of Canada 2015 SCC 5 regarding the constitutionality of physician-assisted dying. Canada's Criminal Code makes it illegal for doctors to assist patients who wish to end their own lives. In particular, section 241(b) of the Criminal Code makes it a punishable offence of up to 14 years in prison for any person to “aid or abet” another individual with taking their own life.

In 1993, Sue Rodriguez, a 42-year-old woman suffering from amyotrophic lateral sclerosis (ALS), challenged the constitutionality of this provision. Ms. Rodriguez sought allowance for a physician to assist her with taking her own life at a time of her choosing after she lost the ability to enjoy it. She argued section 241(b) of the Code violated her constitutional rights to life, liberty and security of the person and to equality, and that the provision constituted cruel and unusual punishment.

By a 5-4 majority, the Supreme Court of Canada ruled against Ms. Rodriguez in the case of Rodriguez v. British Columbia (Attorney General) [1993] 3 S.C.R. 519, and upheld the constitutionality of the provision. Ms. Rodriguez passed away the following year.

The current challenge to the prohibition on assisted dying started in the Canadian province of British Columbia and was brought by a number of individuals, including Gloria Taylor and the daughter and son-in-law of Kay Carter. Both Ms. Taylor and Ms. Carter suffered from intractable diseases and wished to end their own lives. Prior to the commencement of legal proceedings, Ms. Carter travelled with her family and ended her life at a clinic in Switzerland.

In June 2012, a British Columbia trial judge ruled in favour of Ms. Taylor and Ms. Carter’s family in Carter v. Canada (Attorney General), 2012 BCSC 886, declaring certain provisions of the Criminal Code that prohibit physician-assisted dying to be unconstitutional. The judge noted changes in domestic and international law since the Rodriguez case which allowed her to reach
this conclusion.

The Court of Appeal for British Columbia subsequently overturned this decision in 2013 on the basis that the trial judge was bound to follow the Supreme Court’s decision in the Rodriguez case. Ms. Taylor had passed away prior to the release of the Court of Appeal’s decision.

Proponents of physician-assisted dying argue that adequate safeguards can be developed to ensure that the practice is not misused, while opponents fear exploitation of vulnerable citizens. The federal government of Canada, which has jurisdiction over criminal law and therefore the Criminal Code, opposes physician-assisted dying and has expressed no desire to open the debate in Canada’s Parliament.

Currently four European countries – the Netherlands, Belgium, Luxembourg and Switzerland – and five states in the United States – Vermont, Oregon, Washington, New Mexico and Montana – permit physician assisted dying.

Despite Canada’s Criminal Code provision, in June 2014, the Canadian province of Quebec passed its own bill providing terminally ill patients with the right to choose to die. Section 26 of “An Act Respecting End-of-Life Care” specifies a number of conditions an individual must satisfy to request medical aid in dying.

Notably, a person must be in an advanced state or irreversible decline in capability, be of full age and capable of giving consent to care, and must request medical aid in dying in a “free and informed manner” by the means of a form signed in the presence of a health or social services professional. Quebec claims its legislation does not contradict the Criminal Code provision as the law deals with palliative care, which is within the jurisdiction of provinces in Canada, as opposed to criminal law, which is within the jurisdiction of the federal government.

Quebec’s law is set to take effect at the end of 2015, to give hospitals time to establish clinical protocols. Any challenges to Quebec’s legislation will likely be contingent on what the Supreme Court decides from last Wednesday’s hearing.

The Court has reserved its judgment and will likely release a decision within the next year.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

Supreme Court of Canada Strikes Down Ban on Physician Assisted Death
By Jennifer Koshan | 16th February 2015

In a landmark decision, on February 6, 2015 the Supreme Court of Canada unanimously struck down the criminal prohibition against physician assisted death (PAD) in Carter v Canada 2015 SCC 5. The Court declined to follow its 1993 decision in Rodriguez v British Columbia, which had upheld the prohibition, finding that both the legal framework and socio-legal context had changed since that time. In Carter, the Court held that the ban on PAD unjustifiably violates the rights to life, liberty and security of the person contrary to the principles of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms.

The decision focused on persons who have a grievous and irremediable medical condition causing suffering that is intolerable to them, and who clearly consent to the termination of life. The Court indicated that for such persons, denial of PAD presents a “cruel choice” – they can take their own lives prematurely, or suffer until they die from natural causes (at para 1). This choice engaged the right to life under section 7 of the Charter, which protects individuals from government actions that increase the risk of death directly or indirectly (at para 62). While the Court took no position on whether the right to life also includes a more qualitative right to die with dignity, it did affirm that section 7 does not create a “duty to live” (at para 63). Dignity was engaged by the rights to liberty and security of the person however. As noted by the Court, “an individual’s response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy” (at para 66).

Section 7 of the Charter requires proof that the violation of life, liberty or security of the person is contrary to the principles of fundamental justice. In Carter, the Court found that the prohibition against PAD violated these principles because it was overbroad. The object of the law – to protect the vulnerable from inducement to suicide at times of weakness – went further than necessary, as not all persons seeking PAD were vulnerable to such inducements.

The overbreadth of the law also meant that it could not be justified as a reasonable limit under section 1 of the Charter. While protecting the vulnerable – including persons with disabilities and the elderly – is a pressing and substantial objective, the Court rejected the government’s argument that an absolute ban on PAD was reasonably necessary to achieve this objective. The evidence showed that a regime permitting PAD with safeguards to allow physicians to ensure patient competence, voluntariness, and the absence of undue influence was feasible and would minimize the risks associated with PAD (at para 106). Evidence of a
“slippery slope” from other jurisdictions permitting PAD – such as Belgium and the Netherlands – was not seen as persuasive in the Canadian context. The Court clarified that some of the controversial cases arising in these jurisdictions, including euthanasia for minors and for persons with psychiatric conditions, would not fall within the scope of its decision (at para 111). It also clarified that its decision would not compel physicians to provide PAD, noting that their freedom of conscience and religion – protected under section 2(a) of the Charter – must be reconciled with the rights of patients (at para 132).

The relevant sections of the Criminal Code were declared void as applied to persons with grievous and irremediable medical conditions causing suffering intolerable to them who consent to the termination of life. The Court suspended this remedy for 12 months to allow Canadian lawmakers to respond with legislation meeting the requirements of its decision.

Carter is consistent with other recent decisions of the Supreme Court giving broad scope to section 7 of the Charter (see e.g. PHS Community Services Society and Bedford [2011] 3 SCR 134), and, in that context, was not unexpected. Unfortunately, however, the Court did not find it necessary to consider the equality rights claim under section 15 of the Charter that the ban on PAD had an adverse impact on persons with material physical disabilities who were unable to take their lives without physician assistance. As Jonnette Watson Hamilton and I have argued, consideration of the equality dimension of the case would have allowed the Supreme Court to clarify the law of adverse effects discrimination in Canada. It may also have allowed the Court to engage more deeply with the competing arguments of disability rights groups who intervened in Carter. Given that new legislation for PAD is now in the hands of government, it can be expected that this debate will continue in that realm.

Jennifer Koshan is a Professor in the Faculty of Law at the University of Calgary, Canada. Her teaching and research interests are in the area of constitutional and human rights law and violence against women.

Implementation of Carter will be the Ultimate Gauge of Success of the Decision
By Ravi Amarnath | 18th February 2015

In a unanimous judgment released on February 6, 2015, the Supreme Court of Canada became the ninth jurisdiction in the world to recognize some form of assisted death. The federal Parliament now has one year to redraft its criminal legislation to permit physician assisted death.

As discussed by Professor Jennifer Koshan in her Blog post, the substance of the judgment focused on sections 14 and 241(b) in Canada’s Criminal Code.
Section 14 of the Code provides: “No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given”. Section 241(b) of the Code makes it a punishable offence of up to 14 years in prison for any person to “aid or abet” another individual with taking their own life.

Applying section 7 of the Canadian Charter of Rights and Freedoms, the Court held these provisions are “void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition” (para. 127).

The Carter decision brings to an end a two-decade long debate over the constitutionality of criminalizing physician assisted death.

While the courts have now had their say on the matter, two major issues must be addressed to translate the decision into a workable system for Canadians.

First, while the federal government is responsible for redrafting the criminal legislation, Canada’s federal and provincial governments must determine whose responsibility it is to implement the healthcare scheme that permits assisted death.

The Carter judgment simply requires the federal government to amend the aforementioned Criminal Code provisions. The Court held: “It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons” (para. 126).

Under the Constitution Act, 1867, provinces are responsible for the “establishment, maintenance and management of hospitals” (s. 92(7)). For Canadians to have uniform access to assisted death, the federal and provincial governments must work together to implement a workable regime for these services.

The province of Quebec has already passed its own bill that permits physician assisted death and is set to take effect at the end of 2015. The Quebec government has not indicated whether the bill is subject to change following the Carter decision.

A worst case scenario for advocates of assisted death would be for the Criminal Code provisions to be revised, but for no uniformity in access to be reached nationwide.

In the case of abortion, for example, in 1988 in the case of R. v. Morgentaler, [1988] 1 SCR 3, the Supreme Court of Canada struck down a Criminal Code provision which required women to obtain a certificate from a therapeutic abortion committee prior to obtaining an abortion. To date, the federal government has not passed revised legislation and the practice is not standardized in Canada, leading to major discrepancies in access across the country.

The second major issue, hinted at by Professor Koshan, will be how to ensure any future scheme accommodates doctors who object to the practice of assisted death according to their constitutionally protected rights to religion and conscience.

The Court stated: “In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians’ colleges, Parliament, and the provincial legislatures.” (para. 132)

Any future scheme will have to balance the rights of these doctors while ensuring patients who seek assistance with death can be accommodated – something that is not unique to this area of health policy.

Recently, the College of Physicians and Surgeons for the Canadian province of Ontario released a draft policy paper which requires physicians who do not provide certain health services on moral or religious grounds to refer the patient to another health care provider. The draft policy is still under review by the College.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.
DEATH PENALTY

A New Opportunity for the UN to Move Forward the Global Abolition of Death Penalty
By Vincent Ploton | 16th December 2014

On the 2014 world day against the death penalty, Ban Ki Moon made a strong statement calling for global abolition. This declaration reflects a growing trend toward abolition, and yet 25 years after the adoption of the international treaty to abolish the death penalty, the level of ratification remains too low.

The United Nations’ commitment to eradicate the death penalty globally is quite evident. High Commissioners for Human Rights have consistently been calling on States to abolish and ratify the second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR OP2), which provides the best guarantee for sustainable and categorical abolition. 2014 was a particularly active year of UN engagement against the death penalty: in June, the Human Rights Council adopted a resolution which highlights abolition as a recurrent item of its work. In October, the OHCHR launched a specific webpage and a compilation of the most recent arguments and trends for global abolition. Two Special Rapporteurs, Christof Heyns and Juan Mendez, have also been quite vocal in calling for abolition. With 98 countries having abolished death penalty for all crimes, the global abolition movement has never looked so strong.

Despite these positive developments, the reality of the situation remains alarming in various ways:

- Only 81 states have ratified ICCPR OP2
- Several countries such as Indonesia or the Gambia have in recent years resumed executions after multiyear moratoriums
- The latest Amnesty International report on death penalty highlights a 15% increase in executions around the world compared to the previous year
- A small number of countries continue to hold the record for most executions carried out, namely China, Iran, Iraq and Saudi Arabia

Of these record executioners, Iran and Iraq, as well as another notorious executioner, the US, have ratified the ICCPR. That international treaty currently constitutes one of the most restrictive in regards to death penalty: it can only be applied for the most serious crimes and “pursuant to a final judgment rendered by a competent court” (Art.6). Yet the ICCPR, which has been ratified by 167 countries, does not strictly prohibit the application of death penalty.

A new opportunity for the UN to move abolition forward
The UN Human Rights Committee (HR Ctte), almost systematically recommends ratification of the international treaty on abolition
Capital Punishment in China: Room for Cautious Optimism?
By Roger Hood and Carolyn Hoyle | 12th January 2015

Recent weeks have seen the resumption of executions in Jordan, after an 8-year de facto moratorium, and in Pakistan, following the murderous terrorist attack on a school in Peshawar, along with news of numerous executions each week in Iran. While these are clear setbacks for those of us who believe that the use of the death penalty is in any circumstances an infringement on the universal human rights to life and freedom from cruel, inhuman and degrading punishment, they stand in sharp contrast to the declining use of the death penalty worldwide. Since the end of 1988, the number of actively retentionist countries (countries that have carried out judicial executions in the past 10 years) has declined from 101 to 39, while the number that has completely abolished the death penalty has almost trebled from 35 to 99, with a further 33 regarded as abolitionist in practice.

When a critical mass is reached and especially when influential powers abandon the death penalty, those who still maintain it will come under international pressure to conform to international standards for human rights in the enforcement of punishment. Asia – home to more than 90 per cent of global judicial executions – seems to be a thorn in the side of abolitionists, but even there the picture is somewhat optimistic, as its approach to capital punishment has changed considerably in the past decade.

In 2004 the statement that ‘the State has respect for and protects human rights’ was written into the constitution, and beginning around the turn of the millennium there was a distinct change in the discourse, evidenced by the willingness of the Chinese authorities to discuss the death penalty in human rights seminars and dialogues with European countries and the gradual opening up of the subject to research. There followed three significant reforms.

In order to ensure more uniformity in the imposition of the ultimate sanction, and to reduce its infliction only for the most serious crimes, the Supreme People’s Court (SPC) decided in 2004 that it would in future review all death penalty cases itself. The new review system came into effect on 1 January 2007, with an order that execution should be reserved for ‘an extremely small number of serious offenders’ and carried cautiously in order to avoid wrongful executions. Three months later, China’s representative, Mr La Yifan, promised the UN Human Rights Council that the scope of the death penalty would be reduced ‘with the final aim of abolition,’ in line with UN resolutions. Change came in 2011, with the Eighth Amendment to the Criminal Law which removed 13 non-violent capital offences from the criminal law and excluded the elderly from the death penalty, unless the crime was exceptionally atrocious. Since then, plans have been announced to abolish it for nine more non-violent crimes.

Another factor that has helped to reduce the rate of executions is the increasing use of ‘Sihuan’, which suspends death sentences for a period of two years to give the convicted person an opportunity to show that they have repented. And from January 2007, the SPC President instructed lower court judges to use immediate execution ‘only as a last resort and only for the most serious criminals’.

While the number of death sentences and executions regrettfully remains a state secret (which is widely regarded as a human rights abuse in itself), they appear to have declined significantly. Indeed, in December 2011, it was revealed at a seminar jointly organized by the UN Office of the High Commissioner for Human Rights and China’s Foreign Ministry that since the SPC regained the final review power over death sentences in January 2007, the number of executions had dropped by approximately 50 per cent. It has been estimated that China executed 4,000 people in 2011, half of the estimated total for 2006. While this is intolerably high, it is undoubtedly a significant reduction on past rates. But perhaps as important as execution rates is the changing nature of the relationship between Europe and China and the success of European ‘soft power’ to bring about political and cultural change.

The upcoming Human Rights Committee general comment on Art. 6 (Right to life) provides a new opportunity for the Committee to clarify its interpretation of the Covenant in favour of abolition, and to encourage or request ratification of OP2 as a related obligation under Art.6. In a 1982 General Comment, the Committee had already stated that Art.6 “refers generally to abolition in terms which strongly suggest … that abolition is desirable”. The current momentum for a global moratorium provides a good window of opportunity for the Committee to set the interpretation standard for Art.6 even higher.

Let us hope that the global movement of individuals and institutions speaking out against the death penalty will seize the opportunity of the upcoming ICCPR general comment, and use it to voice their views on how the ICCPR interpretation can be improved even further to favour abolition.

Vincent Ploton has been working in different humanitarian and human rights organisations for the past ten years. He is currently the Head of External Relations at the Centre for Civil and Political Rights.
While Chinese political leaders still strongly defend capital punishment as an essential tool to fight crime and preserve social order in a country of 1.3 billion that is undergoing wrenching economic and social changes, the former defensiveness has largely evaporated and the debate has come to centre on how abolition might be achieved and what lessons can be learned from experiences abroad in this regard; how, pending eventual abolition, pre-trial and fair trial procedures with adequate legal defence in cases liable to the death penalty can be brought into line with international standards to guarantee procedural justice; how the number of citizens put to death can be restricted and the infliction of the death penalty be based on more rational criteria and made more equitably; and how public opinion can be moderated and cultural attitudes changed to make abolition acceptable to both the masses and the legislative and judicial elites. Efforts by the UN, the European Union, the Council of Europe, and the UK Foreign and Commonwealth Office are clearly paying off.

Professor Roger Hood is Professor Emeritus of Criminology and an Emeritus Fellow of All Souls College, and former Director of the Centre for Criminology at the University of Oxford.

Professor Carolyn Hoyle is Director of the Centre for Criminology in the Faculty of Law and Fellow of Green Templeton College at the University of Oxford.

Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation
By Gautam Bhatia | 5th February 2014

Recently, in the case of Shatrughan Chauhan v. Union of India, 1 Writ Petition (Criminal) No.55 of 2013, a three-judge bench of the Indian Supreme Court delivered a landmark judgment on the death penalty: holding, in particular, that an excessive delay in carrying out the death sentence was an essential mitigating factor in a plea for commutation. In doing so, it joined jurisdictions such as the United States and the Privy Council, and overruled its own 2013 judgment in Bhullar v. NCT, Writ Petition (Criminal) D.No. 16039 of 2011.

In Bhullar, the Supreme Court relied upon a concurring judgment in the previous case of Triveniben 1989 SCR (1) 509 that appeared to hold that delay need not be a ground for commutation. The Court drew a distinction between ordinary capital crimes and capital crimes under terrorism statutes (at issue in Bhullar). It held that because of the serious nature of the crimes involved, an excessive delay in processing a death row convict’s mercy petition need not be a ground for commuting the death sentence to life imprisonment. Thus, the Court had effectively held that the nature of the capital crime determined the due process treatment that the convict was entitled to.
In Shatrughan Chauhan, the Supreme Court comprehensively rejected this reasoning. It held that the Bhullar court had overlooked the Triveniben’s majority judgment’s contrary stance that a delay in carrying out the death sentence was, indeed, one ground for commutation; and thus, the Court held Bhullar to be per incuriam (i.e. decided without reference to an earlier relevant judgment, and thus having no force as precedent). The Court held, on the other hand, that: “There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence.” (para 63)

The Court, however, refused to provide a specific time after which a delay would render commutation necessary, and held that each case would be adjudicated on its own merits. In essence, the Court thus made delay an essential mitigating factor. This would be considered on the Court’s “balance sheet” enquiry, under which it draws up a list of aggravating and mitigating factors, in order to decide whether or not to award the death penalty in a particular case.

At the heart of the argument is the idea that keeping a death row convict under the shadow of death for years is a form of cruel, inhuman and degrading punishment that no civilized society (whether or not it allows capital punishment) should inflict upon human beings. The inevitable mental agony that accompanies waiting for an inevitable death, demeans individual dignity. Insofar as the Court has interpreted Article 21’s guarantee of the right to life to include treating all individuals with dignity, the judgment reaffirms the humanism that is the foundation the Constitution, and that whatever the crime might have been, human beings continue to have a legitimate claim to be treated with dignity under the Constitution.

The Court further held, referring to a copious body of foreign law and international law, that insanity was a ground for commutation (paras 71 – 78); this is justified by our basic, intuitive notion that persons in a democracy ought to suffer penalties and burdens only to the extent that they are responsible for the actions that they undertake – and that punishment must respond not just to the nature of the crime, but to the ability of the actor to understand or comprehend the nature of his actions.

Coming to the fifteen individual cases before it, the Court applied the delay principle to reduce the sentences to life imprisonment. It ended by framing guidelines for the purpose in future, laying down various requirements such as the written communication of the outcome of a mercy petition to a convict and his family, the provision of free legal aid, a post-mortem report to verify whether hanging, as a form of capital punishment, caused undue amounts of pain, and so on.

The Shatrughan judgment is a progressive step in Indian death penalty jurisprudence. Perhaps it is best to leave the last word to the Court, in its penultimate paragraph, suggesting not just that the death penalty should be administered humanely, but that the very idea – say it softly – of State-sanctioned killing of human beings has no place in a civilized democracy:

“Remember, retribution has no Constitutional value in our largest democratic country.” (para 263)

Gautam Bhatia is a legal academic, and a practicing lawyer based in New Delhi, India. His book, Offend, Shock or Disturb: Free Speech under the Indian Constitution, will be published by OUP in August 2015.

Meriam Ibrahim Saved from 100 Lashes and the Death Penalty
By Jon Yorke | 28th June 2014

On 11 May 2014, Meriam Yahia Ibrahim was found guilty by the Al-Haj Yousif Criminal Court of charges under the Sudanese Penal Code (1991), Articles 126 for the crime of ridda (apostasy from Islam) and 146 for the crime of zena (unlawful intercourse in the act of adultery).

Her husband, Daniel Wani, a US citizen, was not found guilty, but Mrs Ibrahim was sentenced to 100 lashes for the zena crime and death by hanging for the ridda crime. These are Shari’a Hudud punishments. She was detained in the Omdurman’s Women’s Prison, with her 20 month old son, and on 27 May, whilst shackled, she gave birth to a daughter.

On 22 May, Mrs Ibrahim’s lawyers filed in the Sudanese Court of Appeal, in the Khartoum North and Sharg-el-nil Criminal Circuit, and claimed that the lower court had made errors in both procedure and merit.

It was argued in the defence petition that the court made a procedural error in that it did not have jurisdiction to hold the marriage null and void, and that the Personal Status of Muslims Code 1991 contained no conclusive provision banning such marriage (Christian and Christian, see below). Further, Article 61 of the Code establishes that, “a void marriage does not yield any consequence of marriage,” and yet, it was argued, “this judgment has impacted directly on the Appellant, her child and her [then] unborn baby.”

As to the merits, after stating that there is “no compulsion in religion” (Surat Al-Baqara, verse 256), the defence brief identified that Mrs Ibrahim had been a Christian who attended Khartoum Catholic Church, and met her husband whilst a practising Christian. Her marriage was conducted in public at the church on 19 December 2011, and the authorities only became aware of the Ibrahim family
in September 2013 when a man claiming to be her brother, informed the authorities that she had married a Christian and that she had committed adultery. It was the misrepresented position of her personal faith and beliefs that set in motion the horrific events that followed.

Mrs. Ibrahim’s lawyers, along with Redress, the African Centre for Justice and Peace Studies, the Sudanese Organization for Development and Rehabilitation, the Sudanese Human Rights Initiative and the Justice Center for Advocacy and Legal Consultancy, submitted a Complaint on 2 June, with the African Commission on Human and Peoples’ Rights. On 10 June, an Urgent Appeal was lodged with the Special Rapporteur on Women’s Rights, Soyata Maiga. It was claimed that Sudan had violated the African Charter on Human and Peoples’ Rights (“ACHPR”).

In essence, the claims were that Mrs Ibrahim suffered gender and religious discrimination under ACHPR, Articles 2 and 3, suffered torture and ill-treatment under Article 5, and that her right to liberty and security of the person had been violated under Article 6. Her right to a fair trial had been violated under Article 7, and her freedom of conscience and religion was violated under Article 8. Furthermore, her children’s rights were violated, contrary to Article 18(1), which states that “the family…shall be protected by the State which shall take care of its physical health and moral.”

As these appeals were pending, there was an immense global outcry by politicians and civil society, and on 31 May, Abdullahi Alazreg, Under-Secretary of the Sudanese Foreign Ministry, appeared to speak out of turn as he indicated that Mrs Ibrahim would be released. However, the domestic courts, and the African Commission, were still considering the case and so this statement was premature.

The Sudanese Court of Appeal judgment of 22 June, which overrules the Al-Haj Yousif Criminal Court judgment, is to be commended. It is judicial affirmation of the rule of law and a protection of human rights.

However, this case, and the international exposure it has received, has demonstrated that there are serious questions concerning women’s rights, religious freedom, the protection of the family, and the welfare of children, which the government of Sudan must address. If there is not legislative change to remedy these deficiencies, it is hoped that the lower courts in Sudan will adhere to this Court of Appeal decision and protect others from the horrific treatment which the Ibrahim-Wani family has recently endured.

Dr Jon Yorke is a Reader in Law at Birmingham City University. He is a Member of the Foreign Secretary’s Expert Panel on the Death Penalty and has been a consultant for the United Nations and the European Union, advising on death penalty issues.

**Federal Judge Strikes Down California Death Penalty as Unconstitutional**
Carol S. Steiker | 6th August 2014

In a stunning – and possibly prescient – decision of Jones v Chappell, Case No.: CV 09-02158-CJC, the United States District Court Judge Cormac J. Carney of the Central District of California struck down the state of California’s death penalty system as unconstitutional under the Eighth Amendment’s prohibition against cruel and unusual punishment.
Instead of addressing the particularities of the defendant’s case, Judge Carney widened his lens to scrutinize the California death penalty system. He noted that while over 900 people have been sentenced to death since California’s current system was adopted in 1978, only 13 have been executed. He observed that California’s lengthy delays between sentence and execution have “quietly transformed” a sentence of death into a sentence that “no rational jury or legislature could ever impose: life in prison, with the remote possibility of death.” In such a system, Judge Carney concluded, the “random few” who actually do eventually get executed “will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.”

This decision is extraordinary along a number of dimensions.

First, the messenger: Judge Carney is no bleeding heart liberal on criminal justice matters. He was appointed to the federal bench by Republican President George W. Bush after serving briefly as a California state court judge in conservative Orange County following a substantial career in private practice. A ruling from an experienced, cautious, and non-ideological jurist like Judge Carney will and should receive careful attention.

Second, the zeitgeist: We are in an extended period of greatly increased skepticism about the American death penalty. Today, executions are down more than half from their nationwide peak in the late 1990s, and new death sentences are down by more than two-thirds. Six states have legislatively repealed capital punishment over the past decade. Concerns about wrongful convictions in capital cases and botched executions from lethal injection protocols are on the rise. Judge Carney’s decision adds a new critique to the growing chorus of consternation.

Finally, the context: California has long been known as Exhibit A in the case against the American death penalty on procedural dysfunction grounds. As Judge Carney points out, execution is not the leading cause of death on California’s Death Row. Indeed, execution is not even the second leading cause of death on California’s Death Row; it comes in third after natural causes and suicide. Such a system cannot possibly deliver any benefit from the rare and random execution that does eventually occur. California’s systemic dysfunctions may be extreme in their degree, but they are not unusual. Across the country, the steep decline in death sentences and executions has rendered capital punishment both more rare and random than it has been in decades.

The current dysfunctional state of the American death penalty is not without precedent, however. In the 1960s and early 1970s, a spate of legislative abolitions preceded a steep decline in public support and use of capital punishment. The few death sentences that were imposed were the product of broad and standardless sentencing statutes that permitted, even invited, arbitrary application. These conditions led key swing Justices Potter Stewart and Byron White to join the five-Justice majority that (temporarily) invalidated the American death penalty in the landmark decision of Furman v. Georgia in 1972 408 U.S. 238. As Justice Stewart wrote, the Constitution “cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” Justice White agreed on the ground that arbitrary imposition of the death penalty could not serve the punishment’s legitimate penological goals of deterrence or retribution:
Glossip v. Gross: SCOTUS to Consider Oklahoma’s Lethal Injection Protocol

By Jon Yorke | 4th February 2015

On Friday 23rd January, 2015, the US Supreme Court granted three Oklahoma death row inmates certiorari to challenge the state’s three-drug lethal injection protocol. In Baze v. Rees 553 U.S. 35 (2008), it was held that an execution protocol which provided for an initial injection of a fast-acting barbiturate (sodium thiopental), then a paralytic agent (pancuronium bromide) which stops respiration, and finally a drug to induce a cardiac arrest (potassium chloride), did not violate the US Constitution’s Eighth Amendment’s Cruel and Unusual Punishments Clause.

In Warner v. Gross, (No. 14-6244, 12 January, 2015) the United States Court of Appeals for the Tenth Circuit, denied a challenge to Oklahoma’s adoption of midazolam as a replacement for sodium thiopental. As a result of the post-Baze decline in Food and Drug Administration licences to American pharmacological companies to supply drugs to state and federal prisons for the use in executions, and the contributory effect of international human rights law, such as the EU’s Commission Implementing Regulation (EU) No. 1352 (2011), there has been a depletion of supplies of sodium thiopental for the use by American prisons in the death penalty.

The retentionist states have had to identify an alternative drug to formulate an execution. Whilst Baze acknowledges that “some risk of pain is inherent in any method of execution,” and that “the Constitution does not demand the avoidance of all risk of pain in carrying out executions,” a violation of the Eighth Amendment does occur when “the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering,” and give rise to “sufficiently imminent dangers.”

The current litigation has introduced substantial medical evidence that Oklahoma’s use of midazolam produces adverse reactions. On 29 April 2014, midazolam was used in the execution of Clayton Lockett. He strained on the gurney in extreme physical pain, claiming, “something is wrong” and the “drugs aren’t working.” He was not in a “coma-like state” following the initial drug, and the execution team observed a large swelling at the IV access point. The White House released a statement that the execution, “fell short of humane standards.”

There is significant doubt as to whether midazolam can effectively act as a sedative in compliance with the Baze criteria and the three questions the US Supreme Court will consider in Glossip v. Gross are:

1. Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious?
2. Does the Baze-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in Baze?
3. Must a prisoner establish the availability of an alternative drug formula even if the state’s lethal-injection protocol, as properly administered, will violate the Eighth Amendment?

The first two questions can be classified as normative constitutional issues within the assessment of the protocol. The third question places upon the defendant the task of establishing to a degree of medical certainty that the sedative will not act in accordance with constitutional standards. It potentially will place the burden on the defendant to establish that there is an alternative protocol that if the state adopts, will produce an execution of the defendant that does meet the Baze criteria.

Are we going to see the Court establish a new rule that assessing the legitimate standards set out in Baze, for pain in punishment, shifts from the responsibility of the state to the responsibility of the prisoner? This would be a quixotic result. What the litigation concerning the Oklahoma protocol demonstrates is that there are still, and perhaps always will be, irredeemable consequences that...
renders lethal injection a form of torture.

Dr Jon Yorke is a Reader in Law at Birmingham City University. He is a Member of the Foreign Secretary’s Expert Panel on the Death Penalty and has been a consultant for the United Nations and the European Union, advising on death penalty issues.

Executing the Intellectually Disabled: A Stronger Prohibition
By Jon Yorke | 12th June 2014

On 21 February 1978, Freddie Hall and his accomplice, kidnapped, raped and murdered a young woman, and in a separate incident, killed a sheriff’s deputy. Hall’s siblings, teachers, and the Florida sentencing judge acknowledged that he was raised under horrific family circumstances. As a child, he was beaten between ten to fifteen times a week.

There is substantial evidence that Hall suffers from a severe intellectual disability, and it is clear that he was unable to contribute effectively to his own defence. However, this evidence was not considered enough to mitigate the capital offence. In Hall v. State No. SC10-1335 the Florida Supreme Court upheld his death sentence, holding that because his IQ was identified at 71, he was above a strict threshold of 70, as established in Cherry v. State No. SC02-2023.

Previously, the U.S. Supreme Court in Atkins v. Virginia 536 U.S. 304 (2002) had used diagnostic standards to formulate a three pronged test for identifying intellectual disability for capital proceedings – (a) significant sub-average intellectual functioning (established through an IQ test); (b) deficits in adaptive functioning (the inability to learn basic skills and adjust behaviour to changing circumstances); and, (c) onset of defects during the developmental period (e.g. before 18 years of age).

The Florida statute acknowledges the diagnostic flexibility for Atkins proceedings, but the Florida Supreme Court interpreted the statute narrowly, at variance with the American Psychiatric Associations’ (APA) Diagnostic and Statistical Manual, which provides that, “A person with an IQ score above 70 may have such severe adaptive behaviour problems...that the person’s accrual functioning is comparable to that of individuals with a lower IQ score.” The APA amicus curiae brief stated, “the relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist.”

In Hall v. Florida 572 U.S. ___ (2014) decided by the US Supreme Court on 27 May, 2014, Justice Kennedy held, in a 5-4 majority, that the Florida Supreme Court ruling disregards established medical practice as it takes the IQ score as final and conclusive evidence of a defendant’s intellectual capacity. Furthermore, while experts say that IQ should be taken within a “standard error of measurement,” the Florida Supreme Court used the test score as a fixed number, thus denying the imprecise nature of diagnosis.

Justice Alito dissented, joined by Chief Justice Roberts, and Justices Scalia and Thomas, stating that “what counts are our society’s standards – which is to say, the standards of the American people – not the standards of professional associations, which at best represent the views of a small professional elite.”
However, Justice Alito provided no specific guidance to demonstrate how “American society” is better equipped than the “small professional elite” to determine complex cognitive evaluations. He further inadequately opined that “the Court implicitly calls upon the Judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change.”

The judicial system will always have to grapple with the ethical and scientific questions posed by advances in medicine. The courts can most appropriately do this after and not before new medical techniques, diagnosis and treatment, are identified.

Justice Kennedy did not base his decision upon diagnostic standards. He used evaluative criteria to inform the adjudication of what is considered appropriate protection of human dignity under the Eighth Amendment’s prohibition against, “cruel and unusual punishments.” He held, “Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.”

It is not insignificant that he shifts the focus from the “Nation” to the “world.” It reflects the evolving international discourse that the death penalty is a violation of human dignity, most specifically advanced by the European Union and the Council of Europe, and it is consistent with the denunciation of the death penalty for persons suffering from intellectual disabilities in R.S. v. Trinidad and Tobago.

The furtherance of dignity and decency is our global, cosmopolitan, call. If the dissenters had had their way, simply put, it would have made it easier for states to execute people with intellectual disabilities. Justice Kennedy’s judgment is a victory for human rights and the evolution of science and medicine.

Dr Jon Yorke is a Reader in Law at Birmingham City University. He is a Member of the Foreign Secretary’s Expert Panel on the Death Penalty and has been a consultant for the United Nations and the European Union, advising on death penalty issues.

WHOLE LIFE SENTENCES

Hutchinson v UK – A Change in Direction on Whole Life Orders?
By Neil Shah 23rd | February 2015

The European Court of Human Rights (ECtHR) has ruled in Hutchinson v UK 2015] ECHR 111 that the imposition of a ‘whole life order’ for murder does not violate Article 3 ECHR. The decision, a clear victory for the UK, is surprising given the Court’s previous case law and is unlikely to be the last word on this controversial issue.

The case concerned a challenge brought by Arthur Hutchinson who was convicted in 1984 for three counts of murder, rape and aggravated burglary. The circumstances of the crimes were particularly egregious with the then Lord Chief Justice commenting that Hutchinson should never be released “quite apart from the risk that would be involved”. The Home Secretary (then responsible for determining the minimum term a prisoner should serve after a murder conviction) imposed a whole life order. Following the passing of the Criminal Justice Act 2003 Hutchinson applied for that sentence to be reviewed. Tugendhat J held that there was no reason to change it and the Court of Appeal dismissed Hutchinson’s appeal. Hutchinson accordingly turned to the ECtHR.

In July 2013 the Grand Chamber of the ECtHR held in Vinter [2013] ECHR 66069/09 that the imposition of whole life orders under English law did violate Article 3 because the law lacked clarity as to the existence of an Article 3 compliant review mechanism (the Court stated that for a sentence to be Convention compliant there had to be a prospect of release and possibility of review and that the mechanism for this had to exist at the time the sentence was passed). A specially constituted Court of Appeal considered this decision in R v McLoughlin [2014] EWCA Crim 188 and expressly rejected the ECtHR’s conclusion. Instead it implied that the ECtHR had misunderstood English law, set out how domestic law would treat applications for release and declared that it did provide offenders with a clear hope or possibility of release in exceptional circumstances (a power which, under the relevant legislation, is the Secretary of State’s to exercise).

Hutchinson argued that this was insufficient, that the reasoning of the Court of Appeal in McLoughlin did not differ in substance from earlier English decisions which Vinter had considered before nevertheless finding a violation, and that review of whole life orders required a judicial not executive decision. One might have expected these arguments to succeed, not just in light of Vinter, but also the court’s other recent decisions (considering this issue albeit in different contexts) in Magyar v Hungary [2014] ECHR 491 and Trabelsi v Belgium [2014] ECHR 893. The Court of Appeal may have confidently declared that English law was clear but nothing has actually been done to remove the uncertainty of what steps a prisoner needs to take, from the time of incarceration, to be considered for eventual release – one of the ECtHR’s main sticking points.

Yet the Court’s Fourth Section rejected them noting that given a Contracting State’s margin of appreciation it was not its task to prescribe the form (executive or judicial) that a review should take and, significantly, that the Court of Appeal’s direct and reasoned
response to the Grand Chamber’s concerns in Vinter was sufficient; the Court of Appeal, it said, had set out an “unequivocal statement of the legal position” and the ECtHR had to accept that interpretation of domestic law. As such there was no violation of Article 3.

Much has been said of the importance of judicial dialogue between Strasbourg and our domestic courts, particularly in the current climate (see for example Natasha Holcroft-Emmess’ post) but Hutchinson simply muddies the waters. The decision undercuts Vinter without saying so. The ECtHR has back pedalled in the past (the Grand Chamber’s decision in Al-Khawaja and Tahery [2011] ECHR 2127 in response to R v Horncastle [2009] UKSC 14 is one example) but it must acknowledge that such is the course being taken. If Vinter went too far in requiring the existence of a detailed review mechanism at the time of incarceration (with the English system therefore being sufficiently Convention compliant) then Strasbourg should say so; if it didn’t (which seems more likely) then it is hard to see how McLoughlin really addresses one of the key areas of complaint. Ambiguous and contradictory decisions are not conducive to legal certainty and it seems likely that Hutchinson will go to the Grand Chamber.

Neil Shah is a barrister at Coram Chambers and is a former BCL student of St. Cross College, University of Oxford.

Whole Life Sentences in Hutchinson v UK – Compromise or Concession?
By Natasha Holcroft-Emmess | 5th February 2015

In Hutchinson v UK [2015] ECHR 111 the ECtHR again addressed the vexed question of the compatibility of whole life sentences with human rights law. This post analyses the Chamber decision, recognising the value of judicial dialogue, but also highlighting cause for concern where problematic questions remain.

The starting point is the Grand Chamber case Vinter v UK [2013] ECHR 66069/09. In this decision, the highest authority in the ECtHR criticised the English law on mutability of whole life sentences. It was held that the narrow scope for reducibility of such sentences under s 30 Crimes (Sentences) Act 1997, on compassionate grounds limited primarily to terminal illness or physical incapacitation, was incompatible with Article 3 ECHR (freedom from inhuman and degrading treatment / punishment).

In McLoughlin [2014] EWCA Crim 188, the Court of Appeal disagreed with the ECtHR. Despite the restrictive written policy of the Secretary of State, found in the 1997 Act and the Lifer Manual, the court held that Article 3 was adequately protected. This was because the Secretary of State was obliged to make decisions compatibly with Article 3, and this would involve a consideration of all the relevant ‘exceptional circumstances’. The effect of the Court of Appeal decision was that it did not matter that the policy on reducibility of sentences has not been reformulated. The combination of that policy with the judicial interpretation provided by the Court of Appeal made the law sufficiently clear and did not violate Article 3.

In Hutchinson, a majority of the Chamber accepted this approach. The majority relied on the practice of allowing questions of interpretation of domestic legislation to be resolved by the national authorities. This was enough to satisfy the majority that the law is now sufficiently clear.

There is a positive corollary of this vexed debate. It seems that the courts are working on the basis of a (gradually developing) consensual acceptance that reducibility of sentence is key. These cases also provide an example of judicial dialogue between the domestic and supranational courts, which should assist to cement the ECtHR as an important forum in human rights debates.

However, problems remain. It is doubtful whether this jurisprudence suffices to address the concerns of the Grand Chamber in Vinter. At [126] the Court held that it “must be concerned with the law as it presently stands on the published policies as well as in judicial dicta and as it is applied in practice to whole life prisoners. The fact remains that … the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his section 30 power. "Should not the published guidance of the executive be required to match the scope of the legal policy set out by the Court of Appeal? It hardly begets legal certainty that these decisions rest with the Secretary of State, who appears to have free rein over what counts as ‘exceptional circumstances’.

In a dissenting opinion, Judge Kalaydjieva questioned the assumption that the Grand Chamber was not fully informed about the scope of the Secretary of State’s discretion, and the manner of its exercise, in reaching its conclusions in Vinter. Her dicta, although cautious, appear to be quite telling: “I do not deem myself competent to determine whether the Court of Appeal expressed an ex tunc trust or an ex nunc hope that, even though to date the Secretary of State for Justice has not amended the content of the Lifers Manual after Vinter, he was, is and always will be “bound to exercise his power … in a manner compatible with Article 3” … [I]n so far as the Court of Appeal’s part in the admirable post-Vinter judicial dialogue said “Repent!”, I wonder whom it meant?”

Perhaps it is relevant that the Chamber’s acceptance of the Court of Appeal’s gloss on the UK rules comes at a time when the ECtHR is particularly vulnerable. The entire debate has been played out in the shadow of political contentions to renegotiate the UK’s relationship with the ECtHR. It is argued that good judicial dialogue and steadying relations between the UK and ECtHR are
valuable. But the ECtHR must be careful not to take concessions where more could be done to ensure adequate protection for human rights, especially where rights as important as liberty may be compromised.

Natasha Holcroft-Emmess is currently studying for the LPC. She has recently completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

Throwing Away The Key – Whole Life Sentences in the Court of Appeal
By Natasha Holcroft-Emmess | 1st March 2014

Flouting the judgment of the European Court of Human Rights (ECtHR) in Vinter v UK [2013] ECHR 66069/09, the UK Court of Appeal has held that whole life sentences do not violate Article 3 ECHR (R v McLoughlin [2014] EWCA Crim 188– see Neil Shah’s post). This post explains why the Court of Appeal decision is wrong and why it matters.

Article 3 ECHR prohibits inhuman and degrading treatment and punishment. The ECtHR held that UK sentencing law permitting whole life orders violates Article 3 because it does not allow for any real possibility of review. As the law currently stands, the only prospect of release for a whole life prisoner is ‘under compassionate grounds in exceptional circumstances’. In reality this means only if such a prisoner is severely physically incapacitated or terminally ill.

Does this fit with the requirement of a review of imprisonment to determine whether it continues to serve a legitimate penological purpose? No. In such circumstances, would allowing a prisoner to die on the outside, rather than behind prison walls, constitute a meaningful prospect of release, sufficient to satisfy the prohibition on inhuman and degrading treatment? No. Does the current UK law, as recently upheld by the Court of Appeal, comport with the basic standards of respect for human dignity which underlie the spirit of the human rights obligations accepted by the UK under the ECHR? No.

For these reasons, the Court of Appeal’s decision to flout the ECtHR jurisprudence on whole life sentences is wrong. It denies minimalist procedural protection for a substantive right of fundamental importance.

To be entirely clear: people still can, and should, be imprisoned for a very long time for very serious crimes. That imprisonment can and, in many cases, will last until the end of such prisoners’ lives. All that Vinter said was that imprisonment must be reviewed after lengthy periods. We cannot throw away the key. To do so constitutes inhuman and degrading treatment. The availability of review
does not deny the seriousness of the crimes which these people committed. All it does is preserve the bare minimum of the basic rights afforded to all human beings.

Some in the media have argued that such decisions, which bring the ECtHR into conflict with the UK politically, actually undermine human rights, because protecting prisoners’ rights discredits the ECtHR’s judgments and gives human rights a ‘bad name’. But these are in fact exactly the cases in which human rights protection is most needed.

UK laws are, and should be, made by a sovereign Parliament. But these laws are instigated and supported by governments and parliamentarians who are keen to please the voting majority. They are therefore susceptible to the views of this majority. The majority often either takes no interest in, or effectively suppresses, the interests of minorities. Prisoners are a minority group which the majority actively dislikes. As a result, their interests are marginalised, and little account is taken of them in the laws which the representatives of our majoritarian democracy enact. Yet, just because these people are subject to the criminal law does not mean that they forfeit the rights which are afforded to everyone by virtue of their humanity. It is well established in domestic UK law that prisoners retain their human rights.

It is in these situations that human rights are most needed. They are not discredited where they protect the interests of unpopular minorities in society. On the contrary, such situations show that human rights are achieving their most difficult and important objective: protecting the basic rights of the marginalised from suppression by the prevailing majority.

That is why getting it right matters. That is why we cannot throw away the key.

Natasha Holcroft-Emmessa London-based solicitor. She completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

---

**Court of Appeal Affirms Ability to Pass Whole Life Tariffs for Murder**

By Neil Shah | 20th February 2014

A specially constituted five-member Court of Appeal has ruled unanimously in R v McLoughlin [2014] EWCA Crim 188 that the imposition of a ‘whole life order’ for murder not does violate Article 3 ECHR. The case is particularly noteworthy given the contrary position reached by the European Court of Human Rights (ECtHR) in Vinter [2013] ECHR 66069/09.
**Criminal Justice**

Chapter 4

The case concerned appeals brought by three persons convicted of murder and given whole life orders and one reference by the Attorney General under section 36 of the Criminal Justice Act 1988 that a minimum term of 40 years was ‘unduly lenient’. In the latter case the trial judge considered, in light of Vinter, that he was prohibited from passing a whole life order and thus imposed the lighter sentence. One appellant abandoned his appeal and it was confirmed that another had not in fact received a whole life order; as such only the cases of McLoughlin (the AG’s reference) and Newell, two persons convicted of murder for a second time, were determined.

English law mandates that those convicted of murder receive a sentence of life imprisonment. The trial judge sets a minimum term that must be served before the prisoner can be considered for release by the Parole Board; in some cases the judge may determine that the minimum term is the offender’s whole life. The statutory scheme governing such decisions is found in section 269 and schedule 21 of the Criminal Justice Act 2003. Further, section 30 of the Crime (Sentences) Act 1997 gives the Secretary of State the power to release a life prisoner in exceptional circumstances on compassionate grounds.

In Vinter the ECtHR held that for a sentence to be compatible with Article 3 there must be a “prospect of release and a possibility of review” as detention always had to have a legitimate penological purpose and the original justification could shift over time. The Court stated that a review mechanism must exist at the time the sentence is passed and that a life prisoner should know what to do to be considered for future release and not have to serve an indeterminate number of years before being able to complain that his sentence was no longer justifiable. In finding a breach of Article 3 the ECtHR stated that English law lacked clarity and certainty as despite authority indicating that section 30 should be interpreted broadly the Prison Service Order was drafted in extremely restrictive terms (providing, essentially, for release on compassionate grounds only when a prisoner was terminally ill).

The Court of Appeal expressly disagreed with Strasbourg on this point. The fact that the Order had not been changed was of “no consequence” because English law was “clear” as to the possibility of release in exceptional circumstances and the Secretary of State in exercising that power (a decision subject to judicial review) would have a duty to act in a Convention-compliant manner and could not be restricted by the Order. There was therefore no incompatibility between Article 3 and existing English law and courts could continue to hand down whole life orders. In the present case, McLoughlin’s sentence was thus increased to a whole life order and Newell’s appeal was dismissed.

The Court of Appeal’s judgment is certainly a victory for the government, yet it does leave questions unanswered. Thus, what constitutes ‘exceptional circumstances’ has been left open with the Court expressly noting that it was difficult to specify what these might be. Individual offenders may still therefore remain unclear as to what they need to demonstrate and when in order to be considered for compassionate release (both points of issue for Strasbourg). It could of course be argued that it is impossible to specify a ‘when’ at the time of incarceration (notwithstanding Vinter) as the very point of a whole life order is that, at the time of sentencing, it is seen as the only just order. As for the ‘what’ the simplest solution might be to revise the Prison Service Order. In fact it seems nonsensical not to when on the face of it the policy stated therein is not Convention-compliant. Indeed, had the government done this in the first place the need to go back to the Court of Appeal might have been avoided entirely.

Neil Shah is a barrister at Coram Chambers and is a former BCL student of St. Cross College, University of Oxford.

**Perpetual Life Sentences, Reformation and the Indian Supreme Court**

By Vishwajith Sadananda | 12th April 2014

It is trite to say, or so we hope, that a retributive criminal justice system has no place in a society conceived from the idea that human rights in general, and human dignity in particular, is of paramount importance. As civilized societies dedicated to democracy and constitutionalism, a system of reformatory justice seems but natural.

However, while perhaps indicating a move towards tacit judicial abolition of the death penalty (para 264), the Indian Supreme Court is now moving towards another extreme direction whereby indefinite life imprisonment (LI) is becoming the norm. To effectuate the same, the Supreme Court has been following two different approaches:

1. Explicitly mandating, in cases such as Swarmy Shraddananda v State of Karnataka Criminal Appeal No.454 of 2006, that remission, except by the Governor or President under their constitutional powers, would not be granted to the convict by the State (though the power to grant remission is the sole prerogative of the Executive).
2. Mandating sentences of convicts under multiple charges to run consecutively, and not concurrently, as was the case in Shankar Kisanrao Khade v State of Maharashtra Criminal Appeal No.362-363 of 2010. To put it simply, if a person has been convicted under three separate charges and given 25 years LI under each charge, after the completion of the first sentence under the first charge, the sentence under the second charge would kick in. As a result, even if the Court does not rule out the option of remission explicitly, it becomes next to impossible to seek the same due to the consecutive nature of the sentences.

This approach seriously undermines the rehabilitative approach that a responsible State ought to pursue. Not only is this approach...
not in consonance with reformatory criminal jurisprudence per se, but also contradictory to the approach taken in a number of previous Supreme Court decisions which require the Court to determine whether or not a convict can be reformed and rehabilitated (and which therefore highlight that rehabilitation into society is in fact an important factor).

Furthermore, while reformation of a life convict is theoretically possible inside a prison, the Indian prison scenario leaves a lot to be desired for this to become a reality. The National Human Rights Commission reports that there are at least four deaths per day in Indian prisons, with a total number of 14,231 prisoners dying in police custody from 2001 to 2010. In 2011, 1332 prisoners died in prison. Furthermore, according to a report of the Asian Centre for Human Rights, most of these deaths were directly attributable to police brutality and torture.

Additionally, as disclosed by a recent report of the National Crime Records Bureau, Indian prisons are heavily crowded and far exceed their sanctioned strength. As of 2013, the total prison density in India is estimated to be around 112.1%. These prisons are unhygienic, cramped, lack proper sanitation and have poor ventilation. Prisoners are not given adequate privacy and are not given an opportunity to have a semblance of a dignified existence while incarcerated. Considering the state of the crumbling prison infrastructure, the idea of reformation of a prisoner therefore seems to be a utopian dream.

While it is indeed commendable that the Supreme Court is moving away from the abhorrent death penalty, this alternative approach, which, like the death penalty, pays scant regard to human dignity, simply cannot be countenanced. Indeed, there is an urgent need to strike a balance between adequate punishment that facilitates the reformation and rehabilitation of the convict and the maintenance of human dignity. The Supreme Court simply cannot lose sight of this.

A.S. Vishwajith (B.A, LL.B (Hons) NALSAR University of Law, Hyderabad, India) is a judicial clerk in the High Court of Delhi.

---

**PRISONERS’ RIGHTS**

**Women in Prison: The Particular Importance of Contact With the Outside World**

By Jo Baker | 23rd November 2014

“I felt isolated from the entire world. If I’d stayed any longer I’d have started eating the window bars.” – Inmate, Jordan

Contact with the world outside of prison is vital to the wellbeing of every detained person — but for women this is arguably more important, and more of a challenge.

Such was a key finding in my research with DIGNITY — Danish Institute Against Torture, among women’s prisons and prison communities in five countries, last year. When asked about their greatest hardship or cause for depression, the answers of detained women repeatedly echoed that of this inmate from the Philippines. “The most difficult thing? Leaving my children. I have six. Most of us are mothers and some of us have been here a long time and our husbands left us while we were here. I worry all the time and I can’t think of anything else. I can’t sleep.”

For many such women, their need for contact with family — and their identities as part of these families — are arguably different and much stronger than those of most men, and the stress of not being able to see or find out about their children is all-consuming, and hugely harmful. For those who left children in family environments that were abusive, this situation can be particularly dark.

Meanwhile since women tend to have far less access to financial support or earnings, they rely more heavily on outside help for the basic needs often not met in prison, from nutrition, to baby milk powder and sanitary towels. This affects a range of rights. Our research suggests that often, for example, the women who are most vulnerable to neglect or exploitation in prison are those who do not have help on the outside. “Keep us in prisons near home so that we can have family support,” said one woman in Zambia. “When you don’t [have any support] you are prone to abuse or they don’t really care about you inside.”

Yet women are often less likely to receive visits in prison. This is partly because the stigma of prison can be gendered. Many spoke of pervasive social shame, and of husbands that quickly leave. “When women are in prison it makes a big shame for her family,” an NGO worker told me in Jordan. “They may refuse to visit her and cut all relations with her, particularly those women who have killed.” Thus such women, many of whom have been through years of domestic violence, can find themselves completely cut off from the outside world.

Visiting conditions also play a role. Because women’s prisons are usual scarce, relatives may need to travel a greater distance from their homes, which takes time and money. The mother of one young political prisoner that I met could only afford the three-day journey each way once a year. Visits can also be cold and traumatic, particularly for children... if those children are allowed to visit at all. While in Jordan this involves 10-15 non-contact minutes behind security glass, in one Zambian prison (where visitors simply call their news through two wire fences) children are not allowed to visit. A woman may therefore give birth to a child shortly before
her arrest, and then not be able to hold or see the child again until she is released. This is surely tantamount to inhuman treatment, for both.

But the good practices found in our study show that there are ways in which prisons can ensure dignity, flexibility and intimacy during visits — and help to hurdle gender barriers too. For example in the Philippines our team found that visitors can spend substantial, dignified free time with inmates in communal areas of the prison. In Albania, where I drew a number of good practices, welfare staff try to mediate between female inmates and their estranged families, and arrange visits by detained mothers to their children’s care homes.

The issue of contact with the outside world is well recognized in international standards, including the Bangkok Rules for women prisoners. Yet when it comes to a thorough understanding of women’s human rights, much more work is required among prison systems, and even UN treaty body reports, to make sure that this understanding is grounded in the realities of the women themselves. It is time for all of us to become champions for the human rights of this long-neglected group.

Jo Baker is a writer and research consultant, with a focus on human rights and gender. She most recently led and produced a five-country research study for DIGNITY - Danish Institute Against Torture (formerly RCT) on conditions for women in detention, which was launched at the Human Rights Council in June 2014. www.jobakeronline.com

Prisoner Rights at the Forefront of Canadian Debates
By Ravi Amarnath | 30th January 2015

Over the past month, two major developments have placed the constitutionally protected rights of prisoners front and centre in the Canadian press.

The first of these developments is at the heart of two lawsuits initiated in the Canadian provinces of British Columbia and Ontario, challenging the constitutionality of the Correctional Service Canada’s (“CSC”) practice of subjecting prisoners to solitary confinement.

The practice is defined as the physical and social isolation of a person for 22-24 hours per day, regardless of the intended purpose. According to the British Columbia Civil Liberties Association, one of the organizations involved in the legal proceedings, one in four prisoners have spent time in solitary confinement.

Both lawsuits seek to ban the practice in Canada on the basis that it violates numerous rights under the Canadian Charter of Rights and Freedoms. In particular, the petitioners in both suits assert that the practice violates the rights of prisoners to be free from cruel and unusual punishment. To succeed on this front, the petitioners will have to convince their respective courts that the practice of solitary confinement is “so excessive as to outrage standards of decency”.

The practice of solitary confinement gained notoriety in Canada in 2007 after 19-year-old prisoner Ashley Smith took her life
Restricting Receipt of Rehabilitative Resources: The Prisoner Book Ban

By Natasha Holcroft-Emmess | 28th March 2014

New prison service rules prohibit prisoners in England and Wales from receiving books and essentials from the outside world. The imposition of a sweeping restriction on family and friends sending such items to their loved ones behind bars is an inordinately oppressive measure. The blanket ban constitutes a disproportionate interference with prisoners’ rights as it unduly impedes access to education and rehabilitative resources.

The new rules, which came into effect in November 2013, amended the Incentives and Earned Privileges Scheme (Prison Service Instruction (PSI) 30/2013). They curtail prisoners’ rights to receive commodities from family and friends. Representatives of the Howard League for Penal Reform have expressed serious concerns about the scope of the provisions and their rational connection to legitimate penological policy.

Prisoners may only receive parcels in exceptional circumstances at the discretion of the prison governor. Exceptional circumstances are narrowly defined along the lines of articles necessary to assist with disability or health and artefacts for religious observance. The sending of birthday presents, underwear and clothing is included in the ban and there is evidence that these restrictions will disproportionately affect female prisoners, who depend on family for additional clothing. But the greatest consternation has been expressed at the prohibition on sending books.
Books are a hugely important resource for prisoners. They provide the means through which prisoners can learn the skills necessary to live within the law outside of prison walls. Access to books promotes literacy and comprehension. Depending on the subject matter, reading also facilitates the development of compassion, social skills and greater societal awareness. These are abilities which many of us take for granted. But for those apparently stuck in a life of crime, they can provide a lifeline to a more peaceful existence.

Rehabilitation is an important objective of, and justification for, incarceration. This has been recognised both nationally and internationally. Prisoners need access to the resources in prison that will prepare them for reintegration into society on release. That is why it is important not to impede prisoners’ access to these valuable resources.

Justice Secretary Chris Grayling has attempted to justify the new measures. He argues that prisoners have prison libraries at their disposal, so access to books is not being restricted. Yet in the current age of austerity, library provision in public institutions is far from a priority. He states that employed prisoners are free to purchase books for themselves if they wish. But for many, the cost of one book would be a full week’s wages. The new approach as a whole sits ill at ease with the government’s professed commitment to encouraging prisoners to read.

If the concern behind the new rules is to prevent contraband from entering prisons undetected, the answer is to instigate better checking procedures before sent items are allowed into prisons. The answer is not to prohibit items from being sent in altogether.

Grayling tries to argue that the policy is part of his ‘rehabilitation revolution’. Of course it is necessary to have a system incentivising good behaviour in prisons. But imposing a blanket ban on sending books and essential items is not a proportionate way to achieve this. It is entirely unclear how this encourages rehabilitation. If an important aim of the criminal justice system is to provide prisoners with the tools they need to re-enter society, then surely limiting access to educational tools and necessities is pernicious to this aim.

Natasha Holcroft-Emmess a London-based solicitor. She completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.