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Vietnamese Journal of Legal Sciences, Vol. 08, No. 01, 2023, pp. 78-98 DOI: 10.2478/vjls-2023-0004

LIFE IMPRISONMENT IN CANADA: IS THE "HOPE" LOST?

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Abstract

Life imprisonment has divergent meanings in various countries. With a focus on the issues related to life imprisonment in Canada, more specifically regarding the issue of the 'hope to be released' for the individuals serving a life sentence, the author assesses the legislation and some relevant, positive and negative, jurisprudential developments pertaining to life imprisonment in that context from a few countries, including Vietnam. The positive evolution that the Canadian jurisprudence witnessed in 2022 with respect to the eligibility for release of detainees serving a lifelong sentence could make Canada an interesting case study for Vietnam. This paper mainly relies on legal doctrinal research and comparative law by way of referring to the legislation and caselaw of a few different national jurisdictions for its analysis.

Keywords: *life imprisonment; life sentence; sentencing; Canada, Vietnam, Portugal, Brazil, Colombia, Mexico, United Kingdom, European Court of Human Rights*

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Life imprisonment "has divergent meanings in various countries. States impose life sentences for different ranges of offences; and States that release life-sentence prisoners do it in a variety of ways. ... Life imprisonment is of particular importance, as it is often the most severe penal sanction in countries where the death penalty does not apply."[1] That being said, capital punishment still exists in Vietnam for certain offences,[2] and life imprisonment coexists with it: "life imprisonment is more severe than fixed-term imprisonment and lighter than death penalty".[3][4] In Vietnam, life imprisonment may be imposed for specific crimes, such as bribery.[5] An author claims that "Vietnam has reasons to keep both the death penalty and life sentence to prevent and combat the situation with complex developments",[6] but this statement remains unexplained, without providing, unfortunately, further details regarding these reasons. Therefore, these reasons remain to be elucidated. Life imprisonment in Vietnam may be imposed as a sentence to an accused under the provisions of 20 articles of the 2015 Penal Code.[7]

An author noted that the "death penalty is always a controversial issue, [but] life imprisonment often remains unquestioned",[8] but life imprisonment also has been a controversial issue, including in Vietnam.[9] Perhaps life imprisonment remains unquestioned because "[a] *common* response to the abolition of the death penalty is to substitute life imprisonment",[10] then

1 United Nations Office at Vienna Crime Prevention and Criminal Justice Branch (1994), *Life Imprisonment*, United Nations, Vienna, pp. 1 & 2.

2 Lafrance S. (2021), 'Death Penalty in Canada and Its Abolition: The Way to Go for Asian Countries', in *Death Penalty in Asia: Law and Practice*, International Conference Proceedings, Social Science Publishing House, pp. 44-54.

3 Do T. V. & Le P. T. T. (year of publication unknown), 'Life Imprisonment and Recommendation to Meet Justice Reform Requirements in Vietnam', *Conference Paper*, University of Melbourne, 12. Retrieved from: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/3902589/Tran-Van-Do.pdf [accessed 9 December 2022]

4 Chi L. L. & Vucong G. (2023), 'Life Imprisonment in Viet Nam: Reflections on Reforms from a Human Rights Perspective' in Zyl Smit, D. v., Appleton, C. and Vucong, G. (eds), *Life Imprisonment in Asia*, Palgrave Macmillan, p. 330: "In Viet Nam, the law allows for both the death penalty and life imprisonment"; see also *Ibid*, 9-10: "there is no distinction in the conditions for applying life imprisonment with the death penalty" in Vietnam.

5 Tuoi Tre News, 'Nhận tiền hối lộ lớn 'chưa từng có', tuyên y án chung thân ông Nguyễn Bắc Son' [Received an 'unprecedented' large bribe, sentenced Nguyen Bac Son to life] (April 27, 2020). Retrieved from: https://tuoitre.vn/nhan-tien-hoi-lo-lon-chua-tung-co-tuyen-y-an-chung-than-ong-nguyen-bac-son-20200427162124954.htm [accessed 9 December 2022].

6 Trang N. Q. (year of publication unknown), 'Release of Life Sentence Prisoners in Vietnam', Conference Paper, University of Melbourne, p. 2. Retrieved from: https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3919244/Trang-Nguyen-Quynh.pdf [accessed 9 December 2022].

7 Chi L. L. & Vucong G. (2023), *supra* note 4, p. 340.

8 Spencer M. D. (2016), *Hope for Murderers? Lifelong Incarceration in Canada*, LLM thesis, University of Victoria, p. 73.

9 Trang N. Q., *supra* note 6, p. 1.

10 Spencer M. D. (2016), *supra* note 8 (italics added); see also Bedau H. A. (1989), 'Imprisonment

it would be so common - at least from a Canadian perspective and from the perspective of another "thirty-two countries [that] use a system similar to Canada where life imprisonment is imposed alongside a mechanism for release"[11] -, that life imprisonment may not seem to offer, at least at first glance, much interest for the researchers. However, we hope that this paper will prove the latter statement wrong, especially given the paucity of research on this topic in Vietnam.[12] The issues relating to life imprisonment go well beyond the borders of any country, and they may occur in various jurisdictions, including in Vietnam.

Because "[t]here is … little research on life imprisonment in Viet Nam",[13] the author submits that the recent Canadian jurisprudence as well as the jurisprudence of other selected countries, more specifically with respect to the eligibility for release of detainees serving a sentence of life imprisonment might be interesting and useful for Vietnam, which has not abolished the death penalty yet.[14] For instance, Canada is not positioned in any of the extremes about life imprisonment, i.e. it does not belong to the category of countries that still punish certain offences with the death penalty or it does not belong to the category of countries that abolished both the death penalty and life imprisonment, as some countries did. Having abolished the death penalty in 1976 and having replaced it with mandatory life sentences with specified minimum periods for parole eligibility for accused charged with murder,[15] Canada finds itself in the middle of these two categories. Therefore, Canada may represent, as other such similar countries, an example of a balanced approach between these two categories that could perhaps inspire potential legal reforms in Vietnam or, at least, be some food for thought for Vietnamese scholars and legislative decision-makers.

This paper mainly relies on legal doctrinal research and comparative law by way of referring to the legislation and caselaw of various national

vs. Death: Does Avoiding Schwarzschild's Paradox Lead to Sheleff's Dilemma', 54 *Albany Law Review* 481, p. 481.

11 Spencer M. D. (2016), p. 77; see also Zyl Smit D. v. (2006), 'Life imprisonment: Recent issues in national and international law', 29 *International Journal of Law and Psychiatry* 405, pp. 410-411; United Nations Office at Vienna Crime Prevention and Criminal Justice Branch (1994), *supra* note 1, p. 16: "[i]n practice, life imprisonment rarely exists without the eventual possibility of release."

12 Chi L. L. & Vucong G. (2023), *supra* note 4, pp. 330 and 350; see also Trang N. Q., *supra* note 6, p. 3.

13 *Ibid*.

14 Tran K. & Vucong G. (2019), 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry', 9 *Societies*, p. 14: "the death penalty is … one of the most heated issues for which Vietnam has consistently faced criticism and received recommendations for reform from international communities."

15 United Nations Office at Vienna Crime Prevention and Criminal Justice Branch (1994), *supra* note 1, p. 7: in those countries that have abolished capital punishment "a life sentence is imposed automatically for the crime of murder once a conviction has been reached".

jurisdictions for its analysis because "a comparative method … offer[s] strong benefits for the study of the law",[16] with the caveat that one must remain cautious to only compare what is, in fact, comparable. As the author of this paper previously wrote, "one of the interests in comparative criminal law for the researchers is to allow a better knowledge of their own penal system. Comparative law is also useful for researchers when examining with a critical eye the institutions of their own judicial order."[17] This approach enabled the author to identify and describe in this paper some of the main similarities and differences[18] that exist between various jurisdictions regarding specific aspects of life imprisonment. The approach adopted by the author also made it possible to clarify some of the limits and legal challenges, in terms of human rights for instance, that come out from the current or past (repealed) legislation and caselaw, mostly in Canada, but also in Vietnam, among other jurisdictions examined. In addition, the author suggests that there could be room for improvement about how life imprisonment should be understood legally, both in terms of clarity (for example, with respect to the interpretation given to Article 39 of the Vietnam's 2015 Penal Code) and consistency (for example, with respect to the conflicting conclusions reached by the European Court of Human Rights regarding the incarceration of someone without any chance of release).

The article is divided into five sections. The first section generally describes the current applicable law regarding life imprisonment in Vietnam, with specific attention drawn to the question of release and to some statutory interpretation issues in that context. The second section examines the different positions held by various national jurisdictions around the world regarding life imprisonment. It also sheds light on some similarities and differences between them in that regard. The third section presents the historical background pertaining to life imprisonment in Canada. The example of the murder offence is also used to discuss the evolution of parole eligibility in Canada. The fourth section addresses more specifically the evolution of the 'faint hope clause' in Canada. It starts with a brief comparison between Canada and the current applicable relevant law in Vietnam. This section also considers the question of 'cruel and unusual punishment' as applied to the period of eligibility for parole,

16 Reitz J. C. (1998), 'How Do Comparative Law', 46 *The American Journal of Comparative Law* 4, 617-636, p. 617.

17 Gautam K. & Lafrance S. (2020), 'A Comparative Survey of the Law of Bail in India and Canada', in Khurshid S., Luthra S., Malik L., and Bedi S., *Taking Bail Seriously – The State of Bail Jurisprudence in India*, LexisNexis, p. 126.

18 Reitz J. C. (1998), *supra* note 16, p. 620: "Comparison starts with by identifying the similarities and differences between legal systems or parts of legal systems under comparison."

relying mainly on a seminal case, *Bissonnette*, that caught not only the attention of the courts, but also of the media nationwide in Canada. The fifth section analyzes a few relevant decisions of the United Kingdom and the European Court of Human Rights, which focus on the issue of release for individuals sentenced to life imprisonment.

1. Life imprisonment in Vietnam and the possibility of release

Generally, there are two types of life imprisonment: "the first is formal life sentence, in which the authority held criminals in prison for as long as they live; the second in informal life sentence, which the imposed punishment does not call life sentence, but may result in the person spending life in prison."[19] In Vietnam, the 2015 Penal Code provides that life imprisonment is imposed for an indefinite period for crimes that are considered to be "extremely serious",[20] but "Vietnamese laws do not regulate the maximum duration of executing [a] life sentence."[21] This raises the question of the reasonable maximum duration for a period of imprisonment that will be discussed later in this paper in the context of Canadian criminal law when addressing the *Bissonnette* case. The fact that the maximum duration of life imprisonment is not regulated in Vietnam could also eventually constitute a legal loophole in Vietnam's criminal law. If not, it might cause, at least, some confusion regarding parole,[22] even if "[l]ife imprisonment in Viet Nam is not classified into life with parole and life without parole."[23]

The said confusion may also make one wonder about what category of life imprisonment Vietnam actually belongs to, for example. It may be difficult to determine when comparing the facts that, on one hand, "Viet Nam emphasises the punitive purpose of (life imprisonment)"[24] but, on the other hand, Vietnam's penal policy is "characterised by a combination of

19 Trang N. Q., *supra* note 6, p. 1; see also Zyl Smit D. V. & Appleton C. (2019), *Life Imprisonment: A Global Human Rights Analysis*, Harvard University Press, Massachusetts.

20 Art. 39(1) of the 2015 Vietnam Penal Code; Chi L. L. & Vucong G. (2023), *supra* note 4, p. 337: "the concept of 'extremely serious crimes' in Viet Nam is much broader than the concept of 'the most serious crimes' under international human rights instruments", and the same conclusion stands when comparing Vietnam with Canada *(R. v. Martineau*, [1990] 2 S.C.R. 633), for example.

21 Trang N. Q., *supra* note 6, p. 2.

22 *Ibid*, p. 4: "there is some confusion with parole which is a measure from the Court applying for persons serving the prison sentence when they have enough conditions following the Penal Code 2015" to be released from jail (italics added), even though specific conditions exist for parole in Vietnam: see also Clause 1 Article 11 of Vietnam's Law No. 30/2018/QH14 dated November 19, 2018, on pardon; Clause 1 Article 3 of Vietnam's Law No. 30/2018/QH14 dated November 19, 2018, on pardon. Retrieved from: https://lawnet.vn/en/vb/Law-30-2018-QH14-pardon-6242D.html [accessed 9 December 2022].

23 Chi L. L. & Vucong G. (2023), *supra* note 4, p. 335.

24 *Ibid*, p. 334.

punishment with education and reform",[25] which are factors considered in the context of rehabilitation.[26] Thus, the notion of rehabilitation implies that a detainee would eventually reintegrate society, and then be released from custody, including when they serve a lifelong sentence, but the punitive purpose of life imprisonment would make it more look like a lifelong sentence, if understood as indefinite, as per the wording of Article 39 of Vietnam's 2015 Penal Code.

There could also be an additional related source of confusion for the jurists regarding the application of life imprisonment in Vietnam. An author remarked that "indefinite imprisonment [may be interpreted as] a lifelong imprisonment. However … the definition of 'lifelong' is not absolute [because] a person [serving] life imprisonment may not have to serve the sentence for life … provided that they are in good rehabilitation."[27] Arguably, this might raise a Hamletian[28] dilemma: is the indefinite imprisonment in Vietnam indefinite or not? The 2015 Vietnam Penal Code says it is, but some authors claim that it may not be the case in all circumstances in light of the applicable laws, i.e. in addition to Vietnam's 2015 Penal Code.[29]

A clear and straightforward answer has not been given so far to the issues discussed above. The author of this paper does not pretend to answer them either, especially that "the essence of life imprisonment [in Vietnam] is one whose period cannot be identified",[30] but the beginning of an answer could lie in the fact that "Vietnamese law sets out the ways in which a life sentence can be *changed* to a *determinate* term of imprisonment."[31] Therefore, it would be reasonable to suggest, as a tentative answer to these issues, that as long as a sentence is served as an indefinite imprisonment, there may be no possible release from custody. This is because for a detainee to be released, the State would need to change the *nature* of the imprisonment, i.e. commuting the sentence from an indeterminate length to a determinate one,[32] unless a detainee serving such a sentence benefits, for example, from

25 *Ibid*.

26 Generally, see Art. 31 of the 2015 Vietnam Penal Code.

27 Do T. V. & Le P. T. T., *supra* note 3, 2 (italics added).

28 Shakespeare W. (2022), *Hamlet*, Bloomsbury Publishing (first publisher in 1623). The dilemma may be summarized with this quote: "To be or not to be? That is the question".

29 Chi L. L. & Vucong G. (2023), *supra* note 4, p. 330: "some studies [claim] that Viet Nam had many ways of releasing life-sentenced prisoners". See, e.g., Vietnam's Law No. 30/2018/QH14 dated November 19, 2018, on pardon.

30 Do T. V. & Le P. T. T., *supra* note 3, p. 2.

31 Chi L. L. & Vucong G. (2023), *supra* note 4, p. 335; Clause 1 Article 11 of Vietnam's Law No. 30/2018/QH14 dated November 19, 2018, on pardon (italics added).

32 For example, "To be eligible for a pardon … life prisoner already commuted to termed imprisonment shall fully meet the following eligibility requirements": Clause 1 Article 11 of Vietnam's Law No. 30/2018/QH14 dated November 19, 2018, on pardon (italics added).

the "special clemency granted by the State" of Vietnam.[33] In any event, these uncertainties, being only some of the issues that life imprisonment raises in Vietnam, should bring the topic of life imprisonment under the radar of scholars. These possible gaps in the criminal law of Vietnam may call for the examination of how life imprisonment is understood and used, or not used, abroad[34] in order to find possible guidance, possibly about the above-mentioned issues, but also in general about the topic of life imprisonment.

2. Different perspectives from a few national jurisdictions on life imprisonment

The response to the abolition of the death penalty, even though there is a 'common response' to it that usually corresponds to the imposition of life imprisonment as a sentence, as previously mentioned, is not always the same around the world. Indeed, Trang noted, "a sentence of life with parole is the most common type of life imprisonment in 144 countries [but] 33 countries do not impose life sentence or death penalty as the ultimate sanction."[35] For instance, some countries outlawed life imprisonment in either their constitution or it was declared unconstitutional by the judiciary.[36] Portugal and Brazil are examples of countries that outlawed life imprisonment in their constitution. Portugal outlawed life imprisonment in 1884, and constitutionalized its ban under Article 30(1) of its constitution.[37] By way of historical background, the 1976 Portugal constitution was adopted after the end of the Salazar dictatorship following his death in 1970, and after the Carnation Revolution (Revolução dos Cravos), which was a military coup held in Lisbon on April 25, 1974, that eventually resulted in a transition to democracy. Brazil also forbids life imprisonment under

33 Clause 1 Article 3 of Vietnam's Law No. 30/2018/QH14 dated November 19, 2018, on pardon.

34 See, e.g., in terms of general recommendations, Vietnamese authors suggest to "evaluate the provisions of the criminal law of Vietnam over time and especially the provisions of the current 2015 Penal Code, referring to the criminal laws of some countries": Do T. V. & Le P. T. T., *supra* note 3, 11.

35 Trang N. Q., *supra* note 6.

36 For example, Mexico's Supreme Court of Justice of the Nation, the highest court of the land, ruled that life imprisonment constitutes an 'unusual and transcendental' (*inusitada y trascendental*) penalty that is prohibited by the Mexican Constitution: see, e.g., Suprema Corte de Justicia de la Nación, 'Improcedente la extradición a EU cuando se trate de cadena perpetua: SCJN (2001), *Unfair extradition to the US when it comes to life imprisonment: SCJN*, México, D.F., No. 135/2001.

37 Article 30(1) of the Constitution of the Portuguese Republic [Portugal], 25 April 1976: "Não pode haver penas nem medidas de segurança privativas ou restritivas da liberdade com carácter perpétuo ou de duração ilimitada ou indefinida." (*There can be no penalties or security measures that deprive or restrict liberty with a perpetual or unlimited duration*) [translated from Portuguese by the author of this paper].

Article XLVII b) of its constitution[38]. Rabbat argued that "[t]here are generally two main motives for [outlawing life imprisonment]: First, life imprisonment is considered by these States as constituting a 'cruel and unusual form of punishment', and so would arguably international criminal law.[39] Second, the imposition of a life sentence violates the right of the condemned individual to rehabilitation."[40]

However, contrary to what an author claims,[41] there seems to be, at least in some countries, a movement towards the inclusion of life imprisonment in their criminal law when it did not exist previously. For example, Colombia that forbade life imprisonment until recently saw its Congress adopt a Bill on June 18, 2020 that allowed the amendment of Article 34 of the Colombian constitution in order to render possible life imprisonment for cases of sexual assaults and murders of children and adolescents. The seriousness of these crimes seems to play a role in their selection to fall into this category. The relevant Act came into force recently, on July 6, 2021.[42] Other countries are also contemplating the inclusion of life imprisonment in their criminal law, i.e. Argentina, Chile, Honduras, Mexico and Peru.[43]

Interestingly, Mexico does not have the penalty of life imprisonment as such in its laws but "it is one of the few countries in the world that applies it indirectly" since "a person can be sentenced to 100 years in prison without any possibility of freedom and these sentences only differ in terminology with life imprisonment".[44] This seems to defeat the Latin legal maxim

38 "não haverá penas ... de caráter perpétuo" (*there will be no penalties … of a perpetual character*) [translated from Portuguese by the author of this paper].

39 Gumboh E. (2011), 'The Penalty of Life Imprisonment under International Criminal Law', 11 *African Human Rights Law Journal*, p. 77. Retrieved from: http://www.scielo.org.za/pdf/ahrlj/v11n1/05.pdf [accessed 9 December 2022].

40 Rabbat P. (2002), 'Aut dedere aut judicare: Constitutional Prohibitions on Extradition and the Statute of Rome', 15(1) *Quebec Journal of International Law*, p. 195.

41 Quang M. M. (2020), 'Life imprisonment in the criminal law in some countries and experiences for Vietnam', *Industry and Trade Magazine*. Retrieved from: https://tapchicongthuong.vn/bai-viet/hinh-phat-tu-chung-than-trong-phap-luat-hinh-su-cua-motso-nuoc-tren-the-gioi-va-kinh-nghiem-cho-viet-nam-67968.htm [accessed 9 December 2022].

42 See, e.g., Carranza Jimenez D. C. (July 7, 2021), 'Entra en vigor en Colombia la ley de cadena perpetua para violadores y asesinos de niños' [The law of life imprisonment for rapists and murders of children enters into force in Colombia].

43 BBC News Mundo (November 12, 2020), 'Cardena perpetua en América Latina: Los países que la aplican (y por qué Nicaragua se quiere unir a la lista)' [Life imprisonment in Latin America: The countries that apply it (and why Nicaragua wants to join the list]. Retrieved from: https://www.bbc.com/mundo/noticias-america-latina-54906804 [accessed 9 December 2022].

44 Trejo A. N. (April 14, 2021), '¿Es necesario aplicar la cadena perpetua para terminar con la violencia hacia las niñas y los niños en México?', *Foro jurídico*. Retrieved from: https://forojuridico.mx/es-necesario-aplicar-la-cadena-perpetua-para-terminar-con-la-violencia-

quando aliquid prohibetur ex director, prohibetur et per obliquum[45] since Mexico's Supreme Court of Justice of the Nation, the highest court of the land, ruled that life imprisonment is prohibited by the constitution.

3. Life imprisonment in Canada

The United Nations reported, "[g]enerally, judicial systems establish a minimum period that a life-sentence prisoner must serve before being considered for release".[46] Vietnam does and so does Canada, but let us recall, as previously mentioned, that Vietnam does not regulate the maximum duration of executing a life sentence. Canada was, in the past, one of the most harsh countries in that regard in the Western world.[47] In comparison, "[c]ommon law jurisdictions such as the United Kingdom, the United States, and Canada are generally harsher than their civil law European counterparts, where determinate sentences are utilized even for serious offences such as murder."[48] Therefore, this justifies a brief overview of the evolution of the relevant legislation in Canada.

Sections 745 to 746.1 of the Criminal Code govern sentences of life imprisonment and the procedure for determining the consequent periods of parole ineligibility, but the issues raised in this paper mostly involve the following sections:

**** Sentence of life imprisonment***

745 ... the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

(a) in respect of a person who has been convicted of high treason or first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

(b) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

...

(c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without

hacia-las-ninas-y-los-ninos-en-mexico/ [accessed 9 December 2022].

45 What cannot be done directly, cannot be done indirectly.

46 United Nations Office at Vienna Crime Prevention and Criminal Justice Branch (1994), *supra* note 1, p. 11.

47 *R. v. Swietlinski*, [1994] 3 S.C.R. 481, 492.

48 Grant I., Choi C., & Parkes D. (2020), 'The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing', 52(1) *Ottawa L. Rev.*, p. 138.

eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years ...

**** Ineligibility for parole — multiple murders***

745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may... decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.

**** Application for judicial review***

745.6 (1) Subject to subsections (2) to (2.6), a person may apply, in writing, to the appropriate Chief Justice in the province in which their conviction took place for a reduction in the number of years of imprisonment without eligibility for parole if the person

(a) has been convicted of murder or high treason;

(a.1) committed the murder or high treason before the day on which this paragraph comes into force;

(b) has been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of their sentence has been served; and

(c) has served at least fifteen years of their sentence.

Taking the example of murder, which is the most serious crime set out in the Criminal Code in Canada[49] for which life imprisonment is imposed as a sentence, it is noteworthy to mention that the nature of the sentence imposed for such a crime has changed over time in Canada. It has evolved from imposing the death penalty, in various forms, to imposing life imprisonment as a sentence. Between 1867, the year that Canada became a country, and 1961, all individuals convicted of murder were sentenced to death. Between 1961 and 1976, murder was broken into the two designations of capital murder and non-capital murder. Death penalty was mandatory for capital murder, but was commuted to life imprisonment, and life imprisonment with no parole eligibility for a minimum of 10 years was imposed for non-capital murder.

It must be added that, in Canada, "parole ineligibility is part of the 'punishment'",[50] and when parole is granted, it merely changes the conditions of the sentence, which remains imprisonment in perpetuity.[51] This is different from what is provided by the Vietnamese criminal

49 *R. v. Martineau*, *supra* note 20.

50 *R. v. Shropshire*, [1995] 4 S.C.R. 227, p. 23.

51 *Canada (Attorney General) v. Whaling*, [2014] 1 S.C.R. 392, p. 1 (bold characters and italics added).

legislation that provides for an indefinite length for the sentence to be served when an individual is sentenced to life imprisonment.[52] Thus, the State of Vietnam, as previously indicated, would need to change the nature itself of the imprisonment, not the conditions solely of life imprisonment, i.e. changing the sentence from an indeterminate length to a determinate one, to release an individual from custody. Nevertheless, as we also have seen previously, the indefinite nature of the sentence may not be absolute[53] in Vietnam, and then, understood strictly under that light, this could then give some flexibility to what is meant by a lifelong sentence, brining it closer, perhaps, to what Canada does. However, the confusion identified earlier remains for what concerns Vietnam.[54]

As the author of this paper mentioned in a previous publication, "Canada abandoned the death penalty in 1976, abolishing the death penalty for all offences."[55] Several attempts were made in Canada to abolish death penalty before then, but they were all unsuccessful.[56] The abolition of death penalty in 1976 entailed the creation of the categories of first- and second-degree murders.[57] Grant, Choi and Parkes recalled that "[s]ince the abolition of the death penalty in 1976, Canada has relied on mandatory life sentences with long periods of parole ineligibility to punish persons convicted of murder."[58] During that period, "the Canadian criminal code provide[d] for a minimum penalty of 10 years of imprisonment for second-degree murder and a minimum of 25 years of imprisonment for first-degree murder before parole can be considered."[59]

Overview of Sentences Imposed for Murder Over Time[60]

Years	**Sentence**

52 Art. 39(1) of the 2015 Vietnam Penal Code.

53 Do T. V. & Le P. T. T., *supra* note 3, 2 (italics added).

54 Trang N. Q., *supra* note 6, p. 4.

55 See, e.g., Lafrance S. (2021), *supra* note 2, p. 51.

56 Spencer M. D. (2016), *supra* note 8, 33: "In Canada, M.P. Robert Bickerdike brought forward bills to abolish the death penalty annually from 1914-1917, all of which were defeated. Further bills to abolish the death penalty by William Irvine in 1924 and by Ross Thatcher in 1950, both of which were defeated."

57 Section 235(1) of the *Criminal Code*, RSC 1985, c. C-46 (hereinafter '*Criminal Code*').

58 Grant I., Choi C., & Parkes D. (2020), *supra* note 48, pp. 139-140.

59 United Nations Office at Vienna Crime Prevention and Criminal Justice Branch (1994), *supra* note 1, p. 11; section 745 of the *Criminal Code*; Canada, Legal and Legislative Affairs Division (11 September 2009), *Legislative Summary of Bill C-36: An Act to amend the Criminal Code (Serious Time for the Most Serious Crime Act)* (author: Robin MacKay), p. 2.

60 Information for the table is taken from Spencer M. D. (2016), *supra* note 8, 25.

1867-1891	Death, commutable to life in prison. Those serving life in prison eligible for ticket of leave (1899-1959) and parole[61] (1959-onwards).
1961-1976	Capital murder – death, commutable to life in prison with parole eligibility. Non-capital murder – Life, parole eligibility after 10–20 years.
1976-2011	First degree – Life, parole eligibility after 25 years. Second degree – Life, parole eligibility after 10–25 years. Eligible to apply for reduction after 15 years.
2011-onwards	First degree – Life, parole eligibility after 25 years. In case with multiple victims, up to 25 years per victim.

⋆ Faint Hope Clause in Canada

The faint hope clause, the proverbial name used to describe section 745.6 of the Criminal Code,[62] was enacted in 1976 when the death penalty was abolished. This section "gave an individual sentenced to more than 15 years of parole ineligibility the right to apply to a court after serving 15 years to have that period of parole ineligibility reduced."[63] Similarly, in Vietnam, "life-sentenced prisoners must serve a sentence for at least 12 years in prison before being considered for parole for the first time [but] the actual period of the sentence served must at least [be] 20 years before release … Individuals currently serving multiple sentences (including life imprisonment) must serve at least 15 years in prison [before] being considered for parole for the first time, and the actual period of the sentence served must be at least 25 years before release."[64] Therefore, in Vietnam, "[i]ndividuals who are serving life imprisonment … do not hold much hope of being released".[65]

Contrary to the current situation in Vietnam, An Act to Amend the Criminal Code and Another Act[66] repealed in Canada the faint hope clause in 2011 for all offenders who commit a murder on or after December 2nd, 2011. Until the decision of the Supreme Court of Canada in *R. v. Bissonnette*[67] was rendered in 2022, the loss of hope of release had not been recognized by Canadian courts to constitute an inhuman and degrading

61 In 1958, Parliament established a parole system through the Parole Act, R.S.C. 1958, c. 58. Parole is not a reduction of the sentence handed down by the court. Rather, it is a change in the conditions of the inmate's incarceration.
62 Spencer M. D. (2016), *supra* note 8, p. 41.
63 Grant I., Choi C., & Parkes D. (2020), *supra* note 48, p. 141.
64 Chi L. L. & Vucong G. (2023), *supra* note 4, p. 338.
65 *Ibid*, 330.
66 2011 S.C. c. 2.
67 2022 SCC 23.

treatment within the meaning of section 12 of the Canadian Charter of Rights and Freedoms (hereinafter 'Charter')[68].[69] The Supreme Court of Canada stated in *R. v. Bissonnette*,[70] which case was about multiple murder offences and the applicable fit sentence:

By allowing consecutive 25year parole ineligibility periods to be imposed in cases involving first degree murders, s. 745.51 *Cr. C.* authorizes the imposition of sentences of imprisonment for life without a realistic possibility of parole before death for all offenders who must serve such periods consecutively. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and reenter society.

With respect to multiple murders, the Quebec Court of Appeal recalled in *Bissonnette c. R.*, which appeal at the Supreme Court of Canada was dismissed,[71] that "[u]ntil 2011, the state of the law remained unchanged, and offenders convicted of multiple murders were sentenced to life imprisonment, coupled with periods of ineligibility, all served concurrently."[72] This goes in line with the general rule that "all sentences shall be served concurrently unless a sentencing judge directs that a sentence is to be served consecutively or legislation requires that they are to be served consecutively."[73]

The murders committed by Alexandre Bissonnette not only very sadly took away the lives of too many innocent people, but it rightfully shocked the conscience of many Canadians because it targeted a specific group of people, Muslim worshippers, and was a hate crime.[74] Bissonnette was 27 years old at the time of the event in 2017. At the Great Mosque of Québec city, Bissonnette fired on the worshippers and killed several of them. He pleaded guilty to 12 counts, including six of first-degree murder. The law as it was would have allowed the sentencing judge to impose a 150-year jail sentence, but he rather imposed a sentence of life imprisonment without the possibility of parole for 40 years, which was later reduced to 25 years on appeal. Of important note, the imprisonment for life without the possibility of parole does not exist in Canada.

Perhaps the possibility of imposing a sentence, for example, of 150

68 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982 c. 11.

69 *Bissonnette c. R.*, 2020 QCCA 1585, p. 101.

70 *Ibid*, p. 73.

71 *Supra* note 67.

72 *Supra* note 69, p. 69 (italics added).

73 Canada, Legal and Legislative Affairs Division (11 September 2009), *supra* note 59, p. 4.

74 Another example of such atrocities brings us back to December 6, 1989 with the École Polytechnique massacre that was a misogynist terrorist mass shooting in Montreal, Canada, at an engineering school.

years or, said otherwise, beyond the life expectancy of any human beings could make Canada similar to Mexico, which does *not* have the penalty of life imprisonment as such in its laws, and where, as we previously mentioned, "a person can be sentenced to 100 years in prison without any possibility of freedom and these sentences only differ in terminology with life imprisonment".[75]

The Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act[76] came into force in 2011 and amended section 745.51 of the *Criminal Code*, which gave, before the Supreme Court of Canada decided otherwise in the *Bissonnette* decision, cited above, a sentencing judge the discretion to decide that an offender who commit multiple murders receive *consecutive*[77] parole ineligibility periods rather than concurrent[78].[79] An author remarked that "[a]n offender convicted of ten counts of murder theoretically could receive a sentence of life with no parole eligibility for 250 years"![80] because section 745.51 of the Criminal Code "does not set a maximum duration for the total mandatory imprisonment that can thus be ordered."[81] Section 745.51 was declared unconstitutional by the Quebec Superior Court in the Bissonnette decision. This outcome was confirmed on appeal, which, in turn, was also confirmed by the Supreme Court of Canada,[82] the highest court of the land.

The Quebec Court of Appeal in *Bissonnette c. R.* described the issue related to the ineligibility periods for parole as "whether, in and of itself, a sentence of imprisonment for life, without the possibility of parole before a period of 50, 75, 100 or 125 years, or even longer, represents, by its very nature or because it is grossly disproportionate, a degrading and dehumanizing treatment that is intrinsically cruel and unusual within the meaning of section 12 of the Charter".[83] The Supreme Court of Canada made similar observations in the same case brought before it, on appeal of the Quebec Court of Appeal decision in *Bissonnette*.[84] As a side note, the Ontario Court of Appeal commented in 1972 about life imprisonment, in a different context, and stated that "Parliament cannot have contemplated both a physical impossibility and a logical absurdity which tends to bring the

75 Trejo A. N. (April 14, 2021), *supra* note 44.
76 2011 S.C. c. 5
77 Consecutive sentences are served one after the other.
78 A concurrent sentence means multiple sentences will be served at the same time.
79 Section 745.51 of the *Criminal Code*.
80 Spencer M. D. (2016), *supra* note 8, p. 49.
81 *Bissonnette c. R.*, *supra* note 69, p. 63.
82 *Attorney General of Quebec, et al. v. Alexandre Bissonnette*, application for leave to appeal from the judgment of the Court of Appeal of Quebec (Québec), dated November 26, 2020 is granted.
83 *Ibid*, p. 53; see also p. 89.
84 *Supra* note 69, p. 137.

law into disrepute",[85] but it seems as if this is precisely what the Parliament just did there with the possible length of imprisonment for life... that may go well beyond anybody's lifetime.

The whole idea of no maximum duration for a period of imprisonment was inexistent in Canadian criminal law until 2011.[86] Comparing it again with the current situation in Vietnam, it is noteworthy to recall again that "Vietnamese laws [still] do not regulate the maximum duration of executing [a] life sentence."[87] An author opined that "[w]hile Canada was in line with the international community in abolishing capital punishment and took the international perspective into account creating the new sentencing structure in 1976, the harsher, more retributive sentences introduced in 2011 now put Canada out of step with the global trend on sentencing."[88]

Delaying parole eligibility could "extinguish any hope of early freedom"[89], then "Parliament ha[d] provided [with the existence of the faint hope clause before it was repealed in 2011] for some sensitivity to the individual circumstances of each case when it comes to sentencing."[90] Hope, wrote Berger, "gives flavour, character, and existential texture to the experience of punishment."[91] In a more flamboyant style, Justice Huot of the Quebec Superior Court also wrote in *R. c. Bissonnette* that "[i]ncarceration without hope of parole is an expression of the law of retaliation ('an eye for an eye') and seeks only vengeance. It is tantamount to a death sentence by incarceration."[92] Johnson and McGunigall-Smith wrote about death by incarceration:[93]

Offenders sentenced to death by incarceration suffer a "civil death." Their freedom - the essential feature of our civil society - has come to a permanent end. These prisoners are physically alive, of course, but they live only in prison. It might be better to say they "exist" in prison, as prison life is but a pale shadow of life in the free world. Their lives are steeped in suffering. The prison is their cemetery, a cell their tomb.

As recalled by the Quebec Court of Appeal in the same matter on

85 *R. v. Sinclair*, 1972 CanLII 1297 (ONCA), 524.
86 Spencer M. D. (2016), *supra* note 8, p. 50.
87 Trang N. Q., *supra* note 6, p. 2.
88 *Ibid*., 50.
89 *R. v. Zinck*, [2003] 1 S.C.R. 41, p. 24.
90 *R. v. Luxton*, [1990] 2 S.C.R. 711.
91 Berger B. (2015), 'Sentencing and the Salience of Pain and Hope', in Newman D. & Thorburn M., eds, *The Dignity of Law – The Legacy of Justice Louis Lebel*, Markham: LexisNexis Canada, p. 353.
92 *R. c. Bissonnette*, 2019 QCCS 354, p. 295; see also Trang N. Q., *supra* note 6; Gumboh, *supra* note 39, 78; Zyl Smit D. V. (1999), 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective', 9 *Criminal Law Forum* 5, p. 29.
93 Johnson R. & McGunigall-Smith S. (2008), 'Life Without Parole, America's Other Death Penalty Notes on Life Under Sentence of Death by Incarceration', 88:2 *Prison Journal* 328, p. 329.

appeal, "vengeance has no role to play in a civilized system of sentencing."[94]

4. United Kingdom's and ECHR's jurisprudence on life imprisonment

As observed by Grant, Choi and Parkes, sentences of life imprisonment "raise serious human rights issues that [also] have been addressed in a body of international decisions focused on the fundamental requirement that a life sentence include some form of meaningful hope for release".[95] For instance, Lord Justice Laws of the United Kingdom High Court of Justice wrote: "[A] prisoner's incarceration without hope of release is in many respects in like case to a sentence of death",[96] as it was expressed similarly by Johnson and McGunigall-Smith, cited above. However, on appeal of that decision, the United Kingdom House of Lords disagreed with the lower court's view:[97]

It is not the case 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. ... Opposition to the death penalty may be based upon the more pragmatic grounds that it is irreversible when justice has miscarried, that there is little evidence that its deterrent effect is greater than that of other forms of punishment and that the ghastly ceremony of execution is degrading to the participants and the society on whose behalf it is performed. For people who hold such views, who must include many opposed to the death penalty, the parallels between the death penalty and life imprisonment without parole, to which Laws LJ draws attention, are the very reasons why they think that in some cases the latter sentence is appropriate. The preservation of a whole life sentence for the extreme cases which would previously have attracted the death penalty is for such people part of the price of agreeing to its abolition.

With respect to the jurisprudence of the European Court of Human Rights (hereinafter 'ECHR'), the decision in *Vinter* rendered in 2013 recognized that "the salience of hope is more than a practical consideration that may alleviate some harms of long-term imprisonment. That Court held that it is a violation of fundamental human dignity to incarcerate someone without any chance of release"[98] contravening Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter

94 *Bissonnette c. R.*, *supra* note 69, p. 94; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, p. 80.

95 Grant I., Choi C., & Parkes D. (2020), *supra* note 48, pp. 165-166.

96 *R. (Wellington) v. Secretary of State for the Home Department* [2007] EWHC 1109 (Admin), p. 39(iv).

97 *R. (Wellington) v. Secretary of State for the Home Department* [2009] EWKC 1109 (Admin), p. 7 (italics added).

98 Grant I., Choi C., & Parkes D. (2020), *supra* note 48, pp. 173-174; *Case of Vinter and Others v. The United Kingdom*, (2013) Applications nos 66069/09, 130/10, 3896/10, European Court of Human Rights (Grand Chamber).

'European Convention on Human Rights'), which reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[99] The ECHR found that there is "clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"[100] In *Trabelsi v. Belgium*,[101] the ECHR confirmed the principles set out in *Vinter*. This follows the approach adopted by a line of case law since the decision of the ECHR in *Kafkaris v. Cyprus*[102] that decided, for the first time, that the imposition of a whole-life sentence could violate Article 3 of the European Convention on Human Rights.

Although Article 3 of that European Convention is very close to the wording and meaning of section 12 of the *Charter*,[103] which reads: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment", one must be cautious before considering the two provisions as perfect equivalents in terms of their jurisprudential interpretation and scope of application in Canada, for example. In *Quebec (Attorney General) v. 9147-0732 Québec inc.*, the majority of the Court stated that it "has recognized a role for international and comparative law in interpreting Charter rights. However, this role has properly been to support or confirm an interpretation".[104] In addition, the majority of the Court stated that "[t]hile this Court has generally accepted that international norms can be considered when interpreting domestic norms, they have typically played a limited role of providing support or confirmation for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the Charter are not bound by the content of international norms."[105]

In Hutchinson,[106] the ECHR reversed its position in Vinter and declared that the life-sentencing regime does not violate the European

99 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (Council of Europe). Corrections and Conditional Release Act, RSC 1992, c. 20.

100 *Vinter*, *supra* note 98, p. 114.

101 *Trabelsi v. Belgium*, [GC] No. 140/10 [2014] ECHR.

102 *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35.

103 *R. v. Goltz*, [1991] 3 S.C.R. 485 at p. 34: "The test for determining whether a sentence is disproportionately long very properly stringent and demanding"; *R. v. Nur*, [2015] 1 S.C.R. 773, p. 39: "This Court has set a high bar for what constitutes "cruel and unusual … punishment" under s. 12 of the Charter." Section 12 of the *Charter* protects against any cruel and unusual punishment, namely, a sentence that is "'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society": *R. v. Boudreault*, [2018] 3 S.C.R. 599, p. 45, citing *R. v. Lloyd*, [2016] 1 S.C.R. 130, p. 24; see also *R. v. Morrisey*, [2000] 2 SCR 90, p. 26.

104 2020 SCC 32, p. 28 (bold characters and italics added).

105 *Ibid*., p. 22 (italics added).

106 *Case of Hutchinson v The United Kingdom*, Application no. 57592/08, European Court of Human Rights (Forth Section) (January 2017).

Convention on Human Rights.[107] To reach that conclusion, The ECHR in *Hutchinson* did not surprisingly depart from the principles enunciated in *Vinter*, i.e. life imprisonment without possibility of parole constitutes inhumane or degrading treatment. Graham wisely asks, "Why … did the majority of judges in the Grand Chamber [in the decision *Hutchinson*] come to the opposite conclusion to those in *Vinter* when the principles it espoused were identical?"[108] He suggests the following answer regarding the reasoning of the opposite decision of the ECHR in *Hutchinson*:[109]

The answer falls to the very dubious application of the law to the facts. As regards the first criterion, the standard of review, the Court [in Hutchison] accepted and upheld the Court of Appeal's statement of the law, accepting that it had "clarified" the [United Kingdom] position and, by implication, admitted it had previously *misunderstood it in Vinter*. [Thus, n]othing had changed in practice between *Vinter* and *Hutchinson*, after all.

Therefore, a simple alleged misunderstanding regarding the application of the law to the facts in *Vinter* was used by the deciding court in *Hutchinson* to reverse its position regarding the life sentencing regime in light of the European Convention on Human Rights. Respectfully said for the reasoning of the court in *Hutchinson*, this rationale, if we accept Graham's explanation detailed above, would be far-fetched at best.

Conclusion

Before that decision was rendered, some authors expressed the wish that the Supreme Court of Canada in *Bissonnette* "recognize that *consecutive* parole ineligibility does not serve the interests of public safety".[110] Their wish seems to have been granted in 2022. With respect to the issue regarding the duration of life imprisonment, the author of this paper makes the following findings.

First, the law as it currently is regarding the release of individuals serving a sentence of life imprisonment seems to be at opposite ends in different jurisdictions.

On one hand, the Supreme Court of Canada found that the imposition of sentences of imprisonment for life without a realistic possibility of parole before death for all offenders who must serve such periods *consecutively* are incompatible with human dignity. It would be fair to suggest that this Court would come, more than likely, to the same conclusion in the context

107 This important reversal was left unnoticed by some Canadian authors who recently wrote on these issues: see Grant I., Choi C., & Parkes D. (2020), *supra* note 48.

108 Graham L. (2018), 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights', 3 *EHRLR* 258 (pre-edited copy).

109 *Ibid* (italics added).

110 Grant I., Choi C., & Parkes D. (2020), *supra* note 48, p. 174 (italics added).

of other types of sentences, when a court imposes a sentence for a single offence for example, if the sentence imposed would not give the convict any possibility of parole before their death.

On the other hand, both the United Kingdom and the European Court of Human Rights reached the exact opposite conclusion, being cognizant of the human rights question of human dignity. Nevertheless, jurisprudence conflicting with the current state of the law existed at a certain point in time in these two jurisdictions about the issue of the duration of a maximum sentence imposed for life imprisonment.

Therefore, it would be difficult to argue that there is a clear tendency or path about the release of individuals serving a life sentence in the world now, at least from a jurisprudential perspective. Two main approaches clash, as the Canadian example shows, on one hand, and the examples of the United Kingdom and the European Court of Human Rights show, on the other hand.

Second, the confusion that exists in the Vietnamese criminal legislation regarding the question of parole might still benefit from the experience of other countries as long as the opposite evolution these countries are taking about that is considered, also not forgetting the unusual example of Mexico that stands out.

Third, the issue regarding the maximum duration of life imprisonment in Vietnam, that is indefinite, if we adopt a pure grammatical approach to the Vietnamese criminal legislation, or that is not absolute, if we consider the opinion of the doctrine, remains unsolved. Nevertheless, the author suggested a possible solution to eventually find a meaningful answer to this legal conundrum. ●

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