ANNA-MARIA GETOŠ KALAC*

ASEA GAŠPARIĆ**

Life Sentences, Penal Populism, and Security Confinement***

ABSTRACT: *This paper critically reflects on the normative and practical meaning and purpose of life sentences and long-term prison sentences, which essentially resembles life sentences in their effect. The analysis provides in-depth knowledge about current trends in the global abolitionist movement, showcasing the current opinio iuris on the jus cogens status of the safeguards against the death penalty. Fully subscribing to said opinio iuris, the authors discuss its likely implications in terms of a future rise in life sentences, focusing on their meaning and relation to long-term prison sentences. This is not only a matter of normative definition but also an important issue in comparative penology that empirically investigates the imposition of life sentences. To test their assumptions about the dubious labelling of essential life sentences as ordinary (long-term) prison sentences, a normative analysis of the current legal framework in nine European states (Croatia, Serbia, Slovenia, Poland, Slovakia, Hungary, Germany, France, and Switzerland) is presented in this paper. Preliminary findings show that what is labelled 'life sentence' in one jurisdiction tends to be a far less severe punishment than the sanction's name might imply when compared to 'ordinary (long-term) prison sentence' in another jurisdiction. However, the matter is far more complex, as numerous states apply the so-called 'security confinement' as a security measure. Nevertheless, the*

* Full Professor, University of Zagreb, Faculty of Law, agetos@pravo.unizg.hr, ORCID ID: 0000-0002-0016-764X.

** Ph.D. Candidate at the Ferenc Deák Doctoral School of the University of Miskolc and Scientific Researcher at the Central European Academy, Budapest, gasparic.asea@gmail.com, ORCID ID: 0000-0003-2725-488X.

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authors find that in their effects, such security measures, although not labelled as sanctions, come dangerously close to actual sanctions such as life and long-term prison sentences, thereby normatively undermining current European human rights standards. Since there appears to be a rise in such 'false labelling', the phenomenon is considered in the context of penal populism and, in conclusion, discussed as a matter of the very foundations that criminal law builds upon in an attempt to suggest normative and practical solutions.

■ **KEYWORDS:** penology, life sentence, penal populism, security confinement, *Sicherungsverwahrung*, death penalty, *jus cogens*

1. Background and introduction

The idea and concept for this paper evolved in November 2022 under the powerful and lasting impact of the 8th World Congress Against the Death Penalty in Berlin[1] (hereafter, World Congress).[2] Being confronted for several days by the horrors of the ongoing *barbaric practice*[3] of the death penalty, while experiencing an unprecedented enthusiasm and conviction on the path to its universal abolition, makes one critically reflect upon the relative ease with which European scholars might dismiss the topic as somewhat irrelevant or even obsolete. From a purely Eurocentric perspective and outside the context of historical approaches, the scholarly and practical dealings with the death penalty in Europe have lost their purpose and appeal.[4] Nevertheless, *Beccaria*'s infamous '*Who has ever willingly given up to others the authority to kill him?*'[5] still stands, with the death penalty remaining a

1 For further details, see: ECPM, 2023; Council of Europe (CoE), 2023b.

2 Prof. Dr. Getoš Kalac would like to sincerely thank the organisers of the World Congress, especially Mr. Raphaël Chenuil-Hazan, Executive Director of the Ensemble Contre la Peine de Mort, for their kind speaker invitation and the opportunity to actively participate in a truly extraordinary event.

3 Cit. Network for the Abolition of the Death Penalty and Cruel Punishment, 2022a, p. 3.

4 As the territories of the current 46-member states of the CoE form a '*death penalty free zone*', with the last execution conducted in 1997 (CoE, 2023a), from a strictly Eurocentric perspective, the death penalty issue falls under contemporary criminal law, criminology, and even penology and is commonly dismissed as no longer relevant; thus, one might even deem it obsolete. A noteworthy exception relevant in the context of the current paper is the jurisprudence of the European Court of Human Rights (ECtHR) on the abolition of the death penalty. For a summary of up-to-date case law, see: ECtHR, 2022a.

5 Cit. Beccaria, 1995, p. 66.

global mankind issue.[6] It is also a constant reminder of how little humanity has evolved throughout the past quarter of a millennium vis-à-vis the most severe criminal punishments (death penalties and their so-called *humane* alternative, life sentences). Therefore, we find it scientifically compelling and appropriately timed (in light of the recent 'World and European Day against the Death Penalty' on 10 October[7]) to present to the Central European comparative legal science community the current *opinio iuris* on the *jus cogens* status of safeguards against the death penalty, as provided in the 'Manifesto on the Abolition of the Death Penalty as a Peremptory Norm of General International Law (Jus Cogens)' (hereafter, Manifesto):[8]

ABOLITION OF THE DEATH PENALTY AS A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (*JUS COGENS*)
On the Occasion of the 8th World Congress Against the Death Penalty
Berlin, 15–18 November 2022

1 This 8th World Congress Against the Death Penalty occurs in the year of the 15th anniversary of the UN General Assembly's first vote on the Resolution on the moratorium against the death penalty. In 2007, the resolution received 107 votes in support, subsequently rising to 123 in 2020. During this period, Amnesty International recorded that the abolitionist countries in the world had increased from 144 to 170. This is a clear demonstration of a global trend solidifying the legal standards for a world free of the death penalty.

2 Following this rate of change, we have reached a significant moment in the history of the death penalty. The temporary exception in the International Covenant on Civil and Political Rights (hereinafter: ICCPR) article 6(2), which allows for the application of the punishment for the 'most serious crimes', is now starkly brought into focus through article 6(6), which states '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment'. This is a time-sensitive feature that allows us to question the retentionist member states' claims that they can justifiably continue to use the death penalty in perpetuity.

6 The abolition of the death penalty is not just *one* of the global mankind issues, but *the* issue, because "*[t]he right to life is nowadays universally acknowledged as a basic or fundamental human right. It is basic or fundamental because 'the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights'.*" (cit. Weiss, 1992, s.p., with reference to cit. Przetacznik, 1976, p. 589, 603).

7 For more details, see: CoE, 2023c.

8 Cit. Network for the Abolition of the Death Penalty and Cruel Punishment, 2022a, with listing of signatures as of November 2022 and presented at the World Congress. The first steps in drafting the Manifesto were taken at the international scientific congress, 'Against Death Penalty: *Opinio Iuris* and International Law' held in May 2022 in Madrid. For more details, see: Network for the Abolition of the Death Penalty and Cruel Punishment, 2022b. See also the collection of topical open access publications: Network for the Abolition of the Death Penalty and Cruel Punishment, 2022c.

3 Today, over two-thirds of the states affirm this abolitionist position. We are now within a new moment in the promotion of global synergy for abolition. All countries should join the abolitionist community, as General Comment no. 36 on the right to life:

> reaffirms the position that State parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights[9].

4 As humanity has evolved and we reflect upon the sanguinary history of sovereign power's relationship with capital punishment, we should utilise our refined interpretive tools of the ICCPR to demonstrate what is legitimate in a government's application of punishment.

5 The United Nations [UN] has provided a multi-faceted review to achieve this assessment. The UN has clearly signalled and created mechanisms for the aspiration of global abolition through the following:

- The international legal mechanism for abolition is articulated in the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.
- Article 6(2) is often misunderstood. It is not a licence to execute but rather a necessary imposition of restrictions on the use of capital punishment by those states that still cling to the barbaric practice.
- The ECOSOC Safeguards (and amendments) identifying minimum standards in the capital judicial processes should be observed and interpreted to provide impetus for governments to consider national abolition.
- The Secretary General's Quinquennial Report on the death penalty assesses state compliance with the Safeguards and identifies practices inconsistent with treaty standards.
- The Human Rights Council's High-Level Panel Discussions on the question of the death penalty include dialogues on pertinent issues regarding the punishment and observe global trends leading towards abolition.
- The UN Special Procedures regularly use their mandates to denounce the death penalty around the world. Reports state the global norms towards abolition and specific communications in capital cases identifying treaty violations.
- The concluding observations of UN committees call retentionist countries to adhere to treaty standards,

9 General comment no. 36 (2018) under article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36, 30 October 2018, para. 50, p. 12).

- highlighting issues of unfairness and discrimination in capital trials, inhumane conditions on death row, and the cruelty and torture imposed through executions.
- The Universal Periodic Review [*UPR*] has witnessed increased recommendations for retentionist states under review. Following the three completed UPR cycles, there is a corpus of recommendations for the initiation of moratoriums, *de jure* abolition, and the ratification of the Second Optional Protocol. Both recommending states and civil society organisations use this peer-review mechanism to bring transparency on the inhumanity of the death penalty.
- The abolition of the death penalty reflects one of the Sustainable Development Goals [*SDG*]. Although SDG 16 aims for 'Strong Institutions and Access to Justice and Build Effective Institutions', the application of the death penalty is not included in this goal. Specifically, SDG 16.1 aims to reduce death rates, promote equal access to justice, and protect fundamental freedoms. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society.

6 This sophisticated UN framework aiming to rectify the problem of the death penalty demands that the punishment should now be considered as a violation of the inalienable dignity and the rights of the person.

7 No capital judicial process consistently maintains the legal protections necessary to satisfy fair criminal proceedings under ICCPR Article 14.

8 The death penalty is not a justifiable form of governmental and societal retribution and cannot be proven to possess a special deterrent effect for the prevention or reduction of crime over and above terms of imprisonment.

9 Today, we have extensive empirical knowledge about the modes of execution and know that these generally result in a cruel and inhumane way of killing. This is seen from the phenomenon of death row to the evident failure of procedures once presented as the most humane, which have also systematically incurred inhumane pain and suffering in the form of 'botched executions'.

10 Methods of execution are cruel and have psychological and physiological impact on the condemned. It is inherently a cruel and inhumane invasion of the condemned person and negatively impacts the families and the community.

11 In seeking to create humane ways to protect society and appropriately punish violations of the criminal law, we find ourselves in a historical moment. As a global community that advances principles of human rights, we are in a position of normative legitimacy to maintain that the death penalty is a per se violation of human rights. There is cumulative evidence to suggest that the abolition of the death penalty is now a new global norm, a peremptory norm of general international law (*jus cogens*).

12 Abolition would, therefore, enable people within the jurisdictions of retentionist countries to benefit from this advancement in understanding. The leading research on the death penalty demonstrates:
a) It is not a justifiable function of legitimate government;
b) It violates human rights; and therefore,
c) It contravenes the peremptory norms of general international law (*jus cogens*).

13 For all of the above reasons, the undersigned understand that the proscription of the death penalty from punitive systems is a demand based on the right to life and the right not to subject human beings to torture or inhuman treatment, which we consider to be rights integral to *jus cogens*.

We, therefore, call for a global abolition of the death penalty. The death penalty has no place in our world today.

> SIGNATURES
> William Schabas, London, UK; Robert Badinter, Paris, FR; Jon Yorke, Birmingham, UK; John Vervaele AIDP, Utrecht, NL; Luis Arroyo Zapatero SIDS, Ciudad Real, ES; José Luis de la Cuesta, San Sebastián, ES; Sergio García Ramírez, México, MX; Juan E. Méndez, Washington, USA; Federico Mayor Zaragoza, Madrid, ES; José Luis Rodríguez Zapatero, Madrid, ES; Geneviève Giudicielli Delage, París, FR; Carolyn Hoyle, Oxford, UK; Ulrich Sieber, Freiburg in Breisgau, DE; George Werle, Berlin, DE; Anna Getos, Zagreb, HR; Raul Zaffaroni, Buenos Aires, AR; John Bessler, Baltimore, USA; Salomao Shecaira, Sâo Paulo, BR; Sylvia Steiner, Sâo Paulo, BR; Roberto M. Carlés, Bs As, AR; Sandra Babcock, Ithaca, USA; Alicia Gil, Madrid, ES; Ana Manero, Madrid, ES; John Bessler, Baltimore, USA; Francisco Muñoz Conde, Sevilla, ES; Fernando Velasquez, Bogotá, CO; Antonio Muñoz, Jaen, ES; Anabella Miranda, Coimbra, PO; Adán Nieto, Ciudad Real, ES; Luigi Foffani, Modena, IT; Juliette Tricot, Paris, FR; Oganit Yunam, Beirut, LB.

Based on the presented Manifesto and its findings,[10] we analyse the implications of a (universal) abolition of the death penalty for the life sentence and how the prospects of the life sentence contravene *jus cogens* (Section 2). Here we pay particular attention to the impact of the life sentence (commonly considered a *humane* alternative to the death penalty) (Section 2.2). To analyse this, we build on a conceptual and terminological clarification of the meaning and measurement of

10 For in-depth argument see: Bessler, 2018; Bessler, 2022; Bessler, 2023; Hood and Hoyle, 2008; Schabas, 2002; Stearns, 2020. For an example of counter argumentation, see: Short, 1999. For an analysis of the dubious empirics of the highly questionable deterrent effect of the death penalty, see: Donohue and Wolfers, 2005.

life sentences (Section 2.1) and conclude with a review of the relevant penological research (Section 2.3). In addition, we critically analyse the prospects of upholding established human rights standards for the imposition and execution of life sentences in times of rising penal populism (Section 3). Thus, it is necessary to briefly present these standards, particularly as developed through the relevant case law of the European Court of Human Rights (ECtHR; Section 3.1). Finally, given the ongoing rise in penal populism worldwide, we find it necessary to examine (potential) legal loopholes that successfully circumvent and, thus, undermine these minimal standards for life sentences by introducing the 'security confinement' (German: *Sicherungsverwahrung*). In this context, we also briefly examine a peculiar debate about the rights of incarcerated convicts and security-confined inmates to assisted suicide in Switzerland. This recently evolved debate has been resolved in both theory (through normative clarification) and practice (through successfully executing the first assisted suicide of a security-confined inmate on February 28, 2023).[11] This case raises numerous questions on penology and criminal and human rights law. Among these, we investigate the severe suffering of (indefinitely) incarcerated persons due to their confinement conditions as a cause of (assisted) suicide. This question is not only of great importance in view of the dubious claim that life sentences are a *humane* alternative to death sentences, but it also raises the issue of potential criminal liability and human rights violations for creating favourable conditions that lead to suicide.

The current paper does not aim to universally or ultimately resolve any of the examined issues or the mysteries of criminal punishment. All questions addressed as or within a (sub)section of this paper deserve a full-fledged scientific monography. Nevertheless, we purposefully opted for a very broad contextual approach rather than a targeted, in-depth single-issue analysis. Although this allows for an understanding of the discussed topics imbedded in their wider normative and penological contexts and in a transdisciplinary manner, it also limits the depth of our analysis. Therefore, the presented analysis should be understood as an exploratory venture into the countless questions raised by criminal punishment. Therefore, our goal is not only to discuss major challenges in current criminal punishment. We also aim to provide scientific arguments into an otherwise populist public and policy debate about sentencing (expectations) and the most severe types of punishment, while highlighting the neglected yet promising future paths for penological research.

11 Boos, 2023; ZüriToday, 2023.

2. Life sentences – A normative and penological analysis

This section aimed to resolve major conceptual and definitional (mis)understandings frequently encountered across the scholarly and professional discourse on life sentences. We also reveal key methodological challenges to measuring (life) sentences across time, space, and contexts, which explain the lack of relevant international or global comparative empirical data. This is followed by a condensed overview of basic argumentation on why life sentences should not be considered a *humane alternative* to the death penalty and why they are *not humane punishments*. The section concludes by providing key findings from a preliminary normative and penological review of the state of art in proscribing, imposing, and executing life sentences.

■ *2.1. The meaning and measurement of life sentences*

This subsection explores the complexities of life imprisonment across legal systems. It delves into interpreting guilt variations, dangerousness assessments, and human rights considerations. Furthermore, it distinguishes between life imprisonment and preventive detention, highlighting the challenge of justifying prolonged imprisonment based solely on a person's presumed 'dangerousness'. In this context, the concept of life sentences entails a fundamental question: how do we define a 'life' in the context of imprisonment? The main challenge in tackling this topic lies in how we conceptually approach the notion of life and its quality, which can be seen as a strategy to establish enduring personal conditions throughout one's life.[12] Some scholars[13] emphasise a multifaced perspective encompassing physical, psychological, social, functional, relational, and environmental aspects, which incorporates a broad spectrum of daily life elements, such as housing, recreation, employment, the environment, and income.[14] However, the question remains whether and to what extent life sentences allow those who serve them to have a life at all, i.e., a life that provides any of the qualities, opportunities, and experiences inherent to human life and not of purely physical existence?

The idea of life imprisonment can differ across jurisdictions, reflecting a range of interpretations and practices. This variation is inevitable because it reflects how guilt is understood within different legal frameworks and its connection to the concept of dangerousness.[15] How we approach dangerous offenders depends on the concept of guilt within any given criminal justice system.[16] This plays a crucial role in shaping the system of sanctions imposed on individuals who

12 Karajić, 1992, p. 486.
13 E.g., Hörnquist, 1982; Maslow, 2013.
14 See more in: Campbell, 1976.
15 Drenkhahn and Morgenstern, 2020, p. 88.
16 Ibid.

are deemed a threat.[17] Moreover, the principle of 'life should mean life' renews the focus on permanent incarceration; however, human rights considerations advocate for dignity-based analysis of the life imprisonment sentence.[18] The same was emphasised in the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which stressed the lack of uniformity in Europe's approach, leading to divergent practices and consequences for prisoners with life sentences.[19] As explained in this report, the prison sentence is tied to offenders' past behaviour and guilt, whereas secure preventative detention serves as a measure for the protection of the public. Although assessing dangerousness is crucial, the difficulty lies in rationalising prolonged imprisonment solely on the grounds of 'dangerousness'.[20] In this regard, determining release often depends on assessing the future 'dangerousness' of an individual serving a life sentence, specifically referring to the risk of that person committing another serious crime.[21] Considering such a scenario, the following question arises: what distinguishes life imprisonment as an indeterminate penalty from preventive detention as a measure of safeguarding public security?[22]

While navigating these intricate matters, it must be emphasised that the use of the term 'life sentence' in this discussion refers to a broader concept. This includes the conceptual framework of the definition involving the 'meaning of life', which goes beyond the exclusive idea of a sentence with no possibility of parole or release. By contrast, in instances where we discuss 'life sentence *stricto sensu*', we point to the definition of 'life imprisonment', which refers to a sentence resulting from a criminal conviction, allowing the state authority to keep an individual incarcerated until their natural death,[23] excluding any consideration of the death penalty.

Regarding the mentioned complexity, there is an obvious ambiguity surrounding the terminological distinction between 'life sentence' and 'preventive detention' across different legal systems. In essence, the discourse on life sentences revolves around untangling the complex interplay between notions of life, guilt, dangerousness, and the safeguarding of society. It is necessary to highlight that sentences which are not explicitly defined as 'life imprisonment' could still align with the broader concept of a life sentence, encompassing situations

17 Ibid.
18 van Zyl Smit and Appleton, 2019, p. 16.
19 For more details, see: 25th General Report, 2016, pp. 33–43.
20 UN, 1994, p. 12.
21 Ibid.
22 This is what van Zyl Smit, 2002, p. 2 pointed out: 'The problem with these different modes of detention is that it is not always obvious whether a life sentence is being imposed as punishment or whether one is dealing with some measure that is merely a non-penal form of indeterminate, compulsory treatment, imposed with no intent directly to penalise the offender.'
23 van Zyl Smit and Appleton, 2019, p. 35.

where the state retains the prerogative to incarcerate individuals until the end of their lives.[24]

■ *2.2. Life sentence as a humane alternative to death penalties?*

Beccaria recognised the deterrent horrors of imprisonment, imagining that one '*shall be reduced to so dreary and so pitiable a state if* [committing] *similar crimes*'.[25] Indeed, being reduced to such a 'dreary and so pitiable a state' of spending one's days incarcerated, without any realistic prospect of living a life, cannot qualify as a *humane alternative* to the death penalty, or as a *humane punishment* at all. In this regard, *Flander's* argument on the '*lack of resources within the various punishment theories*' to '*criticise certain modes or methods of punishment*', such as the death penalty (and in our perspective, the life sentence), is enlightening as it captures the challenge at its very core and encourages one '*to look at ideas of human dignity, or of decency, or of civilisation*'.[26] He underlined that '*the problem is not merely that the death penalty might not be compatible with the norms of a civilised society, but that much of the way we punish is incompatible with those norms*'.[27] Against this backdrop, we pose the case against life sentences as an *inhumane punishment*.

As the author of a thoughtful anti-death penalty critique states, '*ending the death penalty is important – but so is how we end it*'.[28] As a substitute, life imprisonment may initially seem to provide a more humane option; however, closer examination reveals a complex array of ethical and practical concerns that challenge its status as a practicable substitute. One abolitionist argued that life sentences were "*in fact a 'civil' death penalty.*"[29] Being sentenced to the death penalty is a condemnation to die, whereas life imprisonment is a condemnation to die in prison. Although both sentences are permanent in theory, the death penalty is perceived as more radical.[30] The concept of a life sentence as a humane alternative to the death penalty underscores the importance of providing prisoners with the opportunity for release in order to avoid any perception of inhumanity and degradation.[31] Continued debates surround the efficacy of life imprisonment, whether as an alternative to the death penalty or when compared to extended fixed terms of imprisonment, with a focus on its role in deterrence and retribution.[32] Unlike

24 Such sentences (as per van Zyl Smit and Appleton, 2019, p. 35) are described as informal life sentences.

25 Cit. Beccaria, 1995, p. 67, in which the full-length quote is worded as follows: "*Much more potent than the idea of death, which men always regard as vague and distant, is the efficacious because often repeated reflection that I too shall be reduced to so dreary and so pitiable a state if I commit similar crimes.*"

26 Cit. Flanders, 2013, p. 619.

27 Cit. Flanders, 2013, p. 619.

28 Cit. Simon, 2014, p. 488.

29 Cit. van Zyl Smit, 2002, p. 58.

30 Cit. Bernaz, 2013, p. 471.

31 Cit. van Zyl Smit and Appleton, 2019, p. 22.

32 van Zyl Smit and Appleton, 2019, p. 11.

fixed-term sentences, which offer inmates a clear endpoint, life imprisonment – especially without the possibility of parole – lacks characteristics such as hope.[33] Although the intention behind considering life sentences as humane alternatives is to avoid the moral complexities of the death penalty, reality presents a range of issues that challenge this perspective.

■ *2.3. (Legal) Facts and (penological) figures*

The following subsection focuses on the Central European region, conducting a normative examination of six countries: Croatia, Serbia, Slovenia, Poland, Slovakia, and Hungary. Subsequently, encompassing a broader geographical scope beyond Central Europe, the analysis expands to Germany, France, and Switzerland. The Criminal Code of Croatia recognises the penalty of 'long-term prison sentence' (Croatian: *kazna dugotranog zatvora*).[34] The Serbian legal system similarly implements life sentences (Serbian: *doživotni zatvor*).[35] The Slovenian Criminal Code introduces a life sentence as a 'sentence of imprisonment until death' (Slovenian: *kazen dosmrtnega zapora*).[36] In Poland there is a literal equivalent of 'lifelong imprisonment' (Polish: *dożywotnie pozbawienie wolności*).[37] Slovakia also recognises life imprisonment in its Criminal Code (Slovak: *trest odňatia slobody na doživotie*).[38] The Hungarian legal system also has a sanction of life imprisonment (Hungarian: *az életfogytig tartó szabadságvesztés*).[39] Germany's Criminal Code uses the term 'lifelong prison sentence' (German: *lebenslange Freiheitsstrafe*).[40] Both the French criminal system and the Swiss Criminal Code recognise lifelong imprisonment (French: *la détention criminelle à perpétuité*)[41] and life sentences (Swiss: *lebenslange Freiheitsstrafe*).[42] The following table provides a summarised overview of

33 See more in: Van Zyl Smit, 2006, p. 409.
34 Croatian Criminal Code, Art. 46.
35 Serbian Criminal Code, Art. 44a.
36 Slovenian Criminal Code, Art. 46. par. 2.
37 Polish Penal Code, Art. 88. par. 5.
38 Slovak Criminal Code, Art. 47.
39 Hungarian Criminal Code, Art. 41. par. 1.
40 German Criminal Code, Art. 38. par. 1.
41 French Penal Code, Art. 131-1.
42 Swiss Criminal Code, Art. 40.

the minimum and maximum durations of life sentences,[43] parole possibilities, and specific restrictions regarding sentencing policies across different countries:

Table 1: Duration of life sentences in countries[44]

Country	Minimum duration in years	Maximum duration in years	Restrictions
Croatia	21[45]	40,[46] exceptionally 50[47]	cannot be imposed on an offender under the age of 18[48]
Serbia	21[49]	until the end of prisoner's life	cannot be imposed on an offender under the age of 21[50]
Slovenia	31[51]	until the end of prisoner's life	cannot be imposed on an offender under the age of 18[52]
Poland	26[53]	until the end of prisoner's life	cannot be imposed on an offender under the age of 18[54]
Slovakia	26[55]	until the end of prisoner's life	no provisions that would permit or forbid for an offender under the age of 18 to be sentenced for life
Hungary	26[56]	until the end of prisoner's life	cannot be imposed on an offender under the age of 20[57]

43 For the scope of this analysis, the table presents information on the duration of life sentences in countries that acknowledge such penalties. Alternatively, using the logical deduction based on the stipulated norms in the respective legal acts, we show the minimum and maximum durations of imprisonment for long-term sentences. If the legal act does not specify a precise duration for a lifelong or long-term prison sentence, we consider that the minimum term extends one year beyond any explicitly stated prison sentence. Furthermore, when determining the maximum duration in legal systems with life imprisonment, we apply the rationale that the maximum duration extends until the end of the prisoner's life while in legal systems, with long-term imprisonment expressed as years of duration that are stated in the law act.

44 Authors' own work.

45 Croatian Criminal Code, Art. 46. par. 1.

46 Croatian Criminal Code, Art. 46. par. 1.

47 Croatian Criminal Code, Art. 46. par. 2.

48 Croatian Criminal Code, Art. 46. par. 4.

49 The Serbian Criminal Code in Art. 45. par. 1. prescribes that '*The prison sentence cannot be shorter than thirty days or longer than twenty years*'. Therefore, all sentences imposed for a period longer than 20 years fall under the category of life sentence.

50 Serbian Criminal Code, Art. 44a. par 2.

51 The Slovenian Criminal Code in Art. 46. par. 1. says that '*Imprisonment may not be shorter than one month or longer than thirty years*'. Thus, life sentences would be longer than 30 years.

52 The Slovenian Criminal Code does not implement a life sentence for offenders under the age of 18, but refers to special criminal legislation for minors in Art. 5. par. 1.

53 Since the Polish Penal Code recognises special institute of deprivation of liberty for 25 years (Art. 88. par. 4.), a longer prison sentence can be considered a life sentence.

54 Polish Penal Code, Art. 54. par. 2.

55 Since the Slovak Criminal Code, Art. 46, states that 'definite period of time of not more than twenty-five years or life imprisonment', a life sentence would encompass a prison term of more than 25 years.

56 According to the Hungarian Criminal Code, Art. 36., the longest fixed-term imprisonment is 25 years, implying that any sentence longer than this would be considered life imprisonment.

57 Hungarian Criminal Code, Art. 41. par. 1.

Country	Minimum duration in years	Maximum duration in years	Restrictions
Germany	15[58]	until the end of prisoners' life	cannot be imposed on an offender under the age of 18[59]
France	31[60]	until the end of prisoners' life	cannot be imposed on an offender under the age of 18[61]
Switzerland	21[62]	until the end of prisoners' life	cannot be imposed on an offender under the age of 18[63]

The presented data underscores the complexity of different approaches to life imprisonment, prompting discussions about the balance between punishment, rehabilitation, and reintegration within diverse criminal justice systems reflecting different cultural and legal traditions. Although the concept of a life sentence,[64] which is described in the criminal code, may not exist in a certain country (e.g., Croatia), when looking at the actual maximum duration of fixed prison sentences (40 or 50 year in Croatia) and comparing them to the maximum of life sentences in other countries (e.g., 15 or 25 years in Germany), it becomes obvious that the mere notion of a life sentence does reveal much and can be misleading in some cases when comparing and assessing punitivity across countries. Thus, in instances besides pure normative analysis, one must consider the actual sentencing and early or conditional release practices to fully understand whether and to what extent 'life sentences' are actual incarcerations until the end of a convict's life, or are, in fact, far more lenient than long prison sentences in other countries.

58 As the German Criminal Code Art. 38. par. 2 prescribes that the maximum term of a fixed-term period of imprisonment is 15 years, any sentence longer than that can be considered a life sentence.

59 The German Criminal Code, Art. 10. refers to special Youth Courts Act, which does not proscribe a life sentence for offenders under 18.

60 Since the French Penal Code Art. 131-1. lists imprisonment of up to 30 years, sentences longer than that period can be considered life sentences.

61 French Penal Code Art. 122-8. states that, 'Minors capable of discernment are criminally liable for the crimes, offences or contraventions of which they have been convicted, taking into account the mitigation of liability they enjoy because of their age, under conditions set by the Code of Criminal Justice for Minors'. Meanwhile, Ordinance No. 45–174. Art. 20–2. par. 1. states that, 'If the sentence incurred is imprisonment or life imprisonment, they may not impose a sentence of more than twenty years of imprisonment or criminal detention'.

62 Art. 40. par. 2 states that the maximum term of custodial sentence is 20 years, if life sentence is not explicitly stated.

63 The Swiss Criminal Code Art. 9. par. 2. refers to special Youth Criminal Law, which does not proscribe a life sentence for minors.

64 The term 'life sentence', as used by the authors, does not run counter to the national legislation nor aim at normatively redefining national legal provisions. The aim is purely scientific and serves the conceptual purpose of identifying those prison sentences which, regardless of their national normative denotation (e.g., long-term prison sentence in Croatia), may be considered *de facto* life sentences owing to their penological effect, especially when compared to other relevant European 'life sentences' (e.g., Germany), where such sentences *de facto* are much shorter (shorter than the 20–40 years of the Croatian long-term prison sentence), although they are normatively denoted as 'life sentences' in the national legislation.

To further expand the comparative overview of life sentencing practices illustrated in the previous table, we consult the Council of Europe Annual Penal Statistics, which offers data about the implementation of life imprisonment in European countries. Analysing the reports of the Council of Europe, we observed a dynamic pattern. First, in 2018, a noticeable decrease was noted in the average percentage of people sentenced to life imprisonment, dropping to 1.2%.[65] However, the annual report from 2019 showed an average of 2.5% of prisoners serving life sentences.[66] In the following year (2020), it increased by 0.7%.[67] Reports examining the overall situation in European countries in the past ten years (2013–2023) show that the punishment of life imprisonment was implemented steadily, but the percentage of life sentences imposed was between 2.5% and 3.3%,[68] with the abovementioned variations.

A considerable body of research shows that imprisonment negatively alters cognitive functioning, which increases the risk of recidivism.[69] Although such a criminogenic impact of incapacitation in the context of the life sentence might be seen as irrelevant, it poses the question of the rehabilitative purpose of punishment, even in the case of life sentences. As neurosciences further evolve and transdisciplinarity[70] replaces inter- and multi-disciplinarity, new intersections relevant for (criminal) law sciences emerge, including 'neurolaw',[71] 'neurocriminology',[72] 'neuropenology',[73] or 'neurosociology and penal neuroabolitionism'.[74] Therefore, we must include findings from these steadily evolving fields and fundamentally reconsider 'why' and 'how' we punish.

65 Aebi and Tiago, 2018.

66 Aebi and Tiago, 2020.

67 Aebi and Tiago, 2021 show the average percentage of the 2.7% of the prisoners sentenced to life sentence in their report.

68 Aebi and Delgrande, 2015; Aebi, Cocco, Molnar and Tiago, 2022; Aebi, Cocco and Molnar, 2023; Aebi, Tiago and Burkhardt, 2015; Aebi, Tiago and Burkhardt, 2016; Aebi, Tiago, Berger-Kolopp, Burkhardt, 2017.

69 For an overview of relevant studies and their key findings, as well as a study on cognitive decline due to incarceration, see: Umbach, Raine and Leonard, 2018. The importance of neuropsychological research has recently been discussed against the backdrop of the ECHR by Ligthart et al., 2019.

70 For example, see: Getoš Kalac, 2020.

71 For example, see: Pardo and Patterson, 2013.

72 For more details, see: Nordstrom et al., 2011.

73 Getoš Kalac and Feuerbach, 2023.

74 According to *Borbón*, Research has yielded valuable results on the adverse neuropsychological effects of prison (Nurse, 2003; Huey and McNulty, 2005; Haney, 2012; Schnittker et al., 2012; Brinkley-Rubinstein, 2013; Meijers et al., 2015; Constantino et al., 2016; Haney, 2017; Meijers et al., 2018; Edgemon and Clay-Warner, 2019; Piper and Berle, 2019; Reiter et al., 2020). Overall, these findings tend to correlate prison with poorer mental health, as impoverished spaces, punitive practices, and the prison environment are profoundly disadvantageous factors for mental health and general well-being. For example, the study by Meijers et al. (2018), suggests that three months of imprisonment may lead to reduced self-control, increased risk taking, and significant deterioration in attention.(Borbón, 2022, p. 2).

3. Upholding European human rights standards against rising penal populism?

In 2022, the National Commission for the Prevention of Torture found that the practice of security confinement in Switzerland does not partially align with human rights standards, particularly because of the placement of security-confined persons within closed prison wards of the general sentence serving system (German: *Normalvollzug*).[75] The Conference of the Cantonal Justice and Police Directors responded that their resources are limited and that a strictly separated placement of security-confined persons with a specific confinement regime is neither requested by law nor established in daily practice (for now).[76] This example, taken from one of the most developed European countries in principle, reflects a setting encountered in many countries that justifies the notion of the prison system being the 'ugly duckling'[77] of the criminal justice system. Fortunately, it is not very popular. It sits at the very end of the criminal processing with little (if any) influence over all of the previous processes and decisions which eventually determine what the prison or correctional system has to deal with (usually much more than it can handle). In the abovementioned example, this would be the normative construction and adjudication of security confinement as a 'measure' (not a 'sentence'), imposed on those deemed 'dangerous' to society after already having served their prison sentence. In the case we present, this includes dealing in daily practice with a suicidal 72-year-old man who barely moves around after he already served his ten-year sentence and must serve another 20 years of security confinement. Such cases pose challenges to the prison or correctional system; however, at its very core, they are a consequence of crime policy decisions taken at a very distant level.

It is this initially highly unfavourable setting in which the prison or correctional system is placed in, that one needs to be immersed in, in order to fully comprehend the devastating consequences of (the rising) 'penal populism'.[78] First, we provide the key points (benchmarks) of the current European human rights

75 National Commission for the Prevention of Torture, 2022.

76 Konferenz der Kantonalen Justiz- und Polizeidirektorinnen und -direktoren, 2022, p. 3.

77 For a Croatian case study, see: Getoš Kalac, Bezić and Šprem, 2021.

78 According to Garland, Tony Bottoms was the first one to raise the issue of 'populist punitiveness' in 1995. Garland defined penal populism as a form of political discourse that, directly or by implication, denigrates the views of professional experts and liberal elites and claims instead the authority of 'the people' whose views about punishment it professes to express. […]. Penal populism typically has a punitive, reactionary cast – which is why we often think of it as a synonym for 'populist punitiveness'.(Garland, 2022, p. 251).

standards on life sentences as established through the ECtHR case law.[79] Then, we present a vivid real-life case of what practice looks like and what might happen if standards and practice were to collide. Within this section, we focus on the normative construct of security confinement to showcase an example of penal populism and highlight the fine normative line separating security confinement from life sentences, which is commonly non-existent in practice.

■ *3.1. Current European human rights standards on life sentences*

Examining the domain of justice and human rights, we focus on the current guidelines established by the ECtHR. One of the key standards in the context of life sentences set forth by the ECtHR is the requirement that life sentences "*must be reducible both* de jure *and* de facto*, ensuring the prospect of release and the possibility of review.*"[80] The jurisprudence of the ECtHR addressed the prohibition of irreducible life sentences and identified the need to avoid sentences that lack any possibility of release, ensuring that detention remains proportionate and respects human dignity.[81] The ECtHR emphasises that prisoners subjected to life sentences must be provided with clarity and certainty regarding the criteria and conditions for potential release.[82] Furthermore, it advocates for the protection of family life and correspondence, allowing life prisoners to maintain their relationships and communication with relatives.[83]

In this context, the ECtHR sets crucial standards for security confinement (*Sicherungsverwahrung*). As per its interpretation, long or even indefinite deprivation of liberty may be permissible following a conviction, and the determination regarding the release of convicted individuals from such measures can be made

79 An up-to-date summary of the impact of ECtHR's decisions on life sentences on national legislation and practice, as reported by the states in question has been published in May 2023 in CoE, 2023d. It provides insight specifically into the following issues: 'review mechanisms; conditions of detention; risk of irreducible life sentences in cases of extradition; the right to respect for family life and correspondence; and legal remedies to challenge the length of criminal proceedings and lawfulness of detention.' Cit. CoE, 2023d, p. 2.

80 Cit. CoE, 2023d, p. 2.

81 Ibid.

82 See more in ECtHR judgements: *Marcello Viola v. Italy* (no. 2) (application no. 77633/16), judgement of 13 June 2021 [online]. Available at: https://hudoc.echr.coe.int/fre?i=002-12494 (Accessed: 14 August 2023); *Vinter and Others v. the United Kingdom* (applications nos. 66069/09, 130/10 and 3896/10), judgement of 9 July 2013 [online]. Available at: https://hudoc.echr.coe.int/?i=001-122664 (Accessed: 14 August 2023); *Petukhov v. Ukraine* (no. 2) (application no. 41216/13), judgement of 12 March 2019 [online]. Available at: https://hudoc.echr.coe.int/rus?i=002-12379 (Accessed: 14 August 2023).

83 CoE, 2023d, p. 8.; see more in ECtHR judgements: *Kalda v. Estonia* (application no. 35245/19), judgement of 6 June 2016 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-160270 (Accessed: 14 August 2023); *Dickson v. the United Kingdom* (application no. 44362/04), judgement of 4 December 2007 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-73360 (Accessed: 14 August 2023); *Trosin v. Ukraine* (application no. 39758/05), judgement of 23 May 2012 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-109197 (Accessed: 14 August 2023).

in subsequent phases.[84] The ECtHR has significantly influenced the evolution of preventive detention practices, particularly in Germany. Noteworthy cases, such as *M. v. Germany*[85] and *Ilnseher v. Germany*[86], have represented the efforts taken by ECtHR to define the preconditions[87] for a form of preventive detention that aligns with the human rights standards set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms[88] (ECHR). In the cases mentioned above, preventive detention imposed on the person no longer constituted a penalty but was preventive in nature.

According to jurisprudence of the ECtHR, any deprivation of liberty must be in accordance with the law. Article 5 of the ECHR outlines the conditions for lawful detention, including preventive detention. This type of detention, similar to other forms of liberty deprivation, must adhere to established rules. Furthermore, under Article 5 of the Convention, the ECtHR established the general acceptance of preventive detention.[89] However, debates on the interpretation of Article 5 occurred in a segment that tackled individuals of 'unsound mind'.[90] In that context, the ECtHR applies the Winterwerp criteria,[91] stipulating the need for objective medical expertise to establish a genuine mental disorder; its severity and persistence must be determined to justify compulsory confinement and

84 Drenkhahn and Morgenstern, 2020. p. 97.

85 *M. v. Germany* (application no. 19359/04), judgement of 17 December 2009 [online]. Available at: https://hudoc.echr.coe.int/fre?i=002-1190 (Accessed: 14 August 2023).

86 *Ilnseher v. Germany* (application no. 10211/12, 27505/14), judgement of 4 December 2018 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-187540 (Accessed: 14 August 2023).

87 E.g., in *M. v. Germany* (19359/04), paragraph 128, the ECtHR states that
...preventive detention orders may be made only against persons who have repeatedly been found guilty of criminal offences of a certain gravity. It observes, in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present, and thus, at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.

88 Drenkhahn and Morgenstern, 2020. p. 96.; ECHR and Fundamental Freedoms, 1950.

89 The ECtHR took the same position in several cases, see in: *van Droogenbroeck v. Belgium* (application no. 7906/77), judgement of 24 June 1982 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-57471 (Accessed: 14 August 2023); *Weeks v. the United Kingdom* (application no. 9787/82), judgement of 2 March 1987 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-57594 (Accessed: 14 August 2023). (Accessed: 14 August 2023); *Stafford v. the United Kingdom* (application no. 6295/99), judgement of 29 May 2001 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-22163 (Accessed: 14 August 2023); *Grosskopf v. Germany* (application no. 24478/03), judgement of 21 October 2010 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-101177 (Accessed: 14 August 2023); *Kallweit v. Germany* (application no. 17792/07), judgement of 13 January 2011 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-102799 (Accessed: 14 August 2023).

90 See more in: Drenkhahn and Morgenstern, 2020. p. 96.

91 This is criteria named after the case *Winterwerp v. the Netherlands* (application no. 6301/73), judgement of 27 November 1981 [online]. http://www.bailii.org/eu/cases/ECHR/1981/7.html (Accessed: 14 August 2023), paragraph 3.

continued confinement validity.[92] Finally, special consideration regarding Article 7 of the ECHR debated whether preventive detention can be categorised as a form of punishment. In that context, the ECtHR observed that despite minor differences in preventive detention conditions and regular imprisonment, the significant distinction between a prison sentence and prolonged detention as a preventive measure order is unclear.[93]

■ *3.2. Security confinement as a reflection of growing penal populism*

The prison system has come a long way, from abolishing death penalties to establishing relatively high standards for the imposition and execution of life sentences throughout Europe. However, the question remains whether and how such high standards will prevail and develop further against the backdrop of steadily rising penal populism. To assess this, this paper examines security confinement as a result of growing penal populism. Although normatively constructed as a 'security measure' instead of a 'sentence' to which the ECtHR's (life) sentencing standards would apply, security confinement often resembles indeterminate or life prison sentences. This certifies that various European countries (such as Germany,[94] Switzerland,[95] Austria,[96] Belgium,[97] France,[98] Poland,[99] Czech Republic,[100] Italy[101] The Netherlands,[102] Denmark,[103] and Norway[104]) have identified certain types of criminals for which they deem incarceration necessary and justified after a fully served prison sentence. Under the leitmotif of 'dangerousness' and 'protection of society', both well-established argumentative anchors of penal populism or the

92 Drenkhahn and Morgenstern, 2020. p. 98.
93 See more in: Drenkhahn and Morgenstern, 2020. p. 97.
94 Tober, 2019.
95 National Commission for the Prevention of Torture, 2022.
96 Drenkhahn and Morgenstern, 2020, pp. 93-94.
97 Drenkhahn and Morgenstern, 2020, p. 94.
98 Drenkhahn and Morgenstern, 2020, pp. 94-95.
99 Szwed, 2021.
100 Kalvodová, Fryšták, 2022.
101 Ferracuti et al., 2019.
102 van Marle, 2002.
103 Lappi-Seppälä, 2023.
104 Ibid.

'Preventive State'[105] and core features of what *Jakobs* termed 'enemy criminal law' (German: *Feindstrafrecht*)[106], these countries have created a normative loophole that has very successfully avoided ECtHR's minimal life sentence standards thus far, as the following case from Switzerland demonstrates:

> Mr. Peter Vogt, aged 72, is a violent sex offender who spent more than half of his life in prison for repeatedly committing rape and sexual assault. His victims were aged 7, 12, 14, 15, 17, and 40 years old, and his crimes were despicable. He has been in and out of prison throughout his whole life. On three occasions following the sentence he served, he had been kept in security confinement but then released. He was arrested once again on 7th October, 1994 – the last day he spent out of prison – for strangling a prostitute close to death. He served his ten-year prison sentence and spent almost twice the sentence time in security confinement from 2004 onwards. The last expert assessment calculated the risks of his criminal relapse (recidivism) within the next ten years to be 80%. Prior assessments found him to be manipulative with an IQ of 136 and unresponsive to therapy. He was married twice and is still in contact with his second wife and their daughter, but his first wife and their two children did not remain in touch with him. He kept close relations with a lady friend, his *sunshine*, since 1993. In 2004, for his security confinement, he was placed in a less restrictive regime where he undertook several excursions, could leave the prison facility, and had an MP3 player, his own computer, and access to a printer. He also has more frequent visitation and communication rights. This abruptly ended after an outside incident occurred concerning another security-confined person, leading to general restrictions for the security confinement regime. Mr. Vogt was heavily affected by the changes in his security confinement regime, and on 9th July, 2018, he got in touch with an assisted suicide organisation to plan his 'demise'.

105 Zedner and Ashworth, 2019, who highlight the feature of what they term '*incapacitative detention*' in relation to the Preventive State and practices of prevention, posit:
Probably the largest expansion of coercive powers for preventive purposes has been with respect to postconviction detention. Even in legal systems that subscribe to proportionality in sentencing, there is often an exception for incapacitative sentences for those deemed dangerous (McSherry and Keyzer 2011). [...] The contestability of judgments of dangerousness is well known (Monahan 2006, Skeem and Monahan 2011, Zedner 2012). In relation to eligibility for incapacitative detention, it has been argued that conviction for a serious violent crime should be sufficient to displace the normal presumption that each individual will be law-abiding, and this loss of the presumption of harmlessness therefore opens the way for an assessment of risk posed by a convicted offender with a view to long-term preventive detention (Floud and Young 1981; Walen 2011a,b).
Cit. Zedner and Ashworth, 2019, p. 436.

106 Jakobs, 2004.

> He stated in his own words, "*...under such conditions, for me, this life in no longer worth living. Therefore, the time has come to plan my demise and, if necessary, to legally fight for ending this pointless life.*" A physician found the reasons for his suicide wish to be "*on the one side, lack of prospects; on the other side, chronic progressive deterioration of physical condition without prospect of improvement.*"[107]
>
> In 2021, he was transferred from Bostadel to Solothurn, which re-subjected him to a regime resembling a normal sentence and was far more restrictive than the prior conditions of security confinement he was placed (e.g., no MP3 player, computer, printer, and less visitation and communication rights). Although Solothurn has a special building with a less restrictive regime for those in security confinement, it lacks free places. He also could not walk around because he has difficulty using the stairs. Additionally, he weighs 170 kg, which is too heavy for the stair lift.[108]

The case of Mr. Vogt, who completed his ten-year prison sentence and an additional security confinement of 20 years (30 years in total), confirms several important findings within the context of this paper. It showcases that a factual life sentence might be executed in practice under the normative disguise of a security measure, based on the assessment of one's dangerousness to society without any retribution or even rehabilitation (and in essence, not even an incarceration purpose). This is because these purposes or grounds have already been consumed by sentence serving. Thus, the debate between the public and experts, triggered by Mr. Vogt's media appearances, in which he voiced his suicide plans, vividly reflected the main reason why we punish: retribution and revenge. The main issue discussed was the possibility that sentenced and security-confined criminals may 'escape' their just punishment and atonement through suicide. The discussion involved the point at which, in the process of sentence serving or security confinement, should these persons be granted the right to take their own life. Serving two-thirds of a prison sentence was suggested as a general finding, whereas for security-confined persons, no limitation seemed appropriate; it was argued that by killing themselves, they will fulfil the purpose of their confinement, thus protecting society.[109]

If the case concluded by Mr. Vogt's successful assisted suicide within the execution of his security confinement, it would pose (at least) two main legal questions from the perspectives of the criminal and human rights law; however, there should be little doubt about him actually serving an additional prison sentence rather than being merely security confined. From the perspective

107 Source of case information and citations: Holzapfel, 2023.

108 Source of case information: Boos, 2022.

109 See in full detail: Schweizerisches Kompetenzzentrum für den Justizvollzug, 2019; Universität Zürich Kompetenzzentrum Medizin – Ethik – Recht Helvetiae, 2019.

of the criminal, there is a well-documented and direct causal link between his psychological suffering and the worsened confinement conditions he was placed in. Additionally, the prison administration, which had a duty of care towards him (German: *Fürsorgepflicht*), knew about his suicide intention and the causes of his severe suffering (cognitive element). By not resolving the worsened confinement conditions, the prison administration accepted and even actively endorsed the outcome of his suicide (voluntative element). In terms of liability, this would constitute at least indirect or even direct criminal intent. Without further diving into the depths of criminal law dogmatics and practice or deliberation on who exactly in the prison administration would be liable, we preliminary conclude that granting an assisted suicide request resulting from severe or unbearable suffering due to disproportionally harsh confinement conditions to both security-confined and sentence-serving persons exposes prison officials to criminal liability for murder by omission (or commission), depending on how the matter of granting the assisted suicide request is addressed.

From the human rights law perspective and based on the jurisprudence of the ECtHR,[110] a (hypothetical) successful assisted suicide by Mr. Vogt within the execution of his security confinement, granted by the prison administration and caused by the worsened confinement conditions that breach the 'normalisation principle' (German: *Normalisierungsgrundsatz*),[111] constitute violations of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the ECHR. In this regard, we find it difficult to imagine that any prison administration might grant an assisted suicide request in a case such as that of Mr. Vogt, especially without at least having made a reasonable effort to fulfil its obligations arising from the 'normalisation principle'. However, the jurisprudence of the ECtHR is rich in cases one would have found difficult to imagine.

110 For example, see *Ketreb v. France* (application no. 38447/09), judgement of 19 July 2012 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-112285 (Accessed: 17 July 2023) and *Renolde v. France* (application no. 5608/05), judgement of 16 October 2008 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-88972 (Accessed: 17 July 2023). And . The ECtHR finds that
'[u]ltimately, for a positive obligation to arise where the risk to a person derives from self-harm, such as a suicide in custody or in a psychiatric hospital, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (Younger v. the United Kingdom (dec.); Fernandes de Oliveira v. Portugal [GC], § 110).'
Cit. ECtHR, 2022b, p. 12.

111 The 'normalisation principle' proscribes that "*life in prison shall approximate as closely as possible the positive aspects of life in the community*" (cit. CoE, 2020, p. 2). This rule "*emphasises the positive aspects of normalisation. Life in prison can, of course, never be the same as life in a free society. However, active steps should be taken to make conditions in prison as close to normal life as possible*" (cit. CoE, 2018, p. 7). See also National Commission for the Prevention of Torture, 2022, pp. 40, 49,

To summarise, the presented current and prospective developments and the analysed case suggest that penology and criminal and human rights law and practice must fundamentally reconsider whether any of the three major theories of punishment (retributive, deterrent, or rehabilitative) can justify the normative construct of 'security measures' such as the security confinement, which, in reality, is *de facto* (indeterminate or life) prison sentences. This is of relevance within the European context and against the backdrop of the minimal standards developed by the ECtHR on the imposition and execution of life sentences. This is because such *de facto* (life) sentences, normatively disguised as 'security measures', not only undermine these standards but also erode the very foundation that modern criminal law builds upon: *nullum crimen sine lege*.

4. Conclusion and food for thought

There is an undeniable and longstanding global trend in the abolition of the death sentence, whereby the current *opinio iuris* makes a strong case for the *jus cogens* status of the safeguards against the death penalty as a peremptory norm of general international law. With the abolition of the death sentence in Europe, the issue may be considered to have merely a historical dimension at best. However, several arguments raised against death penalties are of great relevance regarding life sentences, long-term sentences, and security confinement. Thus, with the abolition of the death penalty and the seemingly rising implementation of penal populism, such *humane* alternatives to the death penalty become more attractive in dealing with dangerous crimes and the criminals who commit them. Whether or not such criminal law acrobatics make any penological sense is first and foremost a matter of conceptualisation, terminology, and measurement – a current challenge in penology. The current paper provided some answers, and in turn, most likely created even more questions. The matter of labelling a normatively proscribed sentence as either a life sentence, an ordinary (long-term) prison sentence, or a security measure (security confinement) does not tell us much about its actual punitive effects. Moreover, the mere labelling may be highly misleading because, in many instances, long-term prison sentences in one state are harsher than life sentences in other states. Furthermore, security measures, such as security confinement, are normatively not constructed and, therefore, commonly not even considered sentences; however, in their practical application, they may be regarded as indeterminate actual life sentences.

As demonstrated, the exploration of various jurisdictions' legal approaches to life sentences shows a complex interplay shaped by historical, legal, and societal elements. These divergent frameworks reflect the ongoing struggle to harmonise the principles of punishment, rehabilitation, human rights, and societal safety. The concept of life imprisonment is a subject that demands careful consideration of its

multifaceted implications. Several questions emerge in this context, including how to accurately assess the quality of life of those serving life sentences, ensure humane treatment for imprisoned individuals, evaluate the reliability of methods for predicting future societal danger, and address challenges related to justifying prolonged imprisonment based solely on anticipations of future criminal behaviour.

Regarding justice and human rights, a fundamental standard established by the ECtHR in the context of life sentences is the requirement for both *de jure* and *de facto* reducibility, ensuring the potential for release and review. Given the strong impact of the ECtHR's interpretations, the question of how national legal systems can effectively integrate human rights considerations, such as proportionality and individual dignity, into their security confinement frameworks, while simultaneously navigating the challenge of balancing pressures of penal populism with the firm commitment to upholding strong human rights standards arises. There is a continuous need to further explore security confinement and the thin line that separates preventive measures with "*their primary justifying aim [...] to restrict individual liberty in order to prevent future harm and not to punish wrongdoing (even where the measure is imposed as a consequence of past wrongdoing)*" from sentences with *"large part of their rationale* [being] *punitive*."[112] As demonstrated, such a distinction is not merely a matter of normative (comparative) analysis and human rights evaluation but actually a penological investigation into the countless practicalities of applying such security measures.[113]

Finally, to overcome the current discrepancies between the proclaimed rule of law and 'false-labelled' security measures (such as security confinement), criminal law must fundamentally reconsider its very basic concepts and the principles they were built upon. If it focuses on criminalising and punishing mere risks that have not yet materialised, then it seems far overdue to normatively reflect upon what criminal law has become. Therefore, "*the task of thinking imaginatively about how the Preventive State might pursue the goal of reducing risk and mitigating harm might best be served by bridging disciplinary boundaries to collaborate on the ambitious task of reconceiving the Preventive State along less coercive, less rights-eroding, and more socially constructive lines.*"[114] In this sense, the goal of this paper to provide interdisciplinary insights while raising cross-disciplinary new questions has been successfully accomplished, i.e., laying the foundations for further explorations into sentencing and punishment and the meaningfulness of (preventative) criminal law.

112 Cit. Ashworth and Zedner, 2010, p. 62.

113 'The perils of under-criminalisation may be less immediately apparent than those of over-criminalisation but are no less grave where the result is that disproportionate, ill-defined, and often burdensome intrusions upon individual liberty are imposed in the name of prevention without appropriate procedural safeguards.'
Cit. Ashworth and Zedner, 2010, p. 60.

114 Cit. Zedner and Ashworth, 2019, p. 444.

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