Thinking Beyond Death Penalty Abolitionist Reform

– Lessons from abroad and the options for China

Carolyn Hoyle and Michelle Miao

Corresponding Author:

Professor Carolyn Hoyle
University of Oxford Centre for Criminology
Manor Road Building, Manor Road
Oxford, Oxfordshire OX1 3UQ
Carolyn.Hoyle@crim.ox.ac.uk

Tel: +44 1865 274452

Abstract

Since 2007, reforms to the administration of China's death penalty and cautious efforts towards restricting its application have inevitably reduced the number of death sentences and executions, though the numbers remain a state secret. Progressive restriction of capital punishment in China, as elsewhere within Asia, will inevitably result in increased use of imprisonment for life. This article examines the experiences of Western liberal democracies that have abolished or progressively restricted the death penalty in choosing alternatives to death. It focuses on two examples; the judicial evolution of whole life orders in the United Kingdom and the increasing recourse to life sentences without the possibility of parole (LWOP) in the United States. In drawing on these jurisdictions, as well as brief consideration of alternative penal structures and practices across Europe and South America, it poses and seeks to answer two questions: Is LWOP or whole life orders a fair and viable substitute for capital punishment in China? If not, what would be a socially, morally, and economically sustainable alternative to the death penalty?

Thinking Beyond Death Penalty Abolitionist Reform

– Lessons from abroad and the options for China

Carolyn Hoyle[1] and Michelle Miao[2]

– Introduction

A series of death penalty reform initiatives, launched by China's top politico-legal authorities in the mid-2000s, have generated significant impact on the scale and administration of capital punishment in China. They are undoubtedly the most important changes that have occurred in the contemporary penal history of China. One of their most visible and direct consequences has been the drop in the volume of executions. By 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 Supreme People's Court (hereinafter, SPC) regained the final review power over death sentences in January 2007, the number of executions has dropped by approximately 50%[3]. A gradual shift away from China's previous overreliance on immediate execution is the main outcome as well as the central aim of the reform-inspired judicial policies of 'kill fewer, kill cautiously' (*shao sha, shen sha*), in striking contrast with the 'swift and severe' justice of the *Yanda* era.

At the same time, a growth in the use of China's unique two-year suspended death sentence (hereinafter, suspended death) as a *de facto* alternative sanction is an important emerging penal phenomenon. It is believed that currently in China most suspended death sentences result in a maximum of 24 years imprisonment[4] . With reforms towards further restriction and eventual abolition of the death penalty in the future, there will be an accumulative increase[5] in the prison population serving around 24 years minimum terms. This transition from death to long-term life sentences will yield a re-allocation of penal resources and a readjustment of China's existing penal structure. Apart from moving away from harsh retributive penological values, which underpin a penal machinery reliant on the use of immediate executions, to a rehabilitation and reform-oriented mode of penal justice, this transition will also have noticeable practical consequences.

---

[1] Professor of Criminology, Director, Centre for Criminology, University of Oxford.
[2] Howard League Research Fellow, Centre for Criminology, University of Oxford.
[3] Dui Hua Foundation. (2011) Dui Hua Estimates 4,000 Executions in China, Welcomes Open Dialogue, http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fduihua.org%2Fwp%2F%3Fpage_id%3D3874&ei=YeQ3Us-CNIflswaz54BQ&usg=AFQjCNHkHtOjyA8_OSzJKlb1T_Ejb-uj4w&sig2=bTNav0auF0oJmLS9TKJarw&bvm=bv.52164340,d.Yms (accessed 15 September 2013).
[4] Johnson DT and Zimring FE. (2009) The Next Frontier: National Development, Political Change, and The Death Penalty in Asia, New York; Oxford: Oxford University Press, footnote 59, page 277.
[5] Johnson and Zimring estimated an approximately 13-14% of increase in prison population if an amount of 9,000 capital offenders waiting for immediate execution per year are sentenced to suspended death instead. Johnson DT and Zimring FE. (2009) The Next Frontier: National Development, Political Change, and The Death Penalty in Asia, New York; Oxford: Oxford University Press.

That said, the recent growth in the use of suspended death as a *de facto* replacement for immediate execution is not the central focus of this article. This increase in the number of capital offenders subject to suspended death is merely the outcome of changing sentencing policies since the Supreme People's Court took back its review power in 2007. As a result of the reform-inspired judicial policy of 'definitely will not kill someone if it is not necessarily required so' (*ke sha ke bu sha de jian jue bu sha*), a substantial portion of the borderline cases between the death sentence and lesser punishments[6] , which previously would fall under the category of immediate execution, are now subject to suspended death. The two year suspension automatically diverts to life imprisonment and even lesser forms of penal sanctions after the expiration of the two-year period, as long as further intentional offences have not been committed.

This top-down implementation of judicial interpretations that narrowly define the scope of capital cases eligible for immediate execution, on a national scale, will facilitate progress towards further and substantial restriction of the death penalty. Nevertheless, these changes with regard to judicial discretion in courtrooms will not lead to a complete abolition of the ultimate punishment. For instance, taking all possible mitigating evidence into consideration at the capital trial, some capital defendants will still be eligible for immediate execution. Furthermore, although most homicide cases sparked by disputes among neighbours or family members will not lead to the use of immediate execution, most homicide cases do not fit into this category. What are the options for penal reformers if their next-step reform agenda is aimed at reducing the use of immediate execution for those egregious offenders who commit the more heinous offenses such as robbery, drug crimes, or even murder?

At a certain point, judicial restraints on the use of capital punishment will need to be elevated to the level of legislative activism aimed at incrementally restricting the applicable scope of immediate execution. After all, suspended death is not a stand-alone penal sanction; its symbiotic relationship with immediate execution determines that it cannot serve as a suitable replacement for immediate execution. Replacing the death penalty *de jure*, which is necessarily the last stage of the abolitionist process, can only be achieved through a legislative invention that introduces an alternative penal sanction to substitute execution permanently for all cases. In other words, the availability of a suspended death sentence inevitably entrenches the death penalty even though it reduces the use of executions.

This article will examine the experiences of Western liberal democracies that have already abolished the death penalty or seem to be working towards abolition. Two examples – the persistence of and judicial evolution of whole life orders in the United Kingdom as well as the ascendency of life without the possibility of parole (LWOP) in the United States - are selected for focused review and analysis of alternative approaches to the abolition or considerable restriction of capital punishment. The aim of this article is to reflect on two questions by exploring the solutions other jurisdictions have adopted and the problems posed by these alternative penal structures: Is LWOP or a penal punishment of equivalent harshness a fair and viable substitute for capital punishment in China? If not, what would be a socially, morally, and economically sustainable alternative that can both satisfy retributive demands in a culture inclined towards penal populism and that is proportionate to the seriousness of certain criminal offenses?

[6] Johnson DT and Zimring FE. (2009) The Next Frontier: National Development, Political Change, and The Death Penalty in Asia, New York; Oxford: Oxford University Press, 279.

– Penal Substitutes to the Death Penalty Worldwide[7]

The eighth (and most recent) quinquennial report of the Secretary-General on capital punishment[8], covering the period from 2004 to 2008, reported considerable variation around the abolitionist world on the maximum punishment that had been substituted for the crimes that had been previously sanctioned by capital punishment. In some States, the minimum penalty imposed by the law ranges from a substantial fixed term of imprisonment to life imprisonment for the most serious offenses. In others, sentencing for crimes that were once subject to the death penalty is within the discretion of the court, and no minimum period is prescribed. All States in the survey reported that those sentenced, whether for a fixed term or for life, are subject to early release, depending upon the circumstances[9]. This provides a clear indication that a sentence of life imprisonment without any eligibility for early release or parole is rarely used by abolitionist jurisdictions around the world.

There are at least two major ways to classify the various options adopted by different countries around the world to punish their 'worst of the worst' offenders. The first is to divide them into two categories: mandatory penal sanctions and discretionary penal sanctions. Mandatory sentences restrict the possibilities for early release. In a minority of abolitionist countries the penalty for certain types of murder is a mandatory sentence to life imprisonment with the possibility of release on parole. For example, persons convicted of first-degree murder in Canada (who were formerly those sentenced to death) are not eligible for parole until they have served 25 years in prison, unless they were a minor when they committed the offence. After 15 years they can, however, apply to have the eligibility date brought forward and become eligible for unescorted temporary leave and 'day parole' three years before their full parole eligibility date.[10] In Ireland, where the penalty for murder is also a mandatory life sentence, the Parole Board initially reviews prisoners after they have served seven years, and regularly thereafter, but the final decision on when the prisoner should be released rests with the Minister of Justice.

Life imprisonment is also the mandatory penalty for murder in Israel but the President usually commutes it to 30 years and the Prisons Service Parole Board has the power to reduce this by one-third for good conduct. In Finland, a life-sentenced prisoner can only be released through clemency granted by the President, but this is usually, even if not always, granted after an average of 13 years. Some countries adopted both mandatory and discretionary sentences as a punishment for the most serious offenses. For instance, in Germany, murder offenses can either be sentenced to mandatory imprisonment of 15 years or discretionary life imprisonment, depending on the gravity of the offence and the individual circumstances involved. If the defendant is sentenced to the mandatory 15-year imprisonment, he will be eligible for early release after a minimum of 10 years; if he is sentenced to life imprisonment, he must serve at least 15 years to be considered for release on parole.

---

[7] This section draws on the work in Hood, R. and Hoyle, C. The Death Penalty: A Worldwide Perspective (Oxford: Oxford University Press, 2008). We are indebted to Professor Roger Hood for his inspiration and guidance in our scholarship.

[8] United Nations Economic and Social Council, 'Capital Punishment and Implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty', Report of the Secretary-General, 18 December 2009, E/2010/10, http://www.penalreform.org/wp-content/uploads/2013/05/RapportQuinquenialDP-SG-ONU2010-en-1.pdf

[9] Neither the United Kingdom nor the United States was among these states which were surveyed.

[10] Since 2011, a court may impose consecutive periods of parole ineligibility for each murder in cases of multiple murders. While the provision is not mandatory, this can mean that someone convicted on three counts could face life without parole for 75 years.

Alternatively, many more countries have replaced the death penalty with a discretionary maximum sentence of life imprisonment, with the alternative being a determinate sentence. The prisoner can obtain release on parole but the period to be served before becoming eligible varies considerably, as do the conditions under which early release is granted and implemented. For example, New Zealand sets no minimum for a life sentence but in Australian states it is set by the judge at the time the sentence is imposed: recently a judge in South Australia fixed the 'non-parole' term at 30 years for two lovers who hired a 'hit-man' to kill the man's wife. Elsewhere, the minimum varies from 10 years in Belgium, 12 years in Denmark, 15 years in Austria, Monaco, Romania, and Switzerland, to 20 or 25 years in Lithuania, 25 years in South Africa, 26 years in Italy, 30 years in Estonia, and two-thirds of the original determinate term of 20–25 years in Slovakia and the Netherlands (where life imprisonment is used very sparingly). A life sentence in France means at least 18 years in 'security detention' with no chance of early release for good conduct or a presidential amnesty.

The second means of classification is to split the penalty chosen to replace the death penalty into indeterminate or determinate sentences of imprisonment of various duration. Determinate sentences stipulate a specific term. Eastern European countries (such as Slovakia and Poland) that replaced the death penalty with determinate sentences of imprisonment set a maximum ranging from 15 to 25 years.[11] On 29 April 2008, the President of Cuba commuted virtually all of the death sentences in force to 30 years' imprisonment.[12] Yet replacing the death penalty with a fixed-term sentence can be as long in practice as a life sentence. For countries like Spain[13] and Cuba, the maximum penalty for murder is 30 years. This could be as long as the rest of the prisoner's life.

Indeterminate life imprisonment is prohibited in various jurisdictions including Brazil, Colombia, Croatia, El Salvador, Mexico, Nicaragua, Norway, Peru, Portugal, Slovenia, Spain, and Venezuela,[14] primarily because of the emphasis, in principle even if not always in practice, on rehabilitation or re-education of prisoners in these countries.[15] So strongly opposed to indeterminate sentences are some of them (Brazil and Portugal, for example) that they fiercely objected—on human rights grounds—to the provision for life imprisonment when the Statute of the International Criminal Court was being finalized in 1998.[16] However, the Rome Statute did

---

[11] Prison Reform Trust, Report of the Committee on the Penalty for Homicide (The Lane Committee) (1995); JUSTICE, Sentenced to Life: reform of the law and procedures for those sentenced to life imprisonment (1996).

[12] Amnesty International, Death Penalty News, April-May 2008, p. 2.

[13] A. Coyle, 'Management of Long-term and Life-Sentenced Prisoners Internationally in the Context of a Human Rights Strategy' in Browne and Kandelia (eds.), *Centre for Capital Punishment Studies Occasional Paper Series Three: Managing effective alternatives to capital punishment* (2005). Also, Penal Reform International Briefing No. 1, *Alternatives to the Death Penalty: The Problems with Life Imprisonment* (2007).

[14] Marc Mauer, Ryan S. King, and Malcolm C. Young, 'The Meaning of "Life": Long Prison Sentences in Context' (May 2004): <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationId=348>. N. Newcomen, 'Managing the Penal Consequences of Replacing the Death Penalty in Europe' in N. Browne and S. Kandelia (eds.), Centre for Capital Punishment Studies Occasional Paper Series Three: Managing effective alternatives to capital punishment (2005). Also, Penal Reform International Briefing No. 1, Alternatives to the Death Penalty: The Problems with Life Imprisonment (2007).

[15] D. van Zyl Smit, 'Life imprisonment: Recent issues in national and international law' *International Journal of Law and Psychiatry* 29 (2006) pp. 405–421 at 411.

[16] Life imprisonment is also the ultimate penalty for the International Criminal Tribunals of Rwanda and the former Yugoslavia, even though there had been no provision for it in Yugoslavian sentencing law: see D. van Zyl Smit, 'International Imprisonment' *International and Comparative Law Quarterly* 54 (April 2005), pp. 357–386 at 366–367.

stipulate that sentences for even the gravest forms of crimes, such as crimes against humanity and genocide, should be reviewed after 25 years.

Where there is discretionary release, the minimum period before this can be considered varies from one-half to three-quarters of the sentence imposed, which can be as long as 20 years in Croatia (Croatia has a 40-year maximum but in practice it is rarely exercised), 21 years in Norway, 30 years in Slovenia, and 40 years in Colombia. Long-term prisoners in Portugal have to serve a longer proportion of their sentence in prison. Anyone sentenced to over six years, up to the maximum of 30 years, must serve five-sixths of the sentence before release can be considered.

Indeterminate sentences of life imprisonment, usually not served for the full term, are subject to review at varying proportions of the time served in custody, and release under supervision on licence if the offender is no longer regarded as a threat to the community. Inevitably, some prisoners have been found to constitute a continuing threat and therefore have remained in custody for the rest of their lives, but there is a big difference between their situation, where they have had the opportunity to earn release if repentance and rehabilitation is shown, and those of prisoners in a few countries—the United States and the United Kingdom—where a life sentence is determined from the outset to be for a full-life period with no possibility of review or parole, regardless of the risk to society posed by the prisoner. The latter situation is the focus of the review and analysis in the following sections of this article.

– The Rising Crisis of Life Without Parole – the American Story

Prior to the temporary ban on the death penalty in America (from 1972[17] to 1976[18]), only seven states[19] had life-without-parole statutes, and these were rarely used. In the immediate wake of this short period of abolition, Alabama, Illinois, and Louisiana, created LWOP statutes as a direct response to the *Furman* ruling.[20] This penalty was held to be constitutional by the US Supreme Court in *Schick v Reed* in 1974.[21] Since then there has been an enormous rise in LWOP statutes. Prior to the mid-1990s LWOP was used infrequently and was available in only about half the states,[22] but today LWOP is part of state sentencing structures in all states but Alaska[23]; it is also the

---

[17] Furman *v.* Georgia 408 U.S. 238 (1972)
[18] Gregg *v.* Georgia 428 U.S. 153 (1976)
[19] These states are Massachusetts, Michigan, Mississippi, Montana, Pennsylvania, South Dakota, and West Virginia. See The Sentencing Project, 'Life Goes On: The Historic Rise in Life Sentences in America', http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (visited on 20 September 2013).
[20] Julian H. Wright, Jr., Note, 'Life-Without-Parole: An alternative to death or not much of a life at all?' *Vanderbilt Law Review* 43 (1990) pp. 529–568 at 548; The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 3), last accessed on 23 September 2013.
[21] *Schick v Reed*, 419 U.S. 256, 267 (1974).
[22] M. Gottschalk, *The Prison and the Gallows: The politics of Mass Incarceration in America* (2006), p. 233; Julian H. Wright, Jr., Note, 'Life-Without-Parole: An alternative to death or not much of a life at all?' *Vanderbilt Law Review* 43 (1990) pp. 529–568 at 548.
[23] Death Penalty Information Centre, 'Year That States Adopted Life Without Parole (LWOP) Sentencing', http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing, last accessed 21 September 2013; The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at

maximum penalty under federal law for serious drug offences.[24] In addition, in some states LWOP is the mandatory penalty on a third conviction (the so-called 'three-strikes' rule) for specific felony offences of varying seriousness.[25]

LWOP exists both alongside—as an alternative to—the death penalty in retentionist states *and* in place of it in abolitionist states. In Kansas, 'every defendant who is possibly eligible for the death penalty but is not executed must be given life without parole'.[26] This means that those with strong mitigating circumstances who were not likely to be sentenced to death are caught in the LWOP net. Today, in six states—Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota—life sentence without the possibility of parole is the only form of life imprisonment. In other words, no life imprisonment in these states allows for parole. In 22 states and the federal government, at least 35% of the lifer population is ineligible for parole.[27] The ascendency of LWOP has had a significant impact on the size of the American prison population and the structure of the American penal regime. In states in the US that do not use LWOP sentences, judges have nonetheless implemented a *de facto* life without the possibility of parole through the use of consecutive life sentencing. For example, in 2005, a serial killer in Kansas was sentenced to ten consecutive life sentences – one for each of his victims – meaning that the prisoner would not be eligible for parole until he had served a minimum of 175 years.[28] This, in any other language, is life without parole. In the state of Wisconsin, the sentencing judge has the power to set the parole eligibility date, which, in reality, could be longer than a person's natural life. A similar provision is in force in Alaska.[29]

The number of prisoners serving life imprisonment has risen to an unprecedented level: 159,520 people in prison are serving a life sentence and among them, 49,081 are subject to LWOP. One in every nine inmates incarcerated is serving a life sentence and one third of this population of lifers has no prospect for parole or release.[30] The population of prisoners serving LWOP is not evenly distributed across all the LWOP jurisdictions in the United States. The combined LWOP population in five states – Florida, Pennsylvania, Louisiana, California and Michigan – combined account for over half (57.7%) of all LWOP sentences nationwide. The rise is even more dramatic

---

http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 3), last accessed on 23 September 2013.

[24] The American military courts can also sentence to LWOP. For example, in 2000 a US military court sentenced an Army sergeant to the maximum LWOP for the sexual assault and murder of an 11-year-old ethnic Albanian girl in Kosovo, while he was on peacekeeping duty: CNN.com, 1 August 2000.

[25] For the list of states which enact three-strike laws requiring mandatory LWOP, see Ogletree, C. & Sarat, A. (2012). Introduction: Lives on the Line: From Capital Punishment to Life without Parole. In C. Ogletree & A. Sarat (Eds.), Life without Parole: American's New Death Penalty? New York: New York University Press, 4-5.

[26] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punishment' *Harvard Law Review* 119 (2006), pp. 1838–1845 at 1842.

[27] The states are Arkansas, Delaware, Florida, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, and West Virginia. The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 5), last accessed on 23 September 2013.

[28] *State of Kansas v. Dennis L. Rader* (2005)

[29] Sentencing for Life: Americans Embrace Alternatives to the Death Penalty, Richard Dieter, Death Penalty Information Center: 2003.

[30] The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 5), last accessed on 23 September 2013.

if the rate of growth of the LWOP population is compared with the general prison population, which has dropped for the third consecutive year since 2011.[31] From 2008 to 2012, the lifer population rose by 11.8% and the LWOP population, at an even faster pace, rose by 22.2%.[32] In New York, a 19.6% drop in the overall prison population occurred alongside a 249% increase in LWOP prisoners, while in New Jersey, with the rate of general incarceration declining by 16%, the number of prisoners serving parole ineligible life imprisonment grew by 232%.[33]

It is clear that the recent penal development in the United States is characterised by divergence - those sanctions at the harsh end of the incarceration spectrum have been escalating in recent years, while those at the lenient end have been declining. This persistent growth of imprisonment at the top of the penal hierarchy is particularly noteworthy given that incidents of most types of crime, including violent crime, have been dropping in the United States[34].

The steady and fast growth of parole ineligible life imprisonment has two possible explanations. First, it could be that harsh sentencing policies led to an increasing number of prisoners admitted to the prison system. The adoption of 'three strike and you're out' laws made LWOP a mandatory sentence upon conviction in 13 states and the federal government.[35] This led to a further proliferation of the LWOP population. For instance, in 2006, the Kansas Legislature passed House Bill 2576, known as 'Jessica's Law', which substantially enhanced the penalties for sexual offenses. It requires life imprisonment without the possibility of parole for repeat offenders classified as aggravated habitual sex offenders.[36] The most recent 2012 Kansas Statute reiterates that 'An aggravated habitual sex offender shall be sentenced to imprisonment for life without the possibility of parole. Such offender … shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, post release supervision, or suspension, modification or reduction of sentence.'[37] As a result, within a six-year period from 2006 to 2012, the number of LWOP prisoners increased from 6 to 21.[38] In addition,

---

[31] Bureau of Justice Statistics, 'U.S. Prison Population Declined For Third Consecutive Year During 2012', http://www.bjs.gov/content/pub/press/p12acpr.cfm, last accessed on 25 September 2013.
[32] The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 13), last accessed on 23 September 2013.
[33] The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 15), last accessed on 23 September 2013.
[34] Federal Bureau of Investigation, 'Crime in the United States (by Volume and Rate per 100,000 Inhabitants, 1993–2012)', http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls (accessed 24 September 2013).
[35] Ogletree, C. & Sarat, A. (2012). Introduction: Lives on the Line: From Capital Punishment to Life without Parole. In C. Ogletree & A. Sarat (Eds.), Life without Parole: American's New Death Penalty? New York: New York University Press, 4-5.
[36] National Conference of State Legislatures, 'State Statutes relating to Jessica's Law', http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf (accessed 23 September 2013)
[37] 2012 Statute, Article 66, 21-6626 (a), http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_066_0000_article/021_066_0026_section/021_066_0026_k/ (accessed 25 September 2013).
[38] The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 15), last accessed on 23 September 2013.

two-thirds of Washington's LWOP population have been sentenced under its three strikes law which was enacted in 1994.[39]

Second, and most obviously, the nature of ineligible life sentences means that as prisoners are never released the number of LWOP prisoners overall will inevitably increase as they remain incarcerated until death. This accumulative effect causes an ever-expanding LWOP population. For instance, in Georgia, after the passage of a 'two-strike' law in 1994, 57 prisoners were sentenced to LWOP within a few years. By mid-2012, 737 prisoners were serving LWOP[40], resulting in a 1293% increase in its population of LWOP prisoners in less than two decades.

The rise of LWOP reflected a broader transformation in penal logic and correction policy from institutional commitment to rehabilitation to a punitive, retribution-based approach. The transformation occurred against the broad context of a political ideology and rhetoric that espoused being 'tough on crime', as a response to public fear about serious crimes. Further, the growth of LWOP coincides with a tendency towards increasing restrictions on the use of parole in state and federal systems in the post-*Furman* era. This is partly because the existence of parole for capital offenders increased the probability that defendants were sentenced to death as jurors worried that dangerous criminals would be released back to society. The possibility of choosing a life sentence without the prospect of parole had a significant impact on juries' decisions about whether to impose capital punishment. Feeling secure in the prospect of permanent incarceration, their fears were reduced and they became more likely to issue life, rather than death sentences, a shift in part promoted by death penalty abolitionists, who were pragmatic in promoting the lesser of two harsh punishments.

Indeed, the popularization of LWOP signifies the shift from a system of discretionary sentencing, emphasizing the role of meaningful parole review, to a mandatory-sentencing-centred regime[41]. Parole was abolished in six states and the federal jurisdiction in the late 1970s, resulting in an escalation in the use of LWOP. A study of 74 jurors in Pennsylvania (which does not require the jury to be told in every case that there is no possibility of parole) found that 'most of the jurors interviewed in that state did not think a life sentence truly meant life in prison' and indeed the majority significantly underestimated the time defendants were likely to spend in prison.[42] As the evidence suggested that 'The existence of parole . . . led more juries to sentence defendants to death . . . death penalty abolitionists hope[d] to force that number back down' through the introduction of the alternative of LWOP.[43] This resulted in an idiosyncratic alliance of death penalty abolitionist and pro-incarceration activists jointly favouring the replacement of the death penalty with LWOP.

In fact, public zeal for the death penalty and the growing weight of long-term imprisonment in the American penal system are connected in an inverse relationship, with the promotion of one

---

[39] The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 16), last accessed on 23 September 2013.
[40] The Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America, available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (page 15), last accessed on 23 September 2013.
[41] Dolovich S. (2012) Creating the Permanent Prisoner. In: Ogletree C and Sarat A (eds) Life Without Parole: American's New Death Penalty? New York: NYU Press, 96-137.
[42] Wanda D. Foglia, 'They know not what they do: guided and misguided discretion in Pennsylvania Capital Cases' Justice Quarterly 20 (2003), pp. 187–211 at 204.
[43] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punish¬ment' Harvard Law Review 119 (2006), pp. 1838–1845 at 1838–1839.

necessitating the repression of another.[44] As stated previously, the *Furman* court's temporal removal of capital punishment from sentencing options provided the opportunity and impetus for the rise of LWOP. The first LWOP statute in the post-*Furman* era was created in Alabama, with frustration and fear about releasing the worst prisoners through the 'revolving door' of the parole system.[45] With the reinstitution of the death penalty by *Greg v. Georgia* in 1976, the heated debate surrounding the use of LWOP had been given new meaning – abolitionists began to use LWOP as an alternative to the death penalty while retentionists pushed for the increasing use of parole in order to justify sentencing more defendants to capital punishment. Starting in the 1970s and generating momentum in the 1980s-1990s, LWOP officially became an inalienable, albeit uncomfortable, part of the anti-death penalty movement.[46]

According to Sharon Dolovich, the rise of LWOP statutes and the increasing restrictions on parole in general[47] signified a shift of the macro-level penal paradigm in the United States from a 'reintergrationist' mode to a permanent exclusion of prisoners from society.[48] This is because LWOP offers no prospect of release or parole regardless of how much the offender rehabilitates. In other words, the penal logic underlying LWOP does not believe the targeted subjects of LWOP – some of whom are the most disadvantaged members of society - are capable of change, reform or becoming productive citizens. They are considered unworthy of state investment and intervention such as treatment and programs to assist them safely and productively to return to society on the completion of their sentences.

Increasing recourse to LWOP is also associated with the institutional culture of penal populism in the States, as locally-elected politicians aspire to accommodate the demands of the majority of the general public that the alternative punishment to the death penalty has a sufficient degree of harshness to serve its retributive and deterrent functions. 'Abolitionists have blitzed both legislatures and the media with pleas to adopt life-without-parole statutes in order to reduce executions, arguing that [it] . . . is a stronger, fairer, and more reliable punishment'.[49] These abolitionist efforts have led to the further entrenchment and apparent legitimacy of LWOP. In November 2010, a comprehensive study of Americans' views on the death penalty conducted by the Death Penalty Information Centre found 'growing support for alternatives to the death penalty compared with previous polls: a clear majority of voters (61%) would choose a punishment other than the death penalty for murder, including life with no possibility of parole and with restitution to the victim's family (39%), life with no possibility of parole (13%), or life with the possibility of parole (9%).[50] A recent poll conducted by Public Policy Polling indicated 68% of respondents from North Carolina support replacing the death penalty with LWOP if the offender had to work and

---

[44] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punishment' *Harvard Law Review* 119 (2006), pp. 1838–1845 at 1840.
[45] J. Wright, 'Life without Parole: An Alternative to Death or not Much of a Life at All?' Vanderbilt Law Review 43 (1990), pp. 529–568 at 548.
[46] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punishment' *Harvard Law Review* 119 (2006), pp. 1838–1845 at 1841.
[47] Parole boards across the United States were given limited discretionary power to grant prisoners release in the 1980s and 1990s.
[48] Dolovich S. (2012) Creating the Permanent Prisoner. In: Ogletree C and Sarat A (eds) Life Without Parole: American's New Death Penalty? New York: NYU Press, 96-137.
[49] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punishment' *Harvard Law Review* 119 (2006), pp. 1838–1845 at 1838.
[50] The Death Penalty Information Centre, 'Growing Support for Alternatives to the Death Penalty', http://deathpenaltyinfo.org/national-polls-and-studies (visited on 24 September 2013).

pay restitution to the victim's family.[51] A recent case to further illustrate changing public opinion is provided by the public reaction to the trial of Dzhokhar Tsarnaev, the Boston Marathon bombing suspect. A poll sponsored by the *Boston Globe* found that a significant majority of Boston residents favour life without parole over the death penalty for this particularly heinous crime.[52]

Although LWOP was originally introduced as a response to the most serious offenses such as homicide and in particular as an alternative to the death penalty, there are signs that its reach is expanding to include other types of offenses which would not be death-eligible. A survey conducted by the Sentencing Project with state corrections agencies shows that in eight states – Idaho, Washington, Alabama, Georgia, Kansas, Delaware, South Carolina, and Louisiana - more than 30% of prisoners serving LWOP were convicted for non-homicide offenses[53] . The entrenchment of LWOP endorses permanent imprisonment for defendants who would not have received or even been eligible for the death penalty, as not only does America not use the death penalty for crimes other than homicide but it uses it only for more egregious homicides. An examination of this effect of LWOP on non-capital defendants found that it resulted in extended sentences for older prisoners, even though pushing parole eligibility beyond about 25 years is generally considered ineffective and costly. Whilst the Supreme Court has struck down as grossly disproportionate a sentence of life imprisonment without parole imposed on a defendant with previous convictions for passing a worthless cheque (*Solem v Helm* 463 US 277 (1983)), it has upheld LWOP for the fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged cheque in the amount of $28.36, and finally obtaining $120.75 under false pretences in Texas.[54] A 50-years-to-life sentence was upheld in California for stealing videotapes on two separate occasions after three prior offences.[55]

Putting aside the clear gross disproportionality of LWOP for non-violent offences that would never have attracted the death penalty, the idea that LWOP should be the replacement for persons who have been or would have been sentenced to death has had its appeal beyond the United States. For instance, LWOP can be found in countries around the world, such as Bulgaria, England and Wales, Estonia, Kenya, the Netherlands, Turkey, and the Ukraine.[56] In some countries, such as the US and Turkey, there is no possibility of release under any circumstance. In some, such as Vietnam, amnesties are usually granted after a prisoner has served 20 to 30 years, and in others like Bulgaria, prisoners can petition the government for a pardon. Certain jurisdictions are in the process of moving towards the endorsement of LWOP. For example, although the Uganda Prisons Act defines 'life' as 20 years imprisonment, the Supreme Court ruled in *Tigo Stephens v. Uganda* (2011)[57]

---

[51] Public Policy Polling, 'North Carolina Survey Results' http://www.publicpolicypolling.com/pdf/2011/DeathPenaltyResults.pdf (visited on 21 September 2013).
[52] Fifty-seven percent (57%) of respondents supported a sentence of life without parole if Tsarnaev is convicted, compared with only 33% who favoured the death penalty. Sixty-one (61) percent of Democrats and 49% of Republicans (a plurality) supported a sentence of life without parole. The option was endorsed by men and women, across all educational levels, and among white, black, and Hispanic respondents. B. MacQuarrie, 'In Globe poll, most favor life term for Dzhokhar Tsarnaev', *Boston Globe*, September 16, 2013.
[53] The Sentencing Project, 'Life Goes On: The Historic Rise in Life Sentences in America', page 8, http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf (visited on 20 September 2013).
[54] *Rummel v Estelle* 445 US 263 (1980)
[55] *Lockyer v. Andrade*, 538 U.S. 63 (2003). As the defendant Andrade was 37 at the time of the offenses in this case, the 50-years-to-life sentence was effectively life without parole.
[56] Prison Reform International, 'Key Facts', http://www.penalreform.org/priorities/life-imprisonment/key-facts/ (accessed 19 September 2013).
[57] *Tigo Stephen v. Uganda* (Criminal Appeal No. 08 Of 2009) [2011] UGSC 7 (10 May 2011).

that life imprisonment means for the natural life of a convict. The *Tigo* judgement, therefore, has created a legal anomaly whereby the legislature has said 'life' means 20 years, and the judiciary that 'life' means life without the possibility of parole.[58]

However, the prevalence and entrenchment of LWOP has been increasingly challenged and criticised in recent years by academic evaluation and analysis of the empirical effect of sentencing for the rest of the prisoner's natural life: 'Twenty years of experience with life-without-parole statutes shows that although they have only a small effect on reducing executions, they have doubled and tripled the lengths of sentences for offenders who never would have been sentenced to death or even been eligible for the death penalty.'[59] A more fundamental approach to reject LWOP is based on the same rationale as that against the death penalty: that LWOP undermines the inherent right to life. To lock up a prisoner and take away all hope of release is to resort to another form of death sentence. LWOP does not respect the inherent dignity of the offender or the prohibition against cruel and inhuman punishment.[60] The experience of the exponential rise of LWOP encourages us to seriously consider its fairness and efficacy. The battle against inhumane, degrading and unduly severe punishment does not disappear when LWOP replaces the death penalty as a state's response to its most heinous criminals. Indeed, the abolition of the death penalty is not the end of the human rights struggle.

Of the sentencing rationales for LWOP, incapacitation is the most persuasive, but it is well established that it is very difficult to predict future dangerousness.[61] A system which imposes a mandatory sentence of LWOP for murder (not just to the minority who would have been formerly sentenced to death) will inevitably sweep up in its net a large proportion of prisoners who in some years' time will no longer present a danger to society.[62] As the warden of Louisiana's Angola Prison has said, most of his ageing charges serving LWOP have long since gone through 'criminal menopause'.[63]

Further, a state-by-state analysis confirmed that the introduction and expansion of LWOP is at most a minor factor in the reduction of executions from the mid-1970s to the mid-2000s. Decreased public support for the death penalty, lower crime rates, and increased judicial supervision in capital cases at the federal level all contributed to the drop in executions during this period. While it is unlikely that the drop in executions can be attributed to the growth in the use of LWOP, the expansion of LWOP might account for a small reduction of death sentences among the sample group of states. Nonetheless, it should be noted that the patterns of death

---

[58] Prison Reform International, 'The Abolition of the Death Penalty and its Alternative Sanction in East Africa: Kenya and Uganda', page 6, http://www.penalreform.org/wp-content/uploads/2013/05/East-Africa-research-report-on-death-penalty-and-life-imprisonment.pdf (accessed 26 September 2013).
[59] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punishment' *Harvard Law Review* 119 (2006), pp. 1838–1845 at 1839.
[60] Prison Reform International, 'Life after death: What replaces the death penalty?' (20 April 2012), http://www.penalreform.org/wp-content/uploads/2013/06/Life-after-death_English-117KB_0.pdf (accessed 19 September 2013).
[61] There is a vast literature on this subject. For an excellent overview, see: J. Monahan, 'The prediction of violent behaviour: Toward a second generation of theory and policy' *American Journal of Psychiatry* 141 (1984), pp. 10–15; and John Monahan, 'Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility' *Washington and Lee Law Review* 57 (2000), pp. 901–916.
[62] Stephen Shute, 'Punishing Murderers: Release Procedures and the "Tariff", 1953–2004' *Criminal Law Review* (November 2004), pp. 873–895 at 887.
[63] Sasha Abramsky, 'Lifers: Prisoners Dilemma' *Legal Affairs* (April 2004), pp. 1–45.

sentences in different states mirror each other regardless of whether or when LWOP statutes were enacted.[64]

A penal mechanism that incarcerates thirteen prisoners until the end of their natural lives in order to spare one prisoner[65] from immediate death needs careful examination and adequate assessment. Is substituting the death penalty with such a 'slow death' a necessary or fruitful step towards, or a prerequisite for, abolishing the death penalty? With the continued expansion of the population of prisoners subject to life imprisonment there are signs that the American jurisprudence on LWOP is developing. In *Graham v. Florida* (2010), the U.S. Supreme Court decided that sentencing juvenile offenders, who are under 18 years old at the time of crime, to LWOP for non-homicide crimes violates the Eighth Amendment's ban on cruel and unusual punishment. The Court ruled that life imprisonment without parole was an especially harsh punishment for a juvenile and that the remote possibility of pardon or other executive clemency did not mitigate the harshness of the sentence. It held that although a State was not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime, it had to provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. This decision calls into question the legitimacy and appropriateness of LWOP for all vulnerable groups and is a promising sign that the U.S. Supreme Court jurisprudence may evolve to gradually limit the use of LWOP to other categories of offenders and offenses. This decision is consistent with the early jurisprudence developed by the European Court of Human Rights, which we turn to in the following section.

– The Evolution of Life Imprisonment in the UK under the Jurisprudence of the European Court of Human Rights

Penal statutes in the United Kingdom provide for whole life imprisonment without the possibility of release or parole, under statutory guidelines, for murder of the most serious kind. In some extremely serious cases, typically murder with aggravating circumstances, prisoners are required to spend the rest of their natural lives in prison, and this form of penal sanction was called 'whole life tariff' in the pre-2004 era and renamed as 'whole life orders' after the enactment of the Criminal Justice Act 2003[66]. A review of the function and impact of this punishment cannot be separated from the abolition of the death penalty in England and Wales, for that was the moment when mandatory life imprisonment became the ultimate sanction in the penal hierarchy. Since then, a mandatory sentence of life imprisonment has been the sole punishment available for murder; a discretionary life sentence with no specific predetermined release date was granted to other serious offences such as manslaughter, rape, attempted murder, armed robbery and arson. Offenders convicted of a second or subsequent serious violent or sexual offence would be liable for an automatic life sentence after the Crime (Sentences) Act

[64] Note, 'A matter of life and death: the effect of life-without-parole statutes on capital punishment' *Harvard Law Review* 119 (2006), pp. 1838–1845 at 1844-1851.

[65] This rough percentage is calculated by comparing the prison population serving LWOP as of June 2013 (approximately 41,000) to the size of death row population (around 3,108) as of April 2013 in the United States. Death Penalty Information Centre, 'Size of Death Row by Year (1968 - present)', http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (accessed 10 September 2013)

[66] Most of those subject to life imprisonment are eligible for early release 'on license' (i.e. they must desist from committing other offences or breach any terms of the licence) into the community. Where a life sentence has been imposed then the minimum period before a person can be considered for release is known as the 'tariff'. After the expiration of this custodial tariff period, the Parole Board of England and Wales will decide whether the prisoner is regarded as safe to be released.

1997. This automatic life sentence was replaced by an indeterminate sentence of Imprisonment for Public Protection (IPP) Under Section 225 of the Criminal Justice Act 2003.

It is generally assumed that mandatory life imprisonment was provided as the substitute for the death penalty in return for the votes of MPs who initially opposed abolition of the death penalty in the Murder (Abolition of the Death Penalty) Act. However, an interview with Sir Louis Blom-Cooper QC reflects that 'The notion of a bargain with the public that there would be substitution of very long sentences as a quid pro quo for abolition is nonsense'. [67] In other words, it was not the necessary step to abolition that was generally believed. Indeed, the growth of mass incarceration in the United Kingdom in the post-abolition era was not a product of the abolition process or a necessary step towards final abolition. Rather, it is the outcome of domestic political manoeuvre to exert control over the 'ultimate punishment', which has been counteracted by judicial endeavours and assimilating European influences.

Those sentenced to life imprisonment - mandatory or discretionary- or IPP have no automatic right to be released. Instead, such prisoners must serve a minimum period of imprisonment to meet the needs of retribution and deterrence. This punitive period is announced by the trial judge in open court and is known commonly as the 'tariff' period. Release on expiry of the tariff period is not automatic. Release will only take place once this period has been served and the authorities (executive, quasi-judicial or judicial bodies) are satisfied that the prisoner poses minimal risk to the public. This means that indeterminate sentence prisoners could remain in prison for many more years on preventative grounds after they have served the punitive period of imprisonment set by the trial judge.[68]

While the release of indeterminate sentence prisoners is entirely a matter for the Parole Board, whether and when to release lifers, in particular mandatory lifers, has afforded scope for a battle of wills between executive and judicial powers. Professor Stephen Shute presented a thorough historical chart of the competition between political forces, mainly the Home Secretary, as well as quasi-judicial bodies (the Parole Board for England and Wales), and the judiciary on the power to release lifers from prison.[69] In sum, from the mid-1960s to the mid-2000s, politicians such as Successive Home Secretaries pushed for longer terms of imprisonment while the judiciary endeavoured to shorten those sentences. For instance, the now well-established practice of setting 'tariffs' was introduced in the early 1980s by the then Home Secretary, Leon Brittan, to promote a minimum period of detention to meet 'the requirements of retribution and deterrence', apart from consideration of risk to the public.[70] Besides, the political need 'to maintain public confidence in the system of justice' also loomed large on the Home Secretary's agenda of engineering and reconfiguring the release procedure.[71] By the early 1990s, not only the release of lifers on parole, but also the transfer of lifers to less secure conditions was mainly determined by ministerial power. The role of the Parole Board was reduced to providing recommendations to the Secretary of State.[72]

---

[67] See Finlo Rohrer, 'The history of life' (BBC News, 16 June 2006), http://news.bbc.co.uk/1/hi/magazine/5086978.stm (accessed 14 September 2013)
[68] Ministry of Justice, 'Life sentenced prisoners', http://www.justice.gov.uk/offenders/types-of-offender/life (accessed 14 September 2013)
[69] Stephen Shute, 'Punishing Murderers: Release Procedures and the "Tariff", 1953–2004' Criminal Law Review (November 2004), pp. 873–895 at 876-887.
[70] Mr Brittain's speech, see Stephen Shute, 'Punishing Murderers: Release Procedures and the "Tariff", 1953–2004' Criminal Law Review (November 2004), pp. 873–895 at footnote 41.
[71] HC Debs, Written Answers, Vol. 120, co. 349, July 23, 1987.
[72] Stephen Shute, 'Punishing Murderers: Release Procedures and the "Tariff", 1953–2004' Criminal Law Review (November 2004), pp. 873–895 at 884.

The release of prisoners serving life imprisonment, therefore, for approximately three decades from the 1960s to 1990s, shifted from a relatively liberal, reform-oriented approach, towards a politicized, retributive-based model. It was not until the intervention of the European Court of Human Rights (ECtHR) in *Thynne v United Kingdom* that the power balance between the executive branch and the judiciary on the procedural issue of the release of lifers started to gradually tilt back. In a series of ECtHR cases, including *Hussain v UK* (1996)[73], *V v United Kingdom* (1999)[74], *Stafford v United Kingdom*[75] (2002), *R (Anderson) v. the Secretary of State for the Home Department* (2003)[76], and most recently, *Vinter and Others v. the United Kingdom* (2013)[77], the European Court in Strasbourg incrementally developed a jurisprudence to restrict the ministerial power held by the Home Secretary regarding the release of lifers – from juvenile lifers to adult lifers, from the power to determine continued detention beyond the tariffs to the authority in fixing tariffs. This was when the British government felt compelled to introduce the Criminal Justice Act 2003, granting the judiciary the power to fix tariffs and post-tariff release, which had been in the hands of the Home Secretary for four decades.

There have been various political backlashes aimed at resisting European influence and asserting sovereign control over sentencing, in response to Strasbourg jurisprudence. One of the most obvious signs of this resistance was the introduction of statutory guidelines in the Criminal Justice Act 2003, which was forced upon judges when fixing the minimum term of detention of lifers. This legislative manoeuvre was intended to allow politicians to retain the preeminent role of 'dealing with the most dangerous and evil people in our society'[78]. Schedule 21 of the Act, which relates to whole life orders, is an illustration of the political attempt to re-establish the power of the executive branch in order to maintain public confidence and support.

Paragraph4(2) of Schedule 21 provides a non-exhaustive list to define in what circumstances the gravity of the criminal behaviour should be considered 'exceptionally high' by the judges. Paragraph 5 further stipulates a long list of offences that although not falling in the scope of paragraph 4, nevertheless are considered to be of 'particularly high' severity. Under this legislation, the discretionary power of judges is substantially curtailed. Previously, judges had the power to decide whether a certain instance of murder is sufficiently heinous to warrant the imposition of whole life tariffs. Under the Criminal Justice Act 2003, the role of judges is reduced to merely applying the specific terms of the criminal statutes; their authority of judicial law-making being greatly limited by this rigid legislation. Further, section 270 of the Act stipulates that judges are obligated to explain any departure from those provisions.

What is more, the scope of offences subject to mandatory life imprisonment, as listed in paragraphs 4 and 5, is in fact broader than the scope of death offences prior to their abolition in 1965.[79] In other words, the replacement of the death penalty by long-term sentences has resulted in a gradual expansion of life-term incarceration in the United Kingdom despite the influences from Europe. Indeed, the net-widening effect of the post-abolition law and practice has

---

[73] Hussain v UK [1996] ECHR 21928/93
[74] V v. United Kingdom [1999] 30 EHRR 121
[75] Stafford v. United Kingdom (2002) 35 EHRR 32
[76] R (Anderson) v. the Secretary of State for the Home Department [2003] 1 AC 837
[77] Vinter and Others v. the United Kingdom [2012] ECHR 66069/09
[78] Asif Ali Zardari, Written Answers, 25 Nov 2002 : Column WA19, http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo021125/text/21125w01.htm (accessed 14 September 2013)
[79] Stephen Shute, 'Punishing Murderers: Release Procedures and the "Tariff", 1953–2004' Criminal Law Review (November 2004), pp. 873–895 at 891.

extended the reach of life imprisonment (without parole) beyond the scope of the 'most serious crimes' and death-by-incarceration is no longer confined to formerly capital offences.[80] In 1957 when the Homicide Act was passed, there were 133 lifers incarcerated in England and Wales. By the end of 2012, this number has climbed to 7,576[81]. Over about 55 years, in the aftermath of the abolition of the death penalty, the imprisonment of lifers increased by about 56 times. Furthermore, there were 42 offenders serving a whole life sentence as at 31 March 2013.[82] The length of time served under a life sentence in England and Wales has also been rising. The average time for prisoners serving a mandatory life sentence rose from 13 years in 1999 to 17.5 in 2009.[83] As of March 2013, just over 1,100 prisoners had either a tariff of over 20 years or a whole life tariff.[84]

Nevertheless, changes are on the horizon. In July 2013, the Grand Chamber of the ECtHR decided in the case of *Vinter and Others v. the United Kingdom* that whole life orders constitute a violation of Article 3 of the European Convention on Human Rights (ECHR) because they offer no prospect of parole or release. The Chamber considered that a life sentence with eligibility for release after a minimum period had been served or a discretionary sentence of life imprisonment without the possibility of parole do not contravene article 3 of ECHR. However, a *mandatory* sentence of life imprisonment without the possibility of parole, because it is irreducible *de facto* and *de jure*, violates article 3 of ECHR, which 'must be interpreted as requiring reducibility of the sentence' in the sense that progress towards rehabilitation has been made in the course of the sentence that continued detention is no longer justified on 'legitimate penological grounds'.[85]

Whilst in whole life orders the trial judge has decided that the requirements of retribution and deterrence can be satisfied only by prisoners remaining in prison for the rest of their lives, by explaining that balance of the main justifications for imprisonment – punishment, deterrence, public protection and rehabilitation – may change during the course of the sentence, the Court implies that after a lengthy period of incarceration, penological grounds such as rehabilitation may overweigh justifications such as retribution, deterrence and incapacitation.[86] However, the Court in *Vinter and Others* did not stop here; it went further to state that a whole life prisoner is entitled to be informed of the possibility of release at the start of his sentence. Consequently, the Court stated that the incompatibility of whole life orders with article 3 of the ECHR arises at the

---

[80] Open Society Justice Initiative, The Socioeconomic Impact of Pre-trial Detention, October 2011.
[81] Ministry of Justice, 'Offender Management Statistics Quarterly Bulletin: October to December 2012, England and Wales' (Ministry of Justice Bulletin, 25 April 2013), page 9, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192314/omsq-q4-oct-dec-2012__2_.pdf (accessed 15 September 2013); Cf. Prison Reform International reported in 2012 that the United Kingdom has more life-sentenced prisoners than the other Council of Europe member states put together (approximately 12,500 lifers in the UK and approximately 8,000 in the rest of Europe). Prison Reform International, 'Life after death: What replaces the death penalty?' (20 April 2012). http://www.penalreform.org/wp-content/uploads/2013/06/Life-after-death_English-117KB_0.pdf (accessed 19 September 2013).
[82] Ibid.
[83] Prison Reform International, 'Life after death: What replaces the death penalty?' (20 April 2012), http://www.penalreform.org/wp-content/uploads/2013/06/Life-after-death_English-117KB_0.pdf (accessed 19 September 2013).
[84] HMI Probation and HMI Prisons, 'A Joint Inspection of Life Sentence Prisoners' (September 2013), http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmiprobation/joint-thematic/life-sentence-prisoners.pdf (accessed 24 September 2013).
[85] *Vinter and Others v. the United Kingdom* (Grand Chamber: application nos. 66069/09, 130/10 and 3896/10), paragraph 119.
[86] *Vinter and Others v. the United Kingdom* (Grand Chamber: application nos. 66069/09, 130/10 and 3896/10), paragraph 111.

outset of the sentence and 'not at a later stage of incarceration'[87]. The court, after surveying relevant comparative and international law, endorsed 'an institution of dedicated mechanism guaranteeing a review no later than 25 years after the imposition of a life sentence, with further periodic reviews thereafter'[88].

Vinter and Others v. the United Kingdom will be a landmark case in the European jurisprudence against arbitrary and degrading punishment. It signifies the evolution of British penal practices and policies to comply with European standards. The changing face of the life sentence in the post-death-penalty-abolition era paints a picture of changing attitudes, sensibilities and philosophies to criminal justice in Britain. Although the first four decades of penal history since the late 1950s were dominated by retributive, politicized mentalities where the ministerial authorities held the power, towards the end of this period, the balance of power between executive power and judicial authority is in the process of being redefined. In particular, influenced by European human rights norms, the jurisprudence and practices in the UK with regards to life imprisonment are in the undergoing incremental evolution against locking prisoners up for extremely long periods, no matter how severe the criminal conduct. The *Vinter* case may symbolize the dawning of a new era and the turning point of the post-abolition growth of an incarcerated-for-life population.

– The Road Ahead

The challenges within the criminal justice system do not end with the institution of a moratorium or with abolition of the death penalty, as the question of what to do with the most serious offenders remains. Returning to our starting point: is a penal sanction equivalent to the harshness of LWOP or Whole life order an effective, useful or necessary option for Chinese penal reformers who are working towards the abolition of the death penalty? Do they need to follow the Anglo-American drive towards increased punitiveness and wait until the complete abolition of the death penalty to commence a second wave of protracted struggle to eliminate the use of LWOP? Available evidence suggests that this might be ill-advised.

Under the jurisprudence of 'death is different', the primary objections to the use of the death penalty are its irrevocability and severity[89]. While LWOP and whole life orders would not be subject to challenges based on grounds of irrevocability, they are not immune to criticism of their excessive severity and lack of fiscal sustainability. The practical advantages of such a severe form of penal punishment do not appear to outweigh its potential problems. Indeed, the institutional arrangement of keeping prisoners inside prison walls during the remainder of their natural lives in the two jurisdictions highlighted in this article are increasingly subject to challenge. Prison overcrowding, an ageing prison population, the difficulty of managing prisoners and disciplining inmates who have no incentive to behave well, and the fiscal costs associated are all

---

[87] *Vinter and Others v. the United Kingdom* (Grand Chamber: application nos. 66069/09, 130/10 and 3896/10), paragraph 122.

[88] *Vinter and Others v. the United Kingdom* (Grand Chamber: application nos. 66069/09, 130/10 and 3896/10), paragraph 120.

[89] An enduring argument in US Supreme Court death penalty jurisprudence is that the death penalty is "qualitatively different" from all other punishments. This was developed initially in Furman v. Georgia, 408 U.S. 238, 286–89 (1972) then further refined in McCleskey v. Kemp, 481 U.S. 279, 340 (1987), Atkins v. Virginia, 536 U.S. 304, 337 (2002) and Ring v. Arizona, 536 U.S. 584, 605–06 (2002). As the Court said in Kennedy v. Louisiana, 554 U.S. 407 (2008) 'This Court has consistently held that death is different: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights."

current and developing concerns. In England and Wales, changes may be on the horizon: the force of ECtHR case law is bound to have impact on interrogating the underpinning philosophy as well as the procedural fairness of whole life orders. Across the Atlantic, there seems to be less hope for change. We have argued that LWOP or whole life orders are not a fair and viable substitute for capital punishment in China and would propose that life sentences *with* the possibility of parole are a socially, morally, and economically sustainable alternative to the death penalty. Those European countries that impose life sentences for the most serious offences committed by the most culpable offenders but allow the prospect of parole once the 'tariff' has been served provide a model for China to follow. Such a model necessarily requires rigorous, fair and accountable parole procedures that offer parole as a privilege – not a right - for those who have proven themselves to be safe for release, and that protect the public, and the prisoner, by imposing release licence conditions that make specific requirements of both prisoner and the community into which they are released.

There is no room to be complacent about the achievements so far. The real question is not to simply argue against the death penalty but to think carefully about how societies should treat those citizens who commit the worst crimes in the absence of capital punishment. This is the ultimate question confronting abolitionists and reformers in every jurisdiction moving towards substantial curtailment and final elimination of the death penalty. And this will become the litmus test of the wisdom of reform-minded legal elites around the world, and also a touchstone of civilised society. Given the fact that the number of immediate executions in China will incrementally drop in the years to come[90] and those who are subject to alternatives to the death penalty will continue to grow, introducing a harsh alternative such as LWOP will result in sparing the lives of a few while subjecting a large proportion of the prison population to 'slow execution'. The moral, social, and fiscal impact of re-engineering of the penal structure on both capital and non-capital offenders in the process of abolishing the death penalty should be carefully evaluated.

[90] The amount of prisoners subject to suspended death outnumbered the number of people sentenced to immediate execution in 2007, the first year after the recall of the review power by the Supreme People's Court. See Tian Yu and Zou Shengwen, 'For the First Time, the Number of Prisoners Sentenced to Suspended Death Exceeded the Number of People Sentenced to Immediate Execution' (23 November 2007), http://news.xinhuanet.com/newscenter/2007-11/23/content_7133864.htm (accessed 15 September 2013)