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## **The Life Sentence and Parole**

**Diarmuid Griffin and Ian O'Donnell**

*Taking the life sentence as the new 'ultimate penalty' for many countries, this paper explores the factors associated with the release of life sentence prisoners on parole. The Republic of Ireland is selected as a case study because it is in the unusual position of being influenced by European human rights norms as well as by the Anglo-American drive towards increased punitiveness. As an apparent outlier to both the human rights and punitive approaches, or perhaps as a hybrid of sorts, the relative impact of the two models can be elucidated. The article also provides an example of how small penal systems can be resistant to broader trends and the value of directing the criminological gaze upon countries where it seldom falls.*

The life sentence, which existed in many jurisdictions prior to the decline in use and eventual abolition of capital punishment, has become the new 'ultimate penalty' across most of the Western world (Sheleff 1987; Hood and Hoyle 2008). Croatia, Norway, Portugal and Spain are exceptions, opting for the imposition of lengthy determinate sentences for the most serious offences, while in the US life imprisonment coexists with the death penalty. The increase in the number of offenders serving life sentences, a phenomenon of the last number of decades (Coyle 2004: 96-8; Penal Reform International 2007: 2-4; European Ministers of Justice 2001; Council of Europe 2003b), has begun to attract critical attention from international institutions (United Nations 1994; Council of Europe 2003a; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) 2007), human rights organizations (Amnesty International and Human Rights Watch 2005) and academic commentators (van Zyl Smit 2001).

Table 1 shows that the percentage of prisoners serving life sentences varies greatly cross-jurisdictionally. Common law countries (particularly the US, UK and New Zealand) contrast starkly with civil law European countries. But these data cannot be taken uncritically as indicators of punitivism. The difficulty of using them in this way relates to factors such as the range of offences for which a life sentence may be applied; the fluctuation in the number of

convictions for crimes which attract life imprisonment; the use of other forms of indefinite detention for homicide offenders; the availability of alternative determinate sentences; the mandatory or discretionary application of the penalty; and the processes governing release. It is the last-mentioned factor that is the primary focus of this paper. It is suggested that the processes of sentence administration and release provide important insights into the meaning of the life sentence and its punitive reach, and may say something about a country's approach to criminal justice more generally. The complexity of release processes in individual countries makes it difficult to identify the 'true purpose' of such systems (Dunkel *et al* 2010: 404). However, just as there is a clear division in the proportionate use of the life sentence so too do common law countries and civil law European countries differ according to the extent to which those subjected to this sanction find themselves exposed to the politics of punitiveness or sheltered by a variety of human rights safeguards.

[Table 1 about here]

At the punitive end of the spectrum, the US pushes past all other countries with its use of 'life without parole' sentences (Nellis and King 2009: 3). The other pole is populated by many European states which, rather than foregrounding punitive goals, have focused attention on shaping the release process to provide protection to those subject to it, by adapting their release mechanisms to reflect the human rights standards developed through the instruments of Europe's institutions. Seeking a level of uniformity across the release process has proven difficult given the 'quirky and esoteric' nature of each country and the influence of local culture, history and politics on penal policy and practice (Cavadino and Dignan 2006: 452). Analysis of European civil and common law countries is complicated by the lack of a clear collective sense of identity in the traditional ethno-cultural sense (Weiler 1995). Despite this, and unlike the US which now emphasizes crime control over due process values, part of what can be identified as a 'European identity' is a sense of shared civic values and an allegiance to human rights protections (Snacken 2010; Nicolaïdis 2003; Rifkin 2004).

This article explores the factors associated with the release of life sentence prisoners using the Republic of Ireland as the fulcrum around which the analysis pivots. Particular attention is given to the minimum term served prior to becoming eligible for release; the structure of the decision-making body; the criteria applied in the decision-making process; available procedural rights; the use of risk assessment; and the role of the victim. Given Ireland's

European commitments, common law traditions, and susceptibility to the penal policies of the US and UK, the system should reflect a complex of competing characteristics.

The jurisprudence of the ECtHR that influenced the UK in the reform of its release process is also applicable in Ireland (*Weeks v. United Kingdom* (1988) 10 EHRR 293; *Thynne, Wilson and Gunnell v. United Kingdom* (1991) 13 EHRR 666; *Hirst v. United Kingdom* (2001) ECHR 481). Yet it appears that parole in Ireland has developed in a vacuum, largely immune to broader pressures of transformation, with the country showing a reluctance to look beyond its own cultural, political and historical realities (on aspects of Ireland's criminal justice history see O'Donnell and McAuley 2003; Rogan 2011). We hope that by providing a policy study of a variety of Hibernian exceptionalism, and placing it in the wider context of European and common law developments, it will be possible to contribute to an understanding of three issues of contemporary relevance. First, how small scale penal systems can be resistant to broader penal trends. Second, how as an apparent outlier to both the human rights and punitive models, or perhaps as a hybrid of sorts, developments in Ireland allow the relative impact of the two models to be elucidated. Third, how scrutinizing exceptions, especially little-known ones, may shed greater light on more general processes.

### **THE RELEASE PROCESS**

In Ireland, the Criminal Justice Act 1964 replaced capital punishment for murder with penal servitude for life, which was in turn replaced with the life sentence *via* the Criminal Justice Act 1990. Prior to the 1960s, most of those convicted of murder and subject to a mandatory death penalty had their sentences commuted to a term of imprisonment (205 Dáil Debates Cols. 324-5: Charles Haughey 24/10/1963). Today the life sentence is mandatorily imposed on conviction for murder, and it may be, but rarely is, imposed for certain other violent offences against the person. The number of life sentence prisoners in Ireland is relatively small although it has increased significantly in recent years both in terms of the absolute numbers and as a proportion of the total prison population (see Table 2).

[Table 2 about here]

*Life does not usually mean life (in prison)*

Legal, moral and management issues preclude the detention of offenders for the duration of their lives in many countries and thus attention has focused on putting in place appropriate procedures governing release. The ambiguity of the term ‘life sentence’ is somewhat resolved through the possibility of the life sentence prisoner being recalled to prison for the breach of conditions pertaining to their release and being subject to supervision while on release. The length of time served prior to release has increased considerably in Ireland. It averaged 7.5 years from 1975 to 1984; 12 years from 1985 to 1994; 14 years from 1995 to 2004; and 17 years from 2004 to 2009 (Irish Prison Service 2010: 23). In the early 1970s, one life sentence prisoner was released after three years (Wilson 2004: 89). A life sentence prisoner on release is required to keep the peace, be of good behavior and sober habits, and comply with any additional conditions that may be set (Prisoners (Temporary Release) Rules 2004: S.I. 680/2004). These conditions are vague, allow for considerable discretion by the authorities and are unlikely to be interfered with by the courts (O’Malley 2010: 259; *Breathnach v. Minister for Justice, Equality and Law Reform* [2004] 3 IR 336).

This approach to release is generally consistent with that taken by European institutions (Council of Europe 2003a and b; ECPT 2007) and in other countries (e.g. Germany, Austria and Italy) although irreducible life sentences appear to operate in a limited manner in some countries (e.g. Netherlands, France and Switzerland). England and Wales allows for the imposition of a whole life tariff, meaning that the prisoner cannot ever be released (*R v. Secretary of State for the Home Department, ex Parte Hindley* [2000] 2 All ER 385 (HL); *R (on the application of Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72; Criminal Justice Act 2003, Section 269). The number serving such sentences is small, standing at 35 in July 2010 (Rowley 2010). It appears that Europe does not approve of ‘actual life’ and ‘life without parole’ sentences but the position of the ECtHR on this issue remains somewhat ambiguous (*Kafkaris v. Cyprus* [2008] ECHR 21906/04; van Zyl Smit 2010). Outside Europe, the US operates in relative isolation from other common law countries in terms of its increasing use of ‘life without parole’ sentences, the imposition of lengthy minimum terms that go beyond the life span of the prisoner, and the reluctance of releasing authorities to grant parole to eligible life sentence prisoners (Mauer *et al* 2004).

### ***A decision by an independent body***

Decision-making in parole generally, and for life sentence prisoners in particular, has transitioned from a process that was often political, informal and discretionary to an increasingly formalized and judicial one. For much of the twentieth century the power to pardon or commute sentences and the act of clemency, all exercised at the discretion of the state, were opaque processes with little accountability (Sebba 1977; Jorgensen 1992). The establishment of parole boards did not necessarily remedy this lack of independence as boards often remained within the control of the executive (Bottomley 1990). Reform of decision-making in parole has been influenced by a multitude of factors the impact of which has been shaped by local contingencies. These factors include, but are not limited to: the decline in support for the rehabilitative ideal; the emergence of a politicised and populist approach to criminal justice; a shift in focus toward the control of those perceived to be dangerous, most often sexual and violent offenders; the emergence of a ‘new penology’ and a focus on risk assessment; a perception of the ineffectiveness of parole; and a concern for standards of due process and high parole revocation rates.

In Europe, the transition to judicial and independent decision-making has been driven at both national and European levels (Livingstone 2000) and the thrust of reform has emphasized the importance of independence and due process. The jurisprudence of the ECtHR has been instrumental in creating a framework for the review of indeterminate sentences by an independent decision-making body. A plethora of court or court-like bodies with a variety of monikers now exist to make a determination on the issue of release, such as the Sentence Implementation Court (Belgium), the Supervision Tribunal (Italy) and the Court for the Execution of Sentences (Germany). The European influence has been dramatic in the UK, where the jurisprudence of the ECtHR over the last number of decades has played a crucial role in the transformation of the Parole Board from an entity controlled by the executive to an independent and formal decision-making body (*Stafford v. United Kingdom* (2002) 35 EHRR 32; *Weeks v. United Kingdom* (1988) 10 EHRR 293; *Hirst v. United Kingdom* (2001) ECHR 481)

Despite these reforms, the constituent jurisdictions of the UK maintain a proportionately high number of life sentence prisoners when compared with other European countries (see Table 1). It is difficult to speak with confidence about recent trends in the US given the diversity of sentencing and release policies that exist although it would appear that in states where parole

boards have not been abolished they are left with limited discretion or subject to the control of the executive (Petersilia 1999). The possibility of political influence has left the process vulnerable to punitivism such that the likelihood of release is becoming increasingly remote for parole-eligible life sentence prisoners (Mauer *et al* 2004). The release process in other common law countries exhibits a mix of both trends with politics, punitivism and due process all playing some role.

In Ireland, little has changed in parole decision-making for more than half a century. The process remains avowedly political and lacks formality, transparency and independence. The Minister for Justice and Law Reform makes a determination on the issue of release for every life-sentenced and long-term offender (those serving eight years or more who have served at least half of the sentence), having received a recommendation from the Parole Board. (In 2001, the Parole Board replaced another non-statutory body called the Sentence Review Group which had been created in 1989, but this was little more than a change in nomenclature.)

The Parole Board contains around twelve people who meet on a monthly basis to review, discuss and formulate recommendations about the administration of a sentence, which may or may not include a view on release. Members are appointed directly by the minister rather than *via* a public appointments process. The minister, on receipt of the Board's recommendation is under no obligation to accept it. Since its establishment the minister has accepted its recommendations in full in 87 per cent of cases and in part in another 4 per cent. The number of recommendations made *per annum* by the Board has ranged from 46 to 88 (Parole Board 2002-2009). The number of life sentence prisoners actually released has been far fewer (see Table 2). While not all recommendations relate to lifers, they do represent a significant proportion of the Board's work, thus suggesting that the majority of the recommendations made relate to sentence management rather than release.

The political nature of parole has been the subject of criticism with various state and non-state bodies highlighting the lack of independence and calling for a statutory framework and the creation of an independent decision-making body to govern the process (Expert Group on the Prison Service 1997; Sub-Committee on Crime and Punishment 2000; McCutcheon and Coffey 2006; Law Reform Commission 2008). While this indicates that reform is on the public agenda at some level, it appears to have had little resonance with those directly

involved. For example, a former chairman of the Parole Board, in response to criticism of political influence, called for the maintenance of the *status quo*, arguing that the minister, as an elected representative was answerable to the public and as a result best placed to reflect and take into account public attitudes (Parole Board 2006: 6). Indeed, it is somewhat anomalous even to talk in terms of a ‘parole’ process as parole is not a legal concept and the release decision is simply a function of the minister’s power of temporary release under the Criminal Justice Act 1960. It is merely a matter of policy that creates this distinction and this may change at any time.

In addition to resisting domestic demands for change the parole process has remained largely impervious to the weight of external pressures. Ireland is a member of the Council of Europe and the European Convention on Human Rights Act 2003 incorporated the provisions of the ECHR into Irish law. While Ireland has not been subject to a direct decision of the ECtHR, the wealth of jurisprudence on Article 5 (relating to lawful detention) and Article 6 (relating to a fair and public hearing by an independent and impartial tribunal) indicates that the compliance of the Irish system with the provisions of the convention ‘can no longer be presumed’ (O’Malley 2006: 451). Applicants in the domestic courts have relied on the provisions of the ECHR when challenging the legality of their detention under the life sentence, thus far without success (*Lynch v. Minister for Justice, Equality and Law Reform* [2010] IESC 34; *Nascimento v. Minister for Justice, Equality and Law Reform* [2007] IEHC 358). The Irish judiciary has been reluctant to interfere with what is perceived as an executive function (*Murray v. Ireland* [1991] I.L.R.M. 465). Furthermore, the impact of the provisions of the ECHR and decisions of the ECtHR in the domestic courts appears to be coming from a low base (O’Connell *et al* 2006; Farrell 2007; McDermott 2005). Given the local context, it is unlikely that reform will come about unless it is the subject of a decision of the ECtHR by a successful Irish applicant.

### ***Temporal limits***

It is common practice that a life sentence prisoner is required to serve a minimum term prior to becoming eligible for release but there exists little by way of numerical consistency across different countries. The Council of Europe (1976: para. 12) has attempted to bring some standardization to minimum terms, recommending that an offender serving a long-term sentence become eligible for review between eight and fourteen years of detention, if not earlier. Nevertheless limits vary considerably cross-jurisdictionally in relation to life

sentences, with Denmark and Finland imposing a minimum term of 12 years while Poland, Russia and the International Criminal Court have opted for 25 years (Padfield *et al* 2010; 408-20). Additional terms may be imposed for those deemed to be recidivists (Belgium, Acts of 5 and 18 March 1998; Snacken *et al* 2010: 82) or where aggravating factors exist (New Zealand, Sentencing Act 2002, Section 104).

The greatest amount of variety is perhaps to be found in England and Wales with the court imposing a tariff or minimum term representing the punitive element of the sentence while further detention on completion of the tariff is based on public protection considerations as determined through the parole process (Arnott and Creighton 2006). The US approach to minimum terms is state-dependent but the median length of time served prior to eligibility, on a national level, is 25 years (Advisory Committee on Geriatric and Seriously Ill Inmates 2005; Nellis and King 2009).

The Irish system has an extraordinarily low minimum term by comparison with any European or common law jurisdiction; life sentence prisoners are eligible for review after seven years (Parole Board 2002: 6). But there is a major dissonance between what the policy permits and what occurs in practice. While the minimum term has not been adjusted upwards it seems clear that it has ceased to act as a meaningful threshold. Public statements by the Parole Board and various ministers over the years indicate that anything from ten to twenty years is the minimum a life sentence prisoner must expect to serve prior to being considered for release (Parole Board 2002: 2; Lally 2006). The rationale for this increase has not been clearly articulated.

It is not the increase in time served that puts Ireland out of step with European policy and practice, as this is within the range imposed by many countries. Rather, it is the lack of certainty that surrounds this process that sets Ireland apart (Council of Europe 2003a: para. 5). Reviewing a life sentence prisoner after seven years is meaningless if the practice is not to release *any* life sentence prisoner until much later. It is difficult to determine whether Ireland is unique in terms of this disjoint between policy and practice without providing a deeper analysis of each jurisdiction. But it may be that systems that are structurally vulnerable to direct political interference are also those that are more likely to allow the temporal limit to drift upwards, even in the absence of a deliberate embrace of punitiveness.

### ***Explicit criteria***

The Council of Europe (2003a: Explanatory Memorandum para. 18) emphasizes that in the context of structuring the release process ‘the most important decision to be made is which criteria will be used to determine whether a prisoner can or cannot be granted release.’ There is a broad spectrum of approaches but, generally speaking, they include such considerations as the nature and circumstances of the offence; conduct while in custody; implementation of the sentence plan (if any); likelihood of committing a further offence; attitude toward the victim; and the prisoner’s health status (Padfield *et al* 2010). Public protection is often cited as the overarching criterion.

Irrespective of the type of criteria applied, the Council of Europe (2003a: para. 18) recommends that offenders are made aware of the date at which they become eligible for release and that the assessment criteria are ‘clear and explicit.’ In Ireland, the minister is required to have regard to a number of criteria contained in the Criminal Justice (Temporary Release of Prisoners) Act 2003 including: the seriousness of the offence and previous convictions; the length of time served; the potential threat to the safety and security of the public (including the victim) should the person be released; the conduct of the person while in custody and during previous terms of release; the reports and recommendations of various criminal justice agencies; the risk of reoffending or failure to comply with the conditions attaching to release; the likelihood that any release period may accelerate social reintegration or improve employment prospects. While the Parole Board is not required to apply any specific criteria, it has adopted the foregoing list which is given in the information leaflet distributed to eligible offenders (Parole Board 2002: 10 and Appendix A).

These criteria allow wide discretion in their application (O’Malley 2006: 432-6) but it would appear that they are supplemented by other considerations that are external to those contained in the legislation, extraneous to the offender’s status and circumstances, and not clearly related to any empirical reality. The murder rate (Parole Board 2006: 4), the prevalence of knife and gun related crimes (Gordon Holmes RTE Radio 1 Interview: 02/09/2009), the public abhorrence of the crime (Parole Board 2007: 4), and the importance of general deterrence (Parole Board 2005: 4) have all been cited as relevant to the Board’s recommendations. As a former chairman of the Parole Board put it: “The Board feels it must indicate that the sanctity of human life must be preserved and maintained and, if this means that persons committing murder can expect to serve longer sentences, so be it” (2002: 2).

There seems to be a moral agenda at work here that is somewhat at odds with legislative intent, introducing a great deal of confusion into the process.

### ***The role of risk***

Conceptions of risk and the use of risk assessment tools in determining an individual's level of dangerousness upon release are central to many parole decision-making processes. The ECtHR has accepted risk as a criterion on which an offender may be detained but the jurisprudence of the court has emphasised the need for appropriate procedural safeguards and judicial oversight of continued detention in addition to the need for the continual review of detention through risk and needs assessment, if detention is based on dangerousness alone (*Van Droogenbroeck v. Belgium* (1982) 4 EHRR 443; *Thynne, Wilson and Gunnell v. United Kingdom* (1991) 13 EHRR 666; *Weeks v. United Kingdom* (1988) 10 EHRR 293; *Stafford v. United Kingdom* (2002) 35 EHRR 1121)

Across common and civil law countries, risk assessment has been a source of legal difficulties as public protection often fits poorly with more traditional principles of punishment (van Zyl Smit and Ashworth 2004: 553) and presents significant uncertainties in terms of accurately predicting future dangerousness (Edens *et al* 2005; Dunkel *et al* 2010). In particular, the perception that sexual and violent offenders pose a significant threat (Hebenton and Seddon 2009) has been undermined by academic research (Hood *et al* 2002) and challenged by international organisations (ECPT: 2007; Council of Europe 2003a: Explanatory Memorandum para. 37). The continued detention of offenders whose dangerousness is not demonstrable is a cause for concern (van Zyl Smit 2006: 415-8).

It is clear that public protection is important to the Irish process and it is envisaged that risk assessment will play some role in decision-making, as is evident from the statutory criteria summarized above. The Probation Service and the Prison Psychology Service utilise actuarial risk assessment tools, as well as making clinical assessments, when providing reports to the Parole Board but little is known as to how these risk assessments are presented and assimilated in the decision-making process. Comments by both the Parole Board and the minister indicate that public protection is key but, as has already been shown, these comments feature within an array of sometimes inappropriate and conflicting criteria.

In addition, the practice of preventative detention is not compatible with the provisions of the Irish constitution (*People (Attorney General) v. O'Callaghan* [1966] IR 501). A recent Supreme Court case dealt with this in the context of the life sentence (*Lynch v. The Minister for Justice and Law Reform, Ireland* [2010] IESC 34). Given that the minister would ultimately determine their release date, with public protection forming a key part of that decision, the applicants argued that the life sentence therefore comprised both a penal and preventative component, thereby rendering the practice of administering life sentences unconstitutional. The Supreme Court rejected this argument stating that the life sentence 'is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention.' It is difficult to reconcile this finding with the actual practice of release in so far as this can be apprehended from the available information.

Ireland is not the only jurisdiction to have a strained relationship with risk and risk assessment as uncertainty still surrounds its use as an aid in decision-making (Slovic *et al* 2000). Finland abolished its system of preventive detention *via* the Prison Act 2006 (Lappi-Seppala 2010: 153-8) and other European countries limit the use of prognostic evaluations given their inherent unreliability (Dunkel *et al* 2010: 420-1). The US, once a pioneer of actuarial risk assessment appears to have moved to limit the impact of such formal assessments on decision-making. However, unlike European jurisdictions, this shift is more likely a manifestation of the politicisation of parole in recent decades than an expression of concern for prisoners' rights (Runda *et al* 1994; Mauer *et al* 2004).

### ***Procedural rights***

In Europe the procedural rights of the offender have come increasingly into focus. While the level of protection is not as high as that found at earlier stages of the criminal process, the more formal parole has become, the greater the emphasis that has been placed upon the rights of the offender and the procedures for challenging the process and its outcome. The Council of Europe (2003a: paras. 32-6) and the ECtHR have developed procedural safeguards for indeterminate sentences such as the right to be heard in person; adequate access to one's personal file; the provision in writing of the reasons underlying a decision; the ability to make a complaint to a higher, independent and impartial body; and the examination of prisoners' cases as early as possible and within reasonable periods thereafter (*Weeks v. United Kingdom* (1988) 10 EHRR 293; *Thynne, Wilson and Gunnell v. United Kingdom* (1991) 13 EHRR 666; *Hirst v. United Kingdom* (2001) ECHR 481; *Stafford v. United Kingdom* (2002) 35 EHRR

1121). In the US, New Zealand and Australia the process still retains some level of informality and has not become dominated by legal procedure and doctrine while some similarities can be drawn between the Canadian model and that of England and Wales (Department of Justice Canada 2005; Polvi and Pease 1991).

In Ireland, the executive power of release has regularly been the subject of litigation but the judiciary has been reluctant to interfere unless the applicant can show that the executive's discretion was exercised in a capricious, arbitrary or unjust manner. The courts have characterized release as a privilege rather than a legal right and have adopted a hands-off approach (O'Malley 2006: 432-6). Life sentence prisoners being considered for parole are not entitled to an oral hearing (*Barry v Sentence Review Group* [2001] 4 IR 167) or a legal representative (*Grogan v Parole Board* [2008] IEHC 204) and there are limited means of contesting the contents of the review dossier when conflicts of information, assessment, or decision-making arise. The only means of challenging the process is through judicial review, which is concerned with fairness of procedure rather than examining the merits of the decision itself. A similarly informal approach is applied when recalling an offender to prison for breaching parole conditions. Again the lack of legal formality is accompanied by minimal safeguards.

### ***The role of victims***

In line with the development of a victims' rights discourse and the greater facilitation of victim participation in, and support by, the criminal justice system over the last number of decades the parole process has also become more inclusive of victims when making a determination of release. There is little by way of settled practice in terms of victim involvement. Herman and Wasserman (2001: 433) state that victims' rights can include the right to information, the right to be heard, and the right to be present at parole hearings. The provision of information to victims or their families is common, but the type of information made available varies. Some countries limit disclosure to the release date while others provide personal information on the offender, details of the parole hearing and reasons for the decision (Roberts 2009).

Victim input, in the form of a written or oral statement presented to the decision-making body is a developing theme (Padfield and Roberts 2010). It appears more frequently in common than civil law jurisdictions and is perhaps indicative of the vulnerability of the political

process to the victim movement and the potential for politicians to harness victims' needs and concerns in the pursuit of punitivism (Ashworth 2000). Over 80 per cent of releasing authorities permit victim input in the US (Kinnevy and Caplan 2008). In England and Wales a victim personal statement can be presented to the Parole Board orally or in writing (Parole Board 2011), while the guidelines of certain states in Australia make provision for victim input to take into account how a victim would 'feel' if a prisoner was released (Victims of Crime Bureau and Department of Corrective Services NSW 2001: 5; Tasmania Department of Justice 2008).

The approach to victim input is cautious in civil law European countries. In Belgium the political system came under intense pressure to facilitate victim involvement following the arrest, in 1996, of child rapist and serial killer Marc Dutroux. The ensuing reforms facilitated the provision of information on parole to victims and allowed the opportunity to be heard by the Parole Commission, now the Sentence Implementation Court, on the specific issue of parole conditions related to the victim's interests (Snacken *et al* 2010: 81-3). However, parliament resisted public and political calls for victim input on decision-making and the inclusion of an expert member on victim issues on the Parole Commission. Instead, a balanced approach to the interests of victims, offender and society was adopted based on the advice of experts and practitioners (Snacken 2007: 186-97).

Research on the impact of written and oral submissions by victims on the parole decision-making process is limited. However, there does appear to be a correlation between victim participation and parole denials (Morgan and Smith 2005; Parsonage *et al* 1994). As Zedner (1997: 607) notes, in an era where the 'impulse to punish dominates', adopting an unstructured and unfettered approach to victim input may service punitivism over the reparative, restorative and reintegration goals of the victims' rights movement. Seen in this light, it is not surprising that victim participation in the parole process is more evident in criminal justice systems vulnerable to populist punitiveness.

The approach in Ireland fits within the European model of victim input, albeit in a characteristically informal fashion. The Victims' Charter states that the Victim Liaison Officer of the Irish Prison Service will inform the victim of the release of a prisoner, where a victim or family member requests such information (Department of Justice and Law Reform 2010). The Charter also states that a victim, or a family member of a victim who has died as a result of a crime, may make a submission to the Parole Board (2010: 40). It is not clear what

form this submission takes, its purpose, or how often the opportunity is availed of. This lack of clarity is not unique to the parole process as similar confusion surrounds the purpose of victim impact statements at sentencing stage (O'Malley 1993; Carney 2007).

## DISCUSSION

An examination of the release process for life sentence prisoners in Ireland reveals a system that appears largely untouched by trends external to the jurisdiction. The country has resisted many of the influences that have led to change across the common law and civil law worlds. This Hibernian exceptionalism is not limited to the release of life sentence prisoners but can be seen in other aspects of the country's criminal justice arrangements such as its approach to zero tolerance policing (O'Donnell and O'Sullivan 2003), probation (Healy and O'Donnell 2004), prosecution and the trial process (Vaughan and Kilcommins 2008), sentencing (O'Malley 2006), capital punishment (Doyle and O'Donnell 2012), prisoner enfranchisement (Behan and O'Donnell 2008), and coercive confinement (O'Sullivan and O'Donnell 2007). Nor is Ireland the only country that can lay a claim to exceptionalism when it comes to apparent trends in criminal justice (for accounts of other small European countries that have followed idiosyncratic trajectories see, for example, Baumer *et al* 2002 on Iceland and McAra 2008 on Scotland). There has been a surge of interest in recent years in identifying the correlates and causes of punitivism and leniency (see, for example, Whitman 2003; Garland 2005; Tonry 2005; Zimring and Johnson 2006; Lappi-Seppala 2007; Pratt 2008a and b; Snacken 2010). Such is the growth in understanding of the diversity of the penal landscape that speaking in terms of commonalities and cross-national trends is becoming increasingly difficult. Nonetheless, several themes emerge from a survey of how life sentences are administered and these are addressed next.

### *The limited influence of 'Europe'*

Europe has greatly influenced issues of criminal justice at a national level through the Council of Europe, the ECHR and ECtHR, the ECPT and the EU (Tonry 2001; Padfield *et al* 2010). Since the 1990s, membership of the Council of Europe has required the ratification of the ECHR and ECPT and acceptance of the complaint procedure of the ECtHR (Snacken 2010: 285-7). The monist nature of civil legal systems rendered these conventions directly effective at a national level thus increasing their significance and impact. Ireland, like the UK, has a dualist legal system and the Irish constitutional framework requires international

instruments to be made effective at a national level through legislation. This was done through the European Convention on Human Rights Act 2003. The Act gave further effect to the ECHR at a sub-constitutional level and drew heavily on the text of the UK Human Rights Act 1998. However, the interpretive obligation is more qualified than that of the UK (ECHR Act 2003, Section 2) and constitutional issues are to be determined by the courts prior to ECHR compatibility issues (*Carmody v Minister for Justice, Equality and Law Reform* [2010] 1 IR 635).

Assessments of the impact of this legislation are still in the early stages but it appears that in comparison with the UK, incorporation has had little impact on decisions of the domestic courts regarding issues of criminal justice (Farrell 2007). This may be explained through the fundamental rights protections already contained in the Irish constitution and the ‘constitutionalisation’ of many criminal justice procedures, providing equivalent or stronger protection when compared with the ECHR in some areas (Ni Raifeartaigh 2007). Another explanation is that dualism has in some way externalised international human rights protections, with related matters to be resolved through international enforcement mechanisms rather than in the domestic courts (O’Connell *et al.* 2006).

An area where constitutional guarantees do not provide equivalence of protection is the process surrounding the release of a life sentenced prisoner. The Irish Supreme Court’s description of the life sentence as ‘wholly punitive’ as a means of downplaying the legal issues related to issues of risk, dangerousness and the release process, is unlikely to be persuasive if the matter is examined in a substantive manner by the ECtHR, as it is clear that there are other considerations at play that go beyond the narrow approach taken by the Supreme Court (*Lynch v. The Minister for Justice, Equality and Law Reform* [2010] IESC 34). What is not clear is how, or if, such a decision will impact on the continued detention of that particular life sentence prisoner or on the process of administering life sentences in general, given the complexities involved in interpreting Convention obligations within the Irish constitutional framework (de Londras and Kelly 2010: 78-94). Previous decisions against Ireland and their subsequent (lack of) impact would caution against overly optimistic predictions of transformation. Whatever the root of this resistance to the external human rights instruments of Europe and its supranational court, it has facilitated the continuation of this defective process.

### *Resisting punitiveness?*

The intense scrutiny directed at decision-making in parole and the resulting system overhauls witnessed in the US and UK, have been absent in Ireland. This is interesting given the historical context and tradition of policy transfer in the criminal justice arena. When Ireland became independent of Great Britain in 1922 it retained the common law tradition, criminal justice institutions, and legal system bequeathed by its colonial ruler. The influence of US penal policy has also been documented, albeit that it appears to be more of a sampling exercise with little appetite for many of the more punitive policies on offer. Despite the potential for policy transfer across common law countries generally, there are many factors that have limited the extent to which this is observed in the context of Ireland including: comparatively low rates of crime and imprisonment; the absence of public or political concern about crime until 1990s; an individualized sentencing system and a fiercely independent judiciary; little concern regarding monitoring, control and punishment; satisfaction with the police; and the absence of a criminological discourse (see Kilcommins *et al* 2004).

The principal reason for the inertia witnessed in the treatment of life sentence prisoners is probably a result of this group never having posed much of a problem for the public thereby providing little political motivation to reform the process. The relatively small number of individuals eligible for parole undoubtedly helped keep them at the periphery of public policy. This marginal position in the public arena may also reflect the importance of local contextual factors in underscoring the principles sustaining penal policies. On examining the practice of temporary release of prisoners at Christmas in the UK and Ireland, O'Donnell and Jewkes (2011) noted the difference in tone and style in media reports. Unlike the UK, which linked the practice to themes of recidivism, pampered (and dangerous) prisoners, and misplaced political correctness, the Irish practice was presented in a factual and uncontroversial manner. Irish politicians tended not to make capital by taking a law and order approach to temporary release, instead supporting the system of trust that such a practice necessitated. The populist punitiveness that characterizes politics and media in the UK and other common law countries, was largely absent from the politico-media landscape in Ireland. Rather, themes of Christian redemption and forgiveness have, until recently, continued to echo across the criminal justice system.

While the criminal justice system may have resisted some punitive trends evident in other countries, it is apparent that there has been a transition toward punitivism in parole, if length of time served prior to release is considered. It is interesting to note that the average length of time served is now on a par with England and Wales at 17 years for mandatory life sentenced prisoners (Table 2 above; Ministry of Justice 2010: 143). Thus, the process in one jurisdiction has undergone radical transformation while the other has continued to operate without being cognisant of wider trends, but both have ended up at the same point in terms of what matters: the time to release.

### ***The impact of inaction***

Little is known about the experience of life sentence prisoners in Ireland. During a recent visit by the ECPT (2011: 32) a number of complaints were received from life sentence prisoners regarding the lack of a structured sentence plan making it difficult to know what the Board required of them when they became eligible for release. It is plausible to suggest that the lack of certainty, legal or otherwise, experienced by life sentence prisoners in Ireland contributes to the pain of indeterminacy and the discretion afforded decision-makers in the application of vague and shifting criteria serves as an aggravating factor. The avenues available to a life sentence prisoner to challenge the decision or process are extremely limited in Ireland. In England and Wales life sentence prisoners are entitled to an oral hearing before the Parole Board, a legal representative can make submissions on the parole dossier, request an independent report where there is a conflict in assessment, call witnesses to the hearing, and contest the evidence presented (Arnott and Creighton 2006: Chapters 7-11). Similar provisions simply do not exist in Ireland.

The secrecy and lack of transparency surrounding decision-making does not serve life sentence prisoners, decision-makers, victims and victims' families, or the public. The scrutiny of parole in other jurisdictions has facilitated greater levels of transparency and accountability, produced research to assist in restructuring both the process and individual decision-making, and fostered a more open approach to the provision of information to life sentence prisoners, the public and victims. A cursory glance at the website of the Parole Board of England and Wales ([www.paroleboard.gov.uk](http://www.paroleboard.gov.uk)) highlights the importance that has been placed on communicating the Board's role to the public. In Ireland there is little documentation available to the public or victims, and the information leaflet provided to the life sentence prisoner is light in content. Requests for additional information on the process

are refused on the basis that the compilation of such information ‘would require a disproportionate and inordinate amount of staff time and effort.’ (709(2) Dáil Debates Col. 442; Dermot Ahern 18/05/2010). This negative approach to information provision and the facilitation of research reflects a lack of openness that has existed within the Department of Justice for many decades (O’Donnell 2008). The result is that nobody involved, including decision makers, has access to adequate levels of information.

### ***What lies ahead?***

What does the future hold for the Irish parole process and what might bring about a transformation? In the short term, it is reasonable to suggest that the trend of detaining offenders for lengthier periods prior to release will continue. The most likely agent of reform, and counterpoint to this trend, is ‘Europe’ but it will at least require a direct decision of the ECtHR on the system by a successful applicant. Whether this will bring about a meaningful engagement with reform or merely result in superficial changes to satisfy international obligations is uncertain. Release processes are often judged publicly by their mistakes or failures rather than their successes. A life sentence prisoner who reoffended violently while on parole would likely bring matters to the fore. Such an incident would certainly challenge the *status quo* but it is unlikely that any debate that ensued would focus on the human rights of the life sentence prisoner. The danger is that such a crisis may facilitate the pursuit of punitivism.

While the life sentence may be reserved for the most serious offences, and is exceptional in a largely determinate-sentence system, this does not diminish its significance in the penal realm. The punitive and human rights model used in this paper, while admittedly simplistic in its own way, is useful in distinguishing two approaches to the administration of life sentences. However, the commonalities identified across different jurisdictions often belie the complexities that emerge on closer examination, as is evident from our analysis of the Republic of Ireland, its resistance to a human rights based ‘European identity’ (European Commission 2008: 13-4) and its ambivalence towards the punitivism that has animated the US and UK, countries with which it has so much else in common.

It is probably reasonable to suggest that if Ireland is drifting in any direction, it is in a punitive one. This can be seen in the increase in the number of life sentence prisoners (Table 2) which means that Ireland’s use of this sanction is now comparatively high in a European

context (Table 1). It can also be seen in the sharp rise in the length of time such prisoners are required to serve before release. These changes are of relatively recent origin. If the human rights bulwarks were more adequately reinforced would life sentence prisoners in Ireland have less to fear? Not necessarily if we consider the experience of the UK where, despite the more direct nature of the European influence, the proportionate use of the life sentence remains high.

So what, if anything, can we conclude? Perhaps the lesson is that where the safeguards are not robust, and politicians take a close interest in punishment, life sentence prisoners are particularly vulnerable to spending longer inside. Such a scenario has been ingrained for some time in the US, UK and New Zealand. The case of Ireland shows that flexibility and informality can accrue to the advantage of the prisoner, as they did in the 1970s and early 1980s when the average life sentence equated to 7.5 years in custody. But equally they can operate in the opposite direction, as the lifers now serving an additional decade behind bars might attest. In this way benign neglect has had malign effect.

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**Table 1**

**Lifers as percentage of all sentenced prisoners, 2009  
(selected countries)**

Australia [1]	4.0
Belgium	3.6
Bulgaria	1.8
Cyprus	3.3
Czech Republic	0.2
Denmark	0.9
Estonia	1.3
Finland	5.0
France	1.0
Germany	3.3
Hungary	2.1
Ireland (Republic)	8.3
Italy	4.6
Latvia	0.9
Lithuania	1.5
Luxembourg	3.4
Malta	4.5
Netherlands	0.4
New Zealand [2]	10.4
Poland	0.3
Romania	0.6
Slovakia	0.4
Sweden	2.8
UK: England & Wales	18.3
UK: Northern Ireland	19.3
UK: Scotland	11.7
USA [3]	9.5

**Notes:**

1. Australian Bureau of Statistics (2009). Based on life imprisonment and preventive detention.

2. New Zealand Department of Corrections (2011). Correspondence with authors on 22/07/2011. Based on life imprisonment and preventive detention.

3. Nellis and King (2009: 3). Data collected between April and December 2008 from state departments of corrections and Federal Bureau of Prisons; excludes prisoners in jails.

Remaining data are from Council of Europe (2011: 75).

**Table 2**  
**Life imprisonment in the Republic of Ireland**

	Prisoners in custody	Lifers committed	Lifers in custody	Lifers released	Lifers recalled	Avg. years
2001	3,112	14	n/a	5	2	15
2002	3,165	13	n/a	3	1	11
2003	3,176	11	166	1	n/a	14
2004	3,199	29	193	1	1	19.5
2005	3,151	17	221	2	1	14.5
2006	3,191	18	234	n/a	2	n/a
2007	3,321	23	239	6	1	15.5
2008	3,544	20	264	2	1	15.5
2009	3,881	22	276	5	1	17.5

**Notes:**

Figures for ‘prisoners in custody’ (average daily population), ‘lifers committed’ (number of new life sentence prisoners received into custody), and ‘lifers in custody’ are from annual reports of Irish Prison Service.

Figures for ‘lifers released’, ‘lifers recalled’, and ‘avg. years’ are from Brandon (2010: 61).

n/a indicates that data were not available.