RIGHT TO HOPE. THE HUMAN RIGHTS ISSUES OF LIFE IMPRISONMENT WITHOUT THE RIGHT TO PAROLE

by Maria Kalinova Yanakieva

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SUPERVISOR: prof. Károly Bárd
Central European University

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INTRODUCTION

In most countries the sentence of “life imprisonment” is the ultimate penalty and it is given for the most serious crimes, the life imprisonment without right to parole is the most severe form among the life sentence penalty practices. The text proposed will focus specifically on this sentence, defined by Johnson and McGunigall-Smith (in comparison with the death penalty) as “death by incarceration”. Whole life sentence however appears to be a more complex phenomenon when viewed in international context. There is no universal definition for either the “life imprisonment” or the “life without parole”. The legal provisions allowing their imposition and implementation can vary from country to country. It does not necessarily mean imprisonment until the offender’s death as in most cases there is indeed some opportunity of a release. That is why for the purposes of this text, we may define “life imprisonment” as incarceration for an indefinite period of time. “Life imprisonment without right to parole,” on the other hand, in most cases means precisely incarceration until the prisoner’s life end, despite the attempts to regulate it and the variety of *de jure* provisions to support the prospect for the offender’s release.

In the different academic traditions the “life sentence without possibility to parole “is referred to as a “whole life sentence”, “actual life sentence”, “life sentence without right to substitution”, “real-life sentence” etc. In the present text I will use these terms as synonyms.

The real life sentence appears to be a punishment that carries the danger of serious human rights infringements in terms of neglect of human dignity and is framed by the idea of the absolute power of the State (or certain institution) over the individual. As it is put in the German Federal Constitutional Court’s judgment on life imprisonment: “The essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom”[1] The link between human dignity and the possibility for development and rehabilitation is also the core idea underlying the ECtHR change of view and approach towards this type of punishment. Judge Power-Forde in his concurring opinion in the groundbreaking Vinter and Others v The United Kingdom formulated the essential idea of the case judgment as follows:

The judgment recognizes, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others,

1 BVerfGE 45 187 at 245 (Ger.).

nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading[2]

This text will consider the relevance and adequacy of the implementation of whole life sentence in the contemporary human rights discourse and more specifically in the context of the European Convention of Human Rights. Therefore it will present the recent regulations on the imposition of the punishment made by the European Court of Human Rights. The focus will be on the level of compliance with these regulations achieved by the Member States and particularly the cases of Bulgaria and Hungary.

Moreover, this text seeks to present the idea that the Presidential Pardon and the institutions that attribute the President's power to grant clemency in the abovementioned countries are arguably not sufficient measure for the achievement of the *de jure* and *de facto* prospect for prisoner's release, nor do they provide an efficient mechanism for a sentence review.

The proposed investigation of the problem stated is not a comprehensive one. It is limited to the Member States of the Council of Europe and as mentioned above – it will focus in detail only on several of them. Further, the research concerns "the life imprisonment without right to parole" and briefly comments on the variety of "life imprisonment" sentences. However, it excludes some measures and punishments that could *de facto* result in imprisonment until one's death.

The text comprises two main parts. Chapter I introduces the human rights analysis of the punishment in question. It will examine some issues that arise from the imposition of real life sentences, namely the contradiction with the prohibition of inhumane or degrading treatment or punishment as a dignity-based argument against the whole life imprisonment. The first part of this chapter comments on the life imprisonment without right to parole as an alternative to death penalty and argues that despite the empirical differences between the two, they are comparable in terms of cruelty of the punishment and seek to achieve the same retributive aims. The second subsection consists of a presentation of the German Constitutional Court's decision on the unconstitutionality of the life imprisonment without right to parole. The argumentation behind this judgment serves as

2 ECtHR, CASE OF VINTER AND OTHERS v. THE UNITED KINGDOM , App. No(s) 66069/09, 130/10 and 3896/10, Judgement: 9 July 2013, Strasbourg, Concurring opinion of Judge Power-Forde

a base for future development of legal practices and behavior towards life sentences in the European context.

The second chapter of this text examines the recent case law of the European Court Of Human Rights. It starts with a brief presentation of the current punishment practices in Europe and concentrates in detail on the regulations on real life sentences in Bulgaria and Hungary and especially on the pardoning procedures in both countries. The second part of this chapter deals with the general scope and nature of Presidential clemency and seeks to demonstrate that the "clemency" is something completely different from the concept of effective mechanism for sentence review and does not comply with the ECtHR requirement for (*de facto*) "prospect of release" of the prisoner.

Both the European Court of Human Rights and the UN Human Rights Committee have underlined the importance of the (*de jure* and *de facto*) possibility for people serving life sentences to be released.

If the domestic law does not provide any objective mechanism or possibility for review of the whole life sentence, the latter is considered not compatible with the standards of Article 3 of the Convention (Prohibition of torture).

I will argue that even if it there was such possibility in the moment of the administration of the sentence, the situation may change due to circumstances like age and mental or physical health deterioration.

CHAPTER I: HUMAN RIGHTS ISSUES AND LIFE IMPRISONMENT

1. Life imprisonment without right to parole and death penalty

Life imprisonment without the possibility of release is often used as an alternative to the capital punishment in countries where the death penalty is abolished. All European states, with the exception of Belarus have either abolished or put a moratorium (Russia) on the capital punishment. Latvia was the last country to abolish the death penalty for all crimes in 2012 and as of 2020 the punishment is abolished for both civilian and military crimes in all European countries except for Belarus. The imposition of the LWOP sentence is usually justified by the idea that for the most serious crimes there is a need of punishment which is more severe than the mere imprisonment, in order to achieve proportionality or to be in line with the retributive aim of the sentence. However, a number of scholars argue that the life imprisonment without any possibility to parole can be even more severe than the capital punishment. Johnson and McGunigall-Smith refer to this punishment as "our other death penalty" or "death by incarceration".[3] Sheleff refers to the whole life sentence as "tantamount to a delayed death penalty" [4] and suggests that it can constitute even "greater violation of human dignity"[5] He cites John Stuart Mill who supported the death penalty as a more humanistic type of punishment, compared to the life imprisonment without hope of release:

> [w]hat comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?[6]

In the contemporary context and especially among the Member states of the European Council it is argued that the whole life sentence can constitute inhumane and degrading treatment and can be a serious violation of the inherent human dignity.

3 Johnson, Robert, and Sandra McGunigall-Smith. „Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration."
4 Sheleff, Leon Shaskolsky. Ultimate Penalties – Capital Punishment, Life Imprisonment, Physical Torture. Columbus: The Ohio State University Press, 1987, p. 131
5 Ibid.
6 Ibid., p. 60

The dignity of the individual is stated as inviolable value in some State's constitutions and the example with the decision of the Federal Constitutional Court of Germany from 1977 about the constitutionality of mandatory life sentences is crucial for understanding how the proportionality of the punishment, the "right to hope" and the autonomy of the human being are inextricably linked with the contemporary European definition of dignity.

2. Human Dignity. Decision of the Federal Constitutional Court of Germany

The above mentioned case concerning whole life sentences in Germany originated when a State Court decided that its obligation to enforce real-life sentence in a case of homicide was in contradiction with several clauses of the German Federal Constitution and referred the question of life imprisonment to the Federal Constitutional Court. The State Court argued that the mandatory nature of the imposition of life sentence in cases of aggravated murder was unconstitutional because it was not compatible with the rule of law principle which "requires the proposed punishment to be in a just relationship with the seriousness of the crime and the culpability of the offender"[7] The Federal Court accepted that the proportionality principle is a valid argument for limiting the power of the State to punish offenders. When depriving a criminal of his/her liberty the State must comply with the relative constitutional principles, proportionality being one of them:

> ... in line with Article 2(II) of the Constitution the right to liberty can be limited by a law. However, in designing such limitations the legislature is constrained by the Constitution in number of ways. It must observe both the inviolability of human dignity (Art. 1(I)), the highest principle of the constitutional order, and other constitutional norms, specifically the principle of equality (Art.3(I)), the requirements of the rule of law and the social state (Art.20(I)). Since the liberty of an individual is already such an important legal interest that it could only be limited based on weighty grounds, the lifelong deprivation of this right requires a specifically strict check against the standard of Verhältnismaßigkeitsgrundsatz.[8]

7 'Imprisonment of the Elderly and Death in Custody: The Right to Review' (CRC Press) p 33p 33
8 45 BVerfGE 187, 21 June 1977, p. 223

Khechumyan, in his book “Imprisonment of the Elderly And Death In Custody” argues that it is important to make a distinction between the terms of “Tatproportionalität” , which refers to retributive proportionality and of “Verhältnismaßigkeitsgrundsatz” which means proportionality of the punishment. The significance of this distinction and the fact that the Court used the term “Verhältnismaßigkeitsgrundsatz” is rooted in the idea that even in cases where the punishment has retributive aims, the principle of “proportionality of the punishment” serves as a certain limit to the power of the State.[9] Although the Court reaffirmed that life imprisonment is compatible with the legitimate aims of the punishment (deterrence, retribution, reform) it stressed that this type of punishment should not exclude the possibility of reform.

Further on, it was in this judgment that the Federal Court linked the notion of human dignity with the “right to hope”. The conclusion was that any act which objectifies the individual by treating him/her as a “mere object of crime prevention”[10] rather than autonomous individual is a violation of his/hers rights to “social worth and respect”[11]. “Within the community each individual must be recognized, as a matter of principle, as a member with equal rights and a value of his own”[12] The view of the individual as an “end in itself” is a contemporary representation of the Enlightenment’s concept of human dignity and autonomy. The key to understanding this idea is the perceptual and philosophical distinction between the importance that objects bear for human beings on the one hand and the significance of a human being to the other and the society on the other. In his major work “The Groundwork of Metaphysics of Morals” [13]Kant formulated the normative requirement that we treat every human being not as an object but as an end in itself: Everything we want and have influence on can be used as means and only the human being – the rational creature – is an end in itself. Here, human dignity is a prerequisite, it seem, as it is not a right itself, but something more – a condition for rights. This thesis is the root of the so called “object-formula” of human dignity. The idea of human dignity as basis of all human rights has its reasoning in the understating that this dignity is pre-political and pre-legal by nature. All fundamental rights in a Constitution can be "deduced" from it; it is the highest principle in all objective law, necessarily valid for both the relationship between citizens and the State, and for the relationship of citizens to one another. Because of this objectivity, human dignity cannot be compared or “weighted” against another principle (which is also characteristic of the validity of all fundamental rights). In turn, the violation of human dignity is a consequence of a radical action, which converts the affected individual into an

9 ‘Imprisonment of the Elderly and Death in Custody: The Right to Review’ (CRC Press) p 35
10 Ibid., 36
11 Ibid.
12 Ibid., 37
13 Kant I, Wood AW and Schneewind JB, Groundwork for the Metaphysics of Morals (Yale University Press 2002)

"object", into “pure means", into a "substitutable quantity". This line of thought allows us to distinguish between infringements of fundamental rights and infringements of the principle of those rights. This concept, however, is in certain way problematic, at least at a philosophical level. Its ambiguous element – especially in the German tradition – is the key to encroaching on the foundation of rights – the violation of dignity through the so-called instrumentalization. In the contemporary context the idea of instrumentalization can be used for supporting “pro-life” (or anti-abortion) ideas, if one is to assume that human dignity starts at conception. Again in the sphere of bioethics – it can be argued that practices of donor insemination or cloning, for example, are in fact "instrumentalisation" because, in the first case, they make the spouse a "substitutable quantity" and in the second, they "rob" the donor of his/hers genetic uniqueness. At the same time the “object-formula” and the prohibition of “instrumentalization” seems helpless in situations where people live in poverty without other people being the cause of their condition. In other words, this theory sometimes sees a lot of infringements of human dignity, but in other cases fails to notice conditions which prevent the possibility of a dignified life .

Despite all that, “the object-formula” can be useful for the purpose of this text, because of its strong preventative functions. There are certain solutions and adaptations of the theory, which fall in line with the contemporary context. Human dignity is now transferred (almost without any residue) in the field of law and is mostly deprived of its function of a pre-political and moral foundation. It is becoming more subjective, relative and flexible in its content. It is laid in a more horizontal, rather than a straight vertical line, forming a certain type of “grading” when the exercise of one's rights affects the rights of third parties. A direct consequence of these "grading" beliefs may be the recognition and respect of the human status and thus dignity of criminal offenders .

CHAPTER II – PRESIDENTIAL PARDON AND THE ECtHR STANDARDS

1. Review of legal practice

1.1 Case-law of the European Court of Human Rights

Life imprisonment without the right to parole is the most severe form of the life sentence penalty practices. Following the example of Germany, both the European Court of Human Rights and the UN Human Rights Committee have underlined the importance of the (*de jure* and *de facto*) possibility for the people serving life sentences to be released.

If the domestic law does not provide the possibility of review of the whole life sentence, the latter is considered not compatible with the standards of Article 3 of the Convention (Prohibition of torture).

In this part I will focus on the process of admitting the whole life sentence without any prospect of release to be in violation of Article 3 of the European Convention of Human Rights.[14] I will comment only on the sentence itself without considering the possible violations arising from the material circumstances of its implementation. Further, by examining several cases of the European Court of Human Rights, this part will attempt to demonstrate that the life imprisonment without the right to parole, when completely stripped from time limitations and a prospect for release, contravenes the notion of human dignity and is in contradiction with the idea of a modern penal system, aiming at rehabilitation and social reform.

The decisions of the Court in relation to the life imprisonment without right to parole are somehow ambiguous. Some cases concern the automatic implementation of the sentence or the material conditions during the enforcement of it. For the purposes of this text I will only focus on the ones where there is a claim that the real life sentence itself is a violation of the ECHR. Some of the most important cases on this topic are Karkaris v. Cyprus from 2008, Iorgov v Bulgaria from 2010, the groundbreaking case Vinter and Others v. the United Kingdom as well as Laszlo Magyar v. Hungary.

14 These first sentences were submitted in my Capstone Proposal

In the first case – Kafkaris v. Cyprus the applicant was previously found guilty of three murders and received life imprisonment sentence for each of them. At the time he entered the prison he was issued with a date for conditional release, but because of change in the Cypriot law his right for an early release was removed. Kafkaris claimed a violation of Article 7 [15] and challenged the change of his sentence which had become heavier. However, the more interesting and especially notable part of this case is his allegation that the real life sentence itself is contradictory to article 3 of the ECHR (“"No one shall be subjected to torture or to inhuman or degrading treatment or punishment”) The applicant claimed that his sentence "exceeded the reasonable and acceptable standards for the length of a period of punitive detention as required by the Convention"[16] Despite the fact that the Court did not finally find a violation of Article 3, because of the possibility of Presidential pardon that was provided by the Cypriot law, it is important to mention the partly dissenting opinions of five of the judges on this case (Judges Tulkens, Cabral Barreto, Fura-Sanstrom, Spielmann and Jebens). Their opinions are specifically in contradiction with the majority opinion on the Presidential pardon as lessening the inhumane and degrading treatment of the punishment. They argue that one can agree to a limited prospect of release for the life prisoner but this prospect “must exist *de facto* in concrete terms, particularly so as not to aggravate the uncertainty and distress inherent in a life sentence”[17] Further, if the pardon acts are hypothetically extended to cover all types of review and revocation measures, this in turn could also raise the issue of Article 3 concerning the need for adequate safeguards against arbitrariness. The judges also comment on issues related to the reintegration of the offenders as a potential aim of imprisonment and cite several earlier recommendations on conditional release and the potential return to society made by the Committee of Ministers and he Council of Europe’s Commissioner for Human Rights.[18] The dissenting opinions in the Kafkaris case is one of the significant moves towards a radical change in the Court's understanding of the conformity of the whole life sentence with Art. 3 of the ECHR.

Two years later, in the case of Iorgov v. Bulgaria,[19] the Court applied the principles used in the Kafkaris judgment. The applicant in this case was initially sentenced to death but after the abolishment of the capital punishment in Bulgaria on 23 December 1998, his sentence was replaced by a decree from the Vice President to a life imprisonment without right to parole. Iorgov’s claim was that this sentence deprived him from any possibility of early release which was in this manner

15 Article 7(1): "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".
16 Kafkaris v Cyprus (2009) 49 EHRR 35 at para 918
17 Ibid
18 Ibid, p. 68
19 CASE OF IORGOV (II)v. BULGARIA(Application no. 36295/02), 02.09.2010

inhumane and degrading. The Court, in response found that the life imprisonment without the right to substitution in Bulgaria is not irreducible *de jure.* According to the national legislation the Pardons Committee has the possibility to replace the whole life sentence with an ordinary life sentence and finally with time-set one. The Court considered that as enough to consider the whole life sentence in Bulgaria not an actual one. However, the Court failed to recognize that the Pardons Committee is an advisory body of the Vise President and does not exert legal power. The decision for the pardon is made by the President, who can or cannot take follow the Committee's advises and has no obligations to argument his potential pardon refusal. Thus, the Committee provides only hypothetical opportunity for release and there is no clear criteria for the final decision of pardon. Even with a maximum level corrections of the convict there is no guarantee for a sentence reduction.

Following the decisions for the Kafkaris and Iorgov cases the European Court of Human Rights made and unambiguous rethinking of its position in relation to the life imprisonment without the right to substitution and declared its imposition a direct violation of Article 3 of the Convention. This statement transpired in the Vinter and Others v, The United Kingdom case and it would not be an overstatement to claim that this case is a turning point in understanding the compliance of the whole life sentence with Article 3 of the ECHR.

The three applicants in the case were sentenced to whole life imprisonment without a tariff. Similarly to the situations in Cyprus and Bulgaria, under the UK law they could only be released by the Secretary of State. In this case The Court explicitly held that there had to be both *de jure* and *de facto* prospect of release in order to avoid violation of Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"):

> A life sentence with eligibility for release after a minimum period was reducible and no issue would arise under Article 3 [...] An Article 3 issue only arose when it was shown that the applicant's continued imprisonment was no longer justified on any legitimate penological grounds such as punishment, deterrence, public protection or rehabilitation; and the sentence was irreducible de facto and de iure[20]

20 CASE OF VINTER AND OTHERS v. THE UNITED KINGDOM (Applications nos. 66069/09, 130/10 and 3896/10), 09.07.2013

The ECtHR held that the reducibility should be achieved by a clear mechanism which was absent from the UK law. The UK Criminal Justice Act did not provide such a mechanism and the Crime (Sentences) Act, which concerns release on compassionate grounds by the Secretary of State's discretion was insufficient. These grounds (a prisoner is to be released if he/she becomes terminally ill or physically incapacitated) are doubtfully granting an actual release if the latter essentially means that the convict was merely allowed to die at home or in a hospice instead of in prison. Further on, "compassionate release of this kind was not what was meant by a "prospect of release" in *Kafkaris*. As such, the terms of the Order by themselves would be inconsistent with *Kafkaris's* and would not therefore be sufficient for the purposes of Article 3"[21]

Another important point in the Vinter judgment is the fact that the Grand Chamber addresses not only the procedural elements for providing a prospect of release but also concludes that limiting the power of the State to punish is substantively related to the prohibition of inhumane and degrading treatment and punishment. As Dirk van Zyl Smit, Pete Weatherby, and Simon Creighton put it in their article[22] the complete denial of the opportunity for rehabilitation and reintegration into the society is "inherently degrading and therefore prohibited"[23] Finally the Grand Chamber findings in the Vinter case come to show that the prospect of rehabilitation and the observation of the hope for release are essential for avoiding suffering. Moreover, it demonstrated the ECHR as a "living instrument" and reminds that the aims of the penitentiary within Europe are deterrence and rehabilitation rather than retribution.

Similarly to the Vinter and Others v. The United Kingdom, in the Laszlo Magyar v. Hungary[24] case the Court found a violation of Article 3 on the grounds that there was no possibility for review of the sentence. The only prospect for release in Hungary was Presidential clemency. However neither the President nor the Minister of Justice had to provide arguments for making pardon decisions. Further, despite the fact that the authorities had the duty to collect information on prisoners in relation to pardon requests, there was no clear mechanism or criteria by which that could be done. In contrast to Vinter in this case the Court also found necessary to rule on the ground of Article 46 and to make recommendations to the Hungarian Government to conduct a reform in the sentence review system and to ensure that in each case of life imprisonment the continued incarceration is based on lawful grounds. The convicts with whole life sentences had to be aware of the terms and

21 Ibid. p. 12
22 Dirk van Zyl Smit and Pete Weatherby and Simon Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done' (2014) 14 HUM RTS L REV 593
23 Ibid, p. 8
24 CASE OF LÁSZLÓ MAGYAR v. HUNGARY (Application no. 73593/10), 20.05.2014

conditions of a possible early release. The pronouncement of Article 46 of the ECHR relates to requiring the sentenced State to comply with the judgments of the Court. In those cases where there are convictions but the convicted State fails to comply with the judgment for one reason or another, the Court provides a mechanism for monitoring the enforcement of the judgment.[25]

After the Laszlo Magyar judgement Hungary did developed new acts for pardoning prisoners with whole life sentences under its "Act on the Execution of Punishments, Measures, Certain Coercive Measures and Confinement for Infractions". The new "mandatory pardon procedure", conducted after the offender had served 40 years of imprisonment was challenged in the T.P. and A.T v. Hunagry case[26]. The Court again found that even after the new measures the life imprisonment sentence in Hungary was not *de facto* reducible. Even with the application of wide margin appreciation the forty year period during which the prisoner has to wait to even be considered for Presidential clemency is significantly longer than the recommended time-frame in Vinter and Others v. The United Kingdom case and in comparison to international law. This case indicates one more time that the unlimited power of the State in relation to punishment is often linked with the notion of "inhumane and degrading treatment and punishment" .

In conclusion, it can be stated that life imprisonment without right to parole is not itself a violation of the Article 3 of the ECHR. Incompatibility with the Convention arises when there is an absence of a prospect for release and of effective mechanisms of review. This can be considered as indirect "right to hope" for the prisoners, which right essentially corresponds to the notion of human dignity. The idea of incarceration without a possibility of release does not serve to any rehabilitative or reformative function of the sentence. It assumes that the offender is absolutely and in any circumstances incorrigible, which cannot be a rational and sufficiently grounded statement. Denying one's right to hope and reform can be viewed as objectification, the latter being incompatible with the notion of dignity. As put by Klein in his article about the human dignity in the German law system:

The concept of human dignity is often invoked to justify the idea that human beings should not be treated as if they are things, that is, that they should not be commodified. The categories of person and property are, according to modern legal orthodoxy, distinct: if one is a person, one is not

25 Petrov S, "Dozhiwoten Zatwor Bez Pravo Na Zamqna" <https://www.bghelsinki.org/media/uploads/special/2017-life_without_parole.pdf> accessed 2017

26 T.P. and A.T. v. Hungary - 37871/14 and 73986/14 Judgment 4.10.2016 [Section IV]

property …. Treating a person or part of a person simply as an object or a thing to be traded would strip a person of his or her dignity[27]

27 Klein E (2002) Human Dignity in German Law. In: Kretzmer D, Klein E (eds) The Concept of Human Dignity in Human Rights Discourse. Kluwer Law International, The Hague, pp 145–159

2. Pardoning procedure and the nature of the Presidential clemency

2.1 Life imprisonment without right to parole: Bulgaria

The life imprisonment sentence in Bulgaria is introduced as late as in 1995 not in order to cancel the capital punishment but in parallel with it. According to the wording of the norm of Art. 38A, para. 1, this type of punishment was defined as “forced isolation of the convict for the rest of his life in places designed for serving the imprisonment sentences”. The punishment could be replaced with 30 years deprivation of liberty only after the offender had effectively served not less than 20 years. This piece of legislation was heavily criticized by a number of penologists because of its inconsistency with the rest of the elements of the penal system and especially because of the lack of clear criterion shaping the scope of the individual sentences. Due to the long vacatio legis process the norm did not come in force before 1998 when the death penalty was abolished. Two new articles were introduced in the place of Art. 38 ,para. 1 one of which consists the new life imprisonment without the possibility to parole. In contrast with the ordinary life imprisonment, it is not replaceable, does not apply to all categories of perpetrators and is defined as a "temporary exceptional measure"[28] Further, for ordinary life imprisonment there are rules for commutation of the sentence (regulated in Articles 449-450 of the Code of Criminal Procedure). There is no such procedure for life imprisonment without right to parole, due to which the other regular institutes of criminal law become inapplicable in connection with the potential subsequent alleviation of repression. This is one of the factors by which the Bulgarian law differs from other European countries, where there is a maximum period after which a certain case must be reviewed. There is no differentiating criterion between the two types of life imprisonment in Bulgaria – the decision is left entirely to the discretion of the Court, which has to decide on the degree of achievability (or respectively non-achievability) of the aims, set in Art. 36 of the CC.

According to the national Criminal Code, the aim of the punishments in Bulgaria is to either provide individual or general prevention (or both). The characteristics of individual prevention are, however, rectification and re-education of the criminal offender, warning action on him and limiting

28 Article 37, para 2 Criminal Code of the Republic of Bulgaria (1968, amended 2017)

the possibility of committing new crimes. Whole life imprisonment however, necessarily excludes the opportunity for correction. It can only serve to the required general deterrence aims regardless of whether the offender continues to pose a threat even after a certain long period of time. For prisoners serving this sentence, there is no prospect of a future change of the punishment, which inevitably leads to irreversible psychological and personal changes and degradation. Further, the penalty should be both effective and relevant. Actual life sentences could not achieve the aim of individual prevention and are thus irrelevant to their own purpose.

Another important point in relation to the discussed punishment is that the sentence of life imprisonment without right to parole is also exceptional in terms of its specific serving. The offenders are placed under an initial “special regime” (considered the most severe), which means almost complete isolation. After 5 years it is possible to have the regime replaced with a lighter one. However, even if such relief is available, those sentenced to life imprisonment continue to be isolated from the rest of the prison population. Exceptions are the daily meals and the one-hour walks outside. According to a number of penologists the specific conditions under which the sentence is served may play an even greater role in the effectiveness of the sentence then its period. Without going into detail about the problems with prison conditions, I will just point out that there is no convincing argument in support of the need to keep all life prisoners in solitary confinement.

Finally, the effectiveness and the expediency of the whole life sentence in Bulgaria can be challenged on its own, even without commenting on the compliance of the State to the EctHR standards. The two lighter alternatives – life imprisonment and deprivation of liberty easily achieve the warning objective as they may suggest to the convicted person that in case of a following relapse, a more severe punishment may follow. Life imprisonment without a right of substitution cannot form such a belief, since the convicted person's legal status cannot be impaired regardless of subsequent criminal behavior. This means that ,paradoxically, not encouraging him in any way towards positive development and demotivating him to compensate the victims, this sentence just preserves the danger of the prisoner.

Pardoning procedure

The Head of State exercises the right to pardon the offenders sentenced to life imprisonment. In order to grant clemency, he must be referred to a person imprisoned or be requested to do so by the administration in the places of punishment. The President may dismiss in full or in part from the execution of a court-imposed penalty for a crime. ("The President may, by granting pardon, exempt from serving the entire or part of the imposed punishment, and in the case of capital punishment, life imprisonment without the right of substitution, and life imprisonment -to grant pardon, or to substitute it for another punishment"[29])That is how he exercises the right of pardon that the Constitution has granted him.

Until 2012 there are no documented rules on the role of the pardoning commission which supports the vice-President in relation to the pardoning procedure. The decree establishing the Pardon Commission in Bulgaria is issued on the 23.01.2012 from the President Rosen Plevneliev. Through this decree, the President also delegates his clemency power to the vice-President. The set of rules for the functioning of the commission were established the following month.

Although it is stated that the Rules are a "system of principles and guidelines from which the members of the Pardon Commission are guided in their work ", they are rather purely procedural in nature. The positive thing about adopting them is that the practice of publishing quarterly reports and annual reports on the work of the Commission was established, which undoubtedly creates greater publicity***. However, this can hardly justify de facto greater guarantees of the actual exercise of the presidential pardon power.***[30]

2.2 Life imprisonment without right to parole: Hungary

In contrast to the case of Bulgaria, the whole life sentence in Hungary can be both discretionary and mandatory. Section 44 of the Hungarian Criminal Code states a number of crimes in which the eligibility of parole is left to the discretion of the Court. Paragraph 2 of the same section and Pargraph 7 of the following Section 45 set the conditions in which the denial of possibility of parole is compulsory – in cases of repeated offenses and a history of violence or when he/she committed a crime (from Section 44, Subsection 1) within the framework of a criminal organization. If a person receives a second life sentence it is necessarily without right to parole.

29 Article 74, Criminal Code of the Republic of Bulgaria (2006, amended 2011)

30 Margaritova-Vuchkova S, 'СЪОТВЕТСТВИЕ НА НАКАЗАНИЕТО ДОЖИВОТЕН ЗАТВОР С ЧЛ. 3 НА ЕВРОПЕЙСКАТА КОНВЕНЦИЯ ЗА ПРАВАТА НА ЧОВЕКА' (2014) XXI Юридически сборник 31 <https://www.ceeol.com/search/article-detail?id=547411> accessed 7 April 2020

As most countries, which were part of the Soviet Block, Hungary abolished the death sentence after the fall of the regime. The decision was made by the Constitutional Court in 1990 and declared the death penalty unconstitutional.[31] The first introduction of the whole life sentence was made with Act No. XVII in 1993 and covered only cases of second imposition of a life sentence. Five years later (1998), because of the massive growth and the brutalization of crimes committed, a reform in the Criminal Code was made which created the possibility the discretionary imposition of whole life sentence for certain crimes.

Despite the heated debate surrounding the actual life imprisonment, the recent reform of the Hungarian Penitentiary Code (Article 109 of Act LXXII of 2014, which inserted a new subtitle on the mandatory pardon proceeding of persons sentenced to life imprisonment without the possibility of conditional release, Articles 46/A-46/H into Act CCXL of 2013[32].)and the arguments given by scholars and legislators against the actual life imprisonment, the punishment is still being imposed. Furthermore, it is important to note that Hungary is the only European country with a provision in the Fundamental Law allowing the imposition of life sentence without the possibility of release – "Life imprisonment without parole may only be imposed for a commission of a willful and violent criminal offense"[33]As pointed by Van Zyl Smit and Appleton, it seems like this provision, despite the restrictive wording aims to "protect LWOP form outright challenge by the Hungarian Constitutional Court"[34]

As in the case with Bulgaria, after being found of violation of Article 3 of the ECHR (in the Harakvhiev and Tolumov v. Bulgaria case) because of the limited nature of pardoning procedures, which provide little to no *de facto* prospect for release for the life sentenced offenders, Hungary introduced a release system similar to the Pardoning Committee in Bulgaria. The established Pardoning Committee was acceptable by the EctHR. However, in 2016, as mentioned in the previous part of the text, the Court found that the forty year period for mandatory parole review had not met the requirements of Article 3.

31 Decision No. 23/1990 (X. 31.)

32Károly Bárd and Petra Bárd, The European Convention on Human Rights and the Hungarian Legal System. In: Silvija Panović-Đurić (Ed.) Comparative Study on the Implementation of the ECHR at the National Level. 186 p., Belgrade: Council of Europe, 2016. Pp. 147-166. (ISBN:978-86-84437-85-5)'

33 Article IV, (2), The Fundamental Law of Hungary, Ministry of Justice 2017

34 Van Zyl Smit D and Appleton C, Life Imprisonment: A Global Human Rights Analysis (Harvard University Press 2019) p 56

Finally, as the aims of the punishment within the Hungarian system are the same as in Bulgaria – prevention and deterrence – the effectiveness of the life imprisonment without the right to parole can be questioned in a similar way.

There is, however, a difference in the Presidential pardoning procedure. In Hungary the right of the President to grant pardon relies on the Fundamental Law, but in contrast to Bulgaria is not completely autonomous. In order for a clemency decision to enter into force it has to be countersigned by the Minister of Public Administration and Justice.

2.3 The nature of the Presidential "clemency" and the de facto possibility of release.

In most modern European constitutions, pardon is regulated in a relatively uniform and in an extremely concise manner. In Art. 89, p. "B" of the Constitution of the Russian Federation proclaims that it is carried out by the President, without going into details about the scope of the very concept of "pardon". The constitutions of France, Hungary, Bulgaria, Italy, Macedonia, Poland, Romania, Estonia, Latvia, Lithuania, Spain, Slovenia and Germany are practically the same. The abstract character of the constitutional definition of the term "pardon", which allows for a wide interpretation of this Presidential right contributes to the importance of the relevant norm in the Criminal Proceedings Law both in Hungary and in Bulgaria.[35] In Hungary this is the Act. no. XIX of 1998 Section 597 on the Code of Criminal Procedure which states that a petition for pardon can be requested by the lawyer or legal representative of the prisoner (in cases where the petitioner is deprived form his/her liberty) to the court of first instance, which then gathers and sends the relevant document to the Minister. The minister can agree or disagree with the petition but he is obliged to send his opinion along with the documents he initially received to the President. The opinion of the Minister id not binding for the President and the latter can grant or deny pardon without giving reasons for that. Finally, his decision have to be endorsed by the Minister of Public Administration and Justice.

In Bulgaria the relevant provision is Article 74 of the Criminal Code: "The President may, by granting pardon, exempt from serving the entire or part of the imposed punishment, and in

35 Velchev, B, Pomilvaneto po nakazatelnoto pravo na Republika Bulgaria(Sofi-R 2001)

the case of capital punishment, life imprisonment without the right of substitution, and life imprisonment -to grant pardon, or to substitute it for another punishment"[36]

Both of these provisions are theoretically problematic in the view of the definition and history of the pardoning institution. As far as this text focuses on on other issues I will not proceed into detail on that matter, but I will mention that the basis of the pardon institution lays into the idea of division of power. The notion or "pardon" or "clemency" had a significantly wider content in the past then it has nowadays: In Roman law it was practically unlimited; In the late Middle Ages, it already acquired certain restrictions and its function was to show the State's mercy to an already convicted offender. Over time, this meaning of pardon is preserved in most European constitutions as a function of the separation of powers, whereby the monarch (subsequently the Head Of State) should not interfere in the work of the judiciary. The mere fact, that the Criminal Code is the institution, regulating the Presidential right to pardon, and in the case of Hungary that his decision has to be endorsed by the Minister of Public Administration and Justice is in contradiction of the division of powers.

According to Hungarian and Bulgarian law, the only way by which life imprisonment without parole can be replaced with a lighter sentence or the prisoner can be granted liberty is pardon. Having mercy, the president is obliged to seek the balance between the basic constitutional values and principles and to decide which of them to give priority in view of the case. The president should be guided by the understanding that he is showing mercy, but at the same time he is obliged to guarantee justice. Clemency is an of humanism, not directly resulting from any formal procedure. It is *contra legem* action in essence because it is overcoming a legitimate injustice through means of political expediency, the corrective of which is public justice. Therefore pardon does not have the quality of legality.[37]

Despite the fact that in Hungary the pardoning decree has to be recommended and then cosigned by the Minister it remains an act of the President's free will. Again – it is not a consequence of the behavior of the convict. The President does not give reasoning for issuing this order. Even if we imagine a hypothetical situation in which the President uses the opinion of the Pardoning Committee as an argument for pardoning a prisoner, his/ her decision substantially remains a humanist act. The specific circumstances of this or any other hypothetical or real situation are, in a manner of speaking, accidental.

As stated above the fact that there was no *de facto prospect for release* in cases of life imprisonment without the right to substitution and the subsequent violation of Article 3 of the ECHR in Bulgaria

36 Criminal Code of the Republic of Bulgaria (1968, amended 2017)

37 See Markov P, Scope of the Presidential pardon in "Iuridichesko spisanie na Nov bulgarski univerisitet" (2012)

was ruled in the case of Harakchiev and Tolumov v. Bulgaria. In Hungary the case was Laszlo Magyar v. Hungary. Pardoning Committees, which make recommendations for pardon based on the correctional process in individual cases were established in both countries. However, the proper functionality of these institutions remains in question. After the Magyar case, Hungary modified the country's Penal Code and allowed the reexamination of the case and possible conditional release after the prisoner has served 40 years of his/her sentence. Further, in the particular case of Mr. Laszlo Magyar, the Supreme Court of Hungary disregarded the function of the new Pardon Committee, due to its discretionary nature (and in the light of the ECtHR requierements) and senenced Laszlo Magyar to life imprisonment with conditional release after 40 years (at the earliest)[38] These actions resulted in the second finding of a violation of Article 3 by the EctHR in the case of T.P and A.T. v. Hungary where the 40-year rule was considered to be in contradiction with the Convention.

Turning to Bulgaria, despite the fact that the Court found that after the establishment of the Pardon Committee and the modifications in the Criminal Code there is *de facto* prospect of release, one can argue about the proper functioning of the pardoning procedure. It is important to note that the EctHR underlined, that the conclusion about the compliance with the European standards is valid only on the condition that the present and the future vice President continues to exercise his/her power with compliance to the newly established procedure in the country.
The following practice demonstrates a rare possibility to compare two very similar cases in which the vice President acted completely discretionary and without taking in consideration the recommendations made by the Committee.
The case in question concerns two individuals who committed a burglary of a Change Burro and murdered two guards. The actual murderer was guided by his accomplice who wanted to kill one of the guards for the personal motive of jealousy. In 2014 (with Decree no. 129) the physical murderer was pardoned and given a substitution of ordinary life sentence after 17 years in prison. The Commission confirmed a positive correctional process. A year later with the same recommendation for pardon by the Committee, the accomplice's petition for clemency was refused.[39]

38 Károly Bárd and Petra Bárd, The European Convention on Human Rights and the Hungarian Legal System. In: Silvija Panović-Đurić (Ed.) Comparative Study on the Implementation of the ECHR at the National Level. 186 p., Belgrade: Council of Europe, 2016. Pp. 147-166. (ISBN:978-86-84437-85-5)' <https://www.academia.edu/31960608/Petra_B%C3%A1rd_K%C3%A1roly_B%C3%A1rd_The_European_Convention_on_Human_Rights_and_the_Hungarian_Legal_System._In_Silvija_Panovi%C4%87-%C4%90uri%C4%87_ed._Comparative_Study_on_the_Implementation_of_the_ECHR_at_the_National_Level._186_p._Belgrade_Council_of_Europe_2016._pp._147-166._ISBN_978-86-84437-85-5_> accessed 7 June 2020.

39 Margaritova-Vuchkova S, 'СЪОТВЕТСТВИЕ НА НАКАЗАНИЕТО ДОЖИВОТЕН ЗАТВОР С ЧЛ. 3 НА ЕВРОПЕЙСКАТА КОНВЕНЦИЯ ЗА ПРАВАТА НА ЧОВЕКА' (2014) XXI Юридически сборник 31 <https://www.ceeol.com/search/article-detail?id=547411> accessed 7 April 2020, p 426

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CONCLUSION

In conclusion, I will briefly note that this text in no way suggests that the right to pardon should be abolished or completely replaced, and that adapting it to meet the requirements of the ECHR makes it inadequate with regard to the requirements of the court and with regard to the constitutional rights of the president and the principle of separation of powers. The mere sentence life imprisonment without possibility to parole often requires not pardon but “substitution”, which can be granted only as a humanitarian act. Further on, the notion of mercy, by its definition, is in contradiction with the idea of legal procedure and is an entirely discretionary action.

From all that has been said so far, it seems to me that the requirements of Article 3 of the ECHR cannot be consistently complied with if life imprisonment without parole is retained as a punishment. Even in the presence of a mandatory review of the case, the judiciary is powerless to overrule or replace the sentence already given. This decision, in order to be a consequence of a logically consistent chain, could not depend on an entirely humanistic and hypothetical institution.

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