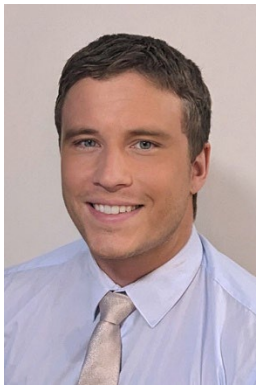

# HUMAN DIGNITY, PURE PUNISHMENT SENTENCING AND ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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## Introduction

Articulated throughout the jurisprudence of the European Court of Human Rights ('ECtHR') is a powerful theoretical argument against the imposition of life sentences without the opportunity for parole. It states that by removing a person's opportunity to rehabilitate, they also remove a person's sense of self-worth and agency, and they are therefore a fundamental breach of human dignity – a concept underpinning human rights law. However, a belief in the sovereignty of Parliament coupled with an inclination for punitiveness has led to the British executive and judiciary arguing that it is them who have the right to determine how offenders are punished and in so practice, the sentence is still used. This article discusses the two camps of argument beginning with a breakdown of the British legislative and policy developments that scaffolded life without parole in the UK. This is then followed by a discussion surrounding a number of legal and theoretical considerations that are used to inform the remainder of the work, which focusses on how the ECtHR case law has developed in the area and subsequently arrived, alongside our domestic law, in a position that is contrary to Article 3 of the European Convention on Human Rights ('The Convention').

## Current UK life without parole law and how it came to be

The case of Myra Hindley is often regarded as the enduring justification for life without parole in the UK.[2] Hindley was convicted in 1966 for the murder of two children, contrary to the Homicide Act 1957. She was described in the media as 'the embodiment of evil'[3] and the judge at her trial expressed to the Home Office his expectation that the Home Secretary

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[2] Mark Pettigrew, 'Retreating from Vinter In Europe: Sacrificing Whole Life Prisoners To Save The Strasbourg Court' (2017) 25(3) European Journal of Crime, Criminal Law and Criminal Justice 260
[3] Mark Pettigrew, 'Public, Politicians, and the Law: The Long Shadow and Modern Thrall of Myra Hindley' (2016) 28(1) Current Issues in Criminal Justice 51

should keep her in prison 'for a very long time'.[4] The House of Lords reviewed and subsequently upheld this ruling in 1998, stating that there is 'no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment'.[5] This judgement laid the foundations for the Criminal Justice Act 2003 ('2003 Act'). In addition to being the UK's central legislation for passing a sentence to life, this Act was passed with the aim of providing a clear and flexible sentencing network by identifying punishment, crime reduction, reform, rehabilitation, public protection and reparation as the purposes of sentencing.[6] It grants trial judges the authority to set an offenders tariff (the minimum term a prisoner should serve in order to satisfy the requirements of punishment and deterrence) with regard to schedule 21, which recommends a variety of starting points ranging from 15 years to a whole life order.[7]

The criteria for a life sentence without parole all involve murder. They are as follows:

> *The murder of two or more persons, where each murder involves any of the following –*
>
> *(i) a substantial degree of premeditation or planning,*
>
> *(ii) the abduction of the victim, or*
>
> *(iii) sexual or sadistic conduct,*
>
> *The murder of a child if involving the abduction of the child or sexual or sadistic motivation,*
>
> *A murder done for the purpose of advancing a political, religious, racial or ideological cause, or*
>
> *A murder by an offender previously convicted of murder.* [8]

All judges are under a general duty to state in open court, in ordinary language, their reasons

[4] Regina v Secretary of State for the Home Department, Ex parte Hindley -Divisional Court [1998] 2 W.L.R. 505
[5] Ibid
[6] Explanatory Notes to the Criminal Justice Act 2003, Chapter 44
[7] See section 269(4), which allows the trial judge in cases of sufficient seriousness, to sentence a prisoner to life.
[8] This has now been repealed by Schedule 21 of the Sentencing Act 2020, although there is little material difference between the two in this context other than to include the murder of a police officer or prison officer in the course of his or her duty, where the offence was committed on or after 13 April 2015.

for arriving at their chosen Schedule 21 starting point.[9] Paragraph 8 does accommodate a degree of judicial flexibility by allowing the court to take mitigating and aggravating factors into account, but all things considered, the 2003 Act was a positive, albeit small step towards clearer, more coherent sentencing. Conversely, regarding opportunities for release, the Act is silent. It makes no provision for the early release of lifers. It does however work in conjunction with the Crime (Sentences) Act 1997 ('1997 Act'). This Act allows the Home Secretary to discretionally release lifers in 'exceptional circumstances'.[10] These circumstances are restricted to compassionate release on medical grounds through policy contained in chapter 12 of the Indeterminate Sentence Manual ('the Manual').

**The grounds for release in the manual are as follows:**

The prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to the Public Protection Casework Section [PPCS]), or the ISP (Indeterminate Sentenced Prisoner) is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke;

and

the risk of re-offending (particularly of a sexual or violent nature) is minimal;

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/her family.[11]

As one may appreciate, these grounds are extraordinarily narrow, requiring total

[9] Unknown author, 'The Criminal Justice Act 2003' (2004) Sentencing News 7
[10] Crime (Sentences) Act 1997 S 30(1)
[11] HM Prison and Probation Service and Ministry of Justice (Gov, December 2020) <https://www.gov.uk/guidance/prison-service-orders-psos> accessed 31 October 2022

incapacitation in order for them to apply. Because of this, at the time of writing, they are yet to result in the release of a single lifer. Also notable is the relentless media backlash when the terms have been applied to those not even serving life.[12] For example, when the Home Secretary Jack Straw released the famous train robber Ronnie Biggs, the Daily Mail published the following quote from Keith Norman, General Secretary of the train drivers union: 'It's ludicrous that a man who was part of a gang that committed a violent crime, and attacked an innocent man and hit him with an iron bar, should deserve clemency'.[13] Similarly, when the Government released the 'Lockerbie Bomber' Abdelbaset Ali al-Megrahi, the Daily Mail reported US Senator Charles Schumer as saying: 'the Scottish government, perhaps with the participation of the British government, created a major injustice when they let him out'.[14] Commentary such as this champions punitive policies.

And thus the domestic position was established. Life without parole had become a part of UK law after gathering support from the media, the executive, the legislature, the judiciary in *ex parte Hindley* and cases that immediately followed.[15] Before discussing how the case law of the ECtHR has approached this, particular focus will be placed upon, the key criminological, legal and philosophical concepts underpinning the courts earlier decisions.

## Legal and Theoretical Considerations

### Article 3 of the ECHR

Article 3 'has been referred to, "often emphatically", as the most absolute right guaranteed by the convention'.[16] It provides that no one shall be subjected to torture or to inhuman or

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[12] Rebecca Camber and Tim Shipman, 'Cameron Dashes Hopes for Relatives of Lockerbie Victims by Rejecting Call for New Inquiry after Bomber Al-Megrahi Dies', *Daily Mail* (May 20) )<https://www.dailymail.co.uk/news/article-2147110/Lockerbie-bomber-Al-Megrahi-dead-health-rapidly-deteriorates-Libya.html> accessed 28 September 2022); Mark Pettigrew, 'Retreating From Vinter In Europe: Sacrificing Whole Life Prisoners To Save The Strasbourg Court' (2017) 25(3) European Journal of Crime, Criminal Law and Criminal Justice 260

[13] Rebecca Camber and Tim Shipman at n(11); Slack, J. Wright, S. (2009) 'Bed-Ridden Ronnie Biggs 'Released' from Prison', *Daily Mail*, (August 6) < https://www.dailymail.co.uk/news/article-1204787/Dying-Ronnie-Biggs-released-prison-compassionate-grounds.html> accessed 28 September 2022

[14] Rebecca Camber and Tim Shipman at n(12)

[15] R. v Lichniak (Daniel Helen); R. v Pyrah (Glyn Edmund) [2002] UKHL 47

[16] Alistair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289; Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22 Leiden Journal of International Law 583; Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15(4) Human Rights Law Review 721

degrading treatment or punishment. Ill-treatment must reach a minimum level of severity if it is to breach the Article 3 threshold.[17] This threshold hinges on the way the treatment affects the individual[18] and is the subject of the living instrument doctrine, which means it must be interpreted 'in light of present day conditions'.[19] Ill treatment will be considered 'inhuman' if it involves premeditation, 'actual bodily injury, or intense mental suffering'.[20] It is considered 'degrading' when it 'humiliates or debases an individual, showing a lack of respect for, or diminishing, their human *dignity*'.[21]

These principles, in their application to inhuman and degrading *treatment,* apply equally to inhuman and degrading *punishment*.[22] However, 'there are a number of elements that distinguish the two in a theoretically and doctrinally significant manner'.[23] Most importantly, punishment has retribution as its 'pivotal notion'.[24] Indeed, as Galligan points out – for many people, 'there is a deeply embedded intuition that part at least of the general purpose of criminal justice is the correction of wrongs'.[25] Unlike treatment, therefore, punishment implies that an individual has behaved unacceptably and that in response, the state must subject them to something inherently unpleasant. It follows that the ECtHR must determine how much unpleasantness a 'reasonable person can endure'[26] before Article 3 is breached.[27] To borrow Moller's assessment, this requires some attunement to the needs, vulnerability and suffering of others, which in turn requires seeing them not necessarily in the way we would perhaps like to see them – say, as 'the embodiment of evil'[28] or an incurable sex offender.[29] On the contrary, it requires an acknowledgement that they are still people, with intrinsic human qualities and a level of vulnerability that we all share.[30] When that recognition has taken place, the immorality of punishing people in ways that are inhuman or degrading should

[17] Ireland v United Kingdom (2018) 67 E.H.R.R. SE1 [162].
[18] A v United Kingdom Application No 25599/94 (1996) 22 E.H.R.R. CD190
[19] Steve Foster, 'Prison Conditions, Human Rights and Article 3 ECHR' [2005] Public Law 35; Selmouni v France Application No 25803/94 [1999]
[20] Pretty v United Kingdom Application No 2346/02, [2002] 4 WLUK 606, [52]
[21] Pretty v United Kingdom Application No 2346/02, [2002] 4 WLUK 606
[22] Ibid
[23] Ibid
[24] David Wood, 'Retribution, Crime Reduction and the Justification of Punishment (2002) 22(2) Oxford Journal of Legal Studies 301
[25] D.J Galligan, 'The Return to Retribution in Penal Theory' in C.F.H. Tapper (ed.) Crime, Proof and Punishment, Essays in Memory of Rupert Cross (Butterworths; 1981)
[26] Jeremy Waldron and Meir Dan-Cohen Dignity, Rank, and Rights (2012; Oxford University Press)
[27] Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context (2015) 15(4) Human Rights Law Review 721
[28] Mark Pettigrew, 'Public, Politicians, and the Law: The Long Shadow and Modern Thrall of Myra Hindley' (2016) 28(1) Current Issues in Criminal Justice 51
[29] Kai Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34 Canadian Journal of Law & Jurisprudence 341
[30] Ibid

become clear.

## Human Dignity

The first thing likely to come to mind when one thinks of dignity is a construct similar to that of honour or pride. For example, to 'die with dignity', is to die before you lose your independence/control of bodily function and before the continuation of your life is prioritised over its quality.[31] Indeed this idea – that dignity is a form of 'nobility for the common man' – has recently been revitalised in debates surrounding the correct approach to dignity.[32] Problematically, however, it carries with it the implication that dignity may be lost. This places it at fundamental odds not only with Immanuel Kant's 'paradigmatic definition of dignity as unnegotiable worth',[33] but also with the terms lexical and etymological roots – the Latin '*dignitas*'[34] – which according to Schachter's analysis is synonymous with the intrinsic worth of a person.[35] Numerous international documents identify with the Kantian/Schachter approach, and so this will be used as the basis for the following discussions.[36] Dworkin, who expands on this idea, claims:

> *'[Dignity] holds that each person has a special responsibility for realising the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him. He must not accept that anyone else has the right to dictate those personal values to him or impose them on him without his endorsement'.*[37]

This account, like most moral theories in the area,[38] also refers to 'human flourishing' – a metaphor that compels us to focus on humans as developing, natural objects, something

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[31] John Kleinig and Nicholas G. Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32 Law and Philosophy 539

[32] Katharina Bauer, 'Do Not Make Yourself a Worm': Reconsidering Dignity as a Duty to Oneself' in Human Dignity, Edited by Austin Sarat (Emerald Publishing, 2022). For an argument for introducing rank into the discussion see Jeremy Waldron and Meir Dan-Cohen Dignity, Rank, and Rights (2012, Oxford University Press).

[33] Katharina Bauer at n(32)

[34] Rebecca Walton, 'Supporting Human Dignity and Human Rights: A Call to Adopt the First Principle of Human-Centered Design' (2016) 46 Journal Of Technical Writing and Communication 402

[35] Oscar Schachter, 'Human dignity as a normative concept (1983) 77(4) The American Journal of International Law 848

[36] Both the European Charter and the preamble to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987); German Basic Law Article 1; The U.N. Declaration of Human Rights also states: 'Recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace'.

[37] Ronald Dworkin Is Democracy Possible Here? Principles for a New Political Debate (Princeton University Press; 2006)

[38] John Kleinig and Nicholas G. Evans at n(31)

Phillipa Foot likens to the life cycle of plants.[39] To elaborate, we have some basic ideas of what human beings (or plants) can be, and depending on whether or not they achieve that, they flourish.[40] When they do not progress, or become worse, they weaken, stagnate, or suffer.[41] In order to uphold dignity, therefore, one could argue that the state has a negative obligation to avoid the suppression of personal development/growth, agency, and a person's capacity to make free and individual choices.[42] This conception, as one may appreciate, is applicable to a diverse set of circumstances. As a result, dignity presents itself in ECtHR case law not as a right in and of itself, but instead as a nuanced, discursive tool for the framing of legal argument.[43] Regarding Article 3, for example, in *Jollah*,[44] the applicant was forcibly administered a drug in order to induce vomiting. He argued that the aim of this was to intimidate and debase him, in disregard of his human dignity.[45] Along similar lines, the ECtHR has drawn on notions of dignity in Article 3 cases that involve abrogations of an individual's 'freedom of choice and action',[46] self-worth,[47] or bodily/mental integrity.[48] In this way dignity, in principle at least, operates as a 'substantive normative concept from which human rights can be deduced by specifying the conditions under which human dignity is violated'.[49] Or, as Riley puts it, as an instrument to be used for the protection of individuals from 'status harms that are incidental to the working out of otherwise legitimate normative orders like the legal system'.[50] The ECtHR have acknowledged the value of such an instrument, and thus claim that dignity is the 'very essence' of the Convention.[51]

Altogether this means, in simple language, that human rights discourse protects *all* humans from situations in which they will be without their dignity. This makes it not only absolute, but foundational in terms of human rights law.[52] This, in turn, presents a problem for the ECtHR.

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[39] Philippa Foot Natural Goodness (Oxford University Press; 2003); John Kleinig and Nicholas G. Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32 Law and Philosophy 539
[40] John Kleinig and Nicholas G. Evans at n(31)
[41] Ibid
[42] Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context (2015) 15(4) Human Rights Law Review 721
[43] Antoine Buyse, 'The Role of Human Dignity in ECHR Case-Law' (The Human Rights Blog; 2016) <https://www.echrblog.com/2016/10/the-role-of-human-dignity-in-echr-case.html> accessed 14 October 2022
[44] R. (on the application of Jalloh (formerly Jollah)) v Secretary of State for the Home Department [2021] A.C. 262
[45] Antoine Buyse at n(43)
[46] Keenan v United Kingdom, [2001] 33 E.H.R.R. 38 [91]
[47] Rahimi v Greece Application No 8687/ 08, [60]
[48] Selmouni v France Application No 25803/94 [2000] 29 E.H.R.R. 403 [99]
[49] Jurgen Habermas, 'The concept of human dignity and the realistic utopia of human rights' (2010) 41(1) Metaphilosophy 464
[50] Dr Stephen Riley, Human Dignity and Law, Legal and Philosophical Investigations (Routledge; 2018).
[51] Goodwin v United Kingdom (17488/90) [1996] 22 E.H.R.R. 123
[52] For further discussion on dignity as the foundation of human rights see Dr Stephen Riley at n(50)

The 2003 Act requires a fidelity to punishment, crime reduction, reform and rehabilitation, public protection and reparation punishment.[53] All of these aims, ostensibly anyway, have the potential to restrict the virtues of dignity as described above. The balancing of these obligations must therefore be further informed by the principles of penology.[54]

## The penological justifications for punishment

The penological justifications for detention may be divided into retributive or instrumental goals.[55] Instrumental goals justify punishment on the basis that they reduce the future likelihood of crime, either through the incarceration itself, deterrence, or rehabilitation. The basic notion of deterrence is that the costs associated with crimes lead to less people committing them. Incapacitation is founded on the even simpler premise that people in prison cannot commit crime. This analysis may seem reductive but criminological evidence provides little rationale for these theories to be applied to lifers. For example, multiple studies evidence that the rates of homicidal[56] and sexual recidivism[57] are extremely low. In fact, in England, only 2.2% of mandatory life prisoners reoffend.[58] This is lower than those who committed public order or property crimes[59] and is miniscule when compared to the 46.9% rate amongst the general population.[60] The justification for incapacitating lifers therefore loses its weight

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[53] Explanatory Notes to the Criminal Justice Act 2003, Chapter 44
[54] Natasa Mavronicola at n(42)
[55] Monica M. Gerber and Jonathan Jackson, 'Retribution as Revenge and Retribution as Just Deserts' (2013) 26(1) Social Justice Research 61; see also John Bowring and Jeremy Bentham (Eds) The works of Jeremy Bentham (William Tait; 1839); Immanuel Kant, The Metaphysics of Morals (1797); Neil Vidmar and Dale Miller, 'Social psychological processes underlying attitudes toward legal punishment' (1980) 14 Law and Society Review 565
[56] John L Anderson 'Recidivism of paroled murderers as a factor in the utility of life imprisonment' (2019) 31(2) Current Issues in Criminal Justice 255; HM Inspectorate of Probation, 'A joint inspection of life sentence prisoners. London: Criminal Justice Joint Inspection, a Joint Inspection by HMI Probation and HMI Prisons; Mitchell, B., & Roberts, J. Exploring the mandatory life sentence for murder (2012, Hart Publishing)
[57] Amanda M. Fanniff, Carol A. Schubert, Edward P. Mulvey, Anne Marie R. Iselin, Alex R. Piquero, 'Risk and outcomes: Are adolescents charged with sex offences different from other adolescent offenders?' (2017) 46 Journal of Youth and Adolescence 1394; Alex R. Piquero, David P. Farrington, Wesley G. Jennings, Brie Diamond & Jessica Craig 'Sex offenders and sex offending in the Cambridge study in delinquent development: Prevalence, frequency, specialization, recidivism, and (dis)continuity over the life-course (2012) 35 Journal of Crime and Justice 412; Lisa Sample and Timothy Bray, 'Are sex offenders dangerous?' (2003) 3 Criminology & Public Policy 59; Lisa Sample and Timothy Bray, 'Are sex offenders different? An examination of rearrest patterns' (2006) 17 Criminal Justice Policy Review 83
[58] Barry Mitchell and Julian Roberts Exploring the mandatory life sentence for murder (Hart Publishing, 2012)
[59] Miethe T Olson J and Mitchell O, 'Specialization and persistence in the arrest histories of sex offenders: A comparative analysis of alternative measures and offense types' (2006) 43 Journal of Research in Crime and Delinquency 204
[60] Miethe T Olson J and Mitchell O, 'Specialization and persistence in the arrest histories of sex offenders: A comparative analysis of alternative measures and offense types' (2006) 43 Journal of Research in Crime and Delinquency 204

as time goes by, as after a certain period they are unlikely to commit crime, regardless of whether they are imprisoned. In the same vein, the deterrent effect of increasing already long sentences to life without parole is nominal.[61] Rehabilitation, on the other hand, is a more forward-orientated practice. It looks to prevent recidivism through rehabilitative measures,[62] such as the re-socialisation of the criminal 'through the fostering of personal responsibility'.[63]

The classic account of retribution is that of Von Hirsch, who claims that 'when someone infringes another's rights, they gain an unfair advantage over all others in society'.[64] Punishment is then justified on the basis that social balance needs to be restored through the redistribution of 'positive and negative experiences'.[65] Judgments such as that in ex parte Hindley are clearly predicated on the idea that any such balance could never be restored and that her victims therefore deserved an emblematic commitment to their own rights through criminal justice.[66] Life without parole therefore has a foundation in retribution, in the sense that criminals should 'pay' for a life they have taken by essentially surrendering theirs to the state. This is the exclusive appeal of retribution and moreover this is its only point – to provide justice to victims by giving criminals 'what they deserve'. Here is an example of retributive thinking from the BBC series Time to demonstrate:

> *"The victim was my older brother. I am here today because both my parents have now died. My dad, a few years back and, my mum 3 months ago. Both died of grief. This man didn't just kill my brother that day, he killed my parents too… he is a murderer. This man implies he should have been out 15 years ago. Well my parents weren't. Both served life."*[67]

Arguments such as these appeal to human sensibilities, including those of judges and members of UK Parliament.[68] It is natural to desire an eye for an eye after all,[69] and so

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[61] Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and crime Can both be reduced?' 10(1) (2011) Criminology & Public Policy 13

[62] Goals Mathias Twardawski, Karen T. Y. Tang and Benjamin E. Hilbig, 'Is It All About Retribution? The Flexibility of Punishment' (2020) 33 Social Justice Research 195; Geoffrey P Goodwin and Dena M. Gromet, 'Punishment' (2014) 5(5) Wiley Interdisciplinary Reviews: Cognitive Science 561; Livia B. Keller, Margit E. Oswald, Ingrid Stucki and Mario Gollwitzer, 'A Closer Look at an Eye for an Eye: Laypersons' Punishment Decisions Are Primarily Driven by Retributive Motives' (2010) 23 Social Justice Research 99

[63] Dickson v United Kingdom (44362/04) [2008] 46 E.H.R.R. 41

[64] Andrew Von Hirsch, Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration (Northeastern University Press, 1986) p.47

[65] Monica M. Gerber and Jonathan Jackson at n(55)

[66] Dr Stephen Riley at n(50)

[67] Time (BBC, 2021)

[68] See further in this essay for examples regarding Parliament, or the Hindley ruling, for examples of this.

[69] Goals Mathias Twardawski, Karen T. Y. Tang and Benjamin E. Hilbig, 'Is It All About Retribution? The Flexibility of Punishment' (2020) 33 Social Justice Research 195; See also the work of Kevin Carlsmith, who elaborates on retribution as part of human nature: Kevin Carlsmith, 'The roles of retribution and utility in determining punishment' (2006) 42(4) Journal of Experimental Social

retributivists are happy with this goal as providing retribution with justificatory force in its own right.[70] However, unlike the utilitarian goals above, which both have clear objectives measurable by their success (reductions/increases in crime rates or rehabilitative success for example) this goal rests on value judgements and so its legitimacy is impossible to measure empirically.[71] Indeed, retribution is correct in saying that the determination of proportionate and effective responses to crime require some quantification of legal responsibility,[72] but it is here that it is flawed. There is a significant difference between moral principles – which we may wish to apply in our personal lives, that help us decide what we 'owe' victims, and that carry with them a level of personal gratification – and those upon which we should base criminal justice policy. Ultimately, such a determination operates in the framework of law and therefore human *rights* rather than human *desire*. This is very much the bottom line, which reinforces the author's contention that sentences based on retribution are thus inherently flawed.

## The connection between Article 3, dignity, and punishment

It may be further extrapolated from the above that rehabilitation and dignity are connected with one another through their mutual relationships with the virtues of personal development, agency, flourishing, and so on. This connection is unequivocal. At a fundamental level, it means that when the State removes a person's opportunity to rehabilitate, they *ipso facto* threaten their dignity, and therefore their human rights. When taken alongside the flaws of retribution, rehabilitation should be an essential precondition to all policies and statutes, particularly those that determine the way that States sentence. This logic is undoubtably a driving factor in the growing European trend for recognizing people's 'capacity for redemption and rehabilitation'.[73] The necessary outcome is that the Convention – functioning as a living instrument – has evolved to include within it a right to rehabilitation, or 'the right to hope', as

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Psychology 437; Kevin Carlsmith, 'On justifying punishment: The discrepancy between words and actions' 2008) 21(2) Social Justice Research 119; Kevin Carlsmith, John Darley and Paul Robinson, 'Why do we punish? Deterrence and just deserts as motives for punishment' (2002) 83(2) Journal of Personality and Social Psychology 284

[70] David Wood at n(23); Andrew Von Hirsch, Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration (Northeastern University Press; 1986); Michael Moore, Placing Blame: A General Theory of Criminal Law (Oxford University Press, 1997)

[71] Ross Kleinstuber, Jeremiah Coldsmith, Margaret E. Leigey and Sandra Jo Life Without Parole, Worse Than Death? (Routledge, 2022)

[72] Dr Stephen Riley at n(50)

[73] Catherine Appleton, Bent Grover, 'The Pros and Cons of Life Without Parole' (2007) 47 The British Journal of Criminology 597; The International Covenant on Civil and Political Rights Article 10(3); The Rome Statute of the International Criminal Court Article 110(3); See also the European Prison Rules, which are of global reference in the penological field, rule 6 of which states that all detention should be 'managed in a way that facilitates reintegration into free society'

it is often referred.[74] This distillation presents a problem for the ECtHR: life without parole sentences eradicate any chance to rehabilitate. Yet, they are still used in multiple jurisdictions, including the UK.[75] This issue was first addressed by the ECtHR in 2008.

## The Case law of the ECtHR

### Kafkaris v Cyprus76

In Kafkaris, the applicant submitted that the indeterminate length of his sentence had exposed him to feelings of 'uncertainty and anguish'[77] comparable to the 'death row phenomenon', which had led to a breach of Article 3 20 years prior.[78] In passing judgement, the ECtHR ratified the decision of the Federal Constitutional Court of Germany in B v L,[79] in which it was recognised that an invariable life sentence entailed a loss of human dignity and 'the denial of the controversial right to rehabilitation'.[80] Without ruling that life without parole sentences are incompatible with Article 3 in and of themselves, the Grand Chamber established a number of principles to remedy this.[81] These are commonly synthesised into one requirement: that life without parole sentences must be 'de jure and de facto reducible', as in, they must carry some 'prospect of release' back into society.[82]

As a precedent, this did not lead to a particularly high level of scrutiny,[83] with the right to hope apparently remaining, due to the availability of mere 'mechanisms' for release.[84] This was also considered the case when a prisoner's release date fell outside their expected lifespan[85] or depended solely on Presidential powers of clemency.[86] Indeed, the UK system, which endorses the release only of terminally ill prisoners, so they can die in a hospice rather than in prison, is permissible under *Kafkaris*, but it is hard to argue sensibly that this constitutes 'hope', or 'release', within the meanings attributed to them by the virtues of dignity. Further,

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[74] Vinter and Others v United Kingdom, (2016) 63 E.H.R.R. 1 [OII-2]
[75] Katie Reade, 'Life imprisonment: A Practice in Desperate Need of Reform' (Penal Reform International; 2018) <https://www.penalreform.org/blog/life-imprisonment-a-practice-in-desperate-need-of/> accessed 20 December
[76] Application No 21906/04 [2008] 49 E.H.R.R. 35
[77] Kafkaris v Cyprus Application No 21906/04 [2008] 49 E.H.R.R. 35 [86]
[78] Soering v United Kingdom [1989] 11 E.H.R.R. 439
[79] BVerfGE 45 187
[80] Kafkaris v Cyprus Application No 21906/04 [2008] 49 E.H.R.R. 35 [83]
[81] n(76)
[82] n(76) [[O-II4] and [99]
[83] Peter Coe, 'Compatibility of Whole Life Orders with the European Convention on Human Rights (2013) Journal of Criminal Law 77(6) 476
[84] Ahmad v United Kingdom (2013) 56 E.H.R.R. 1 [244]
[85] Törköly v Hungary (App No.4413/06).
[86] Iorgov v Belgium (No.2) (App No.36295/02).

it is hardly a state one can bring about through rehabilitative efforts.[87] Fortunately for the UK government, in *R v Bieber*,[88] the Court of Appeal found that no issue could be raised in respect of the 1997 and 2003 Acts. The rationale being that Section 6 of the Human Rights Act 1998, which requires the executive to act in a manner compliant with the Convention, means the Home Secretary could simply exercise his discretion under the 1997 Act whenever a prisoner's 'continued imprisonment would amount to inhuman or degrading treatment'.[89] On this interpretation, all life without parole sentences in the UK, including that of Hindley, are compatible with Article 3 *prima facie.* This was contested in 2013, in *Vinter v United Kingdom.*

## Vinter v United Kingdom[90]

In Vinter, the ECtHR reaffirmed that rehabilitation is a constitutional requirement, 'in any community that establishes human dignity as its centrepiece'.[91] But, taking the Kafkaris principle further, they established additional criteria that must be met in order for a sentence to be considered 'reducible'. They are as follows: firstly, that a review evaluating a sentence's 'appropriateness under the relevant penological grounds', is to take place at various points of a prisoner's sentence.[92] The language of the ECtHR in Ocalan v Turkey (No.2)[93] suggests that this would refer to whether the requirements of punishment and deterrence have been fulfilled, or whether the prisoner remains dangerous. The justification behind this was that the penological grounds for punishment are not static and do not necessarily remain throughout a prisoner's detention.[94] Secondly, this review is to be available from the beginning of the sentence, not when imprisonment becomes unjustifiable. If this is not the case, a breach of Article 3 will be found from the sentence's imposition.[95] Finally, the way the review operates must be 'clear and knowable' from the beginning of the sentence.[96] Following Trabelsi v Belgium[97] this would mean the inclusion of 'objective, pre-established criteria' for release.[98] The ECtHR noted an absence of 'any dedicated review mechanisms'[99]

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[87] Mark Pettigrew at n(12)
[88] [2008] EWCA Crim 1601
[89] n(76) [86]
[90] (2016) 63 E.H.R.R. 1 [87]
[91] Ibid [61]
[92] Ibid
[93] Öcalan v Turkey (No.2) Application no. 46221/99
[94] Ibid
[95] n(90) [122]
[96] Lewis Graham, 'From Vinter to Hutchinson and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights' (2018) 3 European Human Rights Law Review 258
[97] [2015] 60 E.H.R.R. 21
[98] Trabelsi v Belgium [2015] 60 E.H.R.R. 21 [137]
[99] Ibid

in the UK system and a lack of clarity as to whether the 'highly restrictive' and 'exhaustive' policies contained in the Manual would be followed. For these reasons, and unimpressed by the UK's reasoning in Bieber,[100] the ECtHR regarded life without parole sentences in the UK as 'irreducible' and contrary to Article 3.[101] This decision, whilst based on legal, logical and compassionate grounds and a natural progression from Kafkaris, was met with indignance by the UK executive.[102] As this has further influenced subsequent case law, the reasons for this are crucial.

## Attorney General's Reference (No. 69 of 2013) ('McLoughlin')[103]

Just one year later, in *McLoughlin,* five senior members of the Court of Appeal stated that they were in fact correct in *Bieber,* that the Grand Chamber was wrong in *Vinter,* and that the ECtHR had simply 'misunderstood' the British system.[104] They concluded that the 1997 Act does in fact provide an offender "hope" or the "possibility" of release", as the restrictions contained in the Manual cannot exhaustively restrict the Home Secretary's discretion.[105] They claimed that a proper interpretation of 'exceptional circumstances' in the 1997 Act was therefore one of 'wide meaning',[106] and that this could be developed at common law so as to include changing penological grounds and compliance with Article 3.

British trial judges, in following the *Mcloughlin* decision, continued to impose whole life sentences in defiance of the *Vinter* criteria:[107]

### R v. Thomas Mair:

"I have considered this anxiously but have concluded that this offence, as I have described it, is of such a high level of exceptional seriousness that it can only properly be marked by a whole life sentence. That is the sentence which I pass. You will, therefore, only be released, if ever, by the Secretary of State exercising executive clemency on humanitarian grounds to permit you to die at home. Whether or not that occurs will be a matter for the holder of that

[100] n(90)
[101] Ibid
[102] Mark Pettigrew at n(11); see also Mason, C. (2014) 'Cameron Backs 'Life Means Life' Sentences for Murderers' (BBC News; 2014) <https://www.bbc.co.uk/news/uk-25574176> in which the author says Jeremy Bamber, a defendant in the Vinter case, was a 'beneficiary' of the ruling. He is still in prison today.
[103] [2014] 2 Cr. App. R. (S.) 40
[104] Attorney General's Reference (No.69 of 2013) [2014] EWCA Crim 188
[105] Attorney General's Reference (No.69 of 2013) [2014] EWCA Crim 188
[106] Ibid at [33]
[107] These cases were cited in the case of Hutchinson v United Kingdom (57592/08)

office at the time." [108]

### R v. Christopher Halliwell:

"I am satisfied your offending is exceptionally high and satisfies the criteria for a whole life term and that the Transitional Provisions do not require me to impose a minimum term. Were I to impose a minimum term it would be of such a length that you would in all probability never be released. I sentence you to Life Imprisonment and direct there will be a whole life order."[109]

### R v. Stephen Port:

"The sentence therefore upon the counts of murder is a sentence of life imprisonment; I decline to set a minimum term; the result is a whole life sentence and the defendant will die in prison."[110]

*McLoughlin* was a retort to the ECtHR's ruling in *Vinter.* But all it did was restate the law: the lifer manual had not and would not be changed, and further legislation would not be drafted.

## Hutchinson v United Kingdom[111]

Soon after *McLoughlin,* in *Hutchinson* the ECtHR 'backtracked' from *Vinter*,[112] accepting the UK's argument that the policies in the lifer manual could not lawfully fetter the Secretary of State's discretion, and that the lifer manual therefore did not restrict, in any sense, the criteria for release. The main basis for this being that it is well established that domestic courts bear the primary responsibility of interpreting their own law.[113] 'Compassionate grounds', as it were, were thereby said to include any and all circumstances, including any that if omitted, would lead to a breach of the Convention. In essence, the ECtHR accepted that the UK had,

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[108] Sentencing remarks of Mr Justice Wilkie: R v Mair (Jo Cox murder) (23 November 2016) <https://www.judiciary.uk/judgments/sentencing-remarks-of-mr-justice-wilkie-r-v-mair-jo-cox-murder/>
[109] Sentencing remarks of Sir John Griffiths Williams in R v Christopher Halliwell at Bristol Crown Court (23 September 2016) at <https://www.judiciary.uk/wp-content/uploads/2016/09/r-v-halliwell-sentencing-remarks.pdf>
[110] Sentencing remarks of Mr Justice Open shaw in R v Stephen Port at Central Criminal Court (25 November 2016) at <https://www.judiciary.uk/wp-content/uploads/2016/11/sentencing-remarks-r-v-stephen-port.pdf>
[111] (57592/08) [2017] 43 B.H.R.C. 6673
[112] Andrew Beetham, 'Whole life orders and article 3' (2017) 81(3) Journal of Criminal Law 236
[113] Naomi Hart, 'Whole-life sentences in the UK: volte-face at the European Court of Human Rights?' (2015) 74(2) Cambridge Law Journal 205

at least since *Bieber*, maintained 'a Convention compatible parole mechanism for lifers.'[114]

To say that it is the UK's responsibility to interpret its domestic laws is entirely correct, as was established in the Interlaken Declaration, which is now enshrined in the Convention in Article 19. In the ECtHR's 'own words':[115]

> *'The Court reiterates that […] its duty is to ensure the observance of the engagements undertaken by the Contracting Parties […] In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court […].'*[116]

This does not mean, however, that domestic laws can evade the basic requirements of legal certainty. In this respect, there are a number of issues with the *Hutchinson* and *McLoughlin* decisions. First and foremost, the Home Secretary's powers to release are depicted only by the 'abstract legal requirement to act in a manner compliant with Article 3'.[117] Surely, if these powers were not clear to the Grand Chamber before *Mcloughlin*, they could not be considered 'clear and knowable' for future prisoners. Additionally, whilst the Government submitted that the Home Secretary must respond to all requests for a review,[118] it was never clarified in what form such a review would take place. What does the prisoner need to demonstrate? How do they apply? What issues should they address? By what criteria will this be assessed?[119] These issues remain unaddressed. Secondly, 'the golden rule of interpretation is that restrictive rules, with exhaustive terms, must be interpreted narrowly'.[120] It would appear then, that the 'convention friendly' interpretations of the UK system in *Bieber* and *Hutchinson* are 'tenable to the traditionally recognised methods of statutory interpretation'.[121] As was stated in the dissenting judgements, contracting to the Convention entails more than finding the most convincing way to harmonise domestic law with European standards.[122] Indeed, to suggest that the restrictive policies in the Manual may be read un-restrictively, whenever necessary, is nonsense.[123]

As was pointed out in the 'thumping' dissent of Judge Pinto de Albuquerque, there is a further

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[114] Andrew Beetham at n(112)
[115] Ralf Alleweldt, 'Avoiding another Brexit: the subsidiarity principle, the European Convention on Human Rights and the United Kingdom' (2019) 57(2) Commonwealth and comparative Politics 223
[116] Perlala v. Greece, 22 February 2007 – judgment available in Evangelia Psychogiopoulou, The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context (2009; Brill).
[117] Lewis Graham at n(96)
[118] Hutchinson v United Kingdom (57592/08)
[119] Andrew Beetham at n(112)
[120] n(90) [14]
[121] n(90)
[122] Hutchinson v United Kingdom (57592/08) [43]
[123] Matthew Stanbury 'Case comment: Hutchinson v UK (57592/08)' (2017) 1 S. News 8

issue with the *Hutchinson* decision, whether or not it is part of the 'growing trend' towards the downgrading of the ECtHR's role before certain domestic jurisdictions.[124]

To expatiate, there has been an undeniable hostility directed from the UK towards the ECtHR. This began around 1995.[125] This is a political, as well as a legal issue, to which two landmark cases are pivotal. The first is *Hirst vs United Kingdom,*[126] in which the ECtHR found the UK's disenfranchisement of prisoners offensive to the principle of proportionality and contrary to the right to free elections.[127] The second is that of Abu Qatada,[128] a suspected terrorist who the ECtHR decided could not be deported as to do so would contravene Article 6. He was deported following negotiations. The key point here is that both decisions centre around the protection of serious offenders by ECtHR judges. In the immediate aftermath of *Qatada*, in 2012, the Conservatives took over the chairmanship in the Committee of Ministers of the Council of Europe and organised the Brighton Conference. The media portrayed it as a locking of horns between the ECtHR and Britain[129] and any debate on the fundamentals was redirected to the political debate of the moment,[130] with technical critique of the HRA 1998 substituted for boasts about how the Conservatives' proposals would deprive bad people of rights protection as a consequence.[131] The Government subsequently proposed, and enacted through Protocol 15,[132] an increased reliance on the principle of subsidiarity.[133] 'This principle obliges states to protect human rights at home, to their best abilities'.[134]

Considering this background, the political response to *Vinter* was what one would expect. In the days leading up to the decision, Theresa May and the Justice Secretary (Chris Grayling) had pre-emptively denounced the ECtHR: stating on separate occasions that the British Supreme Court was no longer Supreme,[135] that it had consistently made decisions that the

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[124] See the dissenting judgement of Judge Pinto De Albuquerque in Hutchinson v United Kingdom (57592/08)
[125] McCann v United Kingdom (A/324) (1996) 21 E.H.R.R. 97; Chahal v United Kingdom (22414/93) (1997) 23 E.H.R.R. 413
[126] (2006) 42 E.H.R.R. 41
[127] Enshrined in the Human Rights Act 1989 Sch.1 Part II Art.3.
[128] Othman v United Kingdom (2012) 55 E.H.R.R. 1
[129] Kim Brayson, Securing the future of the European Court of Human Rights in the face of UK opposition. Political compromise and restricted rights (2017) 6 International Human Rights Law Review 53
[130] Ibid
[131] Conor Gearty, 'States of denial. What the search for a UK Bill of Rights tells us about human rights protection today' 5 (2018) European Human Rights Law Review 415; Conor Gearty, On Fantasy Island. Britain, Europe, and Human Rights (Oxford University Press, 2016)
[132] See Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms Strasbourg <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf> Ralf Alleweldt at n(15); Kim Brayson at n(129) 3
[134] Ralf Alleweldt at n(15)
[135] EurActiv News (2013) 'Interior Minister Urges Britain to Leave Human Rights Convention', (March 11)

people of the UK did not want,[136] and that this necessitated a 'plan to deal with' the Convention.[137] Following this line of thinking, British politicians accused the ECtHR in *Vinter* of going beyond the Convention's intended scope,[138] threatening the UK's withdrawal from it.[139] This response was not merely in rhetoric. In a letter to the Council of Europe, Chris Grayling stated that 'inmates sentenced to whole-life terms in Britain would not obtain the right to a review', and that 'the British Supreme Court should be the final arbiter of British law, not the ECtHR'.[140] The Conservative Party published a paper advocating for the ECtHR to become a mere advisory body to the British Courts;[141] and even senior UK judges, who are generally loyal to the ECtHR,[142] began to voice their criticisms of it.[143] Going further, in a 'symbolic act of defiance', the UK chose to *widen* the scope of life without parole, adding 'the murder of a police officer or prison officer in the course of his or her duty' to the pool of offences contained in Schedule 21 of the 2003 Act.[144]

Central to the judgment in *Hutchinson* is how this animosity was almost exclusively directed at ECtHR judgements, rather than the Convention itself. ECtHR Judges are not naïve to the political repercussions of their judgments. They therefore wield a large amount of mediating power.[145] This in turn engenders an element of chess within their use of legal principle. As Fuglistaler argues, this led to judges in the past avoiding challenges to domestic decisions; the ECtHR overturning formerly absolute rules; and finally a weakening of the protection

[136] Mark Pettigrew, 'Retreating From Vinter In Europe: Sacrificing Whole Life Prisoners To Save The Strasbourg Court' (2017) 25(3) European Journal of Crime, Criminal Law and Criminal Justice 260
[137] BBC News, 'Theresa May: Tories to Consider Leaving European Convention on Human Rights', (March 9 2013)
[138] Mark Pettigrew, 'A Vinter Retreat in Europe: Returning to the Issue of Whole Life Sentences in Strasbourg' (2017) New Journal of European Criminal Law 8, no. 2 (2017): 128.
[139] Ergul Celiksoy (2020) 'UK exceptionalism' in the ECtHR's jurisprudence on irreducible life sentences, The International Journal of Human Rights, 24(10)1594; see also Nicholas Watt and Owen Bowcott, 'Tories Plan to Withdraw UK from European Convention on Human Rights', The Guardian, (October 3, 2014) <https://www.theguardian.com/ politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights> accessed 12 August 2017
[140] Soeren Kern, 'European Court Undermining British Sovereignty', Gatestone Institute, January 17, 2014, <https://www.gatestoneinstitute.org/4134/echr-uk> accessed 7 September 2022
[141] Conservatives (2014) 'Protecting Human Rights in the UK': Conservative Party Paper available online at https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document]; Grieve, D. Rt Hon (2014) 'Why it Matters that the Conservatives should Support the European Convention on Human Rights' [UCL Judicial Institute Lecture, December 3, 2014 available online at https://www.ucl.ac.uk/constitution-unit/news/2014/dec/video-dominic-grieve-qc-mp-why-it-matters-conservatives-should-support-european (accessed 23 September 2013)
[142] Lewis Graham at n(96)
[143] See Lord Sumption's 2013 lecture, 'The Limits of Law' and Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 Law Quarterly Review 416.
[144] Mark Pettigrew, at n(12)
[145] Lewis Graham, Strategic admissibility decisions in the European Court of Human Rights', 2020 69(1) International & Comparative Law Quarterly 79

afforded by fundamental human rights.[146] In this instance, it led to the UK's Prime Minister, Justice Secretary, and Home Secretary publicly denouncing the ECtHR and the Convention prior to *McLoughlin*; threatening to withdraw from the Convention; threatening to draft a new bill of rights;[147] and refusing to follow previous decisions. All provide circumstantial evidence that this was in fact the case in *Hutchinson.*

It could of course be argued that this was simply subsidiarity or the margin of appreciation at work, but to argue this would be a category error. As stated in Article 32, the ECtHR's jurisdiction extends to all matters concerning the Convention's interpretation and application. As was made clear in *Handyside v United Kingdom,*[148] margins of appreciation place a restriction on this jurisdiction, but this restriction must go 'hand in hand with ECtHR supervision'.[149] Indeed, as *Handyside* also made clear, the Convention is subsidiary to the UK's human rights system, not its political climate. Nor can it undermine absolute rights. A functioning human rights system is a precondition to a margin of appreciation and regardless of how the UK judiciary repackages the lifer manual, one should not and cannot be afforded in this area of law.

## Conclusion

The connection between dignity, rehabilitation and Article 3 is unequivocal. It is therefore an essential precondition to all policy and legislation, including in particular the way States sentence. In this respect, any value placed on pure punishment sentencing, which is already undermined by its prioritisation of moral values over utility/pragmatism, is dramatically outweighed by the importance of our obligations to human rights law. Indeed, as is often said, human rights exist to protect people who we inherently (and justifiably) despise. This issue is no different. Child rapists, serial killers, the list goes on – under human rights law, they do not have to fight for their right not to be treated inhumanely. They possess that right *a priori*. It should be clear, then, why dedication to the Convention demands that rehabilitation be placed centre stage in the UK's sentencing regime. There should be a closer adherence to the *Vinter* ruling, uninfluenced by politics. This should take place in the form of a clearer delineation of the necessary parameters for the *potential* reintegration of *anybody* into society, made clear from the outset of the sentence, and drafted into the lifer manual if needs

[146] Gabriel Fueglistaler, 'The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence' (2016) 83
[147] Conor Gearty at n(131)
[148] (A/24) (1979-80) 1 E.H.R.R. 737. Handyside is the case from which the margin of appreciation doctrine originates
[149] Handyside (A/24) (1979-80) 1 E.H.R.R. 737

be. The UK courts and Parliament are yet to suggest anything close to this and moreover, they are yet to give any reasons outside those in *McLoughlin* as to why. Clearly the applicants in *Vinter* were correct – the right to hope did not exist for them in any substantive way. It is for these reasons that the state of the UK's sentencing law for lifers cannot be described as satisfactory.

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