

***Zedekia Gaingob and Two Others v The State*: A Report on Life Imprisonment**

*A Report for the Supreme Court of Namibia*

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# Executive Summary

## TERMS OF REFERENCE

1. Oxford Pro Bono Publico (OPBP), a programme within the Law Faculty at the University of Oxford, was invited by the Supreme Court of Namibia to conduct a comparative research project on the imposition of life sentences in other jurisdictions, with particular focus on the imposition of such sentences that well exceed the life expectancy of the convicted person. The factual content of the research is summarised below.
2. Namibia renounced the death penalty in its Constitution of 1990 (art. 6), including a provision stating that any reinstatement of the same would not be valid, even if enacted by constitutional amendment (art. 131). Attention is now turned to the questions of life imprisonment and sentences that well exceed the convict’s life expectancy, which, in the eyes of some, have a similar philosophy to that of the death penalty – the accused may only atone for his crimes through his last breath.
3. This issue has received consideration in the internationally-cited Namibian Supreme Court Case of *Tcoieb v The State* 1999 NR 24 (SC), where Chief Justice Mahomed stated that a sentence can never be imposed if it:

…effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise.

The concern was that there might be psychological and sociological changes that might mean the offender can be safely released. In such circumstances, detention would be ‘a cruelty which can no longer be defended in the public interest’.

1. *Zedekia Gaingob and Two Others v The State* is a case currently under consideration by the Namibian Supreme Court. The defendant, Mr Gaingob, received, at the age of 36, an effective sentence of 67 years for, *inter alia,* murder and housebreaking. This makes him 103 years old by the time he will have served his sentence. In effect, therefore, Mr Gaingob has been condemned to die in prison.
2. The Namibian Supreme Court approached OPBP, inviting submission on whether Mr Gainob’s sentence is constitutional in light of the *Tcoieb* case, the guarantee against inhuman and degrading treatment in art. 8(2)(b) of the Constitution, and state practice and regional jurisprudence on the matter. The research in this report focuses on the manner in which life sentences are imposed in various national and international jurisdictions, and the underlying reasons behind such impositions. In particular, the research takes into account the relevant legislation and jurisprudence on the matter, the restrictions on the imposition of life sentences, the applicable mechanisms for early release, and the policy justifications and human rights concerns that the various states have expressed.

JURISDICTIONS INVESTIGATED

1. OPBP has conducted comparative research on nine jurisdictions: eight national jurisdictions and one regional jurisdiction. They are as follows:

|  |  |
| --- | --- |
| **National Jurisdictions** | **Regional Jurisdictions** |
| Australia | The European Human Rights jurisdiction [consisting of (a) the European Convention on Human Rights and (b) the European Court of Human Rights] |
| Canada |  |
| England and Wales |  |
| Germany |  |
| India |  |
| Malaysia |  |
| South Africa |  |
| United States of America |  |

## RESEARCH QUESTIONS

1. The following four primary research questions were formulated in order to structure the research in each jurisdiction for the purposes of this study:
2. How is an individual sentenced to life in your jurisdiction? Is the individual a) given a full life term *ab initio* (i.e. a period of detention that only ends with his or her last breath) or b) is the individual sentenced for a definitive period in excess of their life expectancy? Describe the penal regime. Is there a maximum period of detention? Are very long sentences common?
3. What restrictions are there on the sentencing of a person to life in prison; what are the fundamental guarantees that must be respected (e.g. is there a ‘right to hope’, or a right to a prospect of release)?
4. If an individual is sentenced to life in prison, what, in detail, are the mechanisms for early release such that the individual does not necessarily spend the rest of his life in prison (e.g. State pardon, release after the prison administration agrees). Be specific about the modality of this release (e.g. does the prisoner have to petition the State official him or herself, is there a limited reconsideration of the case every *x* years by a State or a prison authority)?
5. What policy justifications and human rights concerns are used to support the jurisdictions’ stance(s)? Of particular concern are arguments that focus on a) dignitarian perspectives b) theories of punishment, especially the role of rehabilitation c) analogies to the death penalty.

## SUMMARY OF FINDINGS

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. Across the ten jurisdictions investigated, there are various different methods and procedures behind sentencing a person to life imprisonment. Several jurisdictions regard life sentences, in theory, to mean for the remainder of the prisoner’s life. However, in practice, the prisoner will have to serve a specified term before being eligible for parole. As such, in most cases, a life sentence is, in effect, a specified number of years in prison followed by parole.[[1]](#footnote-1) Only in Malaysia does the legislation explicitly state that life imprisonment is to be regarded as a sentence of 20 years in prison.[[2]](#footnote-2)
3. Some jurisdictions, while generally adhering to the practice stated in the paragraph above, nonetheless allow for the possibility to sentence a person to life without the possibility of parole. In England and Wales, such sentences are called “whole life orders”, and are passed on the basis of specific factors, such as the severity of the crime. In India, all life sentences do in effect mean for the remainder of the prisoner’s life without the possibility of parole.
4. The legislation of most jurisdictions prescribes life sentences as mandatory for certain crimes. In all national jurisdictions researched, life sentences are mandatory for murder.[[3]](#footnote-3) In the US and Canada, mandatory life sentences are also passed for offences of high treason. In India and South Africa, they are also mandatory for rape/aggravated rape.
5. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
6. Restrictions of proportionality in sentencing can be seen throughout the jurisdictions researched. While most jurisdictions explicitly refer to proportionality as a restriction, some jurisdictions utilize slightly different formulations that nonetheless appear to fall under the category of proportionality. England and Wales, for instance, refers to the requirement of a “just punishment” while the US legislation refers to the prohibition of “excessive” fines and “cruel and unusual punishments”. An example of how the proportionality principle is phrased for sentencing purposes can be found in the South African legislation. Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 provides that if the court is:

…satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

1. In addition to proportionality, some jurisdictions refer to the principle of “human dignity” as a restriction to sentencing. In Germany, this principle is particularly important and constitutionally protected. However, even in India, where life sentences are *ab initio*, respect for human dignity does play a part in sentencing.
2. Another general restriction to life sentences concerns the age of the offender. The legislations of Malaysia, South Africa, and India all contain provisions prohibiting life sentences to imposed on offenders under a certain age, or require the court to take into account the young age of the offender upon sentencing.
3. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
4. One of the primary ways that a prisoner may be released before he has served the entirety of his sentence is through release on parole. The amount of years a prisoner sentenced to life has to serve before being eligible for parole varies depending on the jurisdiction. In South Africa, a prisoner sentenced to life is eligible for parole after serving 25 years. In Canada, a prisoner sentenced to life for first-degree murder is eligible for parole after 25 years, while the term is 10 years for those convicted for second-degree murder. In England and Wales, on the other hand, the time served before being eligible for parole is determined on a case-by-case basis, taking into account the specific facts and severity of the crime.
5. Most jurisdictions allow for the possibility of early release by a ‘prerogative of mercy’. In some cases, a certain amount of years will have had to be served before the State can exercise its prerogative of mercy (such as in India), while other jurisdictions are non-specific as to the time that will have had to be served.
6. Some jurisdictions further allow for the possibility to be released on compassionate grounds, which appears different than the prerogative of mercy. Release on compassionate grounds is primarily related to the physical or mental health of the prisoner. In Canada, for instance, prisoners not yet eligible for release can nonetheless apply for ‘parole by exception’ if they are ‘terminally ill’, their ‘physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement’, ‘continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time [they were] sentenced’ or they are ‘the subject of an order of surrender under the *Extradition Act* and [will] be detained until surrendered.’[[4]](#footnote-4)
7. Some jurisdictions have other mechanisms for early release in place. In Germany, for instance, the Court *shall* suspend the execution of the remainder of a life sentence if fifteen years of the sentence have been served, the degree of the convicted person’s guilt does not require its continued execution and suspension can be justified upon consideration of the security interests of the general public, and the imprisoned agrees.[[5]](#footnote-5) In Malaysia, each prisoner serving a long-term sentence has the right to an automatic consideration for remission or release. This automatic consideration takes place every four years or whenever the relevant Pardons Board next convenes (whichever comes later).[[6]](#footnote-6) In the US, in addition to being released on parole, a prisoner may be released early for reasons relating to good conduct, for participation in prison treatment programs, or if there is a modification of the imposed sentence.
8. Through the case law of the ECtHR, we find that what is essential for member states to comply with the Convention is that they have in place some form of mechanism for early release. In *Kafkaris v Cyprus*, the existence of the Constitutional provision stating that: “the President of the Republic, on the recommendation of the Attorney General, may suspend, remit or commute any sentence passed by a court” was sufficient for the ECtHR to conclude that life sentences were reducible, and thus compliant with the Convention. The Court has confirmed, however, that the law surrounding the review mechanism must be clear enough so that prisoner may know, from the time of their sentencing, of the conditions under which they might be released.
9. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
10. The various jurisdictions researched show different aims for sentencing a person to life imprisonment, in relation to the theories of punishment. The table below adequately depicts these aims, and how they vary depending on the jurisdiction.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Jurisdiction** | **Retribution** | **Deterrence** | **Rehabilitation** | **Denunciation** | **Public Interest** | **Other** |
| Australia | ✓ | ✓ | ✓ | ✓ | ✓ |  |
| Canada |  | ✓ | ✓ | ✓ |  | Separation of offenders; reparation; promotion of responsibility |
| England and Wales | ✓ | ✓ |  |  |  |  |
| Germany | ✓ | ✓ |  |  |  | Re-socialisation |
| India | ✓ |  | ✓ |  |  |  |
| Malaysia | ✓ | ✓ | ✓ |  | ✓ | Incapacitation |
| South Africa |  | ✓ |  |  | ✓ |  |
| US |  | ✓ |  |  |  | Recidivism |
| ECHR |  |  | ✓ |  |  | Reintegration |

1. In addition to the general theories of punishment, concerns for human dignity stand out as one of the main issues that Courts are required to take into account when determining whether to sentence a person to life imprisonment. Indeed, dignitarian aims can be found in the jurisdictions of Australia, Canada, Germany, South Africa, and the ECHR.

# National Jurisdictions

## AUSTRALIA

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. The Commonwealth of Australia has six states and two territories with each of these eight constituent units bearing primary responsibility to administer its criminal justice system. Therefore, in order to portray the penal regime of Australia in general, the legislation, case law and practice of each jurisdiction has to be examined. While every jurisdiction has its own peculiar features, they also share certain common traits. Life imprisonment sentences that would last for a prisoner’s natural life are still in effect and resorted to, although rates vary from jurisdiction to jurisdiction. The judiciary’s discretion to fix non-parole periods is an important tool in administering criminal justice. Parole boards in each jurisdiction also have important duties when deciding on the possibility of release of an offender.
3. Each Australian jurisdiction has in place imprisonment sentences for a determinate period, but also imprisonment sentences for life. Since the abolishment of the death penalty, life imprisonment is the maximum penalty available in all Australian jurisdictions. Life imprisonment is for an indeterminate term and means ‘the prisoner’s natural life’. Life imprisonment is mandatory for murder in New South Wales, Queensland, South Australia and the Northern Territory jurisdictions.
4. The longest determinate term of imprisonment differs depending on the jurisdiction. However, the longest determinate term in the country does not exceed 25 years imprisonment. Aggregate sentences and cumulative sentencing schemes are available, albeit pursuant to different substantive and procedural rules. Such multiple sentencing mechanisms may result in prison terms longer than the offender’s life expectancy.

***New South Wales***

1. In New South Wales, life imprisonment is available for the most serious cases including murder, certain sexual offences, and certain serious drug trafficking offences.[[7]](#footnote-7) As with all other Australian jurisdictions, life imprisonment means the whole term of a person’s natural life.[[8]](#footnote-8) There is a mandatory life imprisonment penalty for murder and serious drug trafficking offences. However, life imprisonment is only mandatory if the court is satisfied that ‘the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence’.[[9]](#footnote-9) Courts nevertheless hold the power to reduce penalties,[[10]](#footnote-10) and impose lesser and determinate sentences rather than one that spans for the whole natural life of the prisoner.[[11]](#footnote-11)
2. The maximum determinate sentence in New South Wales is imprisonment for 25 years.[[12]](#footnote-12) A court may impose an aggregate sentence of imprisonment where more than one offence is committed.[[13]](#footnote-13) Consecutive sentencing is also available.[[14]](#footnote-14) Therefore, a determinate sentence of imprisonment may have the practical effect of a life imprisonment.

***Victoria***

1. In Victoria, life imprisonment is available for serious offences like murder or treason.[[15]](#footnote-15) Again, life imprisonment means the natural life of the offender.[[16]](#footnote-16) The longest determinate sentence available is imprisonment for 25 years.[[17]](#footnote-17) An aggregate sentence of imprisonment can be imposed for multiple offences founded on the same facts or of same character.[[18]](#footnote-18) Therefore, both definite and indefinite imprisonment sentences may mean the offender’s natural life.

***Queensland***

1. In Queensland, imprisonment for life is the maximum sentence for serious offences such as murder and certain sexual offences.[[19]](#footnote-19) Life imprisonment is mandatory for murder.[[20]](#footnote-20) The longest determinate prison sentence is 25 years.[[21]](#footnote-21) Cumulative sentencing is possible in certain circumstances for serious violent offences.[[22]](#footnote-22) The court may also, on its own initiative or pursuant to the application of the prosecution, impose an indefinite sentence in certain circumstances.[[23]](#footnote-23)

***South Australia***

1. In South Australia, imprisonment for life is mandatory for murder. [[24]](#footnote-24) The longest determinate imprisonment sentence is 25 years.[[25]](#footnote-25) Cumulative sentencing is possible especially if offences are committed during a period of imprisonment or release.[[26]](#footnote-26)

***Western Australia***

1. In Western Australia, imprisonment for life is mandatory for murder unless it is clearly unjust considering the circumstances of the offence and offender’s threat to the community.[[27]](#footnote-27) The maximum determinate imprisonment sentence is 20 years.[[28]](#footnote-28)

***Relevant Australian Case-Law***

1. There are judicial decisions in Australian jurisdictions where offenders were sentenced to imprisonment for their natural life. A notable example is *R v Milat*. Ivan Milat was convicted of seven offences of murder and one offence of detaining of advantage. In 1996, he was sentenced to six years imprisonment, in addition to imprisonment for life without any prospect of parole.[[29]](#footnote-29) Other notable prisoners sentenced to their natural life without any prospect of release in the New South Wales jurisdiction are John Glover[[30]](#footnote-30), who was convicted of six offences of murder, and Malcolm Baker[[31]](#footnote-31), who was also convicted of six offences. A high profile case from Tasmania is *R v Martin Bryant* concerning a massacre.[[32]](#footnote-32) In 1996, Martin Bryant was sentenced to life imprisonment without any prospect of release. In *R v Leslie Alfred Camilleri* before the Supreme Court of Victoria, the court sentenced the offender to imprisonment for life without any prospect of release for the murder of two schoolgirls, who were abducted and raped before they were murdered. The Court specifically stated that the defendant was never to ‘walk among [them] again’.[[33]](#footnote-33)
2. The most recent case is one in New South Wales from February 2016. Kevin Crump was sentenced to two terms of life imprisonment for a murder he committed in 1974. In 1997, a minimum period of 30 years was fixed, with natural life imprisonment as further sentence. He was also sentenced to another 25 years for a separate murder-related offence. There was a judicial recommendation that he never be released from prison, which did not have binding effect at the time but later gained such effect. In *Crump v R*, the court held that, although he had served more than 40 years and did not have any prospect of release, his sentence was not ‘manifestly or obviously excessive’. The Court deliberated on whether the sentence was in compliance with the well-established principles of sentencing in New South Wales, and this deliberation did not address any concerns regarding the prospect of release. The fact that the offender was indeed without any prospect of release did not alter the sentence. [[34]](#footnote-34) Although these are extreme cases of imprisonment sentences that would last for the entirety of the offender’s natural life, it proves that such practice exists.
3. In New South Wales, until the 1990s, a common practice was the executive’s release of prisoners on licence before the expiration of their sentences. This mechanism was also used for prisoners serving life sentences.[[35]](#footnote-35) Executive intervention into sentences determined by the judiciary became quite frequent. While the mechanism for release on Licence Board was operating, the average life imprisonment served in New South Wales was 11.7 years, with only 7.5% of the prisoners serving more than 15 years in prison.[[36]](#footnote-36) In 1989, the average term that a prisoner sentenced to life spent in prison was 13 years, although averages varied greatly among the states.[[37]](#footnote-37) A sentence of life imprisonment rather had a symbolic significance to express the community abhorrence of the crime.[[38]](#footnote-38) Life imprisonment was seen as an indeterminate sentence, imposed by courts, but often subject to executive review at an appropriate time.
4. As the executive’s affect on sentencing increased and early release became more common, concerns about lenient sentences increased in 1990s. This led to the campaign of ‘truth in sentencing’, which meant that the imprisonment term decided by the judiciary should actually be served in practice without any interference by the executive. Many jurisdictions introduced minimum or fixed terms of imprisonment with the aim of achieving greater certainty in penalties. The aim was, where no minimum term of imprisonment was designated, life imprisonment would actually mean one’s natural life.[[39]](#footnote-39)
5. After tougher legislation was put in place, in 2010 in New South Wales, there were 39 prisoners serving actual life sentences (for the remained of their lives); nine of these were subject to non-release recommendations by the respective sentencing courts.[[40]](#footnote-40) In Victoria, it has been rare for a judge to impose a life sentence without fixing a non-parole period. In 2010, the total number of prisoners who were sentenced to life imprisonment and not eligible for parole was 12. In this jurisdiction, the use of imprisonment sentences was quite modest compared to other jurisdictions in Australia.[[41]](#footnote-41) In the case law of Tasmania, the ultimate penalty of imprisonment without any prospect of release was used only once, in *R v Martin Bryant*.[[42]](#footnote-42)
6. According to the latest statistics provided by the Bureau of Statistics in December 2015, the percentage of those sentenced to indeterminate imprisonment terms among the overall number of prisoners convicted of most serious offences varied greatly among states. The minimum was 10% in Victoria, while the maximum was 83% in South Australia. The Australian average was 40%.[[43]](#footnote-43)
7. Overall, despite inconsistent application, a majority of the prisoners sentenced to life imprisonment will be/have been released some time in the future, and the risk of dying in prison is not high.[[44]](#footnote-44)
8. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?

***The Right to a Prospect of Release***

1. As a result of the ‘truth in sentencing’ concerns, the judiciary’s discretion and effect over imprisonment sentences has increased. The judiciary’s main tool is the power to fix non-parole periods for individual offences. Many jurisdictions also allow courts to decline to fix a non-parole period. In certain jurisdictions, parole is inapplicable to life imprisonment by law. On the other hand, the prerogative of mercy, which is usually initiated by the offender, remains available.
2. In New South Wales, a court’s power to fix a non-parole period is available for determinate imprisonment sentences. However, this is inapplicable if the offender is sentenced to life or any other indeterminate imprisonment.[[45]](#footnote-45) Prisoners sentenced to life imprisonment will not be released in principle. Release by the exercise of the prerogative of mercy is, however, preserved.[[46]](#footnote-46)
3. In Victoria, a court has to fix a non-parole period for life imprisonment and determinate imprisonment terms longer than two years. However, the court also has the discretion not to fix a non-parole period if doing so would be inappropriate, taking into account the nature of the offence or the past history of the offender.[[47]](#footnote-47) For offenders who were not given a non-parole period, a prospect of release is not available. Executive exercise of the prerogative of mercy is preserved.[[48]](#footnote-48)
4. In Queensland, parole is the only judicial mechanism for early release. There are different parole eligibility schemes available for prisoners sentenced to life imprisonment, serious violent offenders, particularly serious offenders, and others. However, such a scheme is not available for prisoners sentenced to indefinite imprisonment terms.[[49]](#footnote-49) The sentencing judge has no power to fix a non-parole period to reflect the objective seriousness of the offence and the subjective culpability of the offender unless the offender has been convicted of multiple counts of murder.[[50]](#footnote-50) Prisoners sentenced to life imprisonment and other determinate imprisonment terms will be given information about their possible early release dates, however some of these terms are as long as 30 years (for multiple counts of murder).
5. In South Australia, courts have the discretion to fix a non-parole period.[[51]](#footnote-51) Life imprisonment for an offence of murder has a mandatory minimum non-parole period of 20 years.[[52]](#footnote-52) A court may decline to set a fixed non-parole period if doing so would be inappropriate, taking into account the gravity of the offence or the circumstances surrounding the offence, the offender’s criminal record, their behaviour during previous paroles, or any other circumstances.[[53]](#footnote-53) The prisoner may apply to the court to have a non-parole period fixed at any subsequent time.[[54]](#footnote-54)
6. In Western Australia, life imprisonment for murder can be imposed by setting a minimum period of imprisonment (10 or 15 years) or by ordering that the offender must never be released. Such must be in accordance with the community’s interest in punishment and deterrence.[[55]](#footnote-55) The court must also take into account the circumstances of the commission of the offence and aggravating factors.[[56]](#footnote-56) When such an order is made, prisoners do not have a prospect of release except for in the exercise of the prerogative of mercy.[[57]](#footnote-57)
7. In Tasmania, release on parole is different for imprisonment for life and for determinate terms. When sentencing a prisoner to a determinate term of imprisonment, the court also determines the eligibility of the offender for parole. The court may find that the offender will not be eligible, or will be after the expiry of a specified period, by taking into account the nature and circumstance of the offence, the offender’s character and antecedents, and other sentences of the offender. Courts also have the discretion to fix a non-parole period for life prisoners. The matters to be taken into account are similar to those for determinate imprisonment terms. The court’s decision not to fix such a period should be necessary and appropriate considering the nature and circumstance of the offence, the offender’s character, and other sentences to which the offender is subject. The court’s failure to make an order on parole results in a prisoner being ineligible for parole on that sentence.[[58]](#footnote-58)
8. Prior to 2004, the possibility of parole was not possible in the Northern Territory.[[59]](#footnote-59) Today, courts have the discretion to fix a non-parole period. Courts fix a non-parole period as part of the sentence unless fixing such period would be inappropriate bearing in mind the nature of the offence, the past history of the offender or the circumstances of the particular case.[[60]](#footnote-60). Prisoners convicted of murder can be considered for parole after serving 20 years, or 25 where certain circumstances apply, in prison.
9. In the Australian Capital Territory, there is again a difference between life imprisonment and determinate imprisonment sentences. A court must fix a non-parole period for determinate terms of imprisonment that are one year or longer. However, the court is required to *not* fix a non-parole period for sentences of life imprisonment.[[61]](#footnote-61) Prisoners sentenced to life may only be released on licence after serving at least 10 years. The exercise of the prerogative of mercy is also available.[[62]](#footnote-62)

***Relevant Australian Case-Law***

1. Australian courts have often addressed questions arising out of the imposition of indefinite imprisonment sentences, particularly the absence of prospect of release for certain prisoners.
2. In the notable case of *R v Leslie Alfred Camilleri,* the Supreme Court of Victoria specifically stated that the defendant was never to ‘walk among [them] again’[[63]](#footnote-63). Therefore, he had no right to a prospect of release.
3. The New South Wales Supreme Court, in a number of cases, referred to its lack of power to fix a non-parole period for prisoners sentenced to life imprisonment, which consequently deprived such prisoners of any prospect of release in the future. In *R v Harris* and *R v Ngo*, judges urged the Parliament to consider giving courts the power to fix a non-parole period in life imprisonment sentences. In *R v Ngo*, a judge proclaimed that the Court had no power to fix a non-parole period once the offender was sentenced to life imprisonment.[[64]](#footnote-64) Thus, even if a court sentences an offender to life but believes that the offender should not be kept in custody for his whole life, the statutory regime does not allow for such a scheme.
4. The age of offenders has played a crucial role in some Australian jurisdictions, while it played almost no role in others. In a case where a young offender was sentenced to life imprisonment without any possibility of parole, the Court of Appeal in Victoria held that ‘[c]ertainly he had no hope or expectation of ever gaining his release. He is devoid of incentive to rehabilitate himself. He is entitled to remissions (…)’. The court, in turn, fixed a non-parole period of 30 years, so that offender would have a possibility of release.[[65]](#footnote-65) On the contrary, the High Court of Australia disregarded the relevance of age in a case before it, by holding that ‘it would be “irrelevant or misleading” to calculate the non-parole period by reference to the supposed life expectancy of the prisoner’.[[66]](#footnote-66)
5. In *Crump v R,* the fact that the offender had already served at least 40 years in prison, and that he did not have any prospect of release and meaningful life after prison was completely disregarded; his current sentence was upheld.[[67]](#footnote-67)
6. Life imprisonment sentences do not have a consistent application amongst Australian jurisdictions. While it is mandatory for some jurisdictions, there may nevertheless be a prospect of release through judicial or administrative mechanisms. On the other hand, when the court refuses to fix a non-parole period, prisoners can only be released through the exercise of mercy.
7. Mandatory life imprisonment for murder in Queensland, South Australia and the Northern Territory is largely qualified in practice due to the respective courts fixing a non-parole period, providing prisoners serving life sentences with a prospect of eventual release.[[68]](#footnote-68)
8. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS OR HER LIFE IN PRISON?
9. In New South Wales, where an offender is sentenced to imprisonment for life, the court does not have the power to fix a non-parole period. The only available mechanism is the exercise of prerogative of mercy.[[69]](#footnote-69) The offender may avail himself/herself of the prerogative of mercy by initiating the process through making a petition for review of his/her sentence. Others may also make this submission on offender’s behalf as well.[[70]](#footnote-70) If a non-parole period has been fixed for imprisonments for a determinate term, the Parole Authority must consider whether or not an offender should be released on parole at least 60 days before the offender’s parole eligibility date.[[71]](#footnote-71) If parole is denied, the prisoner can apply again after 12 months.
10. In Victoria, if a court fixes a non-parole period, which is available for determinate imprisonment terms as well as for life imprisonments, the Adult Parole Board considers the offender’s release on parole. Release of offenders that were convicted of sexual offences or serious violent offences can only be made by the respective division within the Parole Board. Release upon the expiration of the non-parole period is at the discretion of the Board.[[72]](#footnote-72) No submission requirement by the eligible prisoner is specified. However, if a court does not find it appropriate to fix a non-parole period, the only release mechanism available is the royal prerogative of mercy. The Governor may use this power even in situations where there was a non-parole period in place that did not expire.[[73]](#footnote-73)
11. In Queensland, there are two types of parole mechanisms: the first one is court-ordered and the second one is board-ordered, for lesser sentences. A person sentenced to imprisonment for more than three years or imprisonment for a serious violent offence or sexual offence must apply to the Parole Board after becoming eligible for parole.[[74]](#footnote-74) The exercise of the royal prerogative of mercy is also available.[[75]](#footnote-75)
12. In South Australia, the prisoner has to formally apply to the South Australian Parole Board following the expiration of the non-parole period.[[76]](#footnote-76) The Parole Board has the discretion to release prisoners with an aggregate sentence of five years or more.
13. In Tasmania, the court has the discretion to fix the eligibility of an offender for parole. If such a period has been fixed, the Parole Board considers the release on parole. Reports on prisoners eligible for parole may be prepared on the initiation of the Director of Corrective Services, or by request from the Parole Board. The Board considers whether a prisoner is to be released on parole before the date on which they become eligible. No prior individual petition requirement is specified. When a prisoner becomes eligible for parole, Secretary of the Parole Board notifies victims of the offence so that they can inform the Board of the injury they have suffered and how they have been affected by the commission of the offence. These accounts are taken into consideration by the Parole Board when determining whether the prisoner should be released.[[77]](#footnote-77) Release by the exercise of the royal prerogative of mercy is also available, which is initiated by a petition.[[78]](#footnote-78)
14. In the Northern Territory, release on parole is available to offenders sentenced to life imprisonment or determinate imprisonment, unless the court refuses to fix non-parole periods due to an extreme level of culpability. Following the expiry of the non-parole period, the Parole Board of the Northern Territory, on its own discretion, may order an offender’s release. To release prisoners sentenced to life imprisonment on parole, the board must give substantial weight to the protection of the community, the effect of the release on the victim’s family, and if necessary, the indigenous community.[[79]](#footnote-79) If a court does not fix a non-parole period, the only available release mechanism is the executive’s exercise of the prerogative of mercy. Such mechanism is subject to the offender’s good behaviour, and may have other conditions, such as being in the interest of the person, or the community.[[80]](#footnote-80)
15. In the Australian Capital Territory, the court has the duty to set non-parole periods, and must state when the period starts and when it ends, in imprisonment sentences other than life.[[81]](#footnote-81) Such mechanisms of release on parole are not available to prisoners sentenced to life imprisonment.[[82]](#footnote-82) In those cases, early release is only possible through executive means. Release on licence is one of the available mechanisms. The Attorney General may ask the Sentence Administration Board whether the offender should be released on licence. The offender should have served at least ten years of the sentence. In this instance, the Board only makes recommendations to the Executive. In making these recommendations, the primary focus is on the public interest. The Executive must review these recommendations and ‘anything else’ that they deem appropriate for release. The Executive grants or rejects release on licence, and may also impose conditions of licence if appropriate.[[83]](#footnote-83) Another mechanism is release by the exercise of prerogative of mercy.[[84]](#footnote-84)
16. The royal Prerogative of Mercy is one of the three powers that form the Institute of Mercy. At the federal level, the Governor General is vested with the royal prerogative of mercy. The Prerogative of mercy, applicable in the Commonwealth in general, is initiated upon submission of a petition by the convicted person, or other people on behalf of the convicted. The Governor General exercises the prerogative of mercy on the advice of the Federal Executive Cabinet and is bound by such advice. The Governor General may pardon the offender unconditionally, conditionally, or they may remit the penalty. At the state level, the Governor of each jurisdiction may pardon a convicted person or mitigate their sentence. The Governor is bound by the advice of the executive government of the jurisdiction on the exercise of mercy. Other mercy institutions are available to the executive so that they may seek out the judiciary’s advice on a petitioned case when deciding whether to exercise the prerogative of mercy or not. The Attorney-General or Law Officer may refer to the Supreme Court of the jurisdiction a question (of law and/or fact) related to the petitioned case so that the court informs the minister of its opinion. A minister may also refer the petitioned case to the Supreme Court to be dealt with as an Appeals case. The Judiciary’s advice is not binding on the executive when they exercise the prerogative of mercy.[[85]](#footnote-85)
17. As explained above, in a large majority of cases concerning imprisonment for life, this sentence ‘rarely has translated to a sentence for the term of a person’s natural life’. In a majority of the cases, a non-parole period was fixed. Academics often criticise that the actual determination of sentences is made by the executive (Parole Boards).[[86]](#footnote-86) An example is Queensland, where custodial durations in most life imprisonment sentences are determined by the Parole Board in practice. Heavy reliance on the administrative scheme has been criticised for including the possibility of serving a natural life imprisonment without the sentencing court ordering so.[[87]](#footnote-87)
18. The royal prerogative of mercy is not frequently exercised. Mercy has been granted in notable cases, where no other solution existed for the convicted. Mercy has a highly discretionary nature, and it is accepted that mercy will not be subject to judicial review.
19. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
20. In New South Wales, the purposes of sentencing are listed as punishment, deterrence, protection of the community, rehabilitation of the offender, holding the offender accountable and denunciation of the offence.[[88]](#footnote-88) The courts’ discretion in sentencing is limited by the mandatory life imprisonment for certain serious offences such as murder. The justifications behind, and also the requirements of, this mandatory sentencing scheme are listed as the community interest in retribution, punishment, community protection and deterrence. These concerns, which arise out of the extreme level of culpability in the commission of the offence, may only be addressed through life imprisonment. Such prisoners never become eligible for parole, making the sentence effectively a whole-life sentence. Where there is a determinate prison sentence in effect, a court still has the power to refuse to fix a non-parole period due to the nature of the offence, previous penalties, and other unspecified reasons.
21. In Victoria, the sentencing purposes are listed as just punishment, deterrence, rehabilitation, denunciation, and community protection.[[89]](#footnote-89) In this jurisdiction, courts may choose not to fix non-parole periods should such fixing be inappropriate, considering the nature of the offence or past history of the offender. Likewise, in South Australia, courts may decline to fix a non-parole period if such determination would be inappropriate because of the gravity of the offence, the circumstances surrounding the offence, the offender’s criminal record, the offender’s behaviour during previous releases, or other similar circumstances.
22. In Western Australia, life imprisonment is the mandatory sentence for murder. However, where such life sentence would be clearly unjust in the face of the circumstances of the offence and the offender, and where the offender is unlikely to be a threat to the society when released from prison, a determinate sentence is imposed.[[90]](#footnote-90) When sentencing an offender to life imprisonment for murder, a court may order that the offender must never be released. Such order should be necessary to meet the community’s interest in punishment and deterrence. To determine whether such order is necessary, the court must take into account the circumstances of the commission of the offence and aggravating circumstances.[[91]](#footnote-91)
23. In Tasmania, the Parole Board, when deliberating on the release of an offender, takes into consideration, *inter alia*, the likelihood of the prisoner re-offending, the protection of the public, the rehabilitation of the offender, and the circumstances and gravity of the offence.[[92]](#footnote-92)
24. In the Northern Territory, a court may, similar to that in New South Wales, refuse to fix a non-parole period if the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection, and deterrence can only be met through the imposition of life imprisonment with no possibility of release on parole.[[93]](#footnote-93)
25. Certain policy justifications lie in the common law principles. One of the central principles is the principle of proportionality. The High Court of Australia recognised the principle of proportionality as a ‘limiting factor on punishment’.[[94]](#footnote-94) In *Hoare v The Queen,* the court stated that the proportionality principle required the sentence to ‘never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances’.[[95]](#footnote-95) Similarly, the concept of ‘just deserts’ refers to the principle of proportionality and is often used interchangeably.[[96]](#footnote-96) The ‘Just deserts’ theory requires taking into account the seriousness of the actual offence committed and the culpability of the offender when measuring the punishment to be imposed.[[97]](#footnote-97) ‘Just deserts’ necessitates achieving proportionality in sentencing, so that the punishment fits the seriousness of the crime but does not exceed it. This relates to the principle of parsimony, which requires a sentence to be no more severe than is necessary to achieve the purpose of the sentence. The Australian Law Reform Commission stated that, as a reflection of this principle, certain punishments were unacceptable according to Australian community values.[[98]](#footnote-98)
26. Another basic principle of common law, one that was again asserted by the Australian High Court, is the principle of equal application of the law. The principle of equal justice necessitates ensuring that ‘no unjustifiable disparity in sentences is imposed upon offenders’ and that the ‘sentence to be imposed will produce no greater disparity than is necessary to give effect to the legislated change’.[[99]](#footnote-99) If there would be no clear criteria demonstrating when and under which circumstances life imprisonment should be imposed, the principle of equal justice would be hampered.[[100]](#footnote-100) Thus, a level of distinction between the most serious cases that should be punishable with the most severe penalty and other cases is required. Categories such as ‘worst cases’ might provide for a certain level of clarity.[[101]](#footnote-101)
27. The principle of totality is another similar principle. When an offender is convicted of multiple offences, the principle of totality requires the sentencing court to ensure that the aggregate or overall sentence must be just and appropriate to the totality of the offending behaviour. Therefore, the overall effect is taken into account to decide whether the sentence in question was too harsh or too lenient.[[102]](#footnote-102) The principle of totality also requires avoiding the imposition of ‘crushing sentences’. A crushing sentence is defined as a sentence which risks ‘provoking within the applicant a feeling of helplessness and the destruction of any reasonable expectation of a useful life after release’, according to the Court of Appeal of Victoria. The crushing effect is said to ‘both increase the severity of the sentence to be served and also destroy such prospects as there may be of rehabilitation and reform’.[[103]](#footnote-103) In *Haines v The Queen*, the crushing effect of the sentence was defined as being dependent on the particular facts of the case. The offender’s age or length of the sentence could not be the sole indicator of this effect.[[104]](#footnote-104) By this reasoning, a life imprisonment sentence is not in itself crushing.
28. Australian case law reflects the contention between different theories of punishment, mostly between retribution and rehabilitation. A common feature among some jurisdictions is how considerations of retribution, deterrence, and denunciation prevailed over prospects of rehabilitation when culpability in commission of the crime was very extreme.
29. In the *R v Leslie Alfred Camilleri* case, in which the Supreme Court of Victoria sentenced the offender to life imprisonment without any prospect of release, the Court explained that ‘elements of denunciation, retribution and general deterrence must predominate over the prospects of rehabilitation as sentencing considerations, to the extent that no minimum terms should be fixed.’[[105]](#footnote-105) Such justifications were also pronounced by the New South Wales courts. The Criminal Court of Appeals stated that in certain situations, objective circumstances might be so appalling that they ‘overwhelmed the offender’s subjective circumstances, including their prospects of rehabilitation’.[[106]](#footnote-106) In yet another case, it was highlighted that subjective circumstances might be disregarded where the level of culpability in the commission of the crime is very extreme.[[107]](#footnote-107)
30. The New South Wales court has held, as per mandatory life imprisonment requirements, that the imposition of life sentence should achieve retribution, punishment, community protection and deterrence cumulatively.[[108]](#footnote-108) The ‘extreme level of culpability’ requirement under the New South Wales life imprisonment legislation was found to be in conformity with the common law approach of ‘worst case category’. A similar finding was made in the *Ibbs v The Queen* case.[[109]](#footnote-109) This line of reasoning highlights how a maximum penalty of life imprisonment was intended for cases ‘falling within the worst category of cases’. In order to sentence an offender to the maximum penalty, the offence in question should be in the ‘worst-case’ category, where the act is of great heinousness and there are no facts to mitigate the seriousness of the crime.[[110]](#footnote-110)
31. A trace of a dignitarian rationale can be encountered in certain cases as well. A notable example is *R v Petroff*, a case before the Supreme Court of New South Wales. Here, one judge acknowledged that ‘the indeterminate nature of a life sentence has long been the subject of criticism by penologists… Such a sentence deprives prisoners of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been an increased difficulty in their management by the prison authorities.’[[111]](#footnote-111)
32. In *R v Denyer*, theCourt of Appeal of Victoria took into account the life expectancy of the offender, stating that if he were sentenced to life imprisonment without parole, there would be a substantial difference between his penalty and that of an offender twice his age. The Court then held that ‘[c]ertainly he had no hope or expectation of ever gaining his release. He is devoid of incentive to rehabilitate himself. He is entitled to remissions (…)’. So, the court fixed a non-parole period.[[112]](#footnote-112)
33. In the most recent case of *Crump v R,* where the offender was sentenced to life imprisonment with a minimum of 30 years and a term of 25 years for another offence, the Court’s adherence to the totality principle was questioned. The Court reiterated how the principle of totality had evolved and become settled in the New South Wales jurisdiction. In accordance with this principle, a sentence imposed when there are multiple offences should reflect the overall criminality involved in all offences, so as to ensure that the offender does not go unpunished for all offences he committed. At the same time, the overall sentence should be just and appropriate.[[113]](#footnote-113) If the appropriate sentence is a life sentence, which in effect does not include any prospect of release, punishment nevertheless adheres to the totality principle. Based on this established principle and the circumstances of the case, the sentence given to Mr Crump was found not to be in breach of the totality principle.[[114]](#footnote-114)
34. As warranted by case law, the weight given to objective and subjective factors vary in each case. More often than not, objective facts are given more importance and the prospect of rehabilitation is overlooked.
35. In New South Wales, a two-step process is employed to determine whether the imposition of life imprisonment is mandatory, by assessing objective facts and subjective factors. If objective facts indicate that the level of culpability in the commission of the crime is so extreme, then it warrants the maximum sentence. In the second step, subjective factors, including the offender’s prospect of rehabilitation, are taken into account to displace the need for sentencing the offender to the maximum penalty.[[115]](#footnote-115) However, in cases where objective facts are found to be extremely serious, they often trump the subjective factors.
36. In Victoria, life imprisonment sentences without parole eligibility are very rare compared to other jurisdictions. However, courts have abstained from articulating ‘clear and specifically weighted relevant considerations for determining when this ultimate sentence is to be used’.[[116]](#footnote-116) In *R v Iddon and Crocker*, the Court of Criminal Appeal in Victoria acknowledged having no precise parameters to determine which murder offences would deserve life imprisonment.[[117]](#footnote-117) Similarly, in Northern Australia, the courts do not have specific criteria or guidance as to what levels of culpability are so extreme that they are deserving of the most extreme penalty. Such absence has been criticised as being contrary to the principles of proportionality and equal application of law.[[118]](#footnote-118) It also shows that policy justifications are not properly reflected in the case law.
37. Another notable practice (or lack thereof) is how crushing sentences, which by definition relate to life imprisonment, were not deliberated on in life imprisonment cases. Academics have emphasized that crushing sentences were not used as a fetter to the imposition of life imprisonment penalties.[[119]](#footnote-119)
38. Dignitarian imperatives have not radically influenced the discussion in Australia, in the way that it did in the European Court of Human Rights jurisprudence. In this respect, it should be highlighted that Australia does not have a Bill of Rights. On the other hand, it is a party to the International Covenant on Civil and Political Rights. Therefore, dignitarian considerations are indeed voiced in some judgments and by certain scholars. However they have never gained enough importance in the face of other criminal justice principles.
39. As legislation, case law and practice show, the Australian jurisdictions mostly prefer a backward-looking theory of punishment. While the level of culpability, circumstances in which the offence was committed, deterrence, denunciation, protection of the community, etc., are frequently cited, individual aspects such as rehabilitation or socialisation of the offender are not so frequently touched upon, or get deprioritized.

## CANADA

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. In the Canadian Criminal Code, mandatory life sentences are imposed on those convicted of high treason, first-degree murder, and second-degree murder.[[120]](#footnote-120) Life sentences may also be given to dangerous offenders or offenders convicted of other serious offences where the maximum possible sentence is life. The period of detention is determined by the period of parole ineligibility and the decision of the National Parole Board once the offender is eligible for parole. As will be discussed below, the Canadian Criminal Code sets the number of years of parole ineligibility for first degree murder, while giving the court some discretion as to the period of parole ineligibility for other offences.
3. However, since 2 December 2011, in the case of multiple murders, a court can order consecutive parole ineligibility periods, after considering the recommendations from the jury. This provision was used in *R v Baumgartner,* in whichthe perpetrator was convicted of one count of first degree murder and two counts of second degree murder, to order life imprisonment with no chance of parole for forty years: twenty five years for the conviction of first degree murder as statutorily mandated, and fifteen years for the two convictions of second degree murder.[[121]](#footnote-121) The perpetrator was 21 years old when he committed the crime. In *R v Bourque*[[122]](#footnote-122), a 24-year-old man was convicted of three counts of first degree murder and two counts of attempted murder. Using this provision he was given a life sentence with ineligibility for parole for 75 years, due to the cumulative effect of the parole ineligibility of 25 years for each of the three counts of first-degree murder. However, ‘most lifers eventually become eligible for parole and are permitted to apply for conditional release with the’ National Parole Board who has the ability to determine whether they will be conditionally released.[[123]](#footnote-123)
4. Previously, the Criminal Law Amendment Act included a ‘Faint Hope Clause’, the process of judicial review whereby an offender who has served at least fifteen years of a life sentence ‘may apply…for a reduction in the number of years of imprisonment without eligibility for parole.’[[124]](#footnote-124) If the jury hearing the application reduce[d] the period of parole ineligibility, the offender [could] then make an application for parole …at the end of that reduced period.’[[125]](#footnote-125) However, this clause is not available for offences committed after 2 December 2011.[[126]](#footnote-126)
5. In 2014, ‘offenders with life or indeterminate sentences represented 23% of the total offender population’, consistent with the previous years’ statistics.[[127]](#footnote-127) This is similar to the statistics in 2000, in which approximately 20% of all offenders were serving indeterminate sentences, including life sentences.[[128]](#footnote-128) In 2000, approximately ‘one-third of the approximately 13, 000 offenders in Canadian federal penitentiaries’ were serving sentences longer than ten years.[[129]](#footnote-129)
6. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
7. The Canadian Criminal Code sets out a number of sentencing principles that constrain the discretion of judges in sentencing. These include: proportionality to the ‘gravity of the offence and degree of responsibility of the offender’[[130]](#footnote-130); consideration of mitigating and aggravating factors to reduce or increase the sentence; similar sentences must be imposed on similar offenders for similar offences in similar circumstances[[131]](#footnote-131); when using consecutive sentences, they must not be unduly long or harsh[[132]](#footnote-132); ‘an offender should not be deprived of their liberty, if less restrictive sanctions may be appropriate’[[133]](#footnote-133); and ‘all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered’.[[134]](#footnote-134) The aggravating circumstances consist of motivation by bias, prejudice, or hate, circumstances of domestic violence, abuse of a position of trust or authority, abuse of a person under 18 years of age, whether ‘the offence was committed for the benefit of, at the direction of or in association with a criminal organisation, or a terrorism offence.[[135]](#footnote-135)
8. The Canadian Charter of Rights and Freedoms may be used to restrict sentencing a person to life in prison. Section 1 of the Charter outlines that all the rights and freedoms in the Charter can only be subject ‘to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ Relevant rights in the Charter include the right to ‘life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’[[136]](#footnote-136) and the right ‘not to be subjected to any cruel and unusual treatment or punishment.’[[137]](#footnote-137)
9. *United States v Burns* concerned the extradition of the respondents to stand trial for murders committed when they were 18 years of age and the possible imposition of the death penalty should they be convicted in the US. It was held that extradition could be refused under s 7 of the Charter of Rights and Freedoms (life, liberty and security) only when it ‘shocked the conscience’, but that extradition violating the ‘principles of fundamental justice’ would always shock the conscience and thus be refused.[[138]](#footnote-138)
10. Justice Lamer in *R v Smith (Edward Dewey)* held that the test for determining whether s 12 of the Charter of Rights and Freedoms (cruel and unusual punishment) has been violated is ‘one of gross disproportionality, because it is aimed at punishments that are more than merely excessive.’*[[139]](#footnote-139)* In determining gross disproportionality, ‘the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment (which will be explained in Part IV), in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the *offender* deserves’ (emphasis added). Justice Lamer went on to hold that the *effect* of the sentence imposed on the offender is also relevant; if ‘it is grossly disproportionate to what would have been appropriate, then it infringes s. 12.’ This analysis should ‘not [be] limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied’ but also includes ‘its nature and the conditions under which it is applied.’ Thus in *United States v Ferras (United States v Latty)*, concerning the extradition of two offenders to the US, the Supreme Court held that a sentence that was grossly disproportionate to the offence would violate s 12 of the Charter of Rights as it would amount to cruel and unusual treatment or punishment.[[140]](#footnote-140) Applying this reasoning, the court in *R v Luxton* held that a mandatory minimum life imprisonment with ineligibility of parole for twenty-five years for a conviction of first degree murder was not grossly disproportionate.[[141]](#footnote-141)
11. *R v Latimer* concerned the conviction of the accused of second degree murder for killing his severely disabled daughter. The question arose as to whether imposing mandatory minimum sentences for convictions of second degree murder violated the prohibition of ‘cruel and unusual punishment’ in s 12 of the Charter of Fundamental Rights and Freedoms, and thus whether the accused should be granted constitutional exemption from the minimum sentence.[[142]](#footnote-142) In determining whether there was a violation of s 12, the court similarly held that ‘the gravity of the offence, as well as the particular circumstances of the offender and the offence, must be considered.’[[143]](#footnote-143) It held that ‘[i]n considering the characteristics of the offender and the particular circumstances of the offence, any aggravating circumstances must be weighed against any mitigating circumstances.’ Thus not only did the court have to take into account the position of trust of the offender, the degree of planning of the murder, his lack of remorse, the victim’s ‘extreme vulnerability’ and efforts to conceal the murder, it also had to account for ‘the accused’s good character,…his tortured anxiety about [his daughter’s] well-being, and his laudable perseverance as a caring and involved parent.’ The Court held that the test for determining ‘gross disproportionality’ was ‘very properly stringent and demanding’ and would only be found on ‘rare and unique occasions’. Thus, a mandatory minimum life sentence without eligibility for parole for 10 years for a conviction of second degree murder was not grossly disproportionate.[[144]](#footnote-144)
12. Further, the Supreme Court in *R v Lyons* held that ‘it is not the detention itself but its indeterminate quality that harbours the potential for cruel and unusual punishment’, emphasizing the devastating effects ‘of an indeterminate sentence on a dangerous offender.’[[145]](#footnote-145) It was held that ‘an enlightened inquiry under s. 12 must concern itself, first and foremost, with the way in which the effects of punishment are likely to be experienced’, and thus for an indeterminate sentence it is the process of parole that is the most significant because it allows the sentence to be tailed to the offender.[[146]](#footnote-146)
13. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
14. Those convicted of high treason or first-degree murder are not eligible ‘for parole until the person has served twenty-five years of the sentence.’[[147]](#footnote-147) Those convicted of second-degree murder are not eligible ‘for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years’.[[148]](#footnote-148)
15. A judge, in utilising their discretion to impose a higher number of years of parole ineligibility for an offender convicted of second degree murder at maximum of twenty-five years will do so ‘having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission’.[[149]](#footnote-149) Those ‘convicted of second degree murder where [they have] previously been convicted of culpable homicide that is murder’ are not eligible ‘for parole until the person has served twenty-five years of the sentence.’[[150]](#footnote-150)
16. It remains the prerogative of the National Parole Board to grant conditional release at the first date of parole eligibility.
17. Pursuant to s 121(1) of the *Corrections and Conditional Release Act 1992*, an offender may apply for parole by exception, an application for parole despite the fact that they are not yet eligible for parole according to their sentence. An order for parole by exception can be made if the offender is ‘terminally ill’, their ‘physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement’, ‘continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced’ or they are ‘the subject of an order of surrender under the *Extradition Act* and [will] be detained until surrendered.’[[151]](#footnote-151) However, if the offender is ‘serving a life sentence imposed as a minimum punishment or commuted from a sentence of death’, they may only apply for parole by exception if they are terminally ill.[[152]](#footnote-152)
18. The Royal Prerogative of Mercy, a discretionary power to grant clemency in exceptional cases of federal offences, is vested in the monarch but exercised by the Governor in Council according to s 748 of the Criminal Code. With respect to those serving life or indeterminate sentences, the Governor in Council may grant a conditional pardon to those offenders who are no eligible for parole by exception under sections 102 and 121 of the *Corrections and Conditional Release* Act.[[153]](#footnote-153) The granting of a conditional pardon results in parole prior to their eligibility date according to the *Corrections and Conditional Release Act.* The Parole Board of Canada acts under the Royal Prerogative of Mercy to review and investigate these applications, and to subsequently make recommendations to the Minister with regards to the applications. In reviewing these applications, the Parole Board of Canada relies on six guiding principles. First, ‘[t]here must be clear and strong evidence of injustice or undue hardship (e.g. suffering of a mental, physical and/or financial nature that is out of proportion to the nature and the seriousness of the offence and more severe than for other individuals in similar situations).’ Second, ‘[e]ach application is strictly examined on its own merits.’ Third, ‘[t]he applicant must have exhausted all other avenues available under the Criminal Code, or other pertinent legislation (i.e. appeals, termination of probation, miscarriage of justice).’ Fourth, ‘[t]he independence of the judiciary shall be respected in that there must be stronger and more specific grounds to recommend action that would interfere with a court's decision.’ Fifth, ‘[i]t is intended only for rare cases in which considerations of justice, humanity and compassion override the normal administration of justice.’ Last, ‘[t]he decision should not, in any way, increase the penalty for the applicant.’[[154]](#footnote-154)
19. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
20. The purposes of sentencing contained in the Criminal Code include the following: denunciation, deterrence, separation of offenders, rehabilitation, reparation, and promotion of responsibility.[[155]](#footnote-155) Furthermore, the *Corrections and Conditional Release Act* states that the ‘purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful, and safe society by carrying out sentences…through the safe and humane custody’ and assisting rehabilitation and reintegration of offenders, emphasizing that ‘the protection of society is the paramount consideration’.[[156]](#footnote-156)
21. In *R v Lyons*, the Supreme Court held discussed that ‘in a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender’ and that these considerations are within the ‘legitimate purview of [both] legislative [and] judicial decisions regarding sentencing.’[[157]](#footnote-157) In *Re B.C. Motor Vehicle Act,* Wilson J, in her concurring judgment, articulated that it ‘is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a “fit” sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender “deserved” the punishment he received and feel a confidence in the fairness and rationality of the system.’[[158]](#footnote-158) The Supreme Court in *R v Latimer* made reference to the ‘considerable difference of opinion …on the wisdom of applying minimum sentences from a criminal law policy or penological point of view’, but that the use of minimum sentences for second-degree murder was Parliament’s choice.[[159]](#footnote-159) The Court elaborated that although the ‘sentencing principles of rehabilitation, specific deterrence and protection’ were not relevant in the case, mandatory minimum sentence plays an important role in denouncing murder’ and thus is ‘consistent with a number of valid penological goals and sentencing principles’.[[160]](#footnote-160)
22. With regard to the death penalty, the Supreme Court in *R v Swietlinski* held that the fairness of the s. 745 Criminal Code proceedings were undermined by counsel’s constant ‘repeating that imprisonment for 25 years is a substitute for the death penalty’. Even though murder used to be sentenced to the death penalty, ‘an invitation to offset the alleged excessive clemency of Parliament by a severity not justified by the wording of s. 745’ was not permitted. The appellant in the case had the right, by virtue of s 745, to ‘seek a reduction in his ineligibility period’ and the ‘fairness of the proceeding in which the appellant may obtain such a reduction’ would be undermined ‘by constant references to the death penalty.[[161]](#footnote-161)
23. The British Columbia Court of Appeal, in a case concerning whether a life sentence could be imposed on a person convicted of sexual assault where the offender poses ‘a continuing danger to society’[[162]](#footnote-162), held that the maximum sentence of life imprisonment is generally ‘reserved for a situation involving the worst offence and the worst offender’ justified on the basis of protection of society. However, it held that ‘these are [not] the only circumstances that can attract the maximum sentence.’[[163]](#footnote-163) Although the ‘sentence must fit the criminal as well as the crime’, ‘it is the nature of the crime which must be the most compelling consideration’[[164]](#footnote-164) codified as *the* fundamental principle of sentencing in s. 817.1 of the Criminal Code.[[165]](#footnote-165) Thus, ‘it will be appropriate to impose the maximum sentence for the purpose of prevention only where the sentence “fits the crime”’.[[166]](#footnote-166)
24. In the 1987 Report on Sentencing Reform by the Canadian Sentencing Commission, it was argued that it was legitimate and relevant to consider retribution in sentencing; however this was not sufficient on its own as it fails to generally justify imposing criminal sanctions. Thus, the Commission argued that a more coherent theory of punishment includes a combination of retribution as well as utilitarian justifications such as deterrence and rehabilitation.[[167]](#footnote-167)

## ENGLAND AND WALES

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. According to the Sentencing Council, ‘When a court passes a life sentence it means that the offender will be subject to that sentence for the rest of their life.  When passing a life sentence, a judge must specify the minimum term (the tariff) an offender must spend in prison before becoming eligible to apply for parole. The only exception to this is when a life sentence is passed with a ‘whole life order’ meaning that such an offender will spend the rest of their life in prison.  A life sentence always lasts for life whatever the length of the minimum term’[[168]](#footnote-168).
3. In England and Wales, whilst there is scope for the sentence to last until the death of the prisoner, in most cases, the prisoner will be eligible for parole, once he/she has served the minimum sentence.
4. Generally, life sentences are imposed in the case of serious offences. Section 225 of the Criminal Justice Act 2003 provides that the court must impose a sentence of life imprisonment (or custody for life where the offender is aged 18 to 20 years old at the date of conviction) where:
	1. A person aged 18 or over is convicted of a serious offence (i.e. a specified violent offence or a specified sexual offence, listed in Sch.15); and
	2. The offence is punishable with imprisonment for life; and
	3. The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences; and
	4. The court considers that the seriousness of the offence (and any associated offences) is such as to justify the imposition of a sentence of imprisonment for life.
5. Section 226 of the Criminal Justice Act 2003 contains a similar provision (known as detention for life) for offenders under the age of 18.
6. Within the umbrella of ‘life imprisonment’, pursuant to the law of England and Wales, there are either *mandatory* or *discretionary* life sentences.

***Mandatory life sentences***

1. England and Wales has given a mandatory life sentence to those convicted of murder since 1965[[169]](#footnote-169). This is the only offence for which a life sentence (defined by s.277 of the Criminal Justice Act 2003) is fixed by law, although a tariff period must also be set (s.269 CJA 2003); this is the minimum term which an offender must serve before they can be considered for release by the Parole Board (see ss.28 (5)-(8) of the Crime (Sentences) Act 1997) (C(S)A 1997). Even if such release is obtained, the individual will only be released on licence (more information is provided in Section II).
2. The minimum term for murder is based on the starting points set out in Schedule 21 of the Criminal Justice Act 2003 (as amended). This schedule sets out examples of the different types of cases and the starting point which would usually be applied, for example: Where the murder is committed with a knife or other weapon, the starting point is 25 years. For less serious cases, i.e. those not involving a knife or weapon, the starting point is 15 years. If the offender was under the age of 18 when he committed the offence, the appropriate starting point, in determining the minimum term, is 12 years.
3. For the most serious cases, 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. A whole life order is imposed where “the court considers the seriousness of the offence…is exceptionally high”[[170]](#footnote-170) and “the offender was aged over 21 when he committed the offence”[[171]](#footnote-171). Cases that usually fall within this sub-section are those which:
	1. Involve the murder of two or more persons, where each murder involves any of: (i) a substantial degree of premeditation or planning; (ii) the abduction of the victim; or (iii) sexual or sadistic conduct;
	2. Include the murder of a child if involving the abduction of the child or sexual or sadistic motivation;
	3. Murder done for the purpose of advancing a political, religious, racial or ideological cause; or
	4. Murder by an offender previously convicted of murder[[172]](#footnote-172).
4. Thus, offenders serving a whole life order, will never be released from prison UNLESS they are released on compassionate grounds (discussed below).
5. In December 2015, there were 7,400 prisoners serving a life sentence in England and Wales and 53 whole-life prisoners[[173]](#footnote-173). The England and Wales prison population is approximately 87,000[[174]](#footnote-174) men and women, and the imposition of a whole life order is not particularly common.
6. The Criminal Justice Act 2003 sets out the nature and extent to which aggravating and mitigating factors may affect departures from the starting point. Paragraph 9 of the Criminal Justice Act 2003 states: “Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order”. Paragraph 10 of the Criminal Justice Act 2003 states:

“Aggravating factors that may be relevant to the offence of murder include—

1. a significant degree of planning or premeditation,
2. the fact that the victim was particularly vulnerable because of age or disability,
3. mental or physical suffering inflicted on the victim before death,
4. the abuse of a position of trust,
5. the use of duress or threats against another person to facilitate the commission of the offence,
6. the fact that the victim was providing a public service or performing a public duty, and
7. concealment, destruction or dismemberment of the body.”
8. Paragraph 11 of the Criminal Justice Act 2003 states:

“Mitigating factors that may be relevant to the offence of murder include—

1. an intention to cause serious bodily harm rather than to kill,
2. lack of premeditation,
3. the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,
4. the fact that the offender was provoked (for example, by prolonged stress),
5. the fact that the offender acted to any extent in self-defence,
6. a belief by the offender that the murder was an act of mercy, and
7. the age of the offender.”
8. It is useful to note that aggravating or mitigating factors enable the court to depart from the recommended minimum term of the life sentence, but the life sentence itself must still be imposed (because it is mandatory).

***Discretionary life sentences***

1. There are a number of crimes for which the maximum sentence for the offence, such as rape or robbery, is life imprisonment. This does not mean that all or most offenders convicted of those offences will get life. The categories are: life sentence for serious offences and life sentence for second listed offences.
2. In regards to the life sentence for serious offences, a sentence of imprisonment for life must be imposed, where the following criteria are met (Section 225 Criminal Justice Act 2003): the offender is convicted of a specified offence (listed in Schedule 15 of the Criminal Justice Act 2003); and in the court’s opinion the offender poses a significant risk to the public of serious harm by the commission of further specified offences; and the maximum penalty for the offence is life imprisonment; and the court considers that the seriousness of the offence justifies the imposition of imprisonment for life.
3. In regards to the life sentence for second listed offence, **t**he court must impose a sentence of imprisonment for life, where the offender is convicted of an offence listed in schedule 15B of the Criminal Justice Act 2003; andthe court would impose a sentence of imprisonment of 10 years or more for the offence; and the offender has a previous conviction for a listed offence for which he received a life sentence with a minimum term of at least 5 years or a sentence of imprisonment of at least 10 years;*unless* it would be unjust to do so in all the circumstances.
4. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
5. There has been considerable discussion in the English courts concerning the compatibility of life imprisonment, particularly ‘whole life orders’ with art. 3 of the European Convention on Human Rights 1950 (“ECHR”), to which the United Kingdom is a party. Art. 3 provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.
6. The English Court of Appeal and the ECtHR have significantly disagreed with one another on the application of ‘whole life orders’. Ever since *Vinter v UK* before the ECtHR, in which the Court found that a legal system which does not offer a right for hope by way of review and potential release violates art. 3 of the ECHR[[175]](#footnote-175), the English Court of Appeal has upheld the imposition of a whole life order and has, in recent years, adopted a very wide interpretation of the Secretary of State’s power to order compassionate release (see *supra*,Part III).
7. In *Attorney General's Reference (No. 69 of 2013)*, for instance, the Court of Appeal held that whole-life sentences were not incompatible with art. 3 of the ECHR, and judges were to continue to impose them in exceptional cases. The review regime provided for by the Crime (Sentences) Act 1997 s.30 was compatible with art. 3, providing offenders serving whole-life sentences with the possibility of release in exceptional circumstances. The judgment considered the following issues: (a) the power to impose a whole life order as just punishment, (b) whether the regime which provides for reducibility has to be in place at the time the whole life order is imposed, and (c) whether the regime under s.30 is a regime for reducibility which is in fact compliant with art. 3.
8. In respect of the power to impose a whole life order as punishment, the judgment was clear: some crimes were so heinous that Parliament was entitled to proscribe, compatibly with the Convention, that the requirements of just punishment encompassed passing a sentence that included a whole-life order. *Vinter v UK* did not cast any doubt on that proposition. There might be a legitimate dispute as to what such crimes were, but Member States had a margin of appreciation. In the United Kingdom it was for Parliament to set the framework under which the judge was to decide whether a whole-life order was the just punishment in any given case. (see paras 15-17 of the *Attorney General's Reference (No. 69 of 2013)*)*.*
9. As for whether the regime has to be in place at the time the whole life order is imposed: The Grand Chamber in *Vinter v UK* stressed that there is no violation of art. 3 if a prisoner spends his whole in prison. However, justification for such detention might shift during the course of a sentence: the punishment may appear just at the outset, however it might cease to be just during the passage of time[[176]](#footnote-176). Thus, the Court in *Attorney General’s Reference (No. 69 of 2013)* appeared to agree with the Grand Chamber in *Vinter v UK* that a whole life prisoner is entitled to know what he must do to be considered for release and under what conditions[[177]](#footnote-177) and agreed with the Grand Chamber in *Vinter v UK* that a legal regime for a review during the sentence must be in place at the time the sentence is passed.
10. As for whether the regime under section 30 is a regime for reducibility which is in fact compliant with art. 3, the Court in *Attorney General’s Reference (No. 69 of 2013)* was of the view that the domestic law in England and Wales was clear as to the “possible exceptional release of whole life prisoners”[[178]](#footnote-178). First, the power of review arose in “exceptional circumstances” and the Court determined that the term “exceptional circumstances” was itself sufficiently certain[[179]](#footnote-179). Second, the Secretary of State was obliged to consider whether such exceptional circumstances justify release of the whole life prisoner on compassionate grounds[[180]](#footnote-180). The policy, set out in the Lifer Manual, detailed the matters which the Secretary of State must consider but he cannot “fetter his discretion by taking into account only the matters set out in the Lifer Manual”[[181]](#footnote-181). Thus, the Secretary of State had the power to consider ‘exceptional circumstances’ beyond those prescribed in the Lifer Manual.
11. Finally, “the decision of the Secretary of State must be reasoned by reference to the circumstances of the each case and is subject to scrutiny by way of judicial review”[[182]](#footnote-182). Thus, the Court concluded that, in its view: the law of England and Wales “provides an offender with ‘hope’ or the ‘possibility’ of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable”[[183]](#footnote-183). The Court explained that all such requests should be considered on an individual basis but refrained from specifying the types of circumstances that would render the punishment no longer just[[184]](#footnote-184). The Court further explained that “circumstances can and do change in exceptional circumstances”[[185]](#footnote-185), thereby necessitating the requirement for review of whole life sentences. The Court completed its judgment by stating:

36. …The interpretation of section 30 we have set out provides for that possibility and hence gives to each such prisoner the possibility of exceptional release.

37. Judges should therefore continue to apply the statutory scheme in the 2003 Act and in exceptional cases, likely to be rare, impose whole life orders in accordance with Schedule 21[[186]](#footnote-186).

Thus making clear the rare and unusual punishment imposed by a whole life order.

1. To summarise, in applying section 30, the Court must have regard to the following:
	1. The power of review arises if there are exceptional circumstances. The offender subject to the order must demonstrate that exceptional circumstances have arisen since the whole life term was imposed.
	2. The Secretary of State must then consider whether such exceptional circumstances justify release on compassionate grounds.
	3. The term “compassionate grounds” must be read in a manner compatible with Art.3. “Compassionate grounds” is a term with a wide meaning that can be elucidated on a case by case basis. It is not restricted to matters set out in the Lifer Manual.
	4. The Secretary of State's decision must be reasoned by reference to the circumstances of each case and is subject to scrutiny by way of judicial review.[[187]](#footnote-187)
2. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
3. As mentioned above, if an offender receives a ‘whole life order’, he/she is not entitled to early release. He/she will never be eligible for parole, unless released in the rare instance on compassionate grounds pursuant to section 30 of the C(S)A 1997:

(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds. (2) Before releasing a life prisoner under subsection (1) above, the Secretary of State shall consult the Parole Board, unless the circumstances are such as to render such consultation impracticable.

1. Guidance concerning the Secretary of State's policy regarding release on compassionate grounds is set out in Chapter 12 of the Indeterminate Sentence Manual (the Lifer Manual) (Prison Service Order 4700). The criteria date from April 2010 and state: ‘the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]), or the ISP is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stoke; and the risk of re-offending (particularly of a sexual or violent nature) is minimal; and further imprisonment would reduce the prisoner's life expectancy; and there are adequate arrangements for the prisoner's care and treatment outside prison; and early release will bring some significant benefit to the prisoner or his/her family.’[[188]](#footnote-188) Thus the Lifer Manual refers to the use of this power whether a prisoner is in the last stages of a terminal illness or is bedridden or incapacitated and the risk of reoffending is minimal.
2. Since the entry into force of the Criminal Justice Act 2003, any offender sentenced to a whole-life order has had only one possible avenue for release - through the Secretary of State's power to release life-sentence prisoners on compassionate grounds under s. 30 of the C(S)A 1997,[[189]](#footnote-189) mentioned above. According to the Criminal Justice Act 2003 the court, in all cases where a life sentence is being imposed, must specify the minimum term to be served by the offender before being considered for release. This term is:

… designed to reflect the period an offender should serve to meet the requirements of retribution and deterrence. After that, the offender must be released by the Parole Board, which…must be satisfied that it is no longer necessary for the protection of the pubic that the prisoner should be confined.[[190]](#footnote-190)

1. However, in the case of mandatory life sentences:

… the offender will only be released once they have served the minimum term and if the Parole Board is satisfied that detaining the offender is no longer necessary for the protection of the public. If released, an offender serving a life sentence will remain on licence for the rest of their life. They may be recalled to prison at any time if they are considered to be a risk to the public. They do not need to have committed another offence in order to be recalled.[[191]](#footnote-191)

1. In the case of discretionary life sentences:

… the judge in sentencing will set a minimum term that the offender must serve in prison. At the end of that term they can apply to the Parole Board for release on licence but will only be released if no longer considered to be a risk to the public. If released the offender would be subject to certain conditions and if the conditions are broken or if the offender is considered to be a risk to the public they will be sent back to prison.[[192]](#footnote-192)

This is similar to the process for those offenders serving a mandatory life sentence, although the release conditions may differ.

1. Section 82A of the Powers of the Criminal Courts (Sentencing) Act 2000 contains within it provisions relating to release after the serving of the tariff period. For example, the court may state that, due to the seriousness of the offence, the early release provisions do not apply; thus, having served their tariff period, the offender will continue to be detained, instead of being permitted early release at the end of the tariff period[[193]](#footnote-193). Thus, early release is not an absolute right and the court may derogate from the early release provisions.
2. The tariff period must be served in full; there is no provision for release prior to serving the length of the tariff period, except in the case of juveniles, who, since R. (on the application of Smith) v Secretary of State for the Home Department [2005] UKHL 51; [2006] 1 A.C. 159, are entitled to periodic reviews of progress with the possibility of a tariff reduction.
3. Once the tariff has been served, s.28 (5) of the Crime (Sentences) Act 1997 applies. This states that it is the duty of the Secretary of State to release the prisoner once he has served his tariff period and the Parole Board has directed his release. Section 28(6) details the test that must be met for the Parole Board to so direct; the Board "must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".
4. Individuals released from a life sentence are subject to a life licence which remains in force for the duration of their natural life. This licence contains various conditions imposed on the individual. Conditions range from e.g. being under the supervision of a parole officer, residence requirements, work and employment restrictions, travel restrictions.[[194]](#footnote-194) The individual may also be recalled to prison at any time to continue serving their life sentence if it considered necessary to protect the public.[[195]](#footnote-195)
5. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
6. In understanding the approach of the English courts, it is useful to consider the comments the judiciary made in the following cases:

***R v Bieber [2008] EWCA Crim 1601(Court of Appeal, Criminal Division))***

1. In this case the appellant appealed against his whole life order. The facts of the case are as follows: The appellant was stopped in his car by police officers on a routine patrol. Three officers approached the car. He produced a handgun and shot all three police officers. He stood over one police officer and shot him through the head, which killed him. The other two officers were wounded. The applicant was convicted of one count of murder, two counts of attempted murder and two counts of possession of a firearm with intent to endanger life.
2. In sentencing the appellant:

The judge concluded that the appropriate starting point for the defendant's minimum term should be 30 years but that, in view of the aggravating feature that the defendant had shot the officer at point blank range when he was disabled and defenceless, the early release provisions should not apply and the defendant should spend the rest of his life in prison[[196]](#footnote-196).

1. The applicant appealed the imposition of a whole life order on the basis that the facts of the case did not justify the imposition of a whole life order and that a whole life order infringed his rights under the European Convention on Human Rights 1950, art 3. And should not have been imposed[[197]](#footnote-197).
2. His appeal was allowed. The judge explained how an irreducible whole life sentence imposed by a judge who considered the offence so serious that for purposes of punishment and deterrence, the offender must remain in prison for the rest of his days, did not violate art. 3 of the ECHR[[198]](#footnote-198). Nevertheless, the judge allowed the appeal as the facts, “horrifying as they were, did not justify the imposition of a whole life order”[[199]](#footnote-199) with regard to the seriousness of the offence.
3. Here, the sentence of a whole life order did not itself violate the appellant’s art. 3 rights. The court recognized that there were situations in which an offence was so serious that for the purposes of punishment and deterrence, the offender must remain in prison for the rest of his life. That said, the circumstances were not grave enough in this case to meet the ‘seriousness’ threshold thus, the imposition of a whole life order was not justified.

***R v Bamber [2009] EWCA Crim 962, in the Court of Appeal (Criminal Division)***

1. In 1986, the applicant was convicted of murdering his adoptive father, his adoptive mother, his adoptive sister and his nephews (two 6 year old twins).
2. In 2002, a reference was made to the Criminal Cases Review Commission, in which this conviction was reviewed and upheld.
3. The murders were planned. The applicant broke into the family home, whilst the deceased were sleeping and fired 25 bullets from a rifle into their bodies. The applicant stood to make considerable financial gain, he was the sole beneficiary to his parents’ estate valued over £400,000. The applicant then attempted to divert blame on to his mentally ill sister and the applicant made significant attempts to deceive the police. Given these facts and the level of careful and sophisticated preparation, the Crown contended that the crime was at the “highest level of seriousness”[[200]](#footnote-200).
4. The court appears to rely on a case-by-case basis in assessing the seriousness of the case. Here, the clear premeditation, the fact that the applicant stood to gain financially and consequently attempted to blame his mentally ill sister, all served to make this offence so seriousness that a whole life order was justified.
5. In 1986, the trial judge made a recommendation about the minimum sentence which should lapse before the applicant could be released on licence. His recommendation reflected his view about the “actual length of detention necessary to meet the requirements of retribution and general deterrence”[[201]](#footnote-201). Drake J imposed a mandatory sentence of life imprisonment on each count of murder and recommended a minimum term of 25 years to be spent in prison. Drake J assessed the case and provided his views about the length of detention sufficient to satisfy the “the requirements of retribution and general deterrence”[[202]](#footnote-202). Drake J concluded that “this was an “exceptionally monstrous crime” [and he] drew particular attention to the way in which the applicant had decided to throw suspicions on to his sister, and how the plan very nearly led “to him escaping detection”[[203]](#footnote-203). On the basis of these recommendations, the Secretary of State then ordered a whole life tariff be imposed on the applicant.
6. Subsequently, the applicant sought review of the minimum term pursuant to legislative changes[[204]](#footnote-204) but the judge ordered that early release provisions did not apply to the applicant. Thus, his sentence remained a whole life order.
7. The applicant appealed this decision and made the following submissions: he submitted that there was no power in the court to review a whole life order, thus it was no reducible and this engaged his art. 3 and art. 7 ECHR rights[[205]](#footnote-205). He also submitted that the whole life order was excessive and unjustified and requested a fixed term[[206]](#footnote-206). The main submissions centred on the inability of a whole life order to provide hope or possible consideration of release, especially given the limited circumstances contained in section 30 of the Crime (Sentences) Act 1997 arising from release in exceptional circumstances (i.e. compassionate release)[[207]](#footnote-207). The applicant submitted that these circumstances were extremely restrictive and an inquiry had revealed that no prisoners subjected to whole life orders had been released on the basis of these powers[[208]](#footnote-208).
8. The Court in this case, reasoned that a whole life order is exceptional, it does not apply in every case of murder and the circumstances of this case were so grave that it justified the imposition of a whole life order[[209]](#footnote-209).
9. In reaching its judgment, the Court departed from the reasoning of the Grand Chamber in *Kafkaris v Cyprus “…*that the whole life sentence imposed in such circumstances constitutes a breach of any of his Convention rights. In our judgment therefore nothing in the Convention meant that Tugendhat J was precluded from making a whole life order if, in his judgment, such an order represented appropriate punishment for extreme criminality resulting in five murders”[[210]](#footnote-210).
10. Finally, the Court reiterated: “The occasions when a whole life order should be made whether by a sentencing judge, or the judge conducting the review under the 2003 Act, are rare, and should be reserved for the most extreme cases”[[211]](#footnote-211). The Court found no possible basis for interfering with the imposition of the whole life order and concluded:

It was neither wrong in principle nor did it produce a manifestly excessive result. We would, however, and unusually, go further. On conviction of these crimes, even when committed by a relatively young man, punishment and retribution in the form of a whole life order was fully justified[[212]](#footnote-212).

1. The court appears to adopt the view that there are particularly grave and serious circumstances, in the name of punishment and retribution, that require a whole life order.

***R v Douglas Gary Vinter [2010] 1 Cr. App. R. (S.) 58***

1. The case just mentioned was followed by R v Douglas Gary Vinter [2010] 1 Cr. App. R. (S.) 58 heard in the Court of Appeal. This case subsequently appeared in the European Court of Human Rights (*Vinter v United Kingdom*).
2. In this case the appellant had been convicted of murder in 1996, after he stabbed a man to death. While serving the sentence he met a woman. On release, he married the woman and, whilst on licence, he later killed her. The deceased had injuries consistent with an attempt at strangulation and stab wounds. The appellant admitted responsibility and was sentenced to life imprisonment with a whole order.
3. The appellant appealed his whole life order: the appellant argued that the judge “directed his sentencing remarks to the future dangerousness of the appellant”[[213]](#footnote-213) and thus failed to correctly address the issue, meaning the whole life term sentence was not appropriate. The Court interpreted this as requiring an assessment of whether a whole life order was appropriate given the seriousness of the crime[[214]](#footnote-214). The Court reasoned that the crime “because it was a second murder, was of exceptionally high seriousness”[[215]](#footnote-215), it had an element of premeditation, followed by kidnap and the appellant intentionally sought to deceive the police[[216]](#footnote-216). Thus, the murder was committed by an individual who was “already a convicted murder, [meaning] a whole life sentence is the appropriate period for punishment and deterrence”[[217]](#footnote-217).
4. Note that a fundamental consideration for the court in this case was whether a whole life order was appropriate in the context of the seriousness of the crime. The comments made at paragraphs 20 and 21 show how a key factor in determining whether a whole life order is appropriate, centres on the seriousness of the crime, which reflects the position adopted in section 225 of the Criminal Justice Act 2003 (see above). Further, the court appears to justify ‘whole life orders’ on the basis of punishment and deterrence.
5. As mentioned, this case subsequently appeared before the European Court of Human Rights which considered the compatibility of English Law (particularly whole life orders) with human rights. The European Court reached a different outcome – see section [X] for further details.
6. To summarise, English case law in respect of whole life orders, operates on the premise that these orders are justified in certain circumstances. The above decisions demonstrate that regard will be hard to the seriousness of the case, which appears to be fact specific. Further, previous judgments have confirmed that the requirements of punishment, deterrence and retribution may, in grave cases, justify the imposition of a whole life order. However, as the case of Bieber shows, the facts of the case must be grave, to justify this order and the court will strike down a whole-life order where the facts do not satisfy the seriousness threshold.

## GERMANY

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. In Germany, mandatory life sentences are statutorily provided for murder,[[218]](#footnote-218) genocide, crimes against humanity, and war crimes.[[219]](#footnote-219) Life sentences may also be passed (depending on the circumstances) for planning a war of aggression, high treason, illegal disclosure of secrets of the Federal Republic of Germany, endangering peaceful relations, homicide, and the following acts when they result in death: child abuse, sexual assault, robbery, arson, abduction for the purpose of blackmailing, taking hostages, effecting a nuclear explosion, effecting an explosion, misuse of ionizing radiation, attacking a driver for the purpose of committing a robbery, and attacking air or sea traffic.[[220]](#footnote-220)
3. The German stance on life sentences is measured: life sentences are constitutionally acceptable, but *only* if they are complemented by adequate consideration of the potential release of prisoners on whom they have been imposed. This is the interpretation of the constitutional and statutory provisions by the Federal Constitutional Court. A full life term *ab initio* is thus possible. However, no sentences in excess of life expectancy are given.
4. According to data from the Federal Ministry of Justice (1998) quoted in decisions of the Federal Constitutional Court, the average time served for a life sentence in Germany is 19.9 years.[[221]](#footnote-221) Very long sentences are thus not common. At the same time the maximum possible period of detention is for life. As of May 2014, the longest serving individual is Hans-Georg Neumann who was sentenced to life in prison in 1963 for murdering a couple, and had completed 52 years in prison in 2014.[[222]](#footnote-222)
5. The German Constitutional Court has routinely upheld life sentences that were extended beyond the minimum amount of years.[[223]](#footnote-223) Challenges to the ECtHR in this regard have been unsuccessful, because the principle that the sentences are reducible has not been seriously undermined by extension of the sentence on a case-by-case basis. The current German procedure was upheld by the ECtHR in Streicher v. Germany, App. No. 40384/04, Eur. Ct. H.R. (2009), and Meixner v. Germany, App. No. 26958/07, Eur. Ct. H.R. (2009).
6. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
7. The leading case on the constitutionality of whole-life sentences at the national level is the *German Federal Constitutional Court's decision of June 21, 1977.*[[224]](#footnote-224)The life sentence as such was challenged as being incompatible with the principle of human dignity (Art. 1 (1) GG) and the right to personal freedom (Art. 2 (2) Sentence 2 GG). The Constitutional Court rejected this challenge.
8. It noted that the prison system had a statutory duty to provide all prisoners with the opportunity for self-improvement, so that they could lead a crime-free life in the future.'[[225]](#footnote-225) This duty applied also to those sentenced to life imprisonment:Life sentences would be compatible with the constitutional norm of human dignity if they left prisoners the hope that they could be released:

The threat of life imprisonment is complemented, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes that go with it. The task that is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the Grundgesetz.[[226]](#footnote-226)

1. The key to the reasoning was the acceptance of the notion of the Behandlungsvollzug (the principle of a treatment-orientated implementation of the sentence). However, the Federal Constitutional Court went further and held that this principle, read together with the requirements of the *Rechtsstaat (Art. 20 (1), (3) GG)*, also requires a clear release procedure, not just the prospect of an executive pardon. In this regard, the procedure for releasing a prisoner sentenced to life imprisonment has to be spelled out in primary legislation that provides for a court to make a decision on their release.
2. Simply stated, these rulings do not mean that every convict will necessarily be released, but that every convict must have a realistic chance for eventual release, provided they are considered safe to the community.[[227]](#footnote-227) This will be developed upon in the next section on mechanisms for early release.
3. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
4. As mentioned above, in its 1977 seminal decision the Federal Supreme Court demanded that the procedure for releasing people sentenced to life imprisonment had to be spelled out in primary legislation that provides for a court to decide on the release.
5. The German legislature responded and inserted a new paragraph into the Criminal Code - § 57 a StGB. § 57 а StGB provides that acourt shall suspend the execution of the remainder of a sentence of life imprisonment if, inter alia:
* fifteen years of the sentence have been served
* the degree of the convicted person's guilt does not require its continued execution and suspension can be justified upon consideration of the security interests of the general public.
* the imprisoned agrees.

An application by the convicted individual to the court is necessary.

1. In this regard, if the court has determined that a "severe gravity of guilt" exists (*besondere Schwere der Schuld*), parole is delayed for a non-specific period beyond 15 years (§ 57a (1) StGB). The parole period in the case of life imprisonment is five years (§ 57 (3) StGB).Paroled prisoners usually must stay in regular contact with a civilian "parole helper" (*Bewährungshelfer*) for the duration of their parole.[[228]](#footnote-228) This provision has remained unaltered, although the Constitutional Court has clarified its meaning. Clarification occurred in 1992, when the Court held that the *initial sentence* should include a finding about the ''gravity of the guilt'' *(die Schwere der Schuld****)***so that a subsequent court could use this finding as a guide when considering a prisoner's suitability for release once the person has served the minimum period of the life sentence.[[229]](#footnote-229)
2. If the parole court rejects the initial application by the convicted individual, the inmate may reapply after a court determined blocking period no longer than two years (§ 57a (4) StGB). In declining a prisoner's first application for parole, the parole court determines a lack of suitability based on the extreme gravity of the offence, as well as the development (or lack thereof) of the prisoner behind bars. Such determination includes how many additional years the inmate must serve before again being eligible to apply for early release
3. In instances where the convict is found to pose a clear and present danger to society (of committing further offences), the sentence may include a provision for preventive detention (*Sicherungsverwahrung*) after the actual sentence is satisfied.[[230]](#footnote-230) Preventive detention has a non-punitive status. The preventive detention may be continued every two years until it is found the convict is unlikely to commit further crimes or be a menace to the public. (compare § 66, 66 a – c StGB) Because of the broadness of its potential application the procedure is very controversial, especially since new amendments were made in 1998 relaxing the substantive requirements.[[231]](#footnote-231)
4. In the case of a Red Army Faction terrorist, the parole court ordered a deferment of at least 11 years (making his sentence a minimum of 26 years) before he again became eligible for parole. Such a long length was due to his involvement in multiple murders, lack of remorse, and his affiliation with a terrorist group.[[232]](#footnote-232)
5. In another case, a court ruled the defendant had to serve at least 38 years in prison for the murder of five people. He was incarcerated beyond the required 38 years after it was determined he was a danger to society.[[233]](#footnote-233) Such a ruling mandates continued imprisonment *de jure*, as not being a danger to society is a requirement for parole from a life sentence (§ 57a I Nr. 3 StGB in conjunction with § 57 I Nr. 2 StGB). However, the case was appealed to the German Constitutional Court, which held that the decision to hold the prisoner beyond the original 38 years was unconstitutional for case-specific reasons.[[234]](#footnote-234)
6. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?

***Theories of Punishment***

1. The Federal Constitutional Court justified its 1977 decision on the prevalent theories of punishment used in German criminal law. It argued that there could be no constitutional objection to the so-called *Vereinigungstheorie* (Unifying or Combination theory), which is dominant and which seeks to combine the various purposes of punishment (retribution and atonement (punitive aspects) with preventive aspects (general and specific prevention – General- and Spezialprevention), albeit with different emphases, depending on the offence and the circumstances of the case.
2. Even if it could not be demonstrated empirically that life imprisonment served a general preventive function, the constitutional duty of the state to protect human life meant that there could be no objection in principle to it prescribing the penalty of life imprisonment as a general indication of the value it attached to human life. The imposition of a life sentence could also be justified as serving as a form of expiation by the offender without, in the view of the court, excluding his eventual re-socialisation.[[235]](#footnote-235)
3. Applied to murder this meant that the legislature was entitled to prescribe the heaviest penalty at its disposal, for the offence infringed upon a citizen's right to life (Art. 2 (1) GG), the highest legal interest of all. What is more, the penalty was considered necessary for discharging the positive obligation of the *Rechtsstaat* (the state governed by the rule of law, Art. 20 (1), (3) GG) to protect its citizens.
4. The state has conflicting obligations. On the one hand, it needs to protect its citizens (rule of law considerations, Art. 20 (1), (3) GG). On the other, the German state is understood as a social State (Art. 20 (2) GG). This provision, according to the Constitutional Court, leads to the obligation torehabilitate and re-socialise individuals sentenced to death. This interpretation allows the Court to view imprisonment for life as constitutional.
5. The German system thus identifies re-socialisation as one of the main purposes of imprisonment.[[236]](#footnote-236) This has been expanded upon in the German Prison Act,which contains provisions on various forms of relaxation of the regime of imprisonment. In this regard, not only does the Act provide that as far as possible all prisoners should be detained in open prisons or in open sections of prisons, but they could also be granted permission to work outside prison without supervision, leave the prison unsupervised for a few hours a day, or be granted a more extensive furlough.[[237]](#footnote-237) As a rule, prisoners serving life sentences are not released unless they have been subjected to the trial period provided by a regime that allows a prisoner a degree of freedom.[[238]](#footnote-238)

***Dignitarian Perspectives***

1. The interpretation of provisions such as § 211 StGB as meaning that it is only possible to sentence an individual to imprisonment for life if there is a possibility of parole indicates a clear dignitarian stance. Human dignity is the primary constitutional provision in Germany. It is considered absolute in the sense that infringements of human dignity cannot be justified.
2. The relevant human rights concerns which need to be balanced against each other are thus the right to life (Art. 2 (1) GG) on the one hand, and human dignity (Art. 1(1) GG) on the other.

## INDIA

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. The relevant legislation with relation to life imprisonment in India is the Indian Penal Code. S.53A of the Indian Penal Code 1860, as amended by the Code of Criminal Procedure (Amendment) Act, 1955, permits life imprisonment as the second most severe form of punishment in India, after the death penalty. An individual is sentenced to life for commission of one of the fifty-one offences outlined in the Indian Penal Code as meriting life imprisonment as punishment. These crimes include rape and murder, or the abetment thereof, for which the death penalty can also be sentenced. Capital punishment is only for “the rarest of the rare” cases however, which means that in the majority of sentences for such crimes the judge will opt for life imprisonment.[[239]](#footnote-239)
3. The individual is given a full time term *ab initio*. S.53A of the Indian Penal Code is not specific on how long imprisonment for life should be, but the Indian Court in *Gopal Vinayak Godse v State of Maharashtra* held that “imprisonment for life must *prima facie* be treated as imprisonment for the whole of the remaining period of the convicted person's natural life.”[[240]](#footnote-240)
4. Life expectancy in India is currently recorded as being 66 years.[[241]](#footnote-241) While the individual’s serving life imprisonment could feasibly live beyond this number, and thus be incarcerated for a period in excess of their life expectancy; due to the indefiniteness of a sentence that lasts as long as the individual is alive this cannot be considered a definitive sentence in excess of their life expectancy *per se.*
5. There is no maximum period of detention as the life sentence only expires upon the death of the individual which could be fifty years after the commission of the crime. Consequently, very long sentences are possible, however the Court has held that the young age of an individual is a factor which can militate against a finding of life imprisonment (see *supra*, Section II). Life sentences are common in India, however, as mentioned in the next section, there is a great deal of judicial discretion as to when to impose full life terms. There is also a large backlog of Indian prisoners on death row, whose capital sentences can be commuted by the Court into life imprisonment sentences if their time on death row is excessively long.[[242]](#footnote-242) Given this, as well as the coincident increasing jurisprudential discomfort with the death penalty,[[243]](#footnote-243) sentences of life imprisonment are likely to increase even more so in the future.
6. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
7. In India, there are no substantive restrictions upon sentencing someone to life in prison save for judicial discretion. In *Jagmohan Singh v State of Uttar Pradesh* the Court outlined a non-exhaustive list of circumstances which are to be considered in alleviation of punishment are including:

(1) the minority of the offender; (2) the old age of the offender; (3) the condition of the offender e.g., wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when [the] offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent.[[244]](#footnote-244)

1. Beyond this broad and incomprehensive list of judicially-constructed conditions however there are no statutory restrictions on sentencing a person to life in prison, where the crime is one carrying the sentence of life imprisonment.
2. Fundamental guarantees that must be respected involve the constitutional duty to treat the prisoners on life sentences with dignity: as stated in *Sunil Batra (i) v Delhi Administration* “The Constitution does not part company with the prisoner at the gates.”[[245]](#footnote-245) It is in pursuit of protecting the rights to dignity of the individual that the Court has held that excessively long durations on death row are unconstitutional, however nothing has yet been held against the excessive duration of many life imprisonment sentences. While their dignity rights are constitutionally protected, there does not exist a ‘right to hope’ or a right to a prospect of release.
3. S. 57 of the Indian Penal Code held that “in calculating fractions of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.” Remittance is covered by the Prison Rules and can enable the prisoner to reach the twenty-year minimum threshold quicker. Nevertheless, in *Laxman Nashkar (Life Convict) v State of Western Bengal* the Court ruled that such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term if served.[[246]](#footnote-246) Thus you are not entitled to a prospect of release: while you may be released the decision is one made exclusively by the Executive Branch acting without regard for the appeals of the prisoner.
4. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
5. The only way in which an individual can be released early from a sentence of life imprisonment is through an exercise of Executive prerogative (pardon); either at the National or State level, through commutation of the sentence for a lesser one, or remittance of the sentence for good behaviour. These powers are protected as exclusively vested in the Executive by Arts. 72(1)[[247]](#footnote-247) and 161[[248]](#footnote-248) of the Indian Constitution respectively.
6. While it is an executive competence whether or not to pardon, commute, or remit a sentence, S.55 of the Indian Penal Code states: “in every case in which sentence of imprisonment for life shall have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.” This provision has been interpreted by the Courts to mean that the Executive cannot commute or pardon an individual who has been sentenced to life imprisonment unless they have served a minimum of fourteen years.[[249]](#footnote-249)
7. The prisoner does not have to petition the State official himself or herself, indeed S.55 of the Indian Penal Code expressly states that the Executive decision to commute a sentence must be taken “without the consent of the offender.” Thus while you may petition a state official for release, not only is there no duty on the State official to consider this petition, but moreover the official is expected to ignore the wishes of the offender in determining whether or not to offer commutation.
8. There is no right to a limited reconsideration of the case every *x* years by a State or prison authority. That your sentence has exceeded the twenty-year limit set out as being equivalent to a life sentence under S.57 of the Indian Penal Code has been held to have no consequence on your prospects for release, meaning that there is no reconsideration of the case following the prisoner exceeding this period of incarceration.[[250]](#footnote-250)
9. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
10. Life imprisonment in India is justified mostly on retributive grounds. The Courts write evocatively of the crimes committed by the convicts and justify their indefinite incarceration by reference to the severity of the crimes that they had committed. For instance, the *Shri Bhagwan* judgment opens with: “the facts in this criminal appeal disclose acts of unparalleled evil and barbarity […] crimes, like the one before us, cannot be looked upon with equanimity because they tend to destroy one’s faith in all that is good in life.”[[251]](#footnote-251) This tone is suggestive of the retributive element of indefinite detention which is prevalent in Indian jurisprudence for which life imprisonment has been handed down. Since the decision whether to sentence for life imprisonment lies with the judge, it follows that there is an expectable desire for the judge to justify the action with reference to the purported barbarity of the accused. Thus punishment and retributive justice also play a considerable role in justifying the preservation of such long sentences.
11. Life imprisonment is also simultaneously viewed as a comparatively compassionate and potentially rehabilitative alternative to the death penalty. As there is the potential for usage of the death penalty, when contrasted to the death penalty, a life sentence can allow for rehabilitation (at least in the instances where the prisoner is pardoned or has his sentence commuted by the Executive). By this, life imprisonment is distinguished from execution, and thereby justified in its own right, on this ground. There is, however, little judicial mention of the human rights implications of their stance on life imprisonment. This can be largely explained by consideration of the continued constitutionality of the death penalty. If it were to be found that life imprisonment was contra human rights, this would incidentally reflect negatively on the constitutionality and human rights implications of the continued use of capital punishment also. Thus it is unlikely there will be much discussion of the human rights implications of indefinite life sentences in India until the abolition of capital punishment there also.

## MALAYSIA

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. In Malaysia, life imprisonment is the prescribed punishment for offences relating to consorting with persons possessing arms or explosives, and to the disruption of public security, public order, and terrorism. ‘Life imprisonment’ is mostly equivalent to ‘imprisonment for 20 years’.  Indeed, Section 130A of the Penal Code (Amendment and Extension) Act 1976 altered the language of the life imprisonment provision from “penal servitude for life” to “life imprisonment for 20 years”. However, offences related to national security under Chapter VI of the Penal Code constitute an exception to the 20-year provision, and carry a sentence of imprisonment until death. The Chapter VI exception became introduced at a time when the security of the nation was being threatened by a communist-inspired armed insurrection.[[252]](#footnote-252)
3. Apart from the Penal Code, there are other specific penal statutes which define the phrase ‘imprisonment for life’ to mean imprisonment for the duration of the natural life of the person sentenced.  Examples of these statutes include the Arms Act 1960 and the Firearms (Increased Penalties) Act 1971. In this regard, crimes not mentioned under Section 130A of the Penal Act may still be subject to life imprisonment under other Acts detailing these specific crimes.
4. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
5. In Malaysia, even persons who were under the age of 18 when they committed any of the relevant crimes bearing a life sentence may be sentenced to life imprisonment. In prohibiting the death penalty for persons under the age of 18, article 97(2) of the Child Act prescribes, in lieu of the death penalty, detention “in a prison”. Paragraph 3 states that the person’s case must be reviewed annually and recommendations may be made for release or further detention, but there is no general prohibition of life imprisonment for persons under the age of 18.
6. The Child Act does, however, state that no child under the age of 14 shall be imprisoned. On the other hand, according to the Essential (Security Cases) Regulations, a person may be sentenced to life imprisonment for an offence under these Regulations, “regardless of his age”. As such, it appears that the type of crime in effect dictates whether or not a person under the age of 14, will be sentenced to life imprisonment.
7. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
8. In Malaysia, whether the accused eventually serves his life imprisonment sentence rests with the Pardons Board. The prerogative power to grant a Royal Pardon may be used either to reduce a death sentence to a punishment less than death, to reduce the term of a prison sentence, or to release the petitioner altogether from prison.[[253]](#footnote-253) This reduction or abrogation of a sentence can be initiated in two ways: either by a petition submitted to the relevant State or Federal Pardons Board established under Article 42(1) of the 1957 Constitution[[254]](#footnote-254) or to the separate Federal Pardons Board for Security Offences established by subordinate legislation in 1981; or through the automatic consideration for remission or release that each prisoner serving a long-term sentence of imprisonment has a right to. This automatic consideration takes place every four years or whenever the relevant Pardons Board next convenes (whichever comes later).[[255]](#footnote-255)
9. The relevant materials that each board must have before making a decision for pardon in the case under consideration typically include:
* The petition submitted by or on the prisoner’s behalf, outlining the reasons that a pardon should be granted;
* Police, narcotics, psychologist, and Prisons Department files on the prisoner; and
* The Federal Attorney-General’s written opinion on the case.
1. Although the reasons for Royal Pardon grants (or rejections) are not often made public, it is possible to speculate on and narrow down the range of factors that may have proved influential across a variety of cases. On the basis of media reports, secondary literature, and interviews with NGO staff, academics and criminal justice practitioners, scholars and journalists have generally noted extraneous non-legal factors as being of great importance to the decision-making of the State and Federal Pardons Boards.[[256]](#footnote-256) This appears consistent with a conventional reading of the Malaysian Constitution, which sees the Yang di-Pertuan Agong (Malaysian King) as ‘the fountain of mercy’, rather than possessing a power resembling judicial review. The non-legal factors that appear influential are the maintenance of good international relations, the state of origin of a foreign prisoner (especially in death penalty cases), and the previous public service and political connections of a prisoner.
2. However, this focus on non-legal matters by commentators may simply reflect the greater media exposure of ‘public interest’ cases, rather than more mundane petitions decided on the basis of retributive factors, where punishment is remitted as it is undeserved owing to the circumstances of the prisoner or his/ her case, or else rehabilitative factors such as a good behaviour and work record in prison, ‘earning’ the prisoner remission or release. As two noted criminal defence lawyers observed by way of interview, there are many cases where Royal Pardon has been granted by the State and the Federal Pardons Boards whose precise details remain unknown,[[257]](#footnote-257) demonstrating a bias in the media towards cases applying non-legal factors.
3. In his article on the Malaysian Pardons Board, Talib quotes a former Malaysian Attorney-General who stated (in 1968) that the members of each Pardons Board:

…have to consider very carefully all aspects of the case in the national and public interest, the nature and gravity of the offence, the circumstances in which the offence was committed and all grounds submitted by their counsel [i.e. the Federal Attorney General] before making their decision.[[258]](#footnote-258)

1. Consistent with this observation, in addition to the non-legal factors mentioned above, there have also been a number of cases evincing retributive justifications for the Pardons Board granting a Royal Pardon. In general, such cases have involved factors such as the young age of the prisoner; the fact that a complete or partial defence, while argued by defence lawyers at trial, could not be proven; procedural irregularities; and pressing legal criteria demanding commutation having emerged during trial.[[259]](#footnote-259)
2. Furthermore, efficient rehabilitation has also proven to be a decisive factor. In the absence of a separate body for the task, each Pardons Board also operate as a parole board, even if Board sittings are sometimes irregular and Board members do not include correctional services personnel. Many prisoners in lower-profile, unreported cases have been awarded pardon or commutation where the prisoner ‘showed remorse, had repented and apologised, and promised good behaviour and not to repeat the offence’; with further favourable criteria including a minor offence having been committed, a clean record before the offence in question, and no assessed risk of dangerousness to the public on release. For prisoners facing natural life or 20-year ‘life’ sentences, the longer the period spent in prison, the greater the opportunity to demonstrate the desired criteria for a Royal Pardon, and the more chances to petition for one.[[260]](#footnote-260)
3. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?

***Constitutional Perspective***

1. Historically speaking, when the Constitution of the Federation of Malaysia was being drafted, human rights issues were not central to the discussion. This was due to a strict focus on the communist insurgency that was threatening the nation.
2. Article 5(1) of the Constitution states that “no person shall be deprived of his life or personal liberty save in accordance with law”. There was a relevant issue in determining whether the protection of Article 5 works only against executive arbitrariness or whether it also applies against oppressive laws by the legislature. The prevailing view is that Article 5(1) does not import the concept of ‘due process’ which enables the courts to examine the reasonableness of legislative measures. In *Comptroller General of Inland Revenue*[[261]](#footnote-261), *Nallakaruppan v Ketua Pengarah Penjara*[[262]](#footnote-262), and *Ooi Kean Thong, Siow Ai Wei*[[263]](#footnote-263), it was observed that the phrase ‘save in accordance with law’ refers merely to enacted law and not to general concepts of law such as natural justice. Thus, in *Che Ani Itam*[[264]](#footnote-264)and *Lau Kee Hoo*[[265]](#footnote-265), it was held that a mandatory life sentence is not inconsistent with Article 5(1).
3. The implication of confining the concept of law to enacted law is that the protection of Article 5(1) is available only against executive arbitrariness and not against harsh, oppressive or unreasonable laws passed by Parliament. As Lord President Suffian (Chief Justice of the Malaysian Federal Court) stated in *Andrew s/o Thamboosamy*:

… if the Government exercises a power conferred on it by Parliament and keeps with the law, then the duty of the court is quite clear; the court should simply apply the law no matter how harsh its effect may be [on the individual affected]. His remedy then is not judicial but political and administrative.[[266]](#footnote-266)

1. The interpretation clause of the Human Rights Commission of Malaysia Act 1999 (Act 597) defines human rights to refer to “fundamental liberties as enshrined in Part II of the Federal Constitution”. This is a restrictive view of human rights which does not take into account provisions of laws outside of Part II that seek to safeguard the dignity and freedom of all Malaysians.[[267]](#footnote-267)
2. According to Professor S.S. Faruqi, the reasons for this are threefold. First, the legislators are of the view that because human rights are regarded as inherent and supra-legal which has no dependency on the existence of a state or a Constitution, there is clearly a need to supply an identifying criterion by reference to which a human rights claim can be accepted or rejected. If not, it treats human rights as a ‘brooding omnipresence in the sky’ and permits too much subjectivity about what claims may be regarded as ‘self-evident’ and as ‘fundamental to human existence’.[[268]](#footnote-268)
3. Second, there exists a fear of a global ‘human rights epidemic’. The right to terminate one’s life through suicide; the right to personal autonomy in matters of homosexuality; pornography; flag-burning; blasphemy; abortion on demand, and same-sex marriages are all being treated as human rights issues in other countries. Thus, Act 597 is meant to prevent these types of human rights from becoming applicable to Malaysia.[[269]](#footnote-269)
4. Third, Malaysia is not a signatory to most human rights treaties, such as the Universal Declaration of Human Rights 1948, and the drafters of Act 597 may have thus chosen a national formulation of human rights over an international one. It is noteworthy, however, that the narrow definition of ‘human rights’ in Act 597 conflicts with Malaysia’s international position on what this concept means. Malaysia has always articulated a composite and holistic view of fundamental rights as encompassing not only political and civil liberties but also socio-economic and cultural rights including freedom from poverty.[[270]](#footnote-270)
5. Despite the jurisdictional limitations in Act 597, it is possible to look beyond the confines of Part II of the Federal Constitution because of a provision in section 4(4) of Act 597. Section 4(4) allows regard to “be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution”. Many Articles of the Universal Declaration have no counterpart provisions in Part II of the Constitution nor are they in conflict with any provisions in Malaysia’s basic law. For instance, Article 16 confers a rights to marry and to find a family, Article 22 confers a right to social security, and Article 23 safeguards the right to work in just and favourable conditions of employment.

***Theories of Punishment***

1. In Malaysia, sentences reflect a combination of several or all of the general aims of imprisonment: rehabilitation, deterrence, retribution, and incapacitation, and balancing these with the public interest. This thus results in an eclectic approach to sentencing as opposed to a single uniform sentencing strategy.  Under the eclectic approach there are no formally fixed aims in advance, but those responsible for sentencing pick and choose which sentencing aim they wish to pursue in the particular case.[[271]](#footnote-271)
2. Wan Yahya J in *Public Prosecutor v Safian bin Abdullah & Anor* stated that “sentencing offenders is ... a complex discerning process, which depends not on the use of a common mathematical yardstick but on various considerations of facts and circumstances relating to the offence, the offender and public interest.”[[272]](#footnote-272)
3. In the Malaysian case of *Loo Choon Fatt*, Hashim Yeop Sani J. highlighted that:

Presidents and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation, the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. *The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused*.[[273]](#footnote-273)

1. The proposition expressed in the sentence above, which was purportedly derived by extrapolation from the UK case of *R v Ball*[[274]](#footnote-274), has since exerted an influence in Malaysian sentencing far beyond its original modest purpose of warning judges not to pander to their own penal philosophies. Notably, in a famous trilogy of cases, the Federal Court cited the public interest for its decision in the face of escalating drug trafficking to award the death sentence as a general practice ahead of legislative changes to make it mandatory.[[275]](#footnote-275)
2. The inclusion of the public interests analysis in sentencing has not signalled a shift to deterrence and to harsher penalties, despite the fact that cases containing this analysis happen to have resulted in harsher or more severe, deterrent punishments. In fact, in these cases, public interest was not equated to deterrence and any suggestion that the sentence would lead to efficient crime prevention was remote.[[276]](#footnote-276) Raja Azlan Shah J. in *Loh Hock Seng v PP*[[277]](#footnote-277)for instance, stated that:

We are of the view that in the circumstances of the second appellant's case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against him, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk.[[278]](#footnote-278)

1. These remarks depict a clear difference between the public interest and deterrence. Further, a strong motivation in stressing the public interest was to avoid sentencing inconsistency. Indeed, when Hashim Yeop Sani J. argued for the role of public interest, he was concerned of the possible inconsistency in sentencing. [[279]](#footnote-279)

## SOUTH AFRICA

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. In South Africa, the application of a ‘life sentence’ typically results in a fixed term of imprisonment rather than the termination of the sentence being contingent on the death of the prisoner *per se*. The reason for this is that offenders sentenced to life imprisonment after 1 October 2004 who have served twenty-five years of their sentence are considered for parole.[[280]](#footnote-280) The principal piece of legislation regulating mandatory and minimum[[281]](#footnote-281) sentences is the Criminal Law Amendment Act 105 of 1997 (‘the Act’). The Act was promulgated as a short-term measure (although it has been continually extended and is still in force) intended to deter the commission of certain serious crimes by prescribing mandatory sentences for those targeted crimes.[[282]](#footnote-282)
3. This mandatory sentencing regime represents a significant shift in the way that courts determine sentences for the crimes specified in the Act. Prior to the Act, courts enjoyed broad sentencing discretion, albeit constrained by well-established common law principles developed casuistically to guide courts in determining appropriate sentences. While these principles, discussed in more detail below,[[283]](#footnote-283) remain relevant to the exercise of judicial discretion in sentencing, the Act places statutory controls on sentencing for certain serious crimes, thereby substantially diminishing the discretion of courts in this area. Section 51(1) of the Act sets out this new approach to a mandatory life sentence for the targeted offences: ‘Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life’. Table I below, based on Part I of Schedule 2, sets out the mandatory minimum sentences prescribed for those serious crimes which can attract a life sentence or a minimum sentence of twenty-five years under certain aggravated circumstances.

| 1. **Offence**
 | 1. **Aggravating Elements**
 | 1. **Criminal History**
 | 1. **Punishment**
 |
| --- | --- | --- | --- |
| 1. **Aggravated Murder**
 | 1. (a) planned or premeditated
2. (b) the victim was a law enforcement officer or a state witness
3. (c) committed during the commission of, or the attempt to commit, compelled rape or aggravated robbery;
4. (d) committed in furtherance of a common purpose or conspiracy
5. (e) the victim was killed for, or as a result of, the removal of his body parts
6. (e) the act was related to the practice of witchcraft or similar practices
 | 1. Inapplicable
 | 1. Life in prison.  (Note that anyone sentenced to life in prison is eligible for parole after serving twenty-five years of the sentence.)
 |
| 1. **Murder**
 | 1. In circumstances other than those stipulated above.
 | 1. Penalty varies depending on whether it is the offender’s first, second, third, or subsequent offense.
 | 1. First-time offense is subject to at least fifteen years’ imprisonment, second conviction results in at least twenty years’ imprisonment, and third or subsequent conviction entails at least twenty-five years’ imprisonment.
 |
| 1. **Aggravated Rape**
 | 1. (a) when committed:
2. (i) in circumstances where the victim was raped more than once by the offender, co-perpetrator, or accomplice
3. (ii) the victim was raped by more than one person as part of a conspiracy;
4. (iii) the victim was raped by a person who has been convicted on two or more counts of rape or compelled rape, but has not been sentenced for those convictions yet;
5. (iv) the victim was raped by a person who knows of his HIV/AIDS positive status
6. (b) where the victim:
7. (i) is a person under the age of 16 years;
8. (ii) is particularly vulnerable due to physical disability
9. (iii) is mentally disabled
10. (c) involving the infliction of a grievous bodily harm
 | 1. Inapplicable
 | 1. Same as for aggravated murder.
 |
| 1. **Aggravated Compelled Rape**
 | 1. Same as aggravated rape above, excluding (a)(ii) as it is not relevant to compelled rape.
 | 1. Inapplicable.
 | 1. Same as for aggravated rape and aggravated murder.
 |
| 1. **Trafficking in Persons for Sexual Purpose**
 | 1. Under any circumstance.
 | 1. Inapplicable.
 | 1. Same as for aggravated rape, aggravated compelled rape, and aggravated murder.
 |

*Table 1: Summary of Mandatory Minimum Sentences under Section 51 of the Act*

1. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
2. Since Section 51(1) is subject to subsections (3) and (6), the life sentence it prescribes for the specified crimes in Part I of Schedule 2 is not strictly mandatory. Rather, courts retain discretion to depart from it under certain circumstances. Firstly, Section 51(6) stipulates that Section 51(1) does not apply where the accused person was under the age of sixteen at the time of the commission of the offence. In a similar vein, section 51(3)(b) was interpreted by the Supreme Court of Appeal in *S v Brandt*[[284]](#footnote-284) to require that if the offender was between the ages of 16 and 18 at the time the offence was committed, life imprisonment should be the exception, not the rule. Secondly, Section 51(3)(a) provides that if the court is ‘satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence’.
3. *S v Malgas*[[285]](#footnote-285) is the leading case on the meaning of ‘substantial and compelling circumstances’ in justifying a departure from the mandatory minimum sentences prescribed by Section 51 of the Act. The Supreme Court of Appeal observed that the prescribed minimum sentences signal the legislature’s aim to ensure ‘a severe, standardised, and consistent response from the courts to the commission of such crimes’.[[286]](#footnote-286) The new regime of mandatory minimum sentences therefore represents increased emphasis on the ‘objective gravity of the type of crime and the public’s need for effective sanctions against it’.[[287]](#footnote-287) On the other hand, the Supreme Court of Appeal recognised that Section 51(3)(a) leaves courts with a ‘residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract…in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may’.
4. With this in mind, the Supreme Court of Appeal laid down the following guidelines for determining whether ‘substantial and compelling circumstances’ exist to justify a departure from the prescribed sentences:

A. Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.[[288]](#footnote-288)

1. Following these guidelines laid down in *S v Malgas*, the Supreme Court of Appeal has departed from the prescribed sentences for aggravated rape in several cases, thereby demonstrating that they will not impose life imprisonment where it would be unjust or disproportionate.[[289]](#footnote-289) In both *S v Mahomotsa[[290]](#footnote-290)* and *S v Abrahams*,[[291]](#footnote-291) for instance, the complainant was raped more than once, which is a condition for attracting the mandatory life sentence under Part I of Schedule 2. Although this condition is unambiguous and the facts in both cases clearly satisfied the condition, the Supreme Court of Appeal held that such a sentence would be disproportionate, thus constituting ‘substantial and compelling circumstances’ justifying a departure from the prescribed life sentence.
2. The Supreme Court of Appeal’s treatment of Section 51 of the Act in relation to rape cases emphasises that the mandatory sentencing regime does not negate the relevance of the factors which have traditionally been taken in determining criminal sentencing. While sentencing discretion might be more constrained due to the shift in emphasis represented by Section 51, courts continue to take into account the general sentencing principles developed casuistically by courts prior to the promulgation of the Act. These general principles are referred to as the ‘triad of *Zinn*’ after the Appellate Division of the Supreme Court held in *S v Zinn[[292]](#footnote-292)* that courts must give equal consideration to the following triad of factors when determining an appropriate sentence: the seriousness of the offence, the personal circumstances of the offender, and the public interest.
3. Finally, in determining whether life imprisonment should be imposed where it is prescribed by the Act, the courts must have due regard to the fundamental guarantees entrenched in the Constitution. In the landmark case of *S v Makwanyane*,[[293]](#footnote-293) the Constitutional Court held that the proportionality is an ‘ingredient’ in determining whether punishment is cruel, inhuman or degrading and thus prohibited by Section 12 of the Constitution.[[294]](#footnote-294) The importance of proportionality in determining a sentence of life imprisonment was underscored in *S v Dodo,*[[295]](#footnote-295) where the Constitutional Court linked proportionality to human dignity, which is not only a right entrenched in Section 10 of the Constitution, but also an overarching constitutional value. Anne Hughes observes in this regard that Ackermann J invoked the Kantian principle of individuals being deserving of respect because of their inherent worth which required that their dignity be not attacked by treating them as objects on account of the imposition of a disproportionate punishment, whether that be merely disproportionate or disproportionate with a deterred or reformative purpose’.[[296]](#footnote-296)
4. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
5. The key piece of legislation on the question of parole for life imprisonment is the new Correctional Services Act, which was enacted in 1998 but only came into effect in October 2004.[[297]](#footnote-297) Section 73(6)(b)(iv) provides that a prisoner serving a life sentence ‘may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such a sentence.’ Before a court may grant parole to an offender serving a life sentence, the release has to be recommended to the court by the Correctional Supervision and Parole Board.[[298]](#footnote-298)
6. With regard to offenders serving a sentence of life imprisonment immediately before 1 October 2004, section 136(3)(a) of the Correctional Services Act provides that such prisoners are ‘entitled to be considered for day parole and parole after he or she has served 20 years of the sentence’. Terblanche notes that the main considerations in such cases are the interests of society and the reports of the parole board.[[299]](#footnote-299) He describes the modalities of this process as follows:

‘The discretion really rests with two bodies: the National Council and the Minister of Correctional Services. If the [National Council] does not recommend release, the Minister has no say in the matter. But if the National [Council] ... does recommend release, the Minister has the final say and is authorised not to accept the recommendation. There are, therefore, at least some checks and balances in the exercise of the discretion. The final responsibility to protect society lies with the Minister.’[[300]](#footnote-300)

1. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
2. As the Supreme Court of Appeal observed in *S v Malgas*, the legislature’s rationale for introducing a mandatory sentence of life imprisonment for certain crimes was to combat the worrying increase of serious crimes in the early years of South Africa’s new democratic dispensation. Mandatory minimum sentences were ‘intended to be relatively short-term responses to a situation which it was hoped would not persist indefinitely. That situation was and remains notorious: an alarming burgeoning in the commission of crimes of the kind specified [in the Act] resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatens and continued to threaten to engulf society.’[[301]](#footnote-301) Deterrence was therefore the principal aim of the Act.[[302]](#footnote-302)
3. Although mandatory minimum sentencing was intended to be a short-term measure, the operation of the Act has been continually extended. It has been criticised by both academics and courts for its bad drafting and its severity in certain cases, as the Supreme Court’s deviation in rape cases demonstrates (discussed above in Section II). Doubt has also been cast on the success of the mandatory sentencing scheme in deterring the targeted crimes, as neither the academic literature nor the statistics suggest this.[[303]](#footnote-303)
4. While courts have recognised the public interest in robust deterrence, they have continued to exercise their discretion when ‘substantial and compelling circumstances’ justify departing from mandatory life sentences. In doing so, courts have often relied on the core constitutional value of human dignity to affirm the importance of proportionality in sentencing, as well captured by the Constitutional Court in *Prinsloo v Van der Linde*:[[304]](#footnote-304)

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence … the offender is being used essentially as a means to another end and the offender’s dignity assailed.[[305]](#footnote-305)

## UNITED STATES OF AMERICA

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?

***USSC Federal Guidelines***

1. The United States federal penal regime currently rests on guideline-based sentencing. The United States Sentencing Commission (USSC) promulgates sentencing guidelines that provide advisory “sentencing ranges” which judges are required to consider when imposing a sentence in federal felony cases and certain misdemeanour cases.[[306]](#footnote-306) This range is determined by the “offense level” and “criminal history score.”
2. To calculate the “offense level,” judges are required to first determine the “base offense level” based on the category of crime and consider it in terms of the offender’s “real offense conduct,” cross-referencing to other guidelines and special instructions, as necessary. Then, adjusting for the type of victim of the crime, the offender’s role in the offense, whether the offender obstructed justice in connection with the offence, and the level of acceptance of the offender for his/her crime, the judge reaches to a final determined “final offense level.”
3. To determine the “criminal history score,” the judge uses the offender’s prior criminal convictions and a numeric system to compile a net score – for example,

Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.[[307]](#footnote-307)

1. The judge, then, takes the “final offense level” and “criminal history score” and refers to a Sentencing Table (Figure 1), to determine the guideline range of imprisonment that applies to the case. The table suggests there are three main ways an offender could receive a life sentence.
2. First, one could receive a life sentence, outright, as deemed appropriate for Offense Level 43 by the USSC. Mandatory minimum sentences for life imprisonment are, by law, required for *first degree murder offenses*, which involve the premeditated killing of another person; for *treason offenses*; and for death and serious bodily injury resulted from the *use of drug*, or somehow related to drug trafficking.
3. It is also possible to receive a life sentence, as the maximum measure within the guideline range. Career offenders, for example, can receive maximum punishment of life imprisonment when s/he commits one of two specified firearms offenses and the judge does not adjust the offender’s sentence downward for accepting responsibility for the offense, or through other mitigating factors.[[308]](#footnote-308)
4. Thirdly, as you can see below, all “Zone D” offense levels generally suggest imprisonment for 80+ years. Given that average human life expectancy is 80 years, the number of years listed amounts to life in imprisonment.



*Figure 1. Sentencing Table provided by the United States Sentencing Commission*

1. As of January 2015, there were 4,436 prisoners incarcerated in the Federal Bureau of Prisons (BOP) serving a life imprisonment sentence. They accounted for 2.5% of the federal sentenced offenders in the BOP system. Interestingly, only 69 of the 153 offenders who received a life sentence in 2013 were subject to a mandatory minimum penalty requiring that sentences be imposed. 81 cases had recommended sentencing range that included life sentences. The remaining 3 cases had a sentence imposed above the applicable guideline to impose a life imprisonment sentence.
2. In practice, the most common offense type for which a life of imprisonment sentence was imposed in 2013 was drug trafficking (64 cases), making up 41.8% of all life sentences that year. But these cases only made up 0.33% of all drug trafficking cases that year. The demographic make-up of life sentence prisoners were mostly US citizens (89%), mostly men (98%), and on average, 37 years old.[[309]](#footnote-309)
3. It is important to note two trends that the data tell us:
* it is mostly black offenders (45%) who make up the “for life” prison population, with whites (24.8%) and Hispanics (24.2%), far behind.[[310]](#footnote-310)
* Among the cases that went to trial, in only two did the offender receive a reduction in the offense level under the guidelines for accepting responsibility for the crime.
1. This overrepresentation of black offenders can be interpreted as a sign of discrepancies in the sentencing judgment, as well as the over criminal justice system; and an offender’s decision to insist on a trial also had an impact on the guidelines sentence that is applied. Although the sentencing guidelines were created as a way to standardize when life imprisonment and other forms of punishment were assigned, these trends suggest more work needs to be done for this to be effective in practice.

***Three-Strikes Rule***

1. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which included the “Three Strikes” statute.[[311]](#footnote-311) It reads:
	* 1. Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if –
	1. the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—
		1. 2 or more serious violent felonies; or
		2. one or more serious violent felonies and one or more serious drug offenses; and
	2. each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant’s conviction of the preceding serious violent felony or serious drug offense.
2. A “serious violent felony” includes murder, manslaughter, sex offenses, kidnapping, robbery, and any offense punishable by 10 years or more which includes an element of the use of force or involves a significant risk of force.[[312]](#footnote-312)
3. While this policy was incorporated into the USSC guidelines, it merits attention because it influences both federal and state-level criminal sentencing. Currently, all 50 states and the District of Columbia have some form of “three-strikes law,” many of which *permit* Life Without Parole (LWOP) for specified crimes, while 30 states *mandate* LWOP for certain crimes – in seven of these 30 states, LWOP is mandatory even if every offense is nonviolent.[[313]](#footnote-313)
4. In practice, the three strikes policy has been the subject of extensive debate over its effectiveness, and defendants have questioned its constitutionality. One defendant was found guilty of stealing $150 worth of video tapes from two California department stores. The defendant had prior convictions of petty theft, residential burglary, transportation of marijuana, and escape from prison. Pursuant to California's three-strikes laws, the judge sentenced the defendant to a mandatory sentence of 25 years to life in prison for the theft of the video tapes. The defendant challenged his conviction before the U.S. Supreme Court in *Lockyer v. Andrade* (2003), but the Court upheld the constitutionality of the law.[[314]](#footnote-314)
5. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
6. All Americans have certain rights protected by the US Constitution. One of these rights include the 8th Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[[315]](#footnote-315)

1. Through various key cases, the United States Supreme Court has developed a complex history of how this right to liberty from “cruel and unusual punishments” applies to life sentences.
2. In *Weems v US*[[316]](#footnote-316)(1910), the plaintiff claimed that the *cadena temporal* punishment he was sentenced – which included imprisonment, hard and painful labour, and chains at the ankles and wrists – were a form of “cruel and unusual punishment” and, hence, a violation of his 8th Amendment rights. Recognizing that the 8th Amendment required graduated and proportioned punishment, the Supreme Court ruled in favour of the plaintiff, finding the punishment to be comparatively disproportionate to the crime of falsifying an official document, making it cruel and unusual by modern standards.
3. In *Coker v Georgia [[317]](#footnote-317)* (1977)*,* the Supreme Court extended the proportionality review of 8th Amendment rights to the death penalty. Stressing that the death penalty “[was] unique in its severity and irrevocability,” the Court found that death was a disproportionate punishment that did not fit the crime of rape.
4. In *Rummel v Estelle[[318]](#footnote-318)* (1980)*,* the Supreme Court defined a much more narrow scope of the proportionality principle. After being convicted of three felonies over a period of 15 years, Rummel was given a life prison sentence as mandated by a Texas “three-strike” statue. Given that his offenses involved around $230, and all of the offenses were nonviolent, Rummel argued that a life sentence with the possibility of parole imposed on a third-time offender was a cruel and unusual punishment. The court rejected the argument, distinguishing between life sentences and death penalties and concluding that prison sentences could not violate the proportionality principle solely on the basis of length.
5. In *Solem v Helm[[319]](#footnote-319)* (1983)*,* the Supreme Court revisited the issue of whether a life sentence fell within the scope of the Eighth Amendment. Here, the Court determined that a life sentence without parole violated the proportionality principle, explicitly rejecting the notion that only death penalty cases required proportionality. The Court reasoned that the important factor was not the sentence itself, but rather the disparity between the sentence imposed and the crime committed. From this developed a three-factor proportionality test for determining violation of the Eighth Amendment:
	* 1. The Court must determine the gravity of the crime in relation to the severity of the punishment, by examining the harm caused or threatened to the victim or society and by measuring the culpability of the offender.
		2. The Court must compare the punishment with penalties imposed for other crimes in the same jurisdiction. If the Court finds that an offender has been treated “in the same manner as, or more severely than,” criminals who committed far more serious crimes, then that punishment is seen as disproportionate on this factor.
		3. The Court must compare the punishment with penalties imposed in other jurisdictions for the same crime.
6. Keir (1984) explains the development of the Court’s reasoning well:

Recognizing that comparing prison terms is substantially more difficult than comparing the death penalty with other modes of punishment, the Court contended that such "line-drawing" was not unknown to the courts, which have adequately addressed such complex issues in other contexts while maintaining the integrity of the federal system of government. For example, the constitutional right to a trial by jury has necessitated judicial line-drawing, as the Court's decision demonstrates in Baldwin v. New York.[[320]](#footnote-320) Because "petty" offenses were generally not considered to require a jury trial, the Court had to determine what constitutes a petty, as opposed to a serious offense for the purpose of trial by jury. The plurality adopted a flexible approach, noting that in the past the Court had "sought objective criteria reflecting the seriousness with which society regards the offense." It was appropriate to examine "the existing laws and practices of the nation." The Court compared the practices in various jurisdictions and observed that the "near uniform judgment of the nation furnishes us with the only objective criteria by which a line could ever be drawn."[[321]](#footnote-321)

1. In *Harmelin v Michigan[[322]](#footnote-322)* (1991)*,* however,the Supreme Court held that a legislatively-mandated life sentence without parole for cocaine possession did not violate the Eighth Amendment. The difference between *Solem* and *Harmelin* lies in who is giving the sentence judgment: *Solem*’s judgment was made by a judge and *Harmelin*’swas made by Congress. However, the Court failed to provide a strong majority opinion, instead, dividing into three distinct camps of interpretation. Justice Kennedy, joined by justices O’Conner and Souter, determined that the Eighth Amendment prohibited only “extreme and grossly disproportionate” sentences, revising the *Solem* standard by deferring to legislative assessments regarding sentencing schemes. Justice Scalia, joined by Chief Justice Rehnquist, took this a step further, and argued for restricting proportionality to capital punishment cases and for overruling *Solem,* in its entirety. Justices Blackmun, Marshall, Stevens, and White dissented with both overruling and limiting of the *Solem* precedent. Of special note, Justice Stevens and Blackmun observed that drug possession was too severe because the punishment rejected all possibility of rehabilitation. The results of this case essentially eliminated judicial review of all legislatively-mandated prison sentences.
2. In the past decade, we have seen these proportionality tests applied to juvenile offenders.
3. In *Roper v Simmons[[323]](#footnote-323)* (2005)*,* the Court addressed whether the Eighth (and Fourteenth) Amendments permitted the execution of a juvenile offender between the ages of 15 and 18, when s/he commits a capital crime. Chief Justice Kennedy wrote:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty… the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.” As respondent and a number of amici emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18… the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.[[324]](#footnote-324)

1. In *Miller v Alabama[[325]](#footnote-325)* (2012)*,* the Court expanded the scope of Eighth Amendment on juvenile offenders, by ruling that it forbid a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. Relying on *Roper*’s foundational principle: the imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children, the Court argued that life-without-parole sentences “share some characteristics with death sentences that are shared by no other sentences,” particularly for non-homicide offenses of juvenile offenders.[[326]](#footnote-326)
2. Just a few weeks ago, in *Montgomery v Louisiana[[327]](#footnote-327)* (2016), the Court considered whether these rulings can be applied retroactively, as a new substantive rule. Justice Kennedy concluded:

In light of what this court has said in Rope, Graham, and Miller about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.[[328]](#footnote-328)

1. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
2. The amount of time offenders serve in prison is almost always shorter than the amount of time they are sentenced to serve by the court.[[329]](#footnote-329) There are four main means of early release.

***Good Conduct Time***

1. Under 18 U.S.Code §3624(b), the Bureau of Prisons (BOP) can award up to 54 days of good conduct time for each year an inmate serves, given exemplary compliance with institutional disciplinary regulations and satisfactory progress on a General Equivalency Degree (GED) education. The credit earned is in addition to any credit the inmate receives for time served. In order to be eligible for good conduct time credits, the inmate must be serving a sentence of more than one year, but not life.[[330]](#footnote-330)

***Participation in Treatment Programs***

1. Under 18 U.S.C. §3621, the BOP is required to provide all prisoners the opportunity to receive residential substance abuse treatment. Prisoners who are convicted of nonviolent crimes and who successfully complete treatment are eligible to have their sentence reduced by up to one year.[[331]](#footnote-331) This option, however, is not available for
2. Immigration and Customs Enforcement detainees;
3. pre-trial inmates;
4. contractual boarders;
5. inmates who have a prior felony or misdemeanour conviction for homicide, forcible rape, robbery, aggravated assault, or child sexual abuse offenses;
6. inmates who are not eligible for participation in a community-based program as determined by the institution’s warden on the basis of his or her professional discretion; or
7. inmates whose current offense is a felony.[[332]](#footnote-332)

Offenders who are in life sentences generally fall into categories of (4) and/or (6).

***Modification of Imposed Sentence***

1. Under 18 U.S.C. §3582(c)(1)(A), the BOP can petition the court to reduce an inmate’s sentence if
2. “extraordinary and compelling reasons warrant such a reduction”; or
3. the inmate is at least 70 years of age, has served at least 30 years of his or her sentence, and a determination has been made by the Director of the BOP that the inmate is not a danger to the safety of any other person or the community.[[333]](#footnote-333)
4. The USSC includes as “extraordinary and compelling reasons”:
* The inmate is suffering from a terminal illness.
* The inmate is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide selfcare within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.
* The only family member capable of caring for the inmate’s minor child or minor children dies or is incapacitated.
* As determined by the Director of the BOP, there exists in the inmate’s case an extraordinary and compelling reason other than, or in combination with, the reasons described above.

This applies to life sentences.

***Parole***

1. The United States Department of Justice defines “parole” as “serving part of the sentence under the supervision of the community.”[[334]](#footnote-334)
2. The process begins at sentencing. Unless the court has specified a minimum time for the offender to serve, or has imposed an "indeterminate" type of sentence, parole eligibility occurs upon completion of one-third of the term. If an offender is serving a life sentence or a term or terms of 30 years or more he or she will become eligible for parole after 10 years.
3. To apply for parole, the offender has to fill out and sign an application furnished by a case manager. Everyone except those committed under juvenile delinquency procedures who wish to be considered for parole must complete a parole application. A case manager notifies the offender when his or her parole hearing is scheduled. The initial hearing will usually take place within a few months after arrival at the institution. The only exception to this rule is if the offender is serving a minimum term of ten years or more, in which case the initial hearing will be scheduled six month prior to the completion of ten years.
4. A Parole Examiner reviews the case file before the hearing occurs. A recommendation relative to parole is made at the conclusion of the hearing and in most instances the offender is notified of that recommendation. If a recommendation is not provided, the Examiner may refer the case to the Commission's Office for further review. The Judge who sentenced the criminal offender, the Assistant United States Attorney who prosecuted the case and the defence attorney may make recommendations regarding parole.
5. These recommendations are generally submitted to the Commission before the first hearing and become a part of the material the Commission considers. All recommendations made at the hearing are only tentative as another examiner review is required before a final decision is made.
6. The U.S. Parole Commission may grant parole if (a) the inmate has substantially observed the rules of the institution; (b) release would not depreciate the seriousness of the offense or promote disrespect for the law; and (c) release would not jeopardize the public welfare.
7. Usually it takes about 21 days for the offender to receive a Notice of Action advising them of the official decision. Within 30 days of the date on the Notice of Action, the offender may file an appeal with the National Appeals Board. Case Managers will have a copy of the form used for appeal. After receiving the appeal, the National Appeals Board may affirm, reverse or modify the Commission's decision, or may order a new hearing. A decision by the National Appeals Board is final.
8. By law, if a sentence is less than seven years the offender will be granted another hearing after 18 months from the time of his or her last hearing. If the sentence is seven years or more the next hearing is scheduled 24 months from the time of the last hearing. The first Statutory Interim Hearing may be delayed until the docket preceding eligibility if there is more than 18 or 24 months between the initial hearing and the eligibility date.
9. If the sentence is five years or longer, the law provides that the offender will be granted mandatory parole by the Commission when he or she has served two-thirds of the term or terms, unless the Commission makes a finding either that (1) the offender has seriously or frequently violated institution rules and regulations, or (2) there is a reasonable probability that the offender will commit a further crime. If an offender is serving a life term or consecutive terms, a Case Manager can explain the law in relation to parole at the two-thirds point.[[335]](#footnote-335)
10. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
11. The policies discussed in the previous three sections should not be viewed within a vacuum; they are the result of changing political and social needs, as well as concerns for human rights and theories of punishment. The sentencing guidelines may be contextualised as follows:
12. Over the past fifty years, the United States has seen a drastic shift in its approach to sentencing. During the 1960s, the Federal Government and all relevant State jurisdictions followed an indeterminate sentencing system that emphasized rehabilitation and individualization of sentences. Judges would hand down sentences with a wide range between minimum and maximum length of time, and offenders were to serve their time and be released with they were rehabilitated, a judgment made by prison authorities and the parole board.[[336]](#footnote-336)
13. However, starting from the 1970s, American society experienced a growing distrust of the State institution, as well as a “moral panic,” as growing popularity of drugs, sex, and homicide led to social anxiety. Changes in the sentencing system began when in 1972, several states enacted or toughened their status regarding all life sentences, particularly broadening those pertaining to life without the possibility for parole. The upward creep in life sentences accelerated through the 1980s, as the “tough on crime” political endeavour sustained popularity. Both liberal and conservative politicians became displeased with the great amount of discretion given to the judges and prison authorities for the sentencing of offenders, and a “justice model” of sentencing and corrections arose, whereby sentences would be determined by a set of fair and just sentencing policies. [[337]](#footnote-337) In 1984, Congress enacted the most sweeping and dramatic reform of federal sentencing – the Sentencing Reform Act – in hopes to reduce unwarranted disparity, increase certainty and uniformity, and correct past patterns of undue leniency for certain categories of serious offenses. This gave cause for the creation of the United States Sentencing Commission, an independent, permanent agency in the judicial branch that would determine the appropriate type(s) and length of sentence(s) for each of the more than 2,000 federal offenses. Through these guidelines, Congress hoped to standardize judicial discretion.[[338]](#footnote-338) Over the next decade, Congress would continue to create legislation on sentencing that the USSC would incorporate into its set of guidelines.

***Deterrence***

1. One of the main goals of the Sentencing Reform Act was deterrence, especially within the context of the War on Drugs. Congress eliminated parole and imposed mandatory minimum sentences for drug and weapons offenses. These policies were meant to support the primary goal of the Sentencing Reform Act (and the Comprehensive Crime Control Act, as a whole) of deterrence. Mandatory minimum laws require automatic prison terms for those convicted of certain federal and state crimes, preventing judges from tailoring punishment to the individual and the seriousness of the offense, barring them from considering factors such as the individual’s role in the offense or the likelihood he or she will commit a subsequent crime.

***Recidivism***

1. Meanwhile, policies like the three-strikes laws were created to tackle repeat offenses by a small number of criminals. These laws were sold to the public as a way to stop irredeemable criminals from committing future crimes by requiring very long sentences, often life in prison, upon conviction of a second or third felony offense. The three-strikes movement has had a dramatic effect on sentencing throughout the country, and it has contributed substantially to the rise of the incarceration rate.

# Regional Jurisdictions

## EUROPEAN CONVENTION/COURT OF HUMAN RIGHTS

1. HOW IS AN INDIVIDUAL SENTENCED TO LIFE IN YOUR JURISDICTION?
2. A comparative study conducted in 2010 of life sentencing practices within state parties to the European Convention on Human Rights (ECHR) found that the majority of European countries do not impose irreducible life sentences and some, including Portugal, Norway and Spain, do not have life sentences at all.[[339]](#footnote-339) A common practice amongst the European states which do impose life sentences is to set fixed tariff periods after which the release of a prisoner sentenced to life imprisonment must at least be considered.
3. At the time of the study, the Netherlands and England and Wales were the only two ECHR member states to have irreducible life sentences. The imposition of these irreducible life sentences within England and Wales was subsequently, successfully challenged in the European Court of Human Rights (ECtHR). At the heart of the ECtHR jurisprudence is the assertion that the imposition of a life sentence without any prospect of release for the prisoner will breach the ECHR Article 3 prohibition on inhuman or degrading punishment. Under the ECHR, some mechanism for review of the life sentence must be in place to ensure that a prisoner’s continued detention remains justified on legitimate penological grounds such as punishment, public protection or rehabilitation, and to enable the release of the prisoner if their detention no longer serves any legitimate purpose.

***Relevant Provisions of the Convention***

1. The provisions of the ECHR which have been most relevant to questions surrounding the legalities of life sentences are Articles 3, 5(1) and 5 (4).

*Article 3– Prohibition of torture*

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

*Article 5 – Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

…

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

***Life Sentencing Practices in the Council of Europe***

1. ECHR member states have considerable discretion to determine their exact sentencing practices and penal policies. As a result, a variety of different life sentencing practices are in existence amongst the different European states and, as noted above, some do not apply life sentences at all. The ECtHR sets out the different approaches that may be taken in the case of *Vinter v United Kingdom[[340]](#footnote-340).* The Court distinguished between life sentences with eligibility for release after a minimum period has been served, discretionary sentences of life imprisonment without the possibility of parole and mandatory sentences of life imprisonment without the possibility of parole.[[341]](#footnote-341) In theory, each of these practices can be permissible under the ECHR, but in reality the principles and procedures that must be adhered to under the ECHR mean that a prisoner will rarely be forced to remain in detention until their last breath (See Section II below).
2. The imposition of a sentence whereby the prisoner may live the rest of their days in prison, and the imposition of life sentences without the possibility of parole are not necessarily incompatible with Articles 3 and 5 of the ECHR; such sentencing practice does exist among the ECHR member states. [[342]](#footnote-342) In reality, however, a sentence will only be carried out in rare circumstances and will be subject to the control mechanisms described below.
3. WHAT RESTRICTIONS ARE THERE ON THE SENTENCING OF A PERSON TO LIFE IN PRISON; WHAT ARE THE FUNDAMENTAL GUARANTEES THAT MUST BE RESPECTED?
4. The overarching principle that governs European life sentencing practices is that any sentence could violate Article 3 if it is “unjustified or grossly disproportionate to the gravity of the crime”[[343]](#footnote-343). Thus the imposition of a life sentence must be proportionate to the crime, as a grossly disproportionate sentence could amount to could amount to ill treatment contrary to art.3 at the moment of its imposition.
5. The Court, in *Vinter v UK* described the ways in which the three kinds of life sentence noted above must operate in order to be Convention compliant. The first is the most common amongst European states, and is deemed to pose no issues under the ECHR as the sentence is “clearly reducible”[[344]](#footnote-344). Thus, whilst a prisoner under this system may end up remaining in prison until they die, this continued extension of their sentence past a certain tariff length, up until their death, will have to be justified, for example on the grounds of public protection and thus will not be grossly disproportionate.
6. The ECtHR’s decision in *Stafford v United Kingdom*[[345]](#footnote-345) provides an example of this kind of sentencing practice. In that case, an applicant who had been sentenced to life imprisonment, was released on licence, then broke the terms of his licence by committing a non-violent offence and was sentenced to a further term in prison. Once that period of imprisonment expired, he continued to be detained on the basis that he might commit another non-violent offence. This was held to constitute a breach of his Article 5(1) and 5(4) rights. The Court described how the tariff scheme should work in practice; the sentence is comprised of a punitive part (the minimum tariff) and a preventive part (after the expiry of the original tariff) whereby the detention can only be continued on the grounds of considerations of risk and dangerousness posed. The Court emphasises that the incarceration of a prisoner who has served the punitive tariff element of their sentence cannot be continued if the prisoner no longer poses a risk to the public: “it is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who has served the term required for punishment for the offence and is no longer a risk to the public.”[[346]](#footnote-346)
7. The ECtHR has also stated that ‘grossly disproportionate’ is a strict test, which will rarely be met. Thus, in the case of *­Vinter v United Kingdom*, none of the applicants sought to argue that their whole-life orders were grossly disproportionate, and “given the gravity of the murders for which they were convicted” the Court did not find that they were either.[[347]](#footnote-347) Vinter’s crime was held to be a “particularly brutal and callous murder” and the Court was satisfied that his continued incarceration served the legitimate penological purposes of punishment and deterrence. The ECtHR case law reveals that where a sentence which could lead to the offender remaining in prison for the rest of their life is imposed for “offences of the utmost severity, such as murder of manslaughter”[[348]](#footnote-348) it will not be deemed grossly disproportionate at the moment of its imposition.
8. Using the above distinction of the three types of life sentences, the Court stated that a mandatory sentence of life imprisonment without the possibility of parole is much more likely to be grossly disproportionate than discretionary or tariff based life sentences. The Court pointed to the fact this kind of sentence “deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court”, in the way that a discretionary life sentence would allow, effectively condemning a defendant to spend the rest of his days in prison, “irrespective of his level of culpability and irrespective of whether the sentencing court considers the sentence to be justified.” They also stated that “the trend in Europe is clearly against such sentences”. A sentence was stated to be especially likely to be deemed grossly disproportionate from the outset if mandatory life imprisonment was ordered in disregard of “mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems.”[[349]](#footnote-349)
9. A life sentence will also meet the “strict test” of gross disproportionality from the outset, if the sentence is wholly irreducible and offers no prospect of release. The fundamental restriction on sentencing a person to life in prison from the ECtHR’s perspective is that the sentence must be reducible – a sentence which extinguishes any prospect of release for the prisoner is incompatible with Article 3 ECHR. The ECtHR established this requirement in the case of *Kafkaris v Cyprus*[[350]](#footnote-350) where it held that although a life sentence did not become “irreducible” by the mere fact that in practice it might be served in full, “the existence of a system providing for consideration of the possibility of release was relevant when assessing the compatibility of a particular life sentence with Article 3”.[[351]](#footnote-351) In essence, an Article 3 issue will not arise at the moment when a sentence is imposed, if the Court has taken into account the relevant mitigating and aggravating factors at the time. Instead, the Judgement demonstrates that an Article 3 issue will arise where it can be shown that: (i) that the applicant’s continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) the sentence is irreducible de facto and de jure. In *Kafkaris v Cyprus* the life sentence in question was held not to breach Article 3 as it was found to be clearly “both de jure and de facto reducible”. In making this determination the Court held that it was relevant to take into account the fact that a number of life prisoners had in fact being released to determine that the sentence was de facto reducible[[352]](#footnote-352).
10. In *Vinter v United Kingdom*, the ECtHR established that a where domestic law does not provide for the possibility of review at all, a sentence of life imprisonment with a whole-life term will be incompatible with art 3 from the outset. The Court reasserted the necessity of having a clear review mechanism in place to ensure that a life sentence was in principle reducible. The Court’s essential point was that detention must always be justified, on “legitimate penological grounds” including (but not limited to) punishment, public protection and rehabilitation. The interrelationship between these different factors may shift throughout the course of an offender’s imprisonment; thus a sustained system of review was held to be necessary after a certain point in the sentence to assess the continuing relevance of these factors, to ensure that detention continues to be required and justified. As a prisoner sentenced to life is highly likely to reach a point in their sentence where their liberty is being deprived without any legitimate justification; the possibility to challenge their continued detention on these grounds must exist.[[353]](#footnote-353)
11. The case consisted of a challenge to the England and Wales sentencing policy whereby “whole life orders” were imposed, and could not be subjected to later review. Release could only be obtained from the Secretary of State on compassionate grounds. The introduction of these ‘whole life orders’ were held by the ECtHR to constitute a violation of Article 3 as the policy could conceivably mean that a prisoner would remain in prison even if his continued imprisonment could not be justified on any legitimate penological grounds, as long as he does not become terminally ill or physically incapacitated. Additionally, the Court doubted whether compassionate release for the terminally ill or physically incapacitated prisoners could really be considered release at all, if all that it means is that a prisoner dies at home or in a hospice rather than behind prison walls.[[354]](#footnote-354)
12. The key restrictions on the use of life sentences evident in the case law are thus that there must be a realistic prospect that the prisoner could be released and this notion of release must amount to more than simply being released to die.
13. IF AN INDIVIDUAL IS SENTENCED TO LIFE IN PRISON, WHAT, IN DETAIL, ARE THE MECHANISMS FOR EARLY RELEASE SUCH THAT THE INDIVIDUAL DOES NOT NECESSARILY SPEND THE REST OF HIS LIFE IN PRISON?
14. Because the ECHR member states have discretion as to the particularities of their penal policies, the ECtHR does not specify the need for any particular mechanism for early release to be in place. What is essential is that there is some form of mechanism to ensure the possibility of early release. In *Kafkaris v Cyprus*, the existence of the Constitutional provision stating that: “the President of the Republic, on the recommendation of the Attorney General, may suspend, remit or commute any sentence passed by a court” was sufficient for the ECtHR to conclude that life sentences were reducible. Their imposition was therefore compatible with Article 3, despite the lack of a parole board system, as the “President could, at any point in time commute a life sentence to another one of a shorter duration and then remit it, affording the possibility of immediate release.”[[355]](#footnote-355)
15. The ECtHR decision in *Vinter v United Kingdom* sets out certain requirements that the review mechanism must adhere to, whatever the mechanism may be. The decision requires the law surrounding the review mechanism to be clear enough that those subject to life sentences would know the conditions under which they might be released from the time of their sentencing. In the case, guidelines were provided in the ‘*Lifer Manual’* to guide the Secretary of State in their choice as to when or if a prisoner might be released. As mere guidelines they were held not to entail the necessary legal predictability for the mechanism to meet Article 5 requirements.
16. The ECtHR held it to be “of relevance” that UK sentencing legislation no longer enforced the need to review a life sentence after a prisoner had been detained for 25 years. The Grand Chamber pointed to this practice as an example of a review mechanism that could be reinstated by the member state to render their life sentencing practice compliant with the judgement. The ECtHR questioned the justifications for removing the practice in light of the fact: “it would appear that a 25-year review, supplemented by regular reviews thereafter, would be one means by which the Secretary of State could satisfy himself that the prisoner’s imprisonment continued to be justified on legitimate penological grounds.” This conclusion was further supported by the Court’s reference to arts 77 and 110 of the Rome Statute of the International Criminal Court, which provide for an identical 25-year review period for life sentences imposed by that court. [[356]](#footnote-356)
17. The ECtHR will not infringe upon the ECHR member states’ discretion under the Convention to specify the precise mechanisms for early release that they should use. However, they suggest a necessary system of sustained review after a certain point in the sentence to assess whether the prisoner’s imprisonment “continues to be justified” as a recommended mechanism to help render life sentences compatible with Article 3.
18. WHAT POLICY JUSTIFICATIONS AND HUMAN RIGHTS CONCERNS ARE USED TO SUPPORT THE JURISDICTIONS’ STANCE(S)?
19. The ECtHR places respect for human dignity as the overriding concern and justification for the limitations on life sentences described above. This concern for dignity has led the ECtHR to place the rehabilitation of a prisoner as their preferred, central aim of sentencing practice. It is within the context of a shifting European focus on the policy aim of rehabilitation, and human rights concerns over the need to at least offer the prisoner the possibility to reintegrate into society, that the ECtHR have set out the conditions which must be met for a whole life tariff to be deemed compatible with the Convention.

***Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules[[357]](#footnote-357)***

1. The European Prison Rules contain the policy motivations that have influenced the ECtHR decisions on life sentencing. They provide:

3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.

…

6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.

1. These policy justifications and human rights concerns were influential in *Vinter v United Kingdom*, where the ECtHR emphasised the strong support within European and International law for the principle that all prisoners, even those serving life sentences, should be offered the possibility of rehabilitation and consequent release. Judge Spielmann, President of the ECtHR stated that “while punishment remained one of the aims of imprisonment, the emphasis in European penal policy was now on the rehabilitative aim of imprisonment, particularly towards the end of a long sentence.”[[358]](#footnote-358) Their judicial starting point is thus that an irreducible sentence to life imprisonment is incompatible with the value of human dignity, as it denies any possibility of rehabilitation and reintegration of a prisoner into society. Member states of the ECHR were asserted to have a duty to ensure the possibility of rehabilitation and the prospect of release should this rehabilitation be achieved. The fundamental human rights concern within the case is that it is incompatible with human dignity to deprive a person of his freedom without at least providing him with the chance to someday regain it.
2. The case of *Khoroshenko v Russia*[[359]](#footnote-359) further exemplifies the policy justifications and aims underlying the ECtHR case law regarding life sentences. The Court states that “the emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies.”*[[360]](#footnote-360)* The case involved a challenge to the Russian policy on family visits to those sentenced to life imprisonment; which was deemed to be incompatible with the Article 8 right to family life. The ECtHR stated that the regime and conditions of a life prisoner’s incarceration must be such as to make it possible for the life prisoner to endeavour to reform himself with a view to being able to seek an adjustment of their sentence.[[361]](#footnote-361)
3. The ECtHR’s increasing focus on the need for a state to allow at least for the possibility of a prisoner’s release can thus be placed in the policy context of an increasing focus on the duty of state to facilitate a prisoner’s reintegration into society, and an increasing emphasis on rehabilitation as the preferred penal policy rationale.
1. See for instance the practice of England and Wales, Germany, Canada, South Africa, and the ECHR. [↑](#footnote-ref-1)
2. Note that exceptions apply for which life sentences indeed mean for the remainder of the prisoner’s life. [↑](#footnote-ref-2)
3. Note, however, that in Australia, this varies depending on the Australian Territory in question. [↑](#footnote-ref-3)
4. Canadian Corrections and Conditional Release Act, s 121(1) (a)-(d). [↑](#footnote-ref-4)
5. German Criminal Code, § 57 a StGB. [↑](#footnote-ref-5)
6. Malaysian Prisons Regulations 2000, Reg. 54. [↑](#footnote-ref-6)
7. Crimes (Sentencing Procedure) Act 1999 (NSW), s 431A. [↑](#footnote-ref-7)
8. Crimes Act 1900 (NSW), ss 19A (2), 19B (2), 61JA (2), 66A (2). [↑](#footnote-ref-8)
9. *Ibid.*, s 61 (1). [↑](#footnote-ref-9)
10. *Ibid.*, s 61 (3). [↑](#footnote-ref-10)
11. *Ibid.*, s 21 (1). [↑](#footnote-ref-11)
12. *Ibid.*, ss 24, 25A (2), 26 – 30, 33 (1), 33 (2), 33A (1), 33A (2), 37 (2) (b), 38. [↑](#footnote-ref-12)
13. Crime (Sentencing Procedure) Act 1999 (NSW), s 53A. [↑](#footnote-ref-13)
14. *Ibid.*, s 55. [↑](#footnote-ref-14)
15. Crimes Act 1958 (Vic), ss 3, 3A (1), 9A, 321C, 321I. [↑](#footnote-ref-15)
16. Sentencing Act 1991 (Vic), s 109 (1). [↑](#footnote-ref-16)
17. See Crimes Act 1958, ss 38 (1), 38A (1), 44 (1)-(2), 45 (2) (a). [↑](#footnote-ref-17)
18. Sentencing Act 1991 (Vic), s 9. [↑](#footnote-ref-18)
19. Criminal Code Act 1899 (Qld), ss 215 (3), 216 (3) (a)-(b), 305, 310, 311. [↑](#footnote-ref-19)
20. *Ibid.*, s 305. [↑](#footnote-ref-20)
21. *Ibid.*, s 469A. [↑](#footnote-ref-21)
22. Penalties and Sentences Act 1992 (Qld), s 156A. [↑](#footnote-ref-22)
23. *Ibid.*, Part 10, s 163. [↑](#footnote-ref-23)
24. Criminal Law Consolidation Act 1935 (SA), s 11. [↑](#footnote-ref-24)
25. *Ibid.*, ss 23, 29A (1), 39 (1), 83E (4). [↑](#footnote-ref-25)
26. Criminal Law (Sentencing) Act 1988 (SA), s 31. [↑](#footnote-ref-26)
27. Criminal Code Act 1913 (WA), s 279 (4). [↑](#footnote-ref-27)
28. *Ibid.*, ss 144, 187 (2), 306 (2). [↑](#footnote-ref-28)
29. *R v Ivan Robert Marko Milat* (Supreme Court of NSW, Hunt CJ at CL, 27 July 1996). [↑](#footnote-ref-29)
30. *R v John Wayne Glover* (Supreme Court of NSW, Wood J, 29 November 1991). [↑](#footnote-ref-30)
31. *R v Malcolm George Baker* (Supreme Court of NSW, Newman J, 6 August 1993). [↑](#footnote-ref-31)
32. *R v Martin Bryant* (Unreported, Supreme Court of Tasmania, Cox CJ, 22 November 1996). [↑](#footnote-ref-32)
33. *R v Leslie Alfred Camilleri* [1999] VSC 184 (27 April 1999) [37]. [↑](#footnote-ref-33)
34. *Crump v R* [2016] NSWCCA 2 [58, 60]. [↑](#footnote-ref-34)
35. John Anderson, ‘From Marble to Mud: The Punishment of Life Imprisonment’ (1999) <http://www.aic.gov.au/media\_library/conferences/hcpp/anderson.pdf> accessed 15 February 2016. [↑](#footnote-ref-35)
36. Nicholas Cowdery QC, ‘Mandatory Life Sentences in New South Wales’ [1999] *UNSWLawJI* 55 <http://www.austlii.edu.au/au/journals/UNSWLJ/1999/55.html> accessed 15 February 2016. [↑](#footnote-ref-36)
37. Anderson (n. 35). [↑](#footnote-ref-37)
38. *Ibid*. [↑](#footnote-ref-38)
39. *Ibid*. [↑](#footnote-ref-39)
40. John Anderson, ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence’ (2012) 35 UNSW Law Journal 747, 761. [↑](#footnote-ref-40)
41. *Ibid.*,, 760. [↑](#footnote-ref-41)
42. *Ibid*. [↑](#footnote-ref-42)
43. Australian Bureau of Statistics, ‘Prisoners in Australia, 2015’ (11 December 2015), 49. <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Explanatory%20Notes12015?OpenDocument> accessed 15 February 2016. [↑](#footnote-ref-43)
44. Anderson (n 40), 762. [↑](#footnote-ref-44)
45. Crimes (Sentencing Procedure) Act 1999 (NSW), s 54 (a). [↑](#footnote-ref-45)
46. *Ibid.*, s 102. [↑](#footnote-ref-46)
47. Crimes (Sentencing Procedure) Act 1991 (Vic), s 11 (1). [↑](#footnote-ref-47)
48. Sentencing Act 1991 (Vic), s 106, s 107. [↑](#footnote-ref-48)
49. Corrective Services Act 2006 (Qld), Part 1. [↑](#footnote-ref-49)
50. Criminal Code Act 1899 (Qld), s 305 (2). [↑](#footnote-ref-50)
51. Criminal Law (Sentencing) Act 1988 (SA), s 32 (1). [↑](#footnote-ref-51)
52. *Ibid.*, s 32 (5) (ab). [↑](#footnote-ref-52)
53. *Ibid.*, s 32 (5) (c). [↑](#footnote-ref-53)
54. *Ibid.*, s 32 (3). [↑](#footnote-ref-54)
55. Sentencing Act 1995 (WA), ss 90 (1), 90 (3). [↑](#footnote-ref-55)
56. Sentencing Act 1995 (WA), s 90 (4). [↑](#footnote-ref-56)
57. *Ibid.*, ss 96 (3), 137, 142. [↑](#footnote-ref-57)
58. Sentencing Act 1997 (Tas), s 18. [↑](#footnote-ref-58)
59. Australian Bureau of Statistics (n 43), 47. [↑](#footnote-ref-59)
60. Sentencing Act (NT), s 53 (1). [↑](#footnote-ref-60)
61. Crimes (Sentencing) Act 2005 (ACT), s 65 (5). [↑](#footnote-ref-61)
62. Crimes (Sentence Administration) Act 2005 (ACT), s 314A. [↑](#footnote-ref-62)
63. *R v Leslie* [37]. [↑](#footnote-ref-63)
64. *R v Harris* (2000) 50 NSWLR 409, 93; *R v Ngo* [2001] NSWSC 1021 (14 November 2001), 43. [↑](#footnote-ref-64)
65. *R v Denyer* [1995] 1 VR 186, Crockett J, para. 11. [↑](#footnote-ref-65)
66. *R v Inge* [1999] HCA 55, 7 October 1999, Kirby J, para. 63; Anderson (n 35). [↑](#footnote-ref-66)
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281. As Terblanche observes, the terms minimum and mandatory are generally used loosely by South African courts. The life imprisonment described in Section 51(1) of the Criminal Law Amendment Act could be argued not to be a minimum sentence since it is, at the same time, also a maximum. It is also not strictly speaking a mandatory sentence either, because courts have discretion to depart from the sentence in certain circumstances, as discussed below. See S. S. Terblanche ‘Mandatory and minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997’ [2003] *Acta Juridica* 194. [↑](#footnote-ref-281)
282. See the Supreme Court of Appeal’s discussion of this in *S v Malgas* 2001 (2) SA 1222 (SCA) [7]. [↑](#footnote-ref-282)
283. See Section II below. [↑](#footnote-ref-283)
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