Public, Politicians, and the Law: The Long Shadow and Modern Thrall of Myra Hindley

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Abstract

To understand the adamant defence of whole life orders by the British government to the perceived intrusion of the European Court of Human Rights, it is pertinent to re-examine the case which settled their appropriateness in domestic sentencing: that of Myra Hindley. Political defiance and public appetite for whole life sentences were born of Hindley's case, which settled any doubt as to the order's justifiability. European human rights proponents, already struggling to negate hostility towards the Court based on what Britain has viewed as unfavourable decisions regarding prisoner voting rights and offender extradition, have not yet been able to counteract the hardened opinion on whole life orders stemming from the case of Myra Hindley.

Keywords: Myra Hindley – whole of life orders – criminal justice politics – long-term imprisonment – European Court of Human Rights

> It is no exaggeration to say that [Myra] Hindley is popularly considered to be the embodiment of evil … this single 'hard case' has had an irrevocable effect on penal policy in the United Kingdom (Schone 2000:273)

Introduction

The United Kingdom ('UK'), specifically England and Wales, stands in confrontation with the European Court of Human Rights ('ECtHR') on its use of whole life orders, particularly in reviewing the continued penological justifications for keeping an offender imprisoned for his or her natural life. In addition, the Strasbourg Court has questioned the clarity of possible release procedures from the order (*Vinter v United Kingdom*). While the Fourth Section of the Strasbourg Court has recently retreated somewhat from the rhetoric in *Vinter* (*Hutchinson v United Kingdom*), the matter is now once again pending before the Grand Chamber. Whether the ECtHR continues to challenge the steadfast defiance of Westminster

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or relent to it, it is pertinent to examine that defiance. From a criminal justice perspective, this article asserts that domestic defence of whole life orders can be understood when examining the genealogy of the order and particularly its applicability and justification in the case of its most notorious and publicised appellant: Myra Hindley. Through an examination of Hindley's case, which settled the justification for whole life orders in England and Wales, and its repetitive citation in the rejection of appeals by other whole life prisoners, this article documents how the whole life order came to be so guarded by domestic politicians, courts, and the general public. Hindley was not just an illustration of policy, but the case upon which policy has been built. In reviewing Hindley's case, this article reveals the difficult task European human rights proponents face in challenging Britain's defence and the principles that underlie it. In a microcosm, Hindley's case reveals the themes and issues attendant to whole life orders, which will be addressed here: retribution; the limits of rehabilitation; public opinion; and politics.

It has now been 50 years since Myra Hindley[1] was convicted of two counts of murder and as an accessory to one other (her co-defendant Ian Brady was convicted of three murders). The case of the 'Moors Murders', but particularly Hindley herself, became a media obsession; still now, more than a decade since her death, she continues to make headlines in various British newspapers (see, for example, Branagan 2015; Bingham 2015). What is pivotal in Hindley's case and the development of the whole life sentence, the two so closely intertwined, was the abolition of the death penalty. Capital punishment was abolished in 1965 (*Murder (Abolition of Death Penalty) Act 1965* (UK)); at the time Hindley was on remand awaiting trial leaving, when she was sentenced, the maximum penalty imposed to be life imprisonment. The trial judge made no recommendation as to how long she should serve.

> With this apparent certainty removed, and a public that was by no means unanimous in respect to its repeal, a lacuna opened … The certainty of execution was replaced with an uncertain future — what would society do with its most notorious and apparently dangerous murderers? (Clark 2011)

Life imprisonment though, at the time, despite misconceptions, was never intended to have a literal meaning (Shute 2004; Kandelia 2011; Blom-Cooper 1999; Blom-Cooper 1996). At the time death penalty abolition was being debated the Home Secretary did, however, somewhat prophetically assert that some offenders may never be released owing to their risk (Kandelia 2011:72). As will be demonstrated here though, Hindley's case was not judged on risk but, instead, on meeting the dictates of retribution. Retribution, alongside deterrence —although contended here, the deterrent value of whole life orders is minimal — is the central support for their use. Indeed, it was eventually settled in Hindley's case, and generally, that retribution is a perfectly acceptable justification for whole life orders (*R v Secretary of State for the Home Department; Ex parte Hindley* [2000]). A justification now extended more generally to other whole life sentenced prisoners; a point settled in Hindley and consistently referred to ever since (*R v David Oakes*; *R v McLoughlin, R v Newell*; *R v Bieber* 2008).

Given her proximity to the death penalty, it is perhaps unsurprising that Hindley's case would be the test case; what to do in the long term with those who avoided the hangman but whom, it was felt, should never be released back into society. Hers was not only the first real case to test developments in sentencing and prison tariffs after the abolition of capital punishment (Gurnham 2003:620), but she was the first whole life sentenced prisoner that,

[1] This research has been made by possible by the release of Hindley's prison files, case notes and records. In some instances, names and specific dates have been redacted.

with such publicity, fought against her eventual sentence (Valier 2002:14). Hindley's case charts the development of a sentence put together in a piecemeal fashion by politicians chiefly in response to her claims for freedom, her appeals, and their steadfast rejection by the public, which, in Hindley's case, was given such importance (Mellor 1985; Cavadino and Dignan 2002; Hansard 2000; Gould 1998). Indeed, her case exemplified the level of significance attached to public confidence in the criminal justice system, openly stated as being irreparably damaged if Hindley's release was ever granted:

> The fact that public interest in this case is so high, and public attitudes to these two was so antipathetic, cannot be conclusive of our decision, but it is bound to be a very material factor to be weighed in the balance having regard to the importance we rightly attach to public confidence in the criminal justice system (Mellor 1985).

It is contended here that the Hindley case settled any issue over the use and appropriateness of whole life orders in the abstract (and to her specifically) and thus, domestically, ever since, the issue is regarded as settled. The ECtHR, held in such negative regard following unfavourable rulings regarding prisoner voting rights and offenders extradition and its perceived intrusion into domestic sovereignty (Slack 2011; Hastings 2013; Conservatives 2014), will struggle to force a change in attitude while the case of Myra Hindley, and the reasoning central to its conclusion, continues to cast such a long shadow.

This article first provides a brief background of Myra Hindley and the offences that would lead to her eventual true life sentence. It then overviews public and political replies to Hindley and her pleas for freedom and the lasting effects upon sentencing policy of those responses. The article concludes with an evaluation of current controversy over whole life orders between the UK and Europe and hypothesises the continued role of Hindley in domestic thinking.

Myra Hindley

For present purposes, only a brief account of Hindley's past is required here. Myra Hindley participated in the murders of five children committed by her partner Ian Brady in the Manchester area of North West England between 1963 and 1965. Some murders involved a sexual element. While the extent of Hindley's sexual involvement and motivation remains a point of debate, what would be damning to Hindley at her trial, and until her death in 2002, was a tape recording that proved her explicit involvement in the sexual abuse of one victim: ten-year-old Lesley Ann Downy. Although the whole ordeal of the child is not captured on the tape, the audio excerpt proved Hindley's involvement and willing participation. This particular aspect of the case cemented public opinion in opposition to Hindley's desire for parole (Birch 1995). With repeated hyperbolic descriptions of her as the 'embodiment of evil' (Schone 2000:273), over time public and political attitudes hardened towards Hindley as if her crimes became worse with age, spurred on in no small part by the popular press (see, for example, Birch 1995; Kay and Gay 1985; Barnes 1990; Saxty 1999; Kay, Saxty and Hartley 2000). With repetitive descriptions of Hindley as evil, most often attendant to her black-and-white mugshot taken at the time of her arrest, Hindley became a fixture of public hatred (Birch 1993; Stanford 2002; Clark 2011). Indeed, the mugshot itself is taken as evidence of a remorseless, predatory killer beyond redemption, of femininity perverted: 'Like the image of Medusa, this photograph has acquired the attributes of myth, the stony gaze of Britain's longest-serving woman prisoner striking terror, mingled with fascination, in those who look upon it' (Birch 1993:32).

Typical media representation of Hindley can be summed up in *The Sun* newspaper headline announcing her death, 'Child Killer Myra Hindley is Rotting in Hell at Last' (Murphy and Whitty 2006:5). More so than her partner Brady, who in the view of one victim's mother 'at least had the decency to go mad' (Birch 1995), Hindley was vilified until her death, on the reading of many commentators owing to her gender (Birch 1993; Clark 2011). As Birch notes, 'there is an implicit assumption that for a woman to be involved in killing children is somehow worse, more ineffable than it is for a man' (1993:33). Although Hindley would claim that she was corrupted and dominated by Brady (*R v Secretary of State for the Home Department; Ex parte Hindley* [1998]), this received little coverage in reporting of the crimes and Hindley herself (Murphy and Whitty 2006:6). At her initial trial, though, the presiding judge remarked:

> Though I believe that Brady is wicked beyond belief without hope of redemption (short of a miracle), I cannot feel the same is necessarily true of Hindley once she is removed from his influence (quoted by Lord Bingham CJ in *R v Secretary of State for the Home Department; Ex parte Hindley* [1998] at 760).

Instead, as a woman involved with the sexual murder of children, she would come to be, in the eyes of most, 'the icon of evil' (Clark 2011), fully competent and rational in her participation in the murders.

Until 1987, Hindley described herself as being guilty of only two 'anti-social' acts (failing to report a murder committed by Brady, and the sexual abuse of Lesley Ann Downy), but not guilty of murder. Many who worked with Hindley in prison believed this version of events and would frequently provide positive reports of her progress and recommend that a release date be set (Durham Prison 1981; Cookham Wood Prison 1984–1985). Hindley was largely compliant with institutional demands, well behaved, gained an Open University degree, and was even described as a model prisoner (Holloway Prison 1972; Cookham Wood Prison 1984–1985). By 1987 though, after more than 20 years of imprisonment, and still unaware of any tariff being set, she saw no real prospect of release and so admitted her fuller involvement in the murders for which she had been sentenced, as well as the commission of two others. While this added weight to the public hatred of Hindley, she was still consistently judged as a low risk of reoffending. Moreover, officially, those admissions could not be part of any decision-making process as she was never charged or convicted of any additional offences. Hindley could only then be 'officially' judged on the progress she had made since her original conviction in 1966.

Yet, as Stanford notes, in Hindley's case, 'the more that convincing evidence was presented of her transformation, the more the myth grew, in response, that she was a manipulative schemer, prepared to trick anyone to be free' (Stanford 2002). It seems more generally settled by Hindley that the crimes that gave rise to the whole life order, and the attributes that come to be given to the perpetrator by the popular press and public, can indelibly fix the term regardless of the clarity of any release procedures. Given the reaction of the public to such prolific offenders, politically at least, keeping a prisoner detained for his or her natural life serves more purpose than to grant release:

> The facts of Hindley's case do not set her apart as unique amongst murderers. Rather, the fact that Lord Steyn's judgement [*R v Secretary of State for the Home Department; Ex parte Hindley* [2000]] acts as a test case for the 'whole-lifers' … indicates that the phrase 'uniquely evil' signifies similarity of type between Hindley and these others, as prisoner whose release … would serve no practical purpose (Gurnham 2003:620).

For all Hindley's 'exceptional progress' in prison, which was indeed exceptional (Stanford 2002), and which, ostensibly, should have gained her a successful review, conversion of her sentence and eventual release was always to be outweighed by the feelings of the public, the strength of which did not diminish over time. Here, although demonstrably exaggerated in Hindley's case, a point is evident that applies to other whole life sentenced prisoners who may seek executive relief and conversion of their sentence to a determinate period: '[C]an the principles of universal human rights be upheld given the national contexts in which notorious criminals are represented in the mass media as monstrous figures who can never be punished enough?' (Valier 2002:15). In a punitive climate where endorsement of life without parole is solid (Mitchell and Roberts 2010; Hough 2013; YouGov 2013), it would seem that those subject to the order, having committed the worst forms of murder, are deemed beyond hope for rehabilitation and eventual release.

Appeals and rejections

After her confession to a fuller involvement in the murders for which she was convicted, and her confession to an additional two murders, Hindley's case was explicitly no longer being judged upon risk (and all reports, even after those confessions, continued to place her at an extremely low risk of reoffending). Similarly now, risk remains increasingly incidental over the very long term; when imprisonment becomes measured in decades, all that is left to justify the whole life order is the principle of retribution, just as it was in Hindley's case:

> Without her active participation the five children would probably still be alive today. The pitiless and depraved ordeal of the victims, and the torment of their families, place these crimes in terms of comparative wickedness in an exceptional category. If it be right, as I have held it to be, that life-long incarceration for the purposes of punishment is competent where the crime or crimes are sufficiently heinous, it is difficult to argue that this case is not in that category (Lord Steyn, *Hansard* [2000] at col 1190).

For some, deterrence may also be a consideration yet, it is submitted, the deterrent effect of the sentence is minimal (Pettigrew 2015:298). As Dyer notes, commentators and judges in support of irreducible life sentences most often premise their agreement on the principle of retribution (Dyer 2016). Imposed so relatively rarely, much like its predecessor the death penalty, which was imposed mandatorily on all convicted murderers until 1957, the deterrent value of whole life orders is somewhat insignificant. Instead, the sentence is weighed in deservedness, in retribution (*R v Secretary of State for the Home Department; Ex parte Hindley* [2000]) and, as Hindley's case demonstrates, over time the concept of risk is downgraded in its importance:

> The panel members concluded early in their discussion that Miss Hindley's case is not one which can be decided solely on the question of whether or not there is a risk of her re-offending on release. They could not in their view completely ignore the question of retribution and thought it right to examine closely the confession made in 1987 and consider how this might possibly, had the details been known at the time, have affected the tariff set (Parole Board Review 1990).

Not only is the Parole Board stepping outside its proper function, considering sentencing, and in relation to offences for which no charges were ever brought, it acknowledges, pivotally, that Hindley's continued imprisonment was concerned with more than risk, a point affirmed in her appeals (*R v Secretary of State for the Home Department; Ex parte Hindley* [2000]).

Hindley's whole life order, set in 1990, was finally revealed to her in 1994 when she was also informed that a provisional tariff of 30 years had been set in 1985. Following *R v Secretary of State; Ex parte Doody*, Hindley became entitled to know why a Home Secretary had departed from a judicial recommendation in setting a tariff and the documents upon which the decision was based. Moreover, Hindley should have been allowed to make representations before any tariff was set. After the communication to her of the whole life order, Hindley set about appealing that decision, after partial success in the Divisional Court, to the Court of Appeal then, when her appeal was rejected, to the House of Lords.

While Hindley's challenge to the whole life order itself was unsuccessful in the court of first instance, her claim that the Home Secretary (who announced in 1994 that he would review whole life cases after 25 years) was unlawful in refusing to consider factors other than retribution and deterrence was successful. Yet Hindley would be a victim of timing. By December 1997, Michael Howard had been replaced as Home Secretary by Jack Straw who, in response to a House of Lords judgement in *R v Secretary of State; Ex parte Pierson*, announced a change in policy:

> So far as the potential for a reduction in tariff is concerned, I shall be open to the possibility that, in exception circumstances, including for example exceptional progress by the prisoner whilst in custody, a review and reduction of the tariff may be appropriate (cited in Schone 2000:281).

So the Home Secretary would exercise his powers of reconsideration whenever he wished, regardless of any decision made by his predecessor, and would consider more than retribution and deterrence, allowing prisoners to make representations as to their 'exceptional progress' (Coutts 2000; Schone 2000). The Divisional Court found that Michael Howard had been unlawful in his actions but the situation had been remedied by changes in policy announced by Jack Straw. Hindley's problem, in a legal sense, was resolved, despite the disadvantage to her:

> [I]t is plain that the applicant should have been told of any decision on her tariff term, of any departure from the judicial recommendations and of the Home Secretary's reasons for departing from the judicial recommendations. It is hard on the applicant that she should be prejudiced by the Home Secretary's failure to do what the law now says he should have done (*R v Secretary of State for the Home Department ex parte Hindley* 1997 at 773).

Hindley's appeals progressed and, in the final appeal before her death to the House of Lords, she contended four points: 1. under the *Murder (Abolition of the Death Penalty) Act 1965* (UK), a sentence of life imprisonment should be a finite period; 2. the whole life tariff unlawfully excludes the discretion of the Parole Board; 3. the finite tariff period prior to 1990 gave Hindley a legitimate expectation of release; and 4. the whole life tariff was disproportionate in her case as it gave insufficient consideration to her young age or to Brady's influence over her at the time. All four points were rejected and it became established that whole life orders could be imposed for the pure purpose of punishment (*R v Secretary of State for the Home Department; Ex parte Hindley* [2000]).

The House of Lords was the highest domestic court to which Hindley could appeal; domestically then her case was settled. The final legal decision corroborated political and public opinion (BBC News 1998; MORI 1997; Reuters 2000) and, from there, both in the abstract and in the case of Hindley, the issue of whole life orders was resolved. Hindley was the case that tested the rationale for imposing and maintaining a whole life order; it was that testing and its response which has fixed the position and attitude towards whole life orders that remains now that defies European intervention or remedy.

According to Gurnham, the response to Hindley legally, politically and by the general public, was part of a wider retributive turn:

> One might construe Hindley as part of a larger apparent resurgence of retributive ideology in recent years. Commentators have pointed to recent political rhetoric in which talk of protecting civil liberties and punishment being of a rehabilitative purpose for the criminal has to a large extent been replaced with demands for tougher law enforcement policies and more punitive criminal sentences (Gurnham 2003:607).

Indeed, there has been much academic scrutiny of 'penal populism' or 'populist punitiveness' in recent history (see, for example, Bottoms 1995; Garland 2001; Pratt 2007), the action of politicians tapping into the perceived punitive attitude, and appetite for harsher criminal sanctions, of the general public.

Pratt (2007:5) asserts that 'populist responses to crime are strongest and would seem most likely to influence policy when they are presaged around a common enemy, a group of criminals who seem utterly different from the rest of the population'. Hindley was a unique case, a woman who, apparently, made the conscious rejection of maternal instinct and chose to participate in the sexualised murder of children. With her attendant mugshot picture which, in itself, according to various feminist scholars, frames her 'otherness' and difference (Birch 1993; Schone 2000), Hindley was fertile ground for such a response. She alone became a common enemy and one upon which a sentencing policy became resolved. Her case became the *par exemplar* of a criminal justice system out of touch with the general public, the cause célèbre of 'common sense' sentencing and, ultimately, the enduring justification for whole life orders. That a convicted child killer should ever be paroled was an affront to common sense, an example of 'the insidious inversion of commonsensical priorities' on which penal populism feeds (Pratt 2007:12). Of course, there was no real sense in keeping Hindley, a 'prison success story' (Stafford 2002), detained for her whole life when her risk of reoffending was minimal; but electoral advantage overrides penal effectiveness (Roberts et al 2003:5).

Although Hindley might be construed as part of a wider resurgence in punitive attitude and consequent policy, in terms of whole life orders her case precipitated the retributive and unwavering defiance that remains steadfast even now. Successive polls at the time Hindley's case was discussed, and in the years since, have found support for whole life prison terms (MORI 1997; Mitchell and Roberts 2010; Hough et al 2013; YouGov 2013) (findings that are consistent with the general public perception over the past 20 years that sentences handed out by courts are too lenient (Hough et al 2013)). In a 2010 survey of public opinion and sentencing for homicide there was support for whole life orders in each hypothetical murder scenario. Scenarios ranged from 'compassionate killing' (specifically, a mother unlawfully disconnecting life support for her child who suffered from a series of untreatable mental and physical disabilities) where support was at 4 per cent, to intentional murder during an armed robbery where support was 52 per cent. Across all scenarios offered, there was an average support for whole life orders of 26 per cent (Mitchell and Roberts 2010). Yet none of those scenarios reach the current threshold for imposing the order under the *Criminal Justice Act 2003* (UK). More recently, although in a less explicit poll where scenarios were broader, a YouGov poll found increased support for the sentence (YouGov 2013). Ninety per cent supported whole life orders for the murder of a child for a sexual or sadistic motive, the category into which Hindley's crimes would fall.

In the case of Hindley, and still now, to stand against such punitive attitude would be political suicide:

> [f]or it is dreadfully clear that even if it were agreed on all hands that in no circumstances would she ever do anything criminal again, the present Home Secretary would be reluctant to release her simply because he would be unwilling for political reasons [to] face the inevitable fury (Levin 1977 cited by *Hindley v United Kingdom* 1980 at 2).

This point would pervade Hindley's imprisonment and undermine any possibility of parole:

> I am not surprised that people in this House and elsewhere say to me, 'I agree with you, my dear chap. Of course after all these years she ought to come out. But you can't imagine any Home Secretary having the guts to let her out, can you? Think what would happen to him. Think what the tabloids would do to him' (Lord Longford cited in Schone 2000:288).

Currently, the reluctance of providing meaningful review (which the ECtHR ruled must change (*Vinter v United Kingdom*)) is a response to public opinion (BBC News 1998; Dyer 2002), as noted by Hindley herself 25 years ago in a petition to the Home Secretary:

> The whole area of neglect and inhumanity pervading my case stems, from what I interpret to be fear of public opinion, but someday, someone has to have the courage to stand up to this so called public opinion … is society going to be compensated for being thwarted of the rope by my perpetual imprisonment? (Hindley 1980)

Hindley asserted that someday someone must stand up to public opinion; instead, that opinion is tapped into for electoral gain. That Hindley should even have any right to a review was abhorrent to the public consciousness. In the tradition of populist punitiveness, any right belonged to the public to express its outrage through the continued detention of Hindley. With deference given to public opinion (Mellor 1985; Cavadino and Dignan 2002; Hansard 2000; Gould 1998), Hindley's case typifies the sentiment that must be reckoned with by the executive and, with regard to Hindley, public opinion was of a general consensus:

> My family and I are writing to you regarding Myra Hindley, because of her new bid for freedom in the House of Lords. We wish to be reassured that this merciless child torturer and murderer will never be released. We are relying on you to uphold British justice, which for Myra Hindley means the rest of her life (Public correspondence to the Home Secretary 2000).

> May I say how horrified I am that Myra Hindley has been given the opportunity to appeal against her imprisonment. In my opinion, which I am sure is a common feeling, Myra Hindley's case is not up for discussion (Public correspondence to the Home Secretary 2000).

> I have been reading an article in one of the morning papers saying that Myra Hindley could be released under the new European Human Rights Act. What a disgraceful mockery of the law it would be, if a person who had no regards for the human rights of the children she cold bloodily and sadistically murdered with her partner could use this Act to obtain freedom (Public correspondence to the Prime Minister 2000).

Interestingly, the public was dissatisfied not only with regard to Hindley herself, but also with the possible means of European intervention, per se, to gain release. The ideal of superior British justice is a common theme throughout correspondence to Ministers in the final years of her life, as Hindley moved closer to probable freedom with a planned appeal to the ECtHR. For Ministers though, and even for the judiciary, the case was settled: whole life orders, even if imposed by the executive (as they still were at the time of Hindley's final appeals) were an acceptable answer to meet the dictate of retribution in 'exceptional' cases.

> It is trite knowledge that politicians are often unwilling to take controversial decisions which might create adverse public opinion. You need only hear the names of those affected by the tariff system — Hindley, Bradley, Thompson, Venables, Silcott — to appreciate why decisions

> relating to their release cannot properly be taken by one whose very status is reliant on maintaining positive public opinion (Mills 2002:1077).

While other notorious cases have followed Hindley — Fred and Rose West, Dennis Nilsen, and Harold Shipman, for example — Hindley was the first test case after the abolition of the death penalty and set the precedent, providing guidance on how to regard such serious offenders and their 'right' to consideration for release.

In *R (Anderson) v Secretary of State*, after Hindley's death, the House of Lords, noting the recent decision of the Strasbourg Court in *Stafford v United Kingdom* (2002), where the power of the Home Secretary to veto release decisions made by the Parole Board was found to be in contravention of art 5(1) and (4) of the *European Convention on Human Rights*, the Court held that the Home Secretary could no longer impose the tariff as he saw fit; that was a role for the judiciary. Thus it was that the whole life order found its way into legislation under the *Criminal Justice Act 2003* (UK). Section 21 of the Act is the executive direction to the judiciary of when a whole life order is to be imposed (the Act makes no mention of the power to release that still now resides with the executive). This was a concession to the European Court, the revocation of the Home Secretary's power to set tariffs, a necessary step to ensure the place of whole life orders in domestic sentencing. Without the inclusion, in legislation, of a possible release mechanism, whole life orders in Sch 21 to the Act allowed the retention of some political control after the ECtHR ruling in Stafford. The decision to keep Hindley detained for natural life was made by the Home Secretary and reinforced by various holders of that office. Setting the threshold criteria for whole life sentencing through legislation is an extension of that political will to keep some offenders detained for the remainder of their lives, which, in turn, is a response to public opinion. This is a point in criminal justice where the separation of powers between the executive and the judiciary has become blurred. After the issue became settled in Hindley's case, the UK position on whole life orders was set, codified in legislation with political influence present by omission of release procedures, so there would be an inevitable clash with the ECtHR.

Current controversy

With Hindley's death, the test case before the Strasbourg Court eventually came from Cyprus (*Kafkaris v Cyprus*). The ECtHR held that whole life sentences did not violate art 3 of the *European Convention on Human Rights*, which prohibits inhuman or degrading treatment or punishment, but there may be a valid claim if the sentence was irreducible; that is, if there was no clarified means of exit from the sentence and possibility for release. In the UK, the Court of Appeal responded in *R v Bieber*, citing Hindley's appeals, where it held that the power of release held by the Secretary of State under s 30 of the *Crime (Sentences) Act 1997* (UK) was enough to render the sentence reducible, noting that the Secretary of State is bound to exercise his power under the Act in a manner compatible with art 3. This position was reconfirmed by the Lord Chief Justice, before the Grand Chamber heard *Vinter*, in *R v Oakes*. In so doing, there was a reliance on other decisions of the Chamber, particularly those dealing with extradition of offenders to the United States to face potential life without parole sentences (*Harkins and Edwards v United Kingdom*; *Babar Ahmad v United Kingdom* (2012)) (Van Zyl Smyt, Weatherby and Creighton 2014:61).

There are two means of release from a whole life order: demonstrating exceptional progress, and with consideration of retribution and deterrence, the order can be substituted for a determinate term; or release on compassionate grounds. Specifically, the criteria that

must be met by a prisoner to be considered for release on compassionate grounds is set down in Ch 12 of the Indeterminate Sentence Manual (the 'lifer manual') issued by the Secretary of State as Prison Service Order 4700, include that:

- the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, three months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section), or the Indeterminate Sentenced Prisoner is bedridden or similarly incapacitated (for example, those paralysed or suffering from a severe stroke); and
- the risk of reoffending (particularly of a sexual or violent nature) is minimal; and
- further imprisonment would reduce the prisoner's life expectancy; and
- there are adequate arrangements for the prisoner's care and treatment outside prison; and
- early release will bring some significant benefit to the prisoner or his or her family.

Despite domestic clarification in *Bieber* and *Oakes*, the ECtHR held in *Vinter v United Kingdom* that not only was such limited means of release insufficient, but, additionally, a clear release mechanism must be in place when the whole life order is imposed so a prisoner can know what he or she needs to do in order to be considered for eventual release. Drawing on various European Union and international treaties, the Court suggested a 25-year time frame for review to determine if the penological justifications for imprisonment had shifted over time, possibly rendering continued detention unnecessary and unjustifiable. The Grand Chamber did, however, make it clear that a person could be incarcerated for the rest of his or her natural life if the person remained a risk to the public. Under such a meaningful review, Hindley would surely have been released, considering the continual reporting of her as of no risk, and several others currently incarcerated could similarly face freedom. For, even after the commission of extreme serial crime, the desistance literature is near unanimous in stating that an offender's risk decreases with age, and many of those serving a whole life sentence are now elderly and frail (Pettigrew 2015:299):

> The Grand Chamber favoured a review of penological principles, the purposes of criminal sentencing which, domestically, are found in Section 142 of the *Criminal Justice Act 2003*:
>
> (1) (a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and
>
> (e) the making of reparation by offenders to persons affected by their offences.

It is relatively settled that presumptive minimum and mandatory sentencing schemes like s 21 of the Criminal Justice Act 2003 have little deterrent value (Fitz-Gibbon 2016:53), rehabilitation is foresworn by a denial of future release, and public protection becomes somewhat of a non-issue when offenders are elderly and frail, leaving only the principle of punishment, retribution.

In *R v McLoughlin*, the legal response to the *Vinter* decision, the Court of Appeal held that the executive power to release was clear enough and allowed the possibility of release. Hindley

was again cited: 'In our judgement the law of England and Wales therefore does provide to an offender "hope" or the "possibility" of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable' (*R v McLoughlin* at 29).

The Court in *McLoughlin*, by its own admission, sets an exceptionally high threshold for a successful application for release, mirroring the exceptional circumstances laid down in the relevant Prison Orders that specify terminal illness. Although the Court does acknowledge that circumstances can change in exceptional cases, it simultaneously notes the heinous nature of the offences that originally warranted the imposition of a whole life order. The conclusion is that, in England and Wales, any review becomes one of the original offence and how much punishment, deprivation of freedom, is commensurable with the heinousness of the crime. For Hindley, and those after her, such is the level of vilification by the general public of offenders like Hindley, and such is the political use of that vilification, that there is no real prospect of release.

In addition to the legal rebuttal of *Vinter*, political rhetoric underscored that of recent years, that which assured the public that Myra Hindley would not be granted parole: certain prisoners, no matter what, will never again see beyond a prison cell (Kern 2014; Dyer 2002) (meaning that the appellants in *Vinter* were no doubt correct then, as was Hindley, that the possibility for release does not exist in any substantive way). Hindley herself set a relatively high threshold for any acceptable claim of 'exceptional progress"' made in prison: religious conversion, educational achievement, and a mass of favourable reports regarding her changed character and exceptionally low risk. As Stanford notes: 'The irony of it all was that Hindley was one of the few success stories of our prison system. She was a woman whom jail had provided an opportunity to make herself a better person' (Stanford 2002). If, for all Hindley's efforts to improve herself while in prison (even if they were entirely self-serving, to impress those who could move her towards release), she was not deemed to have made 'exceptional progress', it is then difficult to imagine any prisoner that could reach that point. Hindley devoted over three-and-a-half decades to all the self-improvement and educational courses she was offered in prison and still that was not enough to persuade politicians (or the public) of a change in her character. Hindley has, in effect, placed the bar so high that other prisoners with whole life orders are left with very little hope of achieving release by that mechanism. Perversely, the remaining avenue for freedom, terminal illness, is not a state to be desired, nor can it be achieved through desire or action.

Supplementing the settled justification of the order from Hindley's case, in context, the *Vinter* decision was one in a string of unfavourable rulings for the UK. In regard to prisoner voting rights:

> The controversy should, therefore, be seen not as an isolated issue but as a continuing public conversation in which demonization of human rights is the preferred way for the right of centre press and many Conservative politicians (ministers as well as back benchers) to express opposition to Europe and support for a particular notion of British legal and constitutional arrangements (McNulty, Watson and Philo 2014:366).

In that context, the rebuttal of the *Vinter* decision from Westminster was unwavering in its defiance to yet another perceived intrusion into domestic policy (Hastings 2013; Conservatives 2014). There has been a growing feeling within the political establishment that the European Court has become too powerful, as Murray notes: 'Strasbourg's role has skewed the reaction of parliamentarian's fearful that the Court, alongside other supra-national institutions such as those of the European Union, poses a threat to Westminster's law-making competence' (Murray 2013:513).

Britain though has been given some respite in the decision of the Fourth Section of the ECtHR in *Hutchinson v United Kingdom*, two years after the Grand Chamber judgement in *Vinter*. The claim in *Hutchinson* was indistinguishable from that in *Vinter*: denial of parole is a violation of art 3. The clarification offered in *R v Mcloughlin* was, in substance, identical to that offered in *R v Bieber* and *R v Oakes*. The law had not changed, but clarification had been affirmed and this was enough to appease the Fourth Section:

> [F]ollowing the Grand Chamber's judgement in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court's interpretation of domestic law (*Hutchinson v United Kingdom* at 25).

The Fourth Section though had made a favourable ruling in *Vinter* before the case was heard by the Grand Chamber. Once again, the decision of the Grand Chamber in *Hutchinson* will be pivotal.

Conclusion

Hindley was the enduring reminder, from the date the death penalty was abolished, of the general public's punitive appetite. Although Hindley was unique, or at least framed as such by the popular press, she engendered a defiant attitude towards prisoners and their 'right' to release. That laid the supportive foundation for whole life orders in England and Wales, a cause that could later be rallied around by many from across the political spectrum to rebut perceived 'intrusion, interference, and meddling' by the ECtHR in settled domestic policy. The *Vinter* decision was strongly rejected by the UK, although influenced by other unfavourable decisions, at its core because the issue, after Hindley, was regarded as settled in public, political and legal arenas.

In England and Wales, some offenders are beyond hope for rehabilitation and have lost any right to meaningful consideration for their eventual release back into society Yet, it seems that the battle between the UK and ECtHR is far from over. As McNulty, Watson and Philo (2014:366) note: 'The emergence of the EU as the bogeyman has, arguably, curtailed debate on not just prisoners' rights but on human rights more generally'. Although the relationship with the Strasbourg Court has deteriorated in recent years, with Britain accusing the ECtHR of intrusion into domestic policy beyond its remit, of 'mission creep' (Conservatives 2014:3), to understand why whole life orders are so vigorously defended by, and supported in the UK, observers might do well to look at the origins of the sentence and the case of Myra Hindley.

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