

# Life Imprisonment and Human Rights

Edited by  
Dirk van Zyl Smit and Catherine Appleton

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# *Introduction*

DIRK VAN ZYL SMIT, CATHERINE APPLETON  
AND GEORGIE BENFORD

## I. BACKGROUND

**L**IFE IMPRISONMENT is the most severe penalty that can be imposed in many countries in the world. In other countries, which retain the death penalty as their ultimate sanction, it is also a penalty served by persons convicted of very serious offences. However, life imprisonment is a relatively under-researched form of punishment. In particular, no attempt has been made to understand the human rights implications of different forms of life imprisonment as they emerge in various jurisdictions around the world. It was to fill this gap for the first time that we brought together a group of scholars from every continent at a workshop held at the International Institute for the Sociology of Law in Oñati on 16 and 17 April 2015. Participants in the workshop were invited to reflect on the human rights implications of the sentence of life imprisonment within the jurisdictions or regions on which they had particular expertise.

This somewhat open-ended approach proved to be invaluable. It soon became clear that ‘life imprisonment’ presented itself in different forms in the various jurisdictions represented and that the participants chose to focus on various incarnations of life imprisonment as problematic from the point of view of human rights.

At an abstract level there was less variation in the ‘human rights’ that were considered relevant to life imprisonment in the different contributions. However, in substantive legal terms there were important differences across jurisdictions in how human rights-based norms impacted on the practice of imposing and implementing life sentences.

The papers that were presented in Oñati have been extensively revised and form the substantive chapters of this book. We have organised them under six thematic headings, which reflect the primary focus of the individual chapters, while recognising that many of them address several issues that cannot be pigeonholed so easily. In this Introduction we highlight how each of these six themes has been developed by our contributors. Before doing so, however, we develop in general terms the concepts of ‘life imprisonment’ and ‘human rights’.

## II. WHAT IS LIFE IMPRISONMENT?

What all sentences of life imprisonment have in common is that they give the state the power to keep incarcerated for the rest of their lives those persons on whom the sentence has been imposed. Other than this commonality there is a great deal of variation. Much of the variation relates to the possibilities of release from life imprisonment, for some life sentences not only give the state the power to incarcerate, they also restrict, or ostensibly remove, the power of the state ever to release someone subject to a life sentence.

Some jurisdictions, most prominently though not exclusively in the USA, provide explicitly for life sentences without the prospect of parole (LWOP) which stand in contrast to 'ordinary' life sentences from which life prisoners can be released conditionally, although this possibility of release may in practice be very restricted too. Even LWOP generally leaves open the possibility of some form of executive pardon outwith the parole system, but this tends to be highly restricted in law, bereft of procedural safeguards and in most jurisdictions rarely used in practice. At the extreme, the executive power to release may be so weak that it is possible to talk of a 'whole life' sentence, from which release is not realistically possible in law or in fact. Even those jurisdictions that allow for the possibility of release from life imprisonment in law do not necessarily facilitate the process of release in practice. Lengthy minimum terms, poor prison conditions, lack of reintegrative opportunities and a concern regarding future recidivism often mean life prisoners are ill-equipped for release and have little chance of gaining parole.

Not all sentences that give states the power to imprison individuals for the rest of their lives are called sentences of 'life imprisonment'. There are at least two further types of sentence that share this characteristic and can quite properly be identified as life sentences. The first type consists of those fixed-term sentences that are so long, and from which prospects of release are so restricted, that it is not realistic to expect that the prisoner will be considered for release before they die. Extreme cases are easy to identify: for example, a fixed-term sentence of 100 years with no consideration of release until the prisoner has served at least three-quarters of the sentence will in almost all cases be a *de facto* whole life sentence. Identifying shorter fixed-term sentences that may also amount to *de facto* life imprisonment is harder and depends on a subtle understanding of the interplay between the age at which the sentence was imposed, demographic patterns and release procedures.

A second type of life sentence, which is not labelled as life imprisonment but nevertheless can be identified as such, is indefinite post-conviction preventive detention. In several jurisdictions such detention may be imposed

on persons convicted of serious offences but not formally sentenced to life imprisonment. This may happen either because life imprisonment is not a punishment within the sentencing court's competence or because the court decided on a fixed-term sentence as an appropriate punishment for the crime concerned but left open the possibility of further indefinite detention by invoking a provision that allowed such detention on the grounds of the risk that the individual allegedly posed to society. There is considerable variation in the form that such detention takes. One potential bright line is between indefinite detention imposed on those persons who are found to have sufficient criminal capacity to be convicted of an offence and those who do not. However, even this distinction, which comes easily to lawyers, can and should be problematised when practice is considered, for this legal distinction may be implemented differently in different jurisdictions, even those that are outwardly similar. Overall, current knowledge about the various forms of *de jure* and *de facto* life imprisonment and the relationship between them is limited.

In addition, a study of the situation in some countries that do not have life imprisonment was thought to be especially important. Accounts of how and why life imprisonment was abolished contribute a different perspective on the meaning of life sentences, while an analysis of attempts in these countries to reintroduce such sentences by the back door of very long fixed-term sentences or preventive detention, gives further insights into the tenacity of the concept of life imprisonment and the ideas that inspire it.

Each chapter in this work therefore offers a unique insight into how life imprisonment in its various forms has been imposed, implemented, restricted or abolished in different parts of the world. Taken together, the various perspectives help develop our understanding of specific human rights issues that have emerged either directly or indirectly from the use and restriction of this ultimate sanction.

### III. WHAT HUMAN RIGHTS ARE MOST RELEVANT TO LIFE IMPRISONMENT?

Whatever form life imprisonment takes, it is a drastic punishment that could infringe a wide range of human rights of the person serving a life sentence. We would put the right to human dignity at the core of all the human rights potentially relevant to both the implementation and imposition of life sentences. Fundamentally, life imprisonment, like all forms of imprisonment, infringes the right to liberty which is a core component of human dignity. Imprisonment also restricts and often infringes a range of other dignity-related human rights, such as rights to family life, privacy and freedom of expression. Life imprisonment, which in practice is usually a long, and very

often a severe, term of imprisonment is particularly open to critique on these grounds.

If life imprisonment is to be used at all in any system that recognises basic human rights, its imposition must therefore be justified carefully. The most common justification for life imprisonment is that it may be an appropriate sentence when imposed for crimes that are sufficiently serious to justify such drastic penal intervention by the state. In other words, it must be a proportionate punishment. It follows that there must be procedures in place for determining whether a life sentence is appropriate. Clearly therefore, at the stage of the imposition of life imprisonment, procedural human rights, rights of due process to ensure safe convictions and proportionate sentencing, are of great relevance.

This oft-cited justification for the imposition of a life sentence on the basis of proportionality, however, may be subject to fundamental objections on human rights grounds. It may be argued that life imprisonment is such an affront to individual liberty and human dignity that it can never be a proportionate punishment for the state to have the power to punish an individual by imprisoning them until death.

More subtly, certain forms of life imprisonment may always infringe human rights because of the way in which they are implemented. In particular it can be argued that whole life imprisonment infringes the fundamental dignity-derived human right to be 'rehabilitated', in the sense of having the possibility of becoming full members of free society.

This argument is being pursued in different ways in various countries. What is important for current purposes is that it brings additional human rights into play in the context of life imprisonment, for it places an important positive duty on prison authorities and indeed on states to intervene in the implementation process of life sentences in a particular way. Of course, prison authorities already have positive duties with human-rights roots that go beyond injunctions not to ill-treat prisoners in their care. Ensuring prisoners' human dignity, indeed their very survival, means that states have a basic duty to feed, house and clothe all prisoners. Providing prisoners with an opportunity to return to society goes beyond that. It requires states to set up procedures for considering the possible release of persons serving life sentences and opens up the possibility for a rights-informed debate about the adequacy of such procedures.

Even more controversially, recognition of a right to be considered for eventual full participation in free society raises the difficult question of what facilities and opportunities persons serving life sentences are entitled to, as a matter of human rights, to improve themselves so that they can demonstrate their fitness to return to society as law-abiding citizens. This question is closely linked to key wider debates about the purposes of imprisonment. How these purposes are prioritised impacts on decisions on when sentences

of imprisonment may be imposed and how they must be implemented in all countries that respect fundamental human rights. We return to these larger questions in the final part of this Introduction.

#### IV. KEY THEMES IN UNDERSTANDING LIFE IMPRISONMENT AND HUMAN RIGHTS

##### A. The Challenge of ‘Life’ in the Americas

As a geographical region in which the approach to life imprisonment is astonishingly diverse, the Americas provide a useful point of departure for elucidating the key themes of this book. The two chapters that form this first section deal with very different penal realities, yet they have in common a shared focus on human rights-derived constraints on the power of the state to penalise. In chapter one life imprisonment in the United States is considered by Marc Mauer and Ashley Nellis. Their focus is on the wider impact of life imprisonment on penal reform in that country, where, by the end of 2012, 159,520 prisoners were serving life sentences, a third of which were life without parole (LWOP) sentences. Mauer and Nellis point out that for some time life sentences in the US have been imposed freely and for an increasingly wide range of offences, and that even lifers with sentences for which parole is legally possible are being released less frequently. The number of LWOP sentences has increased even more quickly than other life sentences and they are being used not only as alternatives to the death penalty but as alternatives to life sentences with parole. Under these circumstances, life sentences generally are a component of the mass incarceration movement in the US.

There are, however, countertendencies derived in significant part from a reconsideration of how the prohibition on ‘cruel and unusual punishment’ in the US constitution applies to life imprisonment. Successive Supreme Court decisions have greatly restricted the ability of courts to impose LWOP on juveniles, and law reform in California has restricted the scope of so-called ‘three strikes and you are out’ sentences, which are mandatory life sentences following conviction for a third felony. There is also evidence of the use of presidential and gubernatorial pardons to release prisoners serving life sentences for non-violent drug offences, in particular. However, the US picture remains one of mass incarceration in which life imprisonment continues to play a large part.

Life imprisonment is manifestly not as important a sentence in South and Central America as it is in the USA, as shown by Beatriz López Lorca in chapter two. Only six—Argentina, Chile, Cuba, Honduras, Mexico (some federal states) and Peru—of the 19 Spanish language countries in the region

have provision for life imprisonment at all. Part of the reason for this is a widespread reluctance in the region to give the state power over convicted individuals for the rest of their lives, powerfully reflected in the absence of life imprisonment in so many Latin American countries. This is coupled with a formal commitment to the idea that all sentences should serve to ‘rehabilitate’ individuals, an ideal that has been much discredited in the US but which survives in the rest of the Americas. In these countries much more attention is paid to international instruments such as the American Convention on Human Rights, which the US has not ratified. Typically these instruments prohibit cruel punishment in much the same way as the US Constitution does, but go further to provide positively for the recognition of prisoners’ dignity (Article 5(2) of the American Convention) and their ‘social rehabilitation’.<sup>1</sup>

López Lorca reports, however, that, somewhat surprisingly, the distrust of state power in Latin America has not led to much controversy about life imprisonment in the six countries that do formally make use of it in the region. Even LWOP, which is found in Cuba and in three of the five Mexican states that have formal life imprisonment, has not been challenged systematically. This is not to say that there have been no changes to life imprisonment regimes as a result of human rights-based legal interventions: in Peru the Constitutional Court held that life imprisonment would only be constitutionally acceptable if all life prisoners had a possibility of release, and the law was altered accordingly. In Argentina, dissenting judgments in the Supreme Court have been very critical of various aspects of life imprisonment.

The Inter-American Court of Human Rights has also intervened, inter alia by outlawing life imprisonment for children in Argentina. In so doing, it has gone much further than the US Supreme Court, which has edged towards outlawing LWOP for children on grounds of its disproportionate severity<sup>2</sup> but has not been called upon to consider whether sentencing them to life imprisonment with a remote prospect of release is equally suspect. In all, the developments in the Americas demonstrate that a wider conception of

<sup>1</sup> The commitment to ‘social rehabilitation’ is contained in Article 12(3) of the International Covenant on Civil and Political Rights which all the countries in the Americas, including the US, have ratified. However, the US is alone in making a reservation to its ratification of the ICCPR, which excludes acceptance of the binding requirement that its prisons should focus on the social rehabilitation of prisoners.

<sup>2</sup> In its most recent decision, *Montgomery v Louisiana* (2016), the Supreme Court gave retroactive effect to its earlier decisions, described by Mauer and Nellis in chapter one, prohibiting mandatory LWOP for children. The consequence was that all mandatory life sentences that had been imposed when the individuals concerned were under the age of 18 when they committed the offence were set aside. They are either to be considered for parole immediately or to be resentenced against a new, very restrictive, standard, which would allow LWOP to be imposed only on the rarest juvenile offenders whose crimes reflect permanent incorrigibility.

human rights can lead to more critical evaluation of life imprisonment, but that this has not been fully realised.

## B. LWOP around the World

Chapters in this section show that the controversies relating to LWOP are not limited to the Americas but extend to every continent. In chapter three, Kate Fitz-Gibbon reveals that although the constituent states of Australia have very different criminal justice systems, every one of them provides for LWOP. Although it has been subject to academic critique it has not been challenged successfully in the courts. This is largely because the Australian national constitution has no bill of rights to provide a legal foothold for such challenges. Perhaps most controversially, in some Australian states there is even provision for LWOP sentences for children, despite Australia being a signatory to the UN Convention on the Rights of the Child, which specifically outlaws life sentences without the prospect of release when imposed on children under the age of 18 years. The lack of relevant national and regional human rights instruments has meant that penal reformers and litigants who wish to overturn LWOP sentences need to resort to international tribunals.

In this regard it is important that the United Nations Human Rights Committee (HRC) found in 2014 that Australia infringed against the International Covenant on Civil and Political Rights (ICCPR) by holding two individuals, who had been sentenced to life imprisonment as juveniles, under a regime that had been modified to ensure that they could not be let out of prison before they were either in imminent danger of dying or physically incapacitated (*Blessington and Elliot v Australia* 2014). In coming to the conclusion that the life prisoners in Australia should have been in the position where their release would be considered at an earlier stage, the HRC relied not only on finding a contravention of the provision of the ICCPR that deals with juveniles (Article 24) against the background of the Convention on the Rights of the Child. It also held that the Australian policy contravened further provisions of the ICCPR: the prohibition on cruel, inhuman and degrading punishment and treatment (Article 7) and the duty that prison authorities have to orient prison regimes towards ‘social rehabilitation’ (Article 10(3)). As Fitz-Gibbon points out, the Australian government has not responded positively to the decision of the HRC: it has shown no inclination to change its law or practice. Nevertheless, the finding of the HRC is important, for most countries in the world, including every country considered in this book, are parties to the ICCPR.

Life sentences from which there is no prospect of release may also be introduced by apex courts rather than by direct legislation. This is the somewhat surprising finding in chapter four and chapter five, where Jamil

Ddamulira Mujuzi and Madhurima Dhanuka consider the position in Uganda and India respectively. Legally, the two countries have in common that the implementation of life imprisonment is governed by legislation dating back to colonial times, which provides for the calculation of remission for persons serving life sentences. Over many years this had hardened into a practice that all persons serving life sentences had to be released after serving a fixed period: 20 years in Uganda and as little as 14 years in India. Both countries also still have provision for the death penalty and this has impacted directly on the interventions by their courts. As Mujuzi explains, when the Supreme Court of Uganda set aside the mandatory death sentences as unconstitutional in 2009, it allowed them to be converted into whole, ‘natural’, life sentences. The result has been confusion. Discretionary death sentences are still constitutional. Some courts continue to impose life sentences on the basis that life prisoners will automatically be released from them after 20 years while others are following the lead of the Supreme Court and imposing natural life sentences. In addition there has been a rise in de facto life sentences with fixed terms of up to 90 years, much longer than the periods after which life prisoners were routinely released in the past, and more significantly, well beyond the average life expectancy in this country.

In India the situation is similar to that in Uganda. The only significant difference is that the death penalty has long been discretionary in India and in fact is used only very rarely. Instead life imprisonment is imposed, especially in high profile cases where a sentence of death may be controversial and divisive. However, as in Uganda, confusion is feared in the light of a recent major decision of the Supreme Court, which is fully described by Dhanuka in chapter five. In the leading case of *Union of India v V Sriharan alias Murugan and others* (2015) the life prisoners concerned were the convicted assassins of the former Prime Minister of India, Rajiv Gandhi. The issue of their release only arose when they were about to complete what hitherto had been regarded as the term after which they should be set free. The ruling by the Indian Supreme Court, that high courts have the power to decide how long life prisoners should serve before they are considered for release and that this period could be for the whole life of the individual, means that life sentences in India may well become much longer. This is a real concern as no less than 55.5 per cent of sentenced prisoners in India are already serving life sentences. What is noteworthy too is that both Uganda and India have constitutions with justiciable bills of rights but that these did not serve to halt what is in effect judicial legislation changing the meaning of life imprisonment.

National constitutions can of course greatly limit the use of life imprisonment in general and of LWOP in particular. A prominent example is the major ‘life imprisonment’ decision of the German Federal Constitutional

Court in 1977.<sup>3</sup> In that case the German Court held that life imprisonment could only meet constitutional standards of human dignity and the rule of law if persons sentenced to life imprisonment had an opportunity for self-improvement during their imprisonment, which would give them a prospect of being considered for release, and if a clear procedure for considering their release was in place. The European Court of Human Rights (ECtHR) has come to the same conclusion in a series of cases culminating in the decision of its Grand Chamber in *Vinter and others v United Kingdom* (2013). It is notable that this decision, although it is based on a finding that life sentences that do not give prisoners a prospect of release offend against the prohibition on inhuman and degrading punishment or treatment (Article 3 of the ECHR), relies heavily on the reasoning of the German Federal Constitutional Court. What the Grand Chamber of ECtHR does articulate quite clearly is that all European prisoners have a fundamental ‘right to hope’, something that LWOP sentences manifestly destroy. In her eloquent concurring opinion in the *Vinter* case Judge Power-Forde explained what this right to hope, which is encompassed in Article 3 of the ECHR, entails:

[H]ope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.

In the light of these developments it is somewhat surprising to find that there are still a few European countries that have LWOP or other life sentences that are very similar to it. Hungary is prominent amongst them. Uniquely in the whole world, as far as we know, its Constitution specifically allows the imposition of LWOP. In chapter six, Miklós Lévy describes the complex interactions between European human rights law, which seeks to ensure that there are no wholly irreducible, hope-destroying life sentences, and the Hungarian legislature, which seems determined to keep LWOP in place. The only basis for compromise lies in the possibility that there may be some life sentences that exclude conventional procedures for granting conditional release (parole) but nevertheless retain the possibility that some other form of executive intervention will allow for the release of those serving them to be considered fairly. Lévy points out that the ECtHR has already once rejected executive release as practiced in Hungary. However,

<sup>3</sup> The German context of the decision of the Federal Constitutional Court (BVerfG 21 June 1977) is explained by Axel Dessecker in chapter 18.

subsequent changes to the release procedure have satisfied a majority of Hungarian judges. Whether they will be upheld by the ECtHR remains to be seen.

The situation in the Netherlands is similar to that in Hungary, as the only way in which life-sentenced prisoners can be released in that country is if they are pardoned by the King. In chapter seven, Wiene van Hattum and Sonja Meijer subject the law and practice of pardon in the Netherlands to close scrutiny. They conclude that although historically the system may have had some equitable features, it is increasingly less fair. It is now not only a system that is wide open to challenge when weighed against European human rights norms, it is also a system that, because of its uncertainties and the very limited prospects of release it confers on life prisoners in the Netherlands, adds greatly to the stress of the prisoners who are effectively serving LWOP sentences and indeed of the prison officers who are responsible for them.

In chapter eight, which deals with life imprisonment in France, Marion Vannier focuses on the right to hope. She notes that the ECtHR has given even the harshest form of life imprisonment in France a clean bill of health, as theoretically even the worst offenders must be considered for release after they have served 30 years. Vannier emphasises, however, that a right in law to be considered for release may not be enough to give rise to hope in fact. On the contrary, the history of life imprisonment in France shows that there has long been the intention to enforce what is effectively an LWOP sentence on at least a narrow category of persons for what are regarded as the worst offences. Vannier concludes that they do not have a *de facto* right to hope. This is a danger that should be recognised both by lawyers and penal reformers.

### **C. Life Imprisonment and the European Convention of Human Rights**

The ECHR has impacted on life imprisonment in Europe in ways that go beyond the immediate debate about whether whole life imprisonment infringes fundamental human rights. An important aspect of this is the recognition, most recently by the Grand Chamber of the ECtHR in *Khoroshenko v Russia* (2015) (which deals with the rights of access of life prisoners to family members) that life imprisonment may affect the human rights of prisoners even more drastically than those of prisoners serving shorter fixed-term sentences.

The wider impact of the ECHR is recognised by Catherine Appleton and Dirk van Zyl Smit in chapter nine. While they deal with the ongoing judicial ping-pong between the courts in Strasbourg and London about whether English procedural law provides individuals with life sentences for which no minimum period has been set with a realistic prospect of release, they also

note other developments in English and Welsh life imprisonment law that have been shaped by the ECtHR over a long period. These have included positive changes to release procedures for the vast majority of life prisoners in England and Wales. Thanks to a series of decisions of the ECtHR, life prisoners now have their release on parole determined by a Parole Board, which is required to act like a court with a range of procedural safeguards, rather than by politicians deciding in private. Also significant is the extent of the recognition, inspired by the ECtHR, that prisoners who are serving life terms have a legal right to participate in training courses and other opportunities to rehabilitate themselves so that they can seek to convince the parole board that they should be released, since the danger that they pose to society has been reduced.

Appleton and Van Zyl Smit note, however, that during the period that these reforms were introduced the number of prisoners serving life sentences has increased greatly. Particularly disastrous in this regard was the introduction in 2003 of Imprisonment for Public Protection (IPP), a fully indeterminate sentence imposed on persons convicted of a second serious offence, whose release was subject to the same criteria and parole board decision-making as those formally sentenced to life imprisonment. Although IPP was abolished in 2012, several thousand prisoners serving this sentence remain in prison. Appleton and Van Zyl Smit ask whether human rights-driven reform may disguise a harsher penal reality in which more life sentences are being imposed and longer periods are actually being served in prison than in the past when procedures were less compliant with human rights standards than is the case now.

In chapter ten Sonja Snacken, Ineke Casier, Caroline Devynck and Diète Humblet address the problems that prisoners serving indeterminate terms face in Belgian prisons. They note that, while there is legal compliance with standards developed in European law for prospects of release for those facing formal sentences of life imprisonment, those who are being held under other legal provisions for indeterminate detention are less assured of having a realistic prospect of release. This applies in particular to mentally ill persons, who in Belgium can be held indefinitely in prison even if they were found not to be criminally responsible for their actions, and to people sentenced to indefinite preventive detention, sometimes in addition to life imprisonment. Snacken and her colleagues go beyond the consideration of formal requirements and concentrate on the human rights implications of the conditions in Belgian prisons, which have many shortcomings; particularly in the area of the treatment of mental illness in prison where both the ECtHR and the European Committee for the Prevention of Torture (CPT) have found Belgian treatment conditions to be degrading and thus in contravention of European human rights standards. Against this background, human rights-based questions raised in Belgium about the right of prisoners to commit suicide have particular salience.

If many of the European contributions focus on the strengths of the emerging human rights jurisprudence of the ECtHR on life imprisonment, chapter eleven, in which Diarmuid Griffin and Ian O'Donnell deal with the situation in Ireland, points to one of the more problematic decisions of that Court (*Lynch and Whelan v Ireland* 2014). At stake was a challenge to the way in which the release of life prisoners was considered in Ireland; involving an informal parole 'system' with no clear legal basis, in which the parole board members were the personal appointees of the Minister of Justice, as opposed to a judicial or court-like body. The release of life prisoners is within the virtually untrammelled discretion of the Minister, who is not bound in any way by the recommendations received from the parole board. Yet, as Griffin and O'Donnell explain, the ECtHR did not intervene to ensure a more robust release procedure. Its key reason for doing so was that Irish life sentences were imposed with a solely retributive (punishment) objective in mind. It was not the case, as it is in English law, that life prisoners should be released after they have served after a minimum period set for purposes of punishment, if they no longer pose a danger to society. On the contrary, Irish constitutional law excluded detention on grounds of dangerousness alone. Under these circumstances the ECtHR held, following similar judgments of the Irish courts, parole was in the power of the executive and strict procedures were not required. This approach is redolent of irony. The Irish prohibition on detention of 'the dangerous' has its roots in a human rights-based protection of liberty, but in this context it has been applied to deny the right to a rigorous and procedurally fair review procedure for life sentences.

#### **D. Countries without Life Imprisonment**

Consideration of the countries that have no life imprisonment provides a welcome antidote to the impression, which may have been created by the chapters outlined thus far, that critiques of life imprisonment must be based on modern human rights instruments that at best provide only for reducing the worst excesses of this form of punishment. In chapter twelve, Inês Horta Pinto notes that Portugal abolished life imprisonment in 1884 and that its constitution has prohibited life imprisonment and other forms of indefinite detention since 1911. The maximum sentence of imprisonment is 25 years and exceptions for the indefinite detention of persons who are seriously mentally ill are closely circumscribed and carefully monitored. Horta Pinto attributes the opposition to life imprisonment to the belief in human perfectibility, which manifested itself from the late eighteenth century onwards and is reflected in the reasoning of the legislature at the time of its initial abolition. On this approach, all prisoners should be given the opportunity to prove themselves in free society again. Horta Pinto also draws attention to the question of how Portugal's principled

opposition to life imprisonment has been reflected in its attempts to ensure that co-operation with other countries in matters such as extradition does not lead to Portugal having to accept life imprisonment via a back door. Horta Pinto concludes that Portugal is in the position to take the moral lead in ensuring that life imprisonment is abolished on human rights grounds in Europe and elsewhere.

The abolition of life imprisonment is also the focus of chapter thirteen where Giovanna Frisso considers the position in Brazil, another country which has a constitutional prohibition on life imprisonment. Frisso gives an account of a long struggle against life imprisonment that keeps reasserting itself in various ways. In some historical instances military regimes have amended the Constitution of Brazil, thus reintroducing life imprisonment for a while. More insidiously however, there have been more recent attempts to introduce fixed-term sentences that are longer than the current 30-year maximum and amount to *de facto* life terms. Frisso pays considerable attention to the details of what *de facto* life imprisonment could mean. She calculates that under Brazilian prison conditions, and given the average life expectancy of the class of persons incarcerated in Brazil, a 50-year fixed-term sentence would mean that prisoners subject to it are likely to die in prison. Their sentence would effectively be whole life imprisonment.

Chapter fourteen, in which Javier de León Villalba considers the wider issue of long-term prison sentences in Latin American countries that do not have life imprisonment, complements both chapter thirteen on Brazil and the account of Latin American countries with life imprisonment in chapter three. De León Villalba notes that while the majority of these countries formally do not have life imprisonment there is a tension between theory and practice. The theory, as in Portugal, is based on a strong belief in human perfectibility, as reflected in a commitment to the rehabilitative function of imprisonment. The reality is harsh prison conditions exacerbated by long delays in trials and widespread prison overcrowding. *De facto* life imprisonment is common, with countries that formally do not have life imprisonment imposing terms as long as 50 years or more. In De León Villalba's view the best solution would be to focus directly on prison reform. Only if prison conditions are improved to meet international and regional human rights standards can issues around *de facto* life imprisonment be tackled effectively.

## **E. The (Re)introduction of Life Imprisonment**

In contrast to those countries that do not have life imprisonment are those that have introduced it in the relatively recent past. Here too, human rights values have played an unexpected part. Many countries in Eastern Europe

and the Balkans were left, after the fall of the Soviet Union, with legal systems that provided for the death penalty but not for life imprisonment. Human rights-based European institutions, such as the Council of Europe, which these states aspired to join, pressed them to abolish the death penalty and reform their prison systems. In chapter fifteen, Filip Vojta tells of the choices made by the new states that emerged after the breakup of the former Yugoslavia, which had had provision for capital punishment but not life imprisonment. In the early 1990s all of the states abolished capital punishment. However, only Macedonia and Kosovo initially adopted life imprisonment, while Slovenia, Croatia, Serbia, Bosnia and Herzegovina, and Montenegro all enacted fixed-term sentences as their ultimate penalties.

This picture gradually changed and the ultimate sanctions in the states that formerly comprised Yugoslavia have become harsher. In 2001 after an acrimonious debate, life imprisonment became the ultimate penalty in Slovenia. This did not happen in the other states without life imprisonment. However, all of them raised their maximum fixed-term sentences to the extent that prisoners who are serving them are likely to remain in prison for as long as those sentenced to life imprisonment in the other former Yugoslav states.

Poland also re-introduced life imprisonment to replace the death penalty in 1997 in the wake of the fall of communism. In chapter sixteen, Maria Ejchart-Dubois, Maria Niełacznna and Aneta Wilkowska-Płóciennik reflect on this process. They note that since this change was introduced the penal climate has become increasingly repressive. Moreover, as the minimum period before release may be considered is 25 years (and longer in some cases), no life prisoner in Poland has yet been considered for release. Their research, conducted with life prisoners and prison officers as well as a review of court judgments, shows that the system is not oriented towards preparing prisoners for eventual release. Ejchart-Dubois, Niełacznna and Wilkowska-Płóciennik further speculate that in the light of their research findings it may not even be realistic to expect many of these prisoners to be released following the completion of their minimum terms.

The introduction of life imprisonment into Spain, the subject of chapter seventeen by Jon-Mirena Landa Gorostiza, followed a different trajectory to the states in Eastern Europe and the Balkans. For many years prior to its introduction in June 2015, there had been no sentence of life imprisonment in Spain. Although it had not been formally prohibited by the national Constitution, Spanish scholars reasoned, like their Portuguese and Latin American counterparts, that a strong commitment, spelt out in the Constitution, to the rehabilitation of prisoners as a human right meant that a sentence such as life imprisonment, which had the potential of excluding an individual permanently from society, had no place in the Spanish system. Landa shows that at a policy level this understanding was gradually

undermined by diminishing possibilities for the release of prisoners, particularly those convicted of terrorism, who were serving long fixed-term sentences. The result was that, when discretionary life sentences with a review after a fixed period were introduced, they did not change the existing system significantly. At the time of writing, constitutional challenges to life imprisonment in Spain are still pending and there is the possibility that the law will be repealed by a new government. However, as in the states of the former Yugoslavia, the impact of increasing crime control concerns on liberal anti-life imprisonment policy is clear in Spain too.

## F. Life Imprisonment and Preventive Detention

The final section groups together three chapters that pay particular attention to indeterminate post-sentence preventive detention. The German variation of this, *nachträgliche Sicherungsverwahrung*, is considered in chapter eighteen by Axel Dessecker. He explains that in German criminal law there is a ‘dual track’ system.<sup>4</sup> A clear distinction is drawn between punishments, such as life imprisonment, which follow conviction and are related to the heinousness of the offence and the degree of guilt of the individual, and ‘measures’, which can be imposed on convicts because of their dangerousness. The latter may lead to indeterminate loss of liberty. However, such measures are not regarded as criminal penalties and therefore historically have not been subject to all the safeguards, such as prohibitions against double, disproportionate or retrospective punishments, that form part of human rights-based protections against abuse of the criminal process. As Dessecker notes, in 2009 the ECtHR rejected this fundamental distinction of German law and declared that *Sicherungsverwahrung* was a criminal penalty as in this application it was not sufficiently differentiated from criminal punishment because, inter alia, those subject to it were not treated significantly differently to prisoners serving life sentences (*M v Germany* 2009). This led to considerable law reform in Germany, for although the German Constitutional Court did not concede that *Sicherungsverwahrung* was a criminal penalty, in the light of the decision of the ECtHR. It ordered the state to restrict its use to convicted persons who were mentally ill and to introduce better treatment programmes and conditions of detention, which would differentiate them more clearly from ‘ordinary’ prisoners. This was duly done and in early 2016 the ECtHR upheld the new system as providing a fair

<sup>4</sup> Variations on the dual track system are also found in a number of other countries discussed in this book, including Belgium, Brazil, Portugal, Spain and the Netherlands, as well as the Nordic countries.

basis for the continued detention of a convicted individual, who remained in preventive detention long after he had completed his initial sentence, as he was still dangerous because of him being of ‘unsound mind’.<sup>5</sup>

One may doubt whether the ECtHR will be as sympathetic to the form of indefinite post-sentence detention in Switzerland, on which Anna Coninx focuses in chapter nineteen. The doctrinal distinction between the two tracks of criminal penalties and preventive measures is broadly the same in Switzerland and in Germany. However, in Switzerland in the 1990s a popular initiative amended the Swiss Federal Constitution to provide also for detention until the ends of their lives of sex or violent offenders who were deemed to be ‘untreatable’. Only if new scientific findings can demonstrate that these persons can be cured and thus no longer represent a danger to the public may their release even be considered. If an individual in this category is released, the authorities granting the release must accept liability if the person reoffends. This extraordinary measure has only been finally enforced in one case. Coninx uses it as a point of departure to reflect on the shortcomings of using a right to rehabilitation as a device for limiting the impact of indeterminate detention, for the virtually irrefutable assumption is that someone who is subject to this measure cannot be rehabilitated. Instead, she argues for a ‘desert-based’ limit on all forms of life imprisonment, including those that have been designated as preventive detention.

In chapter twenty, the final chapter, Tapio Lappi-Seppälä does not so much focus directly on post-conviction preventive detention as place it in a wider context of indeterminate loss of liberty in Nordic penal systems. He points out that, while there are legally significant differences in this regard between the four countries he considers—Norway, Denmark, Sweden and Finland—, there are interesting similarities in the overall trajectories of their use of indeterminate preventive measures. In law, notoriously Norway does not have any provision for life imprisonment while the other three countries do have it. However, when the legal regime is examined more closely, it becomes clear that Norway does make use of a second-track, post-sentence preventive detention in the form of *fovaring*, which allows it to detain indefinitely individuals who have served their full sentences if they continue to be considered dangerous. There is also provision for the indefinite compulsory detention of persons who commit serious crimes but do not have criminal capacity. Lappi-Seppälä shows that there are subtle differences in the laws of the other three countries, but a mixture of forms of preventive detention allow them each to detain serious offenders who are regarded as dangerous

<sup>5</sup> Being of ‘unsound mind’ is a basis for detention recognised by Art 5(1)(e) of the ECHR: see *Bergmann v Germany* (2016). Someone can be of ‘unsound mind’ in this sense while having sufficient criminal capacity to be convicted of an offence, albeit with diminished responsibility.

for long periods of time. Yet the overall numbers are relatively low, both in international comparison and when compared to the 1950s and 1960s when countries in the region made much freer use of preventive detention measures. Overall there are also significantly more safeguards in place in the Nordic countries than in other jurisdictions to ensure that these various forms of preventive detention are not overused.

## V. FINAL THOUGHTS

Our overview of the outstanding features of the chapters in this volume cannot begin to do justice to the wealth of information and insights that they provide. Nevertheless, we wish to pull together some of what they teach us about our key concepts. As far as life imprisonment is concerned, it is clear that the distinctions between life sentences with a prospect of parole, life sentences without a prospect of release (LWOP) and whole life sentences from which no form of release, not even by way of a pardon, is possible, is much less clear in practice than it may be in legal theory. For release to be possible at all, there needs to be preparation and evaluation in prison, and fair and transparent procedures for considering release, led by judges or others who can act independently of public pressure; and this must all be made clear to life prisoners from the outset of the sentence. If all these procedures are not in place, the notion that any life sentence can be something other than a prolonged wait until death in detention is a mere chimera.

A second insight into the concept of life imprisonment that can be derived from this book is that to make sense of what it means in practice, forms of indeterminate detention that are not formally labelled ‘life imprisonment’ have to be considered too. More work needs to be done on what can be regarded as *de facto* life imprisonment, although scholars, such as Frisso in chapter thirteen, are beginning to grapple with this issue. This is not merely an intellectual exercise, as identifying the fixed-term sentences that should be regarded as life imprisonment means that those subject to them can claim the same rights as other life prisoners.

Similarly, this book demonstrates the many overlaps between indeterminate preventive detention and life imprisonment formally so defined. Preventive detention, too, can take many forms. Lawyers’ distinctions between punishment and measures, or between offenders acting with a ‘guilty mind’ and others who commit criminal acts but lack criminal capacity, easily break down in the face of popular pressure to exclude from society all individuals deemed to be dangerous. Yet persons subject to any form of indeterminate preventive detention require protection against abuses of power. The safest strategy is to make sure that, no matter what form indeterminate preventive detention may take, there are robust procedures in place to ensure that

people are not detained for longer than they should be, or worse still, have no realistic prospects of release.

Taken together, the chapters of this book confirm that human rights concepts offer many resources for those who wish to critique life imprisonment from a clear normative perspective. Life prisoners, more than most other prisoners serving fixed-term sentences, may have a wide range of their rights curtailed in ways that go beyond the 'ordinary' pains of imprisonment.

It seems fair to say that some of the most interesting developments in recent years have been in the European context where the prohibition on inhuman and degrading treatment or punishment in Article 3 of the ECHR has been developed both to provide a substantive protection against the indignity of detention without hope and the beginnings of procedural safeguards for ensuring a realistic prospect of release. Related to this is the growing recognition of a right, also derived from Article 3, of life prisoners, like other prisoners, to improve (rehabilitate) themselves while in prison so as to increase the possibility that they will be released.

For those outside the remit of the ECHR, it is important that the same human rights are recognised in other instruments. Article 12(3) of the ICCPR speaks more clearly of a right to 'social rehabilitation' than does the ECHR, and as we saw in the case of Australia it can be deployed to justify limiting particularly harsh forms of life imprisonment too. Many national constitutions offer similar points of departure both for a right to self-improvement and for procedural safeguards when release is considered. Prisoners' rights generally are recognised to be important too, for no rehabilitation is possible in overcrowded conditions where fundamental rights are denied.

The true human rights challenge, as a number of contributors to this book recognise, is to interpret and apply these all rights effectively in the face of the traditional theories of punishment that are used to justify life imprisonment, notwithstanding that it is always a harsh form of penalty. From a 'just deserts' perspective the contention is sometimes that no-one should ever be imprisoned without a realistic prospect of release, for whole life imprisonment is such an affront to fundamental human dignity that it can never be regarded as acceptable on retributive grounds alone. However, as the chapter on Ireland shows, life sentences justified on purely retributive grounds may be less vulnerable to criticism on the grounds that human rights standards require robust and fair release procedures. It is sometimes argued that because such sentences do not claim to serve a rehabilitatory purpose, complex procedures for considering whether a prisoner has been rehabilitated are not necessary. This argument cannot succeed in the face of the proposition that the fundamental human rights of all prisoners demand that they be given the opportunity to rehabilitate themselves.

Happily, this last proposition is increasingly being accepted, particularly in European human rights law, but also internationally.<sup>6</sup> However, as the chapter on Switzerland demonstrates, human rights-based critics of life imprisonment should be aware of the implications of what they wish for. Using rehabilitation as the core argument to limit the impact of life imprisonment may have the effect that people who cannot demonstrate that they have been ‘rehabilitated’ to the extent that they can take up their place in free society again, in a system where the odds may be severely stacked against them, are excluded from any amelioration of their sentences.

It is against this backdrop that we believe that the inclusion of a number of chapters that describe systems where, on human rights grounds, life imprisonment has been outlawed completely (and other forms of indeterminate preventive detention have been curtailed very severely) has particular merit. These chapters explain the necessity of ensuring, on human rights grounds, that the state does not have unlimited power over the liberty of the individual. The clarity of the argument is compelling, not least because it accepts the importance of opportunities for rehabilitation but also recognises that its ‘success’ can never adequately be measured while someone is in prison.

The accounts of states without life imprisonment have demonstrated that the need for vigilance, lest life imprisonment is reintroduced, either by the back door of very long fixed-term sentences or by the front door of amendment to their penal codes. However, increasingly the compatibility of life imprisonment in all its forms with fundamental human rights norms is being challenged, also at the level of the ECtHR. Notably, in *Öcalan v Turkey (No 2)* (2014) Judge Pinto de Albuquerque, who concurred with the unanimous decision of his colleagues that the whole life sentence imposed on Öcalan infringed Article 3 of the ECHR, went further and roundly condemned all forms of life imprisonment as contrary to fundamental human rights. This may well be a harbinger of the debates about the relationship between life imprisonment and human rights in the future.

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<sup>6</sup> See for example General Comment no 21 of the Human Rights Committee (1992: para 10): ‘No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.’

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