

Outlawing Irreducible Life Sentences: Europe on the Brink?



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“There seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible.”

Lord Phillips, then lord chief justice and now the first president of the new Supreme Court of the United Kingdom, expressed this view in 2008 in the Court of Appeal in *R v. Bieber*.¹ This pronouncement is an indication that an important shift is being recognized, and is being reflected at the highest European judicial level. The shift of attitude is supported by a recommendation from the European Committee for the Prevention of Torture that all individuals sentenced to life imprisonment should be given a prison regime that prepares them for release.² Underlying both, however, is more than a scintilla of doubt about how far the current European legal position, as expressed in early 2008 by the Grand Chamber of the European Court of Human Rights (ECtHR) in *Kafkaris v. Cyprus*,³ goes toward outlawing irreducible sentences.

One issue needs to be clarified immediately: There is no doubt about the position as far as children—that is, people under the age of 18 years—are concerned. An irreducible sentence of life imprisonment cannot be imposed on a child in any European country. In fact, the majority of European countries do not allow life sentences to be imposed on children at all.⁴ Even countries that do allow indeterminate sentences to be imposed on some children are bound by article 37(a) of the Convention on the Rights of the Child, which explicitly prohibits the imposition of “imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age,” and therefore requires procedures for considering their release.

Moreover, the jurisprudence of the ECtHR has put the matter beyond doubt. In *Weeks v. United Kingdom*, the ECtHR held that a discretionary life sentence imposed on a 17-year-old was acceptable only because he had a real prospect of release, and required that additional procedural due process guarantees be put in place for consideration of his release.⁵ In *Hussain v. United Kingdom*, the argument was extended to the mandatory sentence of a child for murder.⁶ Finally, in *V v. United Kingdom*, the Grand Chamber of the ECtHR underlined the importance in these cases of having robust release procedures and of promptly stipulating a

clear and relatively short minimum period after which release would have to be considered, particularly for cases in which the offender was very young at the time of the commission of the offense.⁷

This line of cases not only illustrates further the “climate of international opinion” that the United States Supreme Court took into account in *Graham v. Florida*,⁸ when it declared unconstitutional life without parole for individuals under 18 convicted of offenses other than homicide, but also firmly contradicts a polemical aside by Justice Thomas in the same case. In a footnote to his dissenting opinion, Justice Thomas commented that “democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.”⁹ This statement does not hold true for any of the forty-seven democracies that are signatories to the European Convention of Human Rights. If any of them were to introduce such a sentence for any person under the age of 18 years, even one convicted of homicide, it would clearly be struck down by a judicial decree of the European Court of Human Rights or one of the many national courts that apply the European Convention of Human Rights at the national level.

In Europe, the debate has moved on to acceptability of such sentences *for adults*. In order to understand the doubt that still surrounds irreducible sentences for adults, this article first examines briefly the legal and actual position regarding life imprisonment in European countries, as well as the arguments that have been advanced about irreducible life sentences at the national level. This argument is not as simple as it seems, because which life sentences are irreducible may itself be disputed. As will become apparent, this ambiguity arises in instances without a clearly set period after which prisoners sentenced to life imprisonment must be considered for release but where some other release process may theoretically still function—even if the actual prospect of release is very remote.

After this opening overview, the article focuses on the European level, where the ECtHR, although it has moved a long way toward outlawing truly irreducible life sentences, has struggled to define a clear position. The article

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then considers the reactions to the jurisprudence of the ECtHR at the national level, in European countries that retain apparently irreducible sentences. It pays particular attention to difficulties that courts face when they apply their analysis to offenders facing extradition to other countries, such as the United States, where irreducible life sentences may be imposed on them. In conclusion, the article considers the wider trajectory of European developments in this regard, which, it argues, are likely to lead to the clear outlawing of irreducible life sentences.

I. European Countries with No Irreducible Life Sentences

The current position, as far as it can be ascertained, is as follows: The majority of European countries do not have irreducible life sentences. These countries either have no life sentences at all or have a statutory provision requiring that all individuals who are sentenced to life imprisonment must be considered for release after having served a fixed period.

Countries that have no life sentences at all include Portugal, where life sentences are prohibited by the constitution,¹⁰ and Norway and Spain, where the criminal codes do not provide for them.¹¹ Until 2008, Slovenia had no life sentences either, but in that year the law was amended, following a public controversy, to provide for life sentences that could be reconsidered after twenty-five years.¹²

Countries that have fixed periods after which individuals sentenced to life imprisonment must be considered for release include Belgium, with a ten-year period;¹³ Austria, Germany, Luxemburg, and Switzerland with fifteen years; the Czech Republic, Romania, and Turkey with twenty years; Poland, Russia, and Slovakia with twenty-five years; Lithuania with twenty-six years; and Estonia with thirty years.¹⁴

The arguments in favor of having no life sentence at all and the arguments for having a fixed minimum period after which release must be considered have essentially the same foundation: No human being should be regarded as beyond improvement and therefore should always have the prospect of being released. Both the Spanish and the German constitutions are interpreted as giving prisoners this right. In the case of Spain, it is derived from prisoners' constitutional right to be educated.¹⁵ In Germany, prisoners' right to resocialization has been identified by the Federal Constitutional Court as being a component of people's right to human dignity, as well as relating to the constitutional definition of the Federal Republic of Germany as a *Rechtsstaat* (state governed by the rule of law) and also as a *Sozialstaat* (social welfare state). Such a state has obligations to its citizens that include the duty to provide prisoners with opportunities to resocialize themselves.¹⁶

The conclusions drawn from these shared principles have differed. In Spain, the logical consequence of recognizing the right to resocialization is that there should be

no life sentences, because the state cannot be trusted with power that may allow it to exercise perpetual control over a citizen.¹⁷ In Germany, the conclusion has been more measured: Life sentences are constitutionally acceptable, but *only* if they are complemented by adequate provision for considering the release of prisoners on whom they have been imposed.

The leading European case on the constitutionality of whole-life sentences at the national level is still the German Federal Constitutional Court's decision of June 21, 1977.¹⁸ At stake was no less than the constitutionality of the life sentence itself, which was challenged as being incompatible with the principle of human dignity, the primary norm of the German constitutional order. The Constitutional Court rejected this frontal challenge. It noted that the prison system had a statutory duty to provide all prisoners with the opportunity for self-improvement, so that they could lead a crime-free life in the future.¹⁹ This duty applied also to those sentenced to life imprisonment: Life sentences would be compatible with the constitutional norm of human dignity if they left prisoners the hope that they could be released. However, the Federal Constitutional Court went further and held that this principle, read together with the requirements of the *Rechtsstaat*, also required a clear release procedure, not just the prospect of an executive pardon. The procedure for releasing people sentenced to life imprisonment had to be spelled out in primary legislation that made provision for a court to decide on their release.²⁰

In due course, the German legislature responded and inserted a new paragraph into the Criminal Code.²¹ This paragraph provides that a court shall suspend the execution of the remainder of a sentence of life imprisonment if, inter alia, fifteen years of the sentence have been served, if the degree of the convicted person's guilt does not require its continued execution, and if suspension can be justified upon consideration of the security interests of the general public. This provision has remained unaltered, although the Constitutional Court has clarified its meaning. Clarification occurred most notably in 1992, when the Court held that the initial sentence should include a finding about the gravity of the offense (*die Schwere der Schuld*) so that a subsequent court could use this finding as a guide when considering a prisoner's suitability for release once the person has served the minimum period of the life sentence.²²

The German Constitutional Court has routinely upheld life sentences that were extended beyond the minimum.²³ Challenges to the ECtHR in this regard have proved fruitless, because the principle that the sentences are reducible has not been seriously undermined by these further developments.²⁴

II. Countries with Whole-Life Sentences

Countries without fixed periods after which release must be considered for all prisoners sentenced to life imprisonment are a diverse group. Somewhat unexpectedly

prominent among them is the Netherlands, where all life sentences are imposed without the individuals sentenced having a clear prospect of release; since 1986, only one person serving a sentence of life imprisonment (who was terminally ill) has been released. However, the numbers are small, even by European standards. Life sentences are never mandatory and only thirty-seven prisoners are currently serving life sentences in the Netherlands, ten of whose verdicts still need to be finalized.²⁵

A second jurisdiction that has whole life sentences is England and Wales.²⁶ There, no fixed period must be served before release is considered, but in every case where life imprisonment has been imposed (either because it is a mandatory sentence, as for murder, or because discretion to impose it has been exercised), the sentencing judge has to consider specifying a minimum period that the offender must serve.²⁷ After the offender has served that period, his release is considered automatically (although whether he will in fact be released depends in practice on a wide range of factors, including whether he has been offered courses to improve himself and has been moved to an open prison where his suitability for release can be evaluated).²⁸

In the vast majority of cases, a minimum period is set. However, for a very small number, the judge declines to set a minimum period. Of the prisoners serving fully indeterminate sentences in English prisons in 2008, only thirty-six of the approximately 11,000 fell into this category.²⁹ The failure to set a minimum means that the prisoner can be detained indefinitely. Expressed differently, the minimum period (or tariff, as it used to be called when it was set by the Home Secretary rather than the sentencing judge) of the life sentence for this small group of people was their whole life.

Sentences without a minimum were explicitly upheld by the House of Lords, then court of final instance in England and Wales, in the leading case of *R v. Secretary of State for the Home Department, Ex parte Hindley*. Lord Steyn explained that “there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence.”³⁰ Two further points are significant about this case. First, Hindley sought to appeal her case to the European Court of Human Rights in Strasbourg, but died before she could pursue it. Second, some doubt exists about whether Hindley’s sentence was truly irreducible because, in the course of the appeal being heard before the House of Lords, the Home Secretary gave the court an assurance that he was prepared to reconsider the whole-life tariff during the course of the sentence being served (at that stage, the Home Secretary rather than the sentencing court set this minimum period).

In France, the general rule is somewhat similar to that in England and Wales: Although most prisoners are considered for release after a minimum period, for a small group of individuals sentenced to life imprisonment, no minimum period is set. The French Criminal Code provides that most prisoners sentenced to life imprisonment

may apply for parole after they have served a minimum period of eighteen years—or twenty-four years, in the case of recidivists. In 1994, however, the law was amended to allow for a sentence of life imprisonment with no minimum period (*perpétuité réelle ou incompressible*) in cases of murder of a child under the age of 15 years accompanied by rape, torture, or acts of barbarity.³¹ The constitutionality of the provision was upheld by the *Conseil Constitutionnel* (Constitutional Council) in its decision of January 20, 1994.³²

Whether this French provision amounts to an irreducible life sentence is dubious, however, because the possibility remains that someone may apply for release on license even before their minimum period has been completed if they can demonstrate serious evidence of readjusting to society. Where no minimum period has been set, such an approach cannot be made until thirty years have elapsed.³³ How this provision will work in practice is unclear; since 1994, only three offenders have been sentenced to life imprisonment with no minimum period and none of them has been in prison for thirty years.

There are other outliers, too. In Switzerland, the national Constitution was amended by referendum in 2004 to provide that offenders convicted of sexual or violent crimes who are found by a court to be extremely dangerous and not susceptible to treatment should never be released.³⁴ Their release is only possible if new scientific knowledge were to show that they could be treated in order to render them not dangerous. In such cases, new expert opinions could be sought and, if these were positive, the prisoner could be released. Those who had given the opinions would then be personally responsible if the offenders reoffended. This draconian provision has in fact never been used, but, if it were to be, it would raise problems not only of human rights but also of medical ethics.³⁵

III. The Jurisprudence of the European Court of Human Rights

The legal acceptability of any form of sentence in Europe depends not only on its recognition in national law but also on its not contravening the European Convention on Human Rights. Given the diversity of approaches to life imprisonment in general and to irreducible life sentences in particular among the countries of Europe, the issue of whether irreducible life sentences raised any questions in terms of the European Convention of Human Rights was always likely to arise.

The ECtHR’s initial approach to the issue of life imprisonment was understandably cautious. The Court has often emphasized that matters of sentencing fall largely outside the scope of the European Convention on Human Rights, although it has accepted that arbitrary or disproportionately heavy sentences could raise an issue in that they might infringe the prohibition against inhuman or degrading treatment or punishment in article 3 of the Convention, the functional European equivalent of the Eighth Amendment to the U.S. Constitution.³⁶ The

ECtHR has also emphasized that it is reluctant to intervene in procedural matters relating to the enforcement of sentences—for example, with respect to whether a prisoner has been fairly considered for early release.

This conclusion is supported by article 5(1) of the European Convention on Human Rights, which provides that the lawful detention of a person after conviction by a competent court justifies the deprivation of liberty. This justification normally remains in force, the ECtHR has held, for the period of the sentence. Therefore, parole procedures or even procedures relating to the return to prison of someone who has been released conditionally do not require further justification. In particular, the view is that article 5(4) of the European Convention on Human Rights—which provides that “[e]veryone who is deprived of his liberty by arrest or detention 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”—does not apply to decisions to release individuals on parole or to re-imprison them before the end of their sentence, because these instances are covered by the legality of the detention resulting from the initial sentence.³⁷ From this overall approach to sentencing it therefore followed, as the ECtHR explained in *Sawoniuk v. United Kingdom*,³⁸ that a life sentence could be imposed in a case of appropriate seriousness, even on an offender who was already relatively old at the time of the sentence, without running the risk of infringing article 3 of the Convention.

With respect to the procedural requirements of article 5 for life sentences, however, the ECtHR’s approach was more nuanced. In a series of cases, the Court recognized that the primary English approach to life imprisonment—which drew a clear distinction between the minimum period required for the purposes of retribution and deterrence and the subsequent continued detention for purposes of public protection—did involve the making of a new decision about continued detention after the expiration of the minimum period. The result was that both article 5(1) and article 5(4) were invoked to require a decision by a court-like body that met due process requirements to determine whether the continued detention of a person sentenced to life imprisonment was justified. The practical effects are that in England the trial judge, and not a Minister of State, sets the period after which the release of individuals sentenced to life imprisonment must be considered (except for the few for whom no minimum period has been set), and the subsequent decision on release is taken by an appropriately constituted, court-like parole board headed by a judge at the end of prisoners’ minimum period and at regular intervals thereafter.³⁹

The question remained whether an irreducible life sentence, unlike other life sentences, might not still be inhuman or degrading and thus infringe article 3 of the European Convention on Human Rights. In 2001, in *Nivette v. France*⁴⁰ and subsequently in *Einhorn v. France*,⁴¹ both cases involving extradition of offenders to face life

sentences in the United States, the ECtHR indicated that it “did not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the Convention.”⁴² The Court did not fully explain its reasoning but referred to resolution (76) 2 of the Council of Europe’s Committee of Ministers on the treatment of long-term prisoners, which included the recommendation that member states should ensure that all prisoners had the possibility of applying for conditional release. Although the resolution was not a binding rule of European law, the reference to it indicated at least a degree of judicial approval for the approach it supported. In the end, both *Einhorn’s* and *Nivette’s* cases were settled without coming to a final conclusion on this issue—the ECtHR held that neither applicant in fact would face an irreducible life sentence on conviction if their extradition went ahead.

Finally, in the 2008 case of *Kafkaris v. Cyprus*, it appeared as if the ECtHR would be compelled to settle the question of the acceptability of irreducible life sentences once and for all, because the matter was referred to the seventeen-judge Grand Chamber of the ECtHR as a matter of general importance. In the end, the outcome was decided on the facts again: Ten of the seventeen judges found that the sentence Kafkaris faced was not totally irreducible.

The legal situation to which Kafkaris was subject was certainly confusing, because at that time individuals sentenced to life imprisonment were routinely released after having served twenty years. The basis for this release was a Cypriot prison regulation but, in the course of Kafkaris’s sentence, this regulation was declared unconstitutional in an unrelated case. The result, as best could be ascertained, was that in theory Kafkaris could be released only if the president of Cyprus (who could only act subject to the approval of the attorney general) were to pardon him (¶ 86). The Cypriot government conceded that this legal situation was unsatisfactory (¶ 91), but the majority nevertheless found that, both in law and in fact, there was a possibility, however remote, that Kafkaris could be released and that that was sufficient.

Somewhat ironically, Kafkaris did succeed on one point: The Grand Chamber held by a large majority of fifteen votes to two that there had been a violation of article 7(1) of the European Convention on Human Rights, which provides that

[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The Grand Chamber, however, went out of its way to emphasize that it was not concluding that Kafkaris’s sentence had retrospectively become a heavier sentence.

Kafkaris's sentence had always been a life sentence, and changes in the mode of its execution did not, in the view of the Court, amount to the imposition of a heavier penalty (¶ 151). Instead, the Grand Chamber was concerned with the question it called, in its own quotation marks, the "quality of the law." It explained that

at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision 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. Accordingly, there has been a violation of Article 7 of the Convention in this respect (¶ 150).

The factual finding of the majority in *Kafkaris* that the applicant's sentence was not irreducible does not exhaust the significance of this Grand Chamber judgment. For one thing, the majority judgment includes an exhaustive account of various instruments of the Council of Europe and the European Union that deal with the rehabilitative purpose of imprisonment and link it explicitly to the need for clear release procedures that will allow prisoners the possibility of eventually returning to life in a free society.

At the Council of Europe level, reference is made in this regard to article 21 of the Convention on the Prevention of Terrorism,⁴³ which allows extradition to be limited in certain instances if the person who is to be extradited may be subjected to life imprisonment without the possibility of release. Reference is also made to the 1976 Resolution of the Committee of Ministers on the treatment of long-term prisoners, which was based on an official memorandum that stated the case against irreducible sentences:

[I]t is inhuman to imprison a person for life without any hope of release. A crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society. Nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis.⁴⁴

Further references to the desirability of parole are underlined in the 1999 Recommendation of the Committee of Ministers concerning prison overcrowding,⁴⁵ the 2003 Recommendation on conditional release,⁴⁶ and the 2006 European Prison Rules.⁴⁷

The judgment also noted that the European Arrest Warrant, which operates within the European Union, provides for a person who has been transferred on such a warrant from one country to another to have his life sentence reconsidered after twenty years.⁴⁸ It even referred to

a provision requiring that the International Criminal Court consider the release of all individuals it had sentenced to life imprisonment after they had served twenty-five years.⁴⁹

This very long list of supporting evidence was complemented by a carefully circumscribed outline of when the court might find that a life sentence infringed the European Convention on Human Rights. The judgment emphasized that ill treatment must reach a certain minimum level before it could be regarded as inhuman or degrading to a degree that infringed article 3 of the European Convention on Human Rights, and reiterated that a life sentence did not become irreducible merely because in practice it was served in full. The Grand Chamber acknowledged the earlier jurisprudence that had raised doubts about whether irreducible life sentences were in conformity with the Convention and confirmed that whether a life sentence was de jure and de facto reducible was a factor to be taken into account when assessing the compatibility of a particular life sentence with article 3.

The majority of the Grand Chamber, however, went out of their way to emphasize that there was no unanimity in Europe about what procedures should be followed when releasing prisoners sentenced to life imprisonment and that they would not give any guidance on what such procedures should entail. In other words, states should be allowed what was effectively an unrestricted margin of appreciation in deciding what procedure to adopt.

The dissenting opinion of Judges Tulkens, Cabral, Barreto, Fura-Sandström, and Spielmann regarding article 3 is also of much more significance than one might expect from what appears to be merely a factual disagreement with the conclusion that Kafkaris had a de facto possibility of release. In their view, not only did he not have such a possibility, but the whole approach to release adopted by the Cypriot authorities was flawed, because it could result in an arbitrary outcome. The dissenting judges based this conclusion not on the (manifest) shortcomings of the Cypriot procedures, but on an analysis of what they saw as the fundamental European approach that should underlie release decisions.

To do this, they analyzed the many sources of European policy in this regard quoted by the majority (referred to previously). They noted that these instruments had "contributed and are still contributing to forming a genuine body of law on sentences and prisoners in advanced democratic societies" (¶ 4) and criticized the majority for not paying more attention to the sources it had quoted so fully itself. Their own conclusion was that "once it is accepted that the 'legitimate requirements of the sentence' entail reintegration, questions may be asked as to whether a term of imprisonment that jeopardizes that aim is not in itself capable of constituting inhuman and degrading treatment" (¶ 5). In the absence of such an approach, they could not find that there had been a real consideration of Kafkaris's release. They concluded by agreeing with the sentiment expressed by Judge Bratza in his concurring

opinion that the time had come for a clear ruling that irreducible sentences were unacceptable in Europe.

Although Judge Bratza concurred with the majority on the factual question of whether in practice Kafkaris had a prospect of release, he went further than they did in dealing clearly with the question of the unacceptability of an irreducible life sentence. In his words, “[T]he time has come when the Court should clearly affirm that the imposition of an irreducible life sentence, *even on an adult offender*, is in principle inconsistent with Article 3 of the Convention.”⁵⁹

Judge Bratza’s separate opinion is significant also for the light it sheds on potential procedural developments in this area. When the case was argued before the Grand Chamber, counsel for Kafkaris attempted to show that his rights under article 5(4) had been infringed. They sought to put forward the proposition that, if there was legal procedure for the consideration Kafkaris’s release, as the Cypriot government had claimed and the court found there to be, and if the exercise of this procedure was a condition for the lawfulness of his continued detention, then such procedure should allow for adjudication before an independent tribunal and should meet other due process safeguards (analogous to those that had been required in terms of article 5(4) when the release of English life sentenced prisoners had been considered after they had completed their tariff periods). In the event, counsel was prevented from raising this argument because they had not included it in their initial submissions to the Court. Judge Bratza, however, referred to this argument with apparent approval, although he, too, concluded that the Court was precluded from considering it fully.

IV. National Reactions to *Kafkaris*

The reaction to the *Kafkaris* decision in England and in the Netherlands, the two primary jurisdictions that have retained life sentences that are arguably irreducible, has been to give the majority judgment the most restrictive interpretation possible.

In *R v. Bieber*,⁵¹ the English Court of Appeal adopted a particularly narrow reading of *Kafkaris*,⁵² a reading that was subsequently upheld unanimously by the House of Lords in the case of *Wellington*.⁵³ Then Lord Chief Justice Phillips, who gave the judgment of the Court in *Bieber*, sought to demonstrate that *Kafkaris* did not prevent a court from imposing an ostensibly irreducible sentence; rather, it meant only that unjustifiably long detention of someone sentenced to life imprisonment could possibly infringe article 3. In my view, this distinction is without merit. If the sentence is irreducible as a matter of law when it is imposed, then it logically cannot be reduced at a future date.

In fact, the position in England had become more restrictive than it had been at the time of the early leading case of *Hindley*, because the powers of the Home Secretary to intervene to release an offender sentenced to life imprisonment had all but disappeared. All that remained was a

provision that allowed the Secretary of State for Justice to order the release of a prisoner if he is satisfied that “exceptional circumstances exist which justify the prisoner’s release on compassionate grounds.”⁵⁴ Although in practice this provision had been used only in cases of terminal illness, Lord Phillips held that it was sufficient to meet the de jure and de facto requirements of a prospect of release that had been laid down in *Kafkaris*.

In the Netherlands, too, the *Hoge Raad*, the court of final instance, in its judgment of June 16, 2009,⁵⁵ took a narrow view of the requirements set in the *Kafkaris* case. It noted that in the modern Netherlands, release of a person sentenced to life imprisonment could be effected only by a pardon, because the previous policy of converting life sentences into fixed-term sentences had lapsed. In its view, the existence of legislation governing pardons (the *Gratiwet* of 1987) and, in theory, a procedure that would allow a prisoner to approach the courts and argue that his life sentence should be set aside were sufficient to create a de jure prospect of release. The court refused to consider the de facto aspect of the *Kafkaris* test directly, holding simply that there was no evidence before it that prisoners sentenced to life imprisonment were not being released.

The narrowness of both these decisions may rightly be criticized.⁵⁶ They fail to consider the primary question of why irreducible life sentences are unacceptable. If they had done so, they would have recognized that irreducible sentences are founded on an a priori denial of the ability of this group of prisoners to reform sufficiently to enable them to become responsible members of society. Such an oversight is particularly glaring in the Netherlands, where the 1999 Penitentiary Principles Act, which applies to all prisoners, including those serving life sentences, states as its point of departure that the implementation of all prison sentences and measures of detention are to be used, as far as possible, to prepare inmates to return to society.⁵⁷ In practice, Dutch offenders who are sentenced to life imprisonment are not offered programs that will enable them to fulfill this objective because it is assumed that they will not be released.⁵⁸

Of further significance is the particular dilemma posed to courts in Europe when the attack on an ostensibly irreducible life sentence is related to an extradition application. Such applications are often from the United States of America, where the offender may be subject to a mandatory life sentence without parole. Ironically, such a sentence may be a lesser penalty to accept, because extradition will routinely be subject to the condition that the death penalty not be imposed.

On the facts, the reactions of national courts have been mixed. The House of Lords in England has held in *Wellington* that returning an offender to the United States where he would face a life sentence if convicted would not amount to an infringement of his article 3 rights as interpreted by the ECtHR in *Kafkaris*, because even whole-life sentences could be set aside by gubernatorial pardon—although, as the House of Lords recognized, that is unlikely

to happen. The House of Lords indulged in a great deal of soul searching on whether a different standard should be applied to the absolute prohibition on torture and inhuman or degrading punishment when the application of article 3 of the European Convention on Human Rights concerned an extradition matter. In the end, it accepted by a majority of three to two that, whereas torture was a clear concept, the meaning of the words *inhuman or degrading treatment or punishment* in article 3 of the European Convention on Human Rights depended on their context. Strictly speaking, however, this conclusion was irrelevant in the light of their unanimous primary finding that, in any event, the article would not be infringed if the extradition of Wellington were allowed.

In its decision of July 6, 2005, the German Federal Constitutional Court also allowed extradition of an offender who faced a whole-life sentence on the basis that he might be pardoned.⁵⁹ It reasoned that, although the procedure that would be applied to the consideration of his release in the United States would not meet the due process standards of the German Constitution, the core values of the Constitution were not threatened by a foreign procedure as long as in practice the person serving a life sentence would have an opportunity to be considered for release. This judgment, like that in *Wellington*, is noteworthy because it accepts that offenders who face extradition will have a partial chance of release.

Certainly in California, to which the offender would have been extradited from Germany, there is some evidence that release was unlikely to be considered on the merits of the case,⁶⁰ but neither the German court nor its English equivalent conducted such a factual inquiry. (In fairness, such an inquiry would be hard to undertake in practice, and in extradition cases courts tend to rely largely on diplomatic assurances.) The decision of the German Court, which of course preceded *Kafkaris*, was given without reference to the jurisprudence of the ECtHR, but it does draw a distinction between what national law must require regarding the release of individuals sentenced to life imprisonment and what is acceptable if they are tried abroad.

Against this background, the German Constitutional Court's most recent decision with respect to a person facing extradition to a country where he could be sentenced to life imprisonment, handed down on January 16, 2010,⁶¹ is all the more remarkable for the more stringent requirements that it sets. At issue was the extradition of a person to Turkey to face a charge of terrorism. On inquiry, the court that originally heard the matter was told that, if convicted, the offender would face an aggravated life sentence. However, the court was also told that the Constitution of Turkey gave the president the power to pardon someone sentenced to life imprisonment. More precisely, it was told that in terms of article 104 of the Turkish Constitution, the president of Turkey had the power "to remit, on grounds of chronic illness, disability, or old age, all or part of the sentences imposed on certain individuals."⁶² On

this basis, the initial court found that the matter was *in pari materia* with decision of the Federal Constitutional Court of July 16, 2005, and allowed the extradition to go ahead.

In its decision of January 16, 2010, the Federal Constitutional Court disagreed. It reaffirmed that, notwithstanding the requirement of international law that foreign legal orders were to be respected, if someone had no practical prospect of release, according to whatever procedure, such punishment would be cruel and degrading (*grausam und erniedrigend*). The Court then added:

that human dignity and the inalienable rights derived from the principle of the rule of law (*Rechtsstaatsprinzip*) could also be infringed if a legal order provided that only severe infirmity or life threatening illness of a prisoner could lead to a life sentence not being carried out further. This applies in any case, even if such circumstances are brought to the attention of the authorities but the return to freedom of the prisoner remains uncertain because he can only hope for an act of grace.

Against this background of principle, the Federal Constitutional Court noted that the power of the Turkish president to intervene was limited to certain specific circumstances. In its view, these circumstances were insufficient. As the Federal Constitutional Court explained:

The specific requirement takes away from the offender—notwithstanding the development of his personality—any hope of a self determined life in freedom. The [Turkish] power to pardon that is being considered here does not open even a vague prospect that of a life in freedom that makes the implementation of the life sentence bearable in terms of the dignity of the person in any way that would satisfy the German constitutional order: At best it lets the offender hope to die in freedom.

It is worth emphasizing that this decision was reached not on procedural grounds, but because Turkish law ostensibly precluded a release on the grounds that the prisoner had been resocialized and therefore no longer posed a risk to society. Such an analysis could fruitfully be applied at the European level, too, because it recognizes procedural differences, thus allowing what in European human rights law is referred to as a *margin of appreciation* while making clear what factors must be considered under all circumstances.

V. The Future of the Irreducible Life Sentence in Europe

It seems likely that the European Court of Human Rights will have to clarify its thinking on life imprisonment in the near future, because it remains unclear what a *de jure* and *de facto* prospect of release really means. One way in

which this clarification could be accomplished would be to return to first principles and to ask, as the dissent in *Kafkaris* did most clearly (but the majority did implicitly, too), why individuals who are sentenced to life imprisonment should have a prospect of release. In this regard, the emerging European consensus around the idea that the human rights of individuals sentenced to life imprisonment require that they, too, be prepared for release, gives an indication that the rules governing release should be sufficiently flexible to allow a release on the grounds that the offender is now demonstrably capable of living in a free society without posing a danger to others. Expressed differently, a procedure that allows release only when the offender is at death's door does not meet the requirements set by article 3 of a prospect of release for all prisoners.

Some indication that key judges from the ECtHR are thinking along these lines emerges from the decision of the Grand Chamber in *Léger v. France*.⁶³ This case involved an offender sentenced to life imprisonment whose release had long been delayed—he served forty-one years. Léger challenged the compatibility with the European Convention on Human Rights of the very long delay in granting him release. His application was turned down by a majority of the Chamber of the ECtHR that initially heard it, but the matter was referred to the Grand Chamber because it raised a serious issue of general importance. Unfortunately, Léger and his lawyer both died before the Grand Chamber could come to a conclusion in this case, and in March 2009 the Chamber decided by a majority not to proceed with the case.⁶⁴

Unusually for a procedural matter, a minority of four judges, headed by Judge Spielmann, the Luxembourgian judge on the Court, argued strongly that the Court should have continued to hear the case because the law in this area requires further development. Judge Spielmann referred extensively to the decision of the German Constitutional Court of June 21, 1977 (discussed previously), and argued that the principles it asserted should also be applied at the European level to ensure that individuals sentenced to life imprisonment should retain the hope of entitlement to a measure such as parole.

The most recent German decision on extradition and life imprisonment should provide the ECtHR with additional material for further thought. Applying the German standard as developed in the decision of January 16, 2010, to the rest of Europe should logically lead to the conclusion that the very limited provisions for release from life imprisonment in the Netherlands (as well as in England in those instances where minimum periods are not set by the sentencing court) are not adequate to ensure that these sentences are not de facto irreducible.

In addition, it is likely that courts will recognize that issues about the lawfulness of continued detention are going to be raised whenever a decision is made about the possible release of prisoners serving sentences of life imprisonment for which no clear minimum period has been set. Article 5(4) of the European Convention on

Human Rights is likely to be invoked to ensure that the procedures governing these decisions meet some minimum procedural standards. These procedures will not be uniform across Europe, because individual countries will continue to be allowed a margin of appreciation in deciding what form the procedures should take. Nevertheless, even in countries that may continue to use pardons as the primary way of releasing life-sentenced prisoners, some proceduralization of these decisions can be expected, too, with courts playing an increasingly prominent role in making them. Eventually, the procedure is likely to become fully judicialized.

In sum, there are sufficient indications, even in the *Kafkaris* decision (which for the time being is still the leading case in this area), that pan-European principles about the implementation of sentences of imprisonment recognize the fundamental dignity of all people and the importance of meeting basic procedural standards. For those serving life sentences, giving them a fair prospect of release while they may still be able to play a role in society is a way of applying these principles.⁶⁵ One may confidently expect that this analysis will be developed further and that it will contribute to the unambiguous outlawing of irreducible life sentences in the near future.

Notes

* My sincere thanks go to Andrea Baechtold, Miranda Boone, Frieder Dünkel, Martine Herzog-Evans, and Christine Morgenstern for information, and to David Hayes for research assistance.

¹ [2008] EWCA Crim 1601, [2009] 1 W. L. R. 223 at 238, ¶ 46.

² COMMITTEE FOR THE PREVENTION OF TORTURE, HUNGARY VISIT ¶ 33 (2007), available at <http://www.cpt.ce.int/documents/hun/2007-24-inf-eng.pdf>. On the role of the CPT as a pan-European prison inspectorate, see DIRK VAN ZYL SMIT & SONJA SNACKEN, PRINCIPLES OF EUROPEAN PRISON LAW AND POLICY; PENOLOGY AND HUMAN RIGHTS 13–18, 30–31, 370–71 (2009).

³ App. No. 21906/04, Eur. Ct. H.R. (2008).

⁴ Dünkel and Stańdo-Kawecka summarize the situation as follows: The maximum youth prison sentences or similar sanctions of deprivation of liberty vary between three years in Portugal, four years in Switzerland, five years in the Czech Republic, 10 years in Estonia, Germany and Slovenia and 20 years in Greece and Romania (in cases where life imprisonment is provided for adults) and even longer terms up to (theoretically) life imprisonment in England/Wales, the Netherlands or Scotland (in the latter cases restricted, however, to juveniles of at least 16 years of age). In general, the maximum is fixed at 10 years, sometimes allowing an increase of penalties of up to 15 years for very serious crimes. It is amazing, however, that countries such as Portugal or Switzerland do not allow for longer sentences than three or four years even for very serious (murder) cases.

Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty—Comparative Aspects*, in JUVENILE JUSTICE SYSTEMS IN EUROPE—CURRENT SITUATION AND REFORM DEVELOPMENTS 1772 (F. Dünkel et al. eds., 2010).

⁵ Weeks v. United Kingdom, App. No. 9782/82, Eur. Ct. H.R. (1988).

⁶ Hussain v. United Kingdom, App. No. 21928/93, Eur. Ct. H.R. (1996). Technically Hussain, who was 16 years old at the time of the commission of the offense, was sentenced to “detention at Her Majesty’s pleasure,” but this is a de facto life sentence.

- ⁷ V v. United Kingdom, App. No. 24888/94, Eur. Ct. H.R. (1999). Even this was insufficient for a large dissenting minority of the seventeen judges. Seven of the judges argued that imposing an indeterminate sentence on a child as young as 11 was an inherently inhuman and degrading punishment that violated Article 3 of the European Convention on Human Rights, even if the child had a realistic prospect of release and there were appropriate procedures in place for considering such release.
- ⁸ 2010 WL 1946731, *21-22 (U.S.).
- ⁹ *Id.* at *41 n.11 (Thomas, J., dissenting).
- ¹⁰ CONSTITUIÇÃO DE PORTUGAL art. 30.1.
- ¹¹ Hans-Jörg Albrecht, *Post-Adjudication Dispositions in Comparative Perspective, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 293 (Michael Tonry & Richard S. Frase eds., 2001).
- ¹² Katja Šugman Stubbs & Matjaž Ambrož, *Slovenia, in RELEASE FOR PRISON: EUROPEAN POLICY AND PRACTICE* 337 (N. Padfield et al. eds., 2010).
- ¹³ The number would be sixteen years in the case of recidivists. Sonja Snacken et al., *Belgium, in RELEASE FOR PRISON: EUROPEAN POLICY AND PRACTICE* 7e (N. Padfield et al. eds., 2010).
- ¹⁴ For an overview in tabular form, see Frieder Dünkel, *Kommentierung § 57 StGB, in 1 NOMOS KOMMENTAR ZUM STRAFGESETZBUCH* (U. Kindhäuser et al. eds., 2010).
- ¹⁵ C.E. art. 25.2.
- ¹⁶ *Lebach*, BVerfGE 35, 203.
- ¹⁷ J.C. Mir, *Das neue spanische Strafgesetzbuch von 1995*, 108 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 657 (1996); J.B. Santos, *La reforma española en la transición a la democracia*, 1 REVUE INTERNATIONALE DE DROIT PÉNAL 63 (1978).
- ¹⁸ BVerfGE 45, 187.
- ¹⁹ Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Massregeln der Besserung und Sicherung (Strafvollzugsgesetz) [Prison Act], v. 16.3.1976 (BGBl. I S. 581), art. 2.
- ²⁰ Dirk van Zyl Smit, *Is Life Imprisonment Constitutional?—The German Experience*, 1992 PUBLIC LAW 263.
- ²¹ §§ 57, 57-a-1 StGB.
- ²² BVerfGE 86, 288.
- ²³ For an example, see the decision of December 21, 1994, reported in 49 NEUE JURISTISCHE WOCHENSCHRIFT 3244–46 (1995).
- ²⁴ The current German procedure was upheld by the ECtHR in *Streicher v. Germany*, App. No. 40384/04, Eur. Ct. H.R. (2009), and *Meixner v. Germany*, App. No. 26958/07, Eur. Ct. H.R. (2009).
- ²⁵ FORUM LEVENSLANG, FEITEN LEVENSLANGE GEVANGENISSTRAF IN NEDERLAND ANNO 2010 (2010) (mimeographed fact sheet drawn up by W.F. Van Hattum in cooperation with H. Goeting for the pressure group Forum Levenslang in January 2010).
- ²⁶ The position is different in Scotland because, although its system for setting the duration of life sentences is broadly similar to that in England and Wales, the Convention Rights (Compliance) (Scotland) Act 2001 c. 7 (Scot. Parl. Acts) amended the law in Scotland to ensure that a minimum period would be set in all cases in which a life sentence is imposed. This amendment is significant because this Act, which was introduced at the time of devolution of powers to Scotland, was designed to ensure that all Scots laws were compatible with the European Convention of Human Rights. It indicates that the legislature had doubts about whether failing to set a minimum, which is still found in England and Wales, met this requirement. However, the legislation does explicitly allow the imposition of a minimum period that is likely to exceed the remainder of the prisoner's natural life, thus making it possible that a whole-life sentence may be imposed indirectly by removing a realistic prospect of release during the prisoner's lifetime.
- ²⁷ Criminal Justice Act, 2003, c. 44, § 269 (Eng.).
- ²⁸ NICOLA PADFIELD, *BEYOND THE TARIFF: HUMAN RIGHTS AND THE RELEASE OF LIFE SENTENCED PRISONERS* (2002).
- ²⁹ On 31 March 2008, 10,911 prisoners were serving an indeterminate sentence (life imprisonment or Imprisonment for Public Protection) in prisons in England and Wales. See HM Prison Service, *Life Sentenced Prisoner*, at http://www.hmprisonservice.gov.uk/adviceandsupport/prison_life/lifesentencedprisoners (last visited March 6, 2010).
- ³⁰ 1 A.C. 410, 417H (H.L. 2001).
- ³¹ Articles 221-3 and 221-4 of the Code Pénal create an exception to Article 132-23, which deals with ordinary minimum periods for life sentences.
- ³² Cons. const., Jan. 24, 1994, D. 1994, 93.
- ³³ MARTINE HERZOG-EVANS, *DROIT DE L'EXÉCUTION DES PEINES* (3d ed. 2007).
- ³⁴ See BV, CST., COST. FED. art. 123a (introduced following a referendum on Feb. 8, 2004).
- ³⁵ The constitutional provision does not automatically create criminal law. For this, an amendment to the Swiss Criminal Code was required. Article 64c, which was introduced to the Code in 2007 and came into effect in 2008 (see AS 2008 2961, 2964; BBl 2006 889), attempts to interpret the new constitutional provisions in a way that conforms with the European Convention on Human Rights, for example, by defining new scientific knowledge very widely and requiring an investigation after the offender has served two thirds of the underlying prison sentence. Such an investigation must be repeated annually.
- ³⁶ Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MODERN L. REV. 541 (2004).
- ³⁷ The cases initially dealt only with discretionary life sentences—see *Weeks v. United Kingdom*, App. No. 9782/82, Eur. Ct. H.R. (1988); *Thynne, Wilson and Gunnell v. United Kingdom*, App. No. 11787/85, Eur. Ct. H.R. (1990)—but were extended to mandatory sentences, first for juveniles—see *V v. United Kingdom*, App. No. 24888/94, Eur. Ct. H.R. (1999); *Hussain v. United Kingdom*, App. No. 21928/93, Eur. Ct. H.R. (1996)—and then finally for adults—see *Stafford v. United Kingdom*, App. No. 46295/99, Eur. Ct. H.R. (2002).
- ³⁸ App. No. 63716/00, Eur. Ct. H.R. (2001).
- ³⁹ See *R (Anderson and Taylor) v. Secretary of State for the Home Department*, 1 AC 837 (H.L. 2003); *Stafford v. United Kingdom*, App. No. 46295/99, Eur. Ct. H.R. (2002). The present position in the United Kingdom may be found in statute in the Criminal Justice Act, 2003, c. 44, § 239 & Sch. 19.
- ⁴⁰ App. No. 44190/98, Eur. Ct. H.R. (2001).
- ⁴¹ App. No. 71555/01, Eur. Ct. H.R. (2001).
- ⁴² *Id.* ¶ 27.
- ⁴³ *Convention on the Prevention of Terrorism*, Council of Europe, C.E.T.S. No. 196 (2005).
- ⁴⁴ Eur. Comm. of Ministers, *Draft General Report on the Treatment of Long-term Prisoners*, Doc. No. CM(75)143add3 (1975).
- ⁴⁵ Eur. Comm. of Ministers, *Recommendation R (99) 22 of the Committee of Ministers to Member States Concerning Prison Overcrowding and Prison Population Inflation* (1999).
- ⁴⁶ Eur. Comm. of Ministers, *Recommendation Rec (2003) 22 of the Committee of Ministers to Member States on Conditional Release (Parole)* (2003).
- ⁴⁷ Eur. Comm. of Ministers, *Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules* (2006).
- ⁴⁸ Council Framework Decision 2002/584/JHA, 2002 O.J. (L 190) art. 5.
- ⁴⁹ Rome Statute of the International Criminal Court, 1998, 2187 U.N.T.S. 90 (1998). Although the International Criminal Court is, of course, not a European institution, this requirement

- is of significance not only because most European states are signatories to the Rome Statute, the foundational treaty of the International Criminal Court, but also because the acceptance of a reducible life sentence for a crime such as genocide, the crime of crimes, must lead to some consideration of whether irreducible sentences are acceptable for so-called mere domestic crimes. For the impact of international tribunals generally on this issue, see DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW* ch. 5 (2002).
- ⁵⁰ Emphasis added. Whole-life sentences for juveniles were effectively prohibited in Europe by the decisions of the ECtHR in *Weeks v. United Kingdom*, App. No. 9787/82, Eur. Ct. H.R. (1987), and *V v. United Kingdom*, App. No. 24888/94, Eur. Ct. H.R. (1999).
- ⁵¹ [2008] EWCA Crim 1601, [2009] 1 W. L. R. 223.
- ⁵² It was not strictly necessary for the Court of Appeal to consider this point at all, because Bieber succeeded in his appeal to the extent that the Court of Appeal agreed that a minimum period should have been set for him. Elsewhere I have argued that this analysis is an extended *obiter dictum*, which can perhaps be understood as resistance in England to the shaping of national penal policy by the ECtHR. See Dirk van Zyl Smit & Sonja Snacken, *Shaping Penal Policy from Above? The Role of the Grand Chamber of the European Court of Human Rights, in INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE AND URBAN GOVERNANCE* (A. Crawford ed., 2010) (forthcoming).
- ⁵³ *R (on the application of Wellington) v. Secretary of State for the Home Department*, 1 A.C. 335 (H.L. 2009).
- ⁵⁴ Crimes (Sentences) Act, 1997, § 30 (Eng.).
- ⁵⁵ HR, June 16, 2009, LjN BF3741.
- ⁵⁶ For the English decision, see Michael Bohlander *The Remains of the Day—Whole Life Sentences after Bieber*, 73 J. CRIM. L. 30 (2009). For the decision from the Netherlands, see P.A.M Mevis, *Noot*, 51/52 NEDERLANDS JURISPRUDENTIE 6092 (2009).
- ⁵⁷ *Penitentiaire Beginselwet* [Penitentiary Principles Act], Stb. 1998, 430.
- ⁵⁸ See FORUM LEVENSLANG, *supra* note 25 (quoting policy statement of Minister Ballin and Secretary of State Albaryk).
- ⁵⁹ BVerfGE 113, 154.
- ⁶⁰ Not one of the 2,500 individuals sentenced to life without parole in California between 1978 and 2005 had their sentence commuted. Robert Johnson & Sandra McGunigall-Smith, *Life without Parole, America's Other Death Penalty*, 88 PRISON J. 328, 332 (2008).
- ⁶¹ The decision is unreported.
- ⁶² The Web site of the Prime Minister of Turkey (<http://www.byegm.gov.tr/sayfa.aspx?id=78>) provides an English translation of the Turkish Constitution.
- ⁶³ *Léger v. France*, App. No. 19324/02, Eur. Ct. H.R. (2009).
- ⁶⁴ *Id.* ¶¶ 45–51.
- ⁶⁵ For a more general discussion of the problems with irreducible sentences, see Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597 (2007); Dirk van Zyl Smit, *Life Imprisonment: Recent Issues in National and International Law*, 29 INT'L J. L. & PSYCHIATRY 405 (2006).