

The Role of Human Rights in Long-Term Sentencing

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DOI: [10.1163/18750230-02602010](https://doi.org/10.1163/18750230-02602010)

Abstract

In recent decades, the number of long-term detainees held worldwide has increased significantly. Academics and policy makers have begun to challenge the widespread use and effectiveness of such severe sentences, however. This article aims to shed light on the role of human rights in imposing and executing long-term custodial sentences. There appears to be tension between ensuring that human rights are respected and provision of security through the incapacitation of offenders. This tension can only be understood properly in the context of contemporary risk-management associated with increased punitiveness.

Keywords

imprisonment – long-term sentencing – human rights – risk-management

The Rise in Long-Term Sentences

In recent decades, western countries have seen a drastic increase in long-term prison sentences. This trend dates back to the 1970s and 1980s, when severe and long-term sentences were accepted as an apt, retributive response to growing crime figures in the United States.¹ Some years later, this trend of tough-on-crime policies also started in other parts of the Anglo-Saxon world, eventually taking root in Europe. There is no consensus in criminological literature and national crime statistics as to what constitutes a long-term prison sentence;² definitions range from five years to irreducible (or “whole”) life sentences. In the latter case, life means life. In such cases, prisoners remain incarcerated until they die. What further complicates the definition is that some scholars look at prison time imposed while others focus on actual time served or time remaining.³ In this contribution, a long sentence is a sentence of at least ten years. Following prior studies in this area, long-termers include individuals sentenced to life—both individuals sentenced to life with parole and those sentenced to life without the possibility of parole (also known as LWOP).⁴ Of all countries worldwide, the United States is home to the largest lifer population.⁵ Lifer here refers to someone who is convicted for life without the possibility of parole—i.e., to whole-life and irreducible life sentences. The population of life-sentenced individuals in the United States has quadrupled since 1984. Today, one out of every nine prisoners is serving a life sentence, which is about 160, 000 people or an entire mid-size U.S. city. The vast majority of these prisoners will eventually be released⁶ after spending an average of 29 years in prison.⁷ Although the United States is unparalleled in its number and length of prison sentences,⁸ the growing trend is also mirrored

1 A. Nellis and J. Chung, *Life Goes On: The Historic Rise in Life Sentences in America*, The Sentencing Project, Washington dc, 2013; J. Austin, ‘Reducing America’s Correctional Populations: A Strategic Plan’, in *Justice Research and Policy*, no. 1, 2010, pp. 9–40.; J.Q. Wilson, ‘Bringing Punishment Back In: Conservative Criminology’, in J.R. Lilly, F.T. Cullen and R.A. Ball (eds.), *Criminological Theory: Contexts and Consequences*, Los Angeles, 2015, pp. 317–349.

2 E.L. Cowles and M.J. Sabbath, ‘Changes in the Nature and Perception of the Long-Term Inmate Population: Some Implications for Prison Management and Research’, in *Criminal Justice Review*, no. 21, 1996, pp. 44–61; T.J. Flanagan, ‘Adaptation and Adjustment among Long-Term Prisoners’, in T.J. Flanagan (ed.), *Long-Term Imprisonment: Policy, Science and Correctional Practice*, California, 1995; L. Kazemian and J. Travis, ‘Imperative for Inclusion of Long Termers and Lifers in Research and Policy’, in *Criminology and Public Policy*, no. 14, 2015, pp. 355–395.

3 Kazemian and Travis, 2015.

4 M.D. Cunningham and J.R. Sorensen, ‘Nothing to Lose? A Comparative Examination of Prison Misconduct Rates among Life-without-Parole and Other Long-Term High-Security Inmates’, in *Criminal Justice and Behavior*, no. 33, pp. 683–705; A.L. Crayton, *Long-Term Incarceration and Public Safety: Predicting the Recidivism Risk of Long-Term Prisoners*, unpublished doctoral dissertation, New York, 2012; Flanagan, 1995a.

5 Nellis and Chung, 2013.

6 Ibid.

7 M. Mauer, R.S. King and M.C. Young, *The Meaning of “Life”: Long Prison Sentences in Context*, The Sentencing Project, Washington D.C., 2004.

8 T.R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, New York, 2007.

in Europe.

The percentage of long-termers in Europe now ranges from 11.7 percent in Germany to 71.3 percent in Moldova.⁹ The financial, social and health costs involved with incarceration on this scale are considerable.¹⁰ The average annual costs for housing one prisoner in the United States is \$31,286¹¹ which implies that U.S. taxpayers pay over five billion dollars annually to incarcerate lifers alone—not considering the remainder of the prison population. In Western European countries such as the Netherlands, costs to house prisoners are considerably higher, averaging €90,000 per prisoner per year.¹²

The implications of imprisonment—long-term imprisonment in particular—are not limited to financial costs alone, but extend to vast social costs.¹³ For many individuals, especially individuals from minority groups, prison affects a large part of life, either because they themselves have become incarcerated or because they have a parent or other family member in custody. The adverse effects of incarceration are well documented: Ex-prisoners earn less money during their lifetimes, find it harder to stay employed, are less likely to marry, and suffer a range of medical and psychological problems.¹⁴ Further, long-term incarceration is associated with a high prevalence of mental-health problems, particularly post-traumatic stress disorder (PTSD).¹⁵ Research shows that years of confinement can result in personality changes and difficulties in adapting after release. Imprisonment may thus produce lasting problems that persist long after prisoners are released.¹⁶ Ex-prisoners who have spent decades in confinement have been found to show marked features of estrangement, loss of capacity, moodiness, inability to settle and loss of purpose and direction.

They are reported to be withdrawn and unable to relate properly.¹⁷ Recent research terms the cluster of mental-health symptoms that are specific to incarceration the “post-incarceration syndrome”. It consists of institutionalized personality traits, social-sensory disorientation, and alienation.¹⁸ These aspects involve so-called “unintended effects of incarceration”. Let us now turn to the intended effects of imprisonment.

The Aims of Imprisonment

9 Council of Europe, Annual Penal Statistics: space i – 2013, Strasbourg, 2013. Retrieved 23 September 2015, <http://www.statewatch.org/news/2015/feb/coe-penal-stats>. Also see: K. Drenkhahn, M. Dudeck and F. Dünkel (eds.), Long-term Imprisonment and Human Rights, London, New York, 2014.

10 Osborne Association, ‘The High Costs of Low Risk: The Crisis of America’s Aging Prison Population’, New York, 2014. Retrieved 23 September 2015, <http://www.osborneny.org>.

11 C. Henrichson and R. Delaney, The Price of Prisons: What Incarceration Costs Taxpayers, Vera Institute of Justice, New York, 2012.

12 Rijksoverheid, Rijksbegroting. Rechtshandhaving, Criminaliteitsen Terrorismebestrijding, Den Haag, 2010. Retrieved 23 September 2015, <http://www.rijksbegroting.nl>.

13 For a discussion, see M. Liem, After Life Imprisonment: Re-entry in the Era of Mass Incarceration, NYU Press, New York, 2016.

14 Clear, 2007.

15 A. Goff, E. Rose, S. Rose, D. Purves, ‘Does PTSD Occur in Sentenced Prison Populations? A Systematic Literature Review’, Criminal Behaviour and Mental Health, no. 17, 2007, pp. 152–162; C. Haney, ‘Prison Effects in the Era of Mass Incarceration’, The Prison Journal, 2012.

16 C. Haney, ‘Mental Health Issues in Long-Term Solitary and “Supermax” Confinement’, in Crime and Delinquency, no. 1, 2003, pp. 124–156.

17 R. Jamieson and A. Grounds, ‘Release and Adjustment: Perspectives from Studies of Wrongfully Convicted and Politically Motivated Prisoners’, in A. Liebling and S. Maruna (eds.), The Effects of Imprisonment, London, 2011, pp. 94–117.

18 M. Liem and M.J.J. Kunst, ‘Is There a Recognizable Post-Incarceration Syndrome among Released “Lifers”?’ in International Journal of Law and Psychiatry, no. 3–4, 2013, pp. 333–337.

Imprisonment in general is aimed to reach at least four principal goals,¹⁹ which at the same time constitute the legitimate grounds for punishment (also called penological grounds): deterrence, public protection through incapacitation, retribution and rehabilitation. First, the threat of punishment is meant to deter the public in general from engaging in crime. The theory of general deterrence assumes that prospective offenders know the specific sentences for particular crimes, that they engage in a rational cost-benefit analysis of their actions before they act, and that they are more likely not to commit a crime the more severe the sentence for it.²⁰ From this perspective, the threat of punishment may discourage the offender from committing future criminal acts. Second, public security is served by incapacitating the offender, as he or she is unable to commit crimes in the community while incarcerated. Third, society is justified in imposing punishment as an act of retribution for the harm caused by breaking the law. The final aim of punishment, rehabilitation, seems to be largely forgotten in long-term punishments. Rehabilitation should help offenders successfully re-enter society after prison.

These aims are bound by the principle of proportionality, which dictates that the time fits the crime: i.e., punishment should always be proportionate to the severity of the crime and the culpable harm it has caused.²¹

Re-Evaluating the Aims of Imprisonment

The current trend to impose long-term sentences is linked to policy changes, not to increases in crime rates. Since the mid-1970s in the United States, and somewhat later in Europe, the political climate has progressively embraced tougher policies as the primary focus of crime-control strategy.²² This shift is grounded in the belief that one of the best ways to confront crime is to radically increase both the number of persons being sentenced to prison and the length of their period of incarceration.²³ Especially in the United States, the mid-1970s were characterized by a rising crime rate and rapid social change. This change provided a context for a series of policy choices across all branches of government that significantly increased sentence length.²⁴ During this time, policy makers and the public grew comfortable with the idea of incarcerating people for very long terms or even for the rest of their lives. Because fear of crime among the public and policymakers was crystallized by sensationalized media accounts of repeat offenses by formerly incarcerated persons, imprisonment came to be accepted as a retributive tool.²⁵ It should be emphasized that, so far, there is no evidence that long-term sentences have a deterrent effect on crime rates. In the United States alone, for example, the population of lifers has grown during the last two decades despite declining crime rates and shrinking prison populations in some states.²⁶

In recent years, however, there has been a significant shift in both public and policy discussions concerning

19 E. van den Haag, *Punishing Criminals*, Lanham, 1991.

20 Human Rights Watch, *Old Behind Bars*, 2012. Retrieved 23 September 2015 from <https://www.hrw.org>.

21 A. Von Hirsch, 'Proportionality in the Philosophy of Punishment', *Crime and Justice: a Review of Research*, no. 16, pp. 55–99.

22 See also: T.R. Clear, *Harm in American Penology: Offenders, Victims, and Their Communities*, Albany, 1994; D. Garland, 'Of crimes and criminals: The Development of Criminology in Britain', in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology*, Oxford, 2002, pp. 7–51; C. Haney, 'The Contextual Revolution in Psychology and the Question Of Prison Effects', in A. Liebling and S. Maruna (eds.), *The Effects of Imprisonment*, 2011b, London, pp. 66–93.

23 Austin, 2010.

24 J.S. Henry, 'Reducing Severe Sentences', in *Criminology and Public Policy*, no. 2, 2015, pp. 397–405; National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington D.C., 2014.

25 Nellis and Chung, 2013.

26 Kazemian and Travis, 2015.

the aims of imprisonment—in particular, of the extent to which public safety can be achieved through incarceration. This shift has opened debate on the use of long-term sentences, particularly given their social and fiscal costs.²⁷ In what follows, we re-evaluate the aims of imprisonment from a much-neglected angle: the human-rights perspective.

Deterrence

Deterrence theories identify three elements as crucial to achieving a deterrent effect by prison sentences: certainty, speed and severity. Certainty refers to the likelihood of being caught and brought to justice; speed refers to the time between the crime and the punishment imposed; and severity—which includes the duration of a sentence—relates to the harshness or impact of the sentence on the offender’s life. Contrary to popular belief, studies repeatedly find that the severity of sanctions has little to no impact on crime rates.²⁸ The same goes for sentence length and crime rates.²⁹ The increase of already long sentences is not associated with lower crime rates. This fact leads academics to conclude that sentence severity has been grossly overestimated in many correctional policies.³⁰

Similarly, the idea that a prison sentence can contribute to specific deterrence is not supported by evidence.³¹ Longitudinal studies on the general risk of re-offending indicate that re-offending peaks within one or two years post-release,³² and that within seven years after release, the risk of re-offending is back at the same level as that of the general population.³³ Also, the assumption that long-term detainees are more dangerous and pose greater risks to society than other ex-prisoners is not supported by empirical evidence.³⁴ Recent Dutch research on sentence length and re-offending among 600 homicide offenders shows that longer sentences increase the likelihood of re-offending in the first years after release but that re-offending is less likely to occur when time in prison exceeds eight to ten years.³⁵ In line with these findings, scholars argue that long-termers are often incarcerated long after they have passed the age during which they are at high risk to commit crimes:³⁶ namely, adolescence. It is a well-established fact that age is inversely associated with the risk of committing crimes. Taken together, the evidence suggests that long prison terms are insufficient to deter

27 Henry, 2015.

28 B. Jacobs and A.R. Piquero, ‘Boundary-Crossing in Perceptual Deterrence Investigating the Linkages Between Sanction Severity, Sanction Certainty, and Offending’, in *International Journal of Offender Therapy and Comparative Criminology*, no. 7, 2013, pp. 792–812.

29 D.S. Nagin, ‘Deterrence: A Review of the Evidence by a Criminologist for Economists’, in *Annual Review of Economics*, no. 1, 2013, pp. 83–105.

30 S.M. Mendes, ‘Certainty, Severity, and Their Relative Deterrent Effects: Questioning the Implications of the Role of Risk in Criminal Deterrence Policy’, in *Policy Studies Journal*, no. 1, 2004, pp. 59–74.

31 Clear, T.D., *Imprisoning Communities: How Mass Incarceration makes Disadvantaged Neighborhoods Worse*, 2007.

32 C.M. Harris and S.D. Moltra, ‘Improved Statistical Techniques for the Measurement of Recidivism’, in *Journal of Research in Crime and Delinquency*, no. 2, 1978, pp. 194–213.; M.D. Maltz, *Recidivism*, Chicago, 1984; P. Schmidt and A.D. Witte., *Predicting Recidivism Using Survival Models*, New York, 1988; C.A. Visher, P.K. Lattimore and R.L. Linster, ‘Predicting the Recidivism of Serious Youthful Offenders Using Survival Models’, in *Criminology*, no. 3, 1991, pp. 329–366.

33 M. Kurleychek, R. Brame, and S.D. Bushway, ‘Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Offending?’ in *Criminology and Public Policy*, no. 5, 2007, pp. 483–504; ‘Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement’, in *Crime and Delinquency*, 2007, no. 53, pp. 64–83.

34 A. Coyle, ‘Management of Long-term and Life-Sentenced Prisoners Internationally in the Context of a Human Rights Strategy’, in N. Browne and S. Kandelina (eds.) in *Managing Effective Alternatives to Capital Punishment*, Centre for Capital Punishment Studies occasional paper series three, London, 2005, pp. 41–50.

35 P. Baaij, M. Liem and P. Nieuwebeerta, ‘Ex-imprisoned Homicide Offenders: Once Bitten, Twice Shy?’ The Effect of the Length of Imprisonment on Recidivism for Homicide Offenders’, in *Homicide Studies*, no. 16, 2012, pp. 219–237.

36 D. Cole, ‘Turning the Corner on Mass Incarceration?’ in *Ohio State Journal of Criminal Law*, no. 1, 2011, pp. 27–51.

both actual offenders and prospective offenders from criminal behaviour. From a human-rights perspective, continued incarceration may constitute a violation of the right to a just and proportionate punishment for prisoners who no longer pose a public safety risk and who have already served a considerable portion of their prison sentence.³⁷

Public Security

From a public-security point of view, incapacitation serves to protect the public by incapacitating offenders. Because they are in prison, incarcerated individuals commit fewer crimes. It remains unknown, however, how great this effect is.³⁸ Most studies indicate that there are “substantial upper limits”³⁹ to the incapacitation effect, particularly for prisoners who serve long sentences. Because of the length of their sentence, many long-termers are so-called “geriatric” inmates. Because the process of aging is accelerated in prison, and due to the high burden of disease and unhealthy lifestyles prior to and during incarceration,⁴⁰ long-term prisoners are termed “older” from age 50 and above⁴¹ and “geriatric” when they reach age 55.⁴² Again, from a human-rights standpoint,⁴³ incarceration may have little or no added incapacitation value for older offenders who are declining physically and mentally.⁴⁴ Many long-termers worldwide have passed the upper limit of dangerousness simply because of their age,⁴⁵ but they remain incarcerated because they are unjustly perceived as high-risk re-offenders.

Retribution

An important component of criminal justice is ensuring that offenders are punished for the crimes they commit. Victims, their families, and society at large legitimately want those who commit crimes to be held accountable by punishment that “fits the crime”: i.e., by punishment that is proportionate to the severity of the crime and the individual’s culpability.⁴⁶ In their recent report on the aging prison population, Human Rights Watch (HRW) emphasizes that the proportionality of a sentence is typically assessed based on the circumstances that existed at the time of the crime. Nevertheless, though a prison term may have been proportionate at the time imposed, increasing age and infirmity may change the calculus against continued incarceration and in favor of some form of conditional release. Based on interviews with staff and prisoners from over twenty prisons throughout the United States, HRW concludes that it is hard to see how continued

37 International Covenant on Civil and Political Rights (ICCPR) Article 6.1 (1966); European Charter of Fundamental Rights Article ii 49.3 (2009); D. van Zyl Smit and A. Ashworth, ‘Disproportionate Sentences as Human Rights Violations’, in *The Modern Law Review*, no. 4, 2004, pp. 541–560.

38 A.R. Piquero and A. Blumstein, ‘Does Incapacitation Reduce Crime?’ in *Journal of Quantitative Criminology*, no. 4, pp. 267–285.

39 Clear, T.D., *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, 2007. p. 45.

40 A.R. Piquero and A. Blumstein, ‘Does Incapacitation Reduce Crime?’ in *Journal of Quantitative Criminology*, no. 4, pp. 267–285.

41 R. Aday and J. Krabill, ‘Older and Geriatric Offenders: Critical Issues for the 21st Century’, in L. Gideon (ed.), *Special Needs Offenders in Correctional Institutions*, California, 2013, pp. 203–233.

42 B. Williams and R. Abalades, ‘Growing Older: Challenges of Prison and Reentry for the Aging Population’, in R.B. Greifinger (ed.), *Public Health Behind Bars*, 2007, pp. 56–72.

43 Universal Declaration of Human Rights, art. 5 (1948); European Convention on Human Rights, art. 3 (1950).

44 Human Rights Watch, 2012.

45 Baaij, Nieuwebeerta and Liem, 2012; Cole, 2011.

46 Human Rights Watch, 2012.

incarceration meaningfully serves any of the purposes for which sentences were originally imposed for the vast majority of elderly prisoners.⁴⁷ Now that punitive ideologies are especially prevalent, criminal-justice professionals, victims and members of the public believe that offenders strongly support retributive punishment. The question here is not whether long-termers escape punishment by virtue of old age, but whether continued imprisonment continues to serve a retributive ideal. From a human-rights point of view, once retributive values have been acknowledged—for example when a prison sentence has been imposed and part of it has been served—there seems to be little basis for insisting on continued incarceration regardless of other considerations.⁴⁸ For long-term sentences, retribution has been furthered by an extensive time spent behind bars. Under international human-rights law, imprisonment should not be aimed purely at retribution. Besides punishing the offender for wrongdoing, a prison sentence serves to seek the reformation and social rehabilitation of the prisoner.⁴⁹

Rehabilitation

In addition to being required by human-rights law, the rehabilitation of incarcerated offenders constitutes an apt penal policy that will enhance the ability of former prisoners to lead productive, law-abiding lives. Individuals who have committed crimes can grow and change markedly while incarcerated, especially if they are provided with rehabilitative programs and opportunities for the development and acquisition of new skills.⁵⁰ The United Nations (UN) also claims that imprisonment should attempt the reform and rehabilitation of offenders.⁵¹ Released prisoners in general face multiple challenges when they return home, including substance abuse, (mental) health problems, legal issues, and housing.⁵² For those incarcerated for decades on end, these effects are exacerbated. Long-term imprisonment constitutes an extreme on many fronts: on one hand, it entails considerable deprivations and requires substantial and long-term allocations of scarce correctional resources; on the other hand, long-term imprisonment may cause harm to inmates, and hence may negatively impact their likelihood of doing well after release. Too often, however, the idea of rehabilitating offenders—particularly long-term offenders—is completely abandoned.⁵³ To the extent that correctional facilities provide services, rehabilitation efforts are made only at the very end of long-term sentences.⁵⁴ Currently, the vast majority of criminal-justice policies do not target rehabilitation from the onset of a sentence and allocate few means to re-socialization programs.⁵⁵

The vast majority of long-termers eventually get out of prison. Their reentry into society is not necessarily

47 Human Rights Watch, 2012.

48 Ibid.

49 Ibid.

50 Ibid.

51 United Nations, Persons Deprived of Liberty, U.N. Doc. 04/10/1992, 1992.

52 D.S. Nagin, F.T. Cullen and C.L. Jonson, 'Imprisonment and reoffending', in M. Tonry (ed.), *Crime and Justice: a Review of Research*, 2009, pp. 115–200; D. Pager, 'The Mark of a Criminal Record', in *American Journal of Sociology*, 2003, no. 5, pp. 937–975; J. Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry*, Oxford, 2003; S. Richards and R. Jones, 'Beating the Perpetual Incarceration Machine: Overcoming Structural Impediments to Re-entry', in S. Maruna and R. Immarigeon (eds.), *After Crime and Punishment: Pathways to Offender Reintegration*, 2004, Portland, pp. 201–231.

53 Nellis and Chung, 2013.

54 Mauer, King, and Young, 2004.

55 Kazemian and Travis, 2015.

aided by imprisoning them for as long as possible.⁵⁶

Re-Evaluating the Use of Life Sentences

Prisoners sentenced to life in prison constitute a unique subgroup within the prison population. Recent developments highlight the need to shed light on the role of human rights in life sentences.

ECtHR

In recent years, the European Court of the Human Rights (ECtHR) has developed jurisprudence on the compatibility of human rights with life sentences without the possibility of parole. The court determined that, due to changeable circumstances, the proportionality of a long-term prison sentence can change over the course of a sentence. In such cases, the sentence should be reviewed, for it might infringe human rights.⁵⁷ In other words, long-term prison sentences can become less effective over time and can even become illegitimate. The four aims of punishment are not always served best by long prison sentences; nor have they proven necessary for all prisoners at all times.⁵⁸

This development is illustrated in the case of *Vinter and Others v. United Kingdom*,⁵⁹ in which the court decided that an irreducible life sentence is a clear violation of Article 3 of the European Convention of Human Rights (ECHR): the prohibition of torture and inhumane treatment. The ECtHR explains that an “irreducible” life sentence means a sentence in which there is no real prospect of release. Furthermore, the ECtHR argues that it is dehumanizing to be deprived of the prospect of release and thus of the opportunity to rehabilitate. Humane treatment in the context of a custodial sentence implies that the prison system must try to re-socialize the prisoner. This is not achievable if one awaits death in prison during an irreducible life sentence. Hence, the European Court of the Human Rights concludes that Article 3 of the ECHR demands a guaranteed review, “no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter”.⁶⁰ This review should allow, “the domestic authorities to consider whether any changes in the life prisoner were so significant, and such progress towards rehabilitation had been made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds”.⁶¹ This right to a review is considered a right to due process. In other words, it specifies that a legal case must be conducted in a way that protects the rights of the prisoner.

Alignment of Life Sentences and Human Rights

Given this ECtHR jurisprudence as a reference, it is evident that the life sentences of most nations are not compatible with several human rights, as almost none provide periodic reviews. Such is the case, for example, in the Netherlands,⁶² England and Wales. These countries thus constitute exceptions to European penal policy.

56 S.D. Bushway and G. Sweeten, ‘Abolish Lifetime Bans for Ex-Felons’, in *Criminology and Public Policy*, no. 4, pp. 697–706.

57 *Vinter and Others v. United Kingdom*, Application nos. 66069/09, 130/10, and 3896/10, ECtHR, 2012.

58 Henry, 2015.

59 *Vinter and Others v. UK* para. 125; *Kafkaris v. Cyprus*, Application No. 21906/04, ECtHR, 2008, para. 97/98.

60 *Vinter and Others v. UK*, para. 120.

61 Council of Europe, Intervention In the Council for Penological Cooperation Fourth Plenary Meeting, Strasbourg, 2014. Retrieved 23 September 2015, <https://www.coe.int>; also see *Vinter and Others v. UK*, para. 119.

62 See also: M. Liem, Y.A.J.M. van Kuijck, and B.C.M. Raes, ‘Detentiebeleving van (levens) langgestraften. Een empirische pilotstudie’, in *Delikt en Delinkwent*, no. 2, 2016, pp. 10–26.

In England and Wales, after serving a minimum sentence, prisoners receive a post-tariff review by the parole board. This kind of review, however, differs substantially from reviews suggested by the ECtHR. The latter includes the provision that all grounds for the original sentence should be re-evaluated to determine whether their equilibrium has changed and whether extended containment is justified.⁶³ Currently, no periodic review is in place in the Netherlands. By law, individuals who are serving a life sentence can apply for pardon. In practice, however, pardons are consistently denied, resulting in a status quo of irreducible life sentences. To make life sentences in these and other countries accord with human rights, it is necessary to institutionalize periodic reviews and offer the possibility of conditional releases.

First, periodic reviews should be incorporated in life sentences. Such reviews would not only give hope for a future outside of prison walls to lifers who are serving irreducible life sentences; they could even work as an incentive for good behavior, for work on self-improvement and for making time in prison meaningful. In line with the ruling of the ECtHR in the *Vinter* case, reviews should be held from twenty-five years and onwards in a sentence. An appointed judge should re-evaluate the balance between the aims of punishment and the dangerousness of the individual concerned. This ensures a structured balance between providing public safety by assessing future risk on one hand,⁶⁴ and considering the main aims of imprisonment from a human-rights perspective on the other. Such periodic reviews should thus question whether future incarceration is required based on potential risk rather than on retributive or deterrent grounds.

Further, conditional releases to home confinement under parole supervision should be institutionalized as an alternate punishment to extended confinement. Long-term detainees who no longer pose a threat to society and have already served part of their sentence should have the right to be subjected to alternative forms of punishment, such as home confinement with parole supervision.⁶⁵ These releases should be imposed only when a judge has found that the calculus of the sentence has changed over time. According to Human Rights Watch, at least age and infirmity must be taken into consideration by the judge. Placing individuals who are publicly perceived as dangerous back into society, however, is likely to cause turmoil. Because of the dominant myth that released long-termers are dangerous individuals who are at great risk of committing new crimes,⁶⁶ the incorporation of these practices in the criminal-justice system will not go without objections. However, it is not unreasonable to expect that policy makers build an evidence-based criminal-justice policy that is compatible with human rights.

Conclusion

It is time to change our thinking about long-term punishment. This is of great importance, as long-termers constitute a large and growing number of prisoners worldwide. From a legal perspective, recent jurisprudence dictates that the current state of affairs challenges human-rights agreements, and that a continuous absence of periodic reviews results in disproportionately long sentences.

63 D. van Zyl Smit, P. Weatherby and S. Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' in *Human Rights Law Review*, no.1, 2015, pp. 59–84.

64 D. van Zyl Smit, 'Long-term Imprisonment at Home and Abroad', 2008. Retrieved 23 September 2015, <http://www.rsj.nl>.

65 Human Rights Watch, 2012.

66 Kazemian and Travis, 2015.

In times of rampant penal populism⁶⁷ and societal-risk awareness,⁶⁸ it is easy to misinterpret this advocacy for periodic reviews and possible conditional releases as part of an apt policy for this marginalized prison population. These suggestions should not be read as an appeal to compassion or a plea to retract retribution from the calculus. In contrast, they are arguments to pay closer attention to the role of human rights in long-term sentencing. From a human-rights perspective, a prison setting is not needed to meet the aims of imprisonment. Alternatives to extended prison sentences could improve long-termers' likelihood of successful rehabilitation. In order to meet the legitimate requirement of reintegration, evidence-based programs should be designed that focus on behavioural outcomes, target high-risk offenders, use risk instruments, begin treatment in prison and provide continuity in the community.⁶⁹ It is possible that a more apt policy will reduce the risk of re-offending even further.⁷⁰

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67 J.V. Roberts and J.W. de Keijser, 'Democratising Punishment: Sentencing, Community Views and Values', in *Punishment and Society*, no. 4, 2014, pp. 474–498.

68 U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Frankfurt am Main, 1986.

69 T.P. LeBel and S. Maruna, 'Life on the Outside: Transitioning from Prison to the Community', in J. Petersilia and K.R. Reitz (eds.), *The Oxford Handbook of Sentencing and Corrections*, New York, 2012, pp. 657–683.

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This article was first published with Brill | Nijhoff publishers, and was featured on the Security and Human Rights Monitor (SHRM) website.

Security and Human Rights (formerly Helsinki Monitor) is a journal devoted to issues inspired by the work and principles of the Organization for Security and Cooperation in Europe (OSCE). It looks at the challenge of building security through cooperation across the northern hemisphere, from Vancouver to Vladivostok, as well as how this experience can be applied to other parts of the world. It aims to stimulate thinking on the question of protecting and promoting human rights in a world faced with serious threats to security.

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