

An exploration of ECtHR jurisprudence governing the administration of release processes for life and long-term sentence prisoners: Perspectives from the United Kingdom

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Abstract

The purpose of the research themes examined in this article is to contribute to the ongoing debate pertaining to substantive criminal laws and procedures governing sentence reviews of prolonged detention for life and long-term sentence prisoners in accordance with Article 5(4) ECHR. The incompatibility of whole life irreducible sentences with Article 3 ECHR is examined through the lens of the ECtHR judgment in *Vinter, Moore and Bamber v United Kingdom*. The analyses of ECtHR jurisprudence is heavily skewed towards the administration of indeterminate life, and by analogy long-term determinate sentences, in the United Kingdom which is an outlier jurisdiction in a European context given that, in conjunction with Turkey, it accounts for the majority of persons serving life sentences. The article focuses on pertinent ECHR provisions and associated ECtHR jurisprudence, with perspectives from the United Kingdom on their implementation as a case study. While key themes are disinterred from the ECtHR's jurisprudence that will presumably inform sentence review procedures in European states, a broader analysis of release systems operative in a European context is beyond the scope of the article.

Keywords

Life imprisonment, irreducible life sentences, long-term determinate sentences, rehabilitation and reintegration, Articles 3, 5 and 7 European Convention on Human Rights, *Vinter* reviews

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Introduction

It is widely acknowledged that life sentence prisoners will not be incarcerated for the remainder of their natural life and may be conditionally released by parole authorities. Equally, long-term sentence prisoners may have an expectation of conditional release before the determination of their sentence. The ECtHR has frequently invoked Article 5(4) as a procedural safeguard against unlawful and disproportionately prolonged detention. At appropriate stages of their sentence, prisoners are entitled to frequent and speedy reviews of continued detention by a court or ‘court like’ body. Such quasi-judicial bodies, effectively a parole authority, must be invested with the power to determine the lawfulness of continued detention.¹ It is generally not sufficient that such an authority functions in an advisory capacity to the executive branch of government, albeit release systems between European states for life sentence prisoners vary considerably including release by a judicial authority/court, parole authority, release by the executive, and clemency release.² Sentence reviews must adopt appropriate fair procedures and due process guarantees in the decision-making process. Whether a review is sufficiently speedy or frequent is considered in light of the circumstances and complexities of the sentence under review. Prisoners may have an entitlement to conditional release if continued detention is found to be unlawful.

Prolonged detention may be proportionate commensurate with perceived risk and dangerousness of reoffending. Sentence reviews must be sufficiently broad to determine whether the legitimate penological justifications for continued detention prevail. National laws in conjunction with ECHR provisions and associated ECtHR jurisprudence are equally relevant between European states, and implementing ECHR sentence review standards into national laws is conditional on the diversity of parole authorities. Substantive and procedural law governing release systems for life and long-term sentence prisoners has to a great extent been formulated by ECtHR judgments. The majority of ECtHR judicial formulations on procedures governing sentence reviews emanates from the cases taken against the United Kingdom. Therefore, an appreciation of developments in law and practice in that jurisdiction is particularly apposite in order to appreciate the parameters of ECtHR jurisprudence – albeit most European states operate discretionary release systems. While the ECtHR has emphasised the need for a quasi-judicial authority for reviewing post-tariff sentence prisoners in the United Kingdom, that is due to the primacy of risk in the parole decision-making process in that jurisdiction.³ The ensuing analysis of ECHR provisions and associated ECtHR jurisprudence is informed through perspectives from the United Kingdom on their implementation as a case study.

Through doctrinal analysis of the legalistic issues the purpose of this article is to contribute to the ongoing analysis of legitimate penological justifications for prolonged enforcement of life and long-term sentences commensurate with release systems governed by pertinent ECHR provisions and associated ECtHR jurisprudence. Substantive and procedural safeguards against determinations of parole authorities to arbitrarily prolong detention following the punitive element of sentences are key to the analysis. The general assumption postulated is that life sentences are structured such that they have a punitive element after which point the decision to release is based on assessments of risk and dangerousness by a body independent of the executive – admittedly this is not the case across

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1. While the term ‘parole board’ is used in relation to United Kingdom case law, the term ‘parole authority’ is invoked throughout the article as there is a multitude of such decision-making bodies in a European context.
 2. Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global and Human Rights Analysis* (Harvard University Press, 2019) chp. 9.
 3. The ECtHR has not had similar interpretations in other jurisdictions where there are a broader range of factors at play: *Streicher v Germany* (Application no 40384/04); *Meixner v Germany* (Application no 26958/07).

all European states.⁴ The article concludes with an assessment of counterbalancing risk and public protection commensurate with the liberty and human dignity of prisoners who may be eligible for conditional release. There are significant differences in terms of the administration of life and long-term sentences in the United Kingdom and other European jurisdictions resulting in different ECtHR decisions that are beyond the scope of this article.

Life and long-term sentences

The imposition of life and long-term sentences includes a symbolic element of punishment for heinous criminal offences and are the most severe criminal sanctions in jurisdictions that have abolished capital punishment. The death penalty is prohibited by Article 1 of protocol No. 6 and Article 1 of Protocol No. 13 and has been replaced in European states by life imprisonment or long-term sentences as the maximum penalty.⁵ Unlike sentences of fixed duration, life sentences are by their very nature indeterminate. Whereas prisoners sentenced to fixed term periods of detention will know the date of expected release, life sentence prisoners have no such expectation.⁶

Life sentences are terms of imprisonment without a prescribed duration of incarceration stipulated by the sentencing court, which can be mandatory (prescribed by legislatures) or discretionary (judicially determined).⁷ Mandatory life sentences are not easily reconciled with the overarching principle of proportionality as judges are restrained from exercising judicial sentencing discretion taking into consideration the personal circumstances of offenders and other relevant factors informing the sentencing process.⁸ The prospect of being incarcerated for life raises human rights concerns pertaining to whether such sentences are inconsistent with liberty (Article 5) and human dignity (Article 3). Life sentences per se are not incompatible with Article 3 provided there are frequent reviews of the justification for continued detention and prisoners should have a real hope of conditional release. It is the structures governing release, or prolonged detention, where contentious issues may arise. Irreducible whole life sentences – albeit very seldom applied – equates to a prisoner's life being reduced to mere survival in violation of Article 3, although supporters of whole life sentences advocate for their retributive and deterrent effect.⁹

Life and long-term sentences are based on the premise that prisoners might be eligible for conditional release on the basis of good behaviour and sufficient progress towards rehabilitation. Prisoner reform and rehabilitation would typically be evidenced by participation in counselling or drug rehabilitation programmes, obtaining education or work skills, engaging with rehabilitative and therapeutic regimes, and compliance with prison regulations.

While periods of detention under life sentences are generally not stipulated by sentencing courts, parole authorities enjoy discretionary powers to decide applications for conditional release by

4. Nicola Padfield, Dirk van Zyl Smit, Frieder Dünkel (edn.), *Release from Prison: European Policy and Practice* (Willan, 2010).

5. Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Palgrave MacMillan, 2010).

6. See Estellu Baker, 'Dangerousness, Rights and Criminal Justice' (1993) 56 *Modern Law Review* 528 at 533.

7. Nicola Padfield, 'Parole and the life sentence prisoner' (1993) 32 *Howard Journal of Criminal Justice* 87.

8. Barry Mitchell and Julian V. Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart, 2012); Nicola Padfield, 'The Legality of the mandatory life sentence' (2002) 61 *Cambridge Law Journal* 1; Stephanie Palmer, 'Redefining the meaning of life: the early release of life prisoners' (1994) 53 *Cambridge Law Journal* 480.

9. Catherine Appleton and Bent Grover, 'The pros and cons of life without parole' (2007) 47 *British Journal of Criminology* 597.

reference to factors of risk and dangerousness that are susceptible to change.¹⁰ These factors will be measured against progress made by prisoners which in turn will depend on the sufficiency of resources available to facilitate meaningful rehabilitation and reintegration back into society.¹¹ The question of conditional release for life and long-term sentence prisoners is dependent on factors unknown at the time when the original sentence was imposed. Frequent reviews by parole authorities empowered to determine the lawfulness of continued detention are therefore required.

Discretionary sentence review procedures vary considerably between European states especially between minimum periods of a sentence required to have been served before prisoners may be eligible for conditional release.¹² Once the minimum or punitive term of the sentence has been served, life and long-term prisoners may have an expectation of frequent sentence reviews and determinations regarding justifications for continued detention or conditional release. Sentence reviews are confined to decision-making procedures and do not confer a substantive right to parole.¹³

Lawful detention

Article 5(1)(a) ECHR tolerates ‘the lawful detention of a person after conviction by a competent court’. This procedural safeguard demands that no person shall be deprived of their liberty in an arbitrary, irrational or unreasonable manner.¹⁴ Where the lawfulness of prolonged detention is an issue, including the question whether ‘a procedure prescribed by law’ has been followed in accordance with Article 5(1), the ECtHR defers to conformity with national laws and procedures, which invariably differs between European states. The duration of detention are matters for determination by national courts and parole authorities, not the ECtHR as a supranational whose function is delimited to judicial formulations for implementation and compliance with ECHR standards.¹⁵ Detentions must be lawful under national law conforming to ECtHR judicial pronouncements concerning the quality of the law, which must be accessible with the precision with which it is formulated to the individuals concerned; and sentence reviews must not be arbitrary, such as resorted to in bad faith, or disproportionate.¹⁶ The multitude of different parole decision-making authorities between European states might suggest capricious implementation of ECHR standards and fundamental rights dependant on the state in which the prisoner is detained – somewhat akin to a ‘geographical lottery’ for life and long-term prisoners as to whether conformity with ECHR standards are being complied with or alternatively whether a wider margin of appreciation operates

10. Michael Tonry, ‘Predictions of dangerousness in sentencing: *Deja vu* all over again’ (2019) 48 *Crime and Justice* 439.

11. Emily van der Meulen and Jackie Omstead, ‘The limits of rehabilitation and recidivism reduction: rethinking the evaluation of arts programming in prisons’ (2021) 101 *The Prison Journal* 102; Luc Robert and Elena Larrauri, ‘First steps towards freedom: prison leave across Europe’ (2020) 26 *European Journal on Criminal Policy and Research* 135.

12. Matjaž Ambrož and Katja Šugman Stubbs, ‘Conditional Release (Parole) in Slovenia: Problems and Possible Solutions’ (2011) 91 *The Prison Journal*, 488; Pierre Tournier, ‘Systems of conditional release (parole) in the Member States of the Council of Europe Between the principle of equality and individualization, pragmatism’ (2004) 1 *Penal Field* Available online at: <https://journals.openedition.org/champpenal/378> (accessed 13 November 2021).

13. Steve Foster, ‘Legitimate expectations and prisoners’ rights: the right to get what you are given’ (1997) 60 *Modern Law Review* 727.

14. *Winterwerp v The Netherlands* (Application no 6301/73) para 37.

15. *Saadi v United Kingdom* (Application no 13229/03) para 71; *Weeks v United Kingdom* (Application no 9787/82) para 49; *Van Droogenbroeck v Belgium* (Application no 7906/77) para 40.

16. *McLeod v United Kingdom* (Application no 24755/94) para 41.

in some states, thus effectively circumventing substantive rights and procedural safeguards governing sentence release systems.

Article 5(1) stipulates that loss of liberty should be in keeping with the purpose of protecting detainees from arbitrariness, irrationality or unreasonableness and ECtHR jurisprudence has revealed that these notions vary considerably depending on the nature of detention, conditions and facilities available to prisoners between European states. Although a harmonised definition of 'arbitrariness' has not been devised, ECtHR jurisprudence has nonetheless pronounced judicial formulations for sentence review procedures for implementation by national parole authorities, subject to the caveat of a margin of appreciation being afforded to sovereign states.

Legal certainty and the rule of law are pivotal to safeguarding against arbitrary detention. Sentence review procedures must be clearly defined and foreseeable in their application to the extent that continued detention would only be justified on legitimate penological justifications.¹⁷ Prisoners demonstrating sufficient progress towards rehabilitation should be considered for conditional release at appropriate stages of their sentence consistent with national laws and procedures underpinned through the review requirements of Article 5(4). Article 5 should be read as a whole and a violation of paragraphs (1) and (4) would render detention unlawful. There is no precondition to the application of this provision requiring prisoners to demonstrate 'any particular chance of success in obtaining his release'.¹⁸

Interconnection between original sentence and continued detention

Determinations by parole authorities to prolong detention require sufficient interconnection between the original sentence and detention commensurate with Article 5(1)(a) and frequent reviews consistent with Article 5(4). Risk assessments based on the original offence and sentencing remarks by the trial court are key criterion for sentence reviews conducted by parole authorities. This necessitates reasoned judgments by sentencing judges that may be considered by parole authorities many years or decades after the sentence was imposed. The rationale for the imposition for the criminal sanction may have incorporated prospects for reform and rehabilitation of the offender based on pre-sentence reports and other relevant considerations that should be considered by parole authorities before determining applications for conditional release.

The circumstances and nature of the original offence have frequently been invoked in decisions to revoke parole licences, recall parolees and reactivate the original sentence, thereby justifying continued detention. While the discussion in this context shifts focus to recall of released prisoners, where different considerations may apply, ECtHR jurisprudence in this regard may nonetheless inform broader penological considerations that also pertain to parole applications.

In *Waite v United Kingdom*,¹⁹ the ECtHR found a sufficient correlation where the prisoner, who had killed his grandmother while addicted to glue-sniffing, had his parole licence revoked following his arrest for possession of drugs. The conviction and sentence for murder committed against a background of substance abuse established a sufficient connection, as required in accordance with 'lawfulness' in Article 5(1)(a), between the decision to recall and the original sentence for murder. In *Weeks v United Kingdom*,²⁰ the ECtHR reiterated that discretionary life sentences are indeterminate

17. *Gebura v Poland* (Application no 63131/00) para 29.

18. *Waite v United Kingdom* (Application no 53236/99) para 59.

19. (Application no 53236/99).

20. (Application no 9787/82).

sentences expressly based on considerations of risk and public protection, factors that are susceptible to change during the period of detention. Considering legitimate concerns regarding the applicant prisoner's unstable, disturbed and aggressive behaviour, the ECtHR concluded that the decision to recall was not arbitrary, irrational or unreasonable commensurate and was closely linked to the objectives of the original sentence to satisfy the requirements of Article 5(1)(a).

Detention after recall of a mandatory life sentence prisoner violated Article 5 in *Stafford v United Kingdom*²¹ where recall was based on the risk of non-violent offending (fraud offences) unconnected with the original sentence for murder. On the completion of the sentence for fraud the Home Secretary refused to release the prisoner and ordered continued detention on the original life sentence, on the grounds that he would commit further fraud offences. The ECtHR limited the penological grounds of risk and dangerousness (linked to the original sentence) or refusal to grant parole, and disapproved of the continued detention of a convicted murderer based on concerns that he would commit fraud offences (unconnected with the homicide offence) at some unspecified time in the future.

Reassessing the lawfulness of continued detention

Article 5(4) provides that persons deprived of personal liberty 'shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. This provision demands judicial supervision of the lawfulness of continued detention under the provisions of Article 5(1), which in itself necessitates quasi-judicial sentence reviews. This procedure will safeguard against unreasonable, arbitrary and irrational decisions unsupported by legitimate penological grounds to prolong detention.

Sentence reviews of the lawfulness of continued detention may be necessitated at 'reasonable intervals',²² where the initial parole application has been rejected. Moreover, national parole authorities are obligated to decide sentence reviews 'speedily'. Reviews must be sufficiently broad to include considerations as to whether the legitimate penological grounds for continued detention still prevail.²³ While initial parole applications may be declined, the parole authority should provide guidance on what measures should be undertaken to enhance the possibility of being granted conditional release in a subsequent application. In accordance with the principle of legality, prisoners that have meaningfully engaged in rehabilitation programmes may have a legitimate expectation to receive guidance on what further measures are required to demonstrate a significant reduction in perceived risk and dangerousness if granted conditional release. Frequent reviews may be required over a period of years depending on the prisoner's progress towards rehabilitation and significant reduction in risk and dangerousness as determined by appropriate parole authority assessments. Determinations against granting conditional release typically include recommendations for prisoners to further engage in rehabilitation programmes, pre- and post-release preparations and other stipulations, as may be determined by the assessment of a prisoner's suitability for conditional release. This accords with the principle of legal certainty in that prisoners

21. (Application no 46295/99).

22. *Herczegfalvy v Austria* (Application no 10533/83) para 75.

23. Hazel Kemshall, *Risk in Probation Practice* (Routledge, 2018); Karen Harrison, *Dangerousness, Risk and the Governance of Serious Sexual and Violent Offenders* (Routledge, 2011); Richard Berk, 'An impact assessment of machine learning risk forecasts on parole board decisions and recidivism' (2017) 13 *Journal of Experimental Criminology* 193.

know what is required of them so as to ensure further progression towards satisfactory rehabilitation and perhaps eligibility for conditional release in ensuing sentence reviews.

It is noteworthy that life sentences will not exhaust the provisions of Article 5(4) demanding frequent reviews of continued detention. Many prisoners will have meaningfully engaged with rehabilitation programmes over time and may become eligible for review in due course. This was exemplified in *Thynne, Wilson and Gunnell v United Kingdom*²⁴ where the ECtHR reiterated that ‘factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention’.²⁵ The ECtHR concluded that since the grounds relied upon in sentencing the applicant to a discretionary life term concerned by reference to factors of risk and dangerousness that are disposed to change, new issues of lawfulness of detention could arise after the expiry of the punitive element of the sentence. The circumstances that gave rise to the original conviction and sentence might have changed significantly at some point during the period of detention.

Frequency of reviews

Parole applications must be ‘decided speedily’ in accordance with Article 5(4) which stipulates that the decision-making process should not be unduly prolonged. Nonetheless, a measure of procedural flexibility is tolerated. In *Oldham v United Kingdom*,²⁶ the ECtHR concluded that a 2-year interval between reviews of detention of a discretionary life sentence prisoner following recall to prison did not fulfil the requirements of Article 5(4). The prisoner attended several prescribed courses that were designed to deal with his anger and alcoholism problems in addition to his difficulty in managing relationships. These courses were completed within 8 months of the previous sentence review; however, a further 16 months elapsed before the subsequent review. The United Kingdom government contended that the delay was necessary in order to monitor the prisoner’s progress however no explanation was provided as to the nature or duration of the monitoring process. The ECtHR concluded that ‘the two-year delay between reviews was not reasonable and that the question of whether continued detention was lawful was not decided ‘speedily’ within the meaning of Article 5(4)’.²⁷

ECtHR jurisprudence has accepted periods of less than a year between reviews and rejected periods of more than 1 year. In *AT v United Kingdom*,²⁸ the European Commission of Human Rights and concluded that a period of nearly 2 years that had elapsed before a subsequent review of the continued detention of a discretionary life sentence prisoner was not justified in light of the fact that a discretionary lifer panel had recommended that the sentence should be reviewed within a year. Likewise, in *Herczegfalvy v Austria*,²⁹ the ECtHR concluded that periods between reviews of 15 months and 2 years were not reasonable in the case of a detention on grounds of mental illness. These cases indicate unreasonable decisions in violation of Article 5(4) to prolong detention and perhaps inconsistency of approach to periodic sentence reviews by national parole authorities vested with discretionary powers.

24. (Application nos 11787/85; 11978/86; 12009/86).

25. *Ibid* para 76.

26. (Application no 36273/97).

27. *Ibid* para 37.

28. (Application no 20448/92).

29. (Application no 10533/83) para 77.

Procedural flexibility should also give due consideration to the personal circumstances of prisoners. In *Hirst v United Kingdom*,³⁰ a discretionary life sentence prisoner claimed there had been an unjustifiable administrative policy in arranging review dates, which clearly indicates a lack of fair procedures contrary to the requirements of Article 5(4). In the circumstances of the case, 21-month and 2-year delays between reviews were unreasonable. The determination of whether the prisoner's continued detention was lawful was not decided 'speedily' within the meaning of Article 5(4) and the ECtHR concluded there was a violation of this provision.³¹ In *Dancy v United Kingdom*,³² a decision was made to set a 24-month interval between reviews, although the sentence had previously been considered at 12-month review periods. The prisoner had not made satisfactory progress during the previous 12-month reviews and considerable offence-related progress had been deemed necessary. The ECtHR concluded that the review periods had been approached with procedural flexibility and due regard to the prisoner's circumstances.

Sentence review periods inevitably vary based on progress towards rehabilitation as may be evidenced by risk assessments. Unreasonable delays between reviews were considered in *Blackstock v United Kingdom*,³³ where the ECtHR was not persuaded that the procedure adopted, which led to an overall delay of 22 months, paid due regard to the need for reviews being decided 'speedily' and found a violation of the lawfulness of continued detention were inconsistent with Article 5(4).

The ECtHR has declined to stipulate maximum periods between sentence reviews that should automatically be applicable to life and long-term sentence prisoners. Review procedures should incorporate a sufficient measure of flexibility that reflect the realities of the prisoners' circumstances, which varies considerably and will be measured against the lawfulness of continued detention under Article 5(4).³⁴ ECtHR jurisprudence suggests that reasonable periods of 12 months between reviews would be consistent with the requirements of this provision. A guiding principle would be significantly less than 2 year intervals between reviews, depending on the complex and discretionary nature of parole applications and release systems between European states.

Speedily

Determinations of whether sentence review periods comply with the requirements under the provisions of Article 5(4) that decisions be taken 'speedily' once the review process has commenced must be determined with regard to the complexity of each case and should not be decided in the abstract.³⁵ In *Hutchison Reid v United Kingdom*,³⁶ the ECtHR stated that '[w]hile one year per instance may be a rough rule of thumb in Article 6(1) cases, Article 5(4), concerning issues of liberty, requires particular expedition'.³⁷ Factors to be considered might include whether reviews were conducted with due diligence, any periods of delay caused by the applicant prisoner, the

30. (Application no 40787/98).

31. *Ibid* para 44.

32. (Application no 55768/00).

33. (Application no 59512/00).

34. *Oldham v United Kingdom* (Application no 36273/97) para 31; *Hirst v United Kingdom* (Application no 40787/98) para 38; *Dancy v United Kingdom* (Application no 55768/00) para 2.

35. *Sanchez-Reisse v Switzerland* (Application no 9862/82) para 55.

36. (Application no 50272/99).

37. *Ibid* para 79.

gravity of the criminal offence(s) for which the applicant prisoner had been sentenced and further relevant considerations on a case-by-case basis.

Nature and characteristics of parole authorities

Sentence reviews invariably necessitate access to independent and impartial parole authorities empowered to determine parole applications. This requirement is exemplified by ECtHR jurisprudence that demands an independent and impartial court or ‘court-like’ quasi-judicial body empowered to decide applications for conditional release.³⁸ In *Weeks v United Kingdom*,³⁹ the ECtHR recapitulated fundamental characteristics of ‘court-like’ bodies that must adopt judicial procedures, with the power to ‘decide’ the ‘lawfulness’ of prolonged detention and to order the applicant’s release if detention is unlawful.⁴⁰ The diversity of national parole decision-making authorities between European states would fulfil this requirement subject to the foregoing pre-conditions. The established procedures were reiterated in *Thynne, Wilson and Gunnell v United Kingdom*,⁴¹ where the ECtHR concluded that parole authorities should be empowered to determine, at regular intervals, the complex issues of whether life, and by analogy long-term prisoners should be granted conditional release.

Independence of the executive branch of government and impartiality between the parties is pivotal to ensuring procedural propriety in the sentence review decision-making process. In *Neumeister v Austria*,⁴² the ECtHR clarified the independence of the court from the procedures adopted in accordance with Article 5(4) in that parole authorities ‘must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed’.⁴³ *Neumeister* was elaborated on in *De Wilde, Ooms and Versyp v Belgium (No. 1)*,⁴⁴ where the ECtHR stated that the procedures must be judicial in nature and provide ‘the individual concerned [with] guarantees appropriate to the kind of deprivation of liberty in question’.⁴⁵

National parole authorities should not adopt an interpretation of Article 5(4) unsupported by and in conflict with ECtHR jurisprudence. This accentuates the imperative of adversarial due process safeguards and fair procedures in accordance with the principle of legality and the rule of law. Moreover, accountability of the decision-making process by way of judicial review for unreasonableness, arbitrariness or irrationality is an imperative. While adversarial systems of justice are conventional in common law jurisdictions, inquisitorial systems of justice prevail in most continental civil law jurisdictions. The implications of the diverse systems of justice that pertain between European states could militate against consistency of approach and hence be more problematic for ECHR rights and associated ECtHR jurisprudence to be applied consistently

38. *Stafford v United Kingdom* (Application no 46295/99) para. 87; *Hussain v United Kingdom* (Application no 21928/93), paras 53-54. Patricia Londono, ‘The executive, the parole board and Article 5 ECHR: progress within an unhappy state of affairs’ (2008) 67 *Cambridge Law Journal* 230.

39. (Application no 9787/82).

40. *Ibid* para 61.

41. (Application nos 11787/85; 11978/86; 12009/86) para 76. Geneva Richardson ‘Discretionary life sentences and the European Convention on Human Rights’ (1991) *Public Law* 34.

42. (Application no 1936/63).

43. *Ibid* para 24.

44. (Application nos 2832/66; 2835/66; 2899/66).

45. *Ibid* para 76.

regardless of the nature of release systems; albeit such diverse legal traditions might not exist in their traditional pure systems.⁴⁶

Deprivation of liberty through decisions taken by administrative authorities, that prevail in many European civil law inquisitorial jurisdictions, necessities reviews of the lawfulness of continued detention by courts or quasi-judicial authorities.⁴⁷ In *De Wilde, Ooms and Versyp v Belgium (No 1)*,⁴⁸ the applicants had been detained as vagrants by what were thought to be non-reviewable administrative decisions of the magistrates. The ECtHR contrasted decisions that deprived persons of their liberty taken by administrative bodies on the one hand and judicial bodies on the other.⁴⁹ The ECtHR found a violation of Article 5(4) because there was no judicial remedy open to the applicants against the detention orders. Decisions depriving prisoners of personal liberty must be made by a 'court' within the meaning of Article 5(4) affording fundamental procedural safeguards against arbitrariness. Sentence review procedures should be judicial in character affording due process guarantees appropriate to the deprivation of liberty being challenged.

The issues surrounding administrative decisions are illustrative of the imperative of national parole authorities being empowered to act quasi-judicially in accordance with fair procedures and due process safeguards. Moreover, the decision-making process must be accountable by way of judicial scrutiny, whether on appeal or judicial review. Issues of incompatibility with ECHR and associated ECtHR jurisprudence arise in states where the parole authority is a purely administrative body thus effectively circumventing the substantive and procedural safeguards against the arbitrary loss of liberty and continued detention. Therefore, it is imperative that prisoners have access to judicial remedial procedures.

Right to an effective remedy

Prisoners benefit from the necessary judicial guarantees under Article 5(4) to challenge the lawfulness of prolonged detention. The obligation on states to safeguard human rights and vindicate individual rights for violations is underscored by Article 13, which stipulates that everyone whose rights have been violated shall have an effective remedy before a national authority.⁵⁰ In cases of violations by national parole authorities empowered to make decisions affecting individual rights, the imperative of judicial scrutiny of sentence review procedures is underscored by the obligation on states to provide an effective remedy (including appeal against the parole authority determination or judicial review of procedures adopted during the parole decision-making process).

Judicial review of parole authorities

Judicial scrutiny is implied by the principle of legal certainty and the rule of law safeguarded through Article 7. These fundamental values in democratic states are expressed in the Preamble to the ECHR. Judicial review of the parole decision-making process is mandated by Article 5(4) which

46. John Spencer, 'Adversarial vs inquisitorial systems: is there still such a difference?' (2016) 20 *International Journal of Human Rights* 601.

47. *DL v Bulgaria* (Application no. 7472/14).

48. (Application nos 2832/66; 2835/66; 2899/66).

49. *Ibid* para 76.

50. *O'Keefe v Ireland* (Application no. 35810/09); *McFarlane v Ireland* (Application no. 31333/06). Annabel Lee, 'Focus on Article 13 ECHR' (2015) 20 *Judicial Review* 33.

provides that applicants ‘shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’. This *habeas corpus* judicial review of prolonged detention provides a ‘cornerstone guarantee’ against arbitrarily prolonged detention.⁵¹ Judicial scrutiny of interferences with the right to liberty is an essential feature of the guarantee embodied in Article 5 to minimise the risk of arbitrariness, and enhance judicial oversight and scrutiny of procedures. The independent procedural safeguard is essential for prisoners to challenge the legality of detention and the burden of proving the lawfulness of continued detention rests with national authorities.⁵²

If there is no appeal process or other effective remedy available (against arbitrary or unreasonable decisions to prolong detention), prisoners may be entitled to obtain judicial review of the parole authority decision-making process on the basis that the procedures were tainted by illegality, irrationality or procedural impropriety.⁵³ If a decision is quashed by a writ of *certiorari* the matter would generally be remitted back to the same parole authority to reconsider the prisoner’s case in accordance with procedural propriety.

Sufficiency of judicial review

ECtHR jurisprudence has clarified the procedural requirements of sentence review proceedings: the procedures must be adversarial, and the applicant prisoner must be afforded fair procedures in terms of a fair and reasonable opportunity to attend an oral hearing, with the right to be legally represented and the right to call and question witnesses.⁵⁴ A failure to disclose adverse material that the reviewing body possessed would also constitute a violation of Article 5(4).

Judicial review is a common feature in European states against procedural impropriety in decision-making processes.⁵⁵ It is imperative that procedures adopted by parole authorities are quasi-judicial and empowered to determine parole applications, and not merely administrative or perfunctory. In *E v Norway*,⁵⁶ the ECtHR declared that the review procedure under Article 5(4) ‘does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5(1)’. In *E*, while Article 5(4) was not violated regarding the scope of judicial review as a suitable remedy, the ECtHR found a violation as the sentence review proceedings failed to decide parole applications speedily.

The quality of sentence reviews by parole authorities commensurate with due process values is pivotal, and violations of fundamental procedural safeguards would be amenable to judicial scrutiny.

51. *Rakevich v Russia* (Application no. 58973/00) para 43.

52. *Zamir v United Kingdom* (Application no 9174/80) para 58. Stephen Livingstone, ‘Prisoner’s rights in the context of the European Convention on Human Rights’ (2000) 2 *Punishment and Society* 309.

53. *Thynne, Wilson and Gunnell v United Kingdom* (Application nos 11787/85; 11978/86; 12009/86) para 60; *Weeks v United Kingdom* (Application no 9787/82) para 30-31.

54. *Hussein v United Kingdom* (Application. no 21928/93); *Singh v United Kingdom* (Application no 23389/94); *Stafford v United Kingdom* (Application no 46295/99).

55. Jean-Marie Woehrling, ‘Judicial control of administrative authorities in Europe: toward a common model’ (2006) 6 *Croatian and Comparative Public Administration* 35.

56. (Application no 11701/85) para 50.

Depending on the nature and quality of judicial review between European states, this procedural remedy might not intrinsically satisfy the requirements of Article 5(4). The procedures may be insufficiently broad to determine whether prolonged detention is justified by the objectives of life and long-term sentences.

Judicial review of sentence reviews is a procedural remedy and if a parole authority decision is quashed the contested issues are generally remitted back to the authority for redetermination in accordance with procedural propriety. This procedure does not necessarily guarantee conditional release for eligible prisoners, which may necessitate an appeal of the outcome to the judicial or executive branch of government depending on the constitutional and legal structures in place.

Perspectives from United Kingdom jurisprudence

The House of Lords has frequently invoked Article 5(4) in the context of national sentence review procedures. *R (Giles) v Parole Board*⁵⁷ involved the longer than commensurate determinate sentence than should have been imposed for offences of a violent or sexual nature when the sentencing court decided this was necessary for public protection.⁵⁸ The prisoner had been sentenced to consecutive terms of three and 4 years' imprisonment and invoked Article 5(4). The argument put forward was that he was entitled to an oral hearing before the parole board upon the expiry of what was effectively the punitive element of his sentence, the halfway point, and thereafter at regular intervals so that he could be released if it was no longer necessary to detain him on grounds of risk and dangerousness. The House of Lords rejected this argument as the result would be inconsistent with sentence review procedures and ECtHR jurisprudence and held that the sentence fell squarely within Article 5(1). Lord Bingham considered the core rights protected by Article 5(4) commensurate with Article 5(1) and concluded that the procedure is concerned with the 'deprivation of liberty which is arbitrary, or directed or controlled by the executive'.⁵⁹ Lord Hope opined that the general rule was that detention in accordance with a determinate sentence imposed by a court was justified under Article 5(1) without the need for further reviews of detention under Article 5(4). Lord Hope distinguished between sentences where the length of detention was decided by a court at the close of judicial proceedings, the supervision required by Article 5(4) being incorporated in the decision, and stated 'the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals. This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time'.⁶⁰ This procedure is necessary to ensure that decisions will not be made arbitrarily. Lord Hutton found the applicant was detained pursuant to the single sentence of the court with no break in the link between the sentence imposed by the court and continued detention. The House of Lords rejected the applicants' submission that Article 5(4) entitled a prisoner, subject to a longer than commensurate determinate sentence for public protection, to further reviews once the punitive element of the sentence had been served during the preventative stage of his sentence as if he were a discretionary life sentence prisoner. The House of Lords did not suggest that Article 5(4) would apply once such a prisoner reached the parole eligibility date. The decision illustrates that

57. [2004] 1 AC 1.

58. Ralph Henham, 'Sentencing policy and the abolition of parole and early release' (1997) 25 *International Journal of the Sociology of Law* 337.

59. [2004] 1 AC 1 at 20-21.

60. *Ibid* at 30.

Article 5(4) may have no direct application to long-term sentences; the review effectively being incorporated into the sentencing judgment, at least under United Kingdom release procedures.⁶¹ Nonetheless, prisoners would be entitled to a further right of review under the provisions of Article 5(4) if new issues pertaining to the lawfulness of continued detention arose thereafter, such as sufficient progress towards rehabilitation.⁶²

In *R (West) v Parole Board; R (Smith) v Parole Board (No. 2)*,⁶³ the House of Lords considered the applications of two prisoners both of whom were serving determinate sentences, released on licence and subsequently recalled by the Secretary of State for breach of conditions attached to the parole order, acting on the recommendation of the parole board. The applicants sought judicial review for the failure of the parole board to provide an oral hearing when deciding not to recommend their re-release. Lord Bingham opined that in such cases, the sentence of the trial court satisfied Article 5(1) not only in relation to the initial term served, but also in relation to recalls and revocations; since conditional release on licence is subject to the possibility of recall and formed an integral element of the sentence imposed by the court. The revocation decision must be consistent with Article 5(4), which it did since the parole board effectively made the determination and it was empowered to examine whether circumstances had arisen to justify further detention of a determinate sentence prisoner released on licence and, if so, whether the protection of the public necessitated the applicant's continued detention. Lord Slynn dissented on this point on the basis that recall of a parolee was a new deprivation of liberty, although a review of the recall decision by the parole board could satisfy Article 5(4).

It is a fundamental principle of procedural fairness that a party to judicial proceedings is entitled to the disclosure of all materials that may be taken into account by the court when reaching a decision adverse to that party. The ECtHR affirmed the importance of this principle in criminal cases governed by Article 6(1) to the extent that all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument and to question witnesses against him.⁶⁴ Article 5(4) requires disclosure of adverse material and an adversarial procedure of a judicial character in which the person affected has the effective assistance of a lawyer and the opportunity to call and question witnesses.⁶⁵ In *R (Roberts) v Parole Board*,⁶⁶ the House of Lords concluded that these rights were not absolute or incapable of qualification. Nonetheless, any limitations on

61. *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, paras 42 and 46; *R (Hindawi) v Secretary of State for the Home Department* [2005] 1 WLR 1102, para 73.

62. *James, Wells and Lee v United Kingdom* (Application nos. 25119/09, 57715/09, 57877/09); *Benjamin and Wilson v United Kingdom* (Application no. 28212/95); *Thynne, Wilson and Gunnell v United Kingdom* (Application nos 11787/85; 11978/86; 12009/86) para 68.

63. [2005] 1 WLR 350.

64. *Lamy v Belgium* (Application no 10444/83) para 29; *Kostovski v The Netherlands* (Application no 11454/85) para 41; *Brandstetter v Austria* (Application no 11170/84; 12876/87; 13468/87) para 66-67; *Edwards v United Kingdom* (Application no 13071/87) para 36; *van Mechelen and Others v The Netherlands* (Applications nos 21363/93, 21364/93, 21427/93 and 22056/93) para 51; *Lucà v Italy* (Application no 33354/96) para 39; *Garcia Alva v Germany* (Application no 23541/94) para 39.

65. *Sanchez-Reisse v Switzerland* (Application no 9862/82) para. 51; *Bouamar v Belgium* (Application no 9106/80) para 60; *Weeks v United Kingdom* (Application no 9787/82) para 66; *Megyeri v Germany* (Application no 13770/88) para 23; *Hussain v United Kingdom* (Application no 21928/93) paras 58-60; *Al-Nashif v Bulgaria* (Application no 50963/99) paras 90-98.

66. [2005] 2 AC 738.

a prisoner's rights must not 'restrict or reduce the access [to the court] left to the individual in such a way or to such an extent that the very essence of the right is impaired'.⁶⁷

In *R (Clift) v Secretary of State for the Home Department*,⁶⁸ the issue for determination was whether the Secretary of State was correct to reject the parole board's recommendation for certain prisoners, but not others, and was discriminatory under Article 14 ECHR. Lord Bingham opined that sentences imposed in cases like *Clift* provided lawful authority for the detention of persons until, under national law, their detention became unlawful. ECHR and associated ECtHR jurisprudence did not require states to establish schemes of early release when, as in England and Wales, there was a right under statute to seek early release that procedure fell within the ambit of Article 5(4).

In *R (James) v Secretary of State for Justice*,⁶⁹ the House of Lords held that Article 5(4), which is concerned with procedure rather than substance, required parole boards to decide speedily whether the applicant prisoner continued to be lawfully detained. Prisoners would be lawfully detained unless the parole board was satisfied that continued detention was no longer necessary for public protection, or so long had elapsed without any effective review of dangerousness that the Article 5(1) causal link had to be presumed broken (commission of the same classification of offence if paroled). The fact that the prisoner might be unable to demonstrate suitability for release based on relevant material before the parole board did not as such constitute a violation of Article 5(4).

ECtHR performs a judicial somersault

Sentence review procedures commensurate with Article 5(4) have been influenced by ECtHR jurisprudence and decisions by national courts implementing ECHR standards. A considerable amount of ECtHR jurisprudence governing sentence review procedures has emanated from cases taken against the United Kingdom; however, a rift seems to have emerged with the supranational ECtHR. This divergence might be indicative of underlying issues apparently rebuffing the ECtHR's legitimacy as a supranational court. Nonetheless, the obligation on states 'to secure to everyone within their jurisdiction the rights and freedoms' enshrined in Article 1 (obligation to respect human rights) ECHR prevails.

Vinter reviews

Striking a proportionate balance between public protection and loss of liberty necessitates frequent reviews of the prisoner's level of progress towards rehabilitation, assessments of risk and dangerousness as the legitimate penological justifications for the original sentence might no longer pertain or have significantly reduced.

In *Vinter, Moore and Bamber v United Kingdom*,⁷⁰ the ECtHR recapitulated the fundamental principle that life sentences, which are not *de jure* (substantive law) and *de facto* (practice/

67. *Ibid* para 17.

68. [2007] 1 AC 484.

69. [2010] 1 AC 553.

70. (Applications nos 66069/09, 130/10 and 3896/10). Marek Szydło, 'Free life after life imprisonment as a human right under the European Convention' (2013) 9 *European Constitutional Law Review* 501; Peter Coe, 'Compatibility of whole life orders with the European Convention on Human Rights: *Vinter and others v United Kingdom*' (2013) 77 *Journal of Criminal Law* 476; Steve Foster, 'Whole life sentences and the European Court of Human Rights: now life might not mean life' (2013) 177 *Criminal Law and Justice Weekly* 505.

procedure) reducible and where prisoners have no real hope of release constitutes a violation of Article 3. The Grand Chamber concluded that life sentence prisoners should have a realistic hope of release as otherwise it would constitute human indignity. The ECtHR elaborated on the meaning of reducible sentences concluding that frequent reviews are imperative considering that the rationale for the imposition of the criminal sanction on offenders is susceptible to change during the period of detention. The ECtHR found against the United Kingdom on the grounds that national laws and procedures had failed to provide a sufficiently clear power to the parole board to review life sentences and grant parole, in violation of Article 3.⁷¹ The ECtHR concluded that reducible sentences should be frequently reviewed to determine the necessity of continued detention and prisoners should have a real prospect of conditional release at some future date. These category of prisoners have an expectation of the prospect of release and frequent reviews of the lawfulness of continued detention. Failures by sentence review procedures to provide for these rights would constitute a violation of Article 3 and Article 5.

The ECtHR formulated procedural requirements for *Vinter* reviews that are differentiated from conventional sentence reviews that are concerned with once the applicant prisoner has served the punitive element of the sentence. *Vinter* reviews necessitate assessments of the legitimate penological justifications for prolonged detention including the gravity of the criminal offence, deterrence, retribution, incapacitation and rehabilitation. These justifications ought to be reviewed to determine whether the balance between the legitimate penological grounds of risk and public protection balanced with liberty and human dignity has changed and whether prolonged detention is justified. Conversely, reviews following completion of the punitive element of sentence are limited to the risk of reoffending, as detention for the minimum period is deemed sufficient for retribution and deterrence. In light of the diversity of parole authorities operating between European states, it is conceivable that *Vinter* reviews, and reviews after the punitive element has been served, should be undertaken at appropriate periods during life and, by analogy, long-term sentences. Both forms of review must satisfy the standards of due process safeguards consistent with Article 5(4). Reform of national sentence review laws and procedures might be necessitated in order to comply with pertinent ECHR provisions and associated ECtHR jurisprudence.⁷²

Reducible life sentences do not automatically necessitate conditional release in circumstances where risk assessments indicate a high probability of reoffending. *Vinter* accentuates the underlying tensions between the conception of penal policies within the exclusive domain of release systems and individualistic notions of ECHR fundamental rights.⁷³ It is noteworthy that the judgement emphasises the interconnection between Article 3 and Article 5 in the processes governing frequent reviews of life and long-term sentence prisoners.⁷⁴

71. Marion Isobel, 'European Human Rights Court ruling on life sentences sets new standard' (2014) 5 *New Journal of European Criminal Law* 447.

72. Dirk van Zyl Smit, Pete Weatherby and Simon Creighton, 'Whole life sentences and the tide of European human rights jurisprudence: what is to be done?' (2014) 14 *Human Rights Law Review* 59.

73. Robert Spano, 'Deprivation of liberty and human dignity in the case-law of the European Court of Human Rights' (2016) 4 *Bergen Journal of Criminal Law and Criminal Justice* 150.

74. Mary Rogan, 'The European Court of Human Rights, gross disproportionality and long prison sentences after *Vinter v United Kingdom*' (2015) *Public Law* 22 for a detailed analysis on long-term and disproportionate sentences and compatibility with Article 3 ECHR; Nicola Padfield, 'The legality of the mandatory life sentence' (2002) 61 *Cambridge Law Journal* 1.

Prolonged detention pursuant to irreducible whole life sentences would undoubtedly constitute a breach of Article 3.⁷⁵ Conversely, long-term determinate sentences would not violate Article 3 provided such sentences can be justified on legitimate penological grounds. Nonetheless, these sanctions occasion undue anxiety and uncertainty of continued detention and sufficiency of requisite pre-release measures. However, in cases where there are no particular aggravating circumstances that constituted inhuman treatment, Article 3 may not have been violated.⁷⁶

Prospects of release through rehabilitation

Prisoners are entitled to a fair and reasonable opportunity to engage with rehabilitation programmes facilitated by prison services accommodating individual needs. This will depend on the nature and extent of resources available such as education, work and training, reintegration and overall integrated sentence management. The availability of these resources could be a ‘geographical lottery’ depending on the geographical location of prisons and places of detention. Continued detention without the provision of proper access to rehabilitation programmes would constitute a violation of Article 3 where lack of resources causes delays in prisoners being able to complete rehabilitation programmes before being considered for release. Moreover, the efficacy of sentence management regimes will inevitably vary between European states in terms of penological strategies and the level of interaction by prisoners with rehabilitation and reintegration programmes.

In *Khoroshenko v Russia*,⁷⁷ the Grand Chamber, in the context of Article 8, acknowledged “the approach to assessment of proportionality of State measures taken with reference to ‘punitive aims’ has evolved over recent years, with a heavier emphasis now having to be placed on the need to strike a proper balance between the punishment and rehabilitation of prisoners ... [with an] emphasis on rehabilitation and reintegration has become a mandatory factor that the member states need to take into account in designing their penal policies.”⁷⁸ These fundamental principles are applicable in the context of Article 3 with the right to human dignity necessitating sufficient prison resources to facilitate rehabilitation of offenders and progress towards being eligible for parole.⁷⁹ Frequent reviews of prolonged detention on legitimate penological grounds must be commensurate with the level of progress towards rehabilitation. Determinations by parole authorities that such progress is significant enough to warrant conditional release cannot be counteracted by the executive branch of government through continued detention that is no longer justified on legitimate penological grounds.⁸⁰

Periodic reviews: Due process values

Sentence reviews must incorporate appropriate procedural fairness and overall due process values that accords with procedural propriety in the decision-making procedures of release systems. This may depend on the nature and composition of parole authorities that could vary considerably in the exercise of decision-making procedures, which must be amenable to judicial scrutiny. While the

75. *Einhorn v France* (Application no 71555/01); *Nivette v France* (Application no 44190/98).

76. *Leger v France* (Application no 19324/02).

77. (Application no 41418/04).

78. *Ibid* para 121.

79. *Murray v The Netherlands* (Application no 10511/10) paras. 103-104.

80. *Vinter, Moore and Bamber v United Kingdom* (Applications nos 66069/09, 130/10 and 3896/10) paras. 113, 116.

decision-making process must be adversarial, which is conventional in common law jurisdictions, the procedure in civil law inquisitorial systems might differ in their approach. Although the outcome might be in accordance with due process values, there is the potential for an inconsistency of approach to sentence reviews and concomitant implementation of ECHR substantive rights and procedural guarantees adopted between European states.⁸¹ This diversity of approaches could be exacerbated between states adopting an unduly wide margin of appreciation commensurate with national laws and procedures.

Court of Appeal rejects Vinter

The United Kingdom adopted a different interpretation than that in *Vinter* on the basis that substantive law and sentence review procedures did in fact empower the parole board to conduct sentence reviews and order conditional release of eligible prisoners consistent with Article 3 ECHR and the decision in *Vinter*. In *R v McLoughlin, R v Newell*,⁸² the Court of Appeal refused to modify national sentence review procedures and disagreed with the Grand Chamber judgement in *Vinter* on the basis that United Kingdom release procedures gave prisoners real hope for release. The evidently defiant legal response by the Court of Appeal declared United Kingdom sentence review procedures as sufficiently clear with no amendments to procedures, or the material governing those procedures, being necessary.

Instead of reasserting the reasoning and judgement in *Vinter*, the Grand Chamber was evidently appeased by the Court of Appeal's clarification. The contradictions in the perceived retreat from the *Vinter* judgement might impact on the legitimate authority of ECtHR judgements pertaining to release systems and sentence review procedures.⁸³

ECtHR's perceived retreat from Vinter

In *Hutchinson v United Kingdom*,⁸⁴ the ECtHR placed great emphasis on the importance of the margin of appreciation afforded to European states,⁸⁵ and effectively reversed the reasoning in *Vinter*. The Grand Chamber found no violation of Article 3 based on the Court of Appeal determination that clarified the authority of the Secretary of State to release whole life prisoners. The Secretary was obliged under national law to release a whole life sentence prisoner where 'exceptional grounds' for release pertained and the Secretary's power of release was accountable by way of judicial review. The Grand Chamber concluded that whole life sentences were reviewable under national law and therefore compatible with Article 3, and this approach appears to have been

81. David Garland, 'Penalty and the penal state' (2013) 51 *Criminology* 475 at 484 for an account of variations in punitive outcomes.

82. [2014] 2 Cr App R S 40. Jonathan Bild, 'The whole-life sentence in England and Wales' (2015) 74 *Cambridge Law Journal* 1; Mark Pettigrew, 'Whole of life tariffs in the shadow of Europe: penological foundations and political popularity' (2015) 54 *Howard Journal of Criminal Justice* 292; Andrew Ashworth, 'Case Comment' [2014] *Criminal Law Review* 471; Steve Foster, 'Whole life sentences: resolving the conflict' (2014) 178 *Criminal Law and Justice Weekly* 138.

83. Mark Pettigrew, 'A *Vinter* retreat in Europe: returning to the issue of whole life sentences in Strasbourg' (2017) 8 *New Journal of European Criminal Law* 128.

84. (Application no 57592/08). Naomi Hart, 'Whole-life sentences in the UK: volte-face at the European Court of Human Rights?' (2015) 74 *Cambridge Law Journal* 205.

85. (Application no 57592/08) para. 178.

persuaded by the Court of Appeal's response in *R v McLoughlin; R v Newell* on the basis that the Court clarified the substantive law and procedure governing sentence reviews and statutory duty to conditionally release eligible prisoners. This seemed to have reconciled the divergent interpretations of sentence review procedures between the ECtHR and the Court of Appeal. The ramifications of this apparent volte-face by the ECtHR might ultimately dilute the ECtHR's legitimate authority as a supranational court. This dilemma might conceivably influence the application of the principle of legal certainty and consistency of approach to sentence reviews between European states.⁸⁶

Subsequent ECtHR decisions in *Matiošaitis and Others v Lithuania*⁸⁷ and *Petukhov v Ukraine (No. 2)*⁸⁸ indicate the Court's alignment with pre-*Hutchinson* jurisprudence by adopting strict scrutiny of national sentence review procedures which might curtail the margin of appreciation in such matters. Nonetheless, apparent exceptionalism demonstrated by the United Kingdom towards ECtHR jurisprudence governing reviews of life sentences could potentially undermine the Court's jurisprudence pertaining to release systems.⁸⁹

Proportionate balancing amid opposing rights

Substantive and procedural ECHR rights and obligations aim to strike a fair and proportionate balance between public protection and safeguarding individual rights,⁹⁰ albeit such rights and freedoms may be qualified by limitations prescribed by law.⁹¹ Balancing risks of reoffending and public protection concerns with liberty and human dignity must incorporate competing objectives of human rights safeguards.⁹² Prolonged detention might be justified on legitimate penological grounds that prisoners would present a significant risk of reoffending and danger to society if conditionally released.⁹³ Individual risk assessments are essential in order to determine whether eligible prisoners are suitable for parole or whether they continue to pose a serious risk of harm to self or others.⁹⁴ The composition of national parole authorities must include sufficient expertise in

86. Mark Pettigrew, 'Retreating from *Vinter* in Europe: sacrificing whole life prisoners to save the Strasbourg court?' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 260; Mark Pettigrew, 'A tale of two cities: whole of life prison sentences in Strasbourg and Westminster' (2015) 23 *European Journal of Crime, Criminal Law and Criminal Justice* 281.

87. (Applications nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13).

88. (Application no 41216/13).

89. Lewis Graham, 'From *Vinter* to *Hutchinson* and back again? The story of life imprisonment cases at the European Court of Human Rights' (2018) 3 *European Human Rights Law Review* 258; Ergul Celiksoy, "'UK Exceptionalism" in the ECtHR's jurisprudence on irreducible life sentences' (2020) 24 *International Journal of Human Rights* 1.

90. *Soering v United Kingdom* (Application no. 14038/88) para. 89.

91. Matthias Klatt, 'Balancing rights and interests: reconstructing the asymmetry thesis' (2021) 41 *Oxford Journal of Legal Studies* 321.

92. Alastair 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; Başak Çalı, 'Balancing human rights? methodological problems with weights, scales and proportions' (2007) 29 *Human Rights Quarterly* 251.

93. Diarmuid Griffin and Deirdre Healy, 'The pains of parole for life sentence prisoners in Ireland: risk, rehabilitation and re-entry' (2019) 11 *European Journal of Probation* 124.

94. Robert Werth, 'Theorizing the performative effects of penal risk technologies: (re)producing the subject who must be dangerous' (2018) 28 *Social & Legal Studies* 327; Robert Werth, 'Individualizing risk: moral judgement, professional knowledge and affect in parole evaluations' (2017) 57 *British Journal of Criminology* 808. Ryken Grattet and Jeffrey Lin, 'Supervision intensity and parole outcomes: a competing risks approach to criminal and technical parole violations' (2016) 33 *Justice Quarterly* 565.

law, psychiatry and related disciplines so as to possess the appropriate competencies ensuring that the decision-making process accords with the principles of legality and the rule of law.

Perceived risk of reoffending

Recidivism rates between European states differ significantly,⁹⁵ and the dearth of research into the effects of imprisonment on reoffending is noteworthy.⁹⁶ This might suggest inconsistency of approach to sentence management of life and long-term sentence prisoners.

Assessments of risk and dangerousness must establish a causal link between the criminal offence for which the prisoner has been convicted and sentenced, together with the likelihood of reoffending in relation to similar classification of criminal offences as the basis for declining to grant parole.⁹⁷ The correlation between the original sentence and prolonged enforcement of that sentence might become tenuous where continued detention, conceivably preventative detention,⁹⁸ is not attributable to the objectives of the original sentence or is based on an unreasonable risk assessment of reoffending and public protection that were incongruent with sentencing objectives. Perceptions of fair and respectful treatment of prisoners while incarcerated,⁹⁹ consistent with ECHR safeguarded and minimum standards on the treatment of prisoners specified in the European Prison Rules, are paramount to ensure due process safeguards in parole applications.¹⁰⁰ Perceptions of negative treatment would conceivably impede any meaningful engagement with rehabilitation and pre-release measures for successful reintegration and impair the ability of parolees to function in the community.

Public protection

Public opinion is not a relevant criterion in sentence reviews and should not be taken into consideration by parole boards in determining whether prisoners should be conditionally released. Maintaining public confidence in such reviews could not legitimately require prolonged

95. Council of Europe Recidivism Studies: <https://wp.unil.ch/space/publications/recidivism-studies/> (accessed 13 November 2021).

96. Jodi Viljoen, Dana Cochrane and Melissa Jonnson, 'Do risk assessment tools help manage and reduce risk of violence and reoffending? A systematic review' (2018) 42 *Law and Human Behavior* 181; Daniel Nagin, Francis Cullen and Cheryl Jonson, 'Imprisonment and reoffending' (2009) 38 *Crime and Justice* 115.

97. Lacey Schaefer, 'On the reinforcing nature of crime and punishment: an exploration of inmates' self-reported likelihood of reoffending' (2016) 55 *Journal of Offender Rehabilitation* 168; Council of Europe Annual *Penal Statistics for Statistics on National Recidivism Studies* <https://wp.unil.ch/space/publications/recidivism-studies/> (accessed 13 November 2021).

98. *Schmitz v Germany* (Application no. 30493/04).

99. Karin Beijersbergen, Anja Dirkzwager and Paul Nieuwbeerta, 'Reoffending after release: does procedural justice during imprisonment matter?' (2015) 43 *Criminal Justice and Behavior* 63.

100. Recommendation Rec(2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules – https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581 (accessed 13 November 2021).

detention.¹⁰¹ Moreover, penal populism should not distort the overarching principle of consistency of approach by parole authorities.¹⁰²

Sentences of imprisonment for public protection in the United Kingdom effectively mandated indefinite detention of prisoners without any meaningful prospects of progressing towards parole. This procedure was successfully challenged in *James, Wells and Lee v United Kingdom*,¹⁰³ where the ECtHR concluded that prisoners were arbitrarily deprived of their liberty in violation of Article 5(1).¹⁰⁴ The United Kingdom volte-face on imprisonment for public protection is indicative of ECtHR influence on domestic sentencing. However, this is in stark contrast with the United Kingdom reaction to *Vinter* and the subsequent retreat of the ECtHR in *Hutchinson*.

Risk assessments, in conjunction with sufficient pre-release measures, minimise the potential for parolees to commit further offences and are differentiated from retrospective measures to facilitate rehabilitation and reintegration. Balancing the scales of risk and public protection with rehabilitation and human dignity might weigh in favour of prioritising community safety. Conditions attached to release on licence may vary in stringency and the willingness of parolees to comply with these requirements. Moreover, the propensity and willingness of parole authorities to recall parolees might eliminate potential risks contrasted with monitoring the reduction in risks posed by parolees. Recalls based on risk elimination would be susceptible to further review in accordance with Article 5(4). Decisions to recall parolees may also be amenable to judicial review.

Successful reintegration of parolees would largely depend on pre-release measures including provision of sufficient human and financial resources for prison services and probation services, which vary considerably between European states.

Personal liberty

Article 5(1) guarantees ‘the right to liberty and security of person’ and deprivation of personal liberty will only be lawful as stipulated for in this provision and in accordance with procedures prescribed by national law. Detention following conviction and sentence must be lawful in accordance with Article 5(1)(a), and a sufficient causal link between the prisoner’s continued detention and the original sentence is essential. Article 5(1) enshrines a fundamental human right against arbitrary detention commensurate with the right to personal liberty and underscores the importance of this right in democratic states.¹⁰⁵

The circumstances enumerated in Article 5(1) wherein convicted offenders might be lawfully deprived of personal liberty is exhaustive,¹⁰⁶ and national courts must adopt a narrow interpretation

101. *Stafford v United Kingdom* (Application no 46295/99) para 80. Barry Mitchell and Julian Roberts, ‘Sentencing for murder: exploring public knowledge and public opinion in England and Wales’ (2012) 52 *British Journal of Criminology* 141; Homicide Review Advisory Group, *Public Opinion and the Penalty for Murder: Report of the Homicide Review Advisory Group on the Mandatory Sentence of Life Imprisonment for Murder* (2011).

102. Cf. John Pratt, *Penal Populism* (2007); Liz Campbell, ‘Criminal justice and penal populism in Ireland’ (2008) 28 *Legal Studies* 559.

103. (App. Nos. 25119/09, 57715/09, 57877/09).

104. Vanessa Bettinson, ‘The demise of the unpopular imprisonment for public protection sentence: *James, Wells and Lee v United Kingdom*’ (2013) 77 *Journal of Criminal Law* 22.

105. *Brogan and Others v United Kingdom* (Application nos 11209/84; 11234/84; 11266/84; 11386/85) para 58; Liora Lazarus, ‘Conceptions of liberty deprivation’ (2006) 69 *Modern Law Review* 738.

106. *Brand v The Netherlands* (Application no 49902/99) para 58; *Vasileva v Denmark* (Application no 52792/99) para 33; *Witold Litwa v Poland* (Application no 26629/95) para 49. This contrasts with Article 9 International Covenant on Civil and Political Rights which is not exhaustive.

of those exceptions, as to do otherwise would be inconsistent with the aim of safeguarding against arbitrary deprivation of liberty.¹⁰⁷ The applicability of a particular ground specified in Article 5(1) will not necessarily preclude the applicability of other grounds for depriving personal liberty. Detentions might be justified under several grounds enumerated in Article 5(1) and this invariably depends on the circumstances wherein the criminal offence was committed,¹⁰⁸ with particular reference to aggravating factors. Deprivation of liberty must be in accordance with procedural safeguards against arbitrariness, which necessarily includes an assessment as to whether continued detention is necessary and proportionate to achieve the objectives of risk reduction and public protection. The principle of proportionality stipulates that a fair and just balance must be achieved between public protection against risks of reoffending and individual rights to personal liberty and human dignity.¹⁰⁹ Whole life sentences without any prospects for conditional release would conflict with the overarching principle of proportionality in the sentencing process that is pivotal in safeguarding human dignity.¹¹⁰ The duration of detention will also be a relevant factor in striking a fair and proportionate balance between the individual rights to liberty and human dignity with the public interest to prevent the release of prisoners who continue to present a serious risk of reoffending.¹¹¹

Detention beyond the minimum or punitive term requires frequent reviews of the lawfulness of continued detention under Article 5(4), which is equally applicable to decisions to revoke parole. In *Weeks v United Kingdom*,¹¹² the ECtHR accepted the proposition that liberty of a parolee was ‘more precarious’ than the liberty of the ordinary citizen. The discretionary life sentence imposed was an indeterminate sentence based on considerations of risk and dangerousness to society if the prisoner was paroled, factors that were susceptible to change. The ECtHR found no violation of Article 5(4) and the decision to recall was neither arbitrary, irrational or unreasonable because the decision was based on the parolee’s unstable and aggressive behaviour. Once returned to detention, prisoners are thereafter entitled to frequent reviews of continued detention in accordance with Article 5(4).

Human dignity

Sentence review procedures including necessary pre-release arrangements for eligible prisoners are beyond the remit of the ECtHR provided national laws and procedures do not violate fundamental rights.¹¹³ Irreducible life sentences are evidently incompatible with Article 3 if there is no real hope of conditional release.

107. *Nowicka v Poland* (Application no 30218/96) para 59.

108. *Eriksen v Norway* (Application no 17391/90) para 76.

109. *Saadi v United Kingdom* (Application no 13229/03) para 70; *Vasileva v Denmark* (no 52792/99) para 37; *Nowicka v Poland* (Application no 30218/96) para 61.

110. Dirk van Zyl Smit, ‘Constitutional jurisprudence and proportionality in sentencing’ (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 369.

111. *Johansen v Norway* (Application no 10600/83); *McVeigh, O’Neill and Evans v United Kingdom* (Application nos 8022/77, 8025/77, 8027/77).

112. (Application no 9787/82) para 40.

113. *Kafkaris v Cyprus* (Application no 21906/04) para 99; *Achour v France* (Application no 67335/01) para 51. Michael Tonry, ‘Punishment and human dignity: sentencing principles for twenty-first-century America’ (2018) 47 *Crime and Justice* 119; Tatjana Hörnle and Mordechai Kremnitzer, ‘Human dignity as a protected interest in criminal law’ (2011) 44 *Israel Law Review* 143. Mary Neal, ‘Respect for human dignity as substantive basic norm’ (2014) 10 *International Journal of Law in Context* 26.

ECtHR jurisprudence has been somewhat inconsistent in the approach to vindicating the right to human dignity of prisoners as indicated by the Grand Chamber judgements in *Vinter* and *Hutchinson* that reveal apparent contradictions and inconsistencies pertaining to the scope and protection of liberty and human dignity.

In *Murray v The Netherlands*,¹¹⁴ the Grand Chamber articulated the principles that govern sentence review procedures for life sentence prisoners, and presumably long-term determinate sentences, and neatly summarised emerging principles that correlate with the right to human dignity: the process must comply with the principles of legality and legal certainty; assessments of individual prisoners based on penological grounds for prolonged detention should be based on objective and pre-established criteria; an assessment regarding prospective release within an established time-frame that should be no later than 25 years after the sentence was imposed; procedural guarantees including reasons for a decision not to grant release or to recall a parolee; judicial review should be available to review the parole board decision-making process. The implementation and compliance with these procedural safeguards will vary between European states which may raise issues of dilution of such procedural rights and inconsistency of approach to sentence reviews. The margin of appreciation afforded to states will invariably be interpreted in accordance with national constitutional and laws structured by common law adversarial or civil law inquisitorial release systems.

The rationale for the imposition of the criminal sanction might incorporate elements of retribution, incapacitation, deterrence and the overarching cardinal principle of offender rehabilitation in European penal policies.¹¹⁵ Prolonged detention may constitute ‘inhuman and degrading treatment or punishment’ safeguarded against by Article 3 ECHR as a fundamental value in democratic societies.¹¹⁶ Life sentences are not incompatible with Article 3 ECHR,¹¹⁷ however irreducible whole life sentences would constitute a violation of human dignity if continued detention is disproportionate to risk assessments.¹¹⁸ Whole life sentences without any meaningful hope of release would constitute inhuman and degrading punishment.¹¹⁹ Life sentences should be reducible through frequent reviews to determine the eligibility of prisoners for conditional release before they die in prison. Prisoners that have meaningfully engaged with rehabilitation programmes should have a real hope of conditional release on licence subject to evidence-based assessments of risk and public protection.

114. (Application no. 10511/10) paras. 99-100.

115. Adriano Martufi, ‘The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?’ (2018) 25 *Maastricht Journal of European and Comparative Law* 672; Irene Wieczorek, ‘EU constitutional limits to the Europeanization of punishment: A case study on offenders’ rehabilitation’ (2018) 25 *Maastricht Journal of European and Comparative Law* 655.

116. Natasa Mavronicola, ‘Crime, punishment and Article 3 ECHR: puzzles and prospects of applying an absolute right in a penal context’ (2015) 15 *Human Rights Law Review* 721; Steve Foster, ‘Whole life sentences and Article 3 of the European Convention on Human Rights: time for certainty and a common approach?’ (2015) 36 *Liverpool Law Review* 147.

117. *Sawoniuk v United Kingdom* (Application no 63716/00); *Bamber v United Kingdom* (Application no 13183/87); *Kotälla v The Netherlands* (Application no 7994/77).

118. *Stanford v United Kingdom* (Application no 73299/01); *Wynne v United Kingdom* (Application no 67385/01); *Nivette v France* (Application no 44190/98).

119. *Sawoniuk v United Kingdom* (Application no 63716/00) para 3; *Weeks v United Kingdom* (Application no 9787/82) para. 47.

Irreducible life sentences would, depending on the prospects for parole under the national procedures for sentence reviews, be incompatible with Article 3.¹²⁰ The procedural requirements were set down in *Kafkaris v Cyprus*,¹²¹ where the applicant had been convicted on three counts of premeditated murder and challenged his prolonged detention of a mandatory life sentence, which he contended amounted to an irreducible term of imprisonment. The ECtHR found no violation of Article 3 on the facts of the case and concluded that irreducible life sentences constitute a violation of Article 3 in cases where the sentence is grossly disproportionate to the criminal offence committed, continued detention could not be justified on legitimate penological grounds or where the sentence was *de jure* (substantive law) or *de facto* (practice/procedure) irreducible. While life, and presumably long-term determinate sentences, would not necessarily constitute a violation of Article 3 or Article 5(4), however the imposition of irreducible life sentences would violate Article 3 for prisoners who had no real hope of release. Whole life sentences could be permissible where national laws provided for the suspension or remission, which requires sufficient resources to facilitate prisoners to engage meaningfully with rehabilitation programmes. The ECtHR also considered the scope and application of Article 7 as an essential element of the principle of legality and concluded that there had been a violation as regards the quality of the national law and procedure applicable at the material time when the applicant committed the criminal offence.¹²² The relevant national law was not formulated with sufficient precision so as ‘to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution’.¹²³ The ECtHR found no violation of Article 7 in so far as the applicant’s complaint concerning the retrospective imposition of a heavier penalty with regard to the sentence and changes in national prison law regimes exempting life prisoners from the possibility of remission of their sentence.¹²⁴ Conditions attached to parole orders might not invoke Article 7 in cases where the stipulations do not constitute a heavier sentence than the applicable sentence at the time when the original sentence was imposed. In *Kafkaris*, although the prospects for release under Cypriot national law were limited, life sentences were nonetheless *de jure* and *de facto* reducible.

Irreducible life sentences are incompatible with penal policies and ECHR demands of frequent reviews of continued detention with possibilities for either release entailing post-release conditions, control measures and assistance carefully adapted to the prisoners’ needs and risks of reoffending. It would be arbitrary and unreasonable to take away any hope from life sentence prisoners for whom there must be light at the end of the tunnel.

Analysis

As a general proposition, life and long-term sentence prisoners are detained for the commission of heinous criminal offences and justifiably are perceived as presenting serious risks of reoffending if

120. Ergul Celiksoy, ‘Ongoing problem of irreducible life sentences in Turkey’ (2019) 27 *European Journal of Crime, Criminal Law and Criminal Justice* 320; Andrew Dyer, ‘Irreducible life sentences: what difference have the European Convention on Human Rights and the United Kingdom Human Rights Act made?’ (2016) 16 *Human Rights Law Review* 541; Dirk van Zyl Smit, ‘Outlawing irreducible life sentences: Europe on the brink?’ (2010) 23 *Federal Sentencing Reporter* 39.

121. (Application no 21906/04).

122. *Ibid* para 152.

123. *Ibid* para 150.

124. *Ibid* para 152.

inappropriately granted conditional release. Nonetheless, the relationship between the commission of the most heinous offences and the likelihood of reoffending evidenced by recalls to prison, is somewhat tenuous in the case of the most serious offenders such as murderers who are very often unlikely to commit further offences.

Sentencing in European states is generally governed by the cardinal principle of proportionality.¹²⁵ Justifications for imposing criminal sanctions on convicted offenders incorporates elements of retribution, incapacitation, restitution and deterrence that are proportionate to the gravity of the offence and personal circumstances of offenders. Individual sentences might also include prospects of rehabilitation with the aim of significantly reducing the offender's criminal propensity, improving prospects for conditional release and reintegration back into society under the supervision of probation services. When reviewing parole applications from life and long-term sentenced prisoners, parole authorities are required to strike a proportionate balance between liberty and human dignity with perceived risks of reoffending and public protection considerations.

The 2020 Council of Europe Annual Penal Statistics (SPACE) indicate there are 1,528,343 prisoners in detention between Council of Europe member states of which 1.8% are serving life sentences, 1.3% are serving 20 years and over, and 11.7% between 10 and 20 years.¹²⁶ These statistics accentuate the imperative of proportionate balancing between the public interest regarding risk and dangerousness and individual rights of prisoners to rehabilitation and conditional release. Sentence review processes consistent with ECHR rights and associated ECtHR jurisprudence are underpinned by the prevention of arbitrariness in determinations to prolong detention. European penal policy underscores the significance of rehabilitation to the forefront in national penal systems, Council of Europe Prison Rules and relevant international instruments. Moreover, the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) stipulate that rehabilitation and reduction in recidivism rates is a key purpose of imprisonment; however, life imprisonment controverts this purpose. Removing realistic prospects of rehabilitation for life (effectively indeterminate) and long-term determinate sentenced prisoners undermines the right to human dignity.¹²⁷

The imposition of life and long-term sentences are complex and far-reaching sanctions bestowing the power to suspend the right to liberty for the remainder of their natural lives.¹²⁸ While life sentences are the ultimate sanction imposed for the most heinous criminal offences,¹²⁹ loss of liberty must be reconciled with ECHR fundamental rights standards combined with associated ECtHR jurisprudence.

Consistency of approach and quality of sentence reviews are pivotal to ensure outcomes of sentence reviews and monitoring of conditions of parolees are not *de facto* geographical lotteries.¹³⁰

Harmonised analyses to identify emerging themes and patterns are not easily achievable owing to the various types of release systems in states, and there is great diversity in prison and probation

125. Cf. Anabela Miranda Rodrigues, 'Fundamental rights and punishment: Is there an EU perspective?' (2019) 10 *New Journal of European Criminal Law* 17-27.

126. Council of Europe Annual Penal Statistics <https://wp.unil.ch/space/space-i/annual-reports/> (accessed 13 November 2021).

127. Sonja Meijer, 'Rehabilitation as a positive obligation' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 145; Jill Annison, Lol Burke and Paul Senior, 'Transforming rehabilitation: Another example of English 'exceptionalism' or a blueprint for the rest of Europe?' (2014) 6 *European Journal of Probation* 6.

128. Marc Mauer and Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (2018). Dirk van Zyl Smit, 'Outlawing irreducible life sentences: Europe on the brink?' (2010) 23 *Federal Sentencing Reporter* 39.

129. Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019) at 87.

130. Monica Barry, 'Walking on ice: the future of parole in a risk-obsessed society' (2021) 25 *Theoretical Criminology* 325.

systems between European criminal law jurisdictions.¹³¹ Indeterminate life and long-term determinate sentences without hope of release are in many respects akin to a sentence of death as the offender can never atone for the offence and harm caused to victims.

His Holiness Pope Francis has advocated for the abolition of life sentences, which has been removed from the Vatican's Criminal Code for the reason that '[a] life sentence is just a death penalty in disguise'.¹³² These profound words were spoken against the background of penal populism and the pervasive belief that harsh punishments 'can resolve these most disparate social problems as if completely different diseases could be treated with the same medicine'.¹³³ This accentuates penological and ethical concerns regarding how society should punish offenders convicted of heinous criminal offences and concomitant dilemmas relating to sentence reviews and determinations of life sentences,¹³⁴ and compatibility with human dignity.¹³⁵ Whereas the Pontiff advocated for the abolition of life imprisonment, ECtHR jurisprudence accepts the lawfulness of life sentences provided that sentence review procedures conform to ECHR demands requiring frequent and speedy reviews of prolonged detention, with a real hope of the possibility of release for rehabilitated prisoners.

A life sentence lasts for the natural life of the prisoner however, the entire sentence is generally not served in detention.¹³⁶ Temporary or early release of life prisoners is a feature of prison systems internationally, and the issue of release has been a cause of increasing concern in many European states.¹³⁷ The need to reduce prison numbers, facilitate and encourage rehabilitation and re-integrating prisoners back into society subject to a sufficient period of pre- and post-release supervision in the community would conceivably make early and temporary release policies attractive to government administrations. Conversely, there might be concerns that the quality of sentence reviews and determinations whether or not to grant release may not always be applied equally and fairly to all prisoners. In any event, not all prisoners will be suitable for release based on independent and impartial assessments of risk and dangerousness, and recidivism.

Although life sentences do not constitute a violation of human rights, whole life sentences with no real hope of release are disproportionate and constitute inhuman and degrading treatment of prisoners in violation of Article 3. Human dignity has a practical impact on life sentences, which are an anomaly as most life sentence prisoners will not spend the remainder of their natural lives incarcerated. The emphasis on rehabilitation is to the forefront of European penal policy which suggests life imprisonment should be abolished and replaced by determinate sentences and strict compliance with rehabilitative programmes and post-release supervision.

131. Marcelo Aebi, Yuji Hashimoto and Mélanie Tiago, *Probation and Prisons in Europe 2019: Key Findings of the SPACE Reports* (Council of Europe Annual Penal Statistics) (Strasbourg and Lausanne, 2020) – https://wp.unil.ch/space/files/2020/06/KeyFindings_Probation-and-Prisons-in-Europe_200617_final.pdf (accessed 13 November 2021).

132. Address of Pope Francis to the delegates of the International Association of Penal Law, Thursday, 23 October 2014 http://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html (accessed 13 November 2021).

133. *Ibid.*

134. Richard Lippke, 'Irreducible life sentences and human dignity: some neglected and difficult issues' (2017) 17 *Human Rights Law Review* 383.

135. Meritxell Almenara and Dirk van Zyl Smit, 'Human dignity and life imprisonment: the Pope enters the debate' (2015) 15 *Human Rights Law Review* 369; Gauthier de Beco, 'Life sentences and human dignity' (2005) 9 *International Journal of Human Rights* 411.

136. Catherine Appleton, *Life after Life Imprisonment* (2010).

137. Nicola Padfield, Dirk van Zyl Smit and Frieder Dünkel (eds.), *Release from Prison: European Policy and Practice* (Willan, 2010).

Frequent sentence reviews stipulated for by Article 5(4) restrain potential arbitrariness in discretionary powers and ensure transparency, accountability and fairness of procedures in the sentence review decision-making process.¹³⁸ Sentence review procedures safeguard against the arbitrary deprivation of liberty, which in the context of life sentences means that the decision to prolong detention must not be taken arbitrarily, irrationally or unreasonably. Notwithstanding the review mechanism stipulated for by Article 5(4), ECtHR jurisprudence accepts the necessity for prolonged detention on the limited penological grounds of risk and public protection.

Article 5(4), which has an autonomous meaning, guarantees the right to have the lawfulness of prolonged detention reviewed by parole boards possessing a judicial character and due process values. ECtHR jurisprudence has invoked Article 5(4) and formulated judicial guidelines for consistency of approach ensuring adversarial procedures ensuring due process values are afforded to applicant prisoners. Parole authorities must be invested with the power to determine the lawfulness of continued detention and be independent of the executive, impartial of the parties and must adopt appropriate procedures in decision-making processes. Whether sentence reviews are sufficiently frequent or decided speedily will be determined according to the complexity of parole applications.

Legitimate penological grounds when the original sentence was imposed might be difficult to decipher from the sentencing court's judgment if a fully reasoned decision was not promulgated. Moreover, the personality of the sentencing judge would determine whether incapacitation, retribution or rehabilitation should have underpinned the sentence with the result that the rationale for the sentence imposed could be at the discretion of the sentencing judge as opposed to legitimate penological grounds.¹³⁹ It might very well be the case that a sentencing judge should have given greater consideration to the prospects of rehabilitation rather than incapacitation and retribution and these penological justifications, and any recommendations from the court that imposed the sentence, will inform the decision-making process of parole authorities. Whether the personality of the sentencing judge will be determinative of the penological rationale underpinning the sentence varies significantly by jurisdiction. Nonetheless, relevant dynamic factors should also be taken into account and given sufficient weight.

The extent to which states have ceded authority for the ECtHR to promulgate judicial formulations based on fundamental principles reflecting international human rights standards pertaining to legitimate penological grounds has been somewhat contentious. National sentence review procedures have featured regularly in ECtHR jurisprudence and there might be conflicts of interest between perceived opposition to the ECtHR's legitimacy to decree harmonised standards and the autonomy of sentence review procedures adopted by release systems.

The multitude of release systems adopted by parole authorities between European states and quality of sentence reviews may undermine the legitimate authority of the supranational ECtHR to formulate harmonised standards to ensure consistency of approach to sentence reviews.

The United Kingdom's withdrawal from the European Union has underscored the somewhat fraught relationship between national courts and supranational courts. The apparent non-

138. Bronwyn Naylor and Johannes Schmidt, 'Do prisoners have a right to fairness before the parole board' (2010) 32 *Sydney Law Review* 437.

139. Jerome Frank, 'The judging process and the judge's personality' IN Jerome Frank, *Law and the Modern Mind* (Edition, Routledge, 2017); Gerard Quinn, "The judging process and the personality of the judge: The contribution of Jerome Frank" (2002) 2 *Judicial Studies Institute Journal* 141.

compliance with ECtHR jurisprudence as evidenced in *Vinter* being justified on the basis of exceptionalism could ultimately weaken the legitimate authority of the ECtHR.¹⁴⁰ Be that as it may, the ECtHR's legitimacy might be secured through political concessions, albeit potentially at the cost of individual rights that might be perceived in some quarters as secondary to securing compliance with ECtHR jurisprudence.¹⁴¹

Conclusion

ECtHR jurisprudence has aimed to develop a harmonised approach to sentence review procedures and the place of parole within national criminal justice and sentencing systems. It is notable that a perceived United Kingdom 'exceptionalism' towards the ECtHR seems to have emerged which may have profound implications for the authority of the ECtHR as a supranational court if other European states adopt a similar approach.

Release systems invariably raise human rights concerns pertaining to opportunities to participate in rehabilitative and reintegrative measures, which might be perceived as futile due to perceived risk and dangerousness and unwillingness of prisoners to meaningfully engage with rehabilitation measures. Life sentences should be reducible in accordance with national laws and procedures (*de jure*) and practices (*de facto*) to constitute substantive and procedural compatibility with Article 3. Determinations by parole authorities must strike a necessary and proportionate balance between the purpose of detention and individual rights being restricted. Determinations on parole applications should be balanced with the obligation on states to protect society against the risk and dangerousness presented by recidivists and habitual offenders.

Sentence reviews must be sufficiently broad to allow a determination as to whether the grounds for prolonged detention continue to operate. Assessments of risk and public protection with liberty and human dignity safeguard a fair and proportionate balance between competing interests. Conditions of release on licence safeguard against the perceived risk and dangerousness (linked to the original sentence) and a breach of those conditions triggers the parolee's recall to detention. Much will depend on prisoner's meaningful and positive engagement with therapeutic services (including psychiatric, psychological services, education and work training services) and willingness to be rehabilitated and reintegrated back into society.

It cannot be gainsaid that the realisation of prospects of conditional release is dependent on the rehabilitation progress made by prisoners that may enhance their prospects for parole, reintegration and repatriation.¹⁴² Compliance with ECHR provisions, in particular Articles 3, 5 and 7, and associated ECtHR jurisprudence by parole authorities would enhance the quality and consistency in the sentence review decision-making processes. The spirit of the ECHR emphasises the rule of law, legal certainty and protection from arbitrariness. These are key values to the implementation of substantive and procedural safeguards governing the administration of release systems for life and long-term sentence prisoners

140. Frederick Cowell, 'Understanding the causes and consequences of British exceptionalism towards the European Court of Human Rights' (2019) 23 *International Journal of Human Rights* 1183; Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments: A New Paradigm?* (Springer, 2019).

141. Kimberley Brayson, 'Securing the future of the European Court of Human Rights in the face of UK opposition' (2017) 6 *International Human Rights Law Review* 53.

142. Stefano Montaldo, 'Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: A stress test for EU judicial cooperation in criminal matters' (2019) 5 *Rev. Brasileira de Direito Processual Penal* 925.

The foregoing analysis has demonstrated a central set of key arguments that underscore ECHR rights and associated ECtHR jurisprudence that reform a more critical function in the interpretation and implementation of substantive and procedural safeguards for determining issues of prolonged detention. The issues that arise for determination by the ECtHR are not generally unique to the state concerned and while the analysis provided hold their own intrinsic values they may shed light on similar contentious issues between European states. This may ensure consistency of approach between states albeit facilitating a margin of appreciation in accordance with state sovereignty and the diversity of release systems.

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