

End Crime with Harm? Castration for Sexual Offenders in Hong Kong

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TABLE OF CONTENTS

I.	INTRODUCTION	55
II.	AN ANALYSIS IN LIGHT OF HUMAN RIGHTS AND POLICY CONSIDERATIONS.....	56
III.	CONCLUSION	63

I. INTRODUCTION

The issue of post-conviction treatment of sex offenders has been the subject of debate and changes to State legislation, particularly in respect of paedophile offences. One such treatment method is through chemical or physical castration on either a mandatory or a voluntary basis. In this regard, some States have implemented these measures for certain paedophile offences. Hong Kong (HK) has no such laws in place. Researchers such as William Winslade and his colleagues highlighted that whilst paedophilia may not be a stringently defined condition,¹ it is one which involves a “reinforcing [pattern] of sexual behaviors,”² with the result that sexual abuses of children are likely to be not only repeated, but also of increasing seriousness.³ As there is some evidence, albeit limited by the fact that empirical studies

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1. William Winslade et al., *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment*, 51 SMU L. REV. 349, 355 (1998).

2. *Id.* at 365.

3. *Id.*

have been unable to use meaningful control groups or comparisons with the individuals studied *prior* to the treatment, that surgical castration *specifically*, results in a “low rate of recidivism”⁴ in sex offenders generally. This low rate might suggest that castration offers a useful mechanism for protecting children and preventing reoffending. The prospect of protecting children through prevention would therefore appear to offer justification for assessing the merits of introducing post-conviction treatment of sex offenders in Hong Kong. As such, this Article will undertake a comparison between the use of castration on post-conviction offenders from a policy and human rights perspective in the United Kingdom (UK) and California, discussing whether some form of castration should be incorporated into the HK framework. The Article argues that whilst there may be human rights implications associated with both voluntary and mandatory castration for offenders, *mandatory* schemes for chemical treatment may be justifiable. In a context with evidence that HK recently sought to move towards greater protection of children,⁵ despite some “disapprov[al]”⁶ among the HK public of castration as a treatment, there is a justification for considering mandatory chemical castration as a treatment of post-conviction sex offenders in the State.

II. AN ANALYSIS IN LIGHT OF HUMAN RIGHTS AND POLICY CONSIDERATIONS

Castration may be surgical or chemical, the latter currently only having a medical impact whilst the drugs are taken,⁷ operating to reduce the production of testosterone,⁸ and thus control⁹ “sexual interest.”¹⁰ Although there is

4. Linda E. Weinberger et al., *The Impact of Surgical Castration on Sexual Recidivism Risk Among Sexually Violent Predatory Offenders*, 33 J. AM. ACAD. PSYCHIATRY AND LAW 16, 19 (2005), <http://jaapl.org/content/33/1/16.long#T2%20accessed%205/2/2021> [<https://perma.cc/NDY8-75LA>].

5. LAW REFORM COMM’N OF H.K., SEXUAL OFFENCES RECORD CHECKS FOR CHILD-RELATED WORK: INTERIM PROPOSALS, para. 2.12-2.15 (2010).

6. Wing Hong Chui et al., *Attitudes of the Hong Kong Chinese Toward Sex Offending Policies: The Role of Stereotypical Views of Sex Offenders*, 17 PUNISHMENT AND SOCIETY 94, 99 (2015).

7. Karen Harrison & Bernadette Rainey, *Suppressing Human Rights? A Rights-Based Approach to the Use of Pharmacotherapy with Sex Offenders*, 29 LEGAL STUDIES 47, 48 (2009).

8. Joo Young Lee & Kang Su Cho, *Chemical Castration for Sexual Offenders: Physicians’ Views*, 28 J. KOREAN MED. SCI. 171 *passim* (2013).

9. Keith Rix, *Pharmacological Interventions for Sex Offenders: A Poor Evidence Base to Guide to Practice*, 23 BJPSYCH ADVANCES 361, 361–62 (2018), <https://www.cambridge.org/core/journals/bjpsych-advances/article/pharmacological-interventions-for-sex-offenders-a-poor-evidence-base-to-guide-practice/12DD1FC5B15D1E49146C93AE5B1662E0#ref14%20accessed%205/2/2021> [<https://perma.cc/89ZT-43XL>].

10. Sarah Skett, Joint Head of Offender Personality Disorder Co-Comm’n, NHS England Specialised Comm’n, et al., PowerPoint Presentation: *Medication to Manage Sexual*

some evidence that chemical castration may be effective as a mechanism for preventing reoffending,¹¹ it has also been noted that the usefulness of the studies conducted is potentially doubtful. A medical assessment of the treatment's success rates is beyond the scope of this Article. As such, the Article will assume that the treatment is effective, albeit it is argued that should this transpire not to be the case, or indeed if the process is only of limited use in reducing reoffending, then the issues in respect of the human rights of offenders are likely to be heightened.

For clarity, the respective regimes in England and Wales and California must be outlined. In the former, chemical castration may be performed either on a mandatory basis where offenders are detained under the Mental Health Act (MHA) 1983, or on a voluntary basis for other offenders. In California, the relevant legislation is the Penal Code (as amended in 2019), section 645, which provides mostly for mandatory castration.¹² However, for surgical castration some voluntary aspects are required.¹³ In England and Wales, with respect to voluntary treatment, a government review of the management of post-conviction paedophiles was undertaken in 2007, asserting the importance of developing a policy of public protection.¹⁴ The government review asserted that the primary focus of any measures introduced should be to “enhance”¹⁵ such protection in the interests of children. One does not doubt that this is a laudable policy aim, and indeed the importance of child protection may also have a human rights dimension. However, the point here is how and to what extent the “serious social problem”¹⁶ caused by paedophilia and the policy devised to minimize the effects of the problem, should be balanced with the offender's human rights. Whilst it does not relate to castration specifically, it is observed that there is some evidence that public policy has been influenced

Arousal: Offender Personality Disorder Pathway, https://irep.ntu.ac.uk/id/eprint/32553/1/10030_Winder.pdf [<https://perma.cc/4VJF-8UEY>].

11. Fred S. Berlin, *The Case for Castration, Part 2*, 26 WASH. MONTHLY 28, 29 (1994).

12. CAL. PENAL CODE, tit. 15, §§ 2.645(a)–2.645(b) (amended 2019).

13. Tit. 15, § 2.645(e).

14. The Home Office, *Review of the Protection of Children from Sex Offenders*, 7-8 (2007) (UK), <https://dera.ioe.ac.uk/8671/2/A9R2808.pdf> [<https://perma.cc/48UG-KRPN>].

15. *Id.* at 4.

16. Omer Khan et. al., *Pharmacological Interventions for Those Who Have Sexually Offended or Are at Risk of Offending (Review)*, 2 COCHRANE DATABASE OF SYSTEMATIC REVIEWS 1, 1 (2015) <https://pubmed.ncbi.nlm.nih.gov/25692326/> [<https://perma.cc/6FMZ-ZJQH>].

by growing “fear”¹⁷ of paedophilia, with an associated move towards more stringent penal measures for reprimanding offenders. Indeed, it is argued, and this point is made by Hazel Kemshall and Kieran McCartan, that policy may be affected not only by public opinion on the importance of child protection but by an environment that historically failed to protect children from sex offenders leading to a desire on the part of policymakers to demonstrate a more effective regime and secure public support.¹⁸ This is not to undermine the importance of protecting children from harm as a policy matter or to ensure confidence in the criminal justice system but to highlight that notwithstanding the importance of such goals, they must be balanced with the rights of offenders.

Karen Harrison and Bernadette Rainey highlight that despite their heinous crimes, paedophiles are human beings such that they are “entitled to the protection of their fundamental human rights”¹⁹ under the international framework. The authors draw on the work of David Feldman to submit that the key issue underpinning human rights considerations in the use of castration for paedophiles is the question of human dignity.²⁰ Feldman claims that dignity is something which “gives particularly point and poignancy to the human condition.”²¹ As this is clearly a widely framed definition, Feldman goes on to argue that dignity is not itself a human right, but rather a goal that human rights frameworks seek to protect.²² This Article is not the place for an analysis of whether this argument is in fact true, or what other factors support the need for an international human rights framework. Rather, it is simply argued that documents such as the International Covenant on Civil and Political Rights (ICCPR) of 1966 are drafted in line with the need to respect the “inherent dignity” of all people.²³ Human rights support “inherent dignity” for all people including sex offenders which must be a factor within the development of the law. If “inherent dignity” should be considered to include factors such as the right to a private and family life under Article 8 of the European Convention on Human Rights (ECHR) 1950, and the right to start a family under Article 12 of the

17. David Garland, *The Culture of High Crime Societies: Some Preconditions of Recent Law and Order Policies*, 40 BRIT. J. CRIMINAL 347, 351 (2000).

18. Hazel Kemshall & Kieran McCartan, *Managing Sex Offenders in the UK: Challenges for Policy and Practice*, in MANAGING SEX OFFENDERS IN THE UK: CHALLENGES FOR POLICY AND PRACTICE 206, 207 (Kieran McCartan ed., 2014).

19. Harrison & Rainey, *supra* note 7, at 47.

20. *Id.* at 54–55.

21. David Feldman, *Human Dignity as a Legal Value: Part I*, PUB. L. WINTER 682, 687 (1999).

22. *Id.*

23. International Covenant on Civil and Political Rights, The Preamble, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

same Convention, it would initially seem that castration is fundamentally incompatible with such goal due to the resultant reduction of sexual desire. This might be particularly clear if one considers that, as the European Court of Human Rights (ECtHR) have stated, Article 12 does not contain any mechanism for qualification, unlike Article 8,²⁴ and that instead what is required for compliance is that the respective State not impose laws which go further than its margin of appreciation allows.²⁵ Moreover, if the particular way that the treatment is employed can be shown to be degrading and lack a justifiable purpose, the right to be free from degrading punishment might restrict these treatments.²⁶ As the case of *Lady Hale* made clear, “no matter how unpopular or unworthy” the person may be, there is an unqualifiable human right to protection under Article 3 of the ECHR.²⁷ This is also the case in international documents such as the ICCPR, which provides that no person may have imposed upon them, “cruel, inhuman or degrading treatment or punishment.”²⁸ The extent to which castration may constitute such treatment cannot be assessed in detail in this work, due to the impossibility of conducting medical research. However, Harrison and Rainey state that any form of chemical castration under the law of England and Wales or California may “not meet the severity required” to constitute degrading treatment if the effects are limited to the duration of the treatment and are reversible, rather than permanent, as is the case for surgical castration. This consideration would be relevant in terms of the other human rights issues outlined above as the right to start a family would not necessarily be permanently affected.

The impermanence is particularly clear under California law, which provides that mandatory castration should be imposed a week before an offender’s release from prison, until the Department of Corrections determines that “it is no longer necessary.”²⁹ The impermanence associated with the treatment may reduce the extent to which it can be considered “degrading”

24. *Guide on Article 12 of the European Convention on Human Rights—Right to Marry*, COUNCIL OF EUROPE: EUROPEAN COURT OF HUMAN RIGHTS (Dec. 31, 2020), <https://www.refworld.org/docid/6048e29512.html> [<https://perma.cc/UL5H-VXX8>].

25. *Frasik v. Poland*, App. No. 22933/02, ¶ 90 (Jan. 5, 2010), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-96453%22%5D%7D> [<https://perma.cc/Y62G-MER3>].

26. Lisa Forsberg & Thomas Douglas, *Anti-Libidinal Interventions in Sex Offenders: Medical or Correctional?*, 24(4) *MED. L. REV.*, 453, 466 n.60 (2016).

27. *Regina v. Secretary of State for the Home Department* [2005] UKHL 66, ¶ 76 (appeal taken from Eng.) [hereinafter *Lady Hale*].

28. ICCPR, *supra* note 23, art. 7.

29. CAL. PENAL CODE § 645(d) (amended 2019).

or “undermining the right to family life.” However, one should of course note the same cannot be said in terms of the potential use of surgical castration, which is permanent. Therefore, even where rights are not qualifiable and the international human rights framework would appear to offer considerable protection to the offender, it cannot be said that treatment should necessarily be prohibited. Thus, the policy considerations might justify considering its use in HK. In any event, such matters must be balanced against the protection of children as a human rights issue. For example, Article 24(1) of the ICCPR provides that the state must protect children due to their “status as minor[s].”³⁰ Additionally, the 1989 United Nations (UN) Convention on the Rights of the Child (UNCRC) states that governments should protect children from “sexual abuse.”³¹ It is true that the balance of these issues, given that the rights of children and adults may conflict, is likely to involve a complex assessment which is generally recognized by Rachel McPherson.³² In a context where there is evidence that treatment might be effective and it does not seem that the offenders’ mandatory treatment would impact their human rights, the importance of children’s human rights and public policy would potentially justify mandatory castration in HK.

In England and Wales with regard to mandatory treatment, the MHA applies in respect of offenders who have been detained under the mental health framework rather than a prison sentence being imposed as a punishment.³³ Under section 37(1) a court may order “detention in hospital”³⁴ instead of a custodial sentence when the offender has a “mental disorder,”³⁵ which would appropriately be treated by detention,³⁶ where such treatment is “available,”³⁷ and this approach is the most suitable in the case.³⁸ It is not necessary to consider how the framework approaches the concept of a mental disorder, as this work focuses on the potential use of castration rather than the mental status of defendants. All that is necessary to observe is that where the MHA does apply, section 63 states that unless the relevant treatment

30. ICCPR, *supra* note 23, art. 24, ¶ 1.

31. Convention on the Rights of the Child, art. 19, ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

32. Rachel McPherson, *Sutherland v HM Advocate: The Right to Privacy, Evidence Gathering and the Integrity of Justice in a Criminal Age*, 2 JURID. REV. 104, 109 (2020).

33. Mental Health Act 1983, c.20, § 1(1)-(3) (Eng.), https://www.legislation.gov.uk/ukpga/1983/20/pdfs/ukpga_19830020_en.pdf [<https://perma.cc/8S7R-6CSV>].

34. *Id.* § 37(1).

35. Mental Health Act 2007, c.12, sch. 1, ¶ 7(a), (Eng.) (amendments to 1983 Act) https://www.legislation.gov.uk/ukpga/2007/12/pdfs/ukpga_20070012_en.pdf [<https://perma.cc/LNT2-67D5>].

36. Mental Health Act 1983 § 37(2)(a)(i).

37. Mental Health Act 2007 § 4(5).

38. Mental Health Act 1983 § 37(2)(b).

is of a particular category, and this does not apply in respect of chemical castration,³⁹ treatment may be given without consent.⁴⁰ Again, the MHA is not a criminal statute but rather applies to “mentally disordered persons”⁴¹ and as such, the way England and Wales approach the MHA operates is not in respect of all prisoners, but only offenders detained under the Act. However, as one commentator has observed, the effect of treatment is the same regardless of the legal basis for it. Thus, because chemical castration works by reducing testosterone production, it simply “inhibits sexual function”⁴² rather than operating differently for offenders with mental disorders. Therefore, the real issue of mandatory treatment is how its use can be justified in light of the relevant human rights, shown above to potentially support mandatory chemical schemes, regardless of whether it is imposed in a mental health or prison setting.

Voluntary Chemical Castration schemes have been developed in the UK,⁴³ with recent increases in use,⁴⁴ and one might initially consider that an offender’s decision to enter treatment programs would be an autonomous choice. John Harris notes this is essential for respecting human dignity,⁴⁵ and the choice should therefore certainly be incorporated into the HK framework as it does not raise human rights issues. The issue with this however, is that for there to be meaningful consent and thus a respect for autonomy, the choice to enter a treatment programme must be “valid”⁴⁶ such that consent is given free from coercion. Harrison and Rainey argue this would appear to be correct in light of the fact it is well established that consent must be given freely to constitute a meaningful exercise of autonomy,⁴⁷ where the “treatment is linked to an offender’s sentence or

39. Forsberg & Douglas, *supra* note 26, at 466 n.63.

40. Mental Health Act 1983 § 63.

41. *Id.* at 1.

42. James Hamblin, *Alabama Moves to State-Ordered Castration*, THE ATLANTIC (June 11, 2019), <https://www.theatlantic.com/health/archive/2019/06/alabama-chemical-castration/591226/> accessed 5/2/2021 [<https://perma.cc/YJD7-VE5F>].

43. The Home Office, *supra* note 14, at 14.

44. Francis Gibb, *Castration Drug May be Offered to Hundreds of Sex Offenders*, THE TIMES (Apr. 12, 2018), <https://www.thetimes.co.uk/article/castration-drug-may-be-offered-to-hundreds-of-sex-offenders-70zrppgr3> [<https://perma.cc/F32W-AC3D>].

45. JOHN HARRIS, *THE VALUE OF LIFE AN INTRODUCTION TO MEDICAL ETHICS* 80 (Routledge, 1985).

46. Harrison & Rainey, *supra* note 7, at 57.

47. Jo Samanta & Ash Samanta, *Holistic Determination for Oneself: A New Paradigm for Self-Determination at End of Life*, 72(3) CAMBRIDGE L.J. 689, 711 (2013).

release from prison,”⁴⁸ it cannot be considered as an exercise of a free choice. As William Green notes, prisoners’ “freedom of choice is impossible because the convict’s loss of liberty constitutes a deprivation of such a magnitude that he cannot choose freely and voluntarily.”⁴⁹ This seems persuasive on the basis that an offender might be faced with a decision between longer imprisonment or an unwanted treatment, which is hardly a free choice. This issue is also clear in the Californian approach. California’s section 645(b) provides that second offences require chemical castration to render an offender eligible for parole, with section 645(a) providing such an option to be available depending on circumstances of first-time offenders. The ability to decline gives the appearance of a voluntary element despite the section’s framing of the castration as mandatory. However, even though offenders may decline it, *they instead* must accept a “permanent surgical alternative,”⁵⁰ of physical castration. One may find it difficult to accept that an offender would choose to undergo a more invasive, and perhaps degrading, treatment to avoid chemical castration, regardless, a choice between two unwanted options to prevent longer imprisonment is hardly valid consent. Thus, whilst it has been shown that mandatory chemical treatment seems potentially justifiable and thus should be considered in HK, the same cannot be said for so-called voluntary programmes. Of note, some commentators suggested that the effectiveness of chemical castration is determined not simply by the hormones themselves but also the “willing[ness]”⁵¹ of the patient to accept the treatment. If this suggestion is correct, it might undermine the arguments made throughout this work as treatment would seem to be more likely to be degrading if ineffective. However, provided an “evidence”⁵² based approach is taken, with treatment only imposed where it is proven to be effective, mandatory chemical castration may be potentially justifiable in respect of the issues considered throughout this work and should therefore be considered as an option in HK.

48. Harrison & Rainey, *supra* note 7, at 57.

49. William Green, *Depo-Provera, Castration and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12(1) U. DAYTONA L. REV. 1, 17 (1986).

50. CAL. PENAL CODE, tit. 15, § 645(e) (amended 2019).

51. Phillip J. Henderson, *Section 645 of the California Penal Code: California’s “Chemical Castration”—A Panacea or Cruel and Unusual Punishment?*, 32 U.S.F. L. REV. 653, 653 (1998).

52. Polly Curtis, *Should Sex Offenders be Chemically ‘Castrated?’*, THE GUARDIAN (last visited June 6, 2021), <https://www.theguardian.com/politics/reality-check-with-polly-curtis/2012/mar/13/prisons-and-probation-criminal-justice#block-7> [<https://perma.cc/QA5D-CUK2>].

III. CONCLUSION

The protection of children from paedophiles is an important part of social policy and indeed the international human rights of children. This, it is argued, may seem to justify the use of castration on the assumption that it is effective in securing such protection. Such issues must be balanced against the human rights of the offender. In regard to the offender's human rights, seeking to administer the treatment as voluntary in England and Wales and to an extent California cannot be supported on the basis that consent is unlikely to be freely given, at least in cases where it is linked to the release of the offender. Whilst the issue is a complex one, it may be that effective mandatory treatment such as under the MHA, is justifiable, where the castration used is chemical and thus temporary with the safeguards on time periods that are in the Californian law. In such cases, it seems unlikely that the unqualifiable human rights of offenders would be undermined. Therefore, in light of the increased focus on the importance of protecting children from sexual abuse in HK, mandatory chemical castration should be at least evaluated in the context of the State's legal framework.

