

Why do you lock me up since you think that I will never be good to come out?

Why do you lock me up since you think that I will never be good to come out? Better kill me – it is cheaper!

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Abstract

At a time when the euro crisis publicly engulfs the European identity in a political and ontological crisis, out of the public eye the European Court of Human Rights has commenced its deliberations on *Vinter and Others v. United Kingdom* following a hearing on the 28th of November 2012. The case concerns the compatibility of life long imprisonment with Article 3 (freedom from torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights and Fundamental Freedoms. I argue that this case is timely for a number of reasons. While the abolition of the death penalty in Europe is celebrated as an expression of a European penal consciousness that itself can be seen as a trait of the European identity, in its wake the use and length of life sentences, including indeterminate prison sentences for public protection, show an alarming upward trend. This upward trend has taken place along many notable successes in the legalisation of prisoners' human rights as the European Court of Human Rights and national courts show greater willingness than ever before to scrutinise matters pertaining to prison policy and practice and prisoner treatment. Drawing on prison studies on the effects of life imprisonment, my own data from interviews with lifers in England & Wales and The Netherlands and relevant human rights based prison case law, I build an argument for the abolition of life long imprisonment in Europe and for a principled *qua* restrained approach to the use of life and indeterminate prison sentences. My claim is that, like the abolition of the death penalty, they too need to be part of the European (penal) consciousness - a consciousness that identifies with principles and values as important as the rule of law and human rights.

Key Words: Life and indeterminate sentences, penal consciousness, Europe, human rights.

1. Introduction

The media and all kinds of publications inform us that as a result of the euro crisis large numbers of European citizens are experiencing volatile economic and social conditions and that Europe, in the form of its national governments and regional official fora, is in turmoil. The ongoing euro crisis and its consequences have proven highly divisive socially and politically, posing serious challenges to

the legitimacy of national and European institutions of governance and to the European identity.¹ While the manifestations of this European crisis take place publicly and/or are made public through media reporting, out of the public eye, one formidable regional body, the European Court of Human Rights (ECtHR) heard in November 2012 *Vinter and Others v. UK*, which concerned the compatibility of lifelong imprisonment with Article 3 of the European Convention on Human Rights (ECHR) (the freedom from torture or inhuman or degrading treatment or punishment).²

In anticipation of the ECtHR's judgment, the author argues that the case is timely for a number of reasons not least because they reveal contradictory values on the part of European citizens and of their governments at national and regional level, conflicting priorities and a mismatch between rhetoric, policy and practice. In the author's view, unless these issues are much more widely acknowledged, it will be difficult to sustain a European identity known for its respect for human rights, its emphasis on substantive citizenship and for its progressive penal consciousness, especially in times of crisis.

2. Imprisonment in Europe

Based on the latest Council of Europe (CoE) Annual Penal Statistics, the average European prison population rate was 154 per 100,000 on the 1st of September 2011.³ Whilst the use of imprisonment amongst European countries varies, ranging from less than 100 per 100,000 in the Scandinavian region to more than 300 per 100,000 in the Baltic states and in Russia, out of the 51 prison administrations surveyed in the above statistics, 36 saw increases in their prison population rates between 2002 and 2011, with 34 having more than 100 per 100,000 on the 1st of September 2011.⁴

At the same point in time, there were 1,825,356 people in custody across Europe (a 2% decrease from 2010) 5.3.% of whom were females, reflecting conventional criminological knowledge about the gender gap in offending.⁵ In terms of sentence length, on average, 26% of prisoners were serving sentences of less than a year, 26% between 1 and 3 years, 48% longer than 3 years, and 14% longer than 10 years. More specifically, in relation to life imprisonment, the median and mean levels were 1.4% and 2.6% respectively, masking significant variations amongst countries, from 0.9% in Denmark and France to 3.4% in Germany, and 10.5% in England and Wales.⁶

Against this background of an increased use of imprisonment in the last decade and longer sentences, the serious problem of overcrowding has worsened. On average, there were 99.5 prisoners per 100 places in European prisons, with nearly half of the 51 European prison systems being affected by overcrowding on the 1st of September 2011; a finding that became the subject of a CoE press release on the 3rd of May 2013.⁷

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3. Why the interest in lifers?

The paper's interest in life sentences is for a number of reasons.

First, the European community's requirement for a candidate state to outlaw capital punishment as a precondition for its membership, in the first instance, of the CoE and possibly later of the European Union (EU), emerging from Protocols 6 and 13 to the ECHR on the abolition of the death penalty, has led inadvertently to an increase in life sentenced prisoners in countries that formerly practised the death penalty.⁸ Moreover, the enlargement of the CoE from 21 states in 1987 to 47 in 2013 has accelerated this increase.

Second, in some older CoE member states, we are witnessing a trend towards a greater use of life sentences as well as increased life sentence terms through the passing of legislation that stipulates different types of life sentences and minimum sentence terms before release can be considered. To them are added new offences attracting such penalties along with legislative provision for indeterminate sentences for public protection on grounds of the offender's risk of dangerousness. All these in turn are followed by a periodically reviewable release procedure, either of an executive or (quasi) judicial character, that requires proof of an acceptable reduction in the risk of dangerousness posed by the prisoner.

Nearly all the above measures and mechanisms have been variably in operation, for example in England and Wales since the enactment of the Murder (Abolition of the Death Penalty) Act 1965 that introduced mandatory life for murder.⁹ Following *Stafford v. UK* and *ex p Anderson* in 2002, which stripped the Home Secretary from their power to set the minimum term to be served by a mandatory lifer (known as tariff) and to sanction their release, the Criminal Justice Act 2003 set minimum terms of 15 and 30 years for different categories of murder, reinstating thus limits on judicial discretion in the sentencing of murderers.¹⁰ Notably, the same Act abolished automatic life for a second serious violent or sexual offence and introduced indeterminate sentences for public protection (IPPs) applicable to 153 offences, only for the former to substitute for the latter by the Legal Aid, Sentencing and Punishment of Offenders 2012.¹¹ This change in law was effected as a result of prisoner litigation both at home and abroad that successfully challenged the compatibility of IPPs with Article 5(1 & 4) of the ECHR.¹²

Custodial sanctions for public protection that become indeterminate in the course of their execution are not unique to England and Wales. We also come across them for example in the Netherlands and Germany, and while they enjoy a different status, which is non-existent in the English jurisdiction, they essentially have the same outcome; that is, the offender's detention beyond the expiry of their tariff on grounds of their continuing risk of dangerousness to the public, or of their inclination to commit serious offences.¹³

Third, in Europe, lifelong imprisonment is practised; that is, some lifers have no prospect of release afforded by a (quasi) judicial procedure that is scheduled to take place at some stage of their sentence. Essentially, they are serving life without parole until the end of their natural life. The two countries that practise lifelong imprisonment are England and Wales and the Netherlands.¹⁴

Amongst the three countries mentioned here, England and Wales has the largest number of prisoners serving life sentences. More specifically, it has almost half of the total number of life sentence prisoners including IPPs in Europe, with this prisoner category representing 18.9% of its prison population against a European average of 3.6%.¹⁵ Excluding IPPs that came into force in 2005, between 1994-2004 there was a 75% increase in life sentences from 3,192 to 5,594, and the average length of mandatory life increased from 13 years in 2001 to 16 years in 2011.¹⁶ IPPs led to life sentence numbers rocketing. Imposed at a rate of 100-150 per month, their number was 5059 in the summer 2009 and 6056 in September 2011.¹⁷ At the end of September 2012, IPPs represented 19% of all prison sentences against a European average of 1%, with England and Wales having the biggest number of indeterminately sentenced prisoners in Europe.¹⁸

Comparatively, Germany has seen less stark increases. Between 1995-2004 life sentence prisoners increased 36.5% from 1314 to 1794.¹⁹ With their number at 2048 in September 2011 (3.4% of the German prison population), Germany is the fourth country in Europe with the highest number of life sentences. At the same point in time, 505 people were in Sicherungsverwahrung between 2 years and 3 months and 7 years. In 2008, 70 people were in Sicherungsverwahrung longer than 10 years.²⁰ While, compared to the above two countries, life sentence prisoners are few in the Netherlands (27 people in September 2011), representing 0.5% of the Dutch prison population, TBS numbers are high at 1800 in October 2011, with statistics for the period 2006/2007-2011 placing them between 2100 and 2200. The average length of TBS is 9 to 10 years.²¹ These figures should be viewed in the context of an immense capacity pressure on the Dutch forensic psychiatric sector from the 90s onwards, resulting from both more TBS orders handed down by the courts and longer stays in prison and in forensic psychiatric hospitals.²²

4. Prisoners' human rights in Europe

In the areas of prisons and human rights in Europe, we witness a number of conflicts that need to be acknowledged.

First, as the European prison population and lifer numbers increase, the legalisation of prisoners' human rights grows stronger. The abolition of the death penalty in Europe both in times of peace and war is the most shining example in this respect. Moreover, since the 90s, the EU follows closely the CoE in promoting and normalising the idea of prisoners as deserving of human rights. In the wake of the 1997 Treaty of Amsterdam, EU member states are called to harmonise their

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criminal justice policies based on the EU foundations of liberty, democracy, human rights and the rule of law.²³ In re-affirming these values and proclaiming the universality of human dignity, equality and solidarity, the 2000 EU Charter of Fundamental Rights throws its weight behind the ECHR and ECtHR.²⁴ On its part, the CoE has been prolific in developing soft and hard law in relation to prisoners' human rights. The 2006 European Prison Rules and the Recommendations concerning prison overcrowding and prison population inflation, on the Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners, and on Conditional Release are only a very tiny sample of CoE prison related soft law.²⁵

In terms of hard law, notably the ECtHR has recognised that overcrowding itself and daily strip and close body searches in a maximum security prison constitute degrading treatment.²⁶ It has also strengthened lifers' and indeterminately sentenced prisoners' right to liberty and security the protection of which calls for timely reviews of the continuation of their detention beyond their tariff by a judicially competent body, prisoners' access to rehabilitation to minimise their risk of dangerousness in preparation for such reviews, procedural guarantees for inmates for the purpose of these reviews, correspondence between the grounds upon which the original sentence was imposed and those upon which an inmate's detention is prolonged or justified following their recall to prison, and a clear distinction in prison regimes for inmates receiving penalties and measures.²⁷

Another conflict that we witness in Europe, which impacts on (further) progress being made on prisons and human rights, is between public opinion in the EU and the values of Europeans as well as between them and EU foundational values and European pronouncements on the imperative of normalisation of prison life and the use of prison as a sanction of last resort. A perusal of recent Eurobarometer surveys on these themes provides revealing insights.²⁸

Whilst, in spite of fluctuations between them compared to previous years, democracy, human rights, the rule of law, respect for other cultures and solidarity were identified in the order that they are listed here as the most representative values of the EU and European citizens in May 2012, social policy and human rights issues as EU priorities for the future occupied 5th and 7th place respectively behind economic and monetary policy, health policy, immigration and education policy, and crime.²⁹ At the same time, whilst freedom of movement and democracy were positively identified as the first two attributes of the EU in May 2012 like a year before, since 2011 opposition to further EU enlargement has been recorded, reaching 53% in May 2012, with immigration being amongst the main concerns of citizens at European level at 5th place. Moreover, in May 2012, 84% of Europeans were of the view that offenders were not severely punished, which has been recorded since 2008.³⁰

As mentioned earlier, the case concerns the compatibility of lifelong imprisonment with Article 3 of the ECHR. It was referred to the Grand Chamber of the ECtHR at the applicants' request when by 4 votes to 3 the Chamber of the Court did not find a violation of Article 3. The Court took the view that Article 3 would be breached when lifelong imprisonment a) was irreducible *de jure* and *de facto* and b) ceased to be justified on legitimate penological grounds. Although it recognised that the English release policy (petition to the Home Secretary on compassionate grounds) was restrictive to such a degree that it excluded point b from consideration unless the prisoner was terminally ill or physically incapacitated, it judged that at the time it considered the case the applicants' detention was still legitimate and that '...*de facto* reducibility did not arise for examination.' The latter point was not shared by three judges in whose opinion the given release arrangements were not procedurally sufficient in respect of point a and an established review procedure was needed instead.³¹

The significance of *Vinter and Others v. UK* cannot be stressed enough. Generally, studies on long term imprisonment categorise its effects on inmates in two main groups: prisonisation and institutionalisation. Both serve as coping mechanisms in dealing with the prospect of a long exposure to the pains of imprisonment. In brief, prisonisation involves the formation of prison subcultures and institutionalisation manifests itself in psychological and emotional regression, resignation, dependance on prison life and its routine, and hypochondria.³²

Experience shows that nine...ten years, or thereabouts is the maximum period of confinement that normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens.³³

Interviews with English and Dutch lifers conducted by the author revealed effects that afflicted their self, social and civic identity.³⁴ For example, English lifers talked about how the lack of privacy in visits, particularly in terms of physical intimacy, and of conjugal visits led them doubting their sexuality and feeling confused about their gender roles and inadequate to meet their expectations. In their view, not only does physical and sexual intimacy provide people with a sense of self worth and belonging but it also affords them the opportunity to explore and experience their sexual identities, and for them to be accepted and appreciated.

Pertinent to the issue of lifelong imprisonment, the Dutch lifers, who were serving life without parole, identified the following as its most problematic aspects: a) its grossly disproportionate nature as it did not distinguish between serious crimes based on their peculiarities and foreclosed rehabilitation and thus release as

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a possibility, and b) its inhumanity as it stripped lifers off hope as a belief and feeling.

For one of them, society was a social contract, and punishment was fundamentally an act of communication. It expressed society's censure on a behaviour seen as inimical to its welfare. In doing so, retribution aside, it aimed to inculcate a sense of personal, social and civic responsibility in the offender so as to be able to join society qua social contract. Lifelong imprisonment failed in this because by denying lifers the prospect of release it emasculated them socially and politically and thus rendered them unable to determine and actively participate in their own lives. As a concept and sanction, lifelong imprisonment was synonymous with unfairness, discrimination and injustice and betrayed a delusion of superiority and abuse of power by the state and society. Restraint in the punishment of offenders signified humanity and humility as it acknowledged human fallibility. And, proportionality between crime and punishment was an elemental sign of justice. In a Durkheimian vein, permanent physical incapacitation and social and political exclusion of a large number of people was destructive for experience had shown repeatedly that society's preservation depended on full time citizens and in full numbers.

Moreover, hope as a belief and feeling was instrumentally important. For one of the lifers a death sentence was a lesser evil compared to lifelong imprisonment because death was not foreign to human experience. On the contrary, being confined to a place with limited freedoms over one's surroundings, actions and interactions until the end of their natural lives was. In one lifer's words, taking away the hope of being able to experience again freedom in all its dimensions 'allowed the system to create the monster, to make me a monster; to have a date to look for keeps you human.' Amongst the attributes of this created monster were violence, regression and fixation which were exacerbated by the stigma the lifer carried inside prison. Their offences became their sole identity, contributing to the creation of an image beyond redemption. Lifers were not to be trusted, and the ensuing fear alienated them further, this time within the confines of the prison.³⁵

5. Conclusion

Vinter and Others v. UK raises a series of serious and topical questions in the current economic, social and political uncertainty of the times: about the aims of the prison in a 21st century Europe that prides herself on her democratic credentials and respect for the rule of law, the inviolability of human dignity and human rights; about the role of the prison as a social institution, and of its management and administration as a public authority; about the legitimacy of a democratic state's authority to incapacitate an offender permanently; and, ultimately, about the values of the European project.

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Notes

- ¹ European Commission, *Public opinion in the European Union: Standard Eurobarometer 77 Spring 2012* (2012), 60-8, 89-91, Viewed 30 April 2013, <http://ec.europa.eu/public_opinion/index_en.htm>.
- ² European Court of Human Rights, *Grand Chamber hearing concerning life imprisonment in the United Kingdom: Press Release: ECHR 434* (2012), Viewed 19 November 2012, <[{%22fulltext%22:\[%2266069/09%22\],%22sort%22:\[%22kdate%20Descending%22\]}](http://hudoc.echr.coe.int/sites/eng-press/Pages/search.aspx#)>.
- ³ Marcelo F. Aebi and Natalia Delgrande, *Council of Europe Annual Penal Statistics SPACE I: Survey 2011* (Strasbourg: University of Lausanne and Council of Europe, 2013), 2, Viewed 6 May 2013, <<http://www3.unil.ch/wpmu/space/>>.
- ⁴ Ibid, 58-9, 62-3.
- ⁵ Ibid, 2. Frances Heidensohn and Loraine Gelsthorpe, 'Gender and Crime', *The Oxford Handbook of Criminology*, ed. Mike Maguire, Rod Morgan, and Robert Reiner, 4th ed. (Oxford: Oxford University Press, 2007), 391.
- ⁶ Aebi and Delgrande, *Council of Europe Annual Penal Statistics Space I: Survey 2011*, 108.
- ⁷ Aebi and Delgrande, *Council of Europe Annual Penal Statistics Space I: Survey 2011*, 2. Council of Europe, *Overcrowding is problem in half of European prison administrations: Press release DC061*, Viewed 6 May 2013, <http://hub.coe.int/en/web/coe-portal/press/newsroom_p_p_id=newsroom&_newsroom_articleId=1435242&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=60>.
- ⁸ Protocol No. 6 to the European Convention on Human Rights prohibits the death penalty in times of peace and Protocol No.13 in times of war. Dirk Van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy* (Oxford: Oxford University Press, 2009), 25.
- ⁹ Anastasia Karamalidou, 'A Critical Assessment of Human Rights in English and Dutch Prisons' (PhD Diss., Middlesex University, 2010), 118.
- ¹⁰ Ibid, 124-26, 134.
- ¹¹ Ibid, 134-36. Michael Cavadino, James Dignan and George Mair, *The Penal System: An Introduction* (London: Sage, 2013), 314.
- ¹² Article 5 of the ECHR protects the right to liberty and security. European Court of Human Rights, *Case of James, Wells and Lee v. The United Kingdom Judgment* (Strasbourg: Council of Europe, 2012), Viewed 17 November 2013, <[{%22fulltext%22:\[%22James%22,%22Wells%20and%20Lee%20v.%20United%20Kingdom%22\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#)>.
- ¹³ Karamalidou, 'A Critical Assessment of Human Rights in English and Dutch Prisons', 238-39, 241-46, 250-254. Hartmut Michael Weber, 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls', *Zeitschrift für Internationale Strafrechtsdogmatik* 8 (2006), 364-68. Christine M. Graebisch, *Limits to prisoners' rights and unlimited detention* (2013), Viewed 10 June 2013, <<http://www.inter-disciplinary.net/probing-the-boundaries/persons/experiencing-prison/26051-2/session-4-painful-uncertainties/>>.
- ¹⁴ Dirk van Zyl Smit, 'Outlawing Irreducible Life Sentences: Europe on the Brink?', *23 Federal Sentencing Reporter* 39 (2010).
- ¹⁵ Penal Reform International, *Alternatives to the death penalty: the problems with life imprisonment: Penal Reform Briefing No 1*, 2, Viewed 30 April 2013, <www.penalreform.org>. Aebi and Delgrande, *Council of Europe Annual Penal Statistics SPACE I: Survey 2011*, 108.
- ¹⁶ Penal Reform International, *Alternatives to the death penalty: the problems with life imprisonment: Penal Reform Briefing No. 1*, 2. Prison Reform Trust, *Bromley Briefings Prison Factfile November* (2012), 20, Viewed 30 April 2013, <www.prisonreformtrust.org.uk/Portals/0/.../FactfileNov2012small.pdf>.
- ¹⁷ Sapna, Modi, 'More lifers in England and Wales than anywhere in Europe,' *The Howard*, Summer 2009, 2. Aebi and Delgrande, *Council of Europe Annual Penal Statistics SPACE I: Survey 2011*, 103.
- ¹⁸ Prison Reform Trust, *Bromley Briefings Prison Factfile November*, 20. Aebi and Delgrande, *Council of Europe Annual Penal Statistics SPACE I: Survey 2011*, 108.
- ¹⁹ Weber, 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls', 367.
- ²⁰ Sicherungsverwahrung translates into secure preventative detention in English. Typically, it targets offenders of violent and sexual offences whom the court assesses as posing a risk to the public. It can be imposed on offenders of both diminished and non-diminished responsibility and is implemented in a prison setting. For more information, see Weber, 'Life Imprisonment and Secure Preventative Detention: Problems and Pitfalls'. Aebi and Delgrande, *Council of Europe Annual Penal Statistics Space I: Survey 2011*, 102. European Court of Human Rights, *Case of M. v. Germany Judgment* (Strasbourg, Council of Europe, 2009), 16, Viewed 30 May 2013, <[{%22fulltext%22:\[%22M%20v%20Germany%22\],%22itemid%22:\[%22001-96389%22\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#)>.
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