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LIFE IMPRISONMENT IN ENGLAND AND WALES AND TURKEY IN THE CONTEXT OF EUROPE

A Comparative Jurisprudential Study

by
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Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy.

March 2022

Nottingham

Abstract

This thesis is a comparative jurisprudential study of life imprisonment in England and Wales (E&W) and Turkey. It seeks to examine and compare the imposition and implementation of and release from life imprisonment in E&W and Turkey, as the two legal systems with the highest number of life prisoners in Europe. European human rights standards for life imprisonment are used as the yardsticks of comparison. The thesis examines whether human-rights-compliant life imprisonment is plausible under European human rights law, and if so, whether life sentences in E&W and Turkey are used in a human-rights-compliant way. At the European supranational level, life imprisonment is considered an acceptable form of punishment when its imposition and implementation are governed by human rights norms and standards. The comparative findings of the present thesis demonstrate that most forms of life sentences in E&W and Turkey generally satisfy the fundamental requirements of human-rights-compliant life imprisonment. Although there are certain shortcomings when judged against human rights standards, generally the defects in most forms of life sentence in E&W and Turkey do not reach a point to consider them inhuman or degrading. However, there are a few forms of life imprisonment in the two legal systems that cannot be considered human-rights-compliant, and hence, are unacceptable under European human rights standards. These are life sentences with whole life terms in both E&W and Turkey because they do not provide for any realistic prospect for release from life imprisonment. Further, aggravated life sentences of Turkey cannot be considered human-rights-compliant because it has a punitive rather than rehabilitative character. After conducting a comprehensive, critical comparison, the thesis made some recommendations for what should be done in E&W and Turkey in order for life sentences to fully meet the requirements of human-right-compliant life imprisonment.

Acknowledgements

This thesis would not have been possible without the support and guidance of many people during this long journey of my PhD studies.

I would like to express my deep and sincere gratitude to my supervisors, Professor Dirk van Zyl Smit, Dr Candida Saunders and Professor Nigel White for their continuing support throughout this project. I have always felt extremely lucky for having them as my supervisors, not only because they cared so much about my work and responded to my questions and queries so promptly but also because of their invaluable advice, noble guidance and support with full encouragement and enthusiasm. I consider that it was a privilege to study life imprisonment under the supervision of Professor Dirk van Zyl Smit, as his works inspired me to undertake this project in the first place.

My sincere thanks must also go to Dr Catherine Appleton, Professor David Harris, Professor John Jackson and Professor Paul Roberts for their support, encouragement and intellectual suggestions.

I am extremely grateful to my wife, Vildan Celiksoy, for her love, caring and constant support in the completion of this project. I would like to present my sincere thankfulness to my mother for her love, support, and unwavering belief in me. Without her, I would not be the person I am today. I also deeply thank my brother and sister for their unconditional trust and encouragement.

I would like to thank all my former and current PhD colleagues and friends, with whom I shared a lot of good memories over the last four years. Some special words of gratitude must go to Ashraf-Ul-Bari Nobel, Christos Andrikopoulos, Grace Carter, Edoardo Gabriele Vacca, Cerys Gibson, Jia Wang, Katarina Schwarz, Matt Thomason, Mustafa Nalbant, Ngulu Joshua Mbinda, Nora Han, Özgür Milletsever, Simge Aslan and Usmaan Siddiqui.

Last but not least, I am thankful to the General Directorate for Higher and Foreign Education of Ministry of National Education, Republic of Turkey for funding this project.

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PART I

INTRODUCTORY REMARKS

CHAPTER 1
INTRODUCTION

This thesis is a comparative jurisprudential study on life imprisonment in England and Wales (E&W) and Turkey. Neither E&W nor Turkey is restrained in its use of life imprisonment. By focusing on E&W and Turkey, this comparative study seeks to shed light on the use of life imprisonment in the jurisdictions that rely heavily on this particular form of penalty; in fact, 'the ultimate penalty' in Europe.[1] This comparison is set against the background of a human rights approach. European human rights law is used as a source of normative standards to evaluate the imposition, and implementation of, and release from life imprisonment in E&W and Turkey. The thesis seeks to examine whether human-rights-compliant life imprisonment is plausible under European human rights law, and to discuss whether life sentences in E&W and Turkey, as the two legal systems with the highest number of life prisoners in Europe,[2] are used in a human-rights-compliant way.

By studying life imprisonment in E&W and Turkey, this thesis also aims to fill a significant gap in the research literature. Although the literature on English life imprisonment seems abundant,[3] there is lack of knowledge about life imprisonment in Turkey. Turkish criminal lawyers have hardly engaged with the issue of life imprisonment, despite its critical importance in the Turkish penal

[1] In Europe, life imprisonment is the maximum sentence to be imposed on serious offenders, apart from Andorra, Belarus, Croatia, Montenegro, Norway, Portugal, and the Vatican. Belarus retains the death penalty, whereas the maximum sentence in the other six countries is a fixed term imprisonment. See: van Zyl Smit and Morrison (2020:79-80).

[2] According to Council of Europe Annual Penal Statistics (2021:55-56), in 2020 there were 29,283 life prisoners in total in the Council of Europe member states, more than half of whom were in E&W and Turkey with 7,027 and 8,463 life prisoners respectively. According to the Ministry of Justice (2021: Table A1.15), the number of life prisoners in E&W decreased to 6,963 in June 2021.

[3] See, for example: Appleton (2010); Appleton and van Zyl Smit (2016); Bild (2014); Crewe, Hulley and Wright (2017a); Crewe, Hulley and Wright (2017b); Crewe, Hulley and Wright (2019); Crewe, Hulley and Wright (2020); Forde (2014); Hulley, Crewe and Wright (2016); Liebling *et al.* (2019); Padfield (1997); Padfield (2002); Padfield (2010); Padfield (2015); Padfield (2016a); Padfield (2018a) Richards (1978); van Zyl Smit (2002b).

law and practice (and the thousands of life prisoners in Turkish gaols). There is a dearth of literature exploring this area of penal law in Turkey.[4] Similarly, little is known about the Turkish system of life imprisonment amongst English-speaking scholars. In order to fill this research gap, this thesis employs a comparative law study between Turkey and E&W 'by juxtaposing the unknown to the known'.[5] In doing so, it also provides an opportunity to rethink about the use of life imprisonment in E&W in the light of the recent developments and the comparative analyses. As Bayley asserts:

> Through the study of foreign experience we learn who we are as human beings. International study provides a mirror in which we can see ourselves reflected against the backdrop of others, and it thereby helps us to discover who we are and who we are not. Self-discovery of this sort is a chastening experience because we discover the limits to what we may become and of the experiences we may comfortably share.[6]

1.1. Importance of the European Context

At the European supranational level, life imprisonment is considered a sentence which can be imposed and implemented in a human-rights-compliant way. Since the late 1970s, the European human rights documents and instruments have been shaping the framework of the human rights compatibility of life imprisonment. For example, the Committee of Ministers of the Council of Europe has produced a number of resolutions and recommendations concerning various aspects of life imprisonment. Specifically, Resolution 76(2) on the Treatment of Long-term Prisoners,[7] Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners,[8] Recommendation Rec(2006)2 on the European Prison Rules,[9] Recommendation Rec(2003)22 on Conditional Release (parole)[10] are of significant importance for

[4] So far, only a handful of studies have examined life imprisonment in Turkey. See, for example: Aydınoğlu & Yusufoğlu (2016); Celiksoy (2019); Karakaş-Doğan (2010a); Karakaş-Doğan (2010b); Lüdtke & Aydınoğlu (2016).

[5] Örücü (2007:54) states that '[w]e understand the legal world around us by juxtaposing the unknown to the known'.

[6] Bayley (1999:11).

[7] Committee of Ministers of the Council of Europe (1976).

[8] Committee of Ministers of the Council of Europe (2003c).

[9] Committee of Minister of the Council of Europe (2006).

[10] Committee of Ministers of the Council of Europe (2003b).

the execution of life sentences. Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has set out its own standards for life imprisonment in its *2007 Memorandum of Actual/real life sentences*,[11] and *25th General Report*,[12] alongside the standards derived from its country visit reports. More importantly, the European Court of Human Rights (ECtHR) has gradually developed its jurisprudence on life imprisonment since the early 1980s.[13] It has dealt with life imprisonment under a variety of provisions of the European Convention on Human Rights (ECHR), including Articles 3, 5, 6, 7, 8 and 14.

These developments at the European supranational level have challenged and shaped the understanding of life imprisonment, which was previously considered only in the ambit of national criminal justice systems.[14] Nowadays, life imprisonment cannot be studied without taking into account its close relationship with human rights law and international and regional human rights institutions' understandings of its existence, implementation and conditions. For the present thesis, therefore, it is crucial to explore the relationship of English and Turkish legal systems with the Council of Europe human rights standards and institutions in order to comprehend how they respond to these developments in human rights law, which have direct and/or indirect effects on their national criminal justice systems. Thus, this comparative study is informed by a human rights approach. As will be elaborated in Chapter 2.3 of the thesis, European

[11] CPT (2007a).
[12] CPT (2016a).
[13] See, for example: *X v. the United Kingdom* [1982] 4 EHRR 188; *Weeks v. the United Kingdom* [1987] ECHR 3; *Thynne, Wilson and Gunnell v. the United Kingdom* [1990] ECHR 29; *Hussain v. the United Kingdom* [1996] ECHR 8; *V. v. the United Kingdom* [1999] ECHR 171; *T. v. the United Kingdom* [1999] ECHR 170; *Stafford v. the United Kingdom* [2002] ECHR 470; *Hill v. the United Kingdom* [2004] ECHR 179; *Blackstock v. the United Kingdom* [2005] ECHR 407; *Dickson v. the United Kingdom* [2007] ECHR 1051; *Kafkaris v. Cyprus* [2008] ECHR 143; *Babar Ahmad and Others v. the United Kingdom* [2012] ECHR 609; *Vinter and Others v. . the United Kingdom* [2013] ECHR 786; *Öcalan v. Turkey (No.2)* [2014] ECHR 286; *Trabelsi v. Belgium* [2014] ECHR 893; *Laszlo Magyar v. Hungary* [2014] ECHR 491; *Gurban v. Turkey* [2015] ECHR 1092; *Kaytan v. Turkey* [2015] ECHR 788; *Murray v. the Netherlands* [2016] ECHR 408; *Hutchinson v. the United Kingdom* [2017] ECHR 65.
[14] van Zyl Smit & Appleton (2019: Ch.1).

human rights standards for life imprisonment are used as the yardsticks of comparison between E&W and Turkey in order to assess whether life sentences in the two legal systems can be considered human-rights-compliant. The thesis carefully and comprehensively engages with the human rights treaties, resolutions, recommendations, reports and case law produced by the European institutions in order to explore the principles and standards for human-rights-compliant life imprisonment. The English and Turkish life sentences are then assessed against the European standards.

1.2. Research Questions

This thesis aims to explore the imposition and implementation of, and release from life imprisonment in E&W and Turkey against the background of the European standards for these three stages of life imprisonment. To this end, it addresses the following research questions:

i) Is human-rights-compliant life imprisonment possible and plausible at the European supranational level, and if so, under what conditions?

ii) What are the European human rights standards for the imposition, and implementation of, and release from, life imprisonment?

iii) To what extent, if at all, do the imposition and implementation of, and release from, life imprisonment in E&W and Turkey comply with the European human rights standards for these three stages of life imprisonment?

iv) Does the high number of life prisoners in E&W and Turkey mean that these two countries are not restrained in their use of life imprisonment?

v) Why is life imprisonment imposed at all? In other words, what are the justifications for the imposition of life imprisonment in E&W and Turkey?

vi) For what offences is life imprisonment imposed? For what criminal conduct is life imprisonment considered an appropriate penal response in the two legal systems and is it imposed proportionately?

vii) To what extent do judges have discretion (not) to impose a life

sentence and what are their roles in the determination of the minimum non-parole periods to be served by life prisoners prior to any consideration for release?

viii) What is the primary aim of the implementation of life imprisonment in both jurisdictions? Where does the rehabilitation of life prisoners stand in the two countries' penal systems?

ix) How do E&W and Turkey counteract the damaging effects of life imprisonment? What are purposeful activities offered to life prisoners in the two legal systems, and whether or not are they allowed to contact with the outside world?

x) Do the two countries adopt a different regime for the treatment of the special categories of life prisoners such as female and elderly?

xi) Are life prisoners released from prison at all? If so, are they prepared for release?

xii) Who has the power to order the release of life prisoners in the two legal systems?

xiii) What are the procedural rights of life prisoners at the release stage?

xiv) Do prisoners sentenced to whole life terms in the two legal systems have any prospect for release in the meaning of Art 3 ECHR?

1.3. The Scope of the Thesis

In their ground-breaking book, *Life Imprisonment: A Global Human Rights Analysis*, van Zyl Smit and Appleton define life imprisonment as '[a] sentence following a criminal conviction, which gives the state the power to detain a person in prison for life, that is, until they die there'.[15] They also identify that life imprisonment can be in two basic types: formal and informal.[16] Formal life imprisonment is a sentence which is so defined in law, and thus, pronounced by courts in sentencing, whereas informal life sentences 'are not expressly designated as life imprisonment' in law, but 'the state has the power to keep people in prison until they die there'.[17] Van Zyl Smit and Appleton further divide

[15] ibid, 35.
[16] ibid, Ch.2.
[17] ibid, 35.

both formal and informal life sentences into two subtypes. In the case of formal life imprisonment, they distinguish between life imprisonment without parole (LWOP) and life imprisonment with parole (LWP). As regard the informal life imprisonment, they identify de facto life sentences and post-conviction indefinite detention.[18]

By defining and describing life imprisonment, van Zyl Smit and Appleton draw particular attention to 'the complexity of life imprisonment'.[19] The present thesis also faces such 'complexity' with respect to life sentences in E&W and Turkey, given that these two legal systems have different types of life imprisonment. The thesis, thus, needs to set out its scope at the outset of the study. In order for the present study to make sense, the comparison between the legal systems should be meaningful, that is, 'like' should be compared with 'like'.[20]

In this thesis, only formal life sentences in E&W and Turkey will be examined and compared. Informal life sentences are out of the scope of the present study. This is because Turkey does not have a sentence which can be considered informal life imprisonment. Although Turkish sentencing courts can impose very long determinate sentences (sometimes much longer than the offender's expected life span, say 99 years for example), no offenders with a determinate sentence are required to wait any longer than 32 years to have their sentences reviewed. Turkish penal law makes it very clear that the maximum term to be served prior to a conditional release consideration is 32 years for offenders serving determinate sentences.[21] Therefore, no determinate sentences can be considered de facto life imprisonment in Turkey. Similarly, Turkey does not have post-conviction indefinite detention for any group of offenders.

Unlike Turkey, however, E&W has used post-conviction detention from time to time for dangerous offenders. The best-known example is imprisonment

[18] ibid.

[19] ibid, Preface.

[20] Örücü (2012:560).

[21] Law No: 5275, 'Law on the Execution of Sentences and Security Measures' (LESSM), (Official Gazette Date and No: 29.12.2004 – 25685), Art 107(4-e).

for public protection (IPP). IPP was introduced in 2003 and abolished in 2012. During this rather short period, it had a significant effect on the prison system.[22] IPP was an indeterminate sentence to be imposed on dangerous offenders posing serious risk of violent crimes. The release of IPP sentenced prisoners is not certain, that is, they can be detained indefinitely unless the Parole Board decides it is safe to release them.[23] In this respect, IPP resembles life imprisonment. However, unlike life prisoners, IPP sentenced prisoners may apply for the termination of their licence following their release if they spend ten years without violating the licence conditions.[24] Thus, the effect of an IPP sentence does not have to last for the rest of the offender's life.

As Turkey does not have an equivalent to IPP sentences, this comparative study does not specifically examine this form of indefinite imprisonment. As noted above, this thesis seeks to examine formal life sentences in E&W and Turkey in order to achieve the comparative purposes. In this respect, there are three types of life imprisonment in E&W: mandatory life sentence for murder,[25] discretionary life sentence for some serious offences,[26] and statutory life sentence for second listed offences.[27] Turkey has two different types of life imprisonment: (normal) life sentence and aggravated life sentence. The thesis focuses on these life sentences throughout this study.

1.4. The Structure of the Thesis

This thesis proceeds in four parts. Part I consists of this introductory chapter and Chapter 2 on methodology. Following this introduction, Chapter 2 will explain

[22] See, for example: Beard (2019); The Howard League for Penal Reform (2016).
[23] Brereton (2017); Bettinson & Dingwall (2013).
[24] Rose (2012:303).
[25] If the offender convicted of murder is under 18, the court must impose 'detention at Her Majesty's pleasure' (s.259 of Sentencing Act 2020 (c.17)). If the offender convicted of murder is aged 18 or over but under 21, the court must impose 'custody for life' (s.275 of Sentencing Act 2020).
[26] If the offender convicted of a serious offence is under 18, the court is to impose 'detention for life' (s.258 of Sentencing Act 2020). If the offender convicted of a serious offence is aged 18 or over but under 21, the court is to impose 'custody for life' (s.274 of Sentencing Act 2020).
[27] If the offender convicted of a second listed offence is aged 18 or over but under 21, the court is to impose 'custody for life' (s.273 of Sentencing Act 2020).

the comparative law methodology employed in this thesis. It will also elaborate why using human rights law as the yardstick of comparison is an important tool for the comparison of life sentences in E&W and Turkey.

Part II examines the European standards for life imprisonment, and consists of three chapters (Chapters 3, 4 and 5). The purpose of these three chapters is to analyse what human-rights-compliant life imprisonment looks like under European human rights law.

In Chapter 3, European standards for the imposition of life imprisonment will be explored. This chapter will specifically examine whether life imprisonment is considered an acceptable form of punishment by the European human rights instruments. To address this aim, it analyses the rationales for life imprisonment at the European supranational level and discusses whether any form of life imprisonment can be regarded as inhuman and degrading punishment under Art 3 ECHR.

Chapter 4 focuses on European standards for the implementation of life imprisonment. It analyses the main principles for a human rights-based system for the execution of life sentences. Thus, it addresses a wide range of issues including, for example, the primary purpose of the implementation of life imprisonment, the basic principles for the treatment of life prisoners, risk and needs assessments and sentence planning, and rehabilitation arrangements.

Chapter 5 probes European standards for the release from life imprisonment. It examines the European trend toward ensuring the release of life prisoners. It also specifically discusses whether the release of prisoners sentenced to whole life terms is required under the European human rights law.

The chapters on European standards contained in Part II do not make an explicit comparison with E&W and Turkey. Rather, they provide the background analyses regarding the basic European standards for the imposition and implementation of, and release from, life imprisonment, which are needed to make a judgment about the better use of life imprisonment in E&W and Turkey in Part III.

Part III explores life imprisonment in E&W and Turkey. It also consists of three chapters (Chapters 6, 7 and 8).

Chapter 6 explores the imposition of life imprisonment in E&W and Turkey by addressing the questions of why life imprisonment is imposed at all, for what classes of offences it is imposed, both in theory and practice. It also considers what role sentencing judges play in its imposition and in the determination of minimum non-parole terms to be served by life prisoners before release.

Chapter 7 examines the implementation of life imprisonment in E&W and Turkey in order to explore the treatment of life prisoners in both jurisdictions and to analyse whether or to what extent the implementation of life sentences in the two legal systems complies with European human rights standards. To this end, particular attention is paid to the questions of whether rehabilitation is prioritised as the primary purpose of life imprisonment, how the risk and needs assessments and sentence planning of life prisoners are conducted, whether the two legal systems adopt a rehabilitated-oriented regime to counteract the damaging effects of life imprisonment and how the special categories of life prisoners (e.g. females and elderly) are treated.

Chapter 8 analyses how life prisoners are released from life imprisonment in E&W and Turkey and discusses whether the release mechanisms and procedures adopted by both countries comply with the European standards. It addresses the issues of the preparation arrangements for release and conditional release processes and procedures. Specifically, the situation of prisoners sentenced to whole life terms is discussed against backdrop of Art 3 ECHR jurisprudence on irreducible life sentences of the ECtHR.

Part III of the thesis conducts an explicit comparison of life imprisonment between E&W and Turkey. In every single issue discussed in Part III, there is an explicit comparison concerning the legal systems studied. This explicit comparison contributes to a better understanding of life imprisonment applied in the two jurisdictions by demonstrating their similarities and differences. Moreover, Part III offers an important opportunity to consider whether or to what extent E&W and Turkey respond to the higher level of principles with regard to

life imprisonment at the European supranational level in light of the chapters on the European standards in Part II.

Finally, Part IV of the thesis consists of the conclusion chapter (Chapter 9). It brings together the answers to all the research questions and offers policy recommendations for E&W and Turkey.

CHAPTER 2
METHODOLOGY

This thesis primarily employs a comparative law methodology. Thus, it is following the twenty-first century trend, that Örücü described:

> One thing is certain: there is a growing interest in comparative law … It has become indispensable for all doctoral research, judges and legislators to consult foreign material as a matter of routine … It is not fanciful to predict that the 21st century will be 'the age of comparative law'.[28]

Comparative law methodology has been widely used by criminal and penal law scholars in recent years. For example, a comparative law study was conducted by Lazarus on prisoners' rights in England and Wales (E&W) and Germany. In her book based on her doctoral research, Lazarus juxtaposed these two legal systems in order to elucidate prisoners' legal rights embedded in the foreign system of Germany and to achieve an explicit comparison with E&W.[29] Her aim was to explore 'the method and manner of conceiving of prisoners' legal rights in England' by distancing the readers from their own legal culture and 'bringing out the strangeness in the familiar'.[30] Therefore, she asked 'the reader to consider [prisoners' rights in] England in the light of the German chapters' in her book.[31] In this respect, in deploying a comparative law methodology, both Lazarus's work and the present thesis seek to carefully engage with readers. Whereas Lazarus aimed to distance the readers from their own legal environment by adopting a bilateral comparison, the present study aims to remind the readers of their own system while introducing a relatively less known foreign system of life imprisonment. Given that cultural contexts must be fully explained and communicated to readers in cross-cultural comparisons,[32] the comparative analysis undertaken in this thesis seeks to enable readers to achieve a deeper comprehension of life imprisonment of Turkey and E&W.

[28] Örücü (2007: Ch 2).
[29] Lazarus (2004).
[30] ibid, 2.
[31] ibid, 18.
[32] Nelken (2010:13).

Comparative law methodology has also been used in studies researching long-term imprisonment in different legal systems. For instance, Drenkhahn et al. conducted multilateral comparative law research to unearth long-term prisoners' rights in Belgium, Croatia, Denmark, E&W, Finland, France, Germany, Lithuania, Poland, Spain and Sweden.[33] By adopting comparative law methodology, they examine whether prisoners have the same rights and are treated in the same manner in these jurisdictions, and to what extent the legal systems surveyed comply with the European human rights standards for long-term imprisonment.[34] Similarly, the present comparative law study uses the European standards for life imprisonment shaped by the European human rights instruments as an analytical tool to inform the critique about life imprisonment in E&W and Turkey. In contrast to Drenkhahn et al, however, the present research adopts a bilateral comparison in order to study life imprisonment thoroughly in the selected legal systems. It aims 'to get as deep as possible into the legal systems' in order to understand legal culture and context of law.[35]

In relation to life imprisonment in particular, van Zyl Smit and Appleton have conducted the first global comparative analysis. They have explained how life imprisonment is defined and used in a number of jurisdictions across the world.[36] They address the issues of imposition and implementation of, and release from life imprisonment. They describe how many life prisoners are held in prison in the globe and how they are treated in practice in different legal systems. They discuss the sentence of life imprisonment through human rights lenses. In this respect, the present study also takes a human rights approach in researching life imprisonment in E&W and Turkey. It addresses central human rights questions including, *inter alia*, whether life imprisonment is imposed proportionately, whether life prisoners are treated in compliance with their right to human dignity and other rights ensured by the European human rights instruments, and whether they are provided with the possibility for release in

[33] Drenkhahn, Dudeck, & Dünkel (2014).
[34] ibid, 1.
[35] Husa (2015:108).
[36] van Zyl Smit and Appleton (2019).

both jurisdictions under survey.

Although van Zyl Smit and Appleton's work provides a general picture of how life imprisonment is understood and used across the world, there is still need for further studies conducting deep research to examine life imprisonment in specific national jurisdictions. In this respect, an in-depth comparative law study on a similar topic to the present thesis was carried out by Bild in his doctoral research at the University of Cambridge.[37] In his work, Bild surveyed how mandatory life sentences have been evolved in the two neighbour jurisdictions, E&W and Scotland, since the abolition of the death penalty in the UK in 1965. He used Scotland as a comparator to E&W in order to inform his critique of English law with regard to the historical development of mandatory life imprisonment for murder. Although the scope of the present thesis is wider than that of Bild's work, it also employs a micro-bilateral comparison[38] in exploring the functioning of life imprisonment as an institution and practice in the jurisdictions studied.

2.1. Search for Similarities and Differences

All comparative law studies inevitably explore similarities and differences between the legal systems being surveyed. Nelken states that 'with comparative law the study of similarities and differences is the heart of the endeavour'.[39] In the history of comparative law generally, much attention has been devoted to seeing similarities rather than focusing on differences.[40] A similar tendency is also apparent in comparative criminal law.[41] The quest for seeking similarities led to a presumption described by Zweigert and Kötz as '*praesumptio similitudinis*', whereby 'developed nations' generally undertake to 'answer the needs of legal business in the same way or in a very similar way'.[42]

The similarity approach to comparative law was vigorously challenged,

[37] Bild (2014).
[38] Husa (2015:100-108).
[39] Nelken (2007:25).
[40] Samuel (2017).
[41] See, for example: Bengoetxea and Jung (1991); Dine (1993); Harding *et al.* (1995).
[42] Samuel (2014:53).

however, by scholars highlighting the inherent differences between different legal systems.[43] Frankenberg, for example, argued that comparative lawyers operate, as 'participant observers'[44] analysing the other legal system from their own perspectives, should abandon the 'presumption of similarity … for a rigorous experience of distance and difference'.[45] It is said that the similarity approach, which intended to find harmonisation or unification of law between different legal systems, has been characterised by a superficial and technical focus, rather than an attempt to 'understand law in depth'.[46] The idea that comparative law 'must not just tolerate but appreciate legal difference, no less urgently than it seeks similarity between the laws of different systems' has been adopted by comparative analysts.[47] As a major protagonist for the differences approach, Legrand advanced the differential approach to comparative law by asserting that comparative legal studies should adopt the presumption of difference. He maintains that '[t]o accord difference priority is the only way for comparative law to take cognisance of what is the case'.[48] Thus, he argues that comparative analysts should 'privilege alterity at all times'.[49]

After a long conflict between the similarity and difference approaches, 'some reconciliation' was achieved and the position of favouring either similarity or difference was abandoned.[50] In fact, it is underlined that to accentuate convergences and divergences is a matter of choice depending on the purpose of the comparative research.[51] Many leading scholars emphasise the nuances in the careful choice of dimensions of similarity and difference in comparative law:

> When there is similarity, this cannot be ignored just because the researcher is keen to follow the 'contrarian challenge', nor can a difference be glossed over because some other policy considerations such as European integration or

[43] Gutteridge (1949:8-9). Ancel (1971:65), as cited in Danneman (2019:395).
[44] Frankenberg (1985:441).
[45] ibid, 453.
[46] Cotterrell (2019:712).
[47] ibid.
[48] Legrand (2003:279).
[49] Legrand (2001:67).
[50] Danneman (2019:398).
[51] Nelken (2010:38).

globalisation dictates that only similarities should be highlighted.[52]

Similarly, Cotterrell states that '[c]omparative law's central orientation today … should be to balance the promotion of similarity in legal arrangements between legal systems, on the one hand, and the defence of differences in legal arrangements, styles, outlooks and ideas'.[53] Therefore, this thesis does not follow a dogmatic approach to emphasise differences against similarities or vice versa; rather it aims to unearth both 'surprising differences and unexpected similarities'[54] with a particular care of reflecting 'what is actually there'[55] in the legal systems being compared.

2.2. What to Compare: 'Law in Books' or 'Law in Action'?

It is asserted that the essence of comparative law is 'functional equivalence'.[56] Zweigert and Kötz posited that '[t]he basic methodological principle of all comparative law is that of functionality'.[57] The gist of the functional comparison is that 'law responds to human needs and therefore all rules and institutions have the purpose of answering these needs'.[58] However, the functionalist approach is criticised on the basis that it fails to consider that the 'purpose and tasks of law are inevitably defined using terms of reference provided by a particular culture, and cannot be satisfactorily generalised or abstracted from these'.[59] A functional approach, according to its critics, is 'too rule-based or too rule-centred', which obscures apprehension of the legal culture in which legal rules are embedded, and their meaning can only be accurately understood in that context.[60] If a comparative law study is focused only on the legal rules (i.e. letter of law), it may fail to unearth the deeper meaning of law in the legal systems studied;

[52] Örücü (2007:50).
[53] Cotterrell (2002:52).
[54] Nelken (2010:32).
[55] Örücü (2007:50).
[56] Örücü (2012:561).
[57] Zweigert & Kötz (1998:34). Some other authors also wrote on some basic aspects of comparative law which is now considered functional approach. See, for example: von Mehren (1971); Glendon, Gordon, & Osakwe (1994:11).
[58] Örücü (2012:561).
[59] Cotterrell (2019:711).
[60] Graziadei (2003:110).

therefore, more than simply studying legal rules is needed.[61]

This thesis acknowledges that the functional approach is a useful method for identifying the subject-matter of comparison. However, in order to achieve a comprehensive study in comparative law, analysts should 'opt for a multiplicity of approaches, compare differences and context, and extend comparison beyond functionality rules'.[62] Therefore, as will be explained in section 2.4 below, this thesis adopts different methods to overcome the shortcomings of the functional comparison.

2.3. Human Rights Law as the Yardsticks of Comparison

In comparative law studies, one of the biggest challenges for comparatists is to decide '[w]hich jurisdictions form appropriate comparators, and which issues are appropriate for comparison?'.[63] This is a question of 'commensurability', which refers to that '[l]ike must be compared with like' or 'things to be compared must be comparable'.[64] In other words, in order to conduct a meaningful comparative law study, the objects of comparison must share at least 'a common comparative denominator';[65] that is, *tertium comparationis*:

> *Tertium* is Latin and means third, ie in this case *tertium comparationis* is the third part of the comparison. It is a question of a yardstick that enables comparison. So, if we want to know what is regarded as cold or warm weather, we need a scale. The scale can be, for example, the Celsius scale by means of which temperature can be measured. In such a case the Celsius scale is a yardstick that allows comparisons and defines temperatures that are above (+) or below (-) zero. Without such a yardstick it would not be possible for people to evaluate commensurately the temperature of, for example, the popular holiday destinations.[66]

Therefore, the inclusion of a yardstick in a comparative law study facilitates the comparatist to 'draw a triadic relation between two objects and a certain

[61] Cotterrell (2019:712).
[62] Örücü (2007:52).
[63] Fredman (2018:4).
[64] Örücü (2012:560).
[65] ibid, 561.
[66] Husa (2015:149).

quality, the *tertium comparationis*',[67] without which 'the comparison turns into an idle exercise'.[68] Thus, all comparative law studies require the existence of a 'yardstick' to evaluate the legal systems compared.

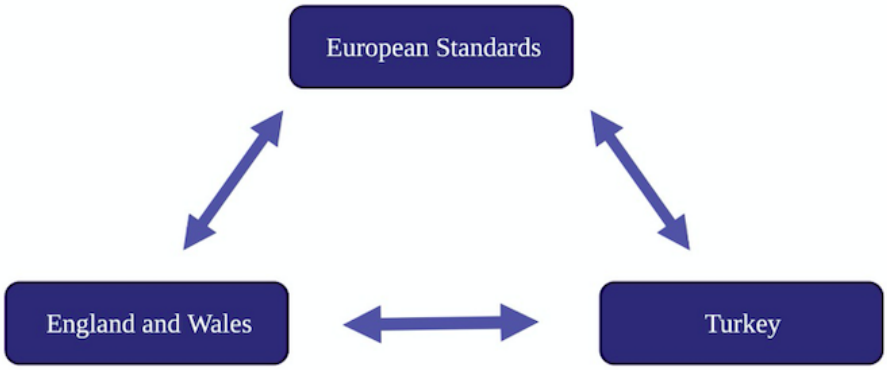
This thesis uses European human rights law as the yardstick of comparison in order to evaluate life imprisonment in E&W and Turkey. Using human rights as the normative standards enables us to carry out a comparison between two such very different legal systems.

In appearance, E&W and Turkey do not seem to have too much in common. For example, the two legal systems traditionally fit into different legal families.[69] Turkish criminal and penal law has been mostly influenced by the civil law jurisdictions, especially Germany, Italy and France.[70] Historically, as will be examined in Chapter 6.1, the development of life imprisonment in the two countries did not follow the same or even similar patterns. More importantly, there are significant divergences between the two countries' current political views towards Europe and European institutions. The UK has left the European Union (EU),[71] and, as will be discussed in Chapter 8.4.1.1.1 of the thesis, there is still a strong negative view against the European Court of Human Rights (ECtHR) amongst British politicians. On the contrary, Turkey has been following a long-standing westernisation policy with an eventual aim of the participation in the EU.[72] So, do all these mean that these two countries are 'incomparable'? The answer, of course, depends on the purpose of comparison. Comparatists can come up with different reasons for their choice of these two jurisdictions as comparators.[73] For the present thesis, the starting point for the

[67] Jansen (2019:295).
[68] Husa (2015:147).
[69] See for the classification of legal families: Glenn (2019); Siems (2018: ch.3 and ch. 4).
[70] Friedman (2001:93).
[71] See: BBC News (2020).
[72] See for the developments concerning Turkey's EU membership process: <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en> [lass access 17 February 2020].
[73] For example, Sevdiren carried out a comparative law study on alternatives to imprisonment in England and Wales, Germany and Turkey. The reason for her choice of these three countries as comparators was to compare developments in the Turkish

comparison of life imprisonment between E&W and Turkey is the fact that they both have the highest number of life prisoners in the Council of Europe member states. This comparison is further informed by a human rights approach as to whether and/or to what extent these two countries, which leniently resort to life imprisonment, comply with the European human rights standards for life imprisonment. The inclusion of human rights as the common comparative denominator provides this thesis with the opportunity to carry out a triangular comparison between E&W and Turkey, on the one hand, and between both countries (E&W and Turkey) and the European standards, on the other.

Figure 2. 1: Triangular Comparison



In this thesis, the inclusion of human rights as the yardsticks of comparison has proved to be an effective and useful method in the choice of the legal systems as comparators. In comparative criminal and penal law studies, generally, the traditional taxonomy of legal families has been the main determinant in the choice of legal systems to be compared.[74] That is, comparisons have been carried out between two or more legal systems within the same legal family, or between 'parent systems' of different legal families.[75] Thus, taking legal families as the

prison system with 'the experience in two major systems, namely England and Wales and Germany'. See: Sevdiren (2011:2).

[74] Danneman (2019:393).

[75] ibid. For example, Fairchild (1993) used England, France, Germany, the former Soviet Union, Japan and Saudi Arabia as the 'model systems' in her comparison of criminal justice systems because she thought that these legal systems represented 'the workings of particular historical families of law within various political context'.

common comparative denominator has resulted in an aggregation of comparisons between certain legal jurisdictions such as English, French, German, Dutch and the US laws.[76] These comparative law studies have, of course, contributed to the development of comparative criminal and penal law. However, the reach of comparative criminal and penal law should not be restricted to a limited number of jurisdictions but should also encompass a variety of other legal systems waiting to be explored. Nowadays, this is particularly important because 'there has probably never been a time in which the call for comparative criminal law could be heard louder than today'.[77] In this respect, human rights can offer comparatists a new dimension to explore different jurisdictions for comparison in a broader sphere than the one the traditional classification of legal families could provide.

In fact, the adoption of a human rights approach can be considered a necessary requirement of any comparative law studies in the field of criminal and penal law. This is because the criminal justice and penal law policies and practices of individual states are no longer immune to the considerations of human rights compatibility both internationally and domestically.[78] Historically, criminal justice policies of a state have been considered an area which is 'the one most closely associated with sovereignty',[79] and is 'by far more strikingly nationally-culturally influenced than any other areas of the law'.[80] Perhaps, this is why comparative criminal law had been 'a long neglected discipline'.[81] However, criminal and penal law issues can no longer be considered only in the ambit of national criminal justice systems, since international and regional human rights instruments have produced a great deal of rules, principles and standards, both in the forms of hard-law and soft-law, concerning criminal and penal law.[82] Today, it is an established thought that '[t]he maintenance of human

[76] See, for example: Harding, Fennell, Jörg & Swart (1995); van Zyl Smit (2002b); Lazarus (2004); Dubber & Hörnle (2014); Dyson & Vogel (2018); Keiler & Roef (2015).
[77] Eser (2017:12).
[78] van Zyl Smit (1998); (2002a) and (2006).
[79] Dubber (2019:1277).
[80] Eser (2017:141).
[81] Eser (2017:147).
[82] van Zyl Smit & Appleton (2019: ch.1 and pp.11-34).

rights in criminal procedures cannot be divorced from the criminal law itself, nor from the treatment of convicted offenders'.[83] Furthermore, it is asserted that '[h]uman rights must provide a constant perspective from which to judge any penal system'.[84] Thus, the importance of human rights in comparative criminal and penal law studies cannot be ignored, because 'the question is no longer *whether* comparative law should be used in a human rights context, but *how* and *why* it should be used'.[85]

2.4. Methods

The previous section has explained the comparative law methodology as the general philosophical orientation employed by this thesis. This section explains the methods deployed in this thesis in order to obtain jurisprudential, empirical and statistical data.

2.4.1. Jurisprudential Data

This comparative law research requires an element of doctrinal methodology since it carefully examines English and Turkish law on life imprisonment. However, it does not pursue a mere comparison between national laws; rather it seeks to reach beyond this to understand such rules in their contexts. For this purpose, it aims to identify the underlying rationales for legislations governing life imprisonment by looking at the pre-legislative debates, legislative commentaries, explanatory notes and, most importantly, their application in court decisions. Particularly, studying case law in a comparative law study provides a significant insight into the legal systems under consideration, since it helps to overcome the shortcomings of studying legislative provisions which may have different contexts in the legal systems in which they are embedded.[86]

In this thesis, the principal method of investigation comprises a comprehensive review of legislation, reports and documentation from government agencies, non-governmental organisations, scholarly publications

[83] Andrews (1982:2).
[84] Zellick (1982:409).
[85] Fredman (2018:4, emphasises in original).
[86] van Hoecke (2004:168).

and newspaper articles on life imprisonment. The documents are analysed to identify key policy objectives and principles underlying the legislative purposes and their effectiveness on life imprisonment. A historical account of the legislative and policy changes is discussed in order to understand how the developments in the legal context has contributed to the evolution of life imprisonment in E&W and Turkey. This allows identification of the deeper meaning of law in the two legal systems being compared.

2.4.2. Empirical Data

For a study that is closely related to prisons and prisoners, access to empirical data is vital, because it allows the researcher to explore how, whether and to what extent the law functions in practice. For the present thesis, potential sources of empirical data are the reports produced by prison inspection bodies of the national jurisdictions. In E&W, Her Majesty's Inspectorate of Prisons for England and Wales (HMI Prison), for example, is 'an independent inspectorate which reports on conditions for and treatment of those in prison'.[87] The responsibilities of HMI Prison can be summarised as: to inspect or arrange for the inspection of prisons, to report to the Secretary of State on the treatment of prisoners and conditions in prisons, and to refer specific matters connected with prisons.[88] HMI Prison addresses a number of issues such as safety in prisons, living conditions and staffing, purposeful activities offered to prisoners, and rehabilitation and release planning. It publishes its reports concerning specific prisons visited as well as its annual reports. Moreover, the Parole Board for England and Wales also publishes its annual reviews with respect to release of prisoners, including life prisoners.

In Turkey, the General Directorate of Prisons and Detention Houses (*Ceza ve Tevkifevleri Genel Müdürlüğü*) (CTGM) is responsible for the governance of prisons. It sets out which organs can inspect prisons. These are the Human Rights Investigation Commission (*İnsan Haklarını İnceleme Komisyonu*) (IHIK),[89] the

[87] HMI Prison (n.d.).

[88] s.5A of the Prison Act 1952 (c.52) as amended by s.57 of the Criminal Justice Act 1982 (c.48).

[89] Human Rights Investigation Commission's website is available at

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Minister of Justice of the Republic of Turkey,[90] the Ombudsman,[91] the Human Rights and Equality Institution of Turkey[92] and the Inspection Institution of Prisons and Detention Houses.[93] Among these inspection bodies, the Ombudsman has not published any reports concerning its inspection function on prisons. As to the others, only the IHIK and the CPT's reports are available to public. The other bodies neither publish their reports on their websites, nor indicate the ways of access to the reports.

IHIK conducts visits to prisons based upon the applications made by prisoners. It carries out a number of visits each year and publishes its reports on its website. These reports provide significant insights into the material conditions of prisons, the treatment of prisoners, regime of activities, security and safety in prisons, and the relationship between staff and prisoners.[94] In addition, IHIK can interview prisoners to obtain information about their specific needs and to report their complaints.[95] Thus, IHIK's reports remain one of the principal sources of insight into the empirical realities of life imprisonment in Turkey.

However, compared to E&W, the national inspection of the treatment of life prisoners is rather under-developed in Turkey. Thus, the present thesis specifically benefits from international and regional human rights bodies' inspections. In this respect, an important source of the empirical data is CPT's visit reports to Turkey. CPT has carried out more than 25 visits to Turkey and

<https://www.tbmm.gov.tr/komisyon/insanhaklari/index.htm> [last access 30 August 2020].

[90] The Ministry of Justice of the Republic of Turkey's website is available at: <http://www.adalet.gov.tr> [last access 30 August 2020].

[91] Ombudsman's website is available at: <https://www.ombudsman.gov.tr> [last access 30 August 2020].

[92] The Human Rights and Equality Institution of Turkey's website is available at: <http://www.tihek.gov.tr/index.html> [last access 30 August 2020].

[93] Çelikyay (2014).

[94] See, for example: Human Rights Investigation Commission (2019); Human Rights Investigation Commission (2018); Human Rights Investigation Commission (2017a).

[95] ibid

published the visit reports with a few exceptions.[96] Most of these reports are not specifically related to the implementation of life imprisonment, but they are relevant to the treatment of life prisoners because most of this group of prisoners join the rest of the prison population at some stages of their sentence or they are detained with other prisoners. For example, as will be examined in Chapter 7, (normal) life prisoners in Turkey are kept with other prisoners and are subject to the same prison regulations, whereas aggravated life prisoners are segregated from the general prison population and are differently treated.[97] Apart from the reports on the general prison populations, CPT has specifically observed the treatment of life prisoners in some of its visits.[98]

In order to access empirical data, the present thesis also consults, *inter alia*, other non-official sources such as academic research, inspection reports published by non-governmental organisations and newspapers articles.

2.4.3. Statistical Data

Statistical information about life prisoners in E&W is published by the Ministry of Justice at regular intervals.[99] Moreover, the Parole Board provides significant figures about, for example, the number of released and recalled life prisoners and the caseload of parole board hearings for life prisoners.[100] Unlike E&W, however, statistical information about life prisoners is not publicly available in Turkey. Although statistical information about the general prison population is regularly provided, statistics on life imprisonment are not included. As part of this research, a number of formal and informal enquiries to access the data about life prisoners in Turkey were made to the Ministry of Justice of the Republic of Turkey, but none were successful.[101] Thus, it has been a challenge for this thesis

[96] The CPT publishes its visit reports upon the authorisation of publication by states. See: CPT (2019a:17 and Appendix 6).

[97] Law No: 5275, 'Law on the Execution of Sentences and Security Measures' (LESSM), (Official Gazette Date and No: 29.12.2004 – 25685), Art 25.

[98] See, for example: CPT (2005b); CPT (2013b); CPT (2013f); CPT (2017c).

[99] Minister of Justice (2020).

[100] See, for example: Parole Board for England and Wales (2019a); Parole Board for England and Wales (2018).

[101] As a part of this research, a number of applications were made to the relevant public institutions in Turkey in order to access to the statistics on life imprisonment. Further,

to access the statistical data about life prisoners in Turkey. To overcome this challenge, however, this thesis consults statistical data provided by, *inter alia*, the following sources:

- Council of Europe Annual Penal Statistics (SPACE I)[102]
- United Nations Office on Drugs and Crime (UNODC)
- Turkish Statistical Institute (TUIK)
- General Directorate of Prisons and Detention Houses (*Ceza ve Tevkifevleri Genel Müdürlüğü*) (CTGM)
- World Prison Brief
- Statistics reported by academic research and newspaper articles.

These *ersatz* sources have enabled the thesis to access some basic statistical data on life imprisonment in Turkey. For example, the number of life prisoners by year is provided by the Council of Europe Annual Penal Statistics (SPACE I). UNODC provides intentional homicide rates in E&W and Turkey. Further, the thesis has consulted TUIK and World Prison Brief for statistics about general prison population in Turkey. Although constrained, these data have become useful to make statistical comparisons between E&W and Turkey, and to draw conclusions from such comparisons throughout Chapters 6, 7 and 8 of the thesis.

2.5. Conclusion

The present thesis uses the comparative law methodology in a human rights law context to carry out a comparison of life imprisonment in E&W and Turkey. The deeper purpose of the thesis is to demonstrate why human rights law should be taken seriously in comparative criminal and penal law studies and to set a good

a number of emails sent, and phone calls made to informally obtain any reasonable data. However, both formal and informal inquires have been unsuccessful. My requests for statistical information about life imprisonment in Turkey were rejected on the ground of Art 25 of Law No. 4982 on the Right to Information. Rejection Letters of 12 April 2021; of 05 October 2018; of 19 July 2018; of 11 July 2018, are on file with the author.

[102] Data for the SPACE reports are collected by the research team of the Criminology Research Unit at the School of Criminal Sciences of the University of Lausanne. In order to obtain data for SPACE reports, questionnaires are sent to the prison administrations (SPACE I) and to the probation agencies (SPACE II) of the Council of Europe member states (Council of Europe Annual Penal Statistics, 2010).

example for how it may be used effectively. To this end, the thesis first examines European human rights law in order to identify the relevant principles and standards for human-rights-compliant life imprisonment in Chapters 3, 4 and 5 of the thesis. Then, it proceeds to compare the English and Turkish life sentences in light of these relevant standards in Chapters 6, 7 and 8. In so doing, it seeks to accomplish a triangular comparison by exploring and explaining the similarities and differences between E&W and Turkey, and by discussing whether and/or to which extent the life sentences in these two countries can be considered human-rights-compliant under the relevant European principles and standards for life imprisonment.

PART II

EUROPEAN STANDARDS FOR LIFE IMPRISONMENT

CHAPTER 3
STANDARDS FOR IMPOSITION

This chapter, along with the following two chapters, examines whether human-rights-compliant life imprisonment is plausible under European human rights law. As noted at the introduction, the European human rights documents and instruments have closely engaged with the issue of life imprisonment and produced a wide set of principles and standards for its imposition and implementation. In order to comprehensively discuss the European standards for life imprisonment, this chapter examines the standards for imposition, while the standards for the implementation of, and release from life imprisonment will be explored in Chapters 4 and 5, respectively. These analyses in Chapters 3, 4 and 5 will not only help us to understand whether or not life imprisonment can be used in a human-rights-compliant way, but also contribute to our discussion (in Chapters 6, 7 and 8) about whether life sentences in England and Wales (E&W) and Turkey can be considered human-rights-compliant under the European standards.

The purpose of the present chapter is to explore the European standards surrounding the imposition of life imprisonment. The European standards for imposition generally focus on the principle of proportionality and the prohibition of inhuman or degrading punishment. The European human rights documents and instruments have also dealt with the rationales for the imposition of life imprisonment. On this basis, this chapter first discusses what justifications are regarded as legitimate penological grounds for the imposition of life imprisonment at the European supranational level. Then, it moves on to analyse whether and, if so, when a life sentence can be considered an inhuman or degrading punishment.

3.1. Justifications for Life Imprisonment

At the European supranational level, retribution, deterrence, rehabilitation and public protection are all regarded as the legitimate penological grounds for the

imposition of life imprisonment.[103] In this section, we examine how these four traditional justifications for punishment are understood by the European human rights documents and instruments in terms of the use of life imprisonment.

3.1.1. Deterrence & Retribution

Life imprisonment is imposed on the grounds of deterrence and retribution in a number of European countries,[104] and no objections have been raised for these underlying rationales by the European human rights instruments. In fact, deterrent and retributive objectives of life imprisonment appear to be approved by the European Court of Human Rights (ECtHR) on many occasions. For example, in a number of life imprisonment cases stemming from the United Kingdom (UK), the ECtHR have had to consider the 'tariff' period,[105] which represents the minimum period of life imprisonment required to meet the necessary requirements of deterrence and retribution in English law.[106] In these cases, the ECtHR has not contested that a very long period of a life sentence had been served to satisfy the requirements of deterrence and retribution.

The purpose of the deterrence theory of punishment is to prevent future offences through sentencing by relying on threat, fear and terror of punishment.[107] It aims to do so by way of individual (or special) deterrence and general deterrence.[108] The former refers to preventing a defendant who has already been tried by the criminal justice system from reoffending (either from recommitting the same offence or, ideally, from violating any other criminal

[103] *Vinter and Others v. the United Kingdom* [2013] ECHR 786 [Grand Chamber], para 111. See also: CPT (2016a: para 73).
[104] As will be discussed in Chapter 5.2, deterrence and retribution are also prioritised as the primary rationales for the imposition of life imprisonment in E&W and Turkey.
[105] The introduction and development of 'tariff' term in English law will be examined in Chapter 6.1.1.
[106] See, for example: *Weeks v. the United Kingdom* [1987] ECHR 3; *Thynne, Wilson and Gunnell v. the United Kingdom* [1990] ECHR 29; *Hussain v. the United Kingdom* [1996] ECHR 8; *V. v. the United Kingdom* [1999] ECHR 171; *T. v. the United Kingdom* [1999] ECHR 170; *Stafford v. the United Kingdom* [2002] ECHR 470; *Benjamin and Wilson v. the United Kingdom* [2003] MHLR 124; *Hill v. the United Kingdom* [2004] ECHR 179; *Blackstock v. the United Kingdom* [2005] ECHR 407.
[107] Ashworth (2010:78).
[108] Bowring (1843:367); Ashworth (1998:45); Ashworth (2010:79).

rules),[109] whereas general deterrence focuses on deterring potential offenders by the threat of incurring a similar penalty, through sending a message that 'criminal laws are not mere empty threats'.[110]

In general, courts should impose sentences which are calculated to sufficiently deter would-be offenders from committing the same offence. Also, the criminal justice system should be designed in a way that includes sufficiently severe penalties so that potential offenders would not risk these sentences by breaking the law.[111] However, according to the eighteenth-century Italian philosopher Beccaria, punishment should also be just, and hence must not be unnecessarily severe while serving deterrent ideals.[112] For this reason, in *Dei delitti e delle pene* (translated into English as *On Crimes and Punishments*), he argued that the death penalty is an unnecessarily cruel punishment and called for its replacement with life imprisonment considered by him as more deterrent.[113] Yet, contrary to his thoughts on other forms of imprisonment and the death penalty, Beccaria supported 'perpetual penal servitude' as the ideal form of life imprisonment, by stating that

> there is no one who, upon reflection, would choose the total and permanent loss of his own liberty, no matter how advantageous a crime might be: therefore, the intensity of perpetual penal servitude, substituted for the death penalty, has all that is necessary to deter even the most determined mind. Indeed, I would say that it has even more: a great many men look upon death with a calm and steady gaze, some out of fanaticism, some out of vanity …. But neither fanaticism nor vanity survives in fetters or chains, under the cudgel and the yoke, or in an iron cage; and the desperate man finds that his woes are just beginning rather than ending.[114]

The understanding of life imprisonment as 'penal servitude' was also supported by Bentham, who claimed that general deterrence should be the principal purpose of punishment.[115] Bentham argued that 'the contemplation of

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[109] Walker & Padfield (1996:116).
[110] Andenaes (1974:34). See also: Hirsch, Bottoms, Burney, & Wikstrom (1999:5).
[111] Lempert (1981:1193).
[112] van Zyl Smit & Appleton (2019:3).
[113] Beccaria (2008:51-7).
[114] Beccaria (2008:53-4).
[115] Bentham (1825:20) says that 'general prevention ought to be the chief end of punishment, as it is its real justification'.

perpetual imprisonment, accompanied with hard labour and occasional solitary confinement, would produce a deeper impression on the minds of persons in whom it is more eminently desirable that the impression should be produced, than even death itself'.[116] As van Zyl Smit and Appleton have observed, both Beccaria and Bentham's perceptions of life imprisonment require a very harsh regime that 'renders death a mercy'.[117] Even prisoners serving life sentences (without the possibility of parole), which are not considered involving such dire prison conditions as described by Beccaria and Bentham, have perceived their sentence as hasher than death.[118]

This perception of life imprisonment also found supporters from the retributive approach of punishment. The fundamental principle of the retributive approach is that offenders should be punished because (and just because) they deserve it due to the fact that they have violated criminal law mandates.[119] Thus, offenders are considered responsible agents for what they have done or omitted to do.[120] The essence of the modern understanding of retributive theory, desert (or just desert), resides in the principle of proportionality, recognising that the seriousness of the crime committed should be the primary determinant of the severity of punishment.[121] This means that punishment should be proportionate to the magnitude of defendants' criminal conduct.[122]

In this respect, retributive theory can explain the imposition of life imprisonment on the basis of the heinousness of the offence committed.[123] Retributivists argue that there are some crimes which cannot be atoned, and hence the offender must be deprived of his/her liberty for the rest of his/her

[116] Bowring (1843:450).
[117] van Zyl Smit & Appleton (2019:3). See also: Bedau (2004:204).
[118] Appleton & Grøver (2007:607); Capers (2012:176). See also: Henry (2012).
[119] How moral desert by in itself can justify the punishment is answered in many distinct ways. See, for example: Quinton (1954:134); Morris (1968:477-78); Sher (1987:82); Lacey (1988:17-25); Andrew von Hirsch (1993:7); Duff & Garland (1994:13); Andrew von Hirsch (1998a:169). See also generally: Feinberg (1970); Andrew von Hirsch (1986); Moore (1987); Bradley (1999); Duff (2001).
[120] Kramer (2011:72).
[121] Andrew von Hirsch (1993:15); Andrew von Hirsch (1998a:173); Frase (2013:8).
[122] Ashworth (2010:89).
[123] Robinson (2012:145).

life.[124] Coyle summarises this theory by stating that 'there are some crimes for which an offender must suffer, if with not physical pain, then at least with the psychological pain of the certainty of life-long imprisonment'.[125]

Where the death penalty is abolished in a jurisdiction, life imprisonment is generally considered an alternative to replace it so as to ensure that the most serious crimes are punished harshly enough.[126] For example, the Central and Eastern European states who sought to participate in the Council of Europe were forced to remove capital punishment from their domestic laws and ratify Protocol No. 6 to the European Convention on Human Rights (ECHR).[127] However, some of these countries did not have provisions for life imprisonment in their domestic law. Their decision to abolish the death penalty was mainly a political decision which was undertaken to appease the Council of Europe and facilitate membership. However, it resulted in the hasty adoption of life imprisonment as an alternative to the death penalty.[128]

Deterrent and retributive justifications focus on explaining life imprisonment, specifically life imprisonment without parole (LWOP), as a harsher or at least not more lenient punishment than the death penalty.[129] Much emphasis is devoted to the dire prison conditions and never-ending nature of this penalty in order to demonstrate how much life prisoners would suffer in the course of their sentence, compared to a rapid death.[130] For example, life-long

[124] Appleton & Grøver (2007:605); Barkow (2012:197).
[125] Coyle (2004:100).
[126] Appleton & Grøver (2007:605); Robinson (2012:139). Capers (2012:169) states that 'one consequence of the turn from death has been a turn to life without parole'.
[127] See for the abolition of the death penalty in the Central and Eastern European countries: Fijalkowski (2001).
[128] van Zyl Smit & Appleton (2019:29).
[129] For example, a number of studies have shown that the support for the death penalty dropped dramatically if the alternative was an LWOP sentence. See: Bowers (1993:163-65); Lane (1993); Bedau (1997:86); Dieter (1997); Wardle & Gans-Boriskin (2004:69); Bedau (2004:203); Schabas (2004:315-16); The Harvard Law Review Association (2006).
[130] Appleton & Grøver (2007:605-607). It must be noted that in some countries where the death penalty was abolished, life prisoners were held in special prison colonies under very harsh treatment. See: Coyle (2004:45).

sentences have been described as 'a life behind bars',[131] 'death behind bars',[132] 'a living death',[133] 'death by incarceration',[134] a 'virtual death sentence',[135] a 'prolonged death penalty',[136] a 'delayed death penalty',[137] 'a death sentence without an execution date',[138] 'a death in slow motion',[139] and the 'other death penalty'.[140] In effect, the underlying idea is that prisoners are sent to prison for a slow death under very harsh conditions, as Mill stated that:

> What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement in diet?[141]

However, this position that life prisoners are sent to prison to receive extra punishment cannot be held anymore in Europe. In its Recommendation No. R(92)17 concerning Consistency in Sentencing,[142] the Committee of Ministers of the Council of Europe explicitly states that '[s]entencing rationales should be consistent with modern and humane crime policies'.[143] It further states that '[i]n proposing or imposing sentences, account should be taken of the probable impact of the sentence on the individual offender, *so as to avoid unusual hardship and to avoid impairing the possible rehabilitation of the offender*'.[144]

In this context, while deterrence and retribution have been recognised as the rationales for the imposition of life imprisonment at the European supranational

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[131] Barkow (2012:197).
[132] Capers (2012:173).
[133] Cockburn (2009:10).
[134] Johnson and Mcgunigall-Smith (2008).
[135] Villaume (2005).
[136] Bedau (1990:485).
[137] Sheleff (1987:131).
[138] Berry (2010:1112).
[139] Gottschalk (2012:234).
[140] Henry (2012:73); Ogletree & Sarat (2012).
[141] House of Commons (1868: col.1049).
[142] Committee of Ministers of the Council of Europe (1992).
[143] ibid, paragraph A.6.
[144] ibid, paragraph A.8 (emphasis added).

level, the idea of penal servitude under very harsh conditions is vigorously rejected. Rather, the European penal law recognises that prisoners, including life prisoners 'are sent to prison as punishment and *not to be punished within the prison*'.[145] As will be explained in Chapter 4, significant guidance has been provided through the recommendations of the Committee of Ministers of the Council of Europe in order to ensure that life prisoners are treated humanely in prison. Similarly, the ECtHR and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have undertaken an important duty to scrutinise the prison conditions so as to ensure that prisoners' rights are respected, and they are treated with respect as well as compliance with their dignity. Equally important is that, as will be explained in Chapter 5, the very concept of a life-long incarceration is nowadays considered unacceptable in Europe.

3.1.2. Rehabilitation & Public Protection

Rehabilitation and public protection are also important rationales put forward for the imposition of life imprisonment. Rehabilitation justifies punishment because 'it provides an opportunity for … tak[ing] steps to reform offenders and so to reduce offences'.[146] Traditional understanding of rehabilitation was based on the principle that the primary rationale of sentencing is to *cure* offenders' criminal tendencies by seeking some modifications in their personality, habits and attitudes in order to make them less inclined to commit crimes.[147]

This ideology perceived proportional sentencing as 'impractical and unprogressive' because it would allow some unrehabilitated offenders to be released after completing the sentence they deserve, whereas requiring some rehabilitated offenders to be unnecessarily held in prison if they have not completed their deserved term.[148] In contrast to retribution, rehabilitation held the principle that inmates may be released only after they were cured through

[145] CPT (2009c: para 112); CPT (2013b: para 17) (emphasis added).
[146] Honderich (1976:88).
[147] Allen (1981); Lynch (2010:10); Dolovich (2012:100).
[148] Andrew Von Hirsch & Ashworth (1998:2).

the rehabilitative treatments they had taken.[149] Therefore, the prospect for release of prisoners was left in the hands of prison or probation authorities. This resulted in a lack of established criteria, accountability and challenge for decision-makers.[150]

However, this understanding of rehabilitation went out of favour in the late 1970s,[151] and was replaced by the concept of 'social (re)integration'.[152] This new form of rehabilitation was described as providing prisoners with 'opportunities to participate in all aspects of social life which are necessary to enable persons to lead a life in accordance with human dignity'.[153] In this respect, the ECtHR and the CPT and the Committee of Ministers of the Council of Europe have all referred to rehabilitation in a positive sense. For example, in the revised commentary to the 2006 European Prison Rules (EPR), the European Committee on Crime Problems (CDPC) notes that the objective of the regime for sentenced prisoners set out in the EPR 'deliberately avoids the use of the term, "rehabilitation", which carries with it the connotation of forced treatment'.[154] Rather, as the CDPC states, the objective of a prison regime adopted in the EPR 'highlights the importance of providing sentenced prisoners … the opportunity to develop in a way that will enable them to choose to lead law-abiding lives'.[155] Similarly, the ECtHR recognises an understanding of rehabilitation which makes prisoners' social reintegration possible, instead of recognising the 'earlier narrow notion of forced treatment with which the concept of rehabilitation is sometimes associated'.[156] By underpinning rehabilitative ideals, the ECtHR has made it clear that sentencing cannot be considered merely in the penological context, but it must also serve the purposes of promoting the progress of life

[149] ibid, 2.
[150] Ashworth (2010:87).
[151] Martinson (1974); Halleck & Witte (1977); Allen (1978); Allen (1981); Cullen, Cullen, & Wozniak (1988); Zimring & Hawkins (1997:8-10); Barkow (2012:198-99).
[152] van Zyl Smit & Snacken (2009:83).
[153] Bouverne-De Bie (2002), as cited in van Zyl Smit & Snacken (2009:83).
[154] European Committee on Crime Problems (2018: para 112).
[155] ibid.
[156] van Zyl Smit, Weatherby, & Creighton (2014:66).

prisoners towards their eventual release into society.[157]

As will be explained in Chapters 4.1 and 5.3, at the European supranational level rehabilitation is considered the primary objective of the implementation of prison sentences, including life imprisonment, and has become *the key* in ensuring that life prisoners are provided with a realistic prospect for release. The underlying philosophy is explained by the CPT, stating 'that a prison sentence which offers no possibility of release precludes one of the essential justifications of imprisonment itself, *the possibility of rehabilitation'*.[158] Rehabilitation, as understood by the ECtHR,[159] requires that the course of life sentences must serve the purposes of promoting the progress of life prisoners towards their eventual release into society, as the prevailing penal policy in both European and international law recognises a 'commitment to both the rehabilitation of life sentence prisoners and to the prospect of their eventual release'.[160]

However, placing rehabilitation at the centre of imprisonment – including life imprisonment – does not guarantee the release of life prisoners if they are deemed dangerous and their incarceration is needed for public protection. The idea behind the public protection rationale for life imprisonment is a simple one: making convicted offenders incapable of offending for a period of time, by restraining them physically.[161] It is to protect the public from criminally-inclined offenders by isolating them from society.[162] In this context, public protection is

[157] Kisic & King (2014:11).
[158] CPT (2016a: para 73) (emphasis added).
[159] In his partly dissenting opinion in *Öcalan v. Turkey* (No. 2) [2014] ECHR 286 (at footnote 7), Judge Pinto de Albuquerque stated that '[t]he Grand Chamber explicitly accepted the German Federal Constitutional Court's understanding of resocialisation as a *sine qua non* of prison sentences, including life imprisonment'. See for an analysis of the German Federal Constitutional Court's interpretation of resocialisation: van Zyl Smit (1992).
[160] *Vinter*, para 117.
[161] Wilson (1983); Zimring & Hawkins (1997:14-5); Ashworth (2010:84).
[162] van Zyl Smit & Snacken (2009:82). It must be noted that a number of studies have raised significant doubts in terms of the accurate identification of potential offenders who are inclined to commit crimes in the future. See, for example: Bottoms (1977:80); Blumstein & Cohen (1979); Floud & Young (1981:30); Andrew von Hirsch (1986:175-78); Tonry (1987); Andrew von Hirsch (1998b:122-23); Ashworth (2010:84); Robinson (2012:142-43).

regarded as crucial to justify the imposition of long imprisonment sentences, including life sentences. For example, Resolution 76(2) on the Treatment of Long-term Prisoners requires that states should 'pursue a criminal policy under which long-term sentences are imposed only if they are necessary for the protection of society'.[163] This point is also relevant to the release of life prisoners since, as will be explained in Chapters 5.2 and 5.3, they may be detained in prison until their death, if the protection of the public so requires.

As we have briefly explained in this section, the traditional justifications of punishment are, to some extent, contradictory.[164] In this respect, Recommendation No. R(92)17 concerning Consistency in Sentencing states that '[w]here necessary, and in particular where different rationales may be in conflict, indications should be given of ways of establishing possible priorities in the application of such rationales for sentencing'.[165] Against this background, in Chapter 6.2 we will discuss what justifications are invoked and prioritised for the imposition of life imprisonment in E&W and Turkey. Now, we will examine what kind of life sentences can be considered inhuman or degrading punishment under the European standards.

3.2. Life Imprisonment as Inhuman or Degrading Punishment?

The existence of legitimate penological grounds for life imprisonment does not, in itself, prove that it is an acceptable form of punishment. This is because the advances in international human rights law are also of significant importance in the acceptability of a particular form of punishment,[166] including life

[163] Committee of Ministers of the Council of Europe (1976: Art 1).

[164] Cross & Ashworth (1981:120-21) argued that 'neither retributive theories standing alone nor utilitarian theories standing alone can provide an adequate answer to any of the major questions that are commonly raised with regard to punishment'. See also: Flew (1969:90).

[165] Committee of Ministers of the Council of Europe (1992: paragraph A.2).

[166] Kurki (2001); Morgan (2001); Tonry (2001:25). For example, developments in international human rights law have helped the abolitionists to ground their arguments on human rights norms to persuade states to outlaw the death penalty. See, for example: van Zyl Smit (2002a:4-5); Hood & Hoyle (2015:18); See also generally: Schabas (2002).

imprisonment.[167] In this respect, international human rights law has primarily shaped the evolution of punishment in two distinct ways: one is its impact on the perception of the acceptable forms of punishment, and the other is the manner in which it regulates the implementation of acceptable forms of penalties.[168] This means that the imposition of disproportionate sentences is prohibited under international human rights law. Further, human rights law also requires that imprisonment sentences are executed in compliance with human rights standards. For the present inquiry, the former will be discussed in this section, while the latter is the subject-matter of Chapter 4.

At the European supranational level, Art 3 ECHR is an important human rights provision in terms of the human rights compatibility of any forms of punishment. This provision explicitly prohibits inhuman or degrading treatment or punishment. Van Zyl Smit suggested that this prohibition has 'two complementary elements: a prohibition on punishments that are inherently incompatible with the [human dignity] standard and a prohibition against all punishments which by their excessive length or severity are grossly disproportionate to the seriousness of the offence'.[169] The ECtHR has dealt with both of these elements in determining whether a form of life imprisonment can be considered an inhuman or degrading punishment under Art 3 ECHR. It has ascertained two situations in this regard: first, where a life sentence is considered 'grossly disproportionate'; and second, where a life sentence is considered 'irreducible'.

3.2.1. Grossly Disproportionate Life Sentences

The principle of proportionality requires that the seriousness of the crime and the culpability of the offender should be the primary determinant of the severity of punishment.[170] This principle is underlined in Recommendation No. R(92)17 concerning Consistency in Sentencing.[171] Paragraph A.4 of this

[167] Appleton & Grøver (2007:607-611).
[168] van Zyl Smit (1998:8-13).
[169] van Zyl Smit (2002a:4).
[170] Ashworth (2010:89). See also: van Zyl Smit & Ashworth (2004).
[171] Committee of Ministers of the Council of Europe (1992).

Recommendation states that '[w]hatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided'. The Recommendation further explains that:

> Custodial sentences should be regarded as a sanction of last resort, and should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate. Where a custodial sentence on this ground is held to be justified, that sentence should be no longer than is appropriate for the offence(s) of which the person is convicted.[172]

It follows, therefore, that like any other criminal sanctions, life imprisonment, too, as the severest custodial sentence, should only be imposed in the cases where it is proportional to the crime and the criminal. In this respect, Art 77(1)(b) of the Rome Statute of the International Criminal Court recognises that life imprisonment should only be imposed 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. Similarly, the United Nation's report on *Life Imprisonment* linked certain international safeguards for the death penalty with life imprisonment and suggested that a life sentence must only be imposed where a person is charged, 'based on clear and convincing evidence', with 'the most serious crimes, intentional crimes, with lethal or other extremely grave consequences'.[173]

The ECtHR has developed this principle in its jurisprudence with regard to life imprisonment relatively recently.[174] In *Vinter and Others v. the United Kingdom*,[175] the Fourth Chamber of the ECtHR explicitly stated that 'a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition'.[176] It arrived at this finding by undertaking a comparative analysis of many countries where 'gross disproportionality is a widely accepted and applied test for determining when a sentence will amount

[172] ibid, paragraph B.5.
[173] UN Crime Prevention and Criminal Justice Branch (1994: para 14).
[174] See for an account of the ECtHR's jurisprudence on 'gross disproportionality': Rogan (2015).
[175] *Vinter and Others v. the United Kingdom* [Fourth Chamber] [2012] ECHR 61.
[176] ibid, para 89.

to inhuman or degrading punishment, or equivalent constitutional norms'.[177] However, it underlined that the gross disproportionality test is strict, and thus, will only be satisfied on 'rare and unique occasions'.[178] It appears that the ECtHR has abstained from indicating exactly what kind of life sentences would amount to a grossly disproportionate sentence. In this respect, Szydlo's interpretation of the *Vinter* judgment concerning gross disproportionality is of importance:

> In order for the life sentence to be qualified as grossly disproportionate, there must be an enormously huge discrepancy between, on the one hand, the value of the remainder of the offender's life and, on the other hand, the severity or cruelty of the offence and the degree of the offender's culpability. Such a discrepancy brought about by a life sentence, however, does not seem to be sufficient in that regard. It must also be identified that from the point of view of an average citizen, this discrepancy is truly shocking to one's sense of justice and decency, and that society is not ready to accept such a life sentence as retaliation for the offence. Such a grossly disproportionate life sentence infringes the very core of human dignity of the offender and weakens the trust of citizens in their own state, which may then be perceived as cruel and unjust.[179]

3.2.2. Irreducible Life Sentences

Apart from gross disproportionality, another situation where the imposition of life imprisonment can be considered inhuman or degrading punishment under Art 3 ECHR is the case where it is an irreducible life sentence.

In *Kafkaris v. Cyprus*,[180] the ECtHR for the first time explicitly declared that life sentences without any hope or possibility of release may constitute an inhuman or degrading treatment under Art 3 ECHR. In a number of following cases, the ECtHR has consistently ruled that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Art 3 ECHR whereas the imposition of an irreducible life sentence may raise an issue under this provision.[181] The Court has noted that a life sentence

[177] ibid, para 88.
[178] ibid, para 89.
[179] Szydlo (2013:506).
[180] [2008] ECHR 143.
[181] See, for example: *Kafkaris*, para 97; *Vinter*, para 107; *Öcalan*, para 194; *Laszlo Magyar v. Hungary* [2014] ECHR 491, para 48; *Trabelsi v. Belgium* [2014] ECHR 893,

does not become an irreducible life sentence because of the mere fact that the prisoner serves it in full. Rather, what Art 3 ECHR prohibits is a life sentence which is not *de jure* and *de facto* reducible.[182] Whether a life sentence is *de jure* and *de facto* reducible depends on whether the life prisoner serving it can be said to have any prospect of release. The ECtHR has explained that:

> Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3.[183]

This means that life sentences must be reviewed by domestic authorities in order to assess whether or not the prolonged detention of a life prisoner can be justified on any legitimate penological grounds.[184] For instance, a life prisoner may remain in prison for the rest of his/her life if the state reaches the decision, after reviewing the life sentence, that the continued detention is required for the purpose of public protection.[185] However, if the review reveals that there are no penological grounds to detain a life prisoner, that prisoner should be released as quickly as possible to prevent him/her being 'treated purely instrumentally'.[186]

What is of importance here is that the determination as to whether a life sentence is irreducible or not requires an investigation into the release phase of life imprisonment. However, once such an investigation reveals that the life sentence in question is an irreducible one, *the imposition of that life sentence* causes a violation under Art 3 ECHR.[187] In *Vinter and Others v. the United Kingdom*, the Grand Chamber held that

> a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of

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para 112; *Lopez Elorza v. Spain* [2017] ECHR 1135, para 97; *Murray v. the Netherlands* [2016] ECHR 408, para 99.

[182] *Kafkaris*, para 98; *Vinter*, para 108; *Laszlo Magyar*, para 49; *Trabelsi*, para 113; *Öcalan*, para 195; *Lopez Elorza*, para 98; *Murray*, para 99.

[183] *Kafkaris*, para 98; *Vinter*, para 109; *Laszlo Magyar*, para 50; *Trabelsi*, para 113; *Öcalan*, para 196; *Lopez Elorza*, para 98.

[184] Celiksoy (2019:328-32); Berry (2015:1069).

[185] *Vinter*, para 108.

[186] Szydlo (2013:508).

[187] Celiksoy (2019:341).

> Article 3 in this regard. This would be contrary to both legal certainty and to the general principles on victim status within Article 34.[188]

Further, the ECtHR held that '[a] whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought'.[189]

One of the strong arguments put forward by the ECtHR to outlaw the imposition of irreducible life sentences is that these forms of life imprisonment infringe the right to human dignity and the right to rehabilitation of life prisoners. Following the German Federal Constitutional Court's *Life Imprisonment* case, the ECtHR has linked the right to human dignity of life prisoners with a right to have a hope to regain their freedom at a future date, because 'the State [strikes] at the very heart of human dignity if it [strips] the prisoner of all hope of ever earning his freedom'.[190] Furthermore, deprivation of all hope for release from life imprisonment contradicts the right to rehabilitation, because it may discourage life prisoners from good behaviour, self-improvement and from making their time in prison meaningful which all contribute to the progression towards their eventual reintegration into society.[191] In this respect, the ECtHR held that 'the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece'.[192] It went on to say that

> in cases *where the sentence on imposition is irreducible* under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. … Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, *the incompatibility with Article 3 on this ground already arises at*

[188] *Vinter*, para 122. This was a rejection of the Fourth Chamber's reasoning in *Vinter*.
[189] ibid.
[190] *Vinter*, para 69.
[191] Liem & Elbers (2015:292).
[192] *Vinter*, para 113; See also for a discussion about the link between human dignity and right to rehabilitation: Ploch (2012).

the moment of the imposition of the whole life sentence, and not at a later stage of incarceration.[193]

Therefore, it can be said that the underlying philosophy behind the incompatibility of the imposition of an irreducible life sentence with Art 3 ECHR is the fact that it takes away any hope for release from life prisoners which is incompatible with their right to respect for human dignity, and it contradicts the principle of rehabilitation which is regarded as the main objective of imprisonment in Europe nowadays. We will further examine the importance of a rehabilitation-oriented regime for life imprisonment in Chapter 4.1, while the right to hope for release will be discussed in Chapter 5.3.

3.3. Conclusion

In the European supranational context, retribution, deterrence, rehabilitation and public protection are regarded as the legitimate penological grounds for the imposition of life imprisonment. However, these four traditional justifications for punishment are restricted by human rights norms and principles. Further, European human rights law has outlawed the imposition of grossly disproportionate life sentences and irreducible life sentences. This means that life imprisonment should only be imposed on offenders convicted of the most serious offences and should be accompanied by release mechanisms. Building on our analyses in this chapter, we will examine the imposition of life imprisonment in E&W and Turkey in Chapter 6. In the light of the European standards for imposition examined in this chapter, we will discuss what justifications are invoked for life sentences in E&W and Turkey and assess whether life imprisonment is designed as a sentence to be imposed for the most serious offences. As the reducibility assessment of a life sentence relates to release mechanisms available to life prisoners, the 'irreducibility' question of life sentences in E&W and Turkey will be discussed in Chapter 8.

[193] *Vinter*, para 122 (emphasis added).

CHAPTER 4
STANDARDS FOR IMPLEMENTATION

The previous chapter has explored the European standards for the imposition of life imprisonment. It has found that in the European supranational context, the imposition of life imprisonment is considered acceptable on the grounds of retribution, deterrence, rehabilitation and public protection, if such a life sentence is not grossly disproportionate or irreducible. In this chapter, the thesis proceeds to explore what constitutes a human-rights-compliant life sentence by examining the European standards for the implementation of life imprisonment.

At the European supranational level, imprisonment as deprivation of liberty is regarded as punishment in itself. Thus, the European penal law considers that 'potentially harmful aggravations of a prison sentence as part of the punishment are not acceptable'.[194] In this respect, the main philosophy behind the execution of life sentences is stated, among others, in Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners, adopted by the Committee of Ministers of the Council of Europe.[195] This Recommendation recognises that the enforcement of life sentences demands striking a balance between 'ensuring security, good order and discipline in penal institutions, on the one hand, and providing prisoners with decent living conditions, active regimes and constructive preparations for release, on the other'.[196] The purpose of the present chapter is to examine how this balance is established at the European level. To this end, this chapter analyses a wide variety of recommendations, reports, policy documents and case law which are produced by the European human rights instruments as far as life imprisonment is concerned. This analysis will provide us with a framework for which a life sentence is implemented in a human-rights-compliant way. Against our analyses in this chapter, in Chapter 7 we will compare and discuss to what

[194] CPT (2012b: para 98); See also Committee of Minister of Council of Europe (2006: Rule 102.2).
[195] Committee of Minister of Council of Europe (2003).
[196] ibid.

extent the execution of life sentences in England and Wales (E&W) and Turkey complies with the European standards for implementation.

In order to explore the European standards for implementation, this chapter first examines the primary aim of the implementation of life imprisonment with a specific focus on the recognition of rehabilitative ideals by the European human rights documents and instruments. Then, it discusses the basic European principles for the treatment of life prisoners. Subsequently, it explains the importance of risk and needs assessments and sentence planning for life prisoners. Thereafter, it addresses whether the European penal law recognises life imprisonment as a sentence with damaging effects on those serving it and discusses the ways that help counteract such negative impacts. Finally, it examines the specific needs of special categories of life prisoners, such as female and elderly, in the course of their sentences.

4.1. Primary Aim of the Implementation of Life Imprisonment

In recent years, the European Court of Human Rights (ECtHR) has developed its jurisprudence on prisoners' legal status as bearers of the fundamental rights and freedoms guaranteed by the European Convention on Human Rights (ECHR). Specifically, in *Hirst v. the United Kingdom* (No.2), the ECtHR explicitly held that:

> There is . . . no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.[197]

The ECtHR further stated that

> prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention; they continue to enjoy the right to respect for family life; the right

[197] *Hirst v. the United Kingdom* (No.2) [2005] ECHR 681, para 70.

> to freedom of expression; the right to practise their religion; the right of effective access to a lawyer or to a court for the purposes of Article 6; the right to respect for correspondence; and the right to marry.[198]

The recognition of prisoners' legal status as bearers of the fundamental human rights and freedoms has contributed to the recognition of rehabilitation as the primary purpose of the implementation of imprisonment sentences in Europe. Van Zyl Smit and Snacken stated that the emphasis on the rehabilitative aims of imprisonment 'is derived from and closely linked to the growing recognition of prisoners' human rights'.[199] Nowadays, rehabilitation is prioritised as the primary purpose of the implementation of imprisonment sentences, including life imprisonment, at the European supranational level. For example, in *Dickson v. the United Kingdom* the ECtHR stated that even though retribution, deterrence, rehabilitation and public protection are referred to by criminologists, 'there has been a trend towards placing more emphasis on rehabilitation' in recent years 'as demonstrated notably by the Council of Europe's legal instruments'.[200] The ECtHR has relied on the European human rights documents in order to demonstrate that rehabilitation is now the main purpose of imprisonment. Among the recommendations of the Committee of Ministers of the Council of Europe, the European Prison Rules (EPR) was particularly quoted by the ECtHR. Specifically, Rule 6 of the EPR requires that '[a]ll detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty'. This rule covers both untried and sentenced persons and aims to ensure their eventual return into the community.[201] Rule 102.1, however, engages more specifically with sentenced prisoners and states that prison regime 'shall be designed to enable them to lead a responsible and crime-free life'.

The rehabilitative aim of imprisonment, specifically life imprisonment, is also addressed by Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners. The values of

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[198] ibid, para 69; See also: *Khoroshenko v. Russia* [2015] ECHR 637, paras 116-117
[199] van Zyl Smit & Snacken (2011:172).
[200] *Dickson v. the United Kingdom* [2007] ECHR 17, para 28.
[201] European Committee on Crime Problems (2018: para 6).

this Recommendation for the treatment of life prisoners will be explained throughout this chapter. Here, it is important to express its emphasis on rehabilitation. The Recommendation explains that its general objectives are 'to counteract the damaging effects of life and long-term imprisonment' and 'to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release'.[202] In order to accomplish these objectives, as will be examined in section 4.2 below, the Recommendation sets out six basic principles for treatment of life and long-term prisoners.

At the European supranational level, the rehabilitative purpose of life imprisonment is also promoted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In its *25th General Report*, the CPT stated that '[w]hile punishment and public protection are important elements of a prison sentence, excluding from the outset any hope of rehabilitation and return to the community effectively dehumanises the prisoner'.[203] It further stated that life prisoners must be provided with 'a developed programme of activities',[204] as 'a programme of purposeful and structured activities is an essential part of the rehabilitation and resocialisation of prisoners and of preparation for their possible release'.[205]

Similarly, the ECtHR has explicitly refused the idea that the sole aim of an imprisonment sentence is to punish offenders. In *Dickson*, for example, the Court rejected the United Kingdom's (UK) approach to the punitive aim of imprisonment by stating that:

> The Government also appeared to maintain that the restriction, in itself, contributed to the overall punitive objective of imprisonment. However, and while accepting that punishment remains one of the aims of imprisonment, the Court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment,

[202] Committee of Minister of Council of Europe (2003: Art 2).
[203] CPT (2016a: para 73).
[204] CPT (2005a: para 30).
[205] CPT (2013e: para 47).

> particularly towards the end of a long prison sentence.[206]

The ECtHR has maintained the same position in *Vinter and Others v. the United Kingdom* and subsequent cases, by stating that 'while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence'.[207] In *Khoroshenko v. Russia*, the Court held that 'the emphasis on rehabilitation and reintegration has become a "mandatory factor" that member states need to take into account when designing their penal policies'.[208] It went on to say that:

> The regime and conditions of a life prisoner's incarceration cannot be regarded as a matter of indifference in that context. They need to be such as to make it possible for the life prisoner to endeavour to reform himself, with a view to being able one day to seek an adjustment of his or her sentence.[209]

In the ECtHR's jurisprudence on life imprisonment, *Murray v. the Netherlands* is one of the most important cases in terms of the rehabilitative aim of a life sentence.[210] In this case, the Court accepted that the Convention itself does not explicitly spell out a right to rehabilitation. Nevertheless, it observed that the Court's jurisprudence presupposes that prisoners, including life prisoners, must be allowed the chance of rehabilitation.[211] Thus, it held that 'national authorities must give life prisoners a real opportunity to rehabilitate themselves.'[212] The Court stated that the rehabilitation of life prisoners is 'an obligation of means, not one of result'.[213] This means that:

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[206] *Dickson*, para 75.
[207] *Vinter v. the United Kingdom* [2013] ECHR 786, para 115. See also: *Khoroshenko v. Russia* [2015] ECHR 637, para 121.
[208] *Khoroshenko*, para 121. In effect, the ECtHR has held on many occasions that the notion of rehabilitation is the main objective of imprisonment. See, for example: *James, Wells and Lee v. United Kingdom* [2012] ECHR 1706; *Rangelov v. Germany* [2012] ECHR 518.
[209] *Khoroshenko*, para 122; *Harakchiev and Tolumov v. Bulgaria* [2014] ECHR 721, para 265.
[210] [2016] ECHR 408.
[211] ibid, para 103
[212] ibid.
[213] ibid, para 104.

> States are not responsible for achieving the rehabilitation of life prisoners … [but], they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves. Were it otherwise, a life prisoner could in effect be denied the possibility of rehabilitation, with the consequence that the review required for a life sentence to be reducible, in which a life prisoner's progress towards rehabilitation is to be assessed, might never be genuinely capable of leading to the commutation, remission or termination of the life sentence or to the conditional release of the prisoner.[214]

In *Murray*, the ECtHR held for the first time that member states have a positive obligation with regard to the rehabilitation of prisoners, including life prisoners. Rehabilitation requires that states must carry out a case-by-case assessment in order to identify individual prisoners' needs, so that they are provided with an opportunity for rehabilitation.[215] Although states have a margin of appreciation in deciding how to enable life prisoners to rehabilitate themselves,[216] the ECtHR states that developments in the European law are *'indicative of a narrowing of the margin of appreciation left to the respondent State*'.[217] In this respect, important guidance for the implementation of life imprisonment in a way that complies with the European standards can be found in Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners. This Recommendation stipulates the basic principles for the treatment of life prisoners.

4.2. Basic Principles for the Treatment of Life Prisoners

Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners sets out its general objectives as follows:

- to ensure that prisons are safe and secure places for these prisoners and for all those who work with or visit them;
- to counteract the damaging effects of life and long-term imprisonment;
- to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following

[214] ibid.
[215] Meijer (2017:151).
[216] *Murray*, para 110.
[217] *Khoroshenko*, para 136 (emphasis added).

their release.[218]

In order to accomplish these objectives, the Recommendation identifies six basic principles: individualisation, normalisation, responsibility, security and safety, non-segregation and progression. These basic principles inform the entire text of the Recommendation.[219] They are also underscored by the CPT,[220] and the ECtHR.[221] Specifically, the CPT states that these general principles remain 'the most pertinent and comprehensive reference document for this group of prisoners'.[222] In this section, we will explain these six basic principles.

4.2.1. Individualisation Principle

The principle of individualisation aims at preventing any indiscriminate restrictions on all life and long-term prisoners.[223] It ensures that due considerations must be given to the diversity of life prisoners' personal characteristics. Accordingly, this principle recognises a prison regime in which life prisoners are treated according to their individual sentence plan, 'which is tailored to the needs and risks of the prisoner'.[224] Individualisation can only be achieved by a comprehensive individual sentencing plan based on an assessment of life prisoners' individual situations. This point will further be elaborated in section 4.3 below.

4.2.2. Normalisation Principle

The principle of normalisation requires a prison life 'as closely as possible to the realities of life in the community'.[225] The CPT states that no restriction must be imposed upon life prisoners unless it is necessary for their safe and orderly confinement.[226] This principle is reiterated as one of the basic principles of the

[218] Committee of Minister of Council of Europe (2003: Art 2).
[219] Drenkhahn (2014:39).
[220] CPT (2013f: para 83); CPT (2016a: para 74).
[221] See, for example *Dickson*, para 35.
[222] CPT (2016a: para 74).
[223] Committee of Minister of Council of Europe (2003: Art 3).
[224] CPT (2016a: para 74).
[225] Committee of Minister of Council of Europe (2003: Art 4).
[226] CPT (2016a: para 74).

EPR,[227] with a minor modification that emphasises 'the positive aspects' of the outside life instead of the 'realities' of the outside life in order to 'avoid the importation of serious social problems from the outside world'.[228]

4.2.3. Responsibility Principle

The principle of responsibility requires that life prisoners 'should be given opportunity to exercise personal responsibility in daily prison life'.[229] The prominent feature of the responsibility principle is to allow life prisoners to engage with their development and progression while serving their sentences. This is considered an important aspect of the rehabilitation of life prisoners. For example, the ECtHR stated that:

> While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the development of the "progression principle": in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.[230]

Similarly, Resolution 76(2) on the Treatment of Long-term Prisoners, adopted by the Committee of Ministers of the Council of Europe, requires that states should 'encourage a sense of responsibility in the prisoner by the progressive introduction of systems of participation in all appropriate areas'.[231] The CPT has also consistently emphasised this principle by stating that life prisoners 'should be able to exercise a degree of choice over the manner in which their time is spent, thus fostering a sense of autonomy and personal responsibility'.[232]

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[227] Committee of Minister of Council of Europe (2006: Rule 5).
[228] van Zyl Smit & Snacken (2009: 103).
[229] Committee of Minister of Council of Europe (2003: Art 5); CPT (2016a: para 74).
[230] *Dickson*, para 28; *Khoroshenko*, para 121.
[231] Committee of Ministers of the Council of Europe (1976: Art 6).
[232] CPT (1997a: para 53); CPT (1997b: para 84); CPT (2000b: 33); CPT (2000c: para 75); CPT (2002b: para 69); CPT (2002c: para 87); CPT (2004a: para 54); CPT (2004b: 70); CPT (2004c: para 73); CPT (2005c: para 100); CPT (2007c: para 54); CPT (2014c: 75).

4.2.4. Progression Principle

The principle of progression requires that the enforcement of life sentences should be designed in a manner which aims 'at securing progressive movement through the prison system',[233] and encourages and enables life prisoners 'to move through their sentence to improved conditions and regimes on the basis of their individual behaviour and cooperation with programmes, staff and other prisoners'.[234] The CPT underlines that 'progression may be an important antidote to mental deterioration by providing for specific goals that can be achieved within foreseeable periods of time'.[235] Thus, life prisoners should be offered some educational, vocational, social, recreational and sport activities in order to ensure that time spent in prison is used for the purpose of increasing the chances of their rehabilitation and successful reintegration. This point will further be elaborated in section 4.4.1 below.

4.2.5. Security and Safety Principle

The principle of security and safety necessitates a clear distinction 'between any risks posed by life sentence and other long-term prisoners to the external community, to themselves, to other prisoners and to those working in or visiting the prison'.[236] This requires carrying out an individual risk and needs assessment to identify life prisoners' dangerousness.

4.2.6. Non-segregation Principle

The principle of non-segregation opposes any segregation of life prisoners on the sole ground of their sentence.[237] This principle requires that life prisoners should 'be allowed to associate with other prisoners on the basis of risk assessments which take into account all relevant factors'.[238] The CPT has consistently stated that it

[233] Committee of Minister of Council of Europe (2003: Art 8).
[234] CPT (2016a: para 74).
[235] CPT (2007a:6).
[236] Committee of Minister of Council of Europe (2003: Art 6); CPT (2016a: para 74).
[237] Committee of Minister of Council of Europe (2003: Art 7).
[238] CPT (2016a: para 74).

> can see no justification for indiscriminately applying restrictions to all life-sentenced prisoners (such as their separation from the rest of the prison population and the prohibition of communication with more than one other prisoner) without giving due consideration to the individual risk they may (or may not) present.[239]

Although the CPT states that life prisoners' segregation from short-term prisoners may be acceptable,[240] the primary determinant of the placement of life prisoners should be the result of a comprehensive and ongoing risk and needs assessment, not merely an automatic result of the type of sentence imposed.[241] However, the CPT has found that a number of countries impose, as a rule, segregation of life prisoners from other sentenced prisoners.[242] This kind of total segregation from the rest of the prison population leads to the de-socialisation of life prisoners rather than contributing to their resocialisation.[243] The CPT expresses that 'an isolation-type regime' for life prisoners is 'a step that can have very harmful consequences for the person concerned and can, in certain circumstances, lead to inhuman and degrading treatment'.[244] Accordingly, the CPT explicitly calls for the abolition of 'the legal obligation of keeping life-sentenced prisoners separate from other (long-term) sentenced prisoners'.[245]

These basic principles, enunciated in Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners, are considered 'a carefully formulated set of relatively abstract general penological principles to govern the management of life sentence and long term-prisoners'.[246] In order to comply with these principles, risk and needs assessments and sentence planning must be carried out for each individual life prisoner.[247] In the following section, we will discuss the importance of risk and

[239] See, for example CPT (2000b: para 33); CPT (2005a: para 29); CPT (2007a:8); CPT (2015: para 90).
[240] CPT (2016a: para 78).
[241] CPT (2007a: 8); CPT (2016a: para 77).
[242] CPT (2016a: para 71).
[243] CPT (2012a: para 39).
[244] CPT (2005b: para 50).
[245] CPT (2016a: para 81).
[246] van Zyl Smit & Snacken (2009:34-35).
[247] Committee of Minister of Council of Europe (2003: Art 9); Committee of Minister of Council of Europe (2006: Rule 103.8).

needs assessments and sentence planning for the execution of life prisoners' sentences.

4.3. Risk/Needs Assessments and Sentence Planning

In their joint concurring opinion in *Khoroshenko v. Rusia,* Judges Pinto de Albuquerque and Turković stated that:

> The cornerstone of a penal policy aimed at resocialising prisoners is the individualised sentence plan, under which the prisoner's risk and needs in terms of health care, activities, work, exercise, education and contacts with the family and outside world should be assessed. This basic principle of penological science has been acknowledged and affirmed by statements made at the level of the highest political authorities both in Europe and worldwide.[248]

Similarly, the CPT states that '[a]fter the imposition of the life sentence, individualisation should continue through the process of sentence planning based on an assessment of the individual situation'.[249] The process of sentence planning must start as early as possible following the life prisoner's arrival at prison.[250] This requires a preliminary evaluation, preferably carried out in a specific place with appropriate personnel 'in the form of experienced and specially trained prison officers, psychologists, educators and social workers'.[251] Where any indication of possible mental health issues of a life prisoner is identified, a psychiatrist must also participate in the preparation process of the sentence planning.[252] As the CPT put forward, the task of the team responsible for preparing a life prisoner's sentence plan is

> to develop as full an understanding as possible of the prisoner's situation, both inside a custodial environment and in the community, and the needs the prisoner has for particular interventions to render the stay in prison as

[248] *Khoroshenko,* Joint Concurring Opinion of Judges Pinto de Albuquerque and Turković, para 10.
[249] CPT (2016a: para 76).
[250] Committee of Minister of Council of Europe (2003: Art 11). Committee of Minister of Council of Europe (2006: Rule 103.2).
[251] CPT (2016a: para 76).
[252] ibid.

> beneficial as possible in terms of resolving identified needs and preparation for release.[253]

This task can be better achieved if life prisoners are also allowed, as far as possible, to be involved actively in the preparation of their sentence planning.[254] The CPT has found that the regime which is not allowed life prisoners to meet the educators and pedagogues on a face-to-face basis in the sentence planning is against the principle of responsibility.[255] Life prisoners' participation in their sentence planning is beneficial for both identifying their needs and contributing to their sense of autonomy and personal responsibility.

With regard to the implementation of life prisoners' sentence plan, the CPT states that the guiding principles should be 'very much the same as for all prisoners'.[256] This means that life prisoners 'should not be subject to any restrictions which are not required for the maintenance of good order, security and discipline within the prison'.[257] In this respect, the CPT is concerned about a very strict and segregated regime imposed upon life prisoners for an initial period (e.g. 5 or 10 years) ordered by a sentencing court or legislation without giving due considerations to the individual situation of each life prisoner.[258] This kind of segregation policy is against the generally recognised principle that prisoners are sent to prison as a punishment, not to receive punishment.[259] The CPT does not rule out the necessity that due to their dangerousness, some life prisoners should be subject to a special security regime for a certain period of time.[260] However, it recognises that the decision to impose such a regime must be taken by prison authorities on the basis of individual risk and needs

[253] ibid.
[254] Committee of Minister of Council of Europe (2003: Art 9); Committee of Minister of Council of Europe (2006: Rules 103.3 and 104.2).
[255] CPT (2006b: para 44).
[256] CPT (2016a: para 77).
[257] ibid.
[258] CPT (2005a: para 31); CPT (2007a:8); CPT (2008a: para 78); CPT (2010c: para 119); CPT (2012b: para 78); CPT (2016d: para 78); CPT (2019b: para 37); CPT (2020b: para 50).
[259] CPT (2017d: para 79); CPT (2018b: para 51); CPT (2018e: para 46).
[260] CPT (2007a:8); CPT (2016a: para 80).

assessment of each life prisoner.[261] This is particularly because of the principle that 'the level of security applied to each individual should be proportionate to the risk presented by the person'.[262]

In this respect, individual risk and needs assessments of life prisoners must be conducted along with their sentence planning. The CPT states that risk assessments should not be 'an empty gesture' and should be carried out in 'a proper manner'.[263] The scope of risk and needs assessments should cover 'harm to self, to other prisoners, to persons working in or visiting the prison, or to the community, and the likelihood of escape, or of committing another serious offence on prison leave or release'.[264] In addition, 'criminogenic needs' of life prisoners should also be identified and, to the greatest extent possible, should be addressed in order to reduce the threat of crime or harmful behaviour both during the sentence and after the release.[265] However, both criminogenic needs and dangerousness cannot be deemed stable and persistent, because 'risk and need assessments made at one point in time may not be valid at a later date'.[266] Thus, risk and needs assessments and sentence planning of life prisoners should be repeated at regular intervals.

4.4. Counteracting the Damaging Effects of Life Imprisonment

In 1968, Radzinowicz stated that:

> Practically nothing is known about the vital subject of the lasting effects on human personality of long-term imprisonment, yet pronouncements on the subject continue to be made and very long prison sentences continue to be imposed.[267]

Since then, a plethora of empirical studies have examined the impacts of long-term incarceration upon inmates. While noting that long-term prisoners

[261] CPT (2016a: para 77).
[262] ibid.
[263] CPT (2009a: para 33).
[264] Committee of Minister of Council of Europe (2003: Art 12).
[265] ibid, Art 13
[266] CPT (2007a:7).
[267] Advisory Council on the Penal System (1968).

experience a number of severe pains in the course of their sentences,[268] studies have diverged in terms of whether or not these prisoners' physical and mental situation have been deteriorated after very long imprisonment. In the earlier literature, physical and mental deterioration of long-term prisoners was seen 'almost inseparable from a long prison sentence'[269] and accepted 'a priori'.[270] While recognising that the degree of deterioration may vary, long-term incarceration was almost always considered a sentence 'result[ing] in damage to the personality' of prisoners.[271]

However, especially from the late 1970s, the 'myth' of mental deterioration of long-term prisoners have been challenged.[272] For example, Richards found that mental health problems were seen as the least severe problems of long-term incarceration by the English male life prisoners.[273] Similarly, Flanagan concluded that physical and mental 'impairment is not a necessary or systematic outcome of long-term confinement'.[274] After examining West-German life prisoners, Rasch also found that there was 'no convincing proof of a constant intellectual deterioration during the course of long imprisonment'.[275]

In the same vein, much recent literature appears to agree that long-term incarceration does not cause mental deterioration.[276] For example, both Leigey and Ryder and Hulley et al. found that mental health problems were ranked as

[268] Johnson & Mcgunigall-Smith (2008).
[269] Fox (1934), as cited in Flanagan (1981:202).
[270] Flanagan (1981:201).
[271] Pickering (1966:159). However, Taylor (1961) found that the experimental results in his study did not support that imprisonment caused the deterioration of prisoners.
[272] Johnson & Dobrzanska (2005:36). In their study of long-term British prisoners, Cohen & Taylor (1972) did not find any evidence of mental deterioration, whereas they documented that long-term prisoners feared of mental deterioration. A number of further studies have agreed that the empirical findings provide no convincing evidence that life and long-term imprisonment results in mental deterioration of inmates. See, for example: Wormith (1984); Porporino (1990); Zamble (1992); Bonta & Gendreau (1995); Flanagan (1995a); Flanagan (1995c:5); MacKenzie & Goodstein (1995); Liebling & Maruna (2005).
[273] Richards (1978).
[274] Flanagan (1981:203).
[275] Rasch (1981:424).
[276] See, for example: Crewe, Hulley, & Wright (2020:13-17); Leigey (2015:134-37).

the least severe problems caused by life imprisonment amongst life prisoners both in the United States and E&W.[277] Contrary to mental deterioration argument, some studies have argued that long-term and life prisoners' mental health has improved over time in the course of their sentences.[278] For example, Dettbarn compared the mental situations of a sample of life prisoners at the beginning of their sentence with the finding obtained at end of their sentence, found 'significant decrease in diagnosed mental disorders by the time of the second examination'.[279]

Despite these empirical findings, the European human rights instruments express the view that life imprisonment causes a unique pain and results in some damaging effects on those who are serving this sentence. For example, the CPT has consistently emphasised that life imprisonment

> is widely considered to have a number of desocialising effects upon inmates. In addition to becoming institutionalised, such prisoners may experience a range of psychological problems (including loss of self-esteem and impairment of social skills) and have a tendency to become increasingly detached from society.[280]

Therefore, the European penal law requires that the regime offered to life prisoners must seek to offset these damaging effects of life imprisonment in 'a positive and proactive way'.[281] In this respect, the importance of a rehabilitation-oriented approach to the implementation of life imprisonment has already been explained in section 4.1 above. In addition to this, the European human rights instruments specifically underline the importance of a regime of purposeful activities offered to life prisoners and their contact with the outside world. For example, the CPT states that life prisoners should be provided with 'a wide range

[277] Leigey & Ryder (2015).
[278] Bolton, Smith, Heskin, & Banister (1976); Wormith (1984); MacKenzie, Robinson, & Campbell (1989); Zamble (1992); Leigey (2010:264); Leigey & Ryder (2015:737); Crewe et al. (2017a:519); Crewe et al. (2020:16).
[279] Dettbarn (2012:238).
[280] CPT (1997a: para 53); CPT (1997b: para 84); CPT (2000b: para 33); CPT (2000c: para 75); CPT (2002b: para 69); CPT (2002c:87); CPT (2004a: para 54); CPT (2004b: para 70); CPT (2004c: para 73); CPT (2005c: para 100); CPT (2007a:6); CPT (2007c: para 54); CPT (2014c: para 75); CPT (2018b: para 51); CPT (2018e: para 46).
[281] ibid

of purposeful activities of a varied nature (work, preferably of a vocational value; education; sport; recreation/association)'.[282] It further emphasises that 'the negative effects of institutionalisation upon prisoners will be less pronounced if they are effectively able to maintain contact with the outside world'.[283] On this basis, in this section we will examine the importance of an implementation regime which provides life prisoners with purposeful activities and allows them to maintain contact with the outside world.

4.4.1. Regime of Purposeful Activities

The CPT states that life prisoners 'should have *access to as full a regime of activities as possible*, and normally in association with other prisoners'.[284] It considers that a regime of purposeful activities 'is an essential part of the process of social rehabilitation'[285] as well as 'preparation for their possible release',[286] because such activities

> not only help pass the time, but are also crucial in promoting social and mental health well-being and imparting transferable skills which will be useful during and after the custodial part of the sentence. The involvement of prisoners in these activities, in addition to their participation in offending behaviour interventions, represents a significant factor in the ongoing assessment of each person's performance. They allow staff of all grades to better understand prisoners and enable the staff to make informed judgments as to when it would be appropriate for the prisoner to progress through the regime and be trusted with lower security conditions.[287]

In this context, it is important to note that life prisoners should be allowed to spend 'a reasonable part of the day outside their cell' in order to participate in various purposeful activities.[288] In effect, the CPT has consistently stated that necessary steps should be taken 'as a matter of priority' in order to ensure that

[282] ibid
[283] ibid
[284] CPT (2016a: para 79) (emphasis in original).
[285] CPT (2005a: para 30).
[286] CPT (2013e: para 47).
[287] CPT (2016a: para 79).
[288] CPT (2014b: para 59). The CPT states that prisoners should be allowed to spend eight hours or more outside their cells in order to for them to participate in purposeful activities. See: CPT (2018a: para 37); CPT (2018c: para 48); CPT (2019d: para 28).

life prisoners are provided with purposeful out-of-cell activities.[289] Whereas these activities are considered significantly important for all prisoners, the CPT is of the view that life prisoners 'should be among the first to be offered such opportunities'.[290] Moreover, as the responsibility principle so requires, life prisoners must have 'opportunities to make personal choices in as many of the affairs of daily prison life as possible',[291] including a choice regarding their participation in and use of purposeful activities.

However, in many of its country visits, the CPT has found that life prisoners suffer from the lack of a regime of activities or are completely deprived of the opportunity to participate in purposeful activities in association with other prisoners.[292] In a number of countries, the CPT has found that life prisoners are locked up in their cell for more than 23 hours with almost total inactivity and very limited human contacts.[293] A number of life prisoners are offered no educational courses and vocational training or work at all. The CPT describes such a prison environment with no purposeful activities 'as a warehouse for human beings rather than a penitentiary facility'.[294]

The importance of purposeful activities for the treatment of life prisoners is also addressed by the ECtHR. For example, in *Harakchiev and Tolumov v. Bulgaria*, one of the applicants, who was serving a life sentence, was subject to a particularly severe prison regime requiring almost complete isolation of the prisoner and very limited possibilities for social contact, work or education throughout the entire period of his incarceration. The ECtHR noted that 'the

[289] CPT (2010a: para 60).
[290] CPT (1997a: para 52).
[291] Committee of Minister of Council of Europe (2003: Art 21).
[292] CPT (1999: para 120); CPT (2000c: para 70); CPT (2002a: para 62); CPT (2002c: para 86); CPT (2004a: para 55); CPT (2004b: para 151); CPT (2004c: paras 72-74); CPT (2005d: paras 112-14); CPT (2006a: para 47); CPT (2009a: para 31); CPT (2009b: paras 69-78); CPT (2010b: para 70); CPT (2013a: paras 27-30); CPT (2013c: para 65); CPT (2013e: paras 45-48); CPT (2013f: paras 78-83); CPT (2014a: para 17); CPT (2015: para 87); CPT (2016b: para 28); CPT (2017a: para 87); CPT (2017b: para 83); CPT (2017d: 78); CPT (2018b: para 45); CPT (2018d: para 103); CPT (2018e: para 46); CPT (2019d: paras 43-44); CPT (2020b: 49).
[293] ibid
[294] CPT (2005a: para 30).

deleterious effects of that impoverished regime … must have seriously damaged his chances of reforming himself and thus entertaining a real hope that he might one day achieve and demonstrate his progress and obtain a reduction of his sentence'.[295] Similarly, in *James, Wells and Lee v. the United Kingdom*, the applicants were not offered appropriate, offender-focused, courses prior to the expiry of the tariff periods of their sentences. This resulted in 'their failure to progress timeously through the prison system', without their faults.[296] Thus, the ECtHR held that:

> While Article 5 § 1 does not impose any absolute requirement for prisoners to have immediate access to all courses they may require, any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case, bearing in mind that whether a particular course is made available to a particular prisoner depends entirely on the actions of the authorities.[297]

Similarly, in its *2nd General Report*, the CPT stated that 'organisational failings or inadequate resources' in prison may lead to the ill-treatment of prisoners.[298] This means that the overall quality of life in prison, which depends to a great extent on the activities offered to prisoners, is important to ensure that prisoners are not subject to inhuman and degrading treatment.[299] It follows, therefore, that domestic authorities must make necessary arrangements so as to ensure that appropriate treatment programmes and purposeful activities are offered to life prisoners, so that they can complete these courses prior to the time they can apply for a release review.

4.4.2. Contact with the Outside World

In counteracting the damaging effects of life imprisonment, it is also crucial to allow life prisoners to maintain their contact with the outside world.[300] The CPT states that 'adequate means of contact with the outside world is a key element'

[295] *Harakchiev and Tolumov*, para 266.
[296] *James, Wells and Lee*, para 215.
[297] ibid, para 218.
[298] CPT (1992: para 44).
[299] ibid
[300] CPT (2007a:9).

of ensuring the protection of life prisoners against ill-treatment.[301] Contact with the outside world is also important to reduce the negative effects of institutionalisation.[302] Thus, life prisoners must be given adequate resources and necessary means in order to ensure that they maintain a good quality of contact with the outside world, especially with their families and friends.

The CPT has found that visit entitlements of life prisoners in many countries are 'extremely limited and significantly lower than those of other sentenced prisoners'.[303] In some countries, visits of life prisoners are unduly restricted in the initial period of imprisonment by legal provisions.[304] These restrictions are considered an additional punishment to actual imprisonment,[305] and hence, cannot be justified, because any restrictions upon contact with the outside world must be grounded 'exclusively on security concerns of an appreciable nature or resource considerations'.[306] The CPT states that 'no additional restrictions should be imposed on life-sentenced prisoners as compared to other sentenced prisoners when it concerns the possibility for them to maintain meaningful contact with their families and other close persons'.[307]

The CPT has observed that life prisoners are the group of prisoners for whom 'the risk of the breakdown of family ties is the greatest'.[308] It states that life imprisonment 'will in any event put a good deal of pressure on these relationships' between life prisoners and their families.[309] This pressure is especially increased where life prisoners are located in specialised prisons far away from their homes, which 'reduces the possibility of maintaining what is a crucial element in promoting resocialisation'.[310] In this respect, special efforts should be made to prevent the breakdown of family ties, including allocating life

[301] CPT (2013b: para 18).
[302] CPT (2002b: para 71); CPT (2002c: para 91); CPT (2004c: para 75); CPT (2005a: para 54); CPT (2006b: para 48).
[303] CPT (2016a: para 71).
[304] CPT (2015: para 128).
[305] CPT (2011b: para 46).
[306] CPT (1992: para 51).
[307] CPT (2016a: para 78).
[308] CPT (2011b: para 46); CPT (2015: para 128).
[309] CPT (2016a: para 78).
[310] ibid.

prisoners, 'to the greatest extent possible, to prisons situated in proximity to their families or close relatives'.[311] Furthermore, life prisoners should be allowed to send and receive letters, make telephone calls and have visits, with the maximum possible frequency and privacy.[312] In this respect, prison authorities are required to take a positive and proactive role to prevent the breakdown of family ties of life prisoners and enable them to exercise their rights under Art 8 and Art 12 ECHR.[313]

4.5. Treatment of Special Categories of Life Prisoners

In the enforcement of life imprisonment, particular attention should be given to the life prisoners who are considered to be in the special categories. For example, Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners urges states to make necessary efforts 'to protect vulnerable prisoners from threats and maltreatment by other prisoners'.[314] It further states that necessary steps should be taken 'for an early and specialist diagnosis of prisoners who are, or who become, mentally disturbed and to provide them with adequate treatment'.[315] In this respect, it advises that elderly life prisoners should be treated with good standards of physical and mental health.

Particular importance is also attached to female life prisoners.[316] The CPT, for example, dealt with the specific needs for the treatment of female prisoners in its *10th General Report*[317] and in a *Factsheet* called 'Women in Prison'.[318] The CPT's standards for women prisoners involve the issues of appropriate accommodation, equal access to activities, adequate hygiene and health care, ante-natal, post-natal and child care, gender-sensitive prison management, staffing and training, gender-sensitive personal searches, and contact with the

[311] Committee of Minister of Council of Europe (2003: Art 22).
[312] ibid. See also: Committee of Minister of Council of Europe (2006: Rule 24.1).
[313] CPT (2007b: para 28); CPT (2010b: para 73); CPT (2015: para 128).
[314] Committee of Minister of Council of Europe (2003: Art 26).
[315] ibid, Art 27.
[316] ibid, Art 30.a.
[317] CPT (2000a: paras 21-33).
[318] CPT (2018f).

outside world.[319] In effect, the CPT has found some deficiencies concerning these standards for the treatment of female life prisoners in its country visits. It has observed that women sentenced to life imprisonment were imprisoned in the men's section, supervised only by male prison staff, deprived of the basic hygiene products, and were not provided with adequate privacy.[320] The CPT is of the view that these conditions are against the dignity of female life prisoners. Thus, it states that they should, in principle, be physically separated from male life prisoners and supervised by predominantly female custodial staff.[321]

4.6. Conclusion

This chapter has found that at the European supranational level, a human-rights-compliant life imprisonment requires an implementation regime which focuses on the rehabilitation of life prisoners. Such a rehabilitation-oriented regime is guided by the principles of individualisation, normalisation, responsibility, security and safety, non-segregation and progression. These principles demand that the treatment of life prisoners should be managed on the basis of regular risk and needs assessments and sentence planning. Further, the execution of life sentences should *not* be punitive; rather it should endeavour to offset the damaging effects of a long-term prison sentence on those who are serving it. Thus, life prisoners should not only be offered with the possibility of rehabilitation, but should also be provided with a regime of purposeful activities and offender behaviour programmes. They should be allowed to contact with the outside world in order both to foster their rehabilitation and to counteract the damaging impacts of life imprisonment. Specifically, specific needs of the life prisoners who are considered in a special category, for example female and elderly life prisoners, should be addressed in the course of their sentences.

Building on our analyses in this chapter, in Chapter 7 we will examine the implementation of life sentences in E&W and Turkey. We will discuss whether a rehabilitation-oriented or a punitive approach is taken at the execution of life imprisonment in the two legal systems. We will discuss what importance is given

[319] ibid. See also: Committee of Minister of Council of Europe (2006: Rule 34).
[320] CPT (2000c: para 77).
[321] ibid

to the risk and needs assessments and sentence planning in the treatment of life prisoners in both jurisdictions. We will further discuss the extent to which life prisoners are offered purposeful activities and offender behaviour programmes, and are allowed to contact with the outside world. We will finally examine whether the English and Turkish prison systems address the specific needs of the special category of life prisoners. On the basis of our analyses in this chapter, the findings of Chapter 7 will enable us to discuss and compare whether life imprisonment is implemented in a human-rights-compliant way in both E&W and Turkey.

CHAPTER 5
STANDARDS FOR RELEASE

The previous two chapters have examined the European standards for the imposition and implementation of life imprisonment. They have found that the European human rights documents and instruments regard life imprisonment as a sentence which can be imposed and implemented in a human rights-compliant way. In this chapter, the thesis proceeds to explore the European standards for release in order to address the final element of the human rights compatibility of life imprisonment.

The European penal law rejects the idea that life imprisonment means a sentence which lasts until the rest of a prisoner's life. Rather, the importance and necessity of the release from life imprisonment are emphasised by different European human rights instruments. The purpose of the present chapter is to analyse the European trend towards ensuring the release of life prisoners. On the basis of our analyses in this chapter, in Chapter 8 we will discuss and compare the release of life prisoners in England and Wales (E&W) and Turkey.

In order to examine the European standards for release, this chapter first explores the recommendations of the Committee of Ministers of the Council of Europe to the extent that they relate to the release from life imprisonment. Then, the jurisprudence of the European Court of Human Rights (ECtHR) under Art 5(4) of the European Convention of Human Rights (ECHR) will be examined in order to discuss the importance and relevance of this provision for the release of life prisoners. Subsequently, the European rejection of life-long sentences will be discussed in the context of the European commitment to the rights to human dignity and rehabilitation. Finally, and following the analyses that the European human rights law requires life prisoners to be provided with both the possibility of release and a sentence review, the chapter examines what needs to be done to prepare life prisoners for their eventual release into the community.

5.1. Recommendations of the Committee of Ministers

In the European supranational context, the necessity of the release from life imprisonment is embedded in several recommendations of the Committee of Ministers of the Council of Europe. For example, as quoted several times in the previous chapters, one of the general objectives of Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners is 'to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release'.[322] Similarly, the European Prison Rules (EPR) specifically emphasises the importance of 'a gradual return to life in free society' for long-term prisoners.[323]

Among the recommendations of the Committee of Ministers of the Council of Europe, Resolution (76)2 on the Treatment of Long-term Prisoners includes the most explicit provisions in terms of how to release life prisoners.[324] It states that 'a review … of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals'.[325] The Resolution points out that life prisoners should be granted conditional release rather than other release possibilities such as pardon or amnesty.[326] The possibility for release through pardon or amnesty is considered insufficient by the Committee, which was responsible for drafting the Resolution.[327] The Committee underlined the importance of granting life prisoners with conditional release by stating that '[b]y law or administrative ordinance it must be ensured that no prisoner may be "forgotten"'.[328]

Similarly, Recommendation No. R(99)22 concerning Prison Overcrowding and Prison Population Inflation aims at ensuring that all prisoners, including life

[322] Committee of Minister of Council of Europe (2003: Art 2).
[323] Committee of Minister of Council of Europe (2006: Rule 107.2).
[324] Committee of Ministers of the Council of Europe (1976).
[325] ibid, Art 12.
[326] ibid, Art 9.
[327] European Committee on Crime Problems (1977: para 78).
[328] ibid, para 80.

prisoners, are given a realistic prospect for release.[329] Although this Recommendation regards conditional release, amnesty and pardon as effective ways of providing a reduction in prison population,[330] conditional release is particularly considered 'one of the most effective and constructive measures', because it 'not only reduces the length of imprisonment but also contributes substantially to a planned return of the offender to the community'.[331]

Further, Recommendation Rec(2003)22 on Conditional Release (parole)[332] states that '[i]n order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, *including life-sentence prisoners*'.[333] In this Recommendation, conditional release is defined as 'early release of sentenced prisoners under individualised post-release conditions'.[334] As amnesty and pardon are 'not necessarily accompanied by individualized conditions' of prisoners,[335] the Recommendation considers them insufficient for an effective release possibility.

Conditional release is also considered the most appropriate means for the release of life prisoners by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT vigorously condemns the deprivation of any hope of being released, 'except by Presidential pardon'.[336] In effect, in its *25th General Report*, it does not state the deprivation of any hope of release, but the deprivation of *'any hope of conditional release'*.[337] This expression is crucial because it discloses the CPT's commitment that life prisoners must be allowed to apply for conditional release.

[329] Committee of Ministers of the Council of Europe (1999).
[330] ibid, Art 23.
[331] ibid, Art 24.
[332] Committee of Ministers of the Council of Europe (2003b).
[333] ibid, Art 4.a (emphasis added).
[334] ibid. Art 1.
[335] Drenkhahn (2014: 40).
[336] CPT (2011a: para 27).
[337] CPT (2016a: para 73) (emphasis added).

In this respect, we can say that at the European supranational level there is a trend towards including life prisoners in the scope of conditional release. However, as we will discuss in section 5.3 below, the ECtHR does not rule out the possibility of a release through amnesties or pardons for some life prisoners, specifically those who commit the most heinous crimes and are sentenced to whole life sentences. Before moving on to that, however, we will examine the possibility of release from life imprisonment under Art 5(4) ECHR in the following section.

5.2. Possibility of Release under Art 5(4) ECHR

From the late 1980s onwards, the ECtHR has dealt with life imprisonment cases under this provision.[338] The Court has made a distinction between the punitive and preventive grounds of a life sentence for the purpose of the applicability of Art 5(4). It has held that Art 5(4) can only be triggered, if the objective of a life sentence remains solely preventive.

The ECtHR has mostly developed its jurisprudence on the possibility of a review under Art 5(4) in cases pertaining to the mandatory and discretionary life sentences in English law. The aim of discretionary life sentences was ascertained in *Thynne, Wilson and Gunnell v. the United Kingdom.* The ECtHR stated that

> the discretionary life sentence has clearly developed in English law as a measure to deal with mentally unstable and dangerous offenders; numerous judicial statements have recognised the protective purpose of this form of life sentence … [I]t seems clear that the principles underlying such sentences, unlike mandatory life sentences, have developed in the sense that they are composed of a punitive element and subsequently of a security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner's release. This view is confirmed by the judicial description of the 'tariff' as denoting the period of detention considered necessary to meet the requirements of retribution and deterrence.[339]

The ECtHR observed that 'the objectives of the discretionary life sentence … are distinct from the punitive purposes of the mandatory life sentence'.[340]

[338] *Weeks v. the United Kingdom* [1987] ECHR 3.
[339] *Thynne, Wilson and Gunnell v. the United Kingdom* [1990] ECHR 29, para 73.
[340] ibid, para 74.

This distinction was important because, unlike the punitive purpose, there was always a possibility of change in the factors required to satisfy the necessity of the preventive purpose. In other words, where a sentence serves only for the preventive objective, the factors (i.e. mental instability and dangerousness) are 'susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention'.[341] This requires a lawfulness assessment of the detention after the expiry of the punitive period of discretionary life sentences.

The ECtHR maintained this approach in *Wynne v. the United Kingdom*,[342] by stating that

> the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender … That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases … does not alter this *essential distinction* between the two types of life sentence.[343]

The Court further clarified that 'as regards mandatory life sentences, the guarantee of [Art. 5(4)] was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-detention following revocation of the life licence'.[344] It held that the applicant's continued detention in *Wynne* was a consequence of the nature of his life sentence, which was imposed to satisfy the requirements of punishment. Thus, the ECtHR held that 'there are no new issues of lawfulness which entitle the applicant to a review of his continued detention under the original mandatory life sentence'.[345]

It must be noted that the 'essential distinction' between mandatory and discretionary life sentences with regard to the applicability of Art 5(4) did not

[341] ibid, para 76.
[342] [1994] ECHR 24.
[343] ibid, para 35 (emphasis added). See also: Padfield (1995).
[344] *Wynne*, para 36.
[345] ibid, para 36.

arise from the mandatory or discretionary nature of the imposition of these sentences. Rather, it was about the punitive or preventive grounds for which the sentence was served. This point was clarified by the ECtHR in the cases concerning detention during Her Majesty's pleasure.[346] For example, in *Hussain v. the United Kingdom* the ECtHR observed that the sentence of Her Majesty's pleasure was mandatory in its nature, because it was fixed by law and imposed automatically by courts in all cases where a person under the age of 18 was convicted of murder. The Court further noted that this kind of life sentence was treated in an identical manner to adult mandatory life sentences with regard to the release and recall procedures.[347] However, the Court was sceptical about the purpose of the sentence of Her Majesty's pleasure:

> In the case of young persons convicted of serious crimes, the corresponding sentence undoubtedly contains a punitive element, and accordingly a tariff is set to reflect the requirements of retribution and deterrence. However an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public.[348]

Accordingly, the ECtHR found that detention during Her Majesty's pleasure was more comparable to a discretionary life sentence, because the decisive ground for the applicant's prolonged detention continued to be his dangerousness to society. Since dangerousness was a characteristic susceptible to change with the passage of time, new issues of lawfulness would always arise during the detention. Thus, an Art 5(4) assessment should have taken place after the expiry of the applicant's tariff.[349]

In *Stafford v. the United Kingdom*, the ECtHR extended the scope of the applicability of Art 5(4) to mandatory life sentences in English law. It stated that if a mandatory life sentence was not only designed in a punitive manner but also included preventive grounds, an Art 5(4) review would be required. In *Stafford*, by taking into account the developments in English law, the Court stated that

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[346] McDiarmid (2000).
[347] *Hussain v. the United Kingdom* [1996] ECHR 8, para 51.
[348] ibid, para 53.
[349] ibid, para 54; See also: *Singh v. the United Kingdom* [1996] ECHR 9.

> it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. *The Court concludes that the finding in Wynne that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner.*[350]

The ECtHR found that in English law, both mandatory and discretionary life sentences consisted of two elements: punitive and preventive. Thus, it held that once the punitive element has been satisfied, the only justification for the further detention will be the offender's dangerousness. As the dangerousness may change with the passage of time, continued detention should be judicially reviewed at regular intervals in order to determine whether a prisoner is still dangerous to society and whether the prolonged detention of the prisoner remains lawful on preventive grounds.[351]

In order to grasp the protection provided by Art 5(4), the *Stafford* judgment must be contrasted with two German cases: *Streicher v. Germany*[352] and *Meixner v. Germany*.[353] In the former, the applicant was sentenced to life imprisonment for committing murder and attempted murder. In the latter, life imprisonment was imposed on the applicant convicted of several serious offences such as sexual assault, rape and theft and triple murder. In both cases, the applicants had become eligible for parole after serving fifteen years of their sentences and applied to a court to decide their release. However, in both cases, domestic courts refused to suspend the applicants' life sentences on probation. Having regard to 'particular gravity of a person's guilt', domestic courts were of the view that the continuation of their imprisonment was warranted until 26 years served by the

[350] *Stafford v. the United Kingdom* [2002] ECHR 470, para 79 (emphasis added).

[351] It is beyond the scope of this chapter to discuss how dangerousness should be assessed, but it should be noted that a number of scholars argue that it is very difficult to determine the dangerousness of an offender. See, for example: Levi (1997:841); von Hirsch (1998a:100); Brown (2000:91); van Zyl Smit (2002b:194); Shute (2007:27).

[352] App No. 40384/04 (Inadmissible) 10 February 2009.

[353] App No. 26958/07 (Inadmissible) 3 November 2009.

applicant in *Streicher* and 25 years served by the applicant in *Meixner*. The applicants invoked Art 5(4) on the ground that their detentions had become unlawful and arbitrary. However, the ECtHR held both cases inadmissible. The distinctive characters of these two cases were the fact that the punitive period of the applicants' sentences after serving fifteen years, albeit they had become eligible for applying parole, was not considered satisfied, and the domestic courts took the 'particular gravity' of their guilt in the refusal of their parole applications. In these cases, the ECtHR reaffirmed its position that an Art 5(4) assessment can be only be invoked in cases where life prisoners have served the punitive terms, and their detention has only been justified on the preventive grounds.

Under Art 5(4) ECHR, a sentence review must be speedily carried out by a judicial court-like body with sufficient power to order the release of life prisoners. Further, the review should be repeated at regular intervals, and prisoners should be provided with procedural guarantees at review.[354] In this respect, as will be examined in Chapter 8, most life prisoners in both E&W and Turkey become eligible to apply for conditional release after serving their minimum terms to be served to satisfy the punitive element of their life sentences. In E&W, the Parole Board assesses the suitability of life prisoners for conditional release, whereas in Turkey conditional release assessments are carried out by courts. However, in both E&W and Turkey, a small group of life prisoners (i.e. whole life prisoners in E&W and life prisoners serving life imprisonment without parole sentences (LWOP) in Turkey) is actually serving life imprisonment as a punishment for life. Thus, they are not covered by the protection provided by Art 5(4) ECHR. But, this does not mean that they are left without any protections to check the human rights compatibility of their life sentences. Rather, Art 3 ECHR has become a significantly important provision in ensuring that all life prisoners are provided with the possibility of release and a sentence review. In the following section, we will discuss the developments in the European penal law with respect to the possibility of release from 'whole life sentences'.

[354] Padfield (2002: Ch 3 and Ch 7); van Zyl Smit (2002b:114-19).

5.3. Prospect for Release from Whole Life Sentences

As we have seen in Chapter 3.2.2, at the European supranational level the imposition of irreducible life sentences is considered inhuman and degrading punishment under Art 3 ECHR. Specifically, the ECtHR has developed a considerable jurisprudence on the requirement that life prisoners should be provided with a prospect for release on the basis of their rights to human dignity and rehabilitation. By deploying a comparative methodology in *Vinter and Others v. the United Kingdom*, the ECtHR has made significant references to the German Federal Constitutional Court's *Life Imprisonment* case to support its implications of human dignity with regard to irreducible life sentences.[355] The German Federal Constitutional Court held in 1977 that 'the essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom'.[356] The ECtHR adopted this position by stating in *Matiošaitis and Others v. Lithuania* that:

> Long and deserved though their prison sentences may be, they [life prisoners] retain the right to hope that, some day, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.[357]

The right to hope for release is considered an important aspect of the right to human dignity of life prisoners by all the European human rights instruments. For example, by emphasising the importance of conditional release of life prisoners, the explanatory memorandum to Recommendation Rec(2003)22 on Conditional Release (parole) states that '[l]ife-sentence prisoners should not be deprived of the hope to be granted release either'[358] Similarly, in both its *25th General Report*[359] and its Memorandum entitled 'Actual/real life sentences',[360]

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[355] *Vinter and Others v. the United Kingdom* [2013] ECHR 786, para 113; See for German Federal Constitutional Court's *Life Imprisonment* case: Kommers (1997:306-313); Michalowski and Woods (1999:101-102).

[356] van Zyl Smit (1992:272).

[357] *Matiošaitis and Others v. Lithuania* [2017] ECHR 471, para 180. These are the exact words of Judge Power-Forde in her concurring opinion in *Vinter and Others.*

[358] Committee of Ministers of the Council of Europe (2003b: para 4).

[359] CPT (2016a).

[360] CPT (2007a).

the CPT pays particular attention to the case of whole life prisoners. The CPT states that deprivation of all hope for release from life imprisonment has very harmful effects on persons.[361] In fact, it has found that the psychological state of some whole life prisoners 'was severely affected by the absence of any perspective of release in the foreseeable future'.[362] Thus, it criticises

> the very principle of such sentences … expressing serious reservations regarding the fact that a person sentenced to life imprisonment is considered once and for all to be dangerous and is deprived of any hope of conditional release (except on compassionate grounds or by pardon). The Committee maintains that to incarcerate a person for life without any real prospect of release is, in its view, inhuman.[363]

The CPT has condemned the policies 'based on the presumption that life-sentenced prisoners are by definition particularly dangerous'.[364] Rather, it underlines that 'life-sentenced prisoners are not necessarily more dangerous than other prisoners'[365] and calls for states to take the same approach to life prisoners as for other sentenced prisoners.[366] Similarly, the explanatory memorandum to Recommendation Rec(2003)22 on Conditional Release (parole) emphasises that 'no one can reasonably argue that all lifers will always remain dangerous to society'.[367] This point is also underlined by the sub-committee responsible for drafting Resolution (76)2 on the Treatment of Long-term Prisoners, which states that:

> 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.[368]

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[361] CPT (2011a: para 27); CPT (2018d: para 89); CPT (2018e: para 53).
[362] CPT (2008b: para 119).
[363] CPT (2016a: para 73). See also: CPT (2011a: para 27); CPT (2012a: para 32); CPT (2013d: para 68); CPT (2013e: para 53).
[364] CPT (2016a: para 72).
[365] ibid
[366] ibid § 80
[367] Committee of Ministers of the Council of Europe (2003a: para 4).
[368] European Committee on Crime Problems (1977: para 77).

At the European supranational level, the rejection of a life-long sentence without a sentence review is also reflected in the Framework Decision of the Council of the European Union on the European Arrest Warrant, Art 5(2) of which provides that

> if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.[369]

The ECtHR has consistently quoted, *inter alia*, the above extract in order to demonstrate that the European penal law requires life prisoners to be given the prospect for release from life imprisonment.[370] In fact, the ECtHR has drawn particular attention to the fact that even those who had committed the most heinous international crimes and were thus convicted by the International Criminal Court (or special international tribunals) 'may in principle benefit at a certain stage from conditional release'.[371]

The ECtHR has reiterated in many occasions that the requirement of a review mechanism for life prisoners does not necessarily mean that they must be released. Rather, it has pointed out that a life sentence may continue to serve for any of the sentencing objectives. A sentence review mechanism should be in place to assess whether a life sentence remains justifiable on any of the penological grounds after many years spent by the prisoner. In *Vinter*, the ECtHR stated that the balance between the penological grounds may shift with the passage of time, or the justifications themselves may cease to exist:

> Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so

[369] Council of the European Union (2012).
[370] See, for example: *Kafkaris v. Cyprus* [2008] ECHR 143, para 74; *Vinter*, para 67; *Murray v. the Netherlands* [2016] ECHR 408, para 65.
[371] *Vinter*, para 90. See also: CPT (2016a: para 73).

> after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.[372]

The CPT also underlines this point by stating that 'those who start their sentence as dangerous may well become significantly less so, not just with the passage of time during lengthy sentences but also with targeted interventions and humane treatment'.[373] Similarly, Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners states that 'neither dangerousness nor criminogenic needs are intrinsically stable characteristics'.[374] Thus, the European human rights instruments have agreed that life sentences should be reviewed on a case-by-case basis in order to examine whether or not the continued incarceration of a life prisoner is justified by any of the penological grounds.

As we have seen in Chapter 3.1, the European penal law regards retribution, deterrence, rehabilitation and public protection as the legitimate penological grounds for the imposition of life imprisonment. The important question here is: How far can a penological ground continue to justify the prolonged incarceration of a life prisoner? In *Vinter*, the ECtHR appears to have recognised that the prolonged detention of a whole life prisoner can be justified by any of these four penological grounds. However, a more careful analysis of this judgment reveals a nuance in the Court's emphasis on public protection. The Court stated that

> no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime, and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence, allowing for the offender's continued detention where necessary for the protection of the public.[375]

[372] *Vinter*, para 111.
[373] CPT (2016a: para 76).
[374] Committee of Minister of Council of Europe (2003: Art 16).
[375] *Vinter*, para 107.

This emphasis is particularly important, given that the United Kingdom authorities claimed that whole life sentences were justified by retribution and deterrence. However, the ECtHR appears to have accepted that after a certain number of years of imprisonment have been served by a life prisoner, the only penological ground for further detention could be public protection.[376] Similarly, while emphasising that a review does not guarantee that 'all life-sentenced prisoners should be released sooner or later', the CPT explicitly singles out the public protection ground for the continued detention of a life prisoner by expressing that 'public protection is a crucial issue'.[377]

5.3.1. Review of Whole Life Sentences under Art 3 ECHR

In the previous section, we have examined the developments of the European human rights law in terms of the prospect for release from whole life sentences. We have explained that the European penal law requires whole life sentences to be accompanied by a sentence review mechanism in order for them not to be considered inhuman and degrading punishment under Art 3 ECHR. In this section, we continue to examine what an effective and realistic sentence review mechanism should look like under Art 3 ECHR.

In his partly concurring opinion in *Murray v. the Netherlands*, Judge Pinto de Albuquerque summarised the relevant principles of an effective review mechanism for life sentences under Art 3 ECHR as follows:[378]

- the principle of legality
- the principle of the assessment of penological grounds for continued incarceration
- the principle of assessment within a pre-established timeframe
- the principle of fair procedural guarantees
- the principle of judicial review

[376] Mavronicola (2014:304).
[377] CPT (2016a: para 73).
[378] *Murray*, Partly Concurring Opinion of Judge Pinto de Albuquerque, para 13.

Firstly, an effective sentence review mechanism should meet *the principle of legality*. This means that the domestic law which governs and regulates the review mechanism must have a sufficient degree of clarity and certainty. The questions of whether life prisoners are made to know what they must do to be considered for a release, and under what circumstances the review will take place are of particular importance in the assessment of whether such review mechanism can be regarded as a realistic prospect for release.[379] The ECtHR seeks 'a degree of specificity or precision as to the criteria and conditions attaching to sentence review, in keeping with the general requirement of legal certainty'.[380] In *László Magyar v. Hungary,* for example, the ECtHR observed the deficiency of specific guidance on what criteria had to be taken into account in gathering a life prisoner's personal particulars, and the assessment of a release request.[381] Similarly, in *Trabelsi v. Belgium*, the absence of a sentence review mechanism for life imprisonment operating on the basis of 'objective, pre-established criteria, of which the prisoner had precise cognisance at the time of imposition of the life sentence' led the ECtHR to find a violation of Art 3.[382]

Secondly, the scope of a sentence review under Art 3 ECHR should not only be confined to compassionate or humanitarian grounds but should include *the assessment of penological grounds for continued incarceration*. The ECtHR doubted 'whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather behind prison walls'.[383] It has established that the scope of a review should encompass considerations of 'significant change in a whole life prisoner and progress towards rehabilitation' during the course of imprisonment.[384] According to the Court, the essential

[379] *Vinter*, para 122.
[380] *Hutchinson v. the United Kingdom* [2017] ECHR 65, para 59.
[381] *László Magyar v. Hungary,* [2014] ECHR 491, para 57.
[382] *Trabelsi v. Belgium* [2014] ECHR 893, para 137.
[383] *Vinter*, para 127.
[384] *Hutchinson*, para 57.

element of a review must be the assessment of whether prolonged detention can still be justified on the legitimate penological grounds.[385]

Thirdly, there must be *a pre-established timeframe for the review of life sentences* under Art 3 ECHR. The ECtHR held that a 'life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence' before being allowed to bring an Art 3 complaint.[386] However, it has not determined *exactly when* such a review is considered appropriate in life imprisonment sentences, because it has regarded this as an issue within the ambit of margin of appreciation. Based on its comparative and international investigation, the Court states that there is a 'clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter'.[387] However, despite clearly stipulating this maximum twenty-five year timeframe pending review of a life sentence, it is not binding, and the Court has on occasion judged longer terms to be essentially compatible with Art 3. For instance, in *Bodein v. France*, the ECtHR tended to declare that a 30-year timeframe prior to the consideration for clemency was not in compliance with the maximum recommended timeframe.[388] However, since the period of the applicant's pre-detention in that case was calculated towards this 30-year time limit, he had to serve 26 years following the imposition of life imprisonment in order to apply for clemency. Thus, the ECtHR considered a 26-year period as an acceptable timeframe for the review of a life sentence. However, in *T.P. and A.T. v. Hungary,* a 40-year timeframe *established* in the legislation in order to satisfy the retribution phase of a life sentence was considered 'a period significantly longer than the maximum recommended time frame'.[389]

Fourthly, the sentence review mechanism should meet *the principle of fair procedural guarantees*. The first issue in this respect is whether the sentence

[385] *Vinter*, para 125.
[386] *Vinter*, para 122.
[387] See, for example: *Vinter*, para 120; *Harakchiev and Tolumov*, para 246; *Murray*, para 99; *Hutchinson*, para 69.
[388] [2014] ECHR 1210, para 61.
[389] [2016] ECHR 807, para 45.

review should be carried out by a judicial authority or an executive review would also be sufficient to satisfy Art 3. Ideally, a judicial review is preferable because, as the ECtHR observed, it provides significant guarantees such as independent and impartial decision-making, procedural safeguards and protection against arbitrariness.[390] For example, in *Čačko v. Slovakia*[391] and *Bodein* the ECtHR held that the domestic law complied with Art 3 ECHR because of the existence of judicial review mechanisms. However, the Court did not exclude the possibility of an executive review. In *Kafkaris v. Cyprus*, for instance, it held that there was no breach of Art 3 because the President of Cyprus, with the recommendation of the Attorney-General, may suspend, remit or commute any sentence passed by a court. In *Harakchiev and Tolumov,* the ECtHR maintained the same position, holding that the Presidential review applied in the Bulgarian law after 2012 is exercised 'in a consistent and broadly predictable way', hence it complies with the Convention.[392]

Whether reasons for a decision of release or no release must be provided in a case is also important in terms of the principle of fair procedural guarantees. In *Murray*, the ECtHR held that reasons *may* be required to 'the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions'.[393] In *László Magyar,* the life prisoner did not know what was required of him in order to be considered for release, because neither the Minister of Justice nor the President of the Republic was bound to give reasons for the decisions made concerning release.[394] However, notwithstanding the lack of reasons for decisions of no release made in *Harakchiev and Tolumov,* the Court was satisfied that Bulgaria provided sufficient 'transparency' through the operation of the Clemency Commission, which is obliged to take account of the relevant case law of the ECtHR, and publishes activity reports.[395] Thus, it appears that the ECtHR does not consider that providing reasons for a negative decision on release in an individual case is *a sine qua non* requirement of an

[390] *Hutchinson,* para 47.
[391] [2014] ECHR 821.
[392] *Harakchiev and Tolumov*, para 258
[393] *Murray*, para 100.
[394] *László Magyar,* para 57.
[395] *Harakchiev and Tolumov*, para 259

effective review mechanism if other safeguards are in place to render the system transparent as a whole.

Finally, a sentence review conducted by an executive body must be *judicially reviewed* in domestic law. The ECtHR held that such a judicial review of an executive decision made on release must not only be 'confined to formal or procedural grounds' but must 'also involve an examination of the merits' so that the judicial body can directly order the release of life prisoners, if it considers this 'to be necessary in order to comply with Article 3'.[396]

To conclude, the European human rights standards require a sentence review for all life prisoners by rejecting a life-long sentence without any consideration for release. In fact, a life sentence which is not accompanied by an effective review mechanism is considered inhuman and degrading punishment under Art 3 ECHR. The European penal law has also established the criteria for what an effective and realistic review for release should look like. Against these analyses, in Chapter 8 we will compare and discuss whether whole life sentences in E&W and LWOP sentences in Turkey can be considered human-rights-compliant under Art 3 ECHR.

5.4. Preparation for Release

Thus far, we have examined the European penal law in terms of the importance and necessity of release from life imprisonment. We have found that the release of life prisoners is given the utmost importance by all the European human rights documents and instruments. In this final section of the present chapter, we will briefly analyse the European perspective on what needs to be done to prepare life prisoners for their eventual release.

The CPT explicitly states that 'a total lack of preparation for release or planning of reintegration are likely to impair seriously the ability of prisoners to function in the outside community'.[397] Thus, it requires life prisoners to be provided with 'the opportunity to address all aspects of their situation before the

[396] *Hutchinson*, para 52
[397] CPT (2016a: para 70).

date of their first review'.[398] Similarly, Rule 33.3 of the EPR provides that '[a]ll prisoners shall have the benefit of arrangements designed to assist them in returning to free society after release'. Further, Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners states that life prisoners' release 'should be prepared well in advance' by taking into account:

- the need for specific pre-release and post-release plans which address relevant risks and needs;
- due consideration of the possibility of achieving release and the continuation post-release of any programmes, interventions or treatment undertaken by prisoners during detention;
- the need to achieve close collaboration between the prison administration and post-release supervising authorities, social and medical services.[399]

The last point is also underscored by Recommendation Rec(2003)22 on Conditional Release (parole) which provides that states should organise the preparation arrangements for conditional release 'in close collaboration with all relevant personnel working in prison and those involved in post-release supervision'. [400] This Recommendation further advises that prison management should ensure that prisoners take part in appropriate pre-release activities and are encouraged to participate in 'educational and training courses that prepare them for life in the community'.[401] The programmes offered to life prisoners should be arranged in a manner which enables them 'to make the transition from life in prison to a law-abiding life in the community'.[402]

The CPT considers that life prisoners should be allowed to spend certain time in less secure conditions and 'on leave in the community towards the end of their sentence' in order to enable them to overcome the difficulties in the outside life following their release.[403] In this respect, the CPT's standards are in

[398] ibid, para 75.
[399] Committee of Minister of Council of Europe (2003: para Art 33).
[400] ibid, Art 12. See also: Committee of Minister of Council of Europe (2006: Rule 107.4).
[401] Committee of Ministers of the Council of Europe (2003b: Art 13).
[402] Committee of Minister of Council of Europe (2006: Rule 107.1).
[403] CPT (2016a: para 75).

line with the Recommendation No. R (82)16 on Prison Leave.[404] This Recommendation also underlines that prison leave is 'one of the means of facilitating the social reintegration of the prisoner', and thus, 'contributes towards making prisons more humane and improving the conditions of detention and prison leave'.[405] The CPT describes prison leave as 'breathing space' that gives prisoners an opportunity to 'maintain some sense of awareness of life in the external world'.[406] In this respect, Recommendation No. R (82)16 on Prison Leave requires that prisoners should be given prison leave 'as soon and as frequently as possible'[407] in the course of their sentence for a variety of purposes including 'medical, educational, occupational, family and other social grounds'.[408] After emphasising the importance of this Recommendation, the CPT explicitly states that it 'should be implemented with life and long-term prisoners'.[409]

In a nutshell, it can be said that at the European supranational level life prisoners' preparation for release is considered a *sine qua non* requirement of both a meaningful release from prison and an effective reintegration into the society. Against this background, in Chapter 8 we will examine whether or not life prisoners are offered with effective release preparation arrangements in E&W and Turkey.

5.5. Conclusion

European penal law has ascertained that the punitive aspect of life imprisonment cannot be considered the ground for the continued detention of life prisoners, as rehabilitation is the primary purpose of a prison system. This requires that life prisoners, like all other prisoners, should be provided with a prospect for release. Release mechanisms could be in different forms (e.g. conditional release or pardon) for different groups of life prisoners subject to some due process requirements. However, the bottom line is to provide life prisoners with a

[404] Committee of Minister of Council of Europe (1982).
[405] See also: van Zyl Smit and Snacken (2009:321-24).
[406] CPT (2007a:10).
[407] Committee of Minister of Council of Europe (1982: Art 3).
[408] ibid, Art 1.
[409] CPT (2007a:10).

realistic hope to be released one day from prison. In the light of our analyses in this chapter, in Chapter 8 we will examine whether, and if so, how life prisoners are released from prison in E&W and Turkey.

PART III

ENGLAND AND WALES AND TURKEY

CHAPTER 6
IMPOSITION OF LIFE IMPRISONMENT

The previous three chapters have examined the European standards for the imposition and implementation of, and release from life imprisonment. According to European human rights law, life imprisonment is a legitimate, acceptable punishment when its imposition and implementation are regulated by human rights norms and standards. There are a wide range of human rights principles and standards with which the Council of Europe member states must comply at the imposition, implementation and release stages of life imprisonment. The present chapter, along with the proceeding Chapters 7 and 8, examine these three stages of life imprisonment in England and Wales (E&W) and Turkey and discuss whether and, if so, to what extent life sentences in these two countries can be considered human-rights-compliant under the European standards.

As we have seen in Chapters 3, 4 and 5 of the thesis, although there are a whole slew of European principles and standards for the implementation and release stages of life imprisonment, the standards for the imposition are rather underdeveloped. As examined in Chapter 3, the European standards for the imposition of life imprisonment have generally been shaped by the principle of the prohibition of cruel, inhuman and degrading punishment. Thus, the imposition of grossly disproportionate life sentences and irreducible life sentences is outlawed at the European supranational level. Although proportionality is regarded by European human rights law as the principle that must be at the centre of sentencing law and practices of life imprisonment, mandatory life sentences are not yet considered unacceptable.

Against this background, this chapter probes the imposition of life imprisonment in E&W and Turkey. The point of departure between these two legal systems is the fact that they have different forms of life sentences. Nowadays, there are three forms of life imprisonment in E&W: mandatory life

sentences for murder;[410] discretionary life sentences for serious offences;[411] and statutory life sentences for second listed offences.[412] Turkey has two different forms of life imprisonment: (normal) life sentences and aggravated life sentences.

In E&W, life imprisonment has been a mandatory sentence for murder since the creation of the Murder (Abolition of Death Penalty) Act 1965 (c.71), s.1 of which provides that 'a person convicted of murder shall … be sentenced to imprisonment for life'. Thus, sentencing courts have to impose a life sentence on everyone convicted of murder.[413] Apart from murder, life sentences can also be imposed for some serious offences carrying the maximum penalty of life imprisonment in E&W. Unlike for murder, however, imposing a sentence of life imprisonment on offenders convicted of serious offences is not mandatorily required by law, but sentencing courts can exercise their discretion to do so.[414] Hence, these kinds of life imprisonment are called discretionary life sentences. The last category of life imprisonment is called statutory life sentences,[415] and can be imposed on second listed offences spelled out in Part 1 of Schedule 15 of Sentencing Act 2020 (c.17).

In Turkey, the Turkish Penal Code (TPC) specifies 26 offences that are punishable by either (normal) life sentences or aggravated life sentences.[416] Aggravated life sentences are reserved for the most serious offences, for

[410] If the offender convicted of murder is under 18, the court must impose 'detention at Her Majesty's pleasure' (s.259 of Sentencing Act 2020 (c.17)). If the offender convicted of murder is aged 18 or over but under 21, the court must impose 'custody for life' (s.275 of Sentencing Act 2020).

[411] If the offender convicted of a serious offence is under 18, the court is to impose 'detention for life' (s.258 of Sentencing Act 2020). If the offender convicted of a serious offence is aged 18 or over but under 21, the court is to impose 'custody for life' (s.274 of Sentencing Act 2020).

[412] If the offender convicted of a second listed offence is aged 18 or over but under 21, the court is to impose 'custody for life' (s.273 of Sentencing Act 2020).

[413] Bingham (2000:329); Ashworth & Mitchell (2000a:5); Fitz-Gibbon (2013:508).

[414] Padfield (2002:3-5); Appleton (2010:10).

[415] *R. v Saunders* [2013] EWCA Crim 1027. See also: Thomas (2013); Harris (2016:501); Padfield (2016a:800).

[416] Law No: 5237, 'Turkish Penal Code', (Official Gazette Date and No: 12.10.2004 – 25611).

example, aggravated forms of murder (Art 82 of the TPC) and crimes against the unity and integrity of the state (Art 302 of the TPC), whereas (normal) life sentences are imposed on offenders convicted of the second most serious crimes, for example, intentional killing without any aggravated circumstances (Art 81 of the TPC). Art 47 of the TPC defines the aggravated life sentence as a sentence which 'continues until the death of the convict and is implemented under the strict security measures as defined in the law and statute'. Art 48 of the same legislation defines the (normal) life sentence as a sentence which 'continues until the death of the convict'. Thus, the primary distinction between these two forms of life imprisonment lies in the different regimes of their implementation.[417] A further distinction is that longer non-parole terms are adopted for aggravated life sentences than (normal) life sentences.[418] However, the same imposition procedures apply to both forms of life imprisonment in Turkey.[419]

The purpose of this chapter is to consider why, for what, and how these different forms of life sentences are imposed in E&W and in Turkey. The 'why' question investigates the rationales behind the imposition of life imprisonment in both legal systems in section 6.2 of this chapter. The 'for what' question relates to the offences punishable by life imprisonment and the proportionality principle. Although life imprisonment is stipulated for a number of offences by law in both E&W and Turkey, it is imposed only on offenders convicted of certain serious offences. Section 6.3 examines for what a life sentence could be imposed in theory, and for what it is imposed in practice in both legal systems. The 'how' question deals with the extent to which judges have discretion to impose a life sentence and their roles in the determination of the minimum non-parole terms to be served by life prisoners before being considered for release. The mandatory and discretionary dimension of the imposition of life

[417] As we will see in Chapter 7, the Turkish law recognises a more restrictive and punitive regime for the implementation of aggravated life sentences, whereas (normal) life sentences are executed in the same way as other fixed term imprisonment sentences. See: Law No: 5275, 'Law on the Execution of Sentences and Security Measures', (Official Gazette Date and No: 29.12.2004 – 25685), Art 25. See also: Yerdelen (2013:19-26); Karakaş-Doğan (2010a:155-73).

[418] See: Chapter 8.2.2 of the thesis.

[419] See: Chapter 6.4.2 below.

imprisonment in E&W and Turkey is, therefore, paid particular attention in section 6.4.

These three questions surrounding the imposition of life imprisonment in the two legal systems are dealt with in the context of the European standards for the imposition explored in Chapter 3. The analyses in this chapter will help us to understand whether or not E&W and Turkey as the two countries with the highest number of life prisoners in Europe are restrained in their use of life imprisonment.

Before embarking on the analysis of these three fundamental questions, it is important to examine the historical backgrounds of the imposition of life sentences in E&W and Turkey in order to avoid the explanations of 'the similarities and differences among laws with a blind eye to how they arose'.[420] Therefore, section 6.1 places life sentences of E&W and Turkey in their historical contexts.

6.1. Historical Backgrounds

6.1.1. England and Wales

In E&W, life imprisonment has been a maximum, discretionary sentence for a number of serious offences 'since at least 1861'.[421] However, murder had long been mandatorily punished by the death penalty.[422] The first erosion of capital punishment for murder was made by s.103 of the Children Act 1908 (c.67), which introduced a mandatory sentence of detention during His Majesty's Pleasure for murderers who were eight to 16 years of age. This was followed by the abolition of the death penalty for those under the age of 18 by s.53 of the Children and Young Person Act 1933 (c.12).[423] As a consequence of these two Acts, a form of life imprisonment became a mandatory sentence for murder committed by persons under 18.[424] Yet, adult murderers continued to be

[420] Gordley (2019:754). See also: Chapter 2.1 of the thesis.
[421] Schone (2000:275); Padfield (2002:3).
[422] Dawtry (1966:187); O'Doherty (2003).
[423] McDiarmid (2000).
[424] Justice (1996:3).

sentenced to death until 1965.

A number of unsuccessful attempts to eliminate capital punishment in E&W was finally followed by an important abolitionist success in 1957.[425] The Homicide Act 1957 (c.11) was enacted to divide murder into capital and non-capital offences.[426] According to this Act, the death penalty was retained as a mandatory sentence for capital murder offences. However, non-capital murder offences would be punished by mandatory life imprisonment.[427] As van Zyl Smit states, 'there was now for the first time a category of crime, non-capital murder, for which life imprisonment was a mandatory sentence' for adult offenders.[428]

However, the Homicide Act 1957 did not survive very long.[429] In order to eliminate the death penalty for all murder offences, the Murder (Abolition of Death Penalty) Act 1965 was enacted.[430] This Act stipulated life imprisonment as a mandatory sentence for all types of murder.[431] Thus, from 1965 onwards, life imprisonment has become a mandatory sentence for murder, and continued to be a maximum, discretionary sentence for many other serious offences.

6.1.1.1. Brief Historical Overview of Mandatory Life Sentences

When abolishing the death penalty, there were some attempts to make life imprisonment for murder discretionary instead of mandatory.[432] However, these

[425] See for an account of the abolition process of the death penalty in E&W: Grünhut (1952); Royal Commission on Capital Punishment (1953); Wingersky (1954); Dawtry (1966); Rutherford (1996); Block and Hostettler (1997); Radzinowicz (1999:245-79); van Zyl Smit (2002b:84-92).
[426] Williams (1957); Edwards (1957); Hughes (1959).
[427] Armitage (1957).
[428] van Zyl Smit (2002b:91).
[429] Some commentators described the Homicide Act 1957 as a 'hopeless muddle' and 'a legislative failure'. See: Shute (2004:875); Blom-Cooper (2004:71).
[430] Blom-Cooper (1966). The Murder (Abolition of Death Penalty) Act 1965 initially suspended the death penalty for a period of five years. The permanent abolition of the death penalty for murder was passed in 1969. See: Bild (2014:30). The full removal of the death penalty from the statute books of E&W was made in 1998. See: Frankis (2019).
[431] Windlesham (1989); Blom-Cooper & Morris (1999).
[432] The then Lord Chief Justice, Lord Parker proposed an amendment in the House of Lords in order 'to abolish once and for all a fixed penalty for murder; in other words to

attempts became unsuccessful.[433] Following the Murder (Abolition of Death Penalty) Act 1965, everyone convicted of murder were to be sentenced to mandatory life imprisonment.[434] Once the trial judge had imposed a life sentence on an offender convicted of murder, it was the Home Secretary's duty to decide how long that life prisoner had to stay in prison.[435] However, when sentencing someone convicted of murder to life imprisonment, trial judges were granted an opportunity to recommend a minimum period which would have to pass before the Home Secretary ordered the release of the life prisoner.[436] In practice, judges initially exercised this power 'sparingly'.[437] For example, in a 10-year period between 1965 and 1975, there had been only 67 recommendations made out of 814 cases where life imprisonment had been imposed on those convicted of murder.[438] These recommendations were not binding on the Home Secretary in deciding the release of a life prisoner.[439] The Home Secretary had the power to release a life prisoner after consulting the Lord Chief Justice together with the trial judge, if available.[440]

In 1983, the then Home Secretary, Leon Brittan, announced a new policy for fixing the minimum terms and release procedures of life sentences.[441] He stated that he would himself fix the minimum terms after consulting with the sentencing judge 'on the requirements of retribution and deterrence'.[442] He explained that the 'new procedures will separate consideration of the requirements of retribution and deterrence from consideration of risk to the

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prevent life imprisonment from being the only sentence which can be passed'. However, this proposal was not supported in parliament. See: House of Lords (1965: col.1212).

[433] Windlesham (1989:245-46).

[434] Crewe, Hulley & Wright (2020:3).

[435] Shute (2004:876).

[436] s.1(2) of the Murder (Abolition of Death Penalty) Act 1965. When this Act was enacted, there were concerns that the Home Secretary would be too lenient and would release life prisoners too easily. In order to make sure that would not happen, the 1965 Act specified that the Home Secretary must consult with the judiciary in releasing the lifer. See: Schone (2000:275).

[437] Blom-Cooper (1973:188).

[438] Shaw (1976:32).

[439] Smith (1988:9).

[440] s.61 of the Criminal Justice Act 1967 (c. 80).

[441] House of Commons (1983: col.507).

[442] ibid.

public, which always has been, and will continue to be, the pre-eminent factor determining release'.[443] This was the emergence of the notion of 'tariff'.[444] Life prisoners had to serve their tariffs before being considered for release. However, the expiration of the tariff did not, in and of itself, mean a fixed release date. Rather, a life sentence now included a punitive and preventive period. After serving their tariffs (i.e. punitive period), life prisoners remained in custody for an indeterminate term for the purpose of public protection, unless they were considered posing no serious risk to the society.[445]

By the early 2000s, tariffs had been fixed by the Home Secretary after privately consulting with the sentencing judges and the Lord Chief Justice.[446] This meant that a sentencing role was undertaken by the Home Secretary in the case of life prisoners.[447] The Home Secretary's 'ultimate discretion' in the release of life prisoners was also maintained.[448] Therefore, as Bild states, 'the management of mandatory life sentence prisoners in England and Wales was now, more than ever, centralised in the hands of the executive'.[449]

Although the English judiciary criticised the tariff-setting policy laid down by the 1983 policy statement,[450] the Home Secretary's power had remained

[443] ibid.
[444] Schone (2000:276); Appleton (2010:20); Crewe et al. (2020:6).
[445] Padfield (2002:6).
[446] In 1993, mandatory life prisoners were granted some procedural safeguards in *R v. Secretary of State for the Home Department, ex parte, Doody* [1993] UKHL 8. In this case, the House of Lords held that mandatory life prisoners should be told what recommendation was made by the trial judge and should be entitled to make an informed representation on tariff to be fixed. Palmer (1994:486-87). Accordingly, all life prisoners were informed about their tariffs with reasons. Broadhead (1999). However, the then Home Secretary, Michael Howard stated that he would increase the minimum terms regardless of the tariff initially set, if he thought 'the minimum requirements of retribution and deterrence will not have been satisfied at the expiry of the period which had previously been determined'. House of Commons (1993: col.863). See also: Schone (2000:279).
[447] Smith (1988:10).
[448] House of Commons (1983: col.507).
[449] Bild (2014:38).
[450] For example, in *R v. Secretary of State for the Home Department ex parte Pierson* [1997] UKHL 37, Lord Hope stated that the Home Secretary's tariff-setting exercise 'has now become so rigid as to be virtually indistinguishable from a sentence imposed

intact until the European Court of Human Rights (ECtHR) ruled out that practice in the late 1990s.[451] In *V. v. the United Kingdom*, the ECtHR held that because 'the fixing of the tariff amounts to a sentencing exercise', Art 6(1) of the European Convention on Human Rights (ECHR) was applicable to this procedure.[452] The ECtHR found that '[t]he Home Secretary, who set the applicant's tariff, was clearly not independent of the executive, and it follows that there has been a violation of Article 6(1)'.[453] This case was not concerned with mandatory life sentences for adult murderers, but those sentenced to the detention at Her Majesty's Pleasure. As examined in Chapter 5.2, the ECtHR initially distinguished discretionary life sentences from mandatory life sentences,[454] and considered that the detention at Her Majesty's Pleasure was similar to the former.[455] However, this distinction was removed in *Stafford v. the United Kingdom*,[456] where the ECtHR reiterated that '[t]he Secretary of State's role in fixing the tariff is a sentencing exercise'.[457]

Following the *Stafford* judgment, the House of Lords declared that the involvement of the Home Secretary in the sentencing process of fixing the minimum terms was incompatible with Art 6 ECHR.[458] Thus, the UK Government introduced the current system under the Criminal Justice Act 2003,[459] which is now replaced by Sentencing Act 2020. Under the current system, the Home Secretary's power of tariff-fixing is transferred to sentencing

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by a court by way of punishment'. See also: Padfield (1997:479-80); Schone (2000:279).

[451] Shute (2004:887).

[452] *V. v. the United Kingdom* [1999] ECHR 171, para 111.

[453] ibid, para 114.

[454] *Wynne v. the United Kingdom* [1994] ECHR 24.

[455] *Hussain v. the United Kingdom* [1996] ECHR 8.

[456] *Stafford v. the United Kingdom* [2002] ECHR 470, para 79.

[457] ibid, para 87.

[458] *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46. See also: Valier (2003); Collis (2013).

[459] Shute (2004:890). Thomas (2004:703) stated that '[t]he new system places the decision on the minimum term exactly where it belongs--in open court and within the judicial process. In future, the minimum term ordered to be served by any offender will be public knowledge. It will be fixed by a judge who has seen the offender and who is familiar with the details of the case, who has heard appropriate mitigation on his behalf, and whose decision will be fully articulated'.

courts,[460] which determine the minimum non-parole terms in the light of the legislative starting points set out in Schedule 21 of Sentencing Act 2020.

The post-2003 sentencing system of mandatory life imprisonment will be examined in detail in Chapter 6.4.1.1 below. Now, the historical overview of discretionary life sentences will be provided in what follows.

6.1.1.2. Brief Historical Overview of Discretionary Life Sentences

In E&W, the history of discretionary life sentences dates back to the nineteenth century.[461] However, from the 1950s onwards these sentences began to be used 'as a measure of preventative detention for mentally unstable and dangerous offenders as a result of judicial innovation'.[462] Specifically, the Court of Appeal for England and Wales replaced the fixed term imprisonment sentences with life sentences in a number of cases where the offenders were deemed dangerous but could not be handled under mental health legislation.[463]

The judicial criteria with regard to the imposition of discretionary life sentences were set out by the Court of Appeal in 1967 in *R v. Hodgson*.[464] In this case, the Court of Appeal held that a life sentence can be imposed by the discretion of the sentencing judge:

> (1) where the offence or offences are in themselves grave enough to require a very long sentence;
> (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and
> (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.[465]

[460] s.322 of Sentencing Act 2020.
[461] Padfield (2002:3).
[462] Cullen & Newell (1999:109); Appleton (2010:13).
[463] See *R v Cunningham* [1955] Crim LR 193; *R v Grantham* [1955] Crim LR 386; *R v Holmes* [1955] Crim LR 578; See also: Appleton (2010:13).
[464] (1968) 52 Cr. App. R. 113.
[465] ibid, at p.114. A. Smith (1998:20) observed that in practice, the sentencing courts frequently made references to the *Hodgson* criteria when dealing with cases concerning discretionary life sentences.

The *Hodgson* criteria are still applicable to the imposition of discretionary life sentences.[466] As the criteria suggest, there are certain limitations on the imposition of discretionary life sentences.[467] First and foremost, a life sentence cannot be imposed on minor offences. This means that sentencing courts could exercise their discretion to impose a life sentence only in serious offences requiring 'a very long sentence'.[468] The further condition is that the offender should be of 'unstable character' and be deemed dangerous to the public.[469]

Prior to 1967, the Home Secretary had had the ultimate power in ordering the release of discretionary life prisoners.[470] However, the Criminal Justice Act 1967 (c.80) (1967 CJA) introduced the same release procedures for both mandatory and discretionary life sentences.[471] According to s.61(1) of the 1967 CJA, the Home Secretary was required to obtain a positive recommendation from the Parole Board and to consult with the Lord Chief Justice and trial judge, if available, before releasing a life prisoner.

This practice continued until 1988, when the Court of Appeal delivered an important judgment in *R v. Secretary of State for the Home Department, ex parte Handscomb and Others.*[472] *Handscomb* brought two important changes concerning discretionary life sentences. First, the Home Secretary was required to immediately consult with the judiciary in order to take an advice on the minimum period.[473] Second, the Court of Appeal held that the Home Secretary

[466] As will be elaborated in Chapter 6.4.1.2 below, the statutory basis of the imposition of discretionary life sentences is set out in s.285 of Sentencing Act 2020. However, the *Hodgson* criteria remain applicable in the areas which are not covered by the statute. See, for example: *R v. DP* [2013] 2 Cr. App. R. (S.) 63; *R v. Saunders (Red)* [2014] 1 Cr. App. R. (S.) 45; *R v. Ali* [2019] 2 Cr. App. R. (S.) 43.
[467] Appleton (2010:14); van Zyl Smit (2002b:94).
[468] In 1978, Advisory Council on the Penal System (1978) identified more than 50 offences that were punishable by discretionary life sentences.
[469] These two criteria were reaffirmed in both *Attorney-General's Reference No.32 of 1996 (Whittaker)* [1997] 1 Cr. App. R. (S.) 261 and *R. v Chapman* [2000] 1 Cr. App. R. 77.
[470] Appleton (2010:15).
[471] Windlesham (1989:246-47).
[472] (1988) 86 Cr. App. R. 59.
[473] van Zyl Smit (2002b:112-13).

had no discretion to increase or decrease the judicially recommended tariff.[474] Thus, after *Handscomb*, discretionary life prisoners began to be treated differently than mandatory life prisoners, since the judicial view on the tariff was final in the case of discretionary life sentences.[475]

As examined in Chapter 5.2, further developments with regard to discretionary life sentences were seen in the 1990s when the ECtHR began to deal with the compatibility of the release and recall processes of these sentences with Art 5 ECHR. Specifically, *Thynne, Wilson and Gunnell v. the United Kingdom* triggered a significant legislative reform in English law.[476] Following this case, a new system of tariff-setting and release for discretionary life prisoners was introduced by the Criminal Justice Act 1991 (c.53) (1991 CJA),[477] s.34 of which provided that the tariff would be specified by sentencing judges in open court, and that the release would be considered by the Parole Board. Accordingly, the 1991 CJA provided 'transparency and clarity in the sentencing process' of discretionary life sentences.[478]

The current statutory basis for the imposition of discretionary life sentences was initially set out in the 2003 CJA, which is now replaced by the Sentencing Act 2020. The post-2003 sentencing system of discretionary life imprisonment will be examined in Chapter 6.4.1.2 below, while the release question will be

[474] Padfield (1993:88); Palmer (1994:482-83).

[475] Schone (2000:276); Appleton (2010:23). Although *Handscomb* had implications for mandatory life prisoners, the then Secretary of State, Douglas Hurd, stated that he would retain the power to overrule the judicial recommendation in mandatory life sentences for murder in order not to damage public confidence. See: House of Commons (1987: col.349).

[476] [1990] ECHR 29. See also: Appleton (2010:27).

[477] Palmer (1994); Windlesham (1993).

[478] Justice (1996:41). In the House of Commons, there was a debate as to whether the new procedures proposed for the review of discretionary life sentences should also extend to mandatory life sentences. However, mandatory life sentences were considered a different category, since '[t]he element of risk is not the decisive factor in handing down a life sentence'. House of Commons (1991: col.310). Thus, the 1991 CJA did not include any legal changes concerning mandatory life sentences. See: Palmer (1994:485); Schone (2000:277).

addressed in Chapter 8. Now, we will turn to the historical background of Turkish life sentences in the following section.

6.1.2. Turkey

In Turkey, the death penalty was fully abolished in 2004.[479] By then, both the death penalty and life imprisonment had been used to punish serious offences. In 1926, when the former Turkish Penal Code (former TPC) was enacted,[480] there were only 14 offences that were punishable by the death penalty.[481] By the 1990s, the number of capital offences in Turkish law had risen to 53.[482] However, the death penalty had never been a mandatory sentence for any of these offences.[483] Rather, sentencing courts were granted the discretionary power to impose the alternative sentence of life imprisonment.[484] Thus, life imprisonment initially was either a sentence for the second most serious offences or an alternative to the death penalty.

As we have seen in the previous section, in E&W the executive had been involved in the tariff-setting and release processes of both mandatory and discretionary life sentences. Unlike in E&W, in Turkey the judiciary had enjoyed a relatively unfettered decision-making power in the imposition and release processes of life imprisonment. In Turkey, life imprisonment had never been a mandatory sentence. The sentencing judges had the power to impose an alternative determinate sentence instead of life imprisonment.[485] Moreover, the release decision of life prisoners was also made by courts. Once a life prisoner had served his/her minimum term, the sentencing court that had previously imposed the life sentence was required to assess whether the life prisoner was

[479] Law No: 5170 (Official Gazette Date and No: 22.5.2004 – 25469). See for a detailed analysis of the death penalty and its abolition in Turkey: Tanör (1994:19-24); Gemalmaz (2001); Gemalmaz (2002).
[480] Law No: 765, '(Former) Turkish Penal Code', (Official Gazette Date and No: 3.3.1926 – 320).
[481] Erdem (1954:133).
[482] Yücel (1995:96); See also: Sokullu-Akıncı (2011).
[483] Toroslu (1989:920).
[484] Sevdiren (2012:79).
[485] Art 59 of the former TPC.

suitable for release.[486] This assessment was carried out on the basis of the reports prepared by prison administration.[487]

In Turkey, historically, life imprisonment never meant a life-long incarceration in prison. Rather, life prisoners were *automatically* considered for release by courts after serving their minimum terms.[488] The minimum amount of time that should be served by life prisoners before release was determined in law, and initially was 24 years, but was reduced to 20 years in 1986, and remained so until 2005.[489]

Release from prison was possible even for those sentenced to death. In Turkey, the death penalty was not directly executed after all judicial processes were finalised.[490] Rather, a death sentence was automatically reviewed by the Court of Cassation (*Yargıtay*). Should the Court of Cassation uphold the imposition of the death penalty, it had to send the case to Parliament. The ultimate decision to approve the execution of a death sentence had to be made by Parliament.[491] In 1984, Parliament ceased to consider the death penalty cases. Since then, no execution law has been passed, and nobody executed.[492] This was a long moratorium period in Turkey. However, the status of those who were sentenced to death, but whose executions were not considered by parliament was somewhat equivocal. It was ambiguous whether they had an opportunity to be released after serving certain number of years, and if so, how long they would have to stay in prison. An important development to put an end to this equivocality took place in 1986 when Parliament enacted Law No: 3267.[493] According to this law, prisoners who were sentenced to death, but whose executions were not approved by Parliament would be entitled to conditional

[486] Law No: 647 (Official Gazette Date and No: 16.07.1965 – 12050), Art 19, as amended by Art 1 of Law No: 1712 (Official Gazette Date and No: 11.05.1972 – 14532).
[487] ibid.
[488] Art 19 of Law No: 647 explicitly stated that courts had to review life sentences irrespective of whether life prisoners applied for such a review or not.
[489] Art 19 of Law No: 647.
[490] Şen (1995:230).
[491] Feyzioğlu (2002:33).
[492] Tanör (1994:23); Turhan (1999:245).
[493] Law No: 3267 (Official Gazette Date and No: 19.05.1986 – 19052).

release after serving 30 years' imprisonment. The reason why death sentences were commuted to a 30 years' imprisonment instead of life imprisonment was because the minimum non-parole period for a life sentence was 20 years at that time in Turkey. Clearly, in the event of the abolition of the death penalty, life imprisonment was not considered a good alternative to it.

6.1.2.1. The Abolition of the Death Penalty and the Emergence of Aggravated Life Sentences

Turkey's long-standing policy of becoming a European Union (EU) member was the biggest trigger for its abolition of capital punishment. In 1997, Turkey was declared eligible to become an EU member.[494] It was recognised as a candidate for the full membership to the EU at the Helsinki submits of the European Council in 1999.[495] In 2001, in the first Accession Partnership with the EU, Turkey promised that the abolition of the death penalty was one of its medium-term plans.[496] In the same year, the Turkish Parliament passed a law amending the Constitution to prohibit the death penalty, 'except in time of war or imminent threat of war, and for terror offences'.[497] This was followed by a legislative amendment with the enactment of Law No: 4771 in 2002.[498] According to this 2002 Act, the death penalty was abolished in Turkish legislation, except in time of war and of threat of war, and was replaced by life imprisonment. Accordingly, in 2003 Turkey signed and ratified Protocol No.6 to the ECHR.

With the 2002 amendments, all death sentences that were previously imposed on offenders were also commuted to life imprisonment. However, life imprisonment would literally mean life for those who were previously sentenced to death due to terror offences. Art 1.B of Law No: 4771 included a provision explicitly stating that 'life imprisonment for these prisoners [convicted of terror offences] will continue until they die in prison'. As explained in the previous section, life prisoners were normally considered for release after serving 20 years

[494] European Council (1997: paras 41-7).
[495] European Council (1999: para 12).
[496] European Council (2001: para 4.2).
[497] Law No: 4709 (Official Gazette Date and No: 17.10.2001 – 24556), Art 15.
[498] Law No: 4771 (Official Gazette Date and No: 9.8.2002 – 24842).

in prison.[499] Thus, Law No: 4771 introduced for the first time a life-long imprisonment for a category of life prisoners in Turkey; namely life prisoners convicted of terror offences. This demonstrated the government's intention that even though the death penalty was abolished, certain offenders have to be punished to death in prison.

The full abolition of capital punishment, including at time of war or threat of war, occurred in 2004 with a constitutional amendment by Law No: 5170.[500] This was followed by a legislative amendment replacing all death penalty sentences in Turkish laws with 'aggravated life sentences'.[501] This was the formal introduction of the aggravated form of life imprisonment into Turkish law. Following the full abolition of the death penalty, Turkey signed Protocol No.13 to the ECHR in 2004 and ratified it in 2006.

Turkey's abolition of the death penalty and its ratification of Protocol No.6 and Protocol No.13 to the ECHR were all important developments. However, the abolition of the death penalty resulted in a more punitive penal policy in Turkey. This is firstly because the abolition resulted in a life-long imprisonment sentence in Turkey. Prior to the abolition, as noted in the previous section, no death sentences had been executed due to the moratorium, and prisoners sentenced to death were allowed to be released after serving 30 years.[502] After the abolition, however, there is now a category of life prisoners (i.e. terrorist offenders serving life) who are literally serving life-long incarceration.[503] Secondly, the abolition led to the emergence of the aggravated form of life imprisonment. Again, prior to the abolition, prisoners serving life and death sentences used to be treated under the same implementation regime. Following the abolition, however, a new category of life prisoners (aggravated life

[499] Art 19 of Law No: 647, as amended by Art 1 of Law No: 3267.
[500] Sokullu-Akıncı (2011).
[501] Law No: 5218 (Official Gazette Date and No: 21.7.2004 – 25529).
[502] Art 19 of Law No: 647, as amended by Art 1 of Law No: 3267. In Turkey, prisoners sentenced to death were released from prison through commutation of their sentences and/or amnesty laws. Of 308 death sentenced prisoners in 1991, for example, 275 were released, as they either had served their commuted terms or had benefitted from an amnesty law. See: Artuk (1991:166).
[503] Law No: 3713 (Official Gazette Date and No: 12.4.1991 – 20843), Art 17(4).

prisoners) began to be treated more harshly under a very punitive implementation regime.

The current imposition procedures of life imprisonment in Turkey will be examined in Chapter 6.4.2 below, while the implementation of, and release from life imprisonment will be explored in Chapters 7 and 8 respectively. Now, the thesis proceeds to examine the justifications for the imposition of life imprisonment in E&W and Turkey.

6.2. Justifications for the Imposition of Life Imprisonment

The previous section has explored the historical background of life imprisonment in E&W and Turkey. It has observed that life imprisonment has existed for a long time in both jurisdictions. It has also found that life sentences have followed different evolutionary paths in the two legal systems being compared. However, the mere historical existence of life imprisonment in E&W and Turkey does not, without more, mean that its imposition is justified, and thus, legitimate. The legitimacy of life imprisonment largely depends on what grounds it is imposed. As discussed in Chapter 3.1 of the thesis, the European human rights instruments recognise that life imprisonment can be imposed on the grounds of retribution, deterrence, rehabilitation and public protection. On this basis, this section examines what justifications are invoked for the imposition of life imprisonment in E&W and Turkey.

6.2.1. England and Wales

In E&W, s.57(2) of Sentencing Act 2020 (c.17) lists the purposes of sentencing as follows:

> (a) the punishment of offenders,
> (b) the reduction of crime (including its reduction by deterrence),
> (c) the reform and rehabilitation of offenders,
> (d) the protection of the public, and
> (e) the making of reparation by offenders to persons affected by their offences.[504]

[504] These are the verbatim copy of sentencing purposes which were set out in s.142(1) of the 2003 CJA.

Sentencing Act 2020 juxtaposes sentencing objectives like a 'shopping list'.[505] It is left to sentencing courts to balance the purposes of the sentence in individual cases. In this respect, Sentencing Act 2020 is not in line with the Committee of Ministers of the Council of Europe's Recommendation No. R(92)17 concerning Consistency in Sentencing. This recommendation suggests that '[w]here necessary, and in particular where different rationales may be in conflict, indications should be given of ways of establishing possible priorities in the application of such rationales for sentencing'.[506] However, Sentencing Act 2020 does not prioritise any of these sentencing objectives over the others.[507]

What is more important is that the sentencing objectives stated in s.57(2) of Sentencing Act 2020 are not applicable to life imprisonment. This is because s.57(3) of the same legislation explicitly provides certain exemptions for which these purposes do not apply in the case of life sentences.[508] This means that there is no statutorily declared rationale for sentencing of life imprisonment in E&W. However, the rationales for the imposition of life sentences have been well established in English common law.

As explained in section 6.1.1 above, both mandatory and discretionary life sentences have punitive and preventive elements.[509] Regarding mandatory life sentences, the House of Lords held in *R v. Lichniak* that:

> The punitive element is … imposed as punishment for the serious crime which

[505] Taylor, Wasik, & Leng (2004:176), referring to s.142(1) of the 2003 CJA.

[506] Recommendation No. R(92)17 concerning Consistency in Sentencing, Art 2.

[507] Unlike both the 2003 CJA and Sentencing Act 2020, the 1991 CJA set out retribution (just desert) as an authoritative primary rationale or philosophy of sentencing. See: Ashworth (2000:298); Ashworth (2010:77).

[508] s.57(3) of Sentencing Act 2020 provides that the sentencing purposes set out in s.57(2) does not apply to an offence in relation to which a mandatory sentence requirement applies. Mandatory sentence requirement generally refers to life sentences, as set out in s.399 of Sentencing Act 2020 which provides that: 'a mandatory sentence requirement applies in relation to the offence if—

(a) the offence is one for which the sentence is fixed by law,

(b) the court is obliged by one of the following provisions to pass a sentence of detention for life, custody for life or imprisonment for life—

(i) section 258, 274 or 285 (life sentence for certain dangerous offenders);

(ii) section 273 or 283 (life sentence for second listed offence).'

[509] See also: Appleton (2010:20-3).

> the convicted murderer has committed. The preventative element is represented by the power to continue to detain the convicted murderer in prison unless and until the Parole Board, an independent body, considers it safe to release him, and also by the power to recall to prison a convicted murderer who has been released if it is judged necessary to recall him for the protection of the public.[510]

Accordingly, the punitive element relates to the imposition stage of a life sentence, whereas the preventive element pertains to the release stage. As the punitive period of life imprisonment is represented by retribution and deterrence,[511] these two objectives are considered the primary rationales for the imposition of mandatory life sentences for murder in E&W. In fact, retribution and deterrence are regarded by the English judiciary as objectives that sometimes justify a life-long incarceration. For example, in *R v. Secretary of State for the Home Department, ex parte Hindley*, Lord Steyn stated that 'there is nothing logically inconsistent with the concept of a tariff by saying 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'.[512] Similarly, *R v. McLoughlin,* Court of Appeal held that 'a judge can impose a whole life order as just punishment [as long as] a legal regime for a review during the sentence must be in place at the time the sentence is passed'.[513]

Unlike mandatory life sentences, however, when imposing a discretionary life sentence, sentencing courts must also consider the public protection ground in addition to the retribution and deterrence objectives. Easton and Piper stated that:

> To impose a discretionary life sentence the court must first find the crime to have been grave and the offender to have been suffering from mental instability. It must then assess the risk posed by the offender and decide that he will probably re-offend and be a danger to the public for some

[510] [2002] UKHL 47, Lord Bingham of Cornhill per se.
[511] See: Chapter 5.2 of the thesis. See also: van Zyl Smit, Weatherby, & Creighton (2014:63).
[512] [2000] UKHL 21.
[513] [2014] EWCA Crim 188, para 22.

(unforeseeable) time.[514]

In essence, it is the offender's risk of reoffending that justifies the imposition of a discretionary life sentence.[515] This is because in exceptional cases imposing a determinate sentence would not be considered sufficient to secure the interests of public safety due to the impossibility of predicting when the risk of reoffending will subside.[516] This requires passing a life sentence, 'so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large'.[517]

In a nutshell, mandatory life sentences are primarily imposed on the grounds of retribution and deterrence, whereas public protection plays a key role in the imposition of discretionary life sentences. However, it must be noted that minimum non-parole terms are determined on the basis of retribution (just desert) in both mandatory and discretionary life sentences. This is because, as will be elaborated in Chapters 6.4.1.1 and 6.4.1.2 below, sentencing courts are required to take into account the seriousness of the offence and the circumstances of the case when determining a minimum term to be served by a life prisoner before being considered for release.

6.2.2. Turkey

Art 1 of the TPC provides that:

> The objective of the Penal Code is to protect individual rights and freedoms, public order and security, the rule of law, peace in the community, public health and the environment and to prevent the commission of offences. In order to achieve this objective criminal responsibility, specific criminal offences, penalties and security measures are regulated under this act.

It must be noted at the outset that Art 1 of the TPC does not regulate the

[514] Easton & Piper (2005:141).

[515] Some scholars have noted at different periods that public protection has been the primary rationale for discretionary life sentences. See, for example: Windlesham (1989); Cullen & Newell (1999:117-19); van Zyl Smit (2002b: ch. 3); Padfield (2002:3-5); Appleton (2010: ch.1).

[516] *R v Edward John Wilkinson and Others* (1983) 5 Cr App R (S) 105 at 109.

[517] ibid. See also: *R v Mansell* (1994) 15 Cr App R (S) 771 at 772 (Lord Taylor CJ).

sentencing objectives in particular but explains the purposes of the 'Penal Code' in a general manner.[518] In this respect, it follows from Art 1 of the TPC that public protection and prevention of crimes are the two main purposes of the Penal Code.[519] This is also reiterated in the explanatory note, which is attached to Art 1 of the TPC and which states that 'protection of public order and safety and prevention of crimes are considered the main objectives of the Penal Code.'

The purposes of sentencing are explicated in Art 3(1) and Art 61 of the TPC. Specifically, Art 3(1) provides that '[a]ny punishment and security measure to be imposed on an offender shall be proportionate to the gravity of the crime committed'.[520] This is an explicit recognition of the retribution (just desert) objective in sentencing matters. Further, retribution (just desert) shapes the procedures that sentencing judges must follow in the determination of the basic sentence to be imposed on an offender. According to Art 61(1) of the TPC, judges should determine the basic punishment to be imposed on an offender between the minimum and maximum limits of the sentence as specified by law. In the determination of the basic punishment, judges must consider the following factors:

a) the manner in which the offence was committed;
b) the means used to commit it;
c) the time and place where the offence was committed;
d) the importance and value of the subject of the offence;
e) the gravity of the damage or danger;
f) the degree of fault relating to the intent or recklessness; and
g) the object and motives of the offender.

These factors are relevant to the seriousness of the offence committed and the culpability of the offender. Thus, when taking the procedures set out in Art 61(1) together with the general proportionality principle set out in Art 3(1), it can be said that the retribution objective of punishment is prioritised at the

[518] Özgenç (2005:66). See also for the analysis of the purposes of Turkish Penal Code: Centel, Zafer, & Cakmut (2016:4-6); Hakeri (2010:107); Koca & Üzülmez (2015:31-4); Zafer (2016:5).
[519] Bayraktar (2005:55); Şen (2006:11); Özbek, Doğan, Bacaksız, & Tepe (2016:48).
[520] See also: Artuk, Gökcen, & Yenidünya (2009:11); Özgenç (2016:73-4).

sentencing stage of criminal justice in Turkish law.

As explained in the previous section, in E&W the statutorily stated purposes of sentencing are not applicable to life imprisonment due to the legislative exceptions. Unlike in E&W, the relevant legislation in Turkey provides no specific exceptions for life sentences with respect to the statutory sentencing objectives. In E&W, the underlying philosophy behind the different forms of life imprisonment has been ascertained by the judiciary. In contrast, in Turkey the rationale for life imprisonment has not been a specific subject of debate before courts. Although higher Turkish courts have, from time to time, explicated the purposes of sentencing in general,[521] they appear not to have addressed the question of rationales for any particular form of punishment, including life imprisonment. Thus, in Turkey life imprisonment is imposed on the basis of the statutory objective of sentencing (i.e. retribution).

The retributive objective was (and is) also the main ground for the emergence and retention of life-long incarceration in Turkey. When the abolition of the death penalty was debated in Parliament, the question of how to deal with terrorist offenders previously sentenced to death was the most controversial issue.[522] As explained in section 6.1.2.1 above, the death sentences of terrorist offenders were replaced by a sentence of life imprisonment without the possibility of release. During the parliamentary debate, Mehmet Ali Şahin, an MP and then the Deputy Prime Minister of Turkey, stated that:

> There is a risk that an amendment in the law concerning conditional release may always be enacted. Even if this does not happen, there is a possibility that the leader of terrorist organisation [Abdullah Öcalan] and other terrorist prisoners who were sentenced to the death penalty may be released after 33 years according to Art 17 of the Anti-Terror Law. What we are proposing here

[521] For example, the Court of Cassation held that deterrence and public protection should be the main purposes of sentencing (See: The Assembly of Criminal Chamber of the Court of Cassation's decision of 02 August 1999, Judgment No: 1998/2-340 E, 1999/2 K). Similarly, the Constitutional Court also stated that deterrence, public protection and rehabilitation should be emphasised at the stage of sentencing (See: Constitutional Court's decision of 06 April 1971, Judgment No: 1971/2 E, 1971/36 K. See also: Constitutional Court decision of 20 June 1995, Judgment No: 1994/92 E, 1995/14 K). See also: Yerdelen (2013:117).

[522] Aydınoğlu (2016:13-14).

> today is to cut these possibilities off. To remove all these possibilities [for the release of terrorist prisoners], the death penalty must be replaced with aggravated life imprisonment, and an arrangement must be made to ensure that they [terrorist prisoners] are excluded from conditional release and amnesties.[523]

Accordingly, Turkish law adopted the sentence of aggravated life imprisonment without the possibility of parole. Art 107(16) of the Law on the Execution of Sentences and Security Measures (LESSM) provides that:

> The provisions of conditional release shall not apply in the event of being sentenced to aggravated life imprisonment for committing, as part of the activities of an illegal organisation, one of the crimes included under Section Four headed "Crimes Against the Security of the State", Section Five headed "Crimes Against the Constitutional Order and the Functioning of this Order", and Section Six headed "Crimes Against National Defence", in Part Four, Chapter Two of the Turkish Penal Code (Law No. 5237).

As will be explained in section 6.3.2 below, the offences referred to in Art 107(16) of LESSM are the most serious crimes against the state. If any of these offences is committed as a part of the activities of an illegal organisation (namely, a terrorist organisation), and if the convicted offender is given an aggravated life sentence, that person will not benefit from conditional release. The only possibility for their release is a Presidential pardon on humanitarian grounds. Thus, aggravated life sentences without parole raise significant issues under Art 3 ECHR. As discussed in Chapter 3.2.2, irreducible life sentences are considered inhuman and degrading punishment under Art 3 ECHR. The question of whether aggravated life sentences without parole complies with Art 3 ECHR will be discussed in detail in Chapter 8.3.2 of the thesis. For the present purpose, it must be noted here that these sentences are 'irreducible', and hence, their imposition is unacceptable under the European standards for the imposition as analysed in Chapter 3.2.2 of the thesis.

6.3. Offences That Carry Life Imprisonment

After analysing the historical background of, and justifications for life imprisonment in the previous two sections, the thesis now proceeds to examine

[523] Şahin (2002).

the offences that carry life imprisonment in E&W and Turkey in this section. To examine for what offences life imprisonment can be and is imposed in E&W and Turkey is important, because, as van Zyl Smit and Appleton state, it is 'a key question about the legitimacy of life imprisonment, namely, whether its imposition represents a proportionate penal response to the criminal conduct of the offender'.[524]

As we have seen in Chapter 3.2.1 of the thesis, European penal law requires the proportionality principle to be at the centre of sentencing of life imprisonment. Art 4 of the Committee of Ministers of the Council of Europe's Recommendation No. R(92)17 concerning Consistency in Sentencing requires that 'disproportionality between the seriousness of the offence and the sentence should be avoided'. Specifically, as discussed in Chapter 3.2.1, the ECtHR held that a grossly disproportionate life sentence is inhuman and degrading punishment, and thus, its imposition breaches Art 3 ECHR. The European human rights documents and instruments underline that life imprisonment should only be imposed for the most serious offences.

On this basis, this section explores for what offences life imprisonment can be imposed in theory, and for what offences it is imposed in practice in E&W and Turkey. This analysis will help us to understand the extent to which life imprisonment is imposed for the most serious offences in the two legal systems being compared.

6.3.1. England and Wales

As briefly outlined at the beginning of this chapter, in E&W life imprisonment can be imposed on offenders convicted of three different categories of offences. These are mandatory life sentences for murder; discretionary life sentences for some serious offences; and statutory life sentences for second listed offences.

Murder is the most serious homicide offence in E&W.[525] Where the defence of loss of control or diminished responsibility is successful, murder is reduced

[524] van Zyl Smit & Appleton (2019:126).
[525] Mitchell & Roberts (2013:501).

to manslaughter, which is the other homicide offence with the maximum penalty of life imprisonment. It is intended that 'murder should encompass what are regarded as the most serious cases of unlawful killing, leaving manslaughter to capture those that are not quite so heinous'.[526] However, some senior judges have observed that the current definition of murder does not restrict it to the most heinous examples of homicide.[527] For example, in *R v. Howe and Others* Lord Hailsham stated that:

> Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so called Moors murders to the almost venial, if objectively immoral, "mercy killing" of a beloved partner.[528]

In recent decades, a number of studies have expressed concerns about the law governing murder and addressed the need for reforms with regard to both its definition and the mandatory element of life imprisonment for it.[529] However, the law of murder remains unchanged and the mandatory life sentence for it continues to be considered 'an essential part of the sentencing framework'.[530]

In E&W, murder is the only offence for which life imprisonment is fixed by law. Apart from murder, there are a number of other serious offences that carry maximum, discretionary life sentences. However, it appears to be a very difficult task to identify accurately the number of serious offences punishable by discretionary life sentences in E&W.

Nowadays, Schedule 19 of Sentencing Act 2020 provides a number of offences that carry the maximum sentence of life imprisonment. The offences listed in this provision include, among many others, attempt to murder,

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[526] Mitchell & Roberts (2012a:5).
[527] Mitchell (1998:454).
[528] [1986] UKHL 4. See also: Bingham (2000:333); Herring (2012:283-84); Simester, Spencer, Stark, Sullivan, & Virgo (2016:388-91).
[529] See, for example, amongst others: Select Committee on Murder and Life Imprisonment (1989); Committee on the Penalty for Homicide (1993); Ashworth & Mitchell (2000b); Cotton (2008); Mitchell & Roberts (2012a); Mitchell & Roberts (2013); Fitz-Gibbon (2013).
[530] Minister of Justice (2011:10).

conspiracy to commit murder, manslaughter, kidnapping, soliciting murder, threats to kill, wounding with intent to cause grievous bodily harm, causing bodily injury by explosives, arson, and sexual offences. However, the reach of discretionary life sentences is not only restricted to those stated in Schedule 19 of Sentencing Act 2020. In theory, discretionary life sentences remain to be imposed for a large number of further offences where the maximum penalties are not set in law.[531]

The last category of offences that can be punished by life imprisonment is listed in Part 1 of Schedule 15 of Sentencing Act 2020. These offences are called as 'second listed offences' and to be punished by statutory life sentences. Part 1 of Schedule 15 provides 53 offences that can be punished by statutory life sentences. It is important to note that many of these offences spelt out in Part 1 of Schedule 15 overlap with those offences which are listed in Schedule 19 of Sentencing Act 2020, and which can also be punished by discretionary life sentences. However, as will be explained in Chapters 6.4.1.2. and 6.4.1.3 below, English law recognises significantly different imposition procedures for statutory life sentences and discretionary life sentences.

At this point, it can be summarised that in E&W there are tens of different statutory and common law offences which, in theory, can be punished by life imprisonment. In practice, however, life imprisonment is only imposed for a limited number of serious offences. Table 6.1 below provides the number of convicts sentenced to life imprisonment and the offences for which a life sentence was passed between 2010 and 2020 in E&W.

[531] *R v Saunders* [2013] EWCA Crim 1027.

Table 6. 1: Number of Convicts Sentenced to Life Imprisonment and the Offences in England and Wales (2010-2020)[532]

Offence Descriptions	Year of Sentencing										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Violence against the Person											
Murder	346	343	356	314	333	266	289	250	328	369	262
Attempted murder	11	12	12	7	17	17	26	19	27	24	14
Conspiracy to murder	1	2	-	1	7	1	5	2	5	-	-
Manslaughter	2	4	2	6	5	5	11	4	3	3	3
Manslaughter due to diminished responsibility	-	1	2	5	2	5	2	1	4	1	-
Child Destruction	-	-	-	-	-	-	1	-	-	-	-
Wounding with intent to cause grievous bodily harm	6	5	4	13	12	13	11	14	10	15	12
Assault occasioning actual bodily harm	-	-	-	-	-	-	-	-	-	1	-
Other Endangering Life – Indictable only	-	1	7	1	2	1	2	1	7	5	2
Kidnapping etc.	-	1	1	4	2	7	4	4	2	1	1
Sexual Offences											
Buggery	-	2	1	1	2	1	1	1	1	1	1
Sexual assault on a male child under 13 – penetration	-	-	-	1	-	-	-	1	-	-	-
Rape of a female aged 16 or over	9	11	8	12	13	18	20	20	13	15	6
Rape of a female aged under 16	3	4	7	6	8	5	3	5	5	4	2
Rape of a female child under 13 by a male	1	3	3	6	4	7	2	5	3	3	4
Rape of a male age under 16	-	2	1	2	1	1	2	2	1	-	1
Rape of a male age 16 or over	-	-	-	2	-	-	2	-	1	1	1
Rape of a male child under 13 by a male	-	-	1	-	4	1	4	2	1	-	1
Sexual assault on a female – penetration	1	-	-	1	4	3	4	1	-	-	1
Sexual assault of a female child under 13 – penetration	1	-	1	2	-	-	3	3	-	-	-
Sexual activity with a child under 13 – indictable only	-	1	-	-	-	1	-	-	-	-	2
Sexual activity involving a child under 16 - indictable only	-	-	1	-	-	-	-	1	1	-	-

[532] The data in this table is reproduced from the sentencing statistics provided by the Ministry of Justice. See: Ministry of Justice (2020a)

Causing sexual activity without consent – penetration	-	-	-	-	-	-	1	-	-	-	-
Other miscellaneous sexual offences	-	-	-	-	-	-	-	1	1	2	-
Theft Offences											
Aggravated burglary in a dwelling	-	-	1	2	1	1	-	-	-	1	-
Criminal Damage and Arson											
Arson endangering life	1	1	1	2	3	4	3	3	5	3	1
Arson not endangering life	-	-	-	1	1	-	1	1	-	-	-
Criminal Damage endangering Life	-	-	-	-	-	-	-	2	-	-	-
Public Order Offences											
Other offences against the State or Public Order – indictable only	-	1	-	1	-	2	1	5	6	-	3
Other offences against the State or Public Order – triable either way	-	-	-	-	-	1	-	-	-	-	1
Robbery	2	1	2	5	17	9	9	12	8	6	1
Possession of Weapons	-	-	1	-	4	-	-	-	-	1	-
Other triable either way (non-motoring)	-	-	-	-	-	-	-	1	-	-	-

As Table 6.1 demonstrates, in practice only 33 offences have been punished by life imprisonment between 2010 and 2020. Many of these offences are those of violent crimes against persons and sexual offences.

It is striking to note that life imprisonment has been imposed fewer than 10 times for 14 offences out of the 33 offences punished by life imprisonment between 2010 and 2020. This means that the average number of life imprisonment impositions per year is less than one for these 14 offences. Although the remaining 19 offences have been relatively frequently punished by life imprisonment, the prevalence of life imprisonment impositions for them also differs dramatically. For example, murder is the offence most often punished by life imprisonment with an average number of 314 impositions per year between 2010 and 2020. It is followed by attempted murder with only 17 life imprisonment impositions per year on average in the same period. Interestingly, manslaughter, the other homicide offence along with murder, has been punished by life imprisonment only 6.4 times per year on average.

The high use of life imprisonment for murder can be explained on the basis that it is a mandatory sentence for this particular offence in English law. As sentencing courts have no discretion whatsoever, all murder convictions result in the imposition of life imprisonment. However, Table 6.1 suggests that where sentencing courts are provided with the discretion to impose or not to impose a life sentence for a particular offence, they tend to use it rather sparingly. This is because within the 11-year period between 2010 and 2020, no imposition of life imprisonment has taken place for a large number of crimes that are, in theory, punishable by life imprisonment. Further, as Table 6.1 illustrates, the use of life imprisonment has been very limited for the offences other than murder. Thus, it can be said that the mandatory use of life imprisonment is the main cause of the high number of life prisoners in E&W. In this respect, there remains the question of whether murder should be *mandatorily* punished by life imprisonment. We will turn back to this question in Chapter 6.4.1.1 below. Now, the thesis will examine offences that carry life imprisonment in Turkey.

6.3.2. Turkey

Compared to E&W, in Turkey the number of offences carrying life imprisonment is relatively small. As Table 6.2 below demonstrates, the TPC specifies only 26 offences that can be punished by aggravated life sentences and/or (normal) life sentences in Turkey.

Table 6. 2: **Offences That Carry Aggravated Life Sentences and/or (Normal) Life Sentences in Turkey (TPC)**

Offences (TPC)	(Normal) Life Sentence	Aggravated Life Sentence
Genocide (Art. 76/2)		√
Offences against humanity (Art. 77/2)		√
Intentional killing (Art. 81)	√	
Aggravated forms of intentional killing (Art. 82)		√
Aggravated torture on account of its consequences (Art. 95/4)		√
Sexual assault resulting in the death or vegetative state of the victim (Art. 102/5)		√
Child molestation resulting in the death or vegetative state of the victim (Art. 103/6)		√
Disrupting the unity and integrity of the state (Art. 302/1)		√
Alliance with the enemy (Arts. 303/1 and 303/2)	√	√
Recruitment of soldiers against a foreign state (Art. 306/2)	√	
Destruction of military facilities and conspiracy which benefits enemy military movements (Arts. 307/2-b and 307/5)		√
Violation of the constitution (Art. 309/1)		√
Assassination of and physical attack towards the President (Art. 310/1)		√
Offence against the Legislative Body (Art. 311/1)		√
Offences against the Government (Art. 312/1)		√
Armed revolt against the Government of Turkish Republic (Arts. 313/2 and 313/3)		√
Usurping military command (Arts. 317/1 and 317/2)	√	
Dissemination of false information in wartime (Art. 323/3)	√	
Documents relating to state security (Art. 326/2)	√	
Securing information relating to state security (Art. 327/2)	√	
Political or military espionage (Art. 328/2)		√
Disclosure of information which must be kept confidential (Arts. 330/1 and 330/2)	√	√
Exploitation of state secrets and disloyalty in Government Services (Art. 333/2)		√

Securing prohibited information for espionage (Art. 335/2)	√
Disclosure of prohibited information for political or military espionage (Art. 337/2)	√
Offences against the head of a foreign state (Art. 340/1)	√

Unlike in E&W, in Turkey a number of serious offences such as attempted murder, kidnapping, soliciting murder, threats to kill, causing bodily injury and most types of sexual offences are left out of the scope of life imprisonment. The breadth of life imprisonment is, therefore, circumscribed to the most serious offences in Turkey.

As Table 6.2 shows, in Turkey life imprisonment is mostly stipulated as a sentence for offences against the state security, offences against the constitutional order and its functioning, offences against the national defence, offences against the state confidentiality and espionage.[533] There are only seven offences for which life imprisonment is stipulated as a sentence for violent crimes against persons. Two of these seven offences are genocide (Art. 76/2) and crimes against humanity (Art. 77/2).[534] Apart from these two offences, intentional killing (Art. 81), aggravated forms of intentional killing (Art. 82), aggravated torture on account of its consequences (Art. 95/4), sexual assault resulting in the death or vegetative state of the victim (Art. 102/5) and child molestation resulting in the death or vegetative state of the victim (Art. 103/6) are the offences against persons for which a life sentence can be imposed. In this regard, unlike in E&W, in Turkey a number of serious violent offences are excluded from the scope of life imprisonment.

As we have seen in the previous section, in E&W many forms of sexual offences carry the maximum sentence of life imprisonment. As Table 6.1 shows, in practice a number of offenders convicted of different types of sexual offences

[533] See generally for an account of these offences in Turkish law: Topçu (2016); Evik (2016); Kangal (2014).

[534] See for the definitions of genocide and crimes against humanity in Turkish law: Değirmenci (2007).

have been sentenced to life imprisonment between 2010 and 2020 in E&W. By contrast, in Turkey life imprisonment is not a sentence available for the most types of sexual offences. As Table 6.2 illustrates, only two types of sexual offences are punishable by life imprisonment in Turkey (i.e. Articles 102/5 and 103/6 of the TPC).

Similarly, in Turkey the use of life imprisonment for homicide offences is more restricted than that in E&W. In Turkish law, there are five different types of homicide offences as defined in Articles 81 to 85 of the TPC.[535] These are intentional killing (Art 81), aggravated forms of intentional killing (Art 82), intentional killing by omission (Art 83), directing suicide (Art 84) and reckless killing (Art 85). Life imprisonment is stipulated only for the first two homicide offences, whereas the last three are punished by fixed-term imprisonment sentences. This means that offenders convicted of offences of intentional killing by omission, directing suicide and reckless killing are never sentenced to life imprisonment in Turkey. By contrast, both types of homicide offences in E&W (i.e. murder and manslaughter) can be and, are punished by life imprisonment.

Table 6.1 shows how often life imprisonment is imposed on offenders convicted of crimes carrying life imprisonment in E&W. However, there are no such data available regarding Turkey. It is, therefore, unknown how often courts in Turkey impose life sentences on offenders convicted of any of the 26 offences that carry life imprisonment. Nevertheless, the use of life imprisonment for murder offences in E&W and Turkey can still be compared, as intentional homicide rates are available. Table 6.3 below shows the intentional homicide rates by year in E&W and Turkey between 2003 and 2017.

[535] See generally for homicide offences in Turkey: Hakeri (2006); Centel, Zafer, & Cakmut (2007); Hafızoğluları & Ketizmen (2008); Hafızoğluları & Özen (2010:37-67); Yurtcan (2015b).

Table 6. 3: Intentional Homicide Rates per 100,000 population in E&W and Turkey between 2003 and 2017[536]

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
England and Wales	1.1	1.5	1.3	1.3	1.3	1.2	1.1	1.1	0.9	1	0.9	0.9	1	1.2	1.2
Turkey	4.3	4.3	4.9	4.6	5.2	4.6	5.2	4.2	4.2	4.3	n/a	n/a	2.8	3.3	3.1

[536] UNODC (2018). UNODC provides a framework for the definition and classification of unlawful killings. It defines intentional homicide as 'unlawful death inflicted upon a person with the intent to cause death or serious injury' See: UNODC (2019:9). It must be noted that this definition is similar to the murder definition in English law. However, there is a divergence between the number of murder convictions reported by the Ministry of Justice of the United Kingdom and the number of homicides reported by UNODC. Probably, such divergence results from different methods adopted by two organisations.

The data in Table 6.3 is derived from the homicide statistics collected by the United Nations Office on Drug and Crime. It must be noted that the intentional homicide rates of Turkey are not available in 2013 and 2014. Thus, the data are limited. Nevertheless, the comparison of the data available still demonstrates an important fact about the use of life imprisonment for murder offences in E&W and Turkey.

As Table 6.3 shows, the intentional homicide rates of Turkey were, on average, more than three times greater than those of E&W between 2003 and 2017. As murder is an offence that carries life imprisonment in both jurisdictions, it could have been anticipated that Turkey would have many more life prisoners than E&W. However, this is not the case. Thus, it appears that sentencing courts in Turkey tend not to impose life imprisonment on offenders convicted of murder as frequently as their English counterparts do. The reason behind this is that in Turkey life imprisonment is not a mandatory sentence for all murder offences. Rather, as will be explained in Chapter 6.4.2.1 below, only aggravated forms of intentional killing are mandatorily punished by life imprisonment in Turkey. By contrast, in E&W everyone convicted of murder is sentenced to mandatory life imprisonment. This resulted in that in E&W the vast majority of life prisoners are those convicted of murder.[537] Again, this raises the question of whether murder should be mandatorily punished by life imprisonment. We will address this question in the following section.

6.4. Imposition of Life Imprisonment and Determination of Minimum Non-Parole Terms

Thus far, the thesis has examined the historical background of and the justifications for life imprisonment in E&W and Turkey. It has also explored for what offences life imprisonment can be, and are, imposed in the two countries being compared. Henceforth, the thesis focuses on the third question put forward at the beginning of this chapter; namely, how are life sentences in E&W and Turkey imposed? To address this question, this section examines whether and, if so, to what extent sentencing courts in E&W and Turkey have the discretion

[537] As of 30 June 2021, there were 5386 mandatory life prisoners convicted of murder. See: Ministry of Justice (2021: Table A1.15).

to impose or not to impose a life sentence, and what roles they play in the determination of minimum non-parole terms.

6.4.1. England and Wales

The historical overview of the imposition of mandatory and discretionary life sentences of E&W has been provided in Chapter 6.1.1 above. Thus, this section focuses on the examination of the post-2003 statutory basis of the imposition of mandatory, discretionary and statutory life sentences in E&W. It must be stated at the outset that the statutory basis of the imposition of life imprisonment had been regulated by the 2003 CJA between 2003 and 2020. Sentencing Act 2020 has repealed the relevant provisions of the 2003 CJA and replaced them with provisions that are also identical to those contained in the 2003 CJA. Therefore, this chapter refers to the provisions contained in Sentencing Act 2020 and notes the differences between the two laws where applicable.

6.4.1.1. Imposition of Mandatory Life Sentences

In E&W, murder is punished by a fixed, mandatory sentence of life imprisonment.[538] Therefore, life imprisonment for murder is 'a sentence where the sentencer has only one option'.[539] The mandatory nature of life imprisonment restricts the power of courts, 'whilst heightening parliamentary control over the sentencing process'.[540]

The mandatory element of life imprisonment is assumed necessary to ensure public confidence in criminal justice system.[541] The rationale behind this is the belief that the imposition of any lesser sentence for murder would reduce public confidence.[542] In this respect, Roberts described mandatory sentencing as 'the most visible example' of penal populism that sends a message that the public

[538] s.1 of Murder (Abolition of Death Penalty) Act 1965. According to s.259 of Sentencing Act 2020, the court is to impose 'detention at Her Majesty's pleasure' if the offender convicted of murder is under 18. According to s.275 of Sentencing Act 2020, the court is to impose 'custody for life' if the offender convicted of murder is aged 18 or over but under 21.
[539] Warner (2007:323).
[540] Fitz-Gibbon (2013:509).
[541] Mitchell & Roberts (2011:456).
[542] Mitchell & Roberts (2010:3); Roberts (2003:486).

view on crime is taken seriously by the justice system.[543]

However, a number of studies have revealed that mandatory life sentences may, in fact, have a negative impact on public confidence rather than serving to increase it. Wood, for example, argued that policies behind the mandatory sentence of life imprisonment are 'inconsistent with the philosophy of truth in sentencing', since it does not actually mean what it is meant.[544] Similarly, Mitchell and Roberts suggested that mandatory life sentences undermine public confidence, as '[t]he public is very aware that the vast majority of murderers do not spend the rest of their natural lives in prison and therefore regard the sentence as something other than what it appears to be'.[545] The vast majority of the legal practitioners participating in Fitz-Gibbon's research (n= 23 out of 29) do not also share the view that mandatory life sentences raise public confidence in criminal justice system.[546]

The mandatory imposition of life imprisonment is also criticised on the basis of its disproportionality. This is because 'an intentional killing is [not] always the most serious offence'.[547] This point is well illustrated by Ashworth and Mitchell who noted that '[t]he category of murder still includes cases which lie a considerable distance apart in terms of heinousness – one might contrast a deliberate contract killing with a killing in a pub brawl in which a chair or ashtray is used as an impromptu weapon on the victim's head'.[548] Thus, the mandatory imposition of life imprisonment contradicts the proportionality principle, as 'it prevents the court from imposing an individualized punishment that reflects the specific facts and circumstances of the case'.[549]

In murder cases, the individualisation of punishment can only be achieved through the determination of minimum non-parole terms, since 'the only element

[543] Roberts (2008:67).
[544] Wood (1993:238).
[545] Mitchell & Roberts (2013:505). See also: Mitchell & Roberts, (2012b:150).
[546] Fitz-Gibbon (2013:511).
[547] Cotton (2008:294).
[548] Ashworth & Mitchell (2000a:5).
[549] Mitchell & Roberts (2013:504).

of discretion arises through the judge's duty to identify the minimum term'.[550] Since 2003, sentencing courts have had the power to determine minimum non-parole terms for murder in the light of the legislative starting points which were introduced by Schedule 21 of the 2003 CJA. Legislative starting points continue to exist under Schedule 21 of Sentencing Act 2020.

According to s.322 of Sentencing Act 2020, sentencing courts should identify minimum terms in light of the legislative starting points set out in Schedule 21 of Sentencing Act 2020. As in Schedule 21 of the 2003 CJA, Schedule 21 of Sentencing Act 2020 sets out five different legislative starting points for murder cases. These are: 12 years, 15 years, 25 years, 30 years, and a whole life order.[551]

Schedule 21 of Sentencing Act 2020 indicates a number of offence- and offender-based characteristics in order to reflect different starting points for murder offences.[552] Once the sentencing court has identified the right starting point, it must then assess the aggravating and mitigating factors to increase or decrease it.[553] If the court considers departing from the starting point, it must give the reasons why it does so.[554]

The length of the minimum term set by the court must represent the seriousness of the offence committed.[555] However, it must be noted that the creation of legislative starting points has increased the average non-parole terms served by life prisoners.[556] The average non-parole term imposed on offenders convicted of murder rose from 12.5 years in 2003 to 21.3 years in 2016.[557] Accordingly, the average time spent by a mandatory life prisoner in prison increased from 13 years in 2003 to 17 years in 2019.[558]

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[550] Mitchell & Roberts (2013:502).
[551] Schedule 21 of Sentencing Act 2020, paras 2-6.
[552] Mitchell (2011:122).
[553] Schedule 21 of Sentencing Act 2020, paras 7-11.
[554] s.322 of Sentencing Act 2020.
[555] Fitz-Gibbon (2016:49).
[556] Crewe, Hulley, & Wright (2019).
[557] Ministry of Justice (2014), as cited in Bild (2014:84); House of Lords (2017).
[558] Prison Reform Trust (2019:28).

Legislative starting points are also criticised on the basis of being 'centred on the numerical values' and being very 'formulaic' and 'complicated'.[559] Roberts argued that '[b]y limiting a court's ability to impose a proportional sentence, mandatory minima can violate the principle of proportionality, and this is likely to undermine, rather than enhance, public confidence in the courts'.[560] Similarly, in a Green Paper published in 2010, the Ministry of Justice stressed that

> Schedule 21 [of the 2003 CJA] is based on ill-thought out and overly prescriptive policy. It seeks to analyse in extraordinary detail each and every type of murder. The result is guidance that is incoherent and unnecessarily complex, and is badly in need of reform ...[561]

Although noting that there was no plan 'of abolishing the mandatory life sentence or of prompting any general reduction in minimum terms imposed for murder', the then Minister of Justice pointed out the need for the reform of Schedule 21 of the 2003 CJA 'so that justice can be done properly in each case'.[562] However, there have been no reforms to that effect since then. In fact, legislative starting points for murder are retained, without any major changes, in Schedule 21 of Sentencing Act 2020.

6.4.1.2. Imposition of Discretionary Life Sentences

Unlike murder, sentencing courts retain a relatively unfettered discretion with regard to the imposition of discretionary life sentences. There are, currently, two possible ways to impose a discretionary life sentence in English law.[563] One of which has the statutory basis as set out in s.285 of Sentencing Act 2020.[564] The other possibility is the court's power under the *Hodgson* criteria. As the latter has been explained in Chapter 6.1.1.2 above, particular attention is paid to the

[559] Fitz-Gibbon (2016:54-7).
[560] Roberts (2003:504).
[561] Minister of Justice (2010:51).
[562] Minister of Justice (2010:50-1).
[563] *R v. Saunders* [2013] EWCA Crim 1027, para 11; See also: Thomas (2013:931).
[564] s.225 of the 2003 CJA had regulated the imposition of discretionary life sentences until 2020. Sentencing Act of 2020 repealed s.225 of the 2003 CJA, and enacted identical provisions under s.285 of Sentencing Act 2020.

former in this section.

In E&W, sentencing courts must impose a sentence of life imprisonment where the conditions stipulated in s.285 of Sentencing Act 2020 are met. This provision applies to the cases where:

- the offender is 21 or over at the time of the commission of the offence,[565]
- the offender is convicted of a serious offence specified in Schedule 19 of Sentencing Act 2020, and
- the offence was committed on or after 4 April 2005.

Where these conditions are met, the sentencing court is required to judge whether the offender poses a significant risk to reoffend a further specified offence.[566] In assessing the offender's risk of reoffending, the court should take into account the pre-sentence report prepared in accordance with s.30 of Sentencing Act 2020.[567] In imposing a life sentence, the court should also consider whether the seriousness of the offence is such as to justify the imposition of a an imprisonment sentence for life.[568]

It is important to note that there is a divergence between the *Hodgson* criteria and the statutory criteria. Under the *Hodgson* criteria, a life sentence can only be imposed on an offender 'whose behaviour was unpredictable as a result of personality disorder or mental instability'.[569] However, under the statutory criteria set out in s.285 of Sentencing Act 2020, a life sentence can be imposed on an offender who is 'perfectly rational but who is likely to commit serious

[565] The imposition of discretionary life sentences on offenders aged under 21 is regulated in s.258 and s.274 of Sentencing Act 2020. According to s.258, the court is to impose 'detention for life' if the offender is under 18. According to s.274, the court is to impose 'custody for life' if the offender is aged 18 or over but under 21.
[566] s.285(1)(d) of Sentencing Act 2020.
[567] s.285(2) of Sentencing Act 2020.
[568] s.285(3) of Sentencing Act 2020.
[569] Thomas (2010:74).

offences involving danger to others in the future'.[570]

Having imposed a discretionary life sentence, sentencing courts must also determine minimum non-parole terms in accordance with s.323 of Sentencing Act 2020. This provision requires sentencing courts to consider the seriousness of the offence or combination of offences when fixing minimum terms.[571]

6.4.1.3. Imposition of Statutory Life Sentences

The imposition procedures for statutory life sentences are set out in s.283 of Sentencing Act 2020.[572] This provision becomes applicable where:[573]

- the court is dealing with an offender for an offence (the index offence) listed in Part 1 of Schedule 15 of Sentencing Act 2020,
- the index offence was committed on or after the 'relevant date' specified for that offence in Part 1 of Schedule 15,
- the offender is 21 or over when convicted of the index offence,[574] and
- the sentence condition and the previous offence condition are met.

The sentence condition means that the sentencing court would have imposed a sentence of 10 years' imprisonment or detention.[575] The previous offence condition means that when the index offence was committed, the offender had already been convicted of an offence spelled out in Schedule 15, and had been sentenced to a sentence with a minimum term of five years or more.[576] Where these conditions are satisfied, the sentencing court must pass a life sentence

[570] Thomas (2010:74), referring to s.225 of the 2003 CJA which provided provisions identical to s.285 of Sentencing Act 2020.
[571] s.323(3) of Sentencing Act 2020 provides that the minimum term must be at least 14 years if the court imposes a life sentence in a serious terrorism case.
[572] s.224A of the 2003 CJA had regulated the imposition of statutory life sentences until 2020. Sentencing Act of 2020 repealed s.224A of the 2003 CJA, and enacted identical provisions under s.283 of Sentencing Act 2020.
[573] s.283(1) of Sentencing Act 2020.
[574] The imposition of statutory life sentences on offenders aged under 21 is regulated in s.273 of Sentencing Act 2020. According to s.273, the court is to impose 'custody for life' if the offender is aged 18 or over but under 21.
[575] s.283(4) of Sentencing Act 2020.
[576] s.283(5) and (7) of Sentencing Act 2020. See also: Picton (2013).

unless it considers that there are particular circumstances in relation to the index offence, the previous offence or the offender, which would make it unjust to do so in all the circumstances.[577]

It appears that s.283 of Sentencing Act 2020 does not indicate whether the dangerousness of the offender and/or the seriousness of the offence are required for a statutory life sentence to be imposed. The Court of Appeal dealt with this question under s.224A of the 2003 CJA. In *R v. Gintas Burinskas,* the Court of Appeal made the following clarifications:

i) For a life sentence to be imposed under s.224A there is no requirement of a finding that the offender is dangerous within the meaning of the CJA 2003, although it is likely that in most such cases he will be. It follows that the fact that an offender is not dangerous is not something that of itself would make it unjust to pass a life sentence under this section.

ii) S.225(2)(b) does not apply to the relevant offence in s.224A. There is no requirement to consider whether the 'seriousness' threshold has been passed.[578]

As s.283 of Sentencing Act 2020 enacted identical provisions to those contained in s.224A of the 2003 CJA, it can be argued that sentencing courts can impose a statutory life sentence under s.283 of Sentencing Act 2020 without considering the dangerousness and seriousness thresholds if all the other criteria are met. In passing statutory life sentences, sentencing courts fix minimum non-parole terms in the same way as for discretionary life sentences.[579]

6.4.2. Turkey

The historical overview of life imprisonment in Turkey has been provided in Chapter 6.1.2 above. The current system of the imposition is set out in the TPC, which was enacted in 2005, and has been in force since then. This section examines the current legal basis of the imposition of life sentences in Turkey.

[577] s.283(3) of Sentencing Act 2020.
[578] *R v. Gintas Burinskas* [2014] EWCA Crim 334, para 8.
[579] s.323 of Sentencing Act 2020.

6.4.2.1. Imposition of Life Sentences

As we have seen in Chapter 6.3.2 above, life imprisonment is stipulated as a sentence for 26 offences in the TPC. This means that sentencing courts should impose a life sentence on offenders convicted of any of these offences unless they consider that there are grounds for mitigation. Art 62 of the TPC explicitly provides sentencing courts with the discretionary power to decide whether or not the imposition of a life sentence is appropriate in a case. According to Art 62(1) of the TPC:

> If there are grounds for discretionary mitigation, a [normal] life sentence shall be imposed where the offence committed requires the imposition of an aggravated life sentence; or twenty-five years imprisonment shall be imposed where the offence committed requires the imposition of a [normal] life sentence (…)

It is important to note that Art 62 of the TPC does not provide sentencing courts with an unfettered discretion in sentencing of life imprisonment. There are two restrictions on courts' power. First is a requirement of the mandatory consideration of this provision in each and every case. This means that sentencing courts do not have any discretion to disregard the applicability of Art 62 of the TPC in cases with which they are dealing. Rather, they have to make a judgment about whether or not there are grounds for discretionary mitigation in each case and give the reasons for whatever their decision is.

The other restriction on courts' discretionary power is that they do not have the freedom to impose whatever sentence they consider appropriate to the specific facts and circumstances of a case. What Art 62(1) of the TPC does is to provide alternative penalties for (normal) life sentences and aggravated life sentences. If sentencing courts are of the opinion that there are grounds for mitigation in a case, then they can impose the alternative sentence instead of what is actually stipulated as a punishment for that particular offence in the Penal Code. In this respect, Art 62(1) sets out that the alternative of an aggravated life sentence is a (normal) life sentence, whereas a 25 years imprisonment is the alternative of a (normal) life sentence.

What is striking here is the fact that life imprisonment remains a mandatory

sentence for offenders convicted of an offence requiring the imposition of an aggravated life sentence. For example, aggravated forms of murder are punished by aggravated life sentences. Thus, even though the sentencing court considers that there are grounds for mitigation in a case concerning an aggravated murder, it nevertheless has to impose a (normal) life sentence instead of the aggravated life sentence.

Art 62(2) of the TPC provides a non-exhausted list of factors that should be considered by sentencing courts in the assessment of discretionary mitigation.[580] According to this provision:

> In assessing the matters of mitigation, courts must take into account the offender's background and social relationships and his/her behaviours after the commission of offense and during the trial period, in addition to the potential impact of the sentence on his/her future.

Although the factors spelled out in Art 62(2) of the TPC appear to be relevant only to the offender, sentencing courts can also consider other factors pertinent to the case.[581] Whatever factors are considered appropriate for mitigation in a case, sentencing courts must always give reasons why they decide that it is necessary to apply a discretionary mitigation under Art 62 of the TPC.[582]

As we have seen in the previous section, English sentencing courts fix minimum non-parole terms when imposing the life sentences. Unlike in E&W, in Turkey sentencing courts do not have the power to determine minimum non-parole terms to be served by life prisoners. Rather, in Turkey minimum non-parole terms are identified by law. As will be elaborated in Chapter 8.2.2, Articles 107 and 108 of LESSM regulate conditional release from life imprisonment. According to these provisions, a life prisoner may apply for release after serving one of the legislative minimum non-parole terms of 24, 30, 33, 36, 39 or 40 years in prison. As these minimum non-parole terms are

[580] Assembly of Criminal Chamber of the Court of Cassation' decision of 31 January 2012, Judgment No: 2011/4-277 E, 2012/4 K.
[581] Yerdelen (2013:300).
[582] ibid, 302.

absolute, sentencing courts play no role in the determination of how long a life prisoner will be imprisoned.

6.4.2.2. Limiting the Imposition of Life Imprisonment

In Turkey, the use of life imprisonment is prohibited in certain circumstances with the sentencing court required to impose an alternative sentence even though the offence committed has merited the imposition of life imprisonment. These circumstances are described in law and, mostly related to the characteristics of convicted offenders.

For example, life imprisonment cannot be imposed on juvenile offenders. Art 31 of the TPC stipulates alternative sentences for juvenile offenders who are convicted of offences requiring life imprisonment. According to this provision, offenders who are 12 to 15 years old are sentenced to a determinate term of 12 to 15 years instead of an aggravated life sentence, or nine to 11 years instead of a (normal) life sentence. Further, offenders who are 15 to 18 years old are sentenced to a fixed prison term of 18 to 20 years instead of an aggravated life sentence, or 12 to 15 years instead of a (normal) life sentence.[583] Accordingly, children are excluded from the scope of life imprisonment. This is a significant exemption compared to E&W where life imprisonment can be imposed on children. In fact, in E&W a form of life imprisonment (i.e. detention at Her Majesty pleasure for murder) is a mandatory sentence to be imposed on children convicted of murder.

Art 33 of the TPC prohibits the imposition of life imprisonment on deaf and mute offenders. According to this provision, deaf and mute offenders who are older than 18 years old are sentenced to a fixed prison term of 18 to 20 years instead of an aggravated life sentence, or 12 to 15 years instead of a (normal) life sentence.[584] It must be noted that unlike in Turkey, in E&W deaf and mute offenders are not exempted from life imprisonment. Thus, these disabled offenders can be sentenced to life imprisonment in English law. However, if their disability is severe enough, their minimum non-parole terms may be shorter

[583] Polat (2010:69-73); Güner (2014:512-15).
[584] Yurtcan (2015a:583-607).

than they would otherwise have been, as the sentence would be otherwise disproportionally severe.[585]

As explained in Chapters 6.1.1.2 and 6.4.1.2 above, in E&W offenders who suffer from personality disorders or mental instability can be sentenced to discretionary life sentences. In essence, these are *sine qua non* requirements for the imposition of discretionary life sentences under the *Hodgson* criteria. Unlike in E&W, in Turkey life imprisonment cannot be imposed on offenders who suffer from some degree of mental disorder. Art 32(1) of the TPC provides that no penalty can be imposed on offenders who do not comprehend the legal meaning and consequences of their criminal conducts, or whose ability to control their own behaviours is significantly diminished due to mental disorder. Instead, they are subject to security measures.[586] Art 32(2) of the TPC sets out that where an offender's mental disorder does not reach the extent defined in Art 32(1), he/she must be sentenced to 25 years' imprisonment instead of an aggravated life sentence, or 20 years' imprisonment instead of a (normal) life sentence. Thus, unlike in E&W, in Turkey there is no indeterminate sentence to be imposed on offenders with personality disorders or mental instability.

Finally, the imposition of life imprisonment in Turkey is restricted by Art 29 of the TPC. This provision provides that where an offence is committed in a state of anger or severe distress caused by provocation, the offender must be sentenced to a fixed term of 18 to 24 years instead of an aggravated life sentence, or 12 to 18 years instead of a (normal) life sentence. As noted in Chapter 6.3.1 above, provocation (or 'loss of control' in murder)[587] can also play a significant role in English law in terms of the imposition of life sentences. It not only reduces murder to manslaughter, for which life imprisonment is the maximum sentence, but is also taken into account by sentencing courts in the imposition of

[585] In E&W, an offender's disability may be considered a mitigating factor. See: Sentencing Guidelines Council (2004:7).

[586] Art 16(1) of LESSM provides that mentally ill offenders should be placed in a health institution until they recover. The time spent in health institutions is deemed to have been spent in prison.

[587] s.54 of the Coroners and Justice Act 2009 (c. 25).

discretionary and statutory life sentences.[588]

6.5. Conclusion

There are important historical similarities and differences between E&W and Turkey in terms of the evolution of life sentences. The abolition of the death penalty played a significant role in the development of law and practice of life sentences in both countries. While the abolition resulted in a distinction between mandatory and discretionary life sentences in E&W, in Turkey it led to the emergence of another form of life imprisonment, the aggravated life sentence. In E&W, the decision-making structure for both mandatory and discretionary life sentences had long had 'a political, rather than a jurisprudential' character.[589] The Home Secretary was involved in tariff-setting, release and recall processes of life imprisonment.[590] By contrast, in Turkey the executive was never involved in the sentencing process of life imprisonment. Instead, the judiciary enjoyed a relatively wide discretion in the imposition of life sentences, although minimum non-parole terms were always stipulated by law.

In E&W, the Home Secretary's role in tariff-setting, release and recall processes was gradually removed with the intervention of the ECtHR in the issue of life imprisonment.[591] Nevertheless, the government maintained some degree of control over sentencing in murder.[592] In contrast to other serious offences potentially carrying life sentences, murder is mandatorily punished by life imprisonment.[593] Unlike in E&W, in Turkey life imprisonment is not a mandatory sentence for all murder offences. Rather, only aggravated forms of murder are mandatorily punished by life imprisonment in Turkey.

In E&W, sentencing courts fix minimum non-parole terms for all types of life imprisonment, although there are legislative starting points for mandatory life sentences for murder. Unlike in E&W, in Turkey minimum non-parole terms

[588] Sentencing Guidelines Council (2004:7).
[589] Justice (1996:35).
[590] van Zyl Smit (2002b: ch.3).
[591] Appleton (2010: ch.1).
[592] Bild (2014: ch.6).
[593] s.1 of the Murder (Abolition of Death Penalty) Act 1965 (c.71).

are stipulated by law and are absolute; that is, sentencing courts cannot impose a lower or higher minimum term than the one specified in the law. In this respect, in Turkey sentencing courts are restricted in ensuring the proportionality of the punishment when sentencing an offender to life imprisonment. By contrast, sentencing courts in E&W must consider a non-exhaustive list of aggravating and mitigating factors to increase or decrease minimum terms in each type of life sentences. This allows the English sentencing courts to individualise the punishment according to the circumstances of the case.

In E&W, the creation of legislative starting points for mandatory life sentences has increased the average non-parole terms imposed on life prisoners. As will be discussed in Chapter 8.2.1, this increase has, in turn, affected the mean time served by life prisoners. Similarly, Turkey has also seen a gradual increase in the legislative minimum non-parole terms for life imprisonment. These increases in the minimum non-parole terms served by life prisoners indicate a growing punitiveness in both countries when sentencing those convicted of the most serious offences. This growing punitiveness can also be seen in the high reliance on life imprisonment in E&W and Turkey, as they both have the highest numbers of life prisoners within the Council of Europe. Certainly, it could not be argued that either E&W or Turkey is restrained in its use of life imprisonment.

Nevertheless, the comprehensive comparative analyses in this chapter suggest that *formally* Turkey does not rely on life imprisonment to the same extent as E&W. This is firstly because the public protection ground is given little or no importance in the imposition of life imprisonment in Turkey, whereas a form of life sentences, discretionary life sentences, is imposed on dangerous offenders convicted of serious offences in E&W. Secondly, life imprisonment can only be imposed on a few classes of offences in Turkey, whereas a wide variety of offences are punished by this penalty in E&W. Thirdly, life imprisonment is a mandatory sentence for all murder offences in E&W and the majority of life prisoners are those convicted of this offence. By contrast, in Turkey life imprisonment is not a mandatory sentence for all cases of murder, but only for aggravated murders. As Table 6.3 above shows, although the intentional homicide rates of Turkey were, on average, more than three times

greater than those in E&W between 2003 and 2012, the number of life prisoners is not significantly higher in the former jurisdiction than the latter. This suggests that in Turkey sentencing courts tend not to have imposed life imprisonment on most murder cases, whereas their English counterparts have to impose life imprisonment on everyone convicted of murder. And finally, in Turkey certain categories of offenders (for example, children, deaf and mute offenders and mentally unstable offenders) are exempted from life imprisonment, even though the offence they commit merits the imposition of life imprisonment.

Accordingly, the critical comparative analyses in this chapter have demonstrated that *formally* Turkey relies on life imprisonment less than E&W does. However, this does not, without more, mean that Turkey is less punitive than E&W. This argument needs a further nuanced comparative analysis of the implementation of, and release from, life imprisonment in the two jurisdictions, which will be examined in the following two chapters.

CHAPTER 7
IMPLEMENTATION OF LIFE IMPRISONMENT

The previous chapter has explored the imposition of life imprisonment in England and Wales (E&W) and Turkey. In this chapter, the thesis proceeds to examine the implementation of life imprisonment in the two legal systems in the lights of the European standards for implementation.

As we have seen in Chapter 4.1, European penal law requires a rehabilitation-oriented regime for the implementation of life imprisonment. As examined in Chapter 4.2, such a regime necessitates the adoption of the principles of individualisation, normalisation, responsibility, security and safety, non-segregation and progression. Further, as discussed in Chapter 4.3, a rehabilitation-oriented regime also requires carrying out risk and needs assessments and sentencing plans for each individual life prisoner. In order for life prisoners to rehabilitate themselves, as explored in Chapter 4.4, they must be provided with purposeful activities and offender behaviour programmes and must be allowed to contact with the outside world. Further, as examined in Chapter 4.5, a less stringent implementation regime should be adopted for certain categories of life prisoners such as females, juveniles and elderly prisoners in order to address their special needs.

As Chapter 4 demonstrates, European penal law requires that the punitive character of life imprisonment should not be maintained at the execution phase of life imprisonment; rather, rehabilitation and resocialisation must be the main features of the implementation regime of life sentences. Against this background, this chapter examines how life imprisonment is implemented in E&W and Turkey by analysing both the law and practice of the execution of life prisoners' sentences. To this end, it first explores the primary purpose of the implementation of life imprisonment in the two legal systems. Thereafter, it explains how the risk and needs assessments and sentencing plans of life prisoners are carried out and what importance is attached to these procedures in both countries to be compared. Subsequently, it discusses whether or not E&W and Turkey recognise life imprisonment as a sentence causing unique pain, and

how they deal with the damaging impacts of this penalty on those subject to it. Finally, it examines the treatment of special categories of life prisoners (i.e. female and elderly life prisoners) in E&W and Turkey.

7.1. Primary Aim of the Implementation of Life Imprisonment

As we have seen in Chapter 4.1, European human rights law recognises that prisoners, including life prisoners, must be allowed to enjoy all human rights and freedoms enshrined in the European Convention on Human Rights (ECHR), save for the right to liberty. Closely linked with this, rehabilitation is acknowledged as the primary objective of the implementation of imprisonment, including life imprisonment, by the European human rights documents and instruments. Specifically, the European Court of Human Rights (ECtHR) has held that there is a positive obligation on member states to design their domestic penal law and practice to ensure that prisoners, particularly life prisoners, have the chance of rehabilitation. On this basis, this section examines the primary purpose of the implementation of life imprisonment in E&W and Turkey.

7.1.1. England and Wales

In E&W, the main legislation regulating the implementation of imprisonment is the Prison Act 1952 (c.52). The Act states no purposes of the implementation of imprisonment. However, Rule 3 of the Prison Rules 1999/728 provides that '[t]he purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life'. This is the objective of the administration of prison sentences in general. In particular, the policy on the management and treatment of life prisoners is primarily contained in the *Indeterminate Sentence Operational Support* guidance,[594] which was published by Her Majesty's Prison and Probation Service (HM Prison and Probation Service).[595] Paragraph 7.5 of the *Indeterminate Sentence Operational Support* guidance provides that:

[594] HM Prison & Probation Service (2019).

[595] In E&W, the main policy document on the management of indeterminate sentences was the *Indeterminate Sentence Manual (PSO 4700)*. This manual originally consisted

> The ultimate aim is for all prisons to foster a successful rehabilitative culture. This should not be viewed as additional work, as a culture is formed primarily by the attitudes and behaviours of those working and participating in it. A rehabilitative culture provides a supportive environment and a sense of purpose in relation to rehabilitation, desistance, and progression through a sentence. All staff working with prisoners should consistently demonstrate behaviours and attitudes that support rehabilitation and desistance.

This is a clearer and stronger statement of the previous policy contained in the *Indeterminate Sentence Manual*, paragraph 4.1.1 of which provided that indeterminate sentence prisoners are 'managed through their sentence plan with the primary aim being to meet their individual needs and help them to reduce the risk of serious harm they present to the public'. Sentence planning and risk reduction continue to be the main features of the new policy incorporated in the *Indeterminate Sentence Operational Support* guidance. However, there is now a more focused perspective on the release of life prisoners.[596] Paragraph 5.10 the *Indeterminate Sentence Operational Support* guidance provides that:

> Whilst the overall aim is to reduce the risks prisoners present, you must also bear in mind that they will never be risk free. By providing a release plan that is creative, thorough and well thought through, we can and should release ISPs [indeterminate sentence prisoners], where it is safe to do so, and manage their risks in the community under licenced supervision.

Accordingly, it appears that the emphasis on reducing the risk of reoffending posed by life prisoners through interventions and on making their possible release effective and meaningful amounts to the prioritisation of special prevention through the prisoner's rehabilitation and resocialisation at the implementation stage of life imprisonment. This is reiterated in the *Indeterminate Sentence Operational Support* guidance, paragraph 7.4 of which

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of 12 chapters. However, in 2019, the Ministry of Justice cancelled this manual (See: <https://www.justice.gov.uk/offenders/psos/pso-4700-indeterminate-sentence-manual> [last accessed August 30, 2021]). Now, the *Indeterminate Sentence Operational Support* guidance contains the main principles and policy of the management of indeterminate sentences. See: HM Prison & Probation Service (2019).

[596] HM Prison & Probation Service (2019: para 1.1) states that the primary purpose of the *Indeterminate Sentence Operational Support* guidance is to provide prison staff with 'a practical understanding of indeterminate sentences and the tools for managing prisoners through them, with the ultimate aim being sustained, successful release into the community on licence'.

states that '[t]he goal for staff is to provide a consistent and reliable support system for prisoners so that they may make the most of the rehabilitative opportunities available in an environment that is conducive to this'.

The rehabilitative purpose of the implementation of life imprisonment has also been recognised by the judiciary in recent years. For example, in *R (James, Lee and Wells) v. Secretary of State for Justice,*[597] Lord Judge stated that

> the statutory regime for dealing with indeterminate sentences is predicated on the possibility that, save for those for whom the punitive element of the sentence requires that life imprisonment should indeed mean imprisonment for the rest of the offender's natural life, prisoners may be reformed or will reform themselves. A fair opportunity for their rehabilitation and the opportunity to demonstrate that the risk they presented at the date of sentence has diminished to levels consistent with release into the community should be available to them.[598]

In this case, the applicants, who were all sentenced to imprisonment for public protection (IPP), argued that their continued detention became arbitrary and unlawful under Art 5(1) and (4) ECHR, since they were unable to demonstrate that they were rehabilitated and thus suitable for release, because of the Secretary of State's failure to ensure that they were provided with necessary rehabilitative courses to address their offending behaviours. The House of Lords accepted that 'common humanity, if nothing else, must allow for the possibility of rehabilitation',[599] and found that the Secretary of State failed to provide adequate resources to meet his public law duty. Yet, it did not find any violation under Art 5 ECHR, since it considered that the aim of an indeterminate sentence did not necessarily include rehabilitation. Hence a failure properly to progress prisoners towards post-tariff release did not constitute a breach under that provision.[600]

The applicants then applied to the ECtHR. In *James, Wells and Lee v. the United Kingdom,* the ECtHR considered that the public protection and the

[597] *R (James, Lee and Wells) v. Secretary of State for Justice* [2009] UKHL 22.
[598] ibid, para 105.
[599] ibid, Lord Judge *per se*.
[600] Freer (2017:6); Annison (2014:362).

rehabilitation of prisoners are different sides of the same coin.[601] It stated that 'a real opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection'.[602] The Court held that

> where a Government seek to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicants' cases, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed.[603]

Thus, the ECtHR found a violation under Art 5(1) ECHR.[604] The impact of this judgment was seen in the Supreme Court's case of *Kaiyam and Others v. Secretary of State*.[605] In this case, the Supreme Court admitted that its view in *R (James, Lee and Wells) v. Secretary of State for Justice* 'was based on a contrary conclusion that the aim of a life or IPP sentence does not include rehabilitation, at least for the purposes of the ECHR'.[606] It went on to say that

> the Supreme Court should now accept the Fourth Section's conclusion [in *James, Wells and Lee*], that the purpose of the sentence includes rehabilitation, in relation to prisoners subject to life and IPP sentences … We also consider that the Supreme Court can and should accept as implicit in the scheme of article 5 that the state is under a duty to provide an opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public.[607]

Accordingly, the Supreme Court has accepted that rehabilitation is included in the purposes of the implementation of life imprisonment, and that the state has a duty to provide a reasonable opportunity for life prisoners to rehabilitate themselves.[608] In this respect, it can be said that the English common law now

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[601] *James, Wells and Lee v. the United Kingdom* [2012] ECHR 2021.
[602] ibid, para 209.
[603] ibid, para 218. See also: *David Thomas v. United Kingdom* [2014] ECHR 1195.
[604] See for the analysis of the ECtHR's judgment in *James, Wells and Lee v. the United Kingdom*: Appleton & van Zyl Smit (2016:231-35); Bettinson (2013); Bettinson & Dingwall (2013).
[605] *Kaiyam and Others v. Secretary of State* [2014] UKSC 66.
[606] ibid, para 35.
[607] ibid, para 36.
[608] See also: Walker & Laird (2018).

recognises rehabilitation as 'a right of the citizen' rather than a 'privilege of the state'.[609] Currently, the Supreme Court's judgment in *Kaiyam and Others v. Secretary of State* is the strongest authority with regard to the primary purpose of the implementation of indeterminate sentences in E&W.[610]

7.1.2. Turkey

In Turkey, the main legislation regulating imprisonment sentences is the Law on the Execution of Sentences and Security Measures (LESSM).[611] The purposes of the implementation of imprisonment are explicitly stated in LESSM, Art 3 of which provides that:

> The primary purposes to be reached with the execution of sentences and security measures are to achieve general and special prevention and, with this aim, to strengthen factors preventing prisoners from re-offending, to protect society against crime, to promote the re-socialisation of prisoners and to facilitate their adaptation to a productive and responsible law-abiding life.

It follows from this provision that the prevention of crimes and the protection of public are aimed to be achieved through the rehabilitation and re-socialisation of prisoners. In essence, the rehabilitation and re-socialisation of prisoners are emphasised throughout LESSM. Specifically, Art 6 and Art 7 of LESSM are important provisions in terms of the rehabilitative purpose of imprisonment. Art 6(1)(c) states that all means and facilities available must be used to rehabilitate prisoners in the execution of their sentences. Art 6(1)(d) provides that where a prisoner is identified not to be in need of rehabilitation, particular attention should be given to ensure that he/she is provided with individualised programmes proportional to his/her personality. Art 7 of LESSM provides that

> (1) The success of the programmes aimed at the rehabilitation of prisoners in the execution of prison sentences is measured in proportion to their new

[609] Rotman (1990:8).

[610] See, for example: *The Queen (On the Application of Anwar Hussain) v. the Parole Board for England and Wales* [2017] EWCA Civ 1074; *The Queen (on the application of Robert Gourlay) v. the Secretary of State for Justice* [2016] EWHC 1957 (Admin).

[611] Law No: 5275, 'Law on the Execution of Sentences and Security Measures' (LESSM), (Official Gazette Date and No: 29.12.2004 – 25685).

attitudes and skills. For this purpose, prisoners are encouraged to be willing towards rehabilitation efforts.

(2) The prison sentence shall be executed in accordance with such programmes, methods, means and mentality that are designed to minimise the harmful effects inherent in prison sentences. The means of rehabilitation shall be implemented according to the procedures and principles that ensure the protection of prisoners' health and self-respect.

In Turkey, rehabilitation and resocialisation of prisoners shape all stages of the execution of prison sentences. Formally, the law does not exclude life imprisonment from the scope of the rehabilitative ideals at the execution phase of imprisonment. In fact, the same implementation regime applies to both (normal) life prisoners and those serving fixed term imprisonment sentences. However, the implementation of aggravated life sentences does not reflect a rehabilitation focus. Rather, LESSM recognises a different and very strict regime for aggravated life prisoners, which can be considered punitive rather than rehabilitative.[612]

Art 25 of LESSM regulates the main principles of the implementation of aggravated life sentences. According to this provision, aggravated life prisoners are placed in a very disadvantaged position compared to other life prisoners. Their access to the purposeful activities, communication with other prisoners and contact with the outside world are highly restricted. The impoverished regime of the implementation of aggravated life sentences will be examined in detail in the relevant parts of this chapter. For the present purpose, however, it must be noted that rehabilitation does not seem to be prioritised in the execution of aggravated life sentences.

7.2. Risk and Needs Assessments and Sentence Planning

As we have seen in Chapter 6.3 of the thesis, life imprisonment is imposed on offenders convicted of the most serious offences both in E&W and Turkey. As such, life prisoners may need to be treated with effective interventions while in custody and upon their release in order to reduce their likelihood of reoffending.[613] In order for life prisoners to be provided with appropriate and

[612] LESSM, Art 25.

[613] HMI Probation and HMI Prisons (2013: para 2.11).

effective interventions, reasons behind the risks posed by them must be properly identified as a part of their risk and needs assessments and sentencing plans.[614] As examined in Chapter 4.3 of the thesis, the European human rights instruments consider that the individualised sentencing plan is '[t]he cornerstone of penal policy aimed at resocialising prisoners'.[615] In this respect, this section examines how the risk and needs assessments and sentencing plans of life prisoners are carried out in E&W and Turkey.

7.2.1. England and Wales

In E&W, life prisoners are formally supposed to be managed through their sentencing plans, which aim to meet their individual needs and help them to reduce the risk of serious harm they present to the public.[616] The *Indeterminate Sentence Operational Support* guidance makes clear that any risk reduction interventions must be based on each life prisoner's identified risks and needs and sequenced through their sentences.[617] Life prisoners' risk assessments are carried out through the Offender Assessment System (OASys),[618] which is a framework used to assess the likelihood of reoffending and the risk of harm to others.[619]

According to the *Indeterminate Sentence Operational Support* guidance, the aim of the initial sentence planning meeting 'is to discuss the case, to set objectives and plan sequenced interventions'.[620] Prison staff should ensure that interventions are sequenced at appropriate points throughout the sentence in

[614] Given the diversity of life and long-term prisoners and their lengthy sentences, a number of studies have underlined that they should be treated on the basis of risk and needs assessments and sentencing plans or 'prison career'. See, for example: Cowles & Sabath (1995:210); Flanagan (1995b:253-54); Flanagan (1995c:7); Flanagan (1995d); Kummerlowe (1995:46); Palmer (1995:227); Cowles & Sabath (1996:58).
[615] *Khoroshenko v. Russia* [2015] ECHR 637, Joint Concurring Opinion of Judges Pinto de Albuquerque and Turković, para 10.
[616] HM Prison & Probation Service (2019: paras 3.1-3.13).
[617] ibid.
[618] ibid, para 3.1. Howard & Dixon (2012:289) describe OASys as 'a structured clinical risk/needs assessment and management tool constructed on risk/need/responsivity principles'.
[619] HMCIP (2020:5).
[620] HM Prison & Probation Service (2019: para 3.3).

order to enable prisoners to obtain maximum benefit.[621] Life prisoners' sentence plans should be revised at least every three years, since their risks and needs are not 'static and will likely change over time'.[622]

It appears that in practice, there are major defects in terms of conducting risk and needs assessments and sentencing plans. For example, in their joint report, *A Joint Inspection of Life Sentence Prisoners*, Her Majesty's Inspectorate of Probation (HMI Probation) and Her Majesty's Inspectorate Prisons (HMI Prisons) found in 2013 that 'in all of the prisons … visited … OASys was far less central to the process of offender management'.[623] The report noted that '[t]he completion of OASys assessments within custody appeared more of a process of filling in a form rather than a carefully considered assessment of the prisoner's needs, likelihood of reoffending and risk of harm to others'.[624] HMI Probation and HMI Prisons pointed out that 'staff had varying degrees of understanding about what was required, of whom, and when' in the risk assessment process of individual life prisoners.[625]

There were also backlogs and out-dated assessments.[626] For example, Drenkhahn et al. found in 2014 that around 40 per cent of long-term and life prisoners participated in their study expressed that they either had not been examined for their sentence planning, or did not remember it even if they had.[627] The same study also found that almost half of long-term and life prisoners had not been informed about the course of their sentence and had not been examined by a doctor, and more than 80 per cent did not have conversation with a psychologist at the admission.[628]

The failure to complete OASys assessments in a number of prisons was also observed by Her Majesty's Chief Inspector of Prisons for England and Wales

[621] ibid, para 3.4.
[622] ibid, para 3.8.
[623] HMI Probation and HMI Prisons (2013: para 2.2).
[624] ibid, para 2.2.
[625] ibid, para 2.3.
[626] ibid, para 2.6.
[627] Drenkhahn, Dudeck, & Dünkel (2014:292).
[628] ibid.

(HMCIP).[629] In its *Annual Report 2017-18*, for example, HMCIP found that 'the number of prisoners without an up-to date OASys assessment remained too high',[630] because a number of prisons did not use OASys 'as an active case management tool'.[631] In its *Annual Report 2019-20,* HMCIP stated that '[f]or several years we have found that this system is failing. We have found prisons where many hundreds of prisoners either have no documentation at all, or where it is hopelessly out of date'.[632] HMCIP indicated that prisoners' risk assessments and sentencing plans had not been revised in places, even where 'evidence of prisoners' violent or antisocial behaviour in prisons suggested ongoing or increased risk of harm to others'.[633] It noted that '[e]ven when prisoners did have up-to-date assessments and sentence plans, they often did not address the issues that underpinned their offending behaviour but instead focused on much broader issues, such as attendance at work and adherence to wing rules'.[634]

In their joint report, HMI Probation and HMI Prisons underlined that 'the prisoner's attendance at the board is essential if he or she is to fully engage with the process and really own the plan'.[635] In practice, however, life prisoners' participation in the risk and needs assessment process and attendance to the sentence planning meetings appear to be far from the desired outcome. Crewe observed that the reports about the risk assessment of prisoners were 'sometimes written by people they have not met, or are conducted with neutral detachment' with the consequence that '[t]he standardisation of assessment practices increases consistency at the expense of humanity'.[636] Even where life prisoners are allowed to attend sentence planning boards, it seems that they are not able to make an active and meaningful contribution.[637] In 2013, HMI Probation and HMI Prisons reported that more than 60 per cent of life prisoners in their survey

[629] HMCIP (2021:62-3); HMCIP (2020:54); HMCIP (2019:40); HMCIP (2018:46); HMCIP (2017:47); HMCIP (2016:45).
[630] HMCIP (2018:46). See also: HMCIP (2019:40).
[631] HMCIP (2018:46).
[632] HMCIP (2020:16).
[633] HMCIP (2018:46).
[634] HMCIP (2017:47).
[635] HMI Probation and HMI Prisons (2013: para 2.25).
[636] Crewe (2011:517).
[637] HMI Probation and HMI Prisons (2013: para 2.25).

were unable to make an effective contribution to the development of their sentencing plans, and more than half believed that their specific needs were not effectively discussed in the sentence planning boards.[638]

7.2.2. Turkey

As in E&W, in Turkey the law pays particular attention to the risk and needs assessments and sentence planning of (life) prisoners. Art 26(2) of LESSM states that prisoners must fully comply with the security requirements of prison and must be participated in rehabilitation programmes offered within the institution. According to Art 73(1) of LESSM, rehabilitation programmes are designed in accordance with prisoners' individual needs, particularly taking into account their past, criminal history, physical ability and mental character, personality, risk to the public, expectations after release as well as the length of their sentence and the causes of their criminality.

In E&W, life prisoners do not have to move through set stages in order to progress their sentence; rather, they are each now supposed to have an individual sentence pathway.[639] Therefore, life prisoners' risk and needs assessments play an important role in their allocation and categorisation.[640] Unlike in E&W, in Turkey life prisoners' allocation and classification do not entirely rely on risk and needs assessments. Art 23(1)(a) of LESSM provides that prisoners must be allocated one of the penal institutions listed below:

- high security prisons
- normal security prisons
- open prisons

In the allocation of prisoners, regard must be given to the types of their offences, the risk of reoffending posed by them and the necessity to keep them under close supervision and control.[641] High security prisons are formally designed only for dangerous offenders. However, Art 9(2) of LESSM requires

[638] ibid, para 2.25.
[639] HM Prison & Probation Service (2019).
[640] ibid, paras 4.1-4.8.
[641] LESSM, Art 23(1)(a).

that all aggravated life prisoners should be held in high security prisons, without any risk and needs assessments.[642] This means that aggravated life prisoners are segregated from other life prisoners (indeed, all other prisoners) on the sole ground of their sentence. [643] Contrary to aggravated life prisoners, (normal) life prisoners are held in prisons with other prisoners in dormitories or rooms.

Before aggravated life imprisonment's entry into force (namely, prior to 1 June 2005), some of life prisoners, who are now serving the strict regime of the aggravated life sentence, had been held together with other inmates and enjoyed access to communal activities together. With its entry into force, those prisoners faced a sudden degradation of their situation. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) asked: 'How can it be cogently argued that a prisoner who on 31 May [2005] worked in the prison kitchen and was accommodated with several other inmates in the workers dormitory is nevertheless so dangerous as to justify his segregation from other prisoners the following day?'. The CPT was aware that it was not about the dangerousness of those prisoners, but the type of their sentence, namely aggravated life imprisonment. Thus, the CPT has consistently stated 'its reservations about the isolation-type regime generally applied to prisoners sentenced to aggravated life imprisonment',[644] and underlined that 'the imposition of such a regime should lie with the *prison authorities* and always be based on an *individual* risk assessment, and not be the automatic result of the type of sentence imposed'.[645]

[642] It must be noted that Zamble and Porporino (1988:143) found that 'sentence length does not predict any important measure of adaptation in prison, from disciplinary history to depression'. Thus, they stated that allocation and classification of prisoners on the basis of the sentence type and length are misguided, since some prisoners who do not need close supervision and control are placed in maximum security institutions. See also: Flanagan (1995a).
[643] CPT (2016a: para 13).
[644] CPT (2009c: para 112); CPT (2013b: para 17).
[645] CPT (2017c: para 87) (emphases in original).

7.3. Counteracting the Damaging Effects of Life Imprisonment

As we have examined in Chapter 4.4, the European human rights instruments recognise that life imprisonment causes a unique pain on those who are serving this sentence.[646] For example, the CPT has consistently underlined that life imprisonment has 'a number of desocialising effects upon inmates'.[647] It has further stated that life prisoners become 'institutionalised' and may undergo 'a range of psychological problems … and have a tendency to become increasingly detached from society'.[648] Similarly, one of the three primary objectives of the Recommendation Rec(2003)23 on Life and Long-term Prisoners adopted by the Committee of Ministers of the Council of Europe is 'to counteract the damaging effects of life and long-term imprisonment'.[649] As we have seen in Chapter 4.4, the European human rights instruments urge member states to adopt a prison regime which seeks to offset the damaging effects of life imprisonment in 'a positive and proactive way'.[650] While there are a wide range of issues related to the effects of life imprisonment upon inmates, this section specifically focuses on the regime of purposeful activities offered life prisoners and their contact with the outside world in E&W and Turkey since these two issues are paid particular attention by the European human rights instruments.

7.3.1. Regime of Purposeful Activities

Hulley et al. found that life prisoners in England ranked the loss of a useful or productive life as one of the most severe problems caused by permanent

[646] See also: van Zyl Smit & Appleton (2019:205-20). A number of scholars have noted that the pains inherent in imprisonment are 'most heavily' experienced by life and long-term prisoners. Thus, special arrangements should be made available to life prisoners in order to debilitate the problems caused by long-term sentences. See, for example: Flanagan (1995a); Flanagan (1995b); Santos (1995).

[647] CPT (1997a: para 53); CPT (1997b: para 84); CPT (2000b: para 33); CPT (2000c: 75); CPT (2002b: para 69); CPT (2002c: para 87); CPT (2004a: para 54); CPT (2004b: para 70); CPT (2004c: para 73); CPT (2005c: para 100); CPT (2007c: para 54); CPT (2014c: para 75).

[648] CPT (2000b: para 33).

[649] Committee of Minister of Council of Europe (2003: Art 2).

[650] CPT (2000b: para 33).

confinement.[651] To overcome this problem, prisoners should be offered purposeful activities in which they feel that they can do some productive and useful activities in their 'involuntary home for life'.[652] In fact, empirical studies have noted that long-term and life prisoners have 'a desire to *use* time constructively rather than simply serving time'.[653] One of the main concerns of long-term prisoners is to use their time in prison in a way of 'gain[ing] tangible improvements in skills, and a better chance to negotiate life following release'.[654] Leigey and Ryder noted that in the USA '[p]articipation in educational and vocational programs provided the men [in prison] the opportunity to learn and develop new skills', which makes their lives 'meaningful despite permanent incarceration'.[655] Toch argued that purposeful activities and programmes offered prisoners not only teach them new skills, but also help them to 'instigate or facilitate personal transformation'.[656]

As examined in Chapter 4.4.1, at the European supranational level, life prisoners' participation in purposeful activities is considered one of the most effective way of offsetting the damaging effects of life imprisonment. For example, in its 25th General Report, the CPT expressed that life prisoners 'should have *access to as full a regime of activities as possible*, and normally in association with other prisoners'.[657] On this basis, this section explores the regime of purposeful activities offered life prisoners in E&W and Turkey.

7.3.1.1. England and Wales

The *Indeterminate Sentence Operational Support* guidance states that life prisoners' participation in purposeful activities such as education, work and

[651] Hulley et al. (2016:780).
[652] Johnson & Dobrzanska (2005:8). Similarly, Crewe et al. (2020:135) have observed that life prisoners talk of making prison as their 'home'. See also: Mitchell (1990:100); Willis & Zaitzow (2015:573).
[653] Flanagan (1981:218) (emphasis in original). See also: Leigey (2015:130).
[654] Toch (1995:246). See also: Toch (1977:287); Flanagan (1991:49).
[655] Leigey & Ryder (2015:737).
[656] Toch (2010:8). Further, Bullock, Bunce and Mccarthy (2019) have found that long-term prisoners' participation in purposeful activities help them to rehabilitate themselves. See also: McGinnis (1995); Liem (2016:104-108).
[657] CPT (2016a: para 79) (emphasis in original).

interventions help them to better adjust to prison life.[658] Similarly, in its *Annual Report 2019-20*, HMCIP noted that '[p]urposeful activity sits at the heart of whether a prison can offer a safe, decent and rehabilitative environment'.[659] This is because, as noted by HMCIP in its *Annual Report 2020-21*, '[t]he long periods of isolation, in often stuffy cells without purposeful activity and for some prisoners, no company, had a profound effect on well-being'.[660] In this respect, in order for prisoners to participate in purposeful activities, HMCIP has consistently stated that they should be unlocked for at least 10 hours a day and allowed to have the opportunity for one hour a day in the open air.[661] Therefore, it can be anticipated that life prisoners should have 10 hours out of their cells in order to participate in purposeful activities, to attend offender behaviour programmes and to do their basic domestic tasks.

However, in practice prisoners are not allowed to have that length of time out of their cells. For example, HMCIP found that in 2019-2020 around 87 per cent of adult male prisoners were not allowed to spend 10 hours out of their cells,[662] and around 20 per cent were locked 22 hours or more.[663] Further, in almost half of the prisons visited during 2018-19, 'there were not enough education, skills and work activity places to cater for all prisoners throughout the week'.[664] HMCIP reported that 75 per cent of prisons visited in 2018-19 'failed to use their activity places effectively, leaving prisoners without work, education or training when they need not have been'.[665] In fact, the average

[658] HM Prison & Probation Service (2019: para 2.4.).
[659] HMCIP (2020:15).
[660] HMCIP (2021:41).
[661] HMCIP (2020:46); HMCIP (2019:33); HMCIP (2018:38); HMCIP (2017:38); HMCIP (2016:38); HMCIP (2015:50); HMCIP (2014:41).
[662] HMCIP (2020:46). See also: HMCIP (2019:33). See also: HMCIP (2020:46); HMCIP (2018:38).
[663] HMCIP (2020:119).
[664] HMCIP (2019:36). The lack of purposeful activities in the prisons visited was also observed in previous years. See, for example: HMCIP (2018:39); HMCIP (2017:41); HMCIP (2016:41). The CPT has also found that the purposeful activities offered prisoners in E&W were 'insufficient'. See: CPT (2020a: para 76); CPT (2017e: para 54). Recently, House of Commons Justice Committee (2019: para 15) reported that purposeful activities offered within prison institutions require 'additional attention'.
[665] HMCIP (2019:36). Similar pattern was also reported in previous years. See, for example: HMCIP (2018:40); HMCIP (2017:41); HMCIP (2016:41).

number of hours of purposeful activity per week for prisoners has significantly decreased, from 27.7 hours in 2000 to 14.5 hours in 2011-12.[666]

Nevertheless, empirical studies found some good practices in terms of purposeful activities offered life prisoners. For example, Liebling et al. conducted an empirical study to investigate the situation of life prisoners in HMP Warren Hill.[667] They found that in HMP Warren Hill both life prisoners and prison staff were given the opportunities to suggest creative purposeful activities.[668] They observed that the implementation of life prisoners' sentence was based on the principles of individualisation and responsibility. More than 80 per cent of respondent life prisoners in their study expressed that they were given 'opportunities to transform themselves' and provided with possibilities to 'stand on their own feet'.[669] Liebling et al. observed that life prisoners in HMP Warren Hill were expected 'to be proactive and responsible' for the 'transformative projects or experiences'.[670] This is very important for life prisoners to progress through their sentence since 'inmates with a sense of control over their lives adjust better to prison and to life on the outside'.[671]

In E&W, the management of life prisoners is based on an expectation that they should use their time constructively and address their offending behaviours identified by risk and needs assessments and included in sentencing plans.[672] In order to achieve this, HM Prison and Probation Service offers a variety of interventions,[673] including:

- accredited and non-accredited offender behaviour programmes
- substance misuse services
- employment, education and training
- one to one work with psychologists and/or offender supervisors

[666] Owen & Macdonald (2015:245).
[667] Liebling et al. (2019:104).
[668] ibid, 110-11.
[669] ibid, 117.
[670] ibid.
[671] Johnson & Dobrzanska (2005:8).
[672] van Zyl Smit & Appleton (2019:229).
[673] HM Prison & Probation Service (2019: para 5.1).

- offender personality disorder pathways
- therapeutic communities
- mental health services
- progression regimes

Drenkhahn et al. found that around 30 per cent of long-term and life prisoners in their survey were participating in a treatment programme and over 60 per cent had already taken part in such a programme.[674] They stated that the high participation in the treatment programmes resulted from the fact that this was an important part of the incentives and earned privileges scheme and thus crucial for progress through the prison system towards more open conditions and early release.[675] Similarly, in their joint report, HMI Probation and HMI Prisons found that life prisoners had 'reasonable access to offending behaviour courses throughout their time in closed training prisons and that most had completed a surprisingly high number of constructive interventions prior to their transfer to open prisons'.[676] However, some prisoners commented that such courses were oversubscribed or that waiting lists were overlong.[677] Since the spaces in treatment courses have been mainly occupied by the IPP prisoners in recent years, demand for programmes has exceeded supply in many prisons. HMI Probation and HMI Prisons observed that the unavailability of offender behaviour programmes enabled 'sexual offenders, in particular, to keep their heads down and avoid any constructive interventions, often for years on end'.[678]

7.3.1.2. Turkey

In Turkey, life prisoners' access to purposeful activities is determined by the type of their sentences. As noted in the previous sections, different implementation regimes are adopted for aggravated life sentences and (normal) life sentences. Turkish law requires that prisoners, including (normal) life prisoners, should be able to access to a variety of purposeful activities such as

[674] Drenkhahn et al. (2014:343).
[675] ibid.
[676] HMI Probation and HMI Prisons (2013: para 2.13).
[677] ibid.
[678] ibid, para 2.17.

work, vocational and skills training, education and sports in association with other prisoners.[679] However, aggravated life prisoners are subject to severe restrictions in terms of regime of activities and association with other inmates.[680] They are held in single cells and allowed to outside exercise only for one hour in a day in the courtyard adjoining their cells. The outdoor exercise period is the only time they can communicate with other prisoners. They may be allowed to have a *limited* contact with other inmates held in the same units during their outside exercise if they are in good behaviour and no disciplinary punishment is imposed on them, and if the risk factors and security requirements do not necessitate otherwise.[681]

Art 25(1)(d) of LESSM provides that aggravated life prisoners may engage in a professional or occupational activity considered suitable by the administrative board, if conditions in the institutions they are held so permit. The Ministry of Justice states that 'prisoners serving aggravated life imprisonment in high-security prisons may be allowed to take part in [activities and rehabilitation] programmes on a limited basis, exclusively with the sentenced prisoners accommodated in their unit'.[682]

The CPT observed that the implementation of the legal provisions governing aggravated life sentences 'varied in practice from one establishment to another'.[683] Similarly, Aydınoğlu and Yusufoğlu reported that a number of aggravated life prisoners responded to their study complained that they were offered no purposeful activities at all in prisons they were transferred, even though they had been provided with this opportunity in the previous prisons they had been held.[684]

[679] Ministry of Justice of the Republic of Turkey, Circular No. 45/1, No: B:03.0.CTE.0.00.00.04/, Date: 22 January 2007, Chapter 3. See also: General Directorate of Prisons and Detention Houses (2016:85-93).
[680] LESSM, Art 25(1)
[681] ibid, Art 25/1-c.
[682] Ministry of Justice, Circular No:45/1, Chapter. 3, para 11.
[683] CPT (2013f: para 79).
[684] Aydınoğlu & Yusufoğlu (2016:82).

In a prison visited by the CPT (Izmir Prison for Women), women serving aggravated life imprisonment were allowed to have two hours of outdoor exercise per day in association with two to five persons serving the same sentence and to participate in courses such as sewing three times a week for up to eight hours per week and sports activities for one hour per week.[685] The CPT regarded this situation 'favourable' compared to the situation of aggravated life prisoners in other establishments, where it found that the inmates 'were subjected to a very impoverished regime'.[686]

In its visit to Metris R-Type Prison, the CPT found that aggravated life prisoners were 'locked up alone in their cell for 21 hours per day'.[687] They were allowed to access to an outdoor exercise yard for up to two hours per day and offered only one hour of purposeful activity on weekdays. A similar practice was also observed in Trabzon E-Type Prison where aggravated life prisoners were only allowed one-hour daily outdoor exercise and fortnightly sports sessions lasting one hour.[688] Further, the CPT found that aggravated life prisoners were subject to 'a solitary-confinement-type regime' in Menemen R-Type Prison where they were held in high security unit, 'locked in their room for 23 hours per day, without being offered any purposeful activities'.[689]

In its visit to Izmir F-Type Prison No.2, the CPT found that different regimes were applied to aggravated life prisoners based on the type of their offences. Although all aggravated life prisoners in that establishment were offered one hour of sports activities twice a month and were allowed to watch a film in the establishment cinema room once a month, participation in these activities in association with other inmate was limited for those convicted of terror offences. Whereas inmates serving aggravated life sentences for ordinary crimes can watch films as a group and exercise sports activities in groups of four persons at a time, aggravated life prisoners convicted of terror offences were restricted to a

[685] CPT (2013f: para 79).
[686] ibid.
[687] CPT (2017c: para 87).
[688] ibid.
[689] ibid.

group of two persons only at a time.[690] The CPT noted that aggravated life prisoners in these establishments were not offered workshops, educational activities or conversation sessions. It reported the shortcoming that 'providing access to sports facilities twice a month for one hour is clearly insufficient'.[691]

As a good practice, the CPT reported that aggravated life prisoners in Kırıkkale F-Type Prison were allowed to share an outdoor exercise yard with other inmates serving the same sentence, which allowed them to have conversation throughout the day. They were also allowed to associate together in groups of five to ten during weekly sports sessions, and some of them were authorised to take part in vocational courses and to attend a workshop and to visit the library.[692]

Contrary to what it specifies for aggravated life prisoners, the law does not impose any restrictions on (normal) life prisoners' access to purposeful activities, such as work, vocational training, education and sports in association with other prisoners.[693] For example, the Human Rights Investigation Commission (*İnsan Hakları İnceleme Komisyonu*) (IHIK) has reported from a prison that 1,212 prisoners, including life prisoners held in this institution, have attended conferences and seminars organized during 2017 in order to enhance their personal, social, cultural, professional, moral and health care and to strengthen their family ties.[694] IHIK has also reported from a number of prison

[690] CPT (2013f: para 80).
[691] ibid.
[692] ibid, para 81.
[693] Several empirical studies have found that in Turkey prisoners are generally offered educational and vocational training programmes within prisons. See, for example: Koçak & Altun (2010); Balaban & Özen (2015); Durmaz (2016);
[694] Human Rights Investigation Commission (2018). HRIC has reported that in a number of prisoners visited, prisoners are offered a variety of purposeful activities, educational courses and hobby workshops. See, for example: Human Rights Investigation Commission (2019); Human Rights Investigation Commission (2017c); Human Rights Investigation Commission (2015); Human Rights Investigation Commission (2014).

establishments that prisoners are encouraged and supported to pursue their education while in custody.[695]

7.3.2. Contact with the Outside World

A number of studies have found that long-term incarceration may cause the 'institutionalisation' or 'prisonisation' of prisoners.[696] However, long-term prisoners always retain their interest in the outside world.[697] Empirical studies have underlined that long-term and life prisoners experience 'outside problems' more severely than 'the inside problems' of a long-term confinement.[698] Long-term prisoners have consistently ranked 'missing somebody', 'missing social life' and 'feeling sexually frustrated' among the five most severe problems caused by long-term incarceration.[699] Thus, as examined in Chapter 4.4.2, maintaining a good contact with the outside world is vital for life prisoners to counteract the damaging impacts of life imprisonment and to achieve their rehabilitation and resocialisation. Sapsford stated that visit entitlements of life prisoners can be seen 'as a chance of keeping them sane and living a normal life again'.[700] Brunton-Smith and Hopkins found that prisoners can be 21 per cent less likely to reoffend if they have received family visits while in custody.[701] On this basis, this section examines life prisoners' contact with the outside world in E&W and Turkey.

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[695] Human Rights Investigation Commission (2017b).

[696] See, for example: Clemmer (1958); Zingraff (1975); Akers, Hayner, & Gruninger (1977); Alpert (1979); Ramirez (1984); Paterline & Orr (2016).

[697] Sapsford (1978:141-42). See also: Stearns, Swanson, & Etie (2019).

[698] Richards (1978:164); Flanagan (1980:150); Kummerlowe (1995:42); Leigey (2015:70-71); Leigey & Ryder (2015:735); Hulley et al. (2016:780); Crewe et al. (2020:210).

[699] Richards (1978:164); Flanagan (1980:150-51); Leigey & Ryder (2015:734); Hulley et al. (2016:780).

[700] Sapsford (1978:142).

[701] Brunton-Smith & Hopkins (2013:16). Similarly, Stearns et al. (2019) have observed that long-term prisoners who have a meaningful contact with the outside world are less likely to engage in violent acts in prison.

7.3.2.1. England and Wales

Life prisoners' contact with their family members can be very difficult, '[b]ecause the length of time involved, relationships can become weakened to the point that they may be irrevocably lost'.[702] To prevent the breakdown of family ties of life prisoners, as explained in Chapter 4.4.2, the European human rights instruments require that prison authorities should take a positive and proactive role. In this respect, Rule 4 of the Prison Rules 1999/728 provides that 'special attention' must be paid to maintaining of the prisoner' relationship with his/her family and that the prisoner must be encouraged and assisted to develop the contact with the outside world in order to 'best promote the interests of his family and his own social rehabilitation'. Under Rule 35(2)(b) of the Prison Rules 1999/728, prisoners are entitled to send and receive a letter in every week and to receive a visit twice in every four weeks.

In their joint report, HMI Probation and HMI Prisons found that while the majority of life prisoners stated that they did not expect any support from the prison authorities, some described a lack of such support.[703] HMI Probation and HMI Prisons reported that in around 75 per cent of all cases examined, life prisoners had been given sufficient attention in promoting contact with their families and/or partners.[704] Nevertheless, it was observed that 'many life sentence prisoners had lost contact with their family, either through the extreme nature of their crime or the length of their incarceration'.[705]

As previously noted, 'feeling sexually frustrated' is perceived as one of the most severe pains of long-term incarceration by life prisoners.[706] In this respect, the issue of whether or not prisoners should be entitled to conjugal visits was raised before the European Commission of Human Rights in *X v. the United Kingdom*. In this case, the European Commission ruled out that a ban on

[702] Flanagan (1981:210). See also: Flanagan (1995b:255); Wikberg & Foster (1995:34); Liem (2016:107-108); Leigey (2015:71).
[703] HMI Probation and HMI Prisons (2013: para 2.30).
[704] ibid, para 2.31.
[705] ibid, para 2.28.
[706] Richards (1978:164); Flanagan (1980:152); Hulley et al. (2016:780).

conjugal visits violated Art 8 ECHR.[707] In domestic law, the Court of Appeal for England and Wales dealt with a similar issue in *R(Mellor) v. Home Secretary*.[708] In this case, the applicant claimed that he was entitled, as a prisoner, to be provided with facilities for artificial insemination in order to have a child with his wife in the absence of conjugal visits. After reviewing the ECtHR's jurisprudence on Art 8 and Art 12 ECHR, Lord Phillips MR concluded that:

> It is not obvious that the signatories to the Convention would have agreed that a man who had, by imprisonment, been justifiably deprived of the enjoyment of family life and the exercise of conjugal rights, should be entitled to inseminate his wife artificially in order to produce a child in whose development and support he could play no part.[709]

Thus, the Court of Appeal held that the denial of the applicant's request for artificial insemination was a necessary implication of the punitive element of imprisonment.[710] In a similar case, *Dickson v. Premier Prison Service*, the Court of Appeal dealt with a life prisoner's claim of artificial insemination.[711] In this case, the applicant argued that the refusal of his and his wife' request for artificial insemination was disproportionate under Art 8 ECHR, since his wife would have been 51 years of age by the time of his earliest release date. However, the Court of Appeal did not find a violation under Art 8 ECHR.

In *Dickson v. the United* Kingdom, the Grand Chamber of the ECtHR reached a different conclusion, stating that inability to beget a child is not an inevitable consequence of imprisonment.[712] It reiterated the importance of rehabilitation and reintegration of prisoners and the vital role of their families in this process. It rejected the UK Government's argument that allowing prisoners to access artificial insemination facilities would undermine the public confidence in the prison system.[713] Rather, it stated that granting artificial insemination facilities does not 'involve any security issues or impose any

[707] *X v. the United Kingdom* App No. 6564/74 2 D&R 105 (1975).
[708] *R(Mellor) v. Home Secretary* [2001] EWCA Civ 472.
[709] ibid, para 43.
[710] ibid, para 54; See for an analysis of this case: Codd (2006).
[711] *Dickson v. Premier Prison Service* [2004] EWCA Civ 1477.
[712] *Dickson v. the United* Kingdom [2007] ECHR 17, para 74.
[713] ibid, para 75.

significant administrative or financial demands on the State'.[714] Thus, it held that the denial of the applicant's request for artificial insemination breached Art 8 ECHR.[715]

Nowadays, in the consideration of artificial insemination requests the Her Majesty's Prison and Probation Service takes into account the information about prisoners' offending history and risk of harm. The final decision to grant the prisoner to access artificial insemination rests with the Secretary of State.[716] In April 2018, the Ministry of Justice verified that since 1965, only ten applications for artificial insemination made by prisoners have been approved.[717] Due to the lack of information, however, it remains unknown how many applications have been refused and on what grounds.

7.3.2.2. Turkey

As in E&W, in Turkey prisoners are provided with the opportunities such as visit entitlements and phone calls in order to contact with the outside world. However, different regimes are applied for aggravated life prisoners and (normal) life prisoners in exercising these entitlements.

Aggravated life prisoners have the right to make phone calls for up to ten minutes in every 15 days if the prison administration considers it appropriate for them to do so,[718] whereas (normal) life prisoners are entitled to ten-minute telephone call per week.[719] Further, aggravated life prisoners' right to receive visits is limited in terms of both persons visiting them and the duration of each visit. Although other prisoners, including (normal) life prisoners, can be visited by persons up to third-degree relatives and three friends listed by them in three closed (i.e. with a glass partition) and one open visit (so-called 'table visit') in

[714] ibid, para 74.
[715] See for the analyses of prisoners' right to artificial insemination: Foster (2006); Codd (2007); Yarwood (2015:92-114).
[716] Joint Committee on Human Rights (2008: para 38).
[717] Ministry of Justice (2018a).
[718] LESSM, Art 25(1)(e).
[719] ibid, Art 66. See also: Prison Regulations on the Management of Prisons and the Execution of Prison Sentences and Security Measures (Official Gazette Date and No: 6.4.2006 – 26131), Art 88(f).

every month,[720] aggravated life prisoners can only be visited by second-degree relatives twice a month (one open and one closed visit) for up to one hour under the conditions specified by the prison administration.[721] This results in aggravated life prisoners not being visited by nephews and nieces, cousins and their friends. The impact of this statutory restriction is well explained by the aggravated life prisoners responded to Aydınoğlu and Yusufoğlu's study. For example, an aggravated life prisoner stated that 'I will not see my nephews, my uncles and my aunts in all my life. My sister got married, but I can't see her husband'.[722] Another prisoner serving aggravated life imprisonment stated that 'we are only able to communicate with [second]-degree relatives … As of age, many of our friends' parents are no longer alive. And since most people are not married, there are no spouses and children to see'.[723]

A further restriction is that aggravated life prisoners are only allowed to meet with a maximum of one visitor at a time during their open and closed visits.[724] This means that they should manage their maximum visit time of one-hour to see their visitors one by one, whereas other prisoners, including (normal) life prisoners, enjoy coming together with all visitors. This statutory restriction imposed on aggravated life prisoners makes visits meaningless since they can only spare ten to fifteen minutes to see each visitor. An aggravated life prisoner stated that:

> My family is crowded. Four – five members of my family are coming to see me in each visit. But I can only see them one by one for only ten to fifteen minutes as they are received to the visiting room individually. Psychologically, I do not feel comfortable with this because they are coming from far away. I told them not to come, but they are coming.[725]

Another important problem of life prisoners' contact with the outside world is caused by the fact that most of them are held in prisons far away from their

[720] LESSM, Art 83.
[721] Regulation on the Visits of Sentenced Prisoners and Prisoners in Remand (Official Gazette Date and No: 17.06.2005 – 25848), Art 5(f).
[722] Aydınoğlu & Yusufoğlu (2016:73).
[723] ibid, 75.
[724] Regulation on the Visits of Sentenced Prisoners and Prisoners in Remand, Art 12.
[725] Aydınoğlu & Yusufoğlu (2016:78).

families. IHIK stated that in almost all prisons visited, the biggest complaint prisoners make is the difficulties experienced in family visits and the requests for the transfer to a prison close to their families.[726] A number of prisoners complained that their families could not manage to come to visit them as they live far away from where they are imprisoned.[727] In 2013, an amendment was made in LESSM to allow prisoners to accumulate three consecutive unused closed/open visits and use them all at once under the Incentive and Earned Privileged (IEP) scheme.[728] This provision is particularly important for prisoners whose families have to come from very far distance to visit.[729] The same amendment also provides that prisoners may be allowed to have conjugal visits for a period of three to 24 hours every three months if they exhibit good behaviour under the IEP scheme.[730]

7.4. Treatment of Special Categories of Life Prisoners

A number of empirical studies have found that the pains and problems of long-term incarceration are experienced differently and more severely by women and elderly prisoners than their male counterparts. For example, MacKenzie, Robinson and Campbell argued that '[t]he environment of prison for women may be more cruel and deprived for them than is the environment of the male prison for males'.[731] Because of their small number in the prison system, female inmates are called as 'forgotten offenders',[732] a label which is considered 'even more appropriate for the long-term female offender'.[733]

A number of studies have underlined the importance of grasping the traumatic events women experienced prior to their incarceration. Crewe et al., for example, stated that '[s]eeking to understand how women experience long

[726] Human Rights Investigation Commission (2016); Human Rights Investigation Commission (2017b).
[727] ibid.
[728] LESSM, Art 25(3)(e).
[729] CPT (2013b: para 23).
[730] Atıl (2015).
[731] MacKenzie et al. (1989:224).
[732] Unger & Buchanan (1985:18).
[733] MacKenzie et al. (1989:223).

sentences is not possible without grasping the multiplicity of abuse and abjection that the great majority of them have experienced in the community, or without recognising their emotional commitments and biographies'.[734] Similarly, Leigey and Reed suggested that 'in order to understand the treatment needs of [female life prisoners], it is necessary to begin with an examination of the traumatic events they experienced prior to incarceration'.[735]

Like female offenders, particular attention should also be paid to elderly long-term prisoners in order to identify their special needs. Crawley and Sparks stated that

> elderly prisoners represent a special population in terms of health care needs, problems of individual adjustment to institutional life and problems of family relationships. In consequence, they pose special difficulties to the prison system regarding custody, rehabilitation and release. Like their counterparts outside the prison walls, elderly prisoners suffer from a variety of age-related health problems, including poor mobility, impaired vision and hearing and depression.[736]

As we have seen in Chapter 4.5, the European penal law requires prison authorities to pay particular attention to those who are considered to be in special categories of life prisoners such as women, children and elderly prisoners. Against that background, this section examines how E&W and Turkey deal with the needs of those life prisoners considered in special categories, by especially focusing on female life prisoners in both jurisdictions.

7.4.1. England and Wales

The *Indeterminate Sentence Operational Support* guidance recognises that female life prisoners have different management and treatment needs.[737] MacKenzie, Robinson and Campbell stated that 'the prison environment for women may be extremely difficult because of the small number of women incarcerated'.[738] This point is also reiterated by the *Indeterminate Sentence*

[734] Crewe, Hulley, & Wright (2017b:1376). See also: Saruç (2013:80-102).
[735] Leigey & Reed (2010:315).
[736] Crawley & Sparks (2006:64).
[737] HM Prison & Probation Service (2019: para 14.2).
[738] MacKenzie et al. (1989:235).

Operational Support guidance, stating that '[w]omen ISPs form a very small cohort and it is easy to overlook them when thinking about progression for ISPs more generally'.[739] Noting that most progression opportunities offered to male life prisoners are not always appropriate for female life prisoners, the *Indeterminate Sentence Operational Support* guidance explicitly states that 'we must consider their differences, and what works, when planning their progression'.[740]

As of 30 June 2021, in E&W there were 2,529 sentenced female prisoners,[741] 308 of whom were serving life imprisonment.[742] This consisted of only 4.4 per cent of all life prisoners. Due to the small number of female life prisoners, the number of dispersal prisons, the range of activities, jobs, educational opportunities, social interactions and the possibility of their transfer to prisons close to families appear to be far more limited in the female system in comparison to the male system.[743] For example, Genders and Player found that while the male system allowed 'a degree of choice and flexibility in planning lifer career paths', such options were very limited for females.[744] Similarly, in their joint report, HMI Probation and HMI Prisons observed that female life prisoners' options for progression are restricted because of 'the lack of a detailed and structured categorisation process'.[745] The limited opportunities for female life prisoners to progress through the prison system were also identified by empirical studies, noting that the severity of problems experienced by long-term female prisoners was increased by the unavailability of options offered to their male counterparts.[746] Further, Crewe et. al. found that female life prisoners felt much more frustrated about the problem that they could not manage to progress through the prison system to the same extent as their male counterparts do.[747]

[739] HM Prison & Probation Service (2019: para 14.2).
[740] ibid.
[741] Ministry of Justice (2021: Table A1.1).
[742] ibid, Table A1.15.
[743] Genders & Player (1990:50); MacKenzie et al. (1989:235).
[744] Genders & Player (1990:56).
[745] HMI Probation and HMI Prisons (2013: para 2.33).
[746] Genders & Player (1990); MacKenzie et al. (1989:235).
[747] Crewe et al. (2017b:1367).

Empirical studies have also found that female long-term prisoners suffer from mental health problems. Gender and Player stated that women life prisoners are likely to experience 'an overwhelming fear of deterioration in their physical health and psychological well-being'.[748] They noted that female life prisoners' fear of psychological deterioration mainly results from 'their inability to think positively about themselves, to their dread of institutionalization and loss of self-identity, and to their inability to conceive of a future after prison'.[749] Further, Crewe et. al. found that female life prisoners were inclined to attempt self-injury and suicide six times greater than their male counterparts.[750] They also found that women life prisoners were more likely to suffer from psychological and emotion problems of their index crimes. Women's narratives revealed 'disclosures of nightmares, flashback and hallucinations' about their offences, which cause 'psychological distress and mental health problems'.[751]

Empirical studies have also examined whether or not elderly life prisoners have experienced mental deterioration. Crawley and Sparks argued that '[f]ear of physical and mental deterioration was significant' amongst elderly life prisoners responded to their study.[752] However, in their study researching older LWOP sentenced prisoners in the USA, Leigey and Ryder suggested that '[n]one of the respondents reported a concern over mental deterioration'.[753] Rather, they claimed that older LWOP inmates 'were confident in their abilities to function in the prison environment and credited a positive outlook and religious beliefs as helping them cope'.[754]

Independent from the mental deterioration argument, a number of empirical studies have found that elderly life prisoners have special age-related needs during their incarceration.[755] For example, Crawley and Sparks found that 'elderly prisoners had lost touch with the outside world, lost touch with family

[748] Genders & Player (1990:54).
[749] ibid.
[750] Crewe et al. (2017b:1371).
[751] ibid, 1372.
[752] Crawley & Sparks (2006:72).
[753] Leigey & Ryder (2015:738).
[754] ibid.
[755] Leigey (2015:90-3).

and friends, doubted their ability to make independent decisions and, in many respects, viewed the prison as home'.[756] They noted that there is a lack of policy regarding the implementation of elderly prisoners' sentences in E&W. Nevertheless, they observed that in 'the absence of a national strategy for elderly prisoners', staff in local prisons tries to do their best to meet the special needs of this category of life prisoners.[757]

7.4.2. Turkey

In 2020, there were 11,586 female prisoners in Turkey, 2347 of whom were in remand.[758] Unfortunately, there is no data available providing the exact number of female life prisoners. However, it is known from both the CPT's and IHIK's reports that there are some female prisoners serving life imprisonment in Turkey.

As in E&W, in Turkey female prisoners are held in different prison establishments than males. If women prison establishments become insufficient to meet the demand, the sentence of female prisoners can be executed in separate units of male prisons.[759] However, Art 63(3) of LESSM makes clear that women and men should not be allowed to come together or to establish contact with each other in any way.

As we have seen in Chapter 7.3.1.2 above, the CPT found that the situation of female prisoners serving aggravated life prisoners was more 'favourable' - though insufficient - than that of their male counterparts.[760] It reported that female life prisoners were offered insufficient purposeful activities and were provided with very limited outdoor exercise. It further noted that because of the unavailability of sufficient beds, some female inmates had to sleep on mattresses on the floor, even one of them was with her baby, in a prison basically designed for male.[761] In essence, the situation of female prisoners held in separate units of

[756] Crawley & Sparks (2006:71).
[757] ibid, 77.
[758] Council of Europe Annual Penal Statistics (2021:46). See also: World Prison Brief (2020).
[759] LESSM, Art 10.
[760] CPT (2013f: para 79).
[761] CPT (2009c: para 86).

male prison establishments appears to be impoverished in many respects. For example, HRIC has reported that some female inmates held in separate units in male prisons feel that they are treated by prison management with a male perspective as the number of male prisoners is much higher.[762] Nevertheless, LESSM provides certain provisions for women prisoners to address their special needs. For example, Art 16(4) of LESSM provides that the execution of female poisoners' sentences can be postponed if they are pregnant or gave birth less than six months ago. Moreover, female prisoners can keep their child with them if the child is under six years old and there is no safe place outside to look after the child.[763]

Apart from female prisoners, LESSM also provides provisions with respect to other special categories of prisoners in order to address their treatment needs. For example, Art 16(1) of LESSM states that mentally ill offenders' sentences must be postponed, and they should be placed in a health institution until they recover. The time spent in health institutions is deemed to have been spent in prison. In any other cases of illness, the execution of prison sentences must be carried out in relevant parts of official health institutions allocated for this purpose. However, if the execution of imprisonment even in this way presents an absolute danger to prisoners' lives, it should be postponed until they are cured.[764]

Art 6(f) of LESSM provides that all necessary measures should be taken to ensure prisoners' right to life and their bodily and mental integrity. Yet, it appears that there are major defects in the provision for disabled prisoners in Turkish prisons. Eren has noted that while a number of prison establishments consist of two floors, they are not designed for disabled inmates. He observed that disabled prisoners are unable to access to workshops and visitor areas which are located on the second floor.[765]

[762] Human Rights Investigation Commission (2017a).
[763] LESSM, Art 65(1). In 2016, there were 529 children who were held in prisons with their mothers. See: General Directorate of Prisons and Detention Houses (2016:81).
[764] LESSM, Art 16(2).
[765] Eren (2013).

7.5. Conclusion

In Chapter 6, we have concluded that formally Turkey relies on life imprisonment less than E&W does. However, we have also noted that Turkey's lesser reliance on life imprisonment does not, without more, mean that it is less punitive than E&W. This is because, as noted in Chapter 6, any punitiveness assessment requires a comparative analysis of the execution of life sentences in both jurisdictions. Building on Chapter 6, this chapter has examined the implementation of life imprisonment in E&W and Turkey in the light of the European standards for implementation.

As discussed in Chapter 4, European penal law discourages the adoption of a punitive implementation regime for life sentences. Rather, the European human rights documents and instruments have consistently underlined the importance of the rehabilitation and resocialisation of life prisoners. In this chapter, we have explored whether the implementation regime of life imprisonment in E&W and Turkey has a punitive or rehabilitative character by examining both the law and practice of the execution of life sentences. The findings of this chapter suggest that all forms of life sentences in E&W and (normal) life sentences in Turkey are *generally* implemented in a rehabilitation-oriented manner, whereas the implementation regime for the aggravated life sentences of Turkey has a punitive rather than rehabilitative focus.

In E&W, the judiciary has recognised that 'the purpose of the sentence includes rehabilitation, in relation to prisoners subject to life and IPP sentences'.[766] Similarly, the *Indeterminate Sentence Operational Support* guidance states that the management and treatment of life prisoners should be based on a 'rehabilitative culture' which fosters 'a supportive environment and a sense of purpose in relation to rehabilitation, desistance, and progression through a sentence'.[767] In this respect, in E&W special prevention through life prisoners' rehabilitation and resocialisation is given the utmost importance, and shapes every aspect of the management and execution of life sentences. For

[766] *Kaiyam and Others v. Secretary of State* [2014] UKSC 66, para 36.
[767] HM Prison & Probation Service (2019: para 7.5).

example, life prisoners' allocation and classification are based on their risk and needs assessments and sentencing plans. Risk and needs assessments and sentencing plans also play an important role in addressing life prisoners' offending behaviours. Further, life prisoners are offered a range of purposeful activities in order to improve themselves and use their time in custody in a constructive and useful way. Life prisoners' rights and entitlements are not more restricted than other prisoners serving fixed prison terms. For example, they are provided with the same entitlements as other prisoners in terms of contact with the outside world through prison visits, phone calls, and the sending and receiving letters. Importantly, a less stringent regime is adopted for the implementation of female and juvenile life prisoners' sentences in order to address their special needs, notwithstanding the practical shortcomings.

As we have seen throughout this chapter, Turkish penal law adopts different implementation regimes for (normal) life sentences and aggravated life sentences. In Turkey, rehabilitation is *formally* prioritised as the primary purpose of imprisonment, including (normal) life imprisonment. (Normal) life prisoners are treated in the same way and are provided with the same rights and entitlements as other prisoners serving fixed-term prison sentences. They are not segregated from the general prison population and in principle have access to the same regime of activities as other prisoners. However, Turkish penal law recognises a very restricted and punitive implementation regime for aggravated life prisoners by excluding them from the scope of rehabilitation. As examined throughout this chapter, aggravated life prisoners are segregated from all other prisoners, including other life prisoners and are subject to a more restrictive regime with highly limited means for the access to purposeful activities, communication with other prisoners and contact with the outside world. Because of the punitive character of its implementation, we conclude that the aggravated life imprisonment cannot be considered human-right-compliant under the European standards.

CHAPTER 8
RELEASE FROM LIFE IMPRISONMENT

The previous two chapters have explored the imposition and implementation of life imprisonment in England and Wales (E&W) and Turkey. In this chapter, the thesis proceeds to examine the release from life imprisonment in the two legal systems being compared against the background of the European standards for release.

As we have seen in Chapter 5, European penal law does not presuppose the necessity of a life-long incarceration of life prisoners. Rather, the principles of rehabilitation and human dignity require that life prisoners must be provided with an effective and meaningful release opportunity. European principles do not specify a particular form of release mechanism. This means that different groups of life prisoners can be offered different release options (e.g. conditional release, presidential pardon or clemency) subject to some due process requirements. The bottom line, however, is to provide all life prisoners with a realistic hope to be released one day from prison.

In both E&W and Turkey, life prisoners do not necessarily have to spend the rest of their natural life in prison. In E&W, a sentence of life imprisonment has two elements: punitive and preventive periods. As explained in Chapter 6, the punitive period of a life sentence (i.e. minimum terms or previously known as 'tariffs') is determined by sentencing courts. However, this is not the exact date the life prisoner will be released. Instead, this is the minimum term to be served by a life prisoner to satisfy the requirements of retribution. After serving the minimum term, life prisoners continue to be detained unless they are considered no longer presenting an unacceptable risk to the public. This post-tariff detention is the preventive period of a life sentence.

In E&W, all life prisoners, except those sentenced to whole life sentences, are considered for release by the Parole Board for England and Wales. The Parole Board assesses whether it is safe to order the release of an individual life prisoner into the community on life licence after he/she has completed the

minimum term.[768] Regarding whole life prisoners, the Secretary of State has the power to order their release on humanitarian grounds or in exceptional circumstances.[769]

Similarly, in Turkey all life prisoners, except those excluded from the scope of parole, are considered for conditional release after serving their minimum terms. As noted in Chapter 6 and will be detailed in section 8.2.2 below, minimum non-parole terms are determined by law. However, the conditional release assessment of life prisoners is carried out by courts. Prisoners serving life imprisonment without the possibility of parole (LWOP) sentences can only apply for the Presidential Pardon on humanitarian grounds.[770]

The purpose of this chapter is to examine how life prisoners are released from prison in E&W and Turkey, and to discuss whether the release mechanisms and procedures adopted by both countries comply with the European standards explained in Chapter 5. To this end, section 8.2 deals with the conditional release procedures for life prisoners in E&W and Turkey. Although a small number of life prisoners (whole life prisoners in E&W, and LWOP sentenced prisoners in Turkey) are excluded from conditional release in both E&W and Turkey, there are still some other release mechanisms for them. Section 8.3 explores the situation of life prisoners excluded from the scope of conditional release and discusses whether the release opportunities available to them are in compliance with the European Court of Human Rights' (ECtHR) jurisprudence on irreducible life sentences.

Before embarking upon the analyses of the release mechanisms and procedures for life sentences employed in English and Turkish law, it is important to explore the extent to which life prisoners are prepared for their release in the two legal systems, as it is a *sine qua non* requirement of an effective and meaningful release.[771] Therefore, section 8.1 examines how, if at all, life

[768] s.28 Crime (Sentences) Act 1997, c.44 (1997 CSA).
[769] s.30 of the 1997 CSA.
[770] Law No: 2709, 'The Constitution of the Republic of Turkey', (Official Gazette Date and No: 9.11.1982 – 17863), Art 104.
[771] See: Chapter 5.4 of the thesis.

prisoners in both jurisdictions are prepared for their eventual release into the community.

8.1. Preparation for Release

As explained in Chapter 5.4, the preparation arrangements for life prisoners' release have received particular attention from the European human rights instruments. For example, Art 33 of the Recommendation Rec(2003)23 on Life and Long-term Prisoners, adopted by the Committee of Ministers of the Council of Europe, provides that life prisoners' release 'should be prepared well in advance' in order 'to overcome the particular problem of moving from lengthy incarceration to a law-abiding life in the community'.[772] Rule 33.3 of the European Prison Rules states that '[a]ll prisoners shall have the benefit of arrangements designed to assist them in returning to free society after release'.[773] Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) states that 'a total lack of preparation for release or planning of reintegration are likely to impair seriously the ability of prisoners to function in the outside community'.[774] Against this background, this section examines release preparation arrangements available to life prisoners in E&W and Turkey.

8.1.1. England and Wales

In E&W, life prisoners are assisted with a variety of release preparation arrangements employed especially at the later stages of their sentences. These include temporary releases from prison and open conditions where life prisoners are tested in environments 'as reflective of the community as possible'.[775]

Life prisoners can apply for the release on temporary licence (ROTL). This is a 'mechanism that enables prisoners to participate in necessary activities, outside of the prison establishment, that directly contribute to their resettlement

[772] Committee of Minister of Council of Europe (2003).
[773] Committee of Minister of Council of Europe (2006).
[774] CPT (2016a: para 70).
[775] HM Prison & Probation Service (2019: para 9.1).

into the community and their development of a purposeful, law-abiding life'.[776] In order to help prisoners to reintegrate into the community, ROTL offers a gradual programme prior to their potential release date.[777]

ROTL is not an entitlement, but a privilege to be earned through compliance with the prison regime.[778] Life prisoners become eligible for the consideration of ROTL only after their arrival at open conditions. They can be granted ROTL for a number of purposes, including:

- reparative community work and unpaid employment,
- life and work skills training and education,
- establishing links with family and the local community,
- maintenance of the parent and child tie and preparing the prisoner for the resumption of their parental duties on release,
- job searches and interviews, paid employment, driving lessons and opening bank accounts, and
- probation interviews, court or tribunal proceedings, inter-prison transfers and conferences with legal advisers.

In their joint report, Her Majesty's Inspectorate of Probation (HMI Probation) and Her Majesty's Inspectorate Prisons (HMI Prisons) stated that ROTL is 'clearly a key component of the resettlement process in the open prisons', particularly 'in the absence of other programmes of preparing prisoners for release'.[779] The decision to grant a life prisoner ROTL rests with the prison governor, based on an assessment of the purpose of the release, the associated risk of harm to others and the likelihood of the prisoner's compliance with the licence conditions.[780]

The transition from closed to open conditions is also an important step in life prisoners' preparation for release as it helps them to overcome 'the culture

[776] HM Prison Service (2005: para i). See also: Potter & Gundersen (2015).
[777] HM Prison Service (2005: para 4.3.5).
[778] Pennington & Crewe (2015:12).
[779] HMI Probation and HMI Prisons (2013: para 4.7).
[780] ibid, para 4.13.

shock'.[781] Prisoners consider their time in open conditions as 'adjustment time', since it is 'something in the middle, between being in a closed prison and then coming straight out'.[782] The environment in open prison is described by prisoners as 'more positive', because the focus here is on their reintegration into the community and on helping them 'to shift from being involved in crime to getting a job'.[783]

It is now well established in English law that life prisoners' transfer from closed to open conditions 'is to do with early release, since the earlier they are transferred to open conditions, the sooner they are likely to be released'.[784] On the contrary, a life prisoner 'is very unlikely to be released without having spent some time in open conditions'.[785] Although spending some time in open prison is not a mandatory requirement for life prisoners' release, only 13 per cent of life prisoners are released directly from closed conditions, having never spent time in open conditions.[786] The *Indeterminate Sentence Operational Support* guidance reiterates the importance of 'a carefully managed transition into the community via open conditions'.[787] Thus, the guidance provides that 'the longer the time in custody served by an ISP [indeterminate sentence prisoner] the more likely they are to require a period in open conditions as a phased progression towards release'.[788]

Life prisoners can apply for the consideration of their suitability for the transfer to open conditions up to three years prior to the expiry of their minimum terms.[789] The Secretary of State has the discretion to transfer a prisoner from closed to open conditions on the basis of a positive recommendation from the

[781] Adams (2011:24).
[782] Aresti & Darke (2015:14).
[783] ibid, 15.
[784] *R (Yusuf) v. Parole Board* [2011] 1 WLR 63, para 7, per Keith J; See also: *R (Hill) v. Secretary of State for the Home Department* [2007] EWHC 2164 (Admin), paras 5-7, per Irwin J; *R (Hussain) v. Parole Board* [2016] EWHC 288 (Admin).
[785] *R (Yusuf) v. Parole Board* [2011] 1 WLR 63, para 7, per Keith J.
[786] HM Prison & Probation Service (2019: para 9.3).
[787] ibid.
[788] ibid, para 9.4.
[789] HM Prison & Probation Service (2020: para 5.4.1).

Parole Board.[790] The Parole Board undertakes 'a rigorous risk assessment to explore the issues and remaining risk' in progressing a life prisoner to open conditions.[791] Further explanations about the Parole Board's hearings and statistical information about life prisoners' transfer to open conditions will be made in section 8.2.1 below. Now, release preparation arrangements available to life prisoners in Turkey will be examined in what follows.

8.1.2. Turkey

As in E&W, in Turkey there are a number of release preparation arrangements for life prisoners.[792] Art 90 of the Law on the Execution of Sentences and Security Measures (LESSM) provides that all necessary measures must be taken to ensure that prisoners think about arranging their future life upon their release.[793] Similarly, Art 102 of LESSM indicates that relevant public institutions and organisations must provide all necessary supports and services in order to ensure that prisoners overcome their personal difficulties, are rehabilitated and reintegrated into the community they will live upon their release from prison.

In order to address prisoners' problems concerning their release and help them be prepared for release in advance, the General Directorate of Prisons and Detention Centres has established a specific programme, 'Prisoner's Progress Programme before Release' (*Salıverilme Öncesi Mahkum Gelişim Programı*).[794] This programme is designed for those whose conditional release date is coming up, and consists of ten sessions, each lasting 90 minutes. During these sessions, prisoners are provided with a variety of structured activities addressing communication skills, decision making, problem solving, negotiation skills, building relationships with family and friends, stress management, their rights

[790] The Secretary of State may order a life prisoner's transfer to open conditions without referring the case to the Parole Board in exceptional circumstances. See: HM Prison & Probation Service (2020: para 5.5).
[791] Gampell (2015:36).
[792] General Directorate of Prisons and Detention Centres (2020a). See also: Yumak (2014:426-29).
[793] Law No: 5275, 'Law on the Execution of Sentences and Security Measures' (LESSM), (Official Gazette Date and No: 29.12.2004 – 25685).
[794] General Directorate of Prisons and Detention Centres (2020b).

and responsibilities, and social assistance. The purpose of these activities is to enable prisoners to acquire new skills as well as improving the existing ones.

As in E&W, life prisoners in Turkey are also allowed to have some sorts of prison leave.[795] Art 93 of LESSM stipulates that prisoners may be granted three different types of prison leave: compassionate leave, family visit leave, and leave to look for work. In the event of the death or serious illness of their relatives, prisoners can apply for compassionate leave of up to ten days.[796] Although compassionate leave is not particularly designed for preparatory purposes, it can still be important for prisoners as they are allowed to be present with their loved ones in sorrowful times such as funerals. Family visit leave and leave to look for work are more specifically intended for the preparatory purposes for release. The former enables prisoners to maintain and strengthen family ties and to adapt to the outside world, while the latter offers them the opportunity to find a job or start their own business when they are released.[797]

As in E&W, in Turkey life prisoners' transfer to open conditions is crucial in their preparation for release. However, unlike in E&W, in Turkey the move to open conditions is not regarded as a process requiring life prisoners to go through it before being released. Whereas in E&W the transfer to open conditions is a 'key decision that made the eventual release decision more likely',[798] in Turkey life prisoners are not necessarily required to spend some time in open conditions before being released. In fact, aggravated life prisoners are explicitly excluded from being considered for open conditions regardless of their personal development and rehabilitation.[799] In this sense, they are in a very disadvantaged position regarding their preparation for release, since they are not allowed to spend any time in such an environment as near as the life in the community. However, this does not prevent them from being released, if other conditions are met and if the court reviewing their sentences is satisfied that they

[795] Yerdelen & Nas (2018:94-117).
[796] LESSM, Art 94.
[797] LESSM, Articles 95-96.
[798] HMI Probation (2006:59).
[799] 'Bylaw on Transfer to Open Prisoners', (Official Gazette Date and No: 02.09.2012 – 28399), Art 8(1)(a).

are suitable for release. The release assessment of life sentences in Turkey will be examined in section 8.2.2 below.

8.2. Conditional Release from Life Imprisonment

As we have seen in Chapter 5, the European human rights documents and instruments regard conditional release as an effective release mechanism. For example, Recommendation Rec(2003)22 on Conditional Release (or parole) states that '[i]n order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, *including life-sentence prisoners*'.[800]

As noted above, most life prisoners in both E&W and Turkey have their minimum non-parole terms determined, and thus are eligible to apply for conditional release. In this section, we examine how life prisoners are assessed for conditional release in the two legal systems being compared.

8.2.1. England and Wales

In E&W, life prisoners can be released in two different ways. The first is conditional release; the other is the release on compassionate grounds. Conditional release is available to only those life prisoners whose minimum non-parole terms are determined. After serving their minimum non-parole terms, the Parole Board assesses life prisoners' suitability to be released on life licence.[801] Life prisoners who do not have a minimum non-parole term determined are also known as whole life prisoners. Whole life prisoners can only be released on compassionate grounds by the Secretary of State. In this section, we examine the conditional release mechanism, while the release on compassionate grounds will be discussed in section 8.3.1 below.

[800] Committee of Ministers of the Council of Europe (2003b: para 4.a) (emphasis added).

[801] It must be noted that the Parole Board exercises a judicial function and acts as a court for the purposes of Art 5(4) ECHR. See: Parole Board for England and Wales (2018:42).

Table 8. 1: Number of Life Prisoners Released from Prison in England and Wales, 2004-2020[802]

Year of first release	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Mandatory life prisoners released	152	156	100	90	98	73	115	160	172	220	147	235	235	308	264	230	236
Other life prisoners released	53	44	35	56	40	69	46	74	117	117	102	146	136	161	169	145	125
Total life prisoners released	205	200	135	146	138	142	162	234	289	337	249	381	371	469	433	375	361

[802] Ministry of Justice (2020b: Table 3.3).

Table 8. 2: Mean Time Served by Life Prisoners in England and Wales, 2004-2020[803]

Years	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Mean time served by mandatory life prisoners (years)	14	14	14	16	16	17	16	16	16	17	17	16	16	17	17	18	17
Mean time served by other life prisoners (years)	9	6	7	9	9	11	11	11	12	14	14	14	15	15	17	18	17

[803] Ministry of Justice (2020b: Table 3.3).

Table 8.1 above shows the number of life prisoners released between 2004 and 2020, while Table 8.2 provides the mean time served by life prisoners in prison in the same period. On average, 272 life prisoners are released from prison per year between 2004 and 2020. However, the mean time served by life prisoners has increased from 14 years for mandatory life prisoners and 9 years for other life prisoners in 2004 to 17 years for both mandatory and other life prisoners in 2020 (See: Table 8.2 above). This increase in the mean time served by life prisoners can be attributable to the increase in the average non-parole term imposed on life prisoners. As explained in Chapter 6.4.1, the average non-parole term imposed on offenders convicted of murder rose from 12.5 years in 2003 to 21.3 years in 2016.[804]

According to s.28 Crime (Sentences) Act 1997 (1997 CSA), the Secretary of State is required to release a life prisoner if he/she has served the minimum non-parole term and the Parole Board has directed his/her release.[805] Regarding the review of life sentences, the Parole Board holds two types of hearings: paper hearings and oral hearings.

The review of life sentences is initially considered on paper by a single Parole Board member.[806] At this stage, the member will decide whether the case can be dealt with based on the papers or an oral hearing is required.[807] A case can usually be decided on the papers if there is no realistic prospect of a recommendation for a move to open conditions or release, and no prospect that an oral hearing could lead to a different outcome.[808] The paper panel cannot order the release of life prisoners.[809] If there are no reasons to adjourn the case for further information or defer it for a set period of time, the paper panel can

[804] Ministry of Justice (2014), as cited in Bild (2014:84); House of Lords (2017).
[805] Parole Board for England and Wales (2019b:10).
[806] Padfield (2018b:4).
[807] Parole Board for England and Wales (2021a).
[808] Bradford & Cowell (2012:2).
[809] However, the paper panel has the power to order the release or to recommend progression to open conditions in the case of recalled life sentence prisoners. See: Parole Board for England and Wales (2021c:16).

either make no direction to release or direct that the case be heard at an oral hearing.[810]

Oral hearings are crucial for life prisoners, since definite decisions about their release or transfer to open conditions are made at this stage. Oral hearing panels comprise between one and three suitably accredited members, depending on the need and complexity of the case.Parole Board for England and Wales (2018:44) One experienced member will be appointed as the panel chair, usually a judge in the case of life prisoners.[811] Where the circumstances of the case warrant it, the panel will include a psychologist or psychiatrist member.[812] Victim or a family member of the victim may also attend the hearing to read a victim personal statement.[813]

If there are no reasons to adjourn the case for further information or defer it for a set period of time, the oral hearing panel can make three different decisions:

- the immediate release of a life prisoner, or
- a recommendation of his/her transfer to open conditions (only where the referral asks for such advice), or
- no direction to release.[814]

[810] Parole Board for England and Wales (2018:43). Where the paper panel makes a negative decision for the release of a life prisoner, this decision is provisional. The life prisoner will have 28 days in which to present a request for the case to be further reviewed at an oral hearing. See: Parole Board for England and Wales (2018:13).

[811] Padfield (2018a:25) notes that the involvement of judges in oral hearing is shrinking in the recent years.

[812] Parole Board for England and Wales (2018:16). Shingler and Needs (2018:38) suggest that prisoners share a 'resentment and mistrust of psychologists and their role in risk assessment', whereas Parole Board members attach significant importance to psychological assessment and weight it heavily in their decision-making.

[813] Parole Board for England and Wales (2020:19). See for an account of how an oral hearing is experienced by those involved in the process: Gadhia & Aslan (2018); Ministry of Justice (2018b).

[814] Parole Board for England and Wales (2018:44).

Table 8. 3: Results of Open Hearings of Life Prisoners by the Parole Board, 2011/12 to 2020/21[815]

	No direction for release	Recommendation for open conditions	Direct the immediate release	Percentage of cases where release directed
2011/12	300	463	311	28.9
2012/13	241	481	397	35.4
2013/14	313	469	379	32.6
2014/15	382	359	350	32.1
2015/16	463	344	372	31.5
2016/17	353	382	385	34.3
2017/18	339	427	469	37.9
2018/19	331	376	488	40.8
2019/20	251	306	401	41.8
2020/21	255	343	391	39.5

Table 8.3 above demonstrates that life prisoners' eligibility for parole and their actual release on licence are two different matters. For example, in 2020/21, only 39.5 per cent of life prisoners were released following on/post tariff parole hearings. This is because in E&W life sentences are indeterminate, and thus, life prisoners do not have an 'automatic right of release'.[816] Rather, in order to be released from prison, life prisoners must satisfy the statutory test contained in s.28(6) of the 1997 CSA. According to this provision, the Parole Board should not direct the release unless it 'is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined'. This is a test where the Parole Board assesses whether 'the lifer's level of risk to the life and limb of others is considered to be more than minimal'.[817] It follows that '[t]here is … a presumption in favour of continuing detention – a life sentence prisoner will remain in custody after the expiry of the non-parole period unless they can demonstrate that it is no longer necessary for the protection of the public that they should remain in prison'.[818] This presumption was explicitly acknowledged in *R (on the application of Brooke and others) v. The Parole Board and The Lord*

[815] Parole Board for England and Wales (2021b); Parole Board for England and Wales (2018:34).
[816] Forde (2014:60).
[817] Padfield (2010:119); Padfield (2016b:43-44).
[818] Bild (2014:100). See also: McCarty (2014:103). See also for an analysis of how the Parole Board reaches a decision to release or not to release a prisoner: Lackenby (2018).

Chancellor and Secretary of State for Justice.[819] In this case, Lord Phillips stated that:

> Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the Board is satisfied that there is no risk that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the Board's judicial function.[820]

However, in E&W the detention of life prisoners beyond their minimum non-parole term can sometimes be very long.[821] As of 30 June 2021, there were 1,606 life prisoners who were still in prison even though their tariff expiry dates had passed.[822] Of these post-tariff life prisoners, 781 were detained less than or equal to 10 years, and 777 detained greater than 10 years to less than or equal to 20 years after their tariff expiry date passed. More worrying is that 48 life prisoners were serving more than 20 years even after completing their tariff. Undoubtably, these long post-tariff detentions raise serious human rights problems as well as questions about the methodology of the Parole Board's risk assessment.[823]

In the current system of risk assessment, life prisoners are required to demonstrate that their risk is reduced to an acceptable level in order for them be released into the community.[824] In order to satisfy the Parole Board, life prisoners should provide evidence that they have completed courses designed to address their offending behaviours, and that they have progressed through the prison system to become eventually ready for release.[825] However, the fact that the burden of proof is incumbent on life prisoners appears not to comply with their right to liberty under Art 5(4) of the European Convention on Human

[819] [2008] EWCA Civ 29.
[820] ibid, para 53.
[821] Forde (2014:60).
[822] Ministry of Justice (2021: Table A1.14).
[823] Padfield (2015:25).
[824] s.28(6) of the 1997 CSA.
[825] Martin (2018).

Rights (ECHR).[826] This is because the necessity of post-tariff detention for public protection should be demonstrated by the State, instead of life prisoners being required to prove that it is unnecessary.[827]

Life prisoners are released only when their risk of reoffending is deemed low enough to supervise them in the community. Once released, life prisoners are supervised by probation authorities.[828] Upon their release from prison, life prisoners are generally moved into Approved Premises (APs), which are residential units in the community that provide them with more supervision and support, where necessary.[829] They are required to stay in an AP for a period of three to six months, depending on their individual circumstances and the level of risk posed by them. Life prisoners' rehabilitation and reintegration are further observed in APs, before they are allowed to finally live in the community.

With their release from prison, life prisoners are bound by a 'life licence' which lasts until the rest of their life.[830] A standard life licence contains the following seven conditions:

1. to place himself or herself under the supervision of whichever supervising officer is nominated for this purpose from time to time,
2. to report to the supervising officer so nominated, and to keep in touch with that officer in accordance with that officer's instructions,
3. to receive visits from that officer where the licence holder is living,
4. to reside only where approved by his or her supervising officer,
5. to undertake work, including voluntary work, only where approved by his or her supervising officer,
6. not to travel outside the UK without the prior permission of his or her supervising officer,
7. to be well-behaved and not to do anything which could undermine the purposes of supervision on licence which are to protect the public, by ensuring that their safety would not be placed at risk, and to secure his or her successful reintegration into the community.[831]

In addition to these seven conditions, a life licence may also include other condition(s) regarded as necessary by the authorities, such as a restriction around

[826] Padfield (2015:25), Padfield (2016b:51); Padfield (2018a:25).
[827] ibid.
[828] Appleton (2010:73).
[829] HM Prison & Probation Service (2019: para 16.5).
[830] HM Prison Service (2012: para 13.2).
[831] ibid.

contacting named individuals (victims).[832] Life prisoners' non-compliance with the conditions specified in their licence may result in them being recalled to prison.[833] Reasons for recall are not, however, only restricted to non-compliance with the licence conditions, but also include 'other factors' that give 'reasonable cause for considering the lifer to be a risk to the public'.[834] As of 31 March 2020, there were 599 life prisoners recalled to prison.[835] It must be noted that the continued detention of all life prisoners recalled to prison are automatically considered by the Parole Board by way of an oral hearing.[836] Under the 1997 CSA, the Parole Board decides whether life prisoners who had been recalled to prison can be re-released.[837]

8.2.2. Turkey

As in E&W, in Turkey life prisoners can be released in two different ways. First is conditional release (*koşullu salıverilme*). The other is Presidential pardon on humanitarian grounds. Conditional release is available to life prisoners with a minimum non-parole term. Thus, both (normal) life prisoners and aggravated life prisoners can apply for conditional release after serving their minimum terms. However, some life prisoners are excluded from conditional release. Therefore, they are effectively serving life imprisonment without the possibility parole (LWOP) sentences. The only release possibility for LWOP sentenced prisoners is Presidential pardon on humanitarian grounds. In this section, we examine the conditional release mechanism, while the release possibility through Presidential pardon will be discussed in section 8.3.2 below.

As in E&W, in Turkey life prisoners are required to serve their minimum non-parole terms prior to being considered for conditional release. As noted in Chapter 6.4.2, in Turkey non-parole terms for each specific imprisonment

[832] HM Prison & Probation Service (2019: para 16.4).
[833] s.32(1) of the Crime (Sentences) Act 1997.
[834] HM Prison Service (2002: para 14.14). According to s. 32(1) of the 1997 CSA, the Secretary of State can revoke a licence at any time on basis of a recommendation of the Parole Board.
[835] Ministry of Justice (2020c: Table 1.9a).
[836] Parole Board for England and Wales (2018:43).
[837] ibid, 42.

sentence are specified by law. Thus, unlike in E&W, in Turkey judges have no discretion in the determination of minimum non-parole terms to be served by life prisoners. Art 107 and Art 108 of LESSM regulate conditional release from life imprisonment.[838] In the determination of minimum non-parole terms, three main categorisations can be made:

- minimum non-parole terms for those who are convicted of offences *unrelated to* a criminal organisation,
- minimum non-parole terms for those who are convicted of offences *related to* a criminal organisation, and
- minimum non-parole terms for recidivist offenders.

According to Art 107(2) of LESSM, aggravated life prisoners convicted of offences *unrelated to* a criminal organisation may be entitled to conditional release after serving 30 years, while (normal) life prisoners in the same category may be entitled to conditional release after serving 24 years in prison. However, the minimum non-parole periods are increased for those who are sentenced to more than one aggravated life sentence (ALS) or life sentence (LS) or a combination of an aggravated life sentence, life sentence and a fixed-term imprisonment sentence (See: Table 8.4 below).

Non-parole terms are also increased in the second category, which regulates minimum non-parole terms for convictions of offences *related to* a criminal organisation. Art 107(4) of LESSM provides that in the case of being convicted of an offence for establishing or leading a criminal organisation, in order to commit offences or being convicted of offences committed as part of the activities of a criminal organisation, non-parole terms are 36 years for aggravated life prisoners and 30 years for (normal) life prisoners. These non-parole terms are also further increased for those who are sentenced to more than one aggravated life sentence (ALS) or life sentence (LS) or a combination of an aggravated life sentence, life sentence and a fixed-term imprisonment sentence (See: Table 8.5 below).

[838] See for an analysis of conditional release in Turkey: Gür (2019); Akkaş (2008).

Table 8. 4: Non-parole Terms of ALS and LS for Offences *Unrelated to* A Criminal Organisation

Sentences	one ALS	one LS	more than one ALS	one ALS + one LS	more than one LS	one ALS + a fixed-term sentence	one LS + a fixed-term sentence
Non-parole terms (years)	30	24	36	36	30	(max) 36	(max) 30

Table 8. 5: Non-parole Terms of ALS and LS for Offences *Related to* A Criminal Organisation

Sentences	one ALS	one LS	more than one ALS	one ALS + one LS	more than one LS	one ALS + a fixed-term sentence	one LS + a fixed-term sentence
Non-parole terms (years)	36	30	40	40	34	(max) 40	(max) 34

As for the last category, Art 108(1) of LESSM provides that minimum non-parole terms for recidivist offenders are 39 years for aggravated life prisoners and 33 years for (normal) life prisoners. This provision does not provide minimum non-parole terms for the combination scenarios of aggravated life sentences, life sentences and a fixed-term sentence. Therefore, it can be interpreted that the minimum non-parole terms stipulated for the combination scenarios in Table 8.4 and Table 8.5 above can also be applied for recidivist offenders, where appropriate.

As these explanations demonstrate, a life prisoner in Turkey can apply for conditional release after serving 24 years in prison in the best-case scenario. The highest minimum non-parole term is 40 years. In this respect, the legislative non-parole terms appear to contradict the ECtHR's recommendation on the timeframe for the review of life imprisonment. As we have seen in Chapter 5, the ECtHR has consistently recommended that the review of a life sentence should be conducted no later than 25 years following its imposition, with further periodic reviews thereafter. As Table 8.4 and Table 8.5 above show, most minimum non-parole terms for life sentences are much longer than the ECtHR's recommendation of 25 years' timeframe. Further, the minimum non-parole terms established in Turkish law are absolute, and thus irreducible. This means that life prisoners have to complete their legislative minimum non-parole terms before being considered for conditional release. This raises an important problem in terms of the timely review of life sentences, as some life prisoners have to wait too many years, sometimes up to 40 years, to be considered for release. It must be noted that the ECtHR has held in *T.P. and A.T. v. Hungary* that a 40-year timeframe established in the Hungarian legislation was 'a period significantly longer than the maximum recommended time frame'.[839]

As in E&W, in Turkey the completion of minimum non-parole terms does not in itself result in an automatic release of life prisoners. Rather, after serving their minimum non-parole terms, life prisoners are assessed for conditional release by courts.[840] In conditional release assessments, courts basically consider

[839] *T.P. and A.T. v. Hungary* [2016] ECHR 807, para 45.
[840] LESSM, Art 107(11).

two issues: one is whether an individual life prisoner has demonstrated a good behaviour (*iyi hal*) while being incarcerated, and the other is whether he/she regrets the offence committed. In the determination of good behaviour, courts assess whether life prisoners have complied with the prison rules on the security and order, used their rights in good faith, fulfilled their obligations, completed rehabilitative programmes and are ready for the reintegration into the community.[841] This assessment is carried out on the basis of documents and reports provided by prison authorities.

Unlike in E&W, in Turkey there are no data available regarding the average length of non-parole terms imposed on life prisoners and the mean time served by them in prison. Thus, we are unable to assess for how many years life prisoners are sentenced on average, and how long they are actually serving in prison. A further limitation is the lack of up-to-date data in terms of the number of life prisoners released from prison in Turkey. Table 8.6 below shows the number of life prisoners released from prison between 1993 and 2008. Unfortunately, this figure has not been publicly available since 2008. Thus, we are unable to show how many life prisoners are released from prison each year since 2008.

[841] 'Regulation on the Execution of Sentences and Security Measures', (Official Gazette Date and No: 6.4.2006 – 26131), Art 133.

Table 8. 6: Number of Life Prisoners Released from Prison in Turkey, 1993-2008[842]

Year of release	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of life prisoners released	99	114	135	152	115	116	70	58	217	830	242	241	82	48	9	3

[842] Turkish Statistical Institute (2008). It must be noted that this data does not include the number of aggravated life prisoners released, simply because aggravated life imprisonment was formally introduced into the Turkish criminal and penal system in 2004. It is also important to note that the high number of life prisoners released in 2002 can be attributable to the general amnesty laws introduced in the early 2000s.

As in E&W, once released from prison, life prisoners in Turkey are also supervised by probation authorities in the community.[843] Unlike in E&W, however, in Turkey life prisoners do not have to be given a standard life licence. Rather, courts decide whether it is necessary to impose any restrictions on a life prisoner released on conditional release.[844] Further, unlike in E&W, in Turkey life licence does not last until the rest of a life prisoner's life. Rather, life prisoners are subject to life licence for the same period of time that they had spent in prison.[845] For example, if a life prisoner is released on conditional release after serving 24 years in prison, he/she will be on life licence for a period of 24 years. During this licence period, life prisoners may be recalled to prison if they do not comply with the licence conditions, where specified by courts, or if they commit an intentional offence requiring an imprisonment sentence.[846] It is important to note that in Turkey life prisoners' risk of reoffending does not in itself result in them being recalled to prison. In fact, life prisoners are not supposed to be recalled to prison also where they commit an *unintentional* offence or an offence *not* requiring an imprisonment sentence. This is an important difference compared to E&W where life prisoners may be recalled to prison solely because of their risk of reoffending. Unfortunately, we are unable to assess how many life prisoners are recalled to prison in Turkey and for what reasons, as there are no data available in that regard.

8.3. Problem of Irreducible Life Sentences

As we have seen in Chapter 5, the idea that 'life means life' has been rejected at the European supranational level. For example, the CPT states that 'to incarcerate a person for life without any real prospect of release is, in its view, inhuman'.[847] Similarly, the ECtHR has consistently held that life prisoners must be provided with the right to a sentence review and the prospect for release.[848]

[843] Denetimli Serbestlik Daire Başkanlığı (2020).
[844] LESSM, Art 107(10).
[845] LESSM, Art 107(6).
[846] LESSM, Art 107(12).
[847] CPT (2016a: para 73).
[848] See, for example: *Kafkaris v. Cyprus* [2008] ECHR 143; *Vinter and Others v. the United Kingdom* [2013] ECHR 786; *Laszlo Magyar v. Hungary* [2014] ECHR 491; *Trabelsi v. Belgium* [2014] ECHR 893; *Öcalan v. Turkey (No. 2)* [2014] ECHR 286;

On this basis, the rest of this chapter discusses whether whole life prisoners in E&W and LWOP sentenced prisoners in Turkey can be considered to have a real prospect for release in the light of the ECtHR's jurisprudence on irreducible life sentences.

8.3.1. England and Wales

As examined in Chapter 6.4.1, in English law whole life sentences can be imposed on offenders convicted of offences (murder and other serious offences) of exceptionally high severity.[849] The meaning of a whole life sentence is that the prisoner serving it is not eligible for conditional release since no minimum terms were set.[850] The only release possibility for whole life prisoners is provided by s.30 of the 1997 CSA. According to this provision, the Secretary of State may order the release of a life prisoner on compassionate grounds. The policy for the release on compassionate grounds is set out in Chapter 12 of the *Indeterminate Sentence Manual*. Paragraph 12.2.1 of this manual provides that an indeterminate sentence prisoner can only be released on compassionate grounds if he/she 'is suffering from a terminal illness and death is likely to occur very shortly'. It follows therefore from the criteria set out in the *Indeterminate Sentence Manual* that release on compassionate grounds is highly restrictive. In this respect, the legality of whole life sentences has been challenged both domestically and internationally on many occasions.

8.3.1.1. Early Judicial View on Whole Life Sentences

The legality of whole life sentences was first raised in *R v. Secretary of State for the Home Department, ex p. Hindley.*[851] In this case, the House of Lords held that whole life prisoners were not entirely stripped of the possibility of a review of their sentence since a policy statement made by the Secretary of State of 10 November 1997 announced that the review of any whole life sentence was

Lopez Elorza v. Spain [2017] ECHR 1135; *Murray v. the Netherlands* [2016] ECHR 408; *Hutchinson v. the United Kingdom* [2017] ECHR 65; *Matiošaitis and Others v. Lithuania* [2017] ECHR 471; Petukhov v. Ukraine [2019] ECHR 206.

[849] Kandelia (2011:70).

[850] van Zyl Smit, Weatherby, & Creighton (2014:64).

[851] [2000] 2 All ER 385.

conducted from time to time and at the 25 year point. Thus, Hindley's appeal was dismissed. After unsuccessful appeals in domestic courts,[852] Hindley wanted to take her case to the ECtHR, but she died in 2002 while she was in prison.

Following the ECtHR's decision in *Kafkaris v. Cyprus*, the issue of whole life sentences was once again domestically considered by English courts in *R v. Bieber (Aka Coleman)*.[853] In this case, the Court of Appeal held that whole life sentences did not contradict Art 3 ECHR.[854] It held that an Art 3 issue regarding whole life sentences would not arise at the imposition stage of the sentence, rather at a later stage where the prisoner's detention constitutes degrading or inhuman treatment on the basis of the time served and progress made by him/her.[855] The Court of Appeal held that:

> At present it is the practice of the Secretary of State to use this power sparingly, in circumstances where, for instance, a prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated. If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner.[856]

In summary, the Court of Appeal held that the Secretary of State's power to order the release of whole life prisoners under s.30 of the 1997 CSA was sufficient to conclude that whole life sentences were not irreducible and, therefore, not in violation of Art 3 ECHR. The *Bieber* judgment was then confirmed in several subsequent domestic cases on whole life sentences.[857] Although domestic courts were reluctant to find whole life sentences incompatible with Art 3 ECHR, the issue was taken to the ECtHR in the case of *Vinter*.

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[852] Pettigrew (2016).
[853] [2008] EWCA Crim 1601.
[854] ibid, para 45.
[855] ibid, para 49.
[856] ibid, para 48.
[857] See, for example: *R (On the Application of Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72; *R v. Bamber* [2009] EWCA Crim 962; *R v. Oakes and Others* [2012] EWCA Crim 2435.

8.3.1.2. ***Vinter and Others v. the United Kingdom***

In *Vinter,* the Grand Chamber (GC) of the ECtHR held that whole life sentences in E&W cannot be regarded as 'reducible' at least for three reasons. Firstly, there was a lack of clarity regarding the release mechanism available to whole life prisoners.[858] On the one hand, the Secretary of State had the power to release a whole life prisoner under s.30 of the 1997 CSA, and was legally bound to act in accordance with the Convention in exercising that power.[859] On the other hand, the Secretary of State had not altered 'the terms of his explicitly stated and restrictive policy' on release on compassionate grounds set out in the *Indeterminate Sentence Manual*.[860] Thus, the ECtHR held that it was 'unclear whether the Secretary of State would apply his existing, restrictive policy … or would go beyond the apparently exhaustive terms of [the *Indeterminate Sentence Manual*] by applying the Article 3 test set out in *Bieber*'.[861]

Secondly, the ECtHR was of the view that the review of whole life sentences by the Secretary of State did not include an assessment of penological grounds for continued incarceration of whole life prisoners.[862] The release policy on compassionate grounds was considered 'highly restrictive',[863] since it only allowed the release of a prisoner in certain exhaustively listed (not merely illustrative) circumstances, where he/she was terminally ill or physically incapacitated. Therefore, the ECtHR found that whole life prisoners were prevented from 'seek[ing] to demonstrate that their continued imprisonment was no longer justified on legitimate penological grounds'.[864]

Thirdly, the ECtHR was concerned with the absence of a timeframe for the review of whole life sentences. Prior to 2003, whole life sentences were reviewed by the Secretary of State after 25 years of imposition.[865] However, the

[858] *Vinter*, para 125.
[859] ibid, para 125, as citing the Court of Appeal's decision of *Bieber*.
[860] ibid, para 126.
[861] ibid, para 129.
[862] ibid, para 128.
[863] ibid, para 127.
[864] ibid, para 129.
[865] Bohlander (2009:37).

Criminal Justice Act 2003 omitted to specify a timeframe for the review of whole life sentences.[866] The ECtHR was not convinced of the need to omit the 25 year timeframe for the review in order to remove the executive entirely from the decision-making process concerning life sentences so as to comply with the ECtHR's ruling in *Stafford v. the United Kingdom*.[867] The Court noted that 'the need for independent judges to determine whether a whole life order may be imposed is quite separate from the need for such whole life orders to be reviewed at a later stage so as to ensure that they remain justified on legitimate penological grounds'.[868] Accordingly, the Court concluded that whole life sentences were irreducible, and thus, in violation of Art 3 ECHR.

8.3.1.3. Political Responses to *Vinter*

British politicians explicitly rejected the *Vinter* ruling, expressing their 'profound disagreement' with the ECtHR.[869] The ECtHR was accused of 'going beyond the scope of what was intended by the founders of the European Convention',[870] and threatened with the UK's withdrawal from it.[871] For example, the then Prime Minister, David Cameron, was described by a spokesman as being 'very, very, very, very disappointed. He profoundly disagrees with the court's ruling. He is a strong supporter of whole life tariffs'.[872] In direct response to the ECtHR, David Cameron himself stated that '[w]hat I believe is very clear. There are some people who commit such dreadful crimes that they should be sentenced to prison and life should mean life, and whatever the European Court has said we must put in place arrangements to make sure

[866] Foster (2015:150-51); Tan (2017:146).
[867] [2002] 35 EHRR 32. As discussed in Chapter 5.2 and Chapter 6.1.1.1, in *Stafford,* the ECtHR held that minimum non-parole periods must be fixed by an independent and impartial tribunal. This triggered the British government to reduce its control over the determination of minimum terms to be served by those convicted of murder by abolishing the Secretary of State's tariff setting power.
[868] *Vinter,* para 124.
[869] Watt & Travis (2013).
[870] Pettigrew (2017a:129). See for an analysis of the UK's general opposition to the ECtHR, described as 'British exceptionalism': Cowell (2019).
[871] Watt & Bowcott (2014).
[872] Watt & Travis (2013).

that should continue'.[873] Similarly, the then Justice Secretary, Chris Grayling, shared Cameron's disagreement with the ECtHR, and threatened to withdraw the UK from the Court by stating that:

> If we cannot reach agreement that our courts and our parliament will have the final say over these matters, then we will have to withdraw. We have a treaty right to withdraw, it is specifically provided for in the convention. We would exercise that right. There is always a first time for everything … We cannot go on with a situation where crucial decisions about how this country is run and how we protect our citizens are taken by the ECHR and not by our parliament and our own courts. We also have to be much clearer about when human rights laws should be used, and that rights have to be balanced with responsibilities … We can no longer tolerate this mission creep … What we have effectively got is a legal blank cheque, where the court can go where it chooses to go. We will put in place a provision that will say that the rulings of Strasbourg will not have legal effect in the UK without the consent of parliament. Effectively, what we are doing is turning Strasbourg into an advisory body.[874]

As a clear rejection of the ECtHR's ruling, Chris Grayling also sent a formal letter to the Council of Europe stating that 'inmates sentenced to whole-life terms in Britain would not obtain the right to a review', and that 'the British Supreme Court should be the final arbiter of British law, not the ECHR'.[875]

8.3.1.4. Judicial Response to *Vinter*: *R v. McLoughlin*

One year after the *Vinter* judgment, the Court of Appeal once again dealt with the issue of the compatibility of whole life sentences with Art 3 ECHR in *R v. McLoughlin*.[876] The English judicial response was far from accepting of the ECtHR's approach on whole life sentences. Although the Court of Appeal for England and Wales recognised the principle that the rights to human dignity and rehabilitation of whole life prisoners require them to be provided with a realistic prospect for release, it disagreed with the ECtHR's finding in *Vinter* that whole life prisoners did not have an effective release opportunity in English law.[877] The Court of Appeal explicitly rejected the ECtHR's opinion that the release

[873] Hope (2014).
[874] Watt & Bowcott (2014).
[875] Kern (2014).
[876] [2014] EWCA Crim 188.
[877] Dyer (2016:581).

mechanism available to whole life prisoners was not sufficiently clear.[878] It disagreed with the ECtHR's view that there was a need to alter the restricted policy set out in the *Indeterminate Sentence Manual*, since it considered that such a revision was of no consequence.[879] This is basically because, according to the Court of Appeal, the Secretary of State is not restricted to the process and criteria set out in the *Indeterminate Sentence Manual* for considering the release of a whole life prisoner.[880] It indicated that the ECtHR in *Vinter* misunderstood English law by holding that it was unclear and restrictive, since release on compassionate grounds is not limited to the criteria spelled out in the *Indeterminate Sentence Manual* but includes cases where there are 'exceptional circumstances'.[881] Furthermore, the Court of Appeal referred to *Bieber* to draw attention to the fact that the Secretary of State is bound to use his release power under s.30 of the 1997 CSA in a manner compatible with Art 3 ECHR.[882] Thus, the Court of Appeal held that there was no need to change domestic law and policy on the release mechanism for whole life sentences since prisoners subject to this sentence are provided with 'hope' or the 'possibility' of release,[883] which renders the sentence reducible under Art 3 ECHR.

8.3.1.5. ***Hutchinson v. the United Kingdom*: A Strasbourg Retreat?**

In 2017, whole life sentences in English law were once again the focus of the ECtHR in *Hutchinson v. the United Kingdom.*[884] In this case, the GC of the ECtHR considered that the *McLoughlin* judgment had 'brought clarity as to the content of the relevant domestic law, resolving the discrepancy identified in the *Vinter* judgment'.[885] It held that

> the *McLoughlin* decision has dispelled the lack of clarity identified in *Vinter* arising out of the discrepancy within the domestic system between the applicable law and the published official policy. In addition, the Court of

[878] Foster (2014:38); Bild (2015:3); Hart (2015:206).
[879] *McLoughlin*, para 30.
[880] Rogan (2015:32).
[881] *McLoughlin*, para 31.
[882] ibid, para 33.
[883] ibid, para 35.
[884] [2017] ECHR 65.
[885] ibid, para 40.

> Appeal has brought clarification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention can no longer be justified on legitimate penological grounds. In this way, the domestic system, based on statute (the 1997 Act and the Human Rights Act), case-law (of the domestic courts and this Court) and published official policy (the Lifer Manual) no longer displays the contrast that the Court identified in *Vinter*.[886]

The ECtHR found whole life sentences 'irreducible' in *Vinter* despite the Court of Appeal's ruling in *Bieber*, whereas it declared them 'reducible' in *Hutchinson* thanks to *McLoughlin*. It is crucial, therefore, to ask why and how the ECtHR was satisfied by *McLoughlin* and yet dissatisfied by *Bieber*. Put differently, did the Court of Appeal in *McLoughlin* say anything different or more convincing than what it had said in *Bieber*?

The one difference between *Bieber* and *McLoughlin* relates to the timing of when an Art 3 issue would arise. The *Bieber* judgment suggested that an Art 3 issue would not arise at the imposition stage of whole life sentences, rather at a later stage when the sentence may be considered inhuman,[887] whereas the *McLoughlin* judgment accepted that an effective and meaningful release mechanism must be in place when the sentence was imposed.[888] It must be noted that this difference between the judgments was of no real consequence, since the Court of Appeal held in both cases that whole life sentences were in fact reducible under English law.

It appears that the reasoning of the Court of Appeal both in *Bieber* and *McLoughlin* in terms of determining whole life sentences as reducible was the same. In *Bieber,* the Court of Appeal held that the release possibilities for whole life prisoners include the consideration of 'all the material circumstances, including the time that he [a whole life prisoner] has served and the progress made in prison'.[889] This was the main argument reiterated by the Court of Appeal in *McLoughlin* where it referred to 'exceptional circumstances' which must be

[886] ibid, para 70.
[887] *Bieber*, para 49.
[888] *McLoughlin,* para 22.
[889] *Bieber*, para 49.

taken into consideration by the Secretary of State in order to review whole life sentences to assess whether the continued detention of a prisoner remains justifiable on penological grounds.[890] It follows that the Court of Appeal in both *Bieber* and *McLoughlin* held that the release of whole life prisoners was not confined to the humanitarian grounds set out in the *Indeterminate Sentence Manual*. Furthermore, both *Bieber* and *McLoughlin* suggested that the Secretary of State was bound to use his power under s.30 of the 1997 CSA in compliance with Art 3 ECHR.[891] In this respect, there seems to be no difference in the legal reasoning of deeming whole life sentences as reducible in both *Bieber* and *McLoughlin.*

In *Hutchinson,* the ECtHR held that 'the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention',[892] since 'the Court of Appeal [in *McLoughlin*] drew the necessary conclusions from the *Vinter and Others* judgment'.[893] Contrary to the ECtHR's assertation, however, it appears that the Court of Appeal in *McLoughlin* made considerable effort to demonstrate how the ECtHR was wrong in *Vinter* by elaborating its position and arguments put forward in *Bieber* rather than addressing the issues raised in *Vinter*.[894] Given that the Court of Appeal put forward the same arguments in both *Bieber* and *McLoughlin* regarding the effect of the policy spelt out in the *Indeterminate Sentence Manual* and that there were no legal changes in domestic law from *Vinter* to *Hutchinson,* the ECtHR's approach towards domestic law was an indication of a more lenient application of the relevant principles in *Hutchinson*.[895]

Turning back to the question of why the ECtHR was satisfied by *McLoughlin* where it was not satisfied by *Bieber* even though the both cases have in fact held the same thing, the Court was not, perhaps, satisfied at all, but,

[890] *McLoughlin,* para 31. See also: Foster (2014:38).
[891] *Bieber,* para 48; *McLoughlin,* para 29.
[892] *Hutchinson,* para 72.
[893] ibid, para 71.
[894] *McLoughlin,* paras 29-36. See also: Bild (2015); Hart (2015).
[895] Celiksoy (2020); Graham (2019); Pettigrew (2018); Graham (2018).

rather, felt compelled to accept the English path due to the strong political threats detailed above.[896]

8.3.2. Turkey

In E&W, sentencing courts have the discretion to impose whole life sentences on offenders convicted of serious offences such as murder. Unlike in E&W, in Turkey LWOP sentences are determined by law.[897] In 2014, the Ministry of Justice of the Republic of Turkey verified that there were 126 LWOP sentenced prisoners in Turkey.[898] Unfortunately, we do not know the current number of LWOP sentenced prisoners, due to the lack of statistics. However, we can anticipate that this number has increased in recent years, since Turkish courts continue to impose LWOP sentences on offenders convicted of serious offences, such as the crime against the security of the State.[899]

As noted above, Presidential pardon is the only release mechanism available to LWOP sentenced prisoners in Turkey. Art 104 of Turkish Constitution grants the President of the Republic of Turkey the power to order immediate or deferred release of prisoners, including life prisoners, in the event of illness or old age.[900] In recent years, LWOP sentenced prisoners have challenged their sentences before the ECtHR, arguing that their sentences are irreducible under Art 3

[896] See, for more detailed accounts of Britain's political responses to *Vinter*: Pettigrew (2017b); Pettigrew (2015a); Pettigrew (2015b).

[897] For example, Art 107(16) of LESSM provides that: 'The provisions of conditional release shall not apply to offenders who are sentenced to aggravated life imprisonment for committing, as part of the activities of an illegal organisation, one of the crimes included under Section Four headed "Crimes Against the Security of the State", Section Five headed "Crimes Against the Constitutional Order and the Functioning of this Order", and Section Six headed "Crimes Against National Defence", in Part Four, Chapter Two of the Turkish Penal Code (Law No. 5237)'. See also: Celiksoy (2019:324-28); Yerdelen (2013:19-26); Karakaş-Doğan (2010a:155-73); Karakaş-Doğan (2010b).

[898] Lüdtke & Aydınoğlu (2016:9).

[899] Turkey's official news agency, Anadolu Agency (AA), has reported at regular intervals that prosecutors seek 'aggravated life sentences' for terrorist offenders accused of serious terror offences, and that a number of the accused persons have been sentenced to this penalty by courts. See, for example: Acil, Kilic, & Beyaz (2018); Aytac & Ugurlu (2017); Chohan (2017).

[900] Can (2016); Atila (2010).

ECHR.[901] The ECtHR has consistently held that 'release on humanitarian grounds does not correspond to the concept of prospect of release on legitimate penological grounds'.[902] Specifically, in *Öcalan v. Turkey*, the Court noted that 'legislation in Turkey clearly prohibits the applicant, in his capacity as a person sentenced to aggravated life imprisonment for a crime against the security of the State, from applying, at any time while serving his sentence, for release on legitimate penological grounds'.[903] Accordingly, it has held in many occasions that LWOP sentences in Turkey are 'irreducible', and thus in violation of Art 3 ECHR.[904] We will now examine what responses, if any, have been given to the ECtHR by Turkish legislature and judiciary.

8.3.2.1. The Lack of Legislative Response to the ECtHR

In Turkey, neither the Government nor other political parties in parliament have taken any serious action to give a legislative response to the issue of irreducible life sentences. However, a private member's bill was proposed in August 2018 by Meral Danış Bektaş, an MP of the Peoples' Democratic Party (*Halkların Demokratik Partisi* – HDP), to amend the conditional release provisions.[905] This bill includes two important proposals: one is to put an end to the exclusion of certain categories of life prisoners from the scope of conditional release; the other is to reduce the minimum non-parole terms. The highest minimum non-parole term proposed in the bill is 26 years. Thus, if this bill were to be taken seriously and become law, it would resolve the problems caused by irreducible life sentences in Turkey, since all life prisoners would have the possibility of conditional release and the highest minimum non-parole term would be compatible with the ECtHR's jurisprudence.

Currently, this bill has been waiting to be negotiated before the Justice Commission (*Adalet Komisyonu*) in parliament since October 2018. However, it

[901] Celiksoy (2019:332-34); Celiksoy (2018:245-47); Yetkin (2019:243-48); Aydınoğlu (2016:73-76); Erden Tütüncü (2016); Dikmen (2015); Öncü (2014); Taşkın (2014).
[902] *Öcalan v. Turkey (No. 2)* [2014] ECHR 286, para 203.
[903] ibid, para 202.
[904] *Gurban v. Turkey* [2015] ECHR 1092; *Kaytan v. Turkey* [2015] ECHR 788; *Boltan v. Turkey* [2019] ECHR 131.
[905] Bektaş (2018).

is highly unlikely that it will be passed by parliament, given the composition of parliament. The majority in parliament consists of the Justice and Development Party (*Adalet ve Kalkınma Partisi*) and the Nationalist Movement Party (*Milliyetçi Hareket Partisi*), with 340 seats out of 600.[906] Both parties have, on occasion, called for the return of capital punishment. Moreover, following the military coup attempt on 15 July 2016, after which most persons involved in the coup have been tried for offences requiring irreducible LWOP sentences,[907] a number of political figures from both parties have made statements regarding the necessity of the death penalty to punish terrorist offenders. For example, Recep Tayyip Erdoğan, the President of the Republic of Turkey and the Chairman of the Justice and Development Party, has stated that he would approve the law reintroducing the death penalty, if it was backed by parliament.[908] Similarly, Devlet Bahçeli, the Chairman of the Nationalist Movement Party, stated in March 2019, that if a bill regarding bringing the death penalty back were introduced in parliament, his party would support it.[909]

These statements reveal that even irreducible LWOP sentences are considered an insufficient punishment for terrorist offenders convicted of serious crimes against the State. In an interview, Erdoğan said that '[t]he people now have the idea, after so many terrorist incidents, that these terrorists should be killed, that's where they are, they don't see any other outcome to it. Why should I keep them and feed them in prisons, for years to come? That's what the people say'.[910] In fact, a survey conducted shortly after the attempted military coup attempt of 2016 revealed that more than 90 per cent of people in Turkey were of the opinion that the death penalty was necessary to punish those who commit serious terrorist related offences.[911] Although there have been no genuine legislative attempts to reintroduce capital punishment,[912] it is unlikely, in the

[906] Grand National Assembly of Turkey (2020).
[907] Anadolu Agency (2018).
[908] BBC News (2016).
[909] HABERTÜRK (2019).
[910] Grinberg & McKenzie (2016).
[911] T24 (2016).
[912] It must be noted that despite all the rhetoric about the death penalty, it is highly unlikely to reintroduce it in Turkish criminal and penal law. This is because the trigger for the abolition of the death penalty in Turkey was Turkey's long-standing

current climate, that the legislature will undertake the needed reforms to comply with the ECtHR's jurisprudence on irreducible life sentences.[913]

8.3.2.2. Deliberate Ignorance of the Turkish Constitutional Court

In the absence of a legislative response to irreducible life sentences, the role of the Turkish Constitutional Court in the protection of life prisoners' human rights becomes of greater importance. However, surprisingly, the Constitutional Court appears to have deliberately avoided considering the irreducibility of LWOP sentences in Turkey. The Constitutional Court has not ruled against the jurisprudence of the ECtHR on irreducible life sentences, nor has it followed it. What the Constitutional Court has done so far, is simply to adopt a *strategy* of ignoring the ECtHR's rulings on irreducible LWOP sentences against Turkey.

The first application concerning the issue of irreducible LWOP sentences in Turkey was brought before the Constitutional Court in 2015 by way of an individual petition.[914] In this case, *Abdülselam Tutal and Others*,[915] the applicants were convicted of crimes against the unity and integrity of the State and sentenced to aggravated life sentence.[916] Since their life sentences were excluded from the scope of conditional release under Art 107(16) of LESSM, and further, since LWOP sentences in Turkey were declared incompatible with Art 3 ECHR by the ECtHR, the applicants applied to the Constitutional Court, arguing that their life sentences amounted to an inhuman and degrading

'westernisation policy'. In the context of harmonisation with the EU, as we have seen in Chapter 6.1.2.1, Turkey made a series of amendments in the constitution and legislation to achieve a gradual abolition of the death penalty in the early 2000s. This was followed by the ratification of Protocol No.6 to the ECHR, concerning the abolition of the death penalty in 2003.

[913] In 2019, Ministry of Justice of the Republic of Turkey (2019) has announced a *Judicial Reform Strategy* which 'aim[s] to strengthen the rule of law, protect and promote rights and freedoms and form an effective and efficient criminal system'. However, no legislative reforms with regard to the issue of irreducible life sentences were promised in this reform strategy.

[914] The system of individual petitions to the Constitutional Court was introduced into the Turkish legal system in 2010 and the Constitutional Court began to accept applications on 23 September 2012. See: Yıldırım & Gülener (2016).

[915] Turkish Constitutional Court's decision of *Abdülselam Tutal and Others*, App. No: 2013/2319, 8 April 2015, para 36.

[916] ibid, para 21.

punishment under Art 3 ECHR.[917] They further argued that their fair trial rights were violated during both the investigation and trial stages, as their convictions were based on statements made by them under coercion and in the absence of a lawyer, and they were prevented from effectively benefiting from legal assistance at their trial.[918]

It is interesting that the Constitutional Court in no way considered the applicant's complaints about the irreducibility of their life sentences. This is because it found a violation of the applicants' fair trial rights under Art 36(1) of the Constitution and ordered a re-trial of the case. It stated that there was no need to consider the issue of irreducibility of the applicants' life sentences as they would be retried.[919] The Constitutional Court relied on the possibility that the applicants might not be sentenced to this penalty after their retrial. In doing so, it avoided having to deal with whether or not LWOP sentences in Turkey contradicts Art 3 ECHR.

This approach of the Constitutional Court can be criticised in many respects.[920] First and foremost is that the Constitutional Court seems to have misunderstood the ECtHR's standards on irreducible life sentences. Although the Constitutional Court ordered the retrial, there is always the possibility that the applicants may receive the same sentence, namely irreducible LWOP sentences. The ECtHR held that the *imposition* of an irreducible life sentence causes a violation under Art 3 ECHR:

> [W]here domestic law does not provide any mechanism or possibility for review of a whole life sentence, *the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence, and not at a later stage of incarceration.*[921]

This point is much clearer in extradition cases. In *Trabelsi v. Belgium*, for instance, the Belgian Government argued that as the applicant in that case was extradited for the sole purpose of prosecution and was not yet convicted, it was

[917] ibid, para 23.
[918] ibid, para 36.
[919] ibid, para 77.
[920] Celiksoy (2018:247-250).
[921] *Vinter*, para 122 (emphasis added).

impossible to determine whether a point at which his incarceration would no longer serve any penological purpose would ever come.[922] Therefore, it claimed that taking the date of imposition of the life sentence as the starting time for determining conformity with Art 3 ECHR was irrelevant in the extradition case, where the applicant was not yet convicted.[923] However, the ECtHR rejected this argument since it considered that this would in effect obviate the preventive aim of Art 3 ECHR.[924] What is of importance in *Trabelsi* is that the ECtHR held that the protection of Art 3 ECHR encompasses an even earlier stage of a conviction requiring the imposition of a life sentence. This case demonstrated that Art 3 may be invoked against the risk (or possibility) of being sentenced to an irreducible life sentence.

If the Turkish Constitutional Court's judgment in *Abdülselam Tutal and Others* is rethought in the light of the ECtHR's rulings in *Vinter* and *Trabelsi,* its failure to ensure the human rights protection of prisoners serving LWOP sentences, becomes manifest. The applicants in *Abdülselam Tutal and Others* were charged with offences requiring LWOP sentences. Even though the Constitutional Court ordered a retrial in this case, the possibility of being sentenced to LWOP sentences, which have been found 'irreducible' (and hence inhuman and degrading) under Art 3 ECHR on four occasions by the ECtHR, continues to exist in the Turkish legal system. Under these circumstances, the preventive aim of Art 3 ECHR, as pointed out by the ECtHR in *Vinter* and *Trabelsi,* should have been taken into account by the Constitutional Court in order to ensure that the applicants would not be sentenced to an inhuman and degrading punishment in any circumstances.[925] Thus, the Constitutional Court should have been confronted with the jurisprudence of the ECtHR and dealt with the issue of irreducibility of LWOP sentences in Turkey. This point was stressed by the only dissenting Judge, Serruh Kaleli, in *Abdülselam Tutal and Others*:[926]

[922] [2014] ECHR 893, para 129.
[923] ibid.
[924] ibid, para 130.
[925] Celiksoy (2018:249).
[926] Turkish Constitutional Court's decision of *Abdülselam Tutal and Others,* Dissenting Opinion of Judge Serruh Kaleli.

> Neither the admissibility nor the merits of the complaint [of the irreducibility of LWOP sentences] were considered in the instant case. However, the existence of a violation found by the Court under another claim in the application [namely, the finding of the violation of the applicants' fair trial rights] should not have prevented the Court from considering a very important complaint [regarding the irreducibility of the applicants' life sentences], which may be a violation of the Human Rights Convention system and the fundamental human rights and freedoms whose essence is based on the respect for human dignity. Any legal consideration in this regard should not have been left to the possible consequences of the retrial [ordered by the Constitutional Court].

Judge Kaleli further explained what the Constitutional Court should have done in the case of *Abdülselam Tutal and Others*:

> Given the fact that the jurisprudence of the ECtHR on Art 3 violations [against Turkey] stands before us today, it is important to discuss the compatibility of the provisions eliminating the rights of conditional release with the Constitution and the Convention. The task of the legislature and courts (e.g. the Constitutional Court) is, therefore, to determine and prevent any violation in this regard. Thus, the Constitutional Court should not have refrained from examining the applicants' concrete claim of irreducibility of their life sentences as a result of the finding of another violation in the instant case.

The *Abdülselam Tutal and Others* case was not the only occasion where the Constitutional Court has deliberately avoided confronting the jurisprudence of the ECtHR on irreducible life sentences. It has continued to use the same *strategy* in other applications concerning the irreducibility of LWOP sentences.[927] The reason behind the Constitutional Court's strategy of deliberately ignoring the ECtHR's judgments against Turkey concerning irreducible LWOP sentences may be the result of political rhetoric about the punishment of terrorist offenders detailed in the previous section. The Constitutional Court may find it difficult to deal with the (un)constitutionality of irreducible LWOP sentences in an environment where the major political figures and the public consider the death penalty necessary to punish those who are convicted of serious terror offences.

[927] See, for example: Turkish Constitutional Court's decision of *Burhanettin Yalçın*, App. No: 2013/2578, 8 September 2015; Turkish Constitutional Court's decision of *Burak Çileli*, App. No: 2013/2541, 9 September 2015.

8.4. Conclusion

In Chapters 6 and 7, we have examined the imposition and implementation of life imprisonment in E&W and Turkey. Building on these two chapters, this chapter has explored the release from life imprisonment in the two legal system being compared, in the light of the European standards for release.

As we have seen in Chapter 5, the European human rights instruments and documents have consistently underlined that life prisoners should be provided with the right to a sentence review and the prospect for release. This means that life imprisonment should not be designed as a sentence for life. In this respect, in both E&W and Turkey life imprisonment does not necessarily mean life in prison for most life prisoners, as they will eventually become eligible to apply for conditional release. In fact, both countries employ a number of different means in order to prepare life prisoners for their eventual release into the community they will live upon their release from prison.

However, in both E&W and Turkey some life prisoners are required to serve very long sentences before being considered for conditional release. In E&W, for example, the statutory starting points allow sentencing courts to determine lengthy minimum terms such as 37 or 40 years in prison. In October 2019, the Ministry of Justice has verified that 880 life prisoners were serving a minimum term of more than 25 years, 291 serving a minimum term of more than 30 years and 264 serving more than 32 years.[928] Similarly, in Turkey minimum non-parole terms are also very high, sometimes up to 40 years.[929] Since minimum non-parole terms are 'irreducible' in both E&W and Turkey, some life prisoners have to serve significantly longer periods than the ECtHR's recommendation of the 25-year timeframe for the review of life sentences. Thus, both E&W and Turkey should reconsider minimum non-parole terms to be imposed on life

[928] Ministry of Justice (2019a). See also for a detailed statistical analysis of the minimum terms imposed on life prisoners and the average length of time spent by them in custody: Crewe, Hulley, & Wright (2020:2-5).
[929] LESSM, Articles 107 and 108.

prisoners with a view on reducing them to the extent that is compatible with the ECtHR's recommendation of the 25-year timeframe for the first review.

Conditional release can be considered an effective release mechanism in both E&W and Turkey. In E&W, Parole Board functions as a court in order to assess life prisoners' suitability for release. In Turkey, conditional release assessments are carried out by courts. In E&W, life prisoners' risk level is the main determinant for their release. In fact, the risk threshold is very high, as life prisoners continue to be detained even after serving their minimum terms unless they demonstrate that their risk of reoffending has decreased to an acceptable level. However, compared to E&W, life prisoners' conditional release is more straightforward in Turkey. This is because life prisoners are not required to demonstrate that their risk is reduced to an acceptable level to be released into the community. Rather, they are *automatically* released from prison if they have served their minimum terms in good behaviour.[930] As explained in section 8.2.2 above, in Turkey life prisoners' risk of reoffending is not, in itself, considered a reason for their recall to prison, whereas in E&W it is a key factor for both life prisoners' release from and recall to prison.

In both E&W and Turkey, a small group of life prisoners are excluded from conditional release. In E&W, whole life prisoners may be released by the Secretary of State on compassionate grounds. The ECtHR held in *Vinter* that whole life sentences were 'irreducible', whereas it rendered them 'reducible' in *Hutchinson*. As discussed in section 8.3.1 above, the ECtHR's retreat from *Vinter* was a result of the strong English responses, both politically and judicially. Despite the ECtHR's decision in *Hutchinson* and the Court of Appeal's decision in *McLoughlin*, whole life sentences are still considered a sentence for life by English sentencing courts. For example, Mr Justice Wilkie in *R v. Thomas Mair* stated that

> I have considered this anxiously but have concluded that this offence, as I have described it, is of such a high level of exceptional seriousness that it can only properly be marked by a whole life sentence. That is the sentence which I pass.

[930] In Turkey, life prisoners do not have to apply for conditional release. After serving their minimum terms, their conditional release is automatically considered by courts.

> You will, therefore, only be released, if ever, by the Secretary of State exercising executive clemency on humanitarian grounds to permit you to die at home. Whether or not that occurs will be a matter for the holder of that office at the time.[931]

Sir John Griffiths Williams in *R v. Christopher Halliwell* stated that

> I am satisfied your offending is exceptionally high and satisfies the criteria for a whole life term and that the Transitional Provisions do not require me to impose a minimum term. Were I to impose a minimum term it would be of such length that you would in all probability never be released. I sentence you to Life Imprisonment and direct there will be a whole life order.[932]

Mr Justice Openshaw in *R v. Stephen Port* stated that

> The sentence therefore upon the counts of murder is a sentence of life imprisonment; I decline to set a minimum term; the result is a whole life sentence and the defendant will die in prison.[933]

Similar to the extracts from the sentencing courts above, whole life sentences are also considered a sentence for life by the UK government[934] and the Sentencing Council, which is a public body of the Ministry of Justice.[935] This indicates a divergence in the understanding of whole life sentences by the Court of Appeal and sentencing courts and some government authorities. In order to resolve this discrepancy in domestic law, there is a need for an amendment of the release policy of whole life sentences in E&W. In fact, in *Hutchinson*, the UK government did not give any reasons why the release policy of whole life

[931] *R v. Thomas Mair,* Sentencing Remarks of Mr Justice Wilkie, Central Criminal Court, 23 November 2016.

[932] *R v. Christopher Halliwell,* Sentencing remarks of Sir John Griffiths Williams, Bristol Crown Court, 23 September 2016.

[933] *R v. Stephen Port,* Sentencing Remarks of Mr Justice Openshaw, Central Criminal Court, 25 November 2016.

[934] 'A whole life term means there's no minimum term set by the judge, and the person's never considered for release.' See: UK Government (n.d.).

[935] 'For the most serious cases of murder, an offender may be sentenced to a life sentence with a whole life order. This means that their crime was so serious that they will never be released from prison.' See: Sentencing Council (n.d.).

prisoners had not been changed if it was to comply with *Vinter*.[936] The ECtHR in *Hutchinson* stated that such a revision 'would be desirable'.[937]

Unlike in E&W, however, the issue of irreducible LWOP sentences remains unaddressed in Turkey, since both Turkish legislature and judiciary have been indifferent to the ECtHR's rulings against Turkey. As noted in section 8.3.2 above, Turkish sentencing courts continue to impose irreducible LWOP sentences on offenders convicted of serious offences such as crime against the security of the State. Turkey's indifference to the ECtHR's jurisprudence on irreducible life sentences can be explained on the basis of its commitment to its own penal law and policy. As we have examined in Chapters 6 and 7, Turkish criminal and penal policy prioritises the punitive aspect of punishment at the imposition and implementation stages of aggravated life imprisonment. In this respect, it is an extension of this punitiveness that Turkish law explicitly states that some life prisoners will never be released from prison until their death.

[936] *Hutchinson*, Dissenting Opinion of Judge Pinto de Albuquerque, at footnote 71.
[937] *Hutchinson*, para 69.

PART IV
CONCLUDING REMARKS

CHAPTER 9
CONCLUSION

This thesis has conducted a comparative jurisprudential study of life imprisonment in England and Wales (E&W) and Turkey. The European human rights standards for life imprisonment have been used as the yardsticks of comparison. The first endeavour of this thesis was to examine the possibility of human-rights-compliant life imprisonment. Thus, it has examined the human rights treaties, resolutions, recommendations, reports and case law, produced by the Council of Europe institutions, as far as life imprisonment is concerned. As we have seen in Chapters 3, 4 and 5 of the thesis, European human rights law provides a framework of the minimum core principles that must be met for a life sentence to be considered acceptable. Further, European human rights law also yields a set of desirable standards for the better use of an acceptable life sentence. In Chapters 6, 7 and 8, the thesis has compared life imprisonment in E&W and Turkey in order to understand to which extent these two countries with the highest number of life prisoners amongst the Council of Europe member states comply with the minimum core principles and desirable standards for life imprisonment produced by the European human rights documents and instruments. In so doing, the thesis has addressed the research questions posed in Chapter 1.

This concluding chapter draws together the answers to the research questions and offers policy recommendations for E&W and Turkey. To this end, it first highlights the key European principles and standards for an acceptable life sentence that is compliant with human rights. Then, it brings together the key findings of the comparison between E&W and Turkey in order to assess whether, and if so, to what extent life sentences in these two countries comply with the fundamental human rights principles and standards for life imprisonment identified at the European supranational level. It proceeds to make some recommendations for what should be done in E&W and Turkey in order for life sentences to fully meet the requirements of human-right-compliant life imprisonment. Finally, it notes the limits of the present thesis, and calls for

further studies on life imprisonment, especially concerning Turkish life sentences.

9.1. Human-Rights-Compliant Life Imprisonment

The European human rights documents and instruments consider life imprisonment as an acceptable form of punishment, when its imposition and implementation are governed by human rights norms and standards. The detailed analyses of what human-rights-compliant life imprisonment could look like at the European supranational level have been made in Chapters 3, 4 and 5 of the thesis. Three main principles have generally shaped the understanding of the human rights compatibility of life imprisonment. These are the principles of proportionality, human dignity and rehabilitation. These three human rights principles not only mould the fundamental standards for the imposition and implementation of, and release from, life imprisonment, but also draw the line between what is an acceptable life sentence and what is not. For example, as discussed in Chapter 3.2 and Chapter 5.3 of the thesis, two forms of life imprisonment are considered inhuman and degrading punishment at the European level. These are: grossly disproportionate life sentences and irreducible life sentences.

In the light of our analyses in Chapter 3, 4 and 5, it can be summarised that human-rights-compliant life imprisonment is, in the first instance, a sentence that is proportionally imposed on offenders convicted of the most serious offences. Such a sentence must be executed in a way that life prisoners are humanely treated, and their fundamental rights respected. The sentence must focus on the resocialisation of life prisoners by providing them with opportunities to improve and rehabilitate themselves in the course of their sentences and aim at reducing the risk of reoffending posed by life prisoners and at preparing them for their eventual release into society, after they have been sufficiently punished and are no longer deemed dangerous to the public. The following section draws together the key findings of the comparison between E&W and Turkey and assesses whether, and if so, to what extent, life sentences in these two jurisdictions meet the fundamental standards of human-rights-compliant life imprisonment.

9.2. Comparing Life imprisonment in England and Wales and Turkey through Human Rights Lenses

The primary difference between E&W and Turkey is the fact that these two countries have different forms of life sentence. In E&W, life imprisonment can be categorised on the basis of the variations in imposition procedures and release possibilities for different forms of life sentences. As we have seen in Chapter 6, according to imposition procedures, three different forms of life imprisonment can be distinguished: mandatory life sentences for murder, discretionary life sentences for some serious offences, and statutory life sentences for second listed offences. As to release possibilities, as discussed in Chapter 8, whole life sentences can be distinguished from all other forms of life imprisonment in the sense that, unlike all other life prisoners, whole life prisoners are not allowed to apply for conditional release (parole). However, as examined in Chapter 7, in E&W, all life prisoners serving these different forms of life sentences are treated in the same manner and their sentences are executed under the same implementation regime.[938]

Unlike English law, Turkish law recognises different implementation regimes and release possibilities for different forms of life sentences, whereas the same imposition procedures apply to all forms of life imprisonment. Fundamentally, as explained in Chapter 7, there are two different forms of life imprisonment in Turkey: (normal) life sentences and aggravated life sentences. As discussed in Chapter 8.3.2, both (normal) life sentences and aggravated life sentences may be coupled with a requirement of the *impossibility* of parole; that is, they may be life imprisonment without possibility of parole sentences. Thus, in Turkey a further distinction can be made between life imprisonment with parole (LWP) and life imprisonment without parole (LWOP) sentences.

This thesis has compared the imposition and implementation of, and release from, these life sentences in E&W and Turkey and discussed their compatibility

[938] However, different, less stringent implementation regimes are adopted for juvenile and female life prisoners. Yet, this distinction does not result from the form of a life sentence they are serving, but from the characteristics of prisoners, namely being juveniles or females. See: Chapter 7.4.1 of the thesis.

with the European human rights standards for these three stages of life imprisonment. The comparative findings of the present thesis not only provide important insight into the life sentences in E&W and Turkey, as the two legal systems with the highest number of life prisoners in Europe, but also demonstrate that the use of life imprisonment in a human-rights-compliant way, as described by the European human rights documents and instruments, is *not* implausible.

As the comparative analyses in Chapter 6, 7 and 8 of the thesis have demonstrated, most forms of life sentences in E&W and Turkey generally satisfy the fundamental requirements of a human-rights-compliant life imprisonment outlined at the European supranational level. As we have seen in Chapter 6 and 7, in both jurisdictions life sentences are imposed on offenders convicted of the most serious offences and generally implemented in a rehabilitation-oriented manner. In both English and Turkish prison systems, life prisoners are not generally segregated from other prison population, and, in principle, are provided with the same entitlements as other prisoners. As discussed in Chapter 7, in both jurisdictions life prisoners are offered purposeful activities and offender behaviour programmes in order to offset the damaging impacts of life imprisonment and to rehabilitate and re-socialise themselves. Life prisoners' contact with the outside world is not generally more restrictive than that of other prisoners serving short-term imprisonment sentences. Importantly, most forms of life sentences are not designed to last until the rest of life prisoners' lives. Rather, as we have seen in Chapter 8, in both E&W and Turkey the vast majority of life prisoners become eligible to apply for parole after serving their minimum terms, and are, in fact, conditionally released from prison unless assessed posing significant risk to the society. Thus, life sentences in both E&W and Turkey *generally* comply with the principles of proportionality, human dignity and rehabilitation, which have, as noted in section 9.1. of this chapter and explained in detail in Chapter 3, 4 and 5 of the thesis, shaped the human rights compatibility of life imprisonment at the European supranational level.

Although there are certain shortcomings when judged against human rights standards, generally the defects in most forms of life sentence in E&W and

Turkey do not reach a point to consider them inhuman or degrading. However, the present thesis has found that there are a few forms of life sentence in the two legal systems that cannot be considered human-rights-compliant, and hence, are unacceptable under the European human rights standards. For example, as discussed in Chapter 8.4 of the thesis, whole life sentences in E&W and LWOP sentences in Turkey contradict the right to human dignity of prisoners serving these sentences, since they do not provide for any realistic prospect for release from life imprisonment.

Another form of life imprisonment that cannot be considered human-rights-compliant is the aggravated life sentences of Turkey. As explained in Chapter 7 of the thesis, the implementation regime of aggravated life sentences has a punitive rather than rehabilitative character, because all aggravated life prisoners are segregated from other prisoners, including other life prisoners, and are subject to a more restrictive regime with highly limited means for the access to purposeful activities, communication with other prisoners and contact with the outside world.

The following sections bring together the key findings of the comparison of life sentences in E&W and Turkey with a particular focus on the assessment of their compatibility with the European human rights standards.

9.2.1. Imposition of Life Imprisonment

This section highlights the key findings of the imposition of life sentences in E&W and Turkey. It first examines whether life sentences are proportionately imposed on offenders convicted of the most serious offences in E&W and Turkey. Then, it analyses whether E&W and Turkey take the principle of parsimony, which is closely linked with the principle of proportionality, seriously in their use of life imprisonment. These analyses will help us to comprehend whether these two countries with the highest number of life prisoners in Europe are restrained in the use of the severest penalty available in their legal systems.

9.2.1.1. Proportionality and Life Imprisonment

As explored in Chapter 3.2.1 of the thesis, the European human rights standards require that the principle of proportionality must be at the centre of sentencing law and practice.[939] In order to fully achieve proportionality in sentencing of life imprisonment, judiciary must be provided with 'double discretion' in terms of both imposing life sentences and determining minimum non-parole terms. Further, life imprisonment must only be imposed on offenders convicted of the most serious offences.

9.2.1.1.1. Double Discretion

As examined in Chapters 6.4.1.2 and 6.4.1.3, English sentencing courts are provided with 'double discretion' in sentencing of discretionary and statutory life sentences, as they are given the power either to impose or not to impose a life sentence, and the power to determine minimum non-parole terms. However, the sentencing power of the courts is constrained with respect to murder by legislation that makes life sentences mandatory following conviction, and by the creation of legislative starting points for the determination of minimum non-parole terms in murder cases.[940] Currently, sentencing courts fix minimum non-parole terms for all forms of life imprisonment, although there are legislative starting points for mandatory life sentences for murder.

Unlike in E&W, as we have seen in Chapter 8.2.2, in Turkey, minimum non-parole terms are stipulated by law, and are absolute; that is, sentencing courts cannot determine a lower or higher minimum term than the one specified in law. This means that, in practice, life prisoners should serve one of the legislative minimum non-parole terms of 24, 30, 33, 36, 39 or 40 years upon the imposition of a life sentence.[941] In this respect, sentencing courts in Turkey are restricted in ensuring the proportionality of the punishment when sentencing an offender to life imprisonment. By contrast, sentencing courts in E&W must consider a non-exhaustive list of aggravating and mitigating factors to increase or decrease

[939] Committee of Ministers of the Council of Europe (1992: paras A-4 and B-5).
[940] Fitz-Gibbon (2016:58).
[941] Law No.5275: Law on the Execution of Sentences and Security Measures (LESSM), (Official Gazette Date and No: 29.12.2004 – 25685), Articles 107 and 108.

minimum terms in each form of life sentences. This allows courts in E&W to individualise the punishment by proportionately determining the sentence to be imposed on the offender based on the circumstances of the case.

9.2.1.1.2. Mandatory Life Imprisonment

In E&W, the mandatory imposition of life imprisonment for murder convictions raises significant concerns in terms of the proportionality principle because the sentencing court has to impose a life sentence to everyone convicted of murder. This implies that all cases of murder are considered serious enough to merit the imposition of life imprisonment. However, as discussed in Chapter 6.3.1, it is highly questionable that the definition of murder in E&W captures only the most serious cases of unlawful killing.[942] For example, in *DPP v. Hyam*, Lord Kilbrandon stated that '[i]t is no longer true, if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide'.[943] Given that the widely defined offence of murder is mandatorily punished by life imprisonment, it can be said that 'certain essential principles of sentencing –namely proportionality, restraint in the use of custody, and individualization' are being violated in E&W.[944]

As discussed in Chapter 6.3.2, the definition of murder in Turkish law is narrower than that of English law. Furthermore, the use of life imprisonment for murder offences is more limited in Turkey than E&W. According to the Turkish Penal Code (TPC), there are five different types of homicide offences.[945] Of these, three are murder: intentional killing (Art 81 of TPC); aggravated forms of intentional killing (Art 82 of TPC); and intentional killing by omission (Art 83 of TPC). The offence of intentional killing by omission cannot be punished by life imprisonment in Turkey.[946] Although life imprisonment is stipulated as an appropriate sentence for intentional killing (Art 81 of TPC), it is *not* a mandatory

[942] Mitchell (1998:454).
[943] [1975] AC 55, 98
[944] Mitchell & Roberts (2013:504).
[945] Law No. 5237: Turkish Penal Code (TPC), (Official Gazette Date and No: 12.10.2004 – 25611), Articles 81-85.
[946] TPC, Art 83.

sentence.[947] Aggravated forms of intentional killing (Art 82 of TPC) is the only murder offence that is mandatorily punished by life imprisonment in Turkey.[948] Thus, it can be said that, unlike in E&W, life imprisonment can only be imposed for the most serious and narrowly defined unlawful killings in Turkey. And, unlike in E&W, only the most and exceptionally serious forms of intentional killings (aggravated murder) are mandatorily punished by life imprisonment in Turkey.

However, this does not, in and of itself, demonstrate that the proportionality principle is applied more effectively in Turkey compared to E&W. This is firstly because, as explained in Chapter 6.4, life imprisonment in Turkey remains as a mandatory sentence for a number of other offences (mostly crimes against the state security and public order), whereas in E&W it is a mandatory sentence only for murder. Secondly, English sentencing courts are given the opportunity to individualise the punishment through the determination of minimum non-parole terms, whereas their Turkish counterparts are lacked such a power.

9.2.1.2. Excessive Use of Life Imprisonment

The proportionality principle is important to ensure that the offender is given a sentence commensurate to the severity of the offence committed. However, proportionality in sentencing should always be accompanied by the principle of parsimony guaranteeing that the sentence imposed on the offender does not exceed the proportion of what is necessary to meet the purposes of sentencing.[949] The parsimony principle is the key to ensuring restraint in the use of custody.[950] As noted in Chapter 4 of the thesis, the European penal law recognises that

[947] According to Art 62 of the TPC, where there are grounds for discretionary mitigation, Turkish sentencing courts can impose 25 years imprisonment for an offence that must otherwise be punished by a life sentence.

[948] According to Art 62 of the TPC, where there are grounds for discretionary mitigation, a life sentence can be imposed for an offence that must otherwise be punished by an aggravated life sentence. As the TPC stipulates that aggravated forms of intentional killings must be punished by aggravated life sentences, even in cases where there are grounds for discretionary mitigation the alternative sentence always remains life imprisonment. See: Chapter 6.4.2 of the thesis.

[949] Tonry (2018:125).

[950] Ashworth (2010:97).

imprisonment should be used as a last resort. In essence, one of the main elements of the European penal law and policy is to reduce the use of imprisonment.[951] In this respect, it is important to examine whether or not E&W and Turkey are restrained in their use of life imprisonment.

One can argue that neither E&W nor Turkey is particularly restrained in its use of life imprisonment, simply because they both have a large number of life prisoners relative to other Council of Europe member states. Although this thesis does not contest such an argument, it nevertheless argues, based on the comprehensive comparative analyses in Chapter 6, that Turkey formally does not rely on life imprisonment to the same extent as E&W for the reasons explained below.

9.2.1.2.1. Public Protection Ground

Firstly, as discussed in Chapter 6.2.2, little or no importance is attached to the public protection ground in the imposition of life imprisonment in Turkey, whereas, as discussed in Chapter 6.2.1, discretionary life sentences are imposed on offenders primarily for purposes of public protection in E&W. In Turkey, life imprisonment is imposed on offenders on the grounds of retribution and deterrence. Sentencing courts may take into account the dangerousness of offenders when sentencing them to life imprisonment, but there are no specific life sentences for dangerous offenders convicted of serious offences in Turkey. In contrast, as explained in Chapter 6.4.1.2, discretionary life sentences are specifically designed to deal with dangerous offenders in E&W.

9.2.1.2.2. Offence Range

Secondly, as examined in Chapter 6.3, life imprisonment is imposed for only a few classes of offences in Turkey, whereas a wider range of offences can be punished by this penalty in E&W. In theory, there are hundreds of common law and statutory offences punishable by life imprisonment in E&W. In practice, however, as noted in Chapter 6.3.1, only 32 offences have been punished by this sentence between 2009 and 2018. Compared to E&W, the scope of life

[951] van Zyl Smit & Snacken (2009: ch.1 and pp.86-99).

imprisonment is restricted to a limited number of offences in Turkey. TPC specifies only 26 offences punishable by life imprisonment.[952] Moreover, unlike in E&W, a number of serious offences, such as intentional killing by the act of omission, attempted murder, kidnapping, soliciting murder and threats to kill, are left out of the scope of life imprisonment in Turkey. In this respect, the scope of life imprisonment is narrowly defined, and its use is strictly restricted to the most serious offences in Turkey.

9.2.1.2.3. Mandatory Life Imprisonment for Murder

Thirdly, as we have seen in Chapter 6.4.1.1, life imprisonment is a mandatory sentence for murder in E&W, and the vast majority of life prisoners are those convicted of murder. According to Ministry of Justice statistics, there were 5,386 mandatory life prisoners convicted of murder in E&W in June 2021.[953] In Turkey, however, life imprisonment is not a mandatory sentence for all cases of murder, but only for aggravated forms of murder (Art 82 of TCP). Although there are no data available regarding the number of life prisoners convicted of murder in Turkey, a comparison between E&W and Turkey can be still made as the intentional homicide rates are available. According to the United Nations Office on Drug and Crime, the intentional homicide rates in Turkey were, on average, more than three times greater than those in E&W between 2003 and 2017.[954] Unfortunately, the intentional homicide rates of Turkey were not available in 2013 and 2014. Although the data are therefore limited, as discussed in Chapter 6.3.2, they nevertheless reveal an important fact that unlike E&W, most murderers have not been sentenced to life imprisonment in Turkey. Given the intentional homicide rates, it could have been anticipated that Turkey would have many more life prisoners than E&W. However, this is not the case.

9.2.1.2.4. Exempt from Life Imprisonment

Fourthly, as explained in Chapter 6.4.2.2, in Turkey, the use of life imprisonment is prohibited in certain circumstances with the sentencing court required to

[952] See Chapter 6.3.2 of the thesis.
[953] Ministry of Justice (2021: Table A1.15).
[954] United Nations Office on Drugs and Crime (2019).

impose an alternative sentence even though the offence committed has merited the imposition of life imprisonment. These circumstances are described in law, and mostly related to the characteristics of the convicted offenders. For example, life imprisonment cannot be imposed on juveniles, irrespective of their culpability and regardless of the seriousness of the offence committed. However, there are no such restrictions in E&W. Rather, English law specifically regulates certain life sentences for juveniles, and there are a number of children sentenced to life imprisonment in E&W.[955]

As the critical comparative analyses in Chapter 6 of the thesis have shown, notwithstanding the large number of life prisoners in both E&W and Turkey in regard of other Council of Europe member states, Turkey formally relies on life imprisonment less than E&W does.[956] However, Turkey's lower reliance on life imprisonment in comparison to E&W does not, without more, mean that the former is less punitive than the latter. This is because, as Whitman states, '[t]o compare levels of punitiveness it is not enough just to compare prison rates. We can and must add a qualitative dimension of "harshness", for example with respect to the way prisoners are treated'.[957] Therefore, a further nuanced comparative analysis of the implementation of, and release from life imprisonment in E&W and Turkey is needed to judge the two countries' punitiveness and harshness in punishing the worst offenders convicted of the most serious offences.

[955] As of 30 June 2021, in E&W there were 18 life prisoners at the age of 15 to 17, and 170 life prisoners at the age of 18 to 20. Ministry of Justice (2021: Table A1.16).

[956] The high number of life prisoners in Turkey can be explained by substantive rather than formal arguments. Firstly, the high murder rates contribute to the number of life prisoners in Turkey notwithstanding that all cases of murder are not mandatorily punished by life imprisonment. And secondly, extraordinary developments in recent years have contributed to high number of life prisoners in Turkey. After the attempted coup in 2016, there has been a considerable increase in the imposition of life imprisonment on offenders convicted of crimes against the state security and public order. See: Aytac & Ugurlu (2017).

[957] Nelken (2010:36), as citing Whitman (2003). See also: Nelken (2009).

9.2.2. Implementation of Life Imprisonment

This section brings together important comparative findings of the implementation of life imprisonment in E&W and Turkey. It draws particular attention to the attached importance to life prisoners' rehabilitation both in law and in practice in order to understand how punitive the two legal systems are in punishing offenders convicted of serious offences.

9.2.2.1. Rehabilitation and Life Imprisonment

European penal law recognises the principle that 'life-sentenced prisoners – as indeed all prisoners – are sent to prison as a punishment and not to receive punishment'.[958] Thus, as we have seen in Chapter 4, the European human rights documents and instruments reject the understanding that the implementation regime of life imprisonment should have a punitive character. Rather, explained in Chapter 4.1 of the thesis, rehabilitation of life prisoners is now considered the main factor to be taken into account in the execution of life sentences at the European level. Therefore, this section highlights whether or not rehabilitation is prioritised at the implementation stage of life imprisonment in E&W and Turkey.

9.2.2.1.1. England and Wales

In E&W, it has been recognised that 'the purpose of the sentence includes rehabilitation, in relation to prisoners subject to life and IPP sentences'.[959] As examined in Chapter 7.1.1 of the thesis, the management of life sentences in E&W is based on an understanding of reducing the risk of reoffending posed by life prisoners through interventions in order to ensure their possible release effective and meaningful.[960] Thus, English law formally prioritises special prevention through the prisoner's rehabilitation and resocialisation at the implementation stage of life imprisonment. This approach shapes all parts of the execution of life sentences in E&W. For example, as discussed in Chapter 7.2.1,

[958] CPT (2016a: para 72);CPT (2018e: para 46). See also: Committee of Minister of Council of Europe (2006: para 102.2).
[959] *Kaiyam and Others v. Secretary of State* [2014] UKSC 66, para 36.
[960] HM Prison & Probation Service (2019: para 5.10).

the risk and needs assessments and sentencing plans of life prisoners play an important role in their allocation and classification. As Chapter 7.3.1.1 demonstrates, life prisoners are allowed to participate in a variety of purposeful activities to improve themselves and are offered to attend offender behaviour programmes to address their risk of reoffending. Further, as explained in Chapter 7.3.2.1, life prisoners are provided with the same entitlements as other prisoners in terms of contact with the outside world through prison visits, phone calls, and the sending and receiving letters. In addition, as examined in Chapter 7.4.1, English prison law recognises a different, less stringent regime for female and juvenile life prisoners in order to address their special needs in the course of the implementation of their sentences.

It follows that English law restricts the more punitive aspect of life imprisonment to the imposition stage of life imprisonment by prioritising the rehabilitation and resocialisation of life prisoners at the execution stage. In fact, English penal law appears to have the principle that '[a] just and civilised society is one where offenders are both punished for breaking the law and given the opportunity to reform and turn away from crime'.[961] The implementation phase of imprisonment is considered a stage where prisoners can be provided with 'the opportunity' to rehabilitate themselves. As discussed in Chapter 7.1.1 of the thesis, this understanding has enabled the Supreme Court of the United Kingdom (UK Supreme Court) in *Kaiyam and Others v. Secretary of State* to recognise the European Court of Human Rights (ECtHR)'s assertion that the state has a duty to provide a reasonable opportunity for life prisoners to rehabilitate themselves.[962]

9.2.2.1.2. Turkey

Unlike E&W, as we have seen throughout Chapter 7 of the thesis, Turkey maintains the punitiveness of life imprisonment at the implementation stage, at least for those serving aggravated life sentences. The implementation of life imprisonment in Turkey differs from that of E&W in the sense that unlike the English prison system, all forms of life prisoners are not treated in the same way

[961] Ministry of Justice (2008:2).
[962] [2014] UKSC 66.

in the Turkish prison system. In Turkey, different regimes are adopted for the implementation of (normal) life sentences and aggravated life sentences. As explained in Chapter 7, although Turkish law formally recognises rehabilitation as the primary purpose of imprisonment and provides the same regime for (normal) life prisoners as applied to other prisoners, it insists on the punitive aspects of imprisonment for aggravated life prisoners, by excluding them from the scope of rehabilitation and subjecting them to a more restrictive and punitive regime compared to other life prisoners.

As examined in Chapters 7.2.2, 7.3.1.2 and 7.3.2.2 of the thesis, in the Turkish prison system, (normal) life prisoners are not segregated from the general prison population and in principle have access to the same regime of activities and are provided with the same entitlements as those prisoners serving a fixed prison term. By contrast, aggravated life prisoners are segregated from all other prisoners, including other life prisoners, and are subject to a more restrictive regime. All aggravated life prisoners, whether they are deemed dangerous or not, are detained in high security prisons as required by the law.[963] This means that aggravated life prisoners are segregated from other life prisoners on the sole ground of their sentences.[964]

As discussed in Chapter 8.4.2.1, the ECtHR has dealt with several cases of irreducible life sentences stemming from Turkey.[965] All of these cases were concerned with aggravated life prisoners. Although the ECtHR has not ruled out the aggravated regime of life imprisonment, it has been very critical of it in *Öcalan v. Turkey* (No.2) in particular.[966] Similarly, the strict regime of the implementation of aggravated life sentence has attracted particular attentions from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its visit reports to Turkey. As noted throughout Chapter 7, the CPT has considered many different aspects of this sentence and concluded that 'the very philosophy underlying Article 25 of

[963] LESSM, Art 9(2).
[964] CPT (2016c: para 13).
[965] *Gurban v. Turkey* [2015] ECHR 1092; *Kaytan v. Turkey* [2015] ECHR 788; *Boltan v. Turkey* [2019] ECHR 131.
[966] [2014] ECHR 286.

the LESSM [regulating the implementation regime of aggravated life sentences in Turkey] should be rethought'.[967]

Despite the CPT's recommendations, however, the law governing the implementation of aggravated life sentences has remained intact since its introduction into Turkish criminal and penal law. The reason behind Turkey's indifference to the recommendations of the CPT seems to be the consequence of Turkey's commitment to its own penal policy, which prioritises the punitive aspect of punishment at the imposition and implementation stages of aggravated life imprisonment. This punitiveness is also extended to the release stage, as Turkish law explicitly states that some aggravated life prisoners will never be released from prison until their death.

9.2.2.2. Shortcomings of the Implementation of Life Imprisonment

As we have seen in Chapter 7 of the thesis, there are significant shortcomings, in practice, concerning the implementation and management of life sentences in both E&W and Turkey. For example, in E&W, as discussed in Chapter 7.2.1, risk and needs assessment and sentence planning of life prisoners are not taken seriously by a number of prison establishments. The national inspection bodies have observed that the Offender Assessment System (OASys) is not at the centre of offender management,[968] and that there are backlogs and out-dated assessments of the sentence plans in prisons visited.[969] Furthermore, as examined in Chapter 7.3.1.1, prisoners are not always allowed sufficient free time to participate in purposeful activities, and sometimes have to wait plenty of time to attend offender behaviour programmes due to oversubscription. As the completion of offender behaviour programmes is a necessary requirement for the release of life prisoners in E&W, the lack of resources causes delays in their parole hearings, and eventually their actual release from prison.

Similarly, there are important practical shortcomings in the implementation of life sentences in Turkey. For example, as discussed in Chapter 7.2.2, risk and

[967] CPT (2005b: 51); CPT (2019c: para 47).
[968] HMI Probation and HMI Prisons (2013: para 2.2).
[969] HM Chief Inspector of Prisons for England and Wales (2018:46).

needs assessments and sentencing plans of life prisoners in Turkey are not given sufficient importance in their allocations and classifications. This raises concern about whether life prisoners are able to follow their individual paths to progress in the prison system towards their release. Further, as examined in Chapter 7.3.1.2, life prisoners have a restricted access to purposeful activities due to prison overcrowding in a number of prison establishments. In this respect, life prisoners' inability to fully benefit from purposeful activities remains as an obstacle to achieve their rehabilitation.

It must be further noted that problems with the implementation of life sentences go beyond the practical shortcomings of the management of life imprisonment in both E&W and Turkey. For example, as we have seen in Chapter 7.4.1, although female life prisoners are differently treated in E&W, they are provided with limited opportunities compared to their male counterparts to progress through the prison system. Further, E&W does not have a separate policy for elderly life prisoners. As discussed in Chapter 7.4, ageing is an important phenomenon among life prisoners as they often have complex health care needs and limited family relationships.[970] In the absence of a distinct policy for the management of elderly life prisoners, it becomes difficult to deal with their special needs.

Unlike E&W, Turkey does not have a distinct management policy for life prisoners. Rather, as we have seen in Chapter 7, life prisoners in Turkey are either treated in the same way as other prisoners or are subject to a more restrictive regime of implementation as in the case of aggravated life prisoners. As discussed in Chapter 4.4, the European human rights instruments urge member states to address life prisoners' special needs in the course of their sentences in order to combat the damaging effects of life imprisonment. That Turkey does not have a separate management policy for life sentences raises the concern about whether or not life prisoners' special needs are well addressed in the Turkish prison system.

[970] Crawley & Sparks (2006:64).

9.2.3. Release from Life Imprisonment

This section highlights the key conclusions of comparison in terms of release from life imprisonment in E&W and Turkey in order to draw attention to the major shortcomings of release mechanisms for life sentences in the two legal systems in comparison to the European standards.

9.2.3.1. Presumption of Release or Presumption of Detention?

As explained in Chapters 5.2 and 5.3 of the thesis, according to the European standards, once the minimum non-parole terms have been served by life prisoners in order to satisfy the requirements of punishment, the presumption should always be in favour of their release unless the protection of the public requires them to be detained beyond their minimum terms.[971] In both E&W and Turkey, public protection plays an important role in the release assessment of life prisoners. However, there is a significant difference between the two countries in terms of their approaches to the release from life imprisonment.

As discussed in Chapter 8.2.2, in Turkey, when assessing a life prisoner's suitability for conditional release, courts take into account whether life prisoners have demonstrated a good behaviour (*iyi hal*) in the course of their sentences, and whether they regret the offence committed. If these conditions are met, life prisoners should be, in principle, released on licence. The burden of proof is on the state to demonstrate that further detention of a life prisoner beyond his/her minimum term is necessary to protect the public. In other words, in order to be conditionally released from prison, life prisoners in Turkey are not required to prove that they are no longer dangerous to the public. On the contrary, in order to detain life prisoners any longer than their minimum terms, the state must show their risk of reoffending upon their release from prison. Thus, in Turkey, the presumption is in favour of release from life imprisonment.

Unlike in Turkey, however, as discussed in Chapter 8.2.1, in E&W, there is 'a presumption in favour of continuing detention' of life prisoners.[972] This is because life prisoners continue to be detained in prison even after the expiry of

[971] See also: van Zyl Smit & Appleton (2019:320).
[972] Bild (2014:100).

their minimum non-parole terms unless *they* can prove that their further detention is no longer necessary for public protection. However, in E&W, post-tariff detention of life prisoners could be very long.[973] As explained in Chapter 8.2.1, in June 2021, 1,606 life prisoners were still being detained in prison even though their tariff expiry dates had passed.[974] Of these post-tariff life prisoners, 781 were detained less than or equal to 10 years, and 777 detained greater than 10 years to less than or equal to 20 years , and 48 detained more than 20 years after their tariff expiry date passed. This raises serious concerns about the way how life prisoners are assessed for their conditional release. In this respect, it must be stated that the burden of proof should be incumbent on the state to demonstrate the necessity of any post-tariff detention, not on life prisoners to demonstrate unnecessity of such detention.[975]

9.2.3.2. Timeframe for the Review of Life Sentences

As discussed in Chapter 5.3.1 of the thesis, the ECtHR urges member states to carry out a review of life sentences within a period of no longer than 25 years from the imposition of the sentence. This recommended timeframe is, in fact, for the review of LWOP sentences imposed on the worst offenders convicted of offences with exceptionally high seriousness. Thus, it can be anticipated that a lower timeframe than the 25 years recommended period would be in place for the review of LWP sentences imposed on those who are convicted of less severe offences. However, in both E&W and Turkey, minimum non-parole terms for LWP sentences may sometimes be significantly higher than the recommended 25 years' timeframe.

As explained in Chapter 6.4.1.1, in E&W Schedule 21 of the Criminal Justice Act 2003 (2003 CJA) sets out five starting points for murder cases: 12 years, 15 years, 25 years, 30 years and a whole life order. Whole life orders are reserved for offenders convicted of murder with exceptionally high seriousness. Where the seriousness threshold of the offence in a case does not fall into the exceptionally high category, the sentencing court should consider other starting

[973] Forde (2014:60).
[974] Ministry of Justice (2021: Table A1.14).
[975] Padfield (2015:25).

points such as 30 years or 25 years. However, even in a case where the starting point is not a whole life order, the sentencing court could determine lengthy minimum non-parole terms such as 37 or 40 years in prison.[976] As a matter of fact, the imposition of minimum non-parole terms of more than 25 years is a common practice in E&W. In response to a request under the Freedom of Information Act 2000, it was verified in October 2019 that 880 life prisoners were serving a minimum term of more than 25 years, 291 serving a minimum term of more than 30 years and 264 serving more than 32 years.[977]

Similar to E&W, the legislative minimum non-parole terms are very high in Turkey. As explained in Chapter 8.2.2, according to Articles 107 and 108 of the Law on Execution of Sentences and Security Measures (LESSM), a life prisoner in Turkey may apply for conditional release after serving one of the legislative minimum non-parole terms of 24, 30, 33, 36, 39 or 40 years in prison. Since these minimum non-parole terms are absolute, most life prisoners are not expected to have their sentences reviewed for conditional release within 25 years of imposition.

The imposition of lengthy minimum non-parole terms seems to cause a paradox in both E&W and Turkey. This is because lengthy minimum non-parole terms may result in life prisoners serving LWP sentences having to wait a much longer time for the review of their sentences than the one for the review of LWOP sentences, if LWOP sentences, were to be reviewed within the recommended 25 years' timeframe, as required by the ECtHR, in order to render them reducible. Alternatively, lengthy minimum non-parole terms may cause that LWOP sentences in E&W and Turkey would not be reviewed within 25

[976] For example, *R v. Bieber (Aka Coleman)* [2008] EWCA Crim 1601 and *R v. Oakes and Others* [2012] EWCA Crim 2435 are two examples of the imposition of very long tariff for some life prisoners. The Court of Appeal upheld Bieber's appeal against the whole life order that the trial court had added to his life sentence and replaced it with a minimum period of 37 years that had to be served before his release could be considered. Similarly, in *Oakes and Others*, the Court of Appeal substituted a life sentence with a minimum term of 40 years for the whole life order imposed on one of the appellants.

[977] Freedom of Information Act (FOIA) Request (2019). See also for detail statistical analyses of the minimum terms imposed on life prisoners and the average length of time spent by them in custody: Crewe, Hulley & Wright (2020:2-5).

years, as many other prisoners sentenced to LWP sentences serve much longer than 25 years, and sometimes as long as 37 or 40 years, to be considered for conditional release. Either way, the existence of lengthy minimum non-parole terms raises significant concerns in both jurisdictions. If the first situation happened, it would be against the proportionality principle because it would mean that less culpable offenders sentenced to LWP sentences are punished more severely than more culpable offenders sentenced to LWOP sentences. If the second situation happened, then LWOP sentences in both countries would not be considered 'reducible' under Art 3 ECHR.

In order to overcome this potential injustice, both E&W and Turkey should reconsider the maximum length of minimum non-parole terms to be imposed on life prisoners serving LWP sentences. From the ECtHR's jurisprudence, it is evident that LWOP sentences should be reviewed within 25 years from the imposition in order for them to be rendered reducible. Thus, a lower timeframe must be in place for the first review of LWP sentences in order to distinguish them from LWOP sentences.

9.2.3.3. LWOP Sentences: An Intention of Slow Death in Prison?

As discussed in Chapter 3.2.2 and Chapter 5.3 of the thesis, a life sentence which is designed to last until the death of the prisoner serving it is considered inhuman and degrading, and thus, is unacceptable at the European supranational level. In this respect, the question is whether or not the executive release mechanisms for whole life sentences in E&W and LWOP sentences in Turkey contain sufficient safeguards to ensure the release of life prisoners serving these sentences. This section brings together the main arguments and reasons for why English whole life sentences and Turkish LWOP sentences cannot be considered human-rights-compliant under the European standards.

9.2.3.3.1. Possibility of Release from LWOP Sentences of Turkey

As examined in Chapter 8.4.2, in Turkey, certain groups of life prisoners are not allowed to apply for conditional release and are thus effectively serving LWOP sentences. The only release opportunity for LWOP sentenced prisoners in Turkey is a Presidential pardon on humanitarian grounds such as illness or old

age.[978] The ECtHR has held on many occasions that LWOP sentences in Turkey are 'irreducible', because a humanitarian pardon shortly before death is not considered release as contemplated in Art 3 ECHR.[979] This finding of the ECtHR is not surprising because Turkish law explicitly provides that life sentences imposed on terrorist offenders will continue until their death in prison.[980] As life prisoners serving LWOP sentences are not given any realistic prospect for release, their right to human dignity is breached. In this respect, LWOP sentences in Turkey cannot be regarded as human-rights-compliant, and thus, are unacceptable under the European standards.

Despite the binding jurisprudence of the ECtHR, there has been no amendment in the law governing LWOP sentences in Turkey. As we have seen in Chapter 8.4.2.2.1, it is highly unlikely that the Turkish legislature will take any action to bring about legislative reforms to comply with the ECtHR's jurisprudence in the near future. Similarly, the Constitutional Court has refrained from confronting the ECtHR's jurisprudence on irreducible life sentences. As discussed in Chapter 8.4.2.2.2, the Constitutional Court has developed a strategy to avoid considering the irreducibility of LWOP sentences by finding a violation under other provisions of the Constitution, and then, by ordering the retrial of the cases. This tactic has enabled the Constitutional Court to ignore the ECtHR's rulings on irreducible LWOP sentences against Turkey. Consequently, irreducible LWOP sentences have remained unaddressed, and hence, continue to cause serious human rights problems in Turkish criminal and penal law. In addition to those who were already subject to these sentences and are serving them in prison, Turkish courts continue to impose irreducible LWOP sentences on offenders convicted of serious offences, such as the crime against the security of the state.[981]

[978] Law No.2709: Constitution of the Republic of Turkey (Official Gazette Date and No: 9.11.1982 – 17863), Art 104.
[979] *Öcalan* (No.2); *Gurban*; *Kaytan*; *Boltan*.
[980] Law No.3713: Anti-Terror Law (Official Gazette Date and No: 12/4/1991 – 20843), Art 17(4).
[981] Ozkaya & Ismet (2019); Reuters (2018); BBC News (2018).

9.2.3.3.2. Possibility of Release from Whole Life Sentences of England and Wales

Unlike Turkey's indifference to the European human rights instruments' recommendations and binding jurisprudence on life imprisonment, E&W has engaged with the European interventions. The English response does not necessarily mean a total rejection or a full acceptance of the European law. Rather, it is an example of reconciliation, compromise and conflict between the UK courts and the European human rights instruments, particularly the ECtHR. For example, as discussed in Chapter 7.1.1, the UK Supreme Court followed the ECtHR's judgment of *James, Wells and Lee v. the United Kingdom* in *Kaiyam and Others v. Secretary of State*,[982] where it recognised that the purpose of life imprisonment includes rehabilitation. Similarly, as examined in Chapter 8.4.1.1.2, the Court of Appeal for England and Wales recognised the principle that the rights to human dignity and rehabilitation of whole life prisoners require them to be provided with a realistic prospect for release.[983] However, it disagreed with the ECtHR's finding in *Vinter and Others v. the United Kingdom*,[984] that whole life prisoners did not have an effective release opportunity in English law.[985]

As discussed in Chapter 8.4.1, the ECtHR initially held in *Vinter* that whole life sentences in E&W cannot be regarded as 'reducible' in the meaning of Art 3 ECHR. However, both British political and judicial responses were far from conciliatory towards the ECtHR. As explored in Chapter 8.4.1.1.1, British politicians explicitly rejected the *Vinter* ruling, expressing their 'profound disagreement' with the ECtHR.[986] As discussed in Chapter 8.4.1.1.2, the judicial response was delivered by the Court of Appeal in *R v. McLoughlin*, where it held that the ECtHR was wrong to have ruled that whole life sentences were irreducible under English law.[987]

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[982] [2012] ECHR 2021.
[983] *R v. McLoughlin* [2014] EWCA Crim 188, paras 14-28.
[984] [2013] ECHR 786.
[985] ibid, para 29.
[986] Watt & Travis (2013).
[987] *McLoughlin*, paras 29-36.

Both political and judicial responses from E&W led to the ECtHR in *Hutchinson v. the United Kingdom* to adopt a softer application of the relevant principles to the review mechanism of whole life sentences in order to render them reducible under Art 3 EHCR for the purpose of defusing the conflict between the UK and Strasburg.[988] As discussed in Chapter 8.4.1.2, in *Hutchinson,* the ECtHR found whole life sentences reducible by holding that release policy stated in the *Indeterminate Sentence Manual* is not restricted to only the humanitarian grounds, and that whole life prisoners are able to apply for the review of their sentences 'at any time' under s.30 of the Crimes (Sentences) Act 1997. Despite the ECtHR's finding in *Hutchinson,* however, it is difficult to accept that whole life sentences are now reducible under English law. This is because there is no established timeframe for the review of whole life sentences in E&W. It is highly questionable that whole life prisoners could apply successfully for the review of their sentences 'at any time', as found by the ECtHR in *Hutchinson*. There are at least two reasons for this:

- ordinal and cardinal proportionality of the crimes (particularly murder) and punishment in English law
- the progress of life prisoners through the prison system (time required to spend in open conditions before being released)

The ordinal and cardinal proportionality of the crimes (particularly murder) and punishment in English law makes it very hard, if not impossible, for whole life prisoners to invoke the review of their sentences 'at any time' and particularly within the recommended 25 years. As discussed in section 9.2.4.1 of this chapter above, given that a number of life prisoners who were convicted of less serious offences, and thus, sentenced to LWP sentences have to serve much more than 25 years in prison before being considered eligible to apply for conditional release, it is very hard to comprehend how whole life prisoners, who were convicted of the most and exceptionally serious offences, could apply successfully for the review of their sentences at any time or after serving 25 years.

[988] [2017] ECHR 65. See: Pettigrew (2015a); Pettigrew (2017a).

Another challenge for whole life prisoners in requesting a review of their sentences arises from the established practice that life prisoners in E&W should spend some time in open conditions before being released. As explained in Chapter 8.1 of the thesis, in English law, the system of transfer from closed to open conditions is straightforward for life prisoners with a minimum term as they are eligible to apply for the consideration of their suitability for the move to open conditions up to three years prior to the expiry of their minimum term.[989] However, the same cannot be said for whole life prisoners, since they have no minimum terms determined. While life prisoners with a minimum term know when they will be eligible to be considered for open conditions, whole life prisoners are in a state of uncertainty in that respect. Thus, it is very difficult to maintain the ECtHR's assertion that whole life prisoners are able to apply for a sentence review at any time under s.30 of the Crimes (Sentences) Act 1997. For these reasons, whole life sentences remain irreducible, and thus, contradict the right to human dignity of prisoners.

9.3. Policy Implications: What Is to Be Done?

As examined in the previous sections of this chapter, and discussed in great details throughout Chapters 6, 7 and 8 of the thesis, most forms of life imprisonment in E&W and Turkey *generally* meet the fundamental requirements of a human-rights-compliant life imprisonment, as described by the European human rights documents and instruments. Generally, the defects in the imposition, implementation and release stages of most life sentences are not sufficiently serious to lead to them being found to be inhuman and degrading. Nevertheless, such shortcomings need to be addressed in order to fully comply with the European human rights standards. Moreover, a few life sentences in both jurisdictions cannot be considered acceptable. These are whole life sentences in E&W and LWOP sentences and aggravated life sentences in Turkey. Based on the comparative analyses and in light of the European standards, this section draws policy implications for E&W and Turkey in order

[989] Ministry of Justice (2015: para 4.1).

to address what should be done in both jurisdictions to ensure a fully human-rights-compliant system of life imprisonment.

9.3.1. Recommendations for Imposition

For the reasons explained in section 9.2.1 of this chapter and in Chapter 6, the present thesis makes the following recommendations for the imposition of life imprisonment:

- In both E&W and Turkey, sentencing courts must be provided with an unfettered discretion in the imposition of life sentences. This requires sentencing courts to have double discretion. Thus, mandatory imposition of life imprisonment for any offences must be abolished in both jurisdictions. When determining minimum non-parole terms, sentencing courts can be advised by legislative starting points for such terms, without their discretion being undermined.
- In Turkey, legislative minimum terms must be *advisory* only, so that sentencing courts can determine minimum non-parole terms in each individual case.
- Both E&W and Turkey should adopt an urgent reduction in minimum non-parole terms to be determined at the point of imposition in order to ensure that life prisoners' sentences will be reviewed within 25 years from their imposition.
- E&W should reconsider the definition of murder in order to make sure that it captures only the most serious cases of unlawful killing.

9.3.2. Recommendations for Implementation

For the reasons explained in section 9.2.2 of this chapter and in Chapter 7, the present thesis makes the following recommendations for the implementation of life imprisonment:

- In both E&W and Turkey, risk and needs assessment and sentence planning of life prisoners should be taken seriously in the implementation of life imprisonment. Specifically, Turkey should give sufficient

importance to risk and needs assessments and sentence planning in the allocations and classifications of life prisoners.

- In E&W, Offender Assessment System (OASys) must be effectively implemented by prison establishments.
- In both E&W and Turkey, life prisoners should be allowed to have sufficient free time to participate in purposeful activities and to attend offender behaviour programmes. Further, Turkey should make sure that prison overcrowding does not prevent life prisoners from having a full access to purposeful activities.
- E&W should strengthen its policy for the management of female life prisoners while adopting a separate treatment policy for elderly life prisoners.
- Turkey should establish a distinct management policy for life sentences, and further, develop different treatment policies for female and elderly life prisoners.
- Turkey should abolish the aggravated regime of life imprisonment as it does not provide for rehabilitation.

9.3.3. Recommendations for Release

For the reasons explained in section 9.2.3 of this chapter and in Chapter 8, the present thesis makes the following recommendations for the release from life imprisonment:

- E&W should bring forward a legislative amendment either to lower the risk threshold that post-tariff life prisoners must meet before being released, or to change the burden of proof concerning their risk of reoffending or both.
- In both E&W and Turkey, prisoners sentenced to whole life terms must be provided with an effective and meaningful sentence review mechanism. Thus, both E&W and Turkey should make amendments to their laws in order to ensure that no life sentences mean life in prison for any category of life prisoners.
- In E&W, Chapter 12 of the *Indeterminate Sentence Manual* should be revised, so that the domestic policy reflects that whole life prisoners are

allowed to apply for the review of their sentences on penological -rather than humanitarian- grounds.

- Turkey should abolish Articles 107(16) and 108(3) of the LESSM and Articles 17(2-3-4) of the Anti-Terror Law, which are the provisions on the prohibition of conditional release for certain groups of life prisoners.

9.4. Limits of Comparison

This thesis has sought to understand how life imprisonment is used in E&W and Turkey as the two countries with the highest number of life prisoners amongst the Council of Europe member states. However, such a comparative endeavour brought with it a number of difficulties. The biggest challenge for the present thesis was also its biggest ambition; that is, a comparison between E&W and Turkey. The difficulty in comparing life sentences in E&W and Turkey did not arise from their inherent comparability but from the availability and accessibility of qualitative and quantitative data on life imprisonment in these two jurisdictions. This is because in E&W almost every aspect life imprisonment has been studied. National prison inspection bodies and Non-Governmental Organisations have published a number of inspection reports on how it is implemented and how life prisoners are treated, and equally importantly, meaningful official statistics about life imprisonment are available and accessible.

In Turkey, in contrast, life imprisonment has hardly been studied, reporting on prison inspections is insufficient, and statistics are either unavailable or inaccessible. Thus, it was a struggle to carry out a comparison of life imprisonment between a jurisdiction (E&W) with an abundant of qualitative and quantitative data on the one hand, and another jurisdiction (Turkey) with the absence of basic statistics and inadequate amount of the existent qualitative knowledge on the other.

Despite the factors that complicated the comparison, this thesis has sought to provide a comprehensive analysis of how life imprisonment is imposed and implemented, and how life prisoners are released from prison. In this respect, a number of specific issues surrounding the execution and management of life

imprisonment, for example coping strategies of life prisoners with their sentences, potentially deleterious effects of life imprisonment and the problem of institutionalisation, have not been specifically addressed in great details in this thesis. Moreover, although extensive research has been carried out on, for example, the material conditions of, and the security and safety in prisons, and the relationship between prison staff and life prisoners, the thesis did not include these research materials in its final version. It was a deliberate decision not to include a very detailed analysis of such specific issues. There were basically two reasons for this. Firstly, the maximum limit of a hundred thousand words did not allow us to equally cover all and every specific aspect of life imprisonment. As such, this thesis had to prioritise certain issues over others in order to achieve its general aim of demonstrating how life sentences are functioned in E&W and Turkey, with a view on their compatibility with the European human rights law. Secondly, as noted above, life imprisonment has been well studied and documented in E&W, whereas there is a dearth of literature exploring this area of penal law in Turkey. Thus, the intention of the present thesis was to provide a general understanding of life imprisonment of Turkey as a starting point for further studies concerning life sentences in Turkey.

There is need for further research on a number of specific aspects of life imprisonment, particularly concerning Turkey, in order to address human rights problems posed by life imprisonment and to campaign for penal reforms. Especially, further studies are needed to examine how life imprisonment is understood by those who are subject to it, how life prisoners cope with their lengthy sentences and whether life imprisonment causes damaging impacts on prisoners serving it. How female and elderly life prisoners experience their sentences must be explored with a focus on the necessity of a separate management policy for them in order to better address their special needs. More attention should also be given to the treatment of terrorist offenders serving life imprisonment, and to the question whether a different, more rehabilitation-focused programme must be in place in the implementation of their sentences. On the top of these, meaningful statistics must be available and accessible, so that future studies can have a better grasp of any shortcomings of life

imprisonment as a criminal and penal law institution, which should be limited by human rights norms and standards.

Despite its limitations, the comparative law methodology has proved to be a useful and effective method in the present thesis. Specifically, the inclusion of human rights law as comparative benchmark has enabled us to carry out the comparison of life sentences between E&W and Turkey. As explained in Chapter 2.3, the deeper purpose of this thesis was to manifest why human rights law should be taken seriously in comparative criminal and penal law studies. If this thesis sets a good example for how human rights law can be used effectively, and thus, encourages others to carry out further studies on different aspects of life imprisonment in comparative criminal and penal law context, it will have achieved its general objective.

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