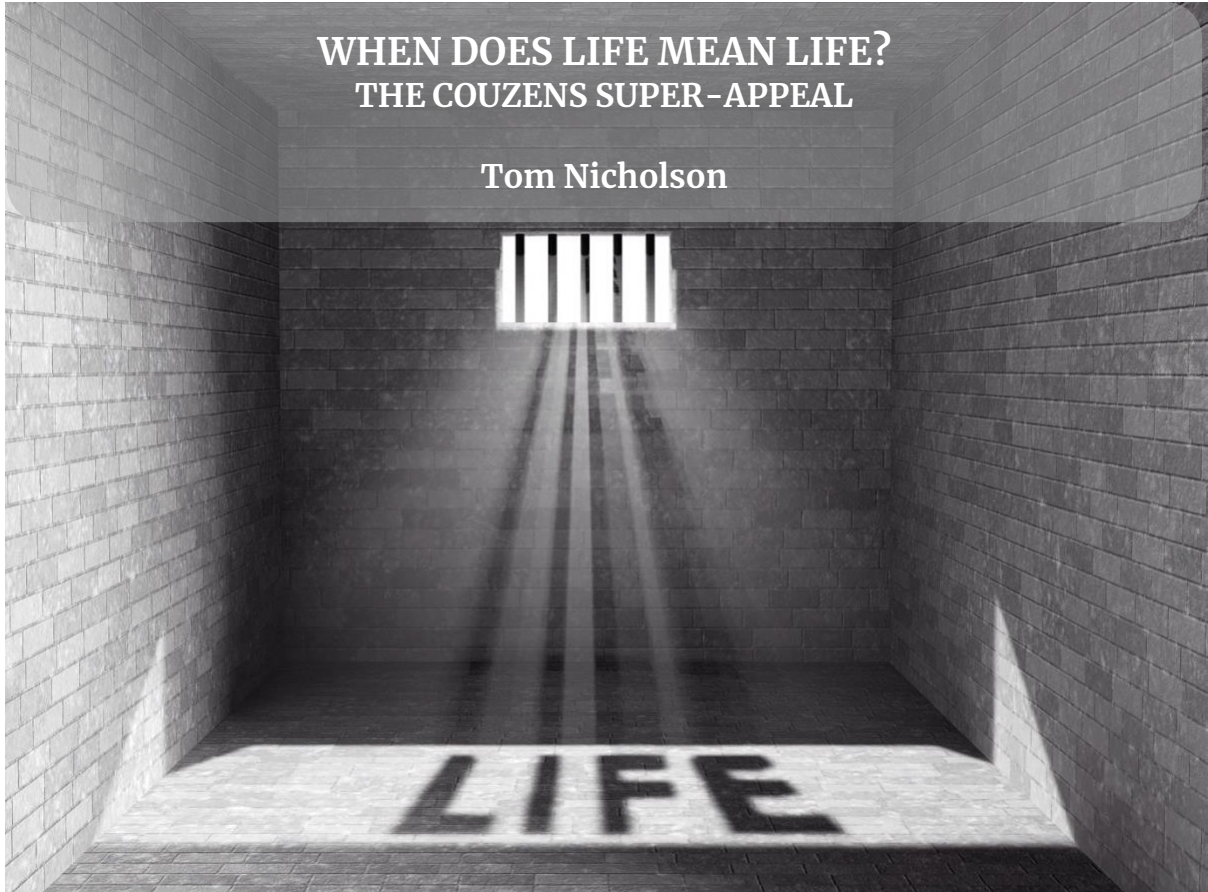


## WHEN DOES LIFE MEAN LIFE? THE COUZENS SUPER-APPEAL

Tom Nicholson



The Court of Appeal has recently reserved judgment in the super-appeal of two prisoners serving ‘whole-life’ prison sentences, *Couzens and Stewart*, as well as three other prisoners convicted of murdering children, where the Attorney General is appealing as ‘unduly lenient’ the life sentences with minimum terms imposed on them (*Tustin, Hughes and Monaghan*).<sup>1</sup>

The terrible murder of Sarah Everard by a policeman, Wayne Couzens, shocked the country. It brought into focus a number of impassioned debates – violence by men against women, the extent to which we can trust the police, whether the coverage was influenced by race or class, and now the question of what society does with offenders guilty of the some of the most serious and horrifying offences dealt with by the courts.

How can society mark the kind of devastating loss that Couzens caused to Ms Everard’s family and friends? The brutal ending of a life, involving kidnap, rape and murder, with these aggravating features, clearly requires a life sentence. But should sentencing policy, even for the very worst crimes and offenders, necessitate some element of the ‘right to hope’, where the prospect of rehabilitation still has a role to play?

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<sup>1</sup> <https://www.independent.co.uk/news/uk/crime/wayne-couzens-sarah-everard-court-of-appeal-b2071098.html>

It is not as simple a question as might appear at first blush. There is a significant dichotomy between the standard **European approach**, where rehabilitation remains the predominant justification for imprisonment, and where pan-European standards, as enunciated by the European Court of Human Rights, see imprisonment with no possibility of parole as incompatible with the fundamental right to 'human dignity', and the approach favoured by countries like Australia, France and the UK, brought to its zenith by the USA, where punishment rules supreme, since offending of the very worst kind may properly forfeit an offender of the right to any life outside of incarceration.

## WHAT DOES IMPRISONMENT FOR LIFE MEAN IN THE UK?

In the United Kingdom, life imprisonment rarely means what the public may think, and, if we are being honest, what they would want (given that up until 2014 at least, there was a clear majority of the public for the reintroduction of the death penalty).<sup>2</sup>

In general, it simply means that a defendant will serve a prison sentence of specified length, before being eligible for parole. If released by the Parole Board, they remain 'on licence', subject to supervision by the Probation Service.

In the UK, it is rare indeed for a defendant to be given a 'Whole Life' Order ('WLO'), meaning that they will stay in prison for the rest of their lives, without the possibility of parole (though even for these prisoners, release may be granted 'in exceptional circumstances' by the Home Secretary under section 30 of the Crime (Sentences) Act 1997).

There are in total 64 prisoners currently in UK prisons who have been given 'whole life' orders, as well as a further 3 life prisoners being treated in secure hospitals.<sup>3</sup>

In general, their criminality has common features:

- They were all convicted of murder (save for one anomalous outlier, John Wass, convicted of historical sexual abuse against 3 victims).<sup>4</sup>
- Most but not all of them were convicted of more than one murder.
- They are all men (save for two women, both serial murderers, Rosemary West and Joanne Dennehy).

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<sup>2</sup> <https://yougov.co.uk/topics/politics/articles-reports/2014/08/13/capital-punishment-50-years-favoured>

<sup>3</sup> <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/life-sentences/> as well as submissions in the Couzens appeal

<sup>4</sup> <https://www.derbytelegraph.co.uk/news/local-news/derbyshire-child-rapist-jailed-life-258653>

Of the 64 prisoners, a majority had committed murder after having been convicted of a first murder, either in prison whilst serving their sentence, or following release on licence.

## THE PURPOSE OF SENTENCING

Those who specialise in criminal law in the UK well know the five purposes of sentencing, as set out in the General Guideline: Overarching Principles.

They are:

- The punishment of offenders
- The reduction of crime (including its reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public
- The making of reparation by offenders to persons affected by their offences

It is submitted that the necessity of a WLO is, in essence, exclusively focused on the question of **punishment** – the extent to which the harm done by the offending is simply so severe, with so many aggravating factors, that there should be no prospect of release. The metaphorical key should be thrown away, as a mark of societal abhorrence at the harm caused to the victim(s), and to their family and friends.

This must follow, since if either rehabilitation or the protection of the public were part of the criteria under consideration, it would follow that the Parole Board – the independent body with the statutory function of assessing the risk prisoners pose – would have a role, particularly at a time in 20 or 30 years, when the prisoners were of advanced years, likely to be infirm and of reduced risk. It is not a question of future danger, but of such heinous offending that the prisoner has forfeited the right to living with any kind of freedom, at any age.

## THE IMPACT OF SCHEDULE 21 SENTENCING CODE

It should be noted that Parliament has, in Schedule 21 of the Sentencing Act 2020, codified the basis for the imposition of a Whole Life Order, deliberately taking it out of the hands of the Sentencing Council (perhaps adding a political dimension to this aspect of sentencing policy).

In simple terms, in identifying the starting point for a WLO, the defendant must be at least 21 and the court must consider the seriousness of the offence(s) to be **exceptionally high**. This is defined as including

- i) The murder of two or more persons, where each murder involves substantial premeditation, abduction or sexual/sadistic conduct
- ii) The murder of a child involving abduction or sexual/sadistic motivation
- iii) Murder of a police or prison officer in course of their duty (if committed after 13 April 2015)
- iv) Murder committed for the purpose of advancing a political, racial/religious or ideological cause
- v) A murder by an offender previously convicted of murder.

The court must then address any further aggravating and mitigating factors, above and beyond the starting point. In particular cases, this may justify the movement upwards from a minimum term to a WLO.

In the *Couzens* case, there are a series of obvious aggravating factors applicable – the abuse of a position of trust as a police officer (described by LJ Fulford as jeopardising “one of the enduring safeguards of law and order in this country”), the significant planning, the abduction and rape of the victim Ms Everard, the suffering inflicted on her and the concealment/attempted destruction of her body.

One of the major points of contention in the Couzens appeal is the fact that he pleaded guilty to the offending, which, given the gravity of the offending, did not persuade the judge to step away from the imposition of a WLO. Schedule 21 makes little reference to plea, other than to say that section 73 of the Sentencing Code will still apply, requiring the court to take account of the stage at which the plea was entered and the circumstances in which it was given (in Couzen’s case, it is noted, after the service of an overwhelming case).

It appears very likely that schedule 21 will increase the number of WLOs imposed in the UK, given for example the wide potential definition of an ideological motivation for a murder.

## IMPACT OF ECHR

The case of *Vinter & Others v United Kingdom*<sup>5</sup> has perhaps yet to have the impact that may have been anticipated. In summary, the Grand Chamber of the European Court of Human Rights ruled that all offenders sentenced to life imprisonment had a right to both a prospect of release and a review of their sentence. It must be *de jure* and *de facto*

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<sup>5</sup> [2016] III ECHR 317 (9 July 2013)

reducible, allowing the possibility of a review which addressed changes in the prisoner and their rehabilitation progress.

In *Hutchinson v UK*, the Grand Chamber of the ECtHR changed its mind in concluding that the UK's sentencing regime did not in fact contravene Article 3 of the Convention, for two principal reasons:

- i) The Indeterminate Sentence Manual (known as the 'Lifer Manual') did not restrict the discretion of the Secretary of State in reviewing life sentences, to consideration of humanitarian concerns.
- ii) Section 30(1) of the Crime (Sentences) Act 1997 provided sufficiently clear guidance to life prisoners as to the circumstances in which they might be released, would be fleshed out by case law, and was in any event subject to judicial review.

The Grand Chamber were clearly persuaded by the judgment in *R v McLoughlin; R v Newell*<sup>6</sup>, where a powerful Court of Appeal set out the law as to the Exceptional Circumstances Release on Compassionate Grounds (ERCG) mechanism. It carefully side-stepped the restrictive nature of the Lifer Manual (suggesting release only for the terminally ill), stating that all potentially exceptional circumstances must be considered, and that compassionate grounds must be read in a way compatible with Article 3 of the ECHR. Any decision is then subject to judicial review.

There are two major issues to resolve in the future:

- How and when a review as to Early Release on Compassionate Grounds (ERCG) by the Secretary of State might take place for prisoners with WLOs;
- How this mechanism squares with the requirement that the length of a person's detention be entrusted to an independent and impartial tribunal, rather than a member of the executive, as long established in *Anderson*<sup>7</sup>

## COMPARISON WITH OTHER JURISDICTIONS

Every country has had to come up with a penal response to the worst crimes imaginable, such as those in this appeal. The significant variation of response in countries throughout the world starkly illustrates how difficult it is to reconcile the conflicting sentencing principles of universal application – punishment and/or public protection vs rehabilitation – when they are tested to their limits.

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<sup>6</sup> [2014] EWCA Crim 188

<sup>7</sup> *R v Sec of State for Home Dept ex parte Anderson* [2002] UKHL 46

## 1) USA

Nothing highlights the extraordinary severity of US penal policy more than the shocking statistics on life imprisonment. Out of the 1.4m prisoners in the USA, a staggering total of 203,865 are serving life imprisonment (one in seven in prison, as of 2020).<sup>8</sup>

The number of prisoners serving sentences of 'Life Without Parole' (which equates to a WLO) is **55,945**, just less than a thousand times more than in the UK (for a population five times the size). This is estimated to be 83% of the world's population of those serving life without parole. In some states, it is a mandatory sentence for those convicted of either first or second degree murder. Other states – Iowa, Virginia and Florida for example – do not have any parole mechanism for those sentenced to life.

Their offences could be as wide-ranging as robbery, aggravated assault or kidnapping. In Florida, 20% of the 10,000 people in the State serving LWOP were sentenced for robbery. In Iowa, 14% of the LWOP population were sentenced for kidnapping. Federal law has also abolished parole, meaning that 3,974 people are serving LWOP for drug-related offending.

In some states, such as Mississippi, any person with two felony convictions, only one of which has to be violent, receives a mandatory LWOP sentence (this includes burglary, for example).

It is understood that it is exceptionally rare for an LWOP prisoner to be released on parole (save through the appeal mechanism), and is very rarely granted clemency, so that they do die in prison.<sup>9</sup>

It has also meant a continuing stream of extradition appeals where the prospect of extradition to a State where there is a real risk of a sentence of LWOP may breach article 3 of the ECHR.<sup>10</sup>

In short, the USA provides no kind of example for any penal system worthy of its name, even before you take account of the number of people it executes. It illustrates how hyperbolic political rhetoric and casually draconian legislative action on crime over the last 50 years has led to unanticipated consequences, where the entire penal system no longer appears fit for purpose. In the USA, the sentencing principle of **punishment** has aggressively outgrown any principle of rehabilitation or reform, like a dominant weed choking the flowers around it.

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<sup>8</sup> 'No End in Sight', The Sentencing Project, <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>

<sup>9</sup> <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison>

<sup>10</sup> Hafeez v USA [2020] EWHC 155

## 2) CANADA

In May 2022, Canada's Supreme Court ruled that life sentences without any prospect of parole are "*cruel and unconstitutional*", risked bringing the administration of justice into disrepute, and were "*intrinsically incompatible with human dignity*".<sup>11</sup>

In general, those serving a life sentence for first-degree murder are eligible to apply for parole at 25 years. But since 2011, the court had the ability to hand out consecutive sentences, which has now been quashed as unconstitutional. Alexandre Bissonnette, who killed six worshippers at a mosque in Quebec in 2017, had his minimum term of 40 years reduced to 25 years on appeal. Alek Minassian, who killed 11 people in a misogynistic hate crime, could also only be sentenced to life with a minimum term of 25 years on 13 June 2022.<sup>12</sup>

This shows the influence of the ECtHR concept of the possibility of parole as a fundamental human right, as embodied in *Vinter* and other decisions, where the prospect of rehabilitation, however remote, can never be removed from the sentencing equation.

## 3) AUSTRALIA

In Australia, around 56 of the approximate 1,000 prisoners currently serving life sentences are serving without the possibility of parole, though scant statistics are kept by the authorities.

These 56 prisoners were almost all convicted of multiple murders, such as Martin Bryant, responsible for the deaths of 35 people in the Port Arthur massacre, who was sentenced to 35 life sentences, plus an additional 1,035 years, all without the chance of parole. There are a few exceptional cases involving offenders such as Katherine Knight, especially serious single murders with extreme aggravating features, such as cannibalism.

In New South Wales, life sentences are required to mean LWOP<sup>13</sup>, but are not mandatory, except for the murder of a police officer. There is an exception for the prerogative of mercy, or for those either dying or physically incapacitated, who have demonstrated they are no longer a risk to the public.<sup>14</sup>

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<sup>11</sup> <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19405/index.do>

<sup>12</sup> <https://toronto.ctvnews.ca/alek-minassian-sentenced-to-life-in-prison-with-no-parole-for-25-years-in-toronto-van-attack-1.5944169>

<sup>13</sup> Section 19A of the Crimes Act 1900

<sup>14</sup> For example, section 154A of the Crimes (Administration of Sentences) Act 1999 (NSW)

There are also a few anomalies, offenders guilty of a series of sexual offending considered so serious that LWOP should be imposed (such as William Turner<sup>15</sup>).

In summary, there is a similar position to that of the UK, where only the most extreme cases merit whole life orders, with a comparable sentencing balance between punishment and rehabilitation.

#### **4) REPUBLIC OF IRELAND**

In the Republic of Ireland, it appears there are no prisoners serving LWOP, though it is a power open to the court. Life sentence is a relatively common sentence in Ireland, with data from the Irish Prison Service showing that in 2020, there were 360 prisoners serving life, 12% of the prison population, the vast majority of whom had committed murder.<sup>16</sup> The percentage of life sentenced prisoners has consistently increased over the last 15 years, against the background of a declining prison population.

#### **5) FRANCE**

In France, Article 221-4 of the Penal Code specifies types of offending that may lead to LWOP, namely child murder involving rape or torture, the premeditated murder of a state official or terrorism resulting in death.<sup>17</sup> There are

Even for an LWOP offender, it is possible for parole to be considered if they can show “serious signs of social re-adaptation” after 30 years.

#### **6) GERMANY**

In Germany, the Constitutional Court ruled in 1977 that life imprisonment without the merest possibility of parole to be antithetical to human dignity, the most fundamental concept of the German constitution.<sup>18</sup> Every offender must have a realistic chance for eventual release, provided that they are not considered dangerous.

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<sup>15</sup> <https://www.abc.net.au/news/2008-05-16/sexual-predator-given-indefinite-sentence/2438526>

<sup>16</sup> <https://www.irishprisons.ie/information-centre/statistics-information/snapshot-statistics/>

<sup>17</sup> <https://web.archive.org/web/20071102213033/http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3685>

<sup>18</sup> <https://openjur.de/u/60105.html>



Normally those serving life imprisonment may apply for parole having served 15 years, unless the court has determined a “severe gravity of guilt”, permitting a longer tariff period.<sup>19</sup>

## 7) AN OVERVIEW OF OTHER EUROPEAN COUNTRIES

There are some countries in Europe which do not have a life sentence as part of their penal regime, a striking departure from the UK’s system and from common law sentencing practice.

For example in **Portugal**, life imprisonment was abolished in 1884 (in a world first), and where there is now a maximum sentence of 25 years.

In **Croatia, Bosnia and Herzegovina**, the maximum sentence is 45 years imprisonment.<sup>20</sup>

For many of the other countries in Europe which have the concept of life imprisonment, there is a limit to the tariff a defendant may serve before release may be considered, either by a body similar to the Parole Board or by way of Presidential pardon. For example:

- In Poland, the sentencing judge can set the minimum term between 25-50 years, after which the President may issue a pardon.
- In Spain, the term may be up to 35 years, with release thereafter determined by the Government.
- In Italy, parole may be considered by a special court after 26 years (or 21 with good behaviour), although interestingly Mafioso convicts are ineligible, unless they cooperate with authorities.

There are other penal systems similar in practice to that of the UK. For example in the **Netherlands**, there is no possibility of parole for those sentenced to life imprisonment, and pardon can only be granted by Royal decree (i.e. if terminally ill). However only 41 prisoners have been sentenced to life imprisonment since the Second World War, so that a murder without aggravating factors would tend to result in a determinate sentence of around 12-30 years.

## Conclusion

It is apparent that the Court of Appeal will not be wrestling with the conflicts inherent in these international approaches to sentencing extreme offenders.

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<sup>19</sup> <https://dejure.org/gesetze/StGB/57a.html>

<sup>20</sup> <https://www.nationmaster.com/country-info/stats/Crime/Punishment/Maximum-length-of-sentence>

Instead the Court will seek to give effect to UK sentencing principles, embodied in Schedule 21 of the Sentencing Code and the various sentencing guidelines, including for guilty pleas.

However it is worth standing back, by way of broad international overview, to see if our approach to sentencing can still be regarded as humane when extinguishing virtually all prospect of release, particularly when there is a continuing tension with ECtHR decisions.

It has to be recognised that this precept, of life meaning life for offenders guilty of the most heinous crimes, seems to be endorsed by the general public in the UK, though research in this area appears unsatisfactory.<sup>21</sup> A penal system must be a product of the society it serves.

Ultimately the UK's penal structure, reserving WLOs for the very worst and most extreme cases, represented by 63 current prisoners, bears similarity with that of Australia, France and the Netherlands.

We must guard against the extremity of American penal policy on life sentences and LWOPs in particular, which appears genuinely beyond the pale, caught up in a vicious cycle of political rhetoric and disproportionate legislation.

It is however submitted that the ERCG exception under section 30 of the Crime (Sentences) Act 1997 must be structured in a way that enhances our commitment to the rule of law, in being transparent from the outset, and as free as possible from political influence. This means, in reality, considering reform of the ERCG review so as to remove or reduce the role of the Home Secretary.

It is suggested that appropriate statutory guidance as to the criteria for an ERCG would be beneficial, overtaking the obsolete observations within the Lifer Manual.

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<sup>21</sup> <https://academic.oup.com/bjc/article-abstract/52/1/141/374310?redirectedFrom=fulltext>