

- 2016 Bergen Lecture on Criminal Law and Criminal Justice -

Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights

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1. Introduction¹

It has historically been argued that what is deemed to constitute just and proportionate punishment in a particular case can legitimately produce different answers in different countries, and even in the same country² in the light of changing social, cultural and political factors. The formulation of penal policy has long been considered inherent in the concept of national sovereignty and thus as falling within the exclusive domain of domestic democratic debate and decision-making. Arguments of this nature are currently being relied upon in the ongoing reformulation of European penal policy in the light of the terrorist threat facing the continent, for example in relation to whether to expand the *actus reus* to what are considered acts tending to create a risk of future terrorist activity. However, these arguments may be considered to be in tension with an individualistic and dignitarian conception of human rights. Such a conception is rooted in the philosophical

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¹ This article is based on a lecture given on 26 October 2016 at the Faculty of Law, University of Bergen, as the *2016 Bergen Lecture on Criminal Law and Criminal Justice*. The analysis presented reflects my personal viewpoint and should not in any way be understood as reflecting the views of the European Court of Human Rights or other judges of the Court. I thank my very talented and able legal assistant, Ms Sabina Garahan, for her contribution in the research and drafting process.

² *R v. Oakes and others* [2012] EWCA Crim 2435, § 6.

doctrines of liberalism that underpin international human rights norms, such as Article 3 of the European Convention on Human Rights, which prohibits torture and other forms of inhuman or degrading punishments, as well as Article 5, which prohibits disproportionate and arbitrary deprivations of liberty, both of which have been examined in depth in the case-law of the European Court of Human Rights (hereinafter: the Court or the Strasbourg Court).

To elaborate further on this thesis, this article seeks to articulate the underlying doctrinal premises of the case-law of the Strasbourg Court in the field of criminal justice, in particular on the use of imprisonment in sentencing as formulated in the seminal Grand Chamber judgment of 2013 in the case of *Vinter and Others v. the United Kingdom*.³ For these purposes, I will proceed in two parts. First, I will examine the individual, as well as interconnected, components in the reasoning of the Strasbourg Court in *Vinter and Others* and analyse the Court's argumentation in the light of the Court's case-law on deprivations of liberty in general. I will seek to demonstrate that, viewed conceptually, the Court's underlying premise is that deprivation of liberty, when viewed through the lens of Articles 3 and 5 of the Convention, requires an enlightened, rational and proportional application of national criminal laws and rules of criminal procedure in conformity with the overarching principle of human dignity, which forms one of the cornerstones of the Convention system. In other words, it is not open to democratic societies within the Council of Europe system to impose punishment in the form of incarceration for criminal acts purely to satisfy the perceived democratic aim of retribution and condemnation by the populace. Nonetheless, due regard must be paid to the views of the latter, in accordance with the principle of majority rule decision-making in national parliaments.

In the second part of the article, I will discuss the very important procedural aspects of the *Vinter* judgment manifested in the so-called *Vinter review* of whole life prison sentences. In particular, the requirements of the review mechanism formulated in the case-law provide useful information on the conceptual nature of the Court's approach in the area of penal policy and criminal justice. In this second part, and before I conclude, I will also venture to say a few words on the nature of the Court's reliance on rehabilitation as the foundation of a dignitarian conception of European penal policy as well as on the extraterritorial reach of the *Vinter and Others* case-law.

³ *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

2. The Reasoning of the Court in *Vinter and Others* and the Convention Conception of Human Dignity

In the landmark Grand Chamber judgment of the European Court of Human Rights in *Vinter and Others v. the United Kingdom* of 2013,⁴ the Court examined the system of ‘whole life prisoners’ in the UK within the context of Article 3 of the Convention. The case concerned three applicants who, having been convicted of murder in separate criminal proceedings, were serving mandatory sentences of life imprisonment. The applicants maintained that their life sentences without the possibility of parole violated Article 3 of the Convention which prohibits, as I mentioned above, torture and inhuman or degrading treatment or punishment. Before the case reached the Grand Chamber, a Chamber of seven judges of the Court had reached the conclusion, by a vote of four to three, that in the light of the then applicable case-law, the life sentences did not violate Article 3. The Grand Chamber, by an overwhelming majority of 16 votes to 1,⁵ disagreed and held that although no Article 3 breach could stem from the mere imposition or, indeed, full serving of a life term, so long as the sentence was *de jure* and *de facto* reducible, irreducible life sentences did amount to a breach of Article 3.⁶ Concluding that the UK system did not in fact provide with certainty the reducibility of a life sentence, the Grand Chamber consequently found a violation in all of the applicants’ cases.⁷

The Court based its reasoning, first, on grounds of ‘*human dignity*’, finding that the imposition of a life sentence could not be imposed without providing the offender with a ‘*prospect of release*’.⁸ Second, the Court considered that an irreducible life sentence created a risk that the offender could ‘*never atone for his offence*’.⁹ Third, emphasis was placed on the argument that the balance between the different justifications, or so-called *legitimate penological grounds* for detention, namely punishment, deterrence, public protection and rehabilitation, was ‘*not necessarily static and [might] shift in the course of a sentence*’,¹⁰ and finally, that an irreducible life sentence was ‘*a poor guarantee of just and proportionate punishment*’.¹¹

At its core, the Grand Chamber in *Vinter* found that certain substantive limits on a State’s power to punish offenders are inherent in the Article 3 prohibition on inhuman or

⁴ *Ibid.*

⁵ Judge Villiger partly dissented predominantly on the grounds that the Court should have undertaken a more concrete and individualised assessment of each applicant’s situation.

⁶ *Vinter and Others*, § 121.

⁷ *Ibid.* § 130.

⁸ *Ibid.* § 110.

⁹ *Ibid.* § 112.

¹⁰ *Ibid.* § 111.

¹¹ *Ibid.* § 112.

degrading treatment or punishment, this finding being primarily based on the recognition of the human dignity of all offenders. No matter their crimes, they should be ‘*given the opportunity to rehabilitate themselves while serving their sentences, with the prospect of eventually functioning again as responsible members of a free society*’.¹² The Court thus considered it axiomatic that a prisoner cannot be detained unless there are ‘*legitimate penological grounds*’¹³ for the detention, placing interestingly particular emphasis on rehabilitation, based in large part on European penal policy.¹⁴ This element was further clarified in the recent Grand Chamber judgment in *Murray v. the Netherlands*¹⁵ which I will shortly return to. For now, I will focus on the Court’s reliance on the *principle of human dignity* as a Convention-based limitation on member States’ democratic and sovereign rights to formulate their domestic penal policy in accordance with domestic traditions and popular opinion.

Although this may cause some disagreement, I would submit that there is nothing in and of itself politically and morally shocking about a State deciding by legislative enactment that the most serious of crimes should be met with life imprisonment without any chance of parole. For example, I suspect that few would have criticised Norway for having in place criminal legislation in 2011 that would have allowed the perpetrator of the mass killings in the Regjeringskvartalet in Oslo and on the island of Utøya on 22 July to face life imprisonment without any chance of parole.¹⁶

Two questions consequently arise. First, what is it in the prohibition of inhuman or degrading punishment under Article 3 of the Convention that the Strasbourg Court seems to rely upon when finding that life sentences have to be *de jure* and *de facto* reducible – in other words, that all criminal offenders, no matter how depraved and serious their crimes are, must be afforded the ability to atone for their offences and have access to a system that provides some prospect of release at a future date? The second question is, how do the Court’s underlying doctrinal premises in its argumentation square with its general use of the principle of proportionality as a methodological tool when dealing

¹² Van Zyl Smit, Weatherby and Creighton, Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to be Done? 14(1) *Human Rights Law Review* (2014) pp. 59-84, at 65.

¹³ *Vinter and Others*, § 111.

¹⁴ See *Vinter and Others*, § 115, citing in particular Rule 6 of the European Prison Rules, which provides that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty, and Rule 102.1, which provides that the prison regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.

¹⁵ *Murray v. the Netherlands* [GC], no. 10511/10, 26 April 2016.

¹⁶ See, for instance, O’Neil, Norway terror suspect could get more than maximum sentence: prosecutor, *National Post* (2011) <<http://news.nationalpost.com/news/norway-terror-suspect-could-get-more-than-maximum-sentence-prosecutor>> (accessed 30 October 2016).

with complaints directed at deprivations of liberty in the member States, both under Articles 3 and 5 of the Convention?

As to the first question, I think it is useful to highlight at the outset that Article 3, like other Convention rights and freedoms, is an individual right. As such, and to use a metaphor, the universe of the Convention is composed of human beings, autonomous conscious living entities that are, as a matter of principle, to be revered by society and protected due to the mere yet inescapable fact of their very humanity. The actions or inactions of human beings, even the senseless murder of another, are external manifestations of faulty or even morally repugnant decision-making, but such acts cannot, by definition, deprive the perpetrator of his or her humanity, or of the dignity that is its foundation. A punishment within the terms of Article 3 is thus *inhuman* if both its substance and its purpose clearly demonstrate that the punishment is imposed without paying heed to the human being's, the perpetrator's, humanity; the punishment itself reflecting the inescapable conclusion of both the criminal justice system and society that he is not worthy of human dignity.

In other words, one can view the Strasbourg Court's underlying message in the *Vinter* judgment through the prism of an autonomy-based, classical liberal conception of dignity that holds that the individual has 'intrinsic worth.'¹⁷ In this way, the Court makes clear that punishments that only serve purposes or aims wholly external to the human being, that disregard his or her humanity by reducing them merely to a subject of punishment, are by definition inhuman within the meaning of Article 3 of the Convention. That is why it may be argued that it is self-evident that the death penalty can never be considered a humane punishment – it is, after all, the ultimate manifestation of society's carefully premeditated decision to extinguish the very essence of a person's humanity. Similarly, the life-long incarceration of a person, for a criminal offence, without any possibility of parole, can in the same way in substance be described as a '*death penalty in disguise*,'¹⁸ to borrow the words of Pope Francis, or, in the words famously expressed by the British judge Lord Justice Laws in the *Wellington* case referred to by the Strasbourg Court in *Vinter*, with a life sentence, '*the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt,*

¹⁷ Dyer, Irreducible Life Sentences: What Difference have the European Convention on Human Rights and the United Kingdom Human Rights Act Made? 16(3) *Human Rights Law Review* (2016), pp. 541-584, at 553.

¹⁸ Pope Francis, Address of Pope Francis to the Delegates of the International Association of Penal Law, 23 October 2012, cited in: Abellán Almenara and Van Zyl Smit, Human Dignity and Life Imprisonment: The Pope Enters the Debate, 15(2) *Human Rights Law Review* (2015) pp. 369-376, at 369.

confined in decent circumstances. That is to pay lipservice to the value of life; not to vouchsafe it.¹⁹

Furthermore, if one proceeds by analysing the Strasbourg Court's case-law from a pure policy perspective, one might also argue that the Court is providing an effective human rights-oriented safeguard within Article 3 to so-called '*penal populism*', which spurs the introduction of '*much ill-considered and irrational criminal justice legislation in western democracies*',²⁰ a manifestation of the attempts made by some governments to '*appease public opinion and to persuade the community that something is being done to protect it from crime*'.²¹

To be fair and complete, there is certainly a counter-argument to be made to the Court's dignitarian rationale in *Vinter* that I have now outlined, which merits a discussion. This argument, which can be termed the *justificatory conception of Article 3 protections*,²² is based on the perhaps more pragmatic recognition that the imposition of punishments in the form of deprivation of liberty must be seen in a fact-specific context where the national authorities are allowed more leeway in striking a balance between the interests of the offender, and his or her human dignity, and the wider interests of society as crystallised in the sufferings of the victim or victims, also human beings deserving of respect. Under this justificatory conception of Article 3 there must then be room for a democratically elected legislature to define the most serious of crimes as being worthy of lifelong incarceration primarily based on the principle of retribution. In other words,

¹⁹ *R (Wellington) v. Secretary of State for the Home Department* [2007] EWHC 1109 (Admin), § 39. On appeal from the High Court, Lord Hoffmann in the House of Lords notably rejected Lord Justice Laws' reasoning that '*the abolition of the death penalty must have been founded upon the premise that the life of every person has such inalienable value that its forfeiture cannot be justified on the ground of retributive punishment*' (*R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, § 7), instead citing '*more pragmatic*' grounds such as irreversibility in cases of miscarriages of justice, sparse evidence of its deterrent effect and the degrading and '*ghastly ceremony of execution*'. The parallels drawn by Lord Justice Laws between the death penalty and life imprisonment without parole, for Lord Hoffmann, constitute the very reasons why life imprisonment has remained an available option in the handing down of sentences for the most severe cases that would have previously attracted the death penalty; it is '*part of the price*' of agreeing to the abolition of the death penalty for those who object to it on the abovementioned pragmatic grounds.

²⁰ Dyer 2016 p. 1.

²¹ Dyer 2016 pp. 1-2.

²² This is termed the '*justification/absoluteness puzzle*' in Mavronicola, Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context, 15(4) *Human Rights Law Review* (2015) pp. 721-743, at 732.

under this rationale the dignitarian view must, so to speak, be relativised to some extent to take account of certain public interest justifications.²³

There is of course an immediate conceptual problem with the justificatory conception of Article 3 that has been identified by academic commentators,²⁴ namely the difficult tension which arises in the application of any kind of a balancing analysis when dealing with a prohibition such as Article 3 that is couched in absolute terms. That very interesting debate would merit an article in itself. For the time being, suffice it to say that the justificatory conception of Article 3 was, it seems, emphatically rejected by the Grand Chamber in *Vinter and Others*. It is clear from the judgment that a purely retributive penal purpose, a so-called *lex talionis*, for life sentences²⁵ without the opportunity of parole, focused exclusively on the gravity of the act and its perceived commensurate punishment, does not conform with Article 3 of the Convention.²⁶

As mentioned above, there is a second conceptual question that arises within the context of the *Vinter and Others* judgment, which is whether the Court's underlying dignitarian conception of Article 3 is in conformity with its general use of the principle of proportionality. The latter is employed by the Court as a methodological tool when dealing with complaints directed at deprivations of liberty in the member States.

In the reasoning in *Vinter and Others*, the Grand Chamber resorts to proportionality-type language in several paragraphs.²⁷ Importantly, the Court begins by confirming its settled case-law that *grossly disproportionate sentences* will violate Article 3 of the Convention;²⁸ hence it is clear that the principle of proportionality is, as such, the contextual framework in which the Article 3 analysis takes place. The Court on this basis goes on to affirm that the Contracting States must remain free to impose life sentences on adult offenders for especially serious crimes such as murder; the imposition of such a sentence is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention.²⁹

In other words, it cannot be claimed that a life sentence is, in and of itself, grossly disproportionate under Article 3 of the Convention, although the Court has recently

²³ Unlike some academic commentators, I would not necessarily equate this justificatory conception of Article 3 with the Court's use of the principle of proportionality in case-law under the same provision, Mavronicola *ibid.* at 733.

²⁴ *Ibid.*

²⁵ As per Lord Justice Laws in *R (Wellington)* [2007] EWHC 1109 (Admin), § 39.

²⁶ See in this respect *Vinter and Others*, § 112 – ‘*even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes... a poor guarantee of just and proportionate punishment.*’

²⁷ See, in particular, *ibid.* § 112.

²⁸ *Ibid.* § 102.

²⁹ *Ibid.* § 106.

been invited to take that step by some commentators.³⁰ Moreover, in *Vinter and Others*, the Court refers approvingly to Lord Justice Laws' dictum in the domestic High Court case of *Wellington*, where he stated that even when a whole life sentence is an appropriate punishment at the time of its imposition, with the passage of time it becomes a 'poor guarantee of proportionate punishment'.³¹

A strong argument can be made that *Vinter and Others* sits quite comfortably within the wider scope of the Court's deprivation of liberty jurisprudence, in particular its Article 5 case-law on the legality of detention where the principle of proportionality is the overarching norm or methodological tool applied by the Court. It is true that the principle is perhaps applied in a different manner in *Vinter and Others* compared to other cases. Discrepancies may be seen in, for example, *M v. Germany*,³² which dealt with the applicant's continued placement in preventive detention beyond the authorised maximum period, and in *James, Wells and Lee v. the United Kingdom*,³³ on the failure to provide rehabilitative courses to prisoners which formed a pre-requisite for their release. However, the underlying premise is, I would submit, the same.

The dignitarian conception of the human person, rooted in autonomy-based theories of classical liberalism, requiring that punishments serve an enlightened, rational and just purpose, lies at the core of both strands of case-law under Articles 3 and 5. In other words, the development of penal policy in the member States is restrained by the Strasbourg Court's interpretation and application of the Convention, serving the ideal that human beings are capable of betterment. In this way, the Court embeds within the Convention the wider prevailing European penal policy, emphasising the principle of atonement and the fundamental rehabilitative aim of imprisonment, as initially proclaimed in the famous 1977 *Life Imprisonment* case in the German Federal Constitutional Court,³⁴ heavily relied upon by the Grand Chamber in *Vinter and Others*.³⁵

³⁰ See for example Abellán Almenara and Van Zyl Smit 2015 p. 376.

³¹ *R (Wellington)* [2007] EWHC 1109 (Admin), § 39, as cited in *Vinter and Others*, § 112.

³² *M v. Germany*, no. 19359/04, 17 December 2009.

³³ *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012.

³⁴ *Life Imprisonment* case (lebenslange Freiheitsstrafe) of 21 June 1977, 45 BVerfGE 187. An English translation of extracts of the judgment is available in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Duke University Press 1997) pp. 306-313.

³⁵ *Vinter and Others*, § 113.

3. Procedural Requirements for Vinter Post-Conviction Review of Life Sentences, the Principle of Rehabilitation and the Extraterritorial Reach of Vinter and Others

I now turn to a discussion of the procedural requirements under the so-called *Vinter post-conviction review* of life sentences or, in other words, the question of what kind of system of possible release is required at the domestic level to warrant a finding that the life sentence imposed is *de facto* and *de jure* reducible and thus in conformity with Article 3 of the Convention. In this part, I will also say a few words about the principle of rehabilitation of offenders, as set out in *Vinter and Others* and then clarified in the recent Grand Chamber judgment in *Murray v. the Netherlands*,³⁶ as well as briefly addressing the Court's case-law on the extraterritorial reach of the *Vinter and Others* case-law.

As I mentioned at the outset, in *Vinter and Others*, the power of a domestic court to impose life sentences was not in itself in question.³⁷ The Grand Chamber made clear that, where prisoners serving such sentences continued to pose a risk to society, they could be detained until the end of their lives.³⁸ However, the judgment imposed three key procedural requirements on the *Vinter* post-conviction review.

First, an adequate mechanism must be in place *at the time* when the sentence of life imprisonment is imposed. Thus a prisoner serving a life sentence is entitled to know, at the outset of his or her sentence, what must be done to merit consideration for release, and under what conditions, including when a review of the sentence will take place or when an application for such a review can be made.³⁹

Second, the mechanism should allow for a global review of whether there continues to be sufficient penological justification for the detention of the individual. In this way, the Court prohibits the lifelong pre-determination of a person's capacity for atonement. There must therefore be:

*...a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.*⁴⁰

³⁶ *Murray v. the Netherlands*.

³⁷ *Vinter and Others*, § 106.

³⁸ *Ibid.* § 108

³⁹ *Ibid.* § 122.

⁴⁰ *Ibid.* § 119.

Third and finally, a mechanism guaranteeing a review should take place no later than 25 years after the imposition of a life sentence, followed by further periodic reviews.⁴¹ Within that framework, having regard to the margin of appreciation accorded to States in matters of criminal justice and sentencing, it is not the Court's task to determine the form, whether executive or judicial, of the review process, nor when exactly it should take place.⁴² However, it can be expected that since only those offenders who have committed the most egregious crimes are given life sentences, it is highly unlikely that their release will be justifiable after only a few years.⁴³

The reason I think it is important to analyse these components of the Court's case-law is that they provide insights into the broader framework of analysis adopted by the Court when enforcing its dignitarian conception of Articles 3 and 5 of the Convention, requiring particular safeguards when it comes to the release of persons deprived of their liberty. I make three points in this respect.

My first remark relates to the requirement that the procedural review mechanism be in place *at the moment* the life sentence is imposed. It seems to me that the nature of this requirement is in direct conformity with the overarching rationale of the Court's criminal justice case-law where, due to the primordial penological ground of rehabilitation, the offender must immediately be put in a situation where he can foresee the steps he needs to take in the long run to maximise his prospects of release, thus allowing him reasonably to adopt an attitude of atonement and betterment, to demonstrate that he or she does not pose a further risk to society.⁴⁴ For a life sentenced prisoner, that is naturally an extended process, but one which requires, as a starting point, that he retains the 'right to hope', as worded eloquently by my former colleague, the Irish judge Ann Power-Forde, in her widely cited concurring opinion in *Vinter*.

It is interesting to note that the consequences of the Court's heavy reliance on the principle of the rehabilitation of prisoners, as developed in European penal policy, were perhaps not readily apparent when *Vinter and Others* was decided. Nonetheless, in subsequent cases it has become clear that the requirement that rehabilitation form the fundamental basis of a dignitarian conception of individual human rights under Article 3 presents the member States and the Court with certain challenges.

In the recent Grand Chamber judgment of April 2016 in *Murray v. the Netherlands*,⁴⁵ the Court was confronted with the claim that even if the applicant's life sentence was *de jure* reducible, in other words that a possibility of release had been created, *de facto* he

⁴¹ *Ibid.* § 122.

⁴² *Ibid.* § 120.

⁴³ Van Zyl Smit, Weatherby and Creighton 2014 p. 78.

⁴⁴ According to the Grand Chamber (*Vinter and Others* [GC], § 122), it would be '*capricious to expect the prisoner to work towards his own rehabilitation*' were the case to be otherwise.

⁴⁵ *Murray v. the Netherlands*.

had no prospect of release as he had never been provided with psychiatric treatment and the risk of recidivism would therefore continue to be considered high.

The applicant in *Murray* had been convicted and sentenced to life in prison for murdering a six year old girl. Suffering from a pathological disturbance, which required treatment, the applicant nevertheless did not receive any psychiatric or psychological treatment in the prisons where he served his life sentence. Relying on *Vinter and Others*,⁴⁶ the Court in *Murray* considered that:

*even though States are not responsible for achieving the rehabilitation of life prisoners ... they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves. Were it otherwise, a life prisoner could in effect be denied the possibility of rehabilitation, with the consequence that the review required for a life sentence to be reducible, in which a life prisoner's progress towards rehabilitation is to be assessed, might never be genuinely capable of leading to the commutation, remission or termination of the life sentence or to the conditional release of the prisoner.*⁴⁷

The obligation to offer a possibility of rehabilitation therefore entails, according to the Court, a '*positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation*'.⁴⁸ As the prison in which the applicant had served his sentence had failed to provide such a regime, his life sentence was not *de facto* reducible and a violation of Article 3 of the Convention was found.⁴⁹

The unanimity of the Grand Chamber's conclusion in *Murray* manifests in my view the Court's firm stance on the principle of rehabilitation as the underlying doctrinal foundation for its Article 3 based dignitarian conception of individual rights. Thus this case-law which rejects the imposition of life sentences that are irreducible in law and in fact not only affects the member States' choices in the field of pure penal policy, but also has important implications for resource allocation within domestic prison systems. Indeed, the jurisprudence requires member States to move away from a pure custody-based, non-rehabilitative system of incarceration of human beings, towards a human dignity-oriented system where every individual must be put in a position to be able to make independent

⁴⁶ *Ibid.* § 103.

⁴⁷ *Ibid.* § 104.

⁴⁸ *Ibid.* § 104.

⁴⁹ *Ibid.* § 125.

choices, with the assistance of prison personnel and experts, so as to fulfil the criteria required to be released at a future date.⁵⁰

On that note, I will now turn to my second remark on the requirements of *Vinter* post-conviction review. As mentioned above, *Vinter and Others* requires a global review of whether there continue to be sufficient penological justifications for the detention of offenders. In post-*Vinter* cases, the Court has made clear that this assessment:

*must be based on rules having a sufficient degree of clarity and certainty ... and the conditions laid down in domestic legislation must reflect the conditions set out in the Court's case-law ... Thus, a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" ...*⁵¹

It is important to note that the Court has not, as of yet, said in clear terms that post-conviction review should be of a judicial nature. This is an interesting element to be considered when analysing the Court's case-law on deprivation of liberty, penal policy and proportionality, as usually, when a person is deprived of his liberty, Article 5 of the Convention requires under its fourth paragraph that the detained person be afforded the opportunity to put his case to a judge who has the power to release him if the conditions for detention are not met. This is the famous legal principle of *habeas corpus*, a constitutional safeguard in most, if not all, member States of the Council of Europe.

However, the Court has not relied on an Article 5 § 4 type review in the *Vinter* context of life imprisonment, a doctrinal move that has been criticised by academic commentators. The Court's main argument on this issue, which is based on its decision in *Kafkaris v. Cyprus* of 2011, is that '*the review of the lawfulness of the applicant's detention required under Article 5 § 4 is incorporated in the conviction pronounced by the courts*'.⁵² Therefore, no further judicial review is required. Although the Court has thus considered, noting that the relevant European standards do not exclude such a review, that administrative or executive review mechanisms can be in conformity with a post-conviction review under *Vinter and Others*, the Court has discounted some types of executive decision-making, for example, the power of presidential clemency.⁵³ However, it has done so not because

⁵⁰ *Ibid.* *Murray v. the Netherlands*, § 117; *James, Wells and Lee v. the United Kingdom*, appl. nos. 25119/09 57715/09 57877/09, 18 September 2012, § 209.

⁵¹ *Ibid.* *Murray v. the Netherlands*, § 100.

⁵² *Kafkaris v. Cyprus* (dec), appl. no. 9644/09, 21 June 2011, § 61.

⁵³ *László Magyar v. Hungary*, appl. no. 73593/10, 20 May 2014, § 58.

of the executive nature of the review as such, but because of various shortcomings in the procedure itself.⁵⁴

It goes without saying that I am not in a position to comment on the Court's view that executive decision-making suffices under Article 3, as the issue is now before the Grand Chamber in the post-*Vinter and Others* case of *Hutchinson v. the United Kingdom*⁵⁵ which will be decided soon. The theoretical element of interest to me for the purposes of this article is whether this part of the Court's case-law can be reconciled with the Court's overall doctrinal and dignitarian conception of individual rights under Article 3, as outlined in this article. I have two observations to make in this respect.

First, one might pose the question whether access to judicial review is, in and of itself, required by the principle of human dignity, either under Article 3 or under the deprivation of liberty provision – Article 5 of the Convention. In other words, does access to a judge implicate a dignitarian conception of human rights, or is it rather a manifestation of procedural due process – or, going further, a pure issue of the separation of powers in a democracy? Frankly, my answer would be that I find it conceptually difficult to divorce these elements from one another. At least on some level, procedural due process, as conceptualised in the ability of a detained person to have access to an independent and impartial judge, can be seen as an element of a dignitarian conception of rights retained by individuals in a democratic society.

My second point is that it is not readily apparent why a *Vinter* review under Article 3, where a prisoner must be afforded a periodic assessment of whether legitimate penological grounds justify his continued detention, is qualitatively or normatively different from the proportionality-based assessment of *habeas corpus* under Article 5, which is also subject to an arbitrariness review.⁵⁶ The Court's recognition in *Vinter and Others* that the balance of justifications for detention can continue to shift⁵⁷ implies that, once the penological justifications for continued detention no longer suffice, detention of an individual becomes disproportionately severe. In that sense it might perhaps be argued that the underlying logic of a post-conviction *Vinter* review under Article 3 is based on the principle of proportionality, in a similar manner to the detention review under Article 5 of the Convention.

If one accepts that the clear and fundamental purpose of a *Vinter* review is to determine the legality of continued imprisonment,⁵⁸ it might be argued that one needs then

⁵⁴ See the recent case of *T.P. and A.T. v. Hungary*, appl. nos. 37871/14 and 73986/14, 4 October 2016, § 49.

⁵⁵ See the Chamber judgment, *Hutchinson v. the United Kingdom*, appl. no. 57592/08, 3 February 2015.

⁵⁶ See *Mooren v Germany* [GC], no 11364/03, 9 July 2009, §§ 72-81.

⁵⁷ *Vinter and Others*, § 111.

⁵⁸ Van Zyl Smit, Weatherby and Creighton 2014 p. 77.

to address the question of the possible applicability of Article 5 § 4 to the review of life sentences.⁵⁹ Without stating a conclusive viewpoint on this issue, as that would be inappropriate at this stage for a serving Strasbourg judge, I would just note that, first, it has been suggested by academic commentators that by applying the requirements of Article 5 § 4, a *Vinter* review would have to be of a judicial nature, propped up by procedural guarantees, such as adversarial proceedings with a hearing as appropriate. Applicants would be entitled to legal assistance and to adequate facilities and time allowing them to properly prepare their submissions. Where the review does not lead to release, there should be a possibility for the matter to be reconsidered after a fixed, reasonable period.⁶⁰ Second, it has also been argued that since *Vinter and Others* is an undeniable authority for the statement that a point may be reached where it is no longer acceptable to detain someone, the argument from *Kafkaris v. Cyprus*, mentioned above, that ‘*the review of the lawfulness of the applicant’s detention required under Article 5 § 4 is incorporated in the conviction pronounced by the courts*’⁶¹ and that no further review is therefore required, seems open to debate.⁶² As I have already stated, I will not propose a substantive view on these arguments; suffice it to say that they certainly merit considered reflection.

My third and last point, as regards the *Vinter* review and the dignitarian conception of human rights which I have attempted to elaborate and apply throughout this article, is the territorial scope of the Court’s jurisprudence in this area. As is well-established, the Court has historically, ever since the landmark judgment in *Soering v. the United Kingdom*⁶³ of 1989, applied Article 3 extraterritorially, meaning that a member State can be held in breach of the Convention if it subjects a person, for example by deportation or extradition, to a real risk of Article 3 type treatment in another country, irrespective of whether the receiving State is a Convention country or a third country.⁶⁴

In the 2014 Chamber judgment in *Trabelsi v. Belgium*,⁶⁵ the Strasbourg Court found a violation of Article 3 because the applicant, if extradited to the US, would likely face a life sentence upon conviction without the possibility of parole. The Court thus deviated from its previous case-law in the judgments of *Babar Ahmad and Others v. the United King-*

⁵⁹ *Ibid.* p. 77.

⁶⁰ *Ibid.* p. 77.

⁶¹ *Kafkaris v. Cyprus*, § 61. It should also be noted that in *Kafkaris*, this finding was based on the premise that the ‘*determination of the need for the [life] sentence imposed on the applicant did not depend on any elements that were likely to change in time*’, see § 59.

⁶² Van Zyl Smit, Weatherby and Creighton, *supra* n 12, at 76.

⁶³ *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989.

⁶⁴ *Ibid.* § 91.

⁶⁵ *Trabelsi v. Belgium*, no. 140/10, 4 September 2014.

*dom*⁶⁶ of 2010 and *Harkins and Edwards v. the United Kingdom*⁶⁷ of 2012. Most of the applicants in these cases had been threatened with extradition from the United Kingdom to the United States, where they faced prosecution for Al Qaeda-inspired acts of terrorism and, in the event of conviction, were liable to mandatory or discretionary life sentences. In the previous judgments of *Babar Ahmad* and *Harkins*, both handed down before *Vinter and Others*, the Court held that the applicants, who had not been convicted, much less begun to serve any sentence imposed, had not shown that in the event of extradition their incarceration in the United States would not serve any legitimate penological purposes.⁶⁸ It deemed it still less certain that if that point were ever reached, the US authorities would refuse to avail them of the available mechanisms to reduce their sentences.⁶⁹

In *Trabelsi*, the Government invited the Court to uphold the approach adopted in *Babar Ahmad* and *Harkins*⁷⁰ as it considered that *Vinter and Others* did not change things.⁷¹ The Government relied on the fact that as the applicant had not been convicted, *Vinter and Others* did not apply, since the starting point for determining conformity of the sentence with Article 3 was conviction.⁷² The Court in *Trabelsi* rejected this argument because, according to the Court, it in effect obviated the preventive aim of Article 3 in matters concerning the removal of aliens.⁷³ It thus proceeded with applying the so-called *Soering* real risk test to the applicant's case, finding that the procedures in the US did not provide for a review mechanism requiring the domestic authorities to ascertain, on the basis of 'objective, pre-established criteria' of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner had changed and progressed to such an extent that continued detention could no longer be justified on legitimate penological grounds.⁷⁴

The *Trabelsi* judgment has been criticised somewhat by certain governments for transposing European human rights requirements to non-Convention states,⁷⁵ not a nov-

⁶⁶ *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.

⁶⁷ *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 32650/07, 17 January 2012.

⁶⁸ *Babar Ahmad*, §§ 243 and 244; *ibid.* *Harkins*, §§ 140, 142.

⁶⁹ *Babar Ahmad*, § 243; *Harkins*, §§ 140, 142.

⁷⁰ *Trabelsi v. Belgium*, § 104.

⁷¹ *Ibid.* § 109.

⁷² *Ibid.* § 129.

⁷³ *Ibid.* § 130.

⁷⁴ *Trabelsi v. Belgium*, § 137.

⁷⁵ In the context of the case itself, see Judge Yudkivska's concurring opinion where it is argued that 'we cannot impose on the rest of the world the evolution of European standards'.

el criticism I might add.⁷⁶ It is interesting to note that the Grand Chamber Panel rejected the Belgian Government's request that the case be referred to the Grand Chamber.⁷⁷ However, on 11 January next year, the similar case of *Harkins v. the United Kingdom* will be heard in the Grand Chamber after it was relinquished by the First Section of the Court where I sit.⁷⁸ The issue of the extraterritoriality of the *Vinter* case-law may then possibly be clarified at the level of the Grand Chamber. As I sit in the Grand Chamber composition in *Harkins*, I will only make a brief remark concerning this issue from the perspective of the binary paradigms of the dignitarian conception of Article 3, on the one hand, and the justificatory conception of the same provision, on the other, both of which I have examined above. It seems clear that the argument made by governments in this regard is, in part at least, based on the idea that Article 3 must be subjected to some kind of relativisation in the extra-territorial third country context so as not to frustrate State sovereignty or intra-state relations and cooperation in the field of criminal justice. However, the argument relied upon by the Fifth Section in *Trabelsi* is rooted in the absolute nature of Article 3 protections and the dignitarian conception of individual rights which forms the basis of the *Vinter and Others* jurisprudence. It remains to be seen whether the Grand Chamber of the Court considers that there are strong arguments in favour of making an exception to *Vinter and Others* in the context of third country extraditions and deportations.

4. Conclusion

When the judgment in *Vinter and Others v. the United Kingdom* was delivered on 9 July 2013, I had, just three weeks previously, been elected a judge of the Strasbourg Court. Let me confess that my first reaction to the judgment was not positive. Having been a national practitioner and academic for many years, dealing with Convention issues, I feared that the Strasbourg Court might, again, have strayed a bit too far in its interpretation of the Convention and, in particular, in restricting legitimate democratic decision-making in the field of penal policy and criminal justice. However, as I hope to have explained in

⁷⁶ See, for example, the reaction of the then UK Home Secretary, Theresa May, to the Strasbourg Court's ruling in the *Othman (Abu Qatada)* case that the UK could not lawfully deport Abu Qatada to Jordan because of the risk that evidence obtained by torture would be used at his trial (*Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, 17 January 2012; see also Lord Rodger's statement in the UK House of Lords that '*the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd*' (*Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26, § 78).

⁷⁷ Grand Chamber Panel's decisions - February 2015, Press Release, 17 February 2015.

⁷⁸ Relinquishment in favour of the Grand Chamber in the case of *Harkins v. the United Kingdom*, Press Release, 13 July 2016.

this article, my views on the judgment have evolved after considered reflection. If one is faithful to the text of Article 3, and its underlying rationale, rooted in a dignitarian and individualistic notion of human rights, it is in my view difficult to argue for a contrary position in the field of penal policy and imprisonment of human beings. I appreciate of course that some may think that the Strasbourg Court is overly idealistic in this area, too comforting to criminals, and failing to give due regard to those that are the victims of crime. However, the Court, through *Vinter and Others* and other judgments, simply requires that all persons, deprived of their liberty, including those serving life sentences, be treated in accordance with their intrinsic worth and humanity. They must be granted an opportunity for rehabilitation and to a realistic prospect of release. They must not be made objects of the State or suffer purely the wrath of the populace. The inherent human capacity for self-betterment, so strongly valued by the Convention system, cannot be wilfully ignored, no matter the judgement society makes of their actions, and no matter the temptation.