Milica KOLAKOVIĆ-BOJOVIĆ, PhD*,
Institute for Criminological and Sociological Research,
Senior Research Fellow

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LIFE IMPRISONMENT AND PAROLE IN SERBIA – (UN) INTENTIONALLY MISSED OPPORTUNITY[1]

Triggered by the cruel rape and murder of a 15-year-old girl in July 2014, the public campaign was launched in order to change penal policy for a sexual violence committed against children in Serbia. Widely supported by general public, but strongly disputed by legal experts and professionals, amendments to the Criminal Code have been adopted in May 2019 introducing the life sentence without parole for the most serious crimes committed against children. This influenced the decision of the author to further explore how this public policy action fits to the relevant international standards, but also to the framework built based on the ECtHR interpretation of the Art. 3 of the ECHR in terms of the life prison. Aware of the current lack of public debate and the initiatives to improve relevant provisions of the Criminal Code, this paper shads a light on the gaps in human rights protection, especially in terms of the rehabilitation and reintegration of prisoners as the undetachable element of a purpose of punishing.

Key Words: penal policy, life sentence, conditional release, parole, evidence-based policy making

* e-mail: kolakius@gmail.com

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1. Introduction

Amended nine times in 13 years since it came into the force in 2006, the Criminal Code of Serbia[2] (hereinafter: CC) has uncovered a clear lack of the penal policy course on a side of policy makers in Serbia. The trend of frequent changes, together with their questionable coherence and often obvious contradictions, could only be partially explained by the need and pressures to, within the framework set by the legislator in 2005, accommodate all requirements of newly adopted international standards or requirements arising from the negotiation process with European Union (hereinafter: EU), but rather triggered by factors different from the real needs and scientific evidence gathered through the theoretical and empirical research and agreed among academic and professional community. It could be frequently heard that, these factors which trigger penal policy in Serbia could be found on the ground of populist policy-making.

In order to explore, to what extent these claims are valid or not, we decided to analyze the recent amendments to the Criminal Code in light of the relevant international standards dealing with penal policy and enforcement of penal sanctions, to check their compatibility with the directions developed based on the synergy of academic expertise and the best practices and further interpreted through the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR). Considering that, when the picture is clear in term of how the particular part of the penal policy should look from the stand point of the legally binding instruments, the next, very important step, was to look for the best modalities of the penal policy to address the challenges and shortcomings typical for the Serbian society, but within the previously explored legal standards and ECtHR jurisprudence. Taking this into account, we also explored on how the CC amendments fit to the penal policy attitudes of the scientific, professional and NGO community in Serbia.

For this step, expertise of the academic community and professionals is of the key importance. Inputs coming from these sources should be considered all together, having in mind the different angles of their views (legal theory, empirical researches, court jurisprudence and the treatment of prisoners). In parallel, there is an NGO community which should not be left behind considering its dedication to human rights defending. However, policy inputs coming from this source should be taken more carefully and overview through the lens of professionals, having in mind that the human rights activism does not necessarily mean an expertise, but rather dedication to certain topis and/or issues.

2 Official Gazette of the Republic of Serbia, no. 85/05, 88/05 - corrected, 107/05 - corrected, 72/09, 111/09, 121/09, 104/13, 108/14, 94/16 and 35/19.

2. Recent Amendments to the Criminal Code

Despite the fact that the significant changes have been brought into the Serbian penal system by the Amendments to the Criminal Code of Serbia adopted in May 2019,[3] the greatest attention of professional and the general public was attracted by the introduction of a life sentence[4], which has replaced a sentence of imprisonment from 30 to 40 years (that used to be maximum penalty), but also by the removal of a parole for certain crimes- mostly (sexual) violence against children.

More precisely, according to Article 46 of the newly amended CC "**the court shall release on parole** a convicted person who has served two thirds of the prison sentence if in the course of serving the prison sentence he has improved so that it is reasonable to assume that he will behave well while at liberty and particularly that he will refrain from committing a new criminal offence until the end of the imposed prison sentence. In deliberating whether to release the convicted person on parole, consideration shall be given to his conduct during serving of the sentence, performance of work tasks relative to his work abilities, and other circumstances indicating that the convicted person will not commit a new criminal offence during release on parole. A convicted person who was given two sanctions for serious disciplinary offences or whose awarded benefits that have been withdrawn shall not be released on parole." In addition to the described above, following the same requirements "**the court may release on parole** a person imposed to a life sentence, but who has served twenty-seven years or convicted of the most serious crimes, namely, crimes against humanity and other right protected by international law (Articles 370 through 393a), sexual criminal offences (Articles 178 through 185b), criminal offence of offences domestic violence (Article 194, paragraph 2 to 4), criminal offence of unlawful production and circulation of narcotics (Article 246 paragraph 5), criminal offences against the constitutional order and security of the Republic of Serbia (Article 305 through 321),

3 E.g. "three strikes principle" which seems to result in controversial grooving in prison population wherever applied.

4 CC (art. 43) recognizes five types of penal sanctions: 1) Life sentence; 2) Imprisonment; 3) Fine; 4) Community service; 5) Revocation of driver's license. While life sentence and imprisonment may be pronounced only as principal sanctions, a fine, community service and revocation of driver's license may be pronounced as principal and as secondary sanctions. If several sanctions are prescribed for a single criminal offence, only one may be pronounced as principal sanction. (art. 44) According to Article 44a of CC, in exceptional cases, life sentence may be pronounced along with imprisonment, for the most severe criminal offences and the most severe forms of severe criminal offences. A life sentence cannot be pronounced to a person who, at the time of commission of a criminal offence is less than twenty-one years of age. A life sentence cannot be pronounced in cases when the law sets forth that a penalty can be mitigated (Article 56, paragraph 1, item 1) or when there is basis for acquittal.

criminal offence of taking bribe (Article 367) and criminal offence of giving bribe (Article 368); or convicted by special departments of competent courts, in proceedings administered in line with the competence defined by the law, governing the organization and competence of state authorities in combating organized crime, corruption and terrorism; or finally convicted more than three times to an imprisonment but none of the convictions were deleted or the requirements for the deletion were not met." This Court decision on the parole may be preconditioned by the fulfilment of any of the obligations specified in Article 73[5]

However, despite the decision of the legislator to keep the possibility for the convicted person to request parole even for the most serious crimes listed above, or even for convicted to a life prison, according to the amendments (Article 46(5)), **the parole is not applicable to those who committed** an aggravated murder of a child of pregnant woman (Article 114((1)9)), rape with a fatal consequence (Article 178(4)), sexual intercourse with a helpless person with a fatal consequence (179 (3)), sexual intercourse with a child with a fatal consequence (Article 180(3)) and sexual intercourse by abuse of position with a fatal consequence (Article 181(5)). For these crimes, a ban on conditional release was introduced, regardless of the sentence that was imposed - whether it was an imprisonment for a certain period of time, or it was a matter of a life sentence.

Such amendments were preceded by short, but intensive (un)official public debate and unanimously unsupported by scientific and professional community, who were explaining that such a course is not in line with the relevant international standards. In the absence of round tables and conferences to discuss this issue in depth, (un)expectingly, the representatives of the policy makers (the Ministry of Justice and the National Parliament) transferred this debate in media representing it using populist narratives on the fight for children wellbeing vs. monsters and killers. This depersonalization of the persons accused of committing (doubtless serious) crimes against children, resulted in the remodeling of the public discourse where anybody publicly speaking about proposed amendments was expected to speak from the position "*pro* or *contra* monsters", rather than based on scientific or professional evidence.

5 1) Reporting to competent authority for enforcement of protective supervision within periods set by such authority; 2) Training of the offender for a particular profession; 3) Accepting employment consistent with the offender's abilities; 4) Fulfillment of the obligation to support family, care and rising of children and other family duties; 5) Refraining from visiting particular places, establishment or events if that may present an opportunity or incentive to re-commit criminal offences; 6) Timely notification of the change of residence, address or place of work; 7) Refraining from drug and alcohol abuse; 8) Treatment in a competent medical institution; 9) Visiting particular professional and other counselling centers or institutions and adhering to their instructions; 10) Eliminating or mitigating the damage caused by the offence, particularly reconciliation with the victim of the offence.

3. What should be considered as a relevant evidence to guide the life sentence related penal policy?

This question could, but should not be answered impulsively prior to look at the relevant provisions of Serbian Constitution. Why is that? Partially, due to earlier mentioned theoretical disputes related to the relevance and (non)hierarchy of evidences in social sciences, but mostly, due to pretty obvious unclearness related to formal, legal character of some evidence against its unformal/guiding/consultative nature. It still seems that a large number of citizens, and even the legal professionals still do not understand the very nature and (non)obligatory status of a certain international legal instruments, consider them to be more like a source of standards and/or guidelines rather than sources of legally binding instruments.

In accordance with the Serbian Constitution[6] (art. 194), the Serbian legal and institutional system is governed by the Constitution, ratified international treaties and generally accepted principles of international law and Serbian laws. Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. (art. 16) Since the art. 167 provides that the Constitutional Court shall decide on the compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties, it's clear that national legislation is subordinated to the ratified international treaties and generally accepted principles of international law that are, as the integral part of the domestic legal order, directly applicable by Serbian authorities, together with the provisions of the domestic legislation.

What does it mean in the practice, when it comes to rendering the decisions by judiciary? According to art. 142. par. 2 of the Constitution, courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international treaties. Even listed following the different order compared with hierarchy of the sources of law, they are still all there. However, according to art. 145. par.2, court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law, which means (if we read this article separately from the previously listed articles), that the court decisions cannot be based on the generally accepted rules of international law. However, it seems that is rather omission of the legislator than the intention not to introduced it after clearly included in arts. 16, 142 and 194.

6 Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/06).

Serbia has ratified the main international human rights instruments (universal and regional) relevant for the penal policy. Among others, Serbia has ratified the main UN instruments such as the International Covenant on Civil and Political Rights[7], International Convention on the Elimination of All Forms of Racial Discrimination[8], Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9], Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Convention on the Rights of the Child[10], Convention for Protection of all Persons from Enforced Disappearances.[11]

The jurisprudence of the international human rights treaty bodies is of great relevance in terms of the penal policy standards[12] in parallel with the set of non-binding/guiding (so called- soft law) instruments[13] developed to facilitate implementation of the legally binding instruments and they should be taken into account when developing penal policy.

In addition to this, Serbia has ratified relevant regional legal instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms followed by its protocols[14] (therefore, the Serbian authorities are also guided by the ECtHR jurisprudence) and European Convention

7 International Covenant on Civil and Political Rights (Official Gazette of the SFRY – International Treaties, no. 7/71)

8 International Convention on the Elimination of All Forms of Racial Discrimination (Official Gazette of the SFRY – International Treaties, no. 31/67)

9 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette of the SFRY – International Treaties, no. 9/91).

10 UN Convention on the Rights of the Child (Official Gazette of the SFRY – International Treaties, nos. 15/90 and 2/97; Official Gazette of the FRY no. 7/02).

11 Convention for Protection of all Persons from Enforced Disappearances (Official Gazette RS– International Treaties, no. 1/11)

12 UN Committee against Torture (CAT), the UN Human Rights Committee (HRC), UN Committee on Enforced Disappearances (CED), the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Committee on the Elimination of Discrimination against Women (CEDAW), UN Committee on the Rights of a child (CRC).

13 Among others, Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of The United Nations High Commissioner for Human Rights Geneva, 2004, Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by General Assembly resolution 45/110 of 14 December 1990, Committee on the Rights of the Child General Comment No. 24 (2019), replacing General Comment No. 10 (2007) on children's rights in juvenile justice, Geneva, 18 September 2019; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990.

14 European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the SaM – International Treaties, no. 9/03).

for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[15], but also a various CoE treaties which deals with the rights and the protection of particularly vulnerable categories such as children, victims of a family violence, war crime victims, etc.[16] As mentioned for the universal instruments, important role in developing penal policy also play non-binding instruments and jurisprudence of the regional treaty bodies.[17]

Further to the aforementioned international instruments, by the ratification of the Stabilisation and Association Agreement (hereinafter: SAA)[18] Serbia committed itself to align its legislation and practices with relevant EU instruments that are not subject to ratification. Therefore, these instruments are not legally binding yet- however, Serbia has committed itself to align its policy (legislation and practice) with them.

To conclude, in addition to the directly applicable ratified international treaties which, according to the Constitution constitute an integral part of the national legal system, there is a many source of standards which, in the absence of their binding character, but also due to the fact that they have been developed based on the best comparative practices and the expert knowledge, should be considered as the superior evidence to frame the national penal policy.

4. International standards- is it the sentencing of life imprisonment without the possibility of parole prohibited *per se*?

The answer to the question raised in the tittle of this chapter is rather simple: The only human rights treaty standards that refer specifically, to life impri-

15 Law on Ratification of the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as amended by Protocol 1 and Protocol 2 to the Convention, "Official Gazette of Serbia and Montenegro - International Agreements", no. 9/2003.

16 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg, 25.I.1974; Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence (Official Gazette of the SaM – International Treaties, no. 12/13); Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence (Official Gazette of the SaM – International Treaties, no. 12/13); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007 (Lanzarote Convention).

17 e.g. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum. Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules[III], Adopted by the Committee of Ministers on 11 January 2006, at the 952nd meeting of the Ministers' Deputies and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies)

18 Stabilization and Association Agreement, available at: https://www.mei.gov.rs/eng/documents/agreements-with-eu/stabilisation-and-association-agreement, last accessed on August 13rd 2020.

sonment concern the use of life imprisonment without the possibility of release is Article 37 of the UN Convention on the Rights of the Child (hereinafter: CRC) which prohibits life imprisonment without the possibility of parole for offences committed by people below the age of 18: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."[19] Considering the status of the CRC in the legal system of Serbia, this provision could be directly applied even in the absence of the earlier mentioned Article 44 of the CC which prohibits life sentence to be imposed to a person below twenty one years of age.

However, following the principle that not everything which is not explicitly forbidden, automatically allowed under any conditions, there are several important provisions of the international standards to be followed, together with the jurisprudence of the treaty bodies.

Therefore, also directly applicable and instructive in terms of the right to be released is the Rome Statute of the International Criminal Court, which ensures that parole is available even in cases of a life imprisonment imposed for the gravest crimes: war crimes, crimes against humanity and genocide. Article 110(3) of the Statute provides that sentences of life imprisonment, which is the maximum sentence available to the court, must be reviewed by the Court when the person has served two-thirds of the sentence, or 25 years in the case of life to determine whether it should be reduced. "Such a review shall not be conducted before that time." As earlier described, even this requirement has been followed by the Article 46 of the CC.

In addition to these two instruments which directly address the issue of a life sentence, this issue can be also approached through the general human rights standards, more precisely, through the prohibition of the inhuman or degrading treatment, as referred in Article 10(1) of the International Covenant on Civil and Political Rights[20] (hereinafter: CCPR) which states: "All deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[21] Article 10(3) of the CCPR tackles this issue from the very

19 UN Convention on the Rights of the Child (Official Gazette of the SFRY – International Treaties, nos. 15/90 and 2/97; Official Gazette of the FRY no. 7/02).

20 International Covenant on Civil and Political Rights (Official Gazette of the SFRY – International Treaties, no. 7/71)

21 "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

purpose of a penal sanction, stipulating that the "penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." This has been underlined in the Nelson Mandela Rules[22] saying that "persons deprived of their liberty shall retain their non-derogable human rights and all other human rights and fundamental freedoms, recalled that the social rehabilitation and reintegration of persons deprived of their liberty shall be among the essential aims of the criminal justice system, ensuring, as far as possible, that offenders are able to lead a law-abiding and self-supporting life upon their return to society." The Rule 107 of the Mandela Rules emphasizes that "from the beginning of a prisoner's sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner's rehabilitation and the best interests of his or her family". Furthermore, provisions of the arts. 88-89, 93, 96, 102, of the Mandela Rules govern the way on how the rehabilitation and reintegration should be fostered.

5. ECHR jurisprudence, life imprisonment and Art. 3 of the Convention

European Court of Human Rights has established a comprehensive and clear jurisprudence toward the life imprisonment sentence in the context of (non) breaching Art. 3 of the Convention.

The very first issue raised by the Court was an **allowance/prohibition of the life imprisonment itself.** In this regard, the Court has a strong position that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see *Kafkaris*, cited above, § 97, and references cited therein), provided that it is not grossly disproportionate (see *Vinter and Others*, cited above, § 102). The same position was reiterated in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.

However, this does not mean that the parties to the Convention are free to prescribe in their national legal systems a life imprisonment without fulfilling any further conditions without breaching the Art. 3 of the Convention. Contrary,

22 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015.

the ECtHR has developed a set of clear and comprehensive criteria to be met in order to comply with the Art. 3 of the Convention in relation with *de iure* and *de facto* status of the life imprisonment. As the Court has found in *Vinter and Others* that **a life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review**, both of which must exist from the imposition of the sentence (see *Vinter and Others*, cited above, §§ 104-118 and 122). The same position Court took in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.[23]

When it comes to the prospect to release, probably, the most important requirement of the Court is a **reducibility of the life sentence *de iure* and *de facto*.** According to the ECtHR, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see *Kafkaris*, cited above, § 97). A life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98, and *Vinter and Others*, cited above, § 108).[24] In practice, this means that's not enough to include legal guarantees and mechanisms in the national legislation- they need to prove their functionality in practice. This opens further of issue of **whether the life sentence is reducible *de facto***. In assessing whether the life sentence is reducible *de facto* it may be of the relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon (see *Kafkaris*, cited above, § 103; *Harakchiev and Tolumov*, cited above, §§ 252 and 262; and *Bodein*, cited above, § 59).[25]

One of the issues that have been frequently raised by the Court is a **minimum time period elapsed before review is done.** In T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 42. the Court recalled that in *Bodein v. France* (no. 40014/10, 13 November 2014) it was called upon to examine the French system of reducibility of whole life sentences, in particular whether the possibility of a review of life sentences after thirty years of imprisonment remained compatible with the criteria established in *Vinter and Others*. In finding that it did, the Court gave particular weight to the fact that the starting point for the calculati-

23 In the Pethukov v. Ukraine, the main focus of the case at hand was the clemency route. The Court therefore analysed whether the applicant in this case had at his disposal a real "prospect of release" through the opportunity to obtain presidential clemency. Ultimately, it found that he did not, and found that Ukraine had breached Article 3 as a result. (Petukhov v. Ukraine (No. 2), 12. March 2019, No. 41216/13)

24 The same in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.

25 *Ibidem*.

on of the whole-life term under French law included any deprivation of liberty, that is to say, even the period spent in pre-trial detention. Since the applicant in that case was thus able to apply for parole twenty-six years after the imposition of his life sentence, the Court concluded that the punishment in his case was to be considered reducible for the purposes of Article 3 (see *Bodein*, cited above, § 61). Also, in par. 45, the Court noted that forty years during which a prisoner must wait before he can for the first time expect to be considered for clemency is a period significantly longer than the maximum recommended time frame after which the review of a life sentence should be guaranteed, established on the basis of a consensus in comparative and international law (see *Vinter*, cited above, § 120). It is also hardly comparable with the twenty-six-year period that the applicant in *Bodein* had to wait before being eligible to apply for parole (see § 42 above and *Bodein*, cited above, § 61).

In addition to the prospect to release itself, the Court has addressed a **type of review procedure, mostly from the perspective- judicial or non-judicial.** Therefore, the Court concluded that it is for the States to decide – and not for the Court to prescribe – what form (executive or judicial) that review should take (see *Kafkaris*, cited above, § 99, and *Vinter and Others*, cited above, §§ 104 and 120).[26] Consequently, the most frequently analysed mechanism was **a presidential clemency.** The Court has held that presidential clemency may thus be compatible with the requirements flowing from its case-law (see *Kafkaris*, cited above, § 102).[27] "In order to guarantee proper consideration of the changes and the progress towards rehabilitation made by a life prisoner, however significant they might be, the review should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided" (Petukhov v. Ukraine § 178). Here, the lack of any obligation to provide reasons for the clemency decision was a factor in finding a breach, which was further aggravated by a lack of access to judicial review (Petukhov v. Ukraine § 177-179)

When it comes to the requirements to be followed in order to keep review procedure in line with the Art. 3, the prisoner's right to a review entails an actual assessment of the relevant information, based on objective, pre-established criteria, accompanied by sufficient procedural guaranties. Thus, a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" as formulated in the *Kafkaris* judgment (see *Vinter and Others*, cited above, § 127, and *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04,

26 *Ibidem*.

27 *Ibidem*.

6201/06 and 10464/07, § 203, 18 March 2014). A Chamber of the Court held in a recent case that the assessment must be based on objective, pre-established criteria (see *Trabelsi v. Belgium*, no. 140/10, § 137, ECHR 2014 (extracts)). The prisoner's right to a review entails an actual assessment of the relevant information (see *László Magyar*, cited above, § 57), and the review must also be surrounded by sufficient procedural guarantees (see *Kafkaris*, cited above, § 105, and *Harakchiev and Tolumov*, cited above, § 262).[28] Furthermore, an access to judicial review on whether conditions and reasons (not) to be released needs to be known to prisoners. To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided, and this should be safeguarded by access to judicial review (see *László Magyar*, cited above, § 57, and *Harakchiev and Tolumov*, cited above, §§ 258 and 262).[29] The Court also required that any prisoners should be able to have "precise cognisance" (*Trabelsi v Belgium* at [137]) of the conditions determining their release, from the outset of their sentence. Whilst the Ukranian rules provided "some guidance" (Petukhov v. Ukraine § 173) the Court was concerned with the vagueness of terms like "exceptional cases" and "extraordinary circumstances", as well as a lack of clarity concerning the applicable tariff period (Petukhov v. Ukraine § 175-176). This was enough to create a situation where "prisoners who receive a whole life sentence do not know from the outset what they must do in order to be considered for release and under what conditions" (Petukhov v. Ukraine § 174).

In *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 100, the Court has found that a prisoner cannot be detained unless there are legitimate penological grounds for incarceration, which include punishment, deterrence, public protection and rehabilitation. While many of these grounds will be present at the time when a life sentence is imposed, the balance between these justifications for detention is not necessarily static and might shift in the course of the execution of the sentence. The penological grounds for the life prison vary through the time- not necessary exist al the time. Therefore, review process should provide for periodical check of their existence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence, that these factors or shifts can be properly evaluated (*Vinter and Others*, cited above, § 111). The review required in order for a life sentence to be reducible should therefore allow the domestic authorities to consider whether, in the course of the sentence, any changes in the life prisoner and progress

28 *Ibidem.*

29 *Ibidem.*

towards his or her rehabilitation are of s uch significance that continued detention is no longer justified on legitimate penological grounds (ibid., § 119). This assessment must be based on rules having a sufficient degree of clarity and certainty (ibid., §§ 125 and 129; see also *László Magyar v. Hungary*, no. 73593/10, § 57, 20 May 2014, and *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 255, 257 and 262, ECHR 2014 (extracts)) and the conditions laid down in domestic legislation must reflect the conditions set out in the Court's case-law (see *Vinter and Others*, cited above, § 128). and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38. It is illustrating that, exploring the system of presidential clemency which exists in Ukraine, the Court concluded that this mechanism was "based on the principle of humanity, rather than… penological grounds" (Petukhov v. Ukraine, §180).

In line with the Court's position regarding penological grounds for the reduction of the life imprisonment is Finally, the principle strongly endorsed in *Murray v the Netherlands*, establishing that prisoners "cannot be denied the possibility of rehabilitation" and thus the state has "a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation" ([181]). Effectively, this means that the state must ensure, whatever conditions it chooses to set for prisoner release, that these conditions are obtainable in practice and that prisoners retain "a chance, however remote, to someday regain their freedom" (*Harakchiev and Tolumov v Bulgaria* at [264]). Given that the Applicant in the current case faced total segregation for 23 hours a day, the Court doubted whether he could ever have a legitimate opportunity to prove to the authorities that any of the penological grounds necessary for his release had been met (*Petukhov,* § § 182 and 183).

To summarize the previous elaboration of the relevant ECtHR jurisprudence as one of the most relevant evidence to feed the life imprisonment related penal policy:

The life imprisonment itself is not prohibited and necessarily incompatible with the Article 3 of the Convention. A life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist from the imposition of the sentence. A life sentence has to be reducible *de iure* and *de facto* through the review which should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided. Access to judicial review on whether conditions and reasons (not) to be released have to be pre-established, objective and known to prisoners. Those reasons and conditions should be based on legi-

timate penological grounds and the review process itself should be accompanied by sufficient procedural guaranties. Since the penological grounds for the life prison vary through the time/ not necessarily exist all the time a review process should provide for periodical check of their existence, starting no later than (approx) 25 years from the deprivation of a liberty. Considering this, prisoners cannot be denied the possibility of rehabilitation and thus the state has a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation.

6. Conclusions

Considering all what have been said of the requirements defined in the international standards against the provisions of the recently amended Criminal Code, it hard to find a scientific or professional evidence in favor of the decision to exclude the right to parole for the certain category of prisoners in situation where there is no a substitute mechanism established in order to ensure properly that all of the substantial elements of the purpose of a penalty (special and general prevention, but also rehabilitation and reintegration) are granted in practice.

This brings us to the two questions: Why such a provision has been introduced in the CC at all and how the current legal gap between relevant evidence and the CC provisions could be bridged?

Answer to the first question may look a less important since the damage has been already accrued. However, we do see an important difference between scenarios where such a decision was made due to ignorance and the omission of the policy makers to consult scientific and professional community prior to accept the proposal coming from the literally one NGO built on the serious tragedy of the family which lost the child due to sexual assault and murder and the intentional decision to put aside all relevant evidence that needs to be taken into account in the process of policy making. If established as a practice, this second scenario leads far away from democratic processes and the evidence-based policy making.

It seems that there are two possible ways out of this situation- to admit the mistake and to go into the process of a new amendments as soon as possible or to wait for the first decision of the ECtHR (which will certainly come sooner or later). Aware of the sensitivity of the decision to initiate new amendments since the admission of the mistakes is not so desirable at the political level, we are afraid that this decision is going to wait for the “external instruction” of the ECtHR.

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