

*Natalia Daško<sup>1</sup>**Nicolaus Copernicus University in Toruń*

## **Irreducible life imprisonment - a few comments on the new institution of the ban on conditional release from serving the rest of the life sentence in the Polish criminal law**

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**Summary:** This article concerns the prohibition of conditional early release from serving the remainder of a life sentence, which was introduced into the Polish Criminal Code. The so-called "irreducible life imprisonment" is a violation of the prohibition of inhuman treatment under the Convention for the Protection of Human Rights and Fundamental Freedoms, as the European Court of Human Rights has repeatedly reminded. The author presents selected case law of the Court in this regard and analyzes it in terms of Polish solutions. As a result, she comes to the conclusion that the adopted solutions not only contradict the Convention, but also have no substantive justification in view of the systematically falling crime rate in Poland, constituting only and exclusively the implementation of a new, repressive and populist criminal policy.

**Keywords:** criminal law, criminal code, conditional early release, life imprisonment, irreducible life imprisonment, torture, inhuman treatment, human rights, ECHR.

**„Nieredukowalne dożywocie” - kilka uwag na temat nowej instytucji zakazu warunkowego przedterminowego zwolnienia z odbycia reszty kary dożywotniego pozbawienia wolności w polskim prawie karnym (streszczenie).** Niniejszy artykuł dotyczy zakazu warunkowego przedterminowego zwolnienia z odbycia reszty kary dożywotniego pozbawienia wolności, który został wprowadzony do polskiego kodeksu karnego. Tzw. „Nieredukowalne dożywocie” jest naruszeniem zakazu niehumanitarnego traktowania w świetle Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności, o czym wielokrotnie przypominał Europejski Trybunał Praw Człowieka. Autorka przedstawia wybrane orzecznictwo Trybunału w tym zakresie i analizuje je pod kątem polskich rozwiązań. W efekcie dochodzi do wniosku, że przyjęte rozwiązania są nie tylko sprzeczne z Konwencją, ale również nie mają żadnego uzasadnienia merytorycznego przy systematycznie spadającej przestępczości w Polsce, stanowiąc tylko i wyłącznie realizację nowej, represyjnej i populistycznej polityki kryminalnej.

**Słowa kluczowe:** prawo karne, kodeks karny, warunkowe przedterminowe zwolnienie, dożywotnie pozbawienie wolności, nieredukowalne dożywocie, tortury, niehumanitarnie traktowanie, prawa człowieka, ETPC.

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<sup>1</sup> Dr Natalia Daško – Assistant Professor of Department of Criminal Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, e-mail: [ndasko@umk.pl](mailto:ndasko@umk.pl), ORCID: 0000-0001-9122-4883.

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The last, major amendment to the Penal Code<sup>2</sup>, which can be boldly called revolutionary, implements the new criminal policy of the current authorities, which is expressed primarily in a drastic increase in the repressiveness and severity of the criminal law. Extensive changes cover both the general and specific parts of the Penal Code, including the tightening of penal sanctions for a significant number of crimes, the introduction of new types of aggravated crimes (e.g. five new types of aggravated rape), lowering the age of criminal responsibility of minors to 14 years in the case of committing a prohibited act specified in art. 148 § 2 or 3 of the Penal Code (aggravated homicide), extending the institution of extraordinary severity of punishment, eliminating the penalty of 25 years of imprisonment, while extending the upper limit of the term penalty to 30 years, modifying the principles and directives of the penalty, including the removal of the "educational purpose of the penalty", introduction of a penal measure in the form of the forfeiture of a motor vehicle driven by the perpetrator of certain crimes against safety in land traffic or the forfeiture of its equivalent and, above all, which this text will be devoted to, the introduction of the institution of a ban on parole from serving the rest of the life sentence.

In the Polish criminal law, the institution of conditional early release from serving the rest of the prison sentence is optional and may apply to convicts for whom there is a positive criminological prognosis, and their further isolation is not necessary. Conditional early release is always for a trial period. According to Article 77 § 1 of the Penal Code: „The court may conditionally release a person sentenced to the penalty of deprivation of liberty from serving the remainder of the penalty, but only if it is reasonable to expect, due to this person's demeanour, characteristics, personal conditions, the circumstances of the commission of the crime and the behaviour after committing the crime and while serving the penalty, that after the release this person will comply with the imposed penal measure or protective measure and will respect the legal order, especially by not committing a crime”. As a rule, pursuant to Article 78 § 1 of the Penal Code, a convict may be conditionally released after serving at least half of the sentence, however, in the case of some convicts, including those sentenced to life imprisonment, the legislator has envisaged stricter restrictions. Until now, Article 78 § 3 of the Penal Code provided that a person sentenced to life imprisonment could be conditionally released after serving 25 years of the sentence, under the amendment this period was extended to 30 years.

The Polish criminal law provides that in particularly justified cases, the court, imposing a penalty of imprisonment, may impose stricter restrictions on the convict's use of conditional release (art. 77 § 2 of the Penal Code), e.g. it may stipulate that a person sentenced to life imprisonment may be released on conditional release after serving at least 35 years of the sentence. Such reservations appear in exceptional cases, e.g. when the convict is particularly demoralized, not susceptible to social rehabilitation, or the crime he committed was extremely brutal, committed in a drastic way, or when the need to satisfy the sense of justice so requires (Konarska-Wrzosek, 2020, art. 77 t. 6 and the case law cited therein).

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<sup>2</sup> The Act of 7 July 2022 r. o z Amendments to the Law - Criminal Code and Certain Other Laws (Journal of Laws 2022, item 2600), hereinafter: the July 7, 2022 amendment. Most of the regulations, including the ban discussed here, were supposed to go into effect on March 14, 2023, but this date has been moved to October 1.

Under the amendment of 7 July 2022, the institution of the prohibition of conditional early release from serving the remainder of a life sentence was introduced. The prohibition is optional and may be imposed in two cases.

The first one applies to perpetrators who were previously validly sentenced for a crime against life and health, freedom, sexual freedom, public safety or for a terrorist offense to life imprisonment or imprisonment for a minimum period of 20 years. When imposing the penalty of life imprisonment on these perpetrators, the court may prohibit their parole (new Article 77 § 3 of the Penal Code). The court may also order a prohibition of conditional early release from serving the rest of the life sentence, when the nature and circumstances of the act and the personal characteristics of the perpetrator indicate that his remaining at large will cause a permanent threat to the life, health, freedom or sexual freedom of other persons (new Article 77 § 4 of the Penal Code).

In the explanatory memorandum to the bill, not much attention was paid to explaining the need to introduce the institution of a ban on conditional early release from serving the rest of a life sentence in these specific cases. The drafters only indicated in general terms that: "The view should be expressed that in the event of a life sentence for a crime committed after a valid conviction for a crime against life and health, freedom, sexual freedom, public security or for a terrorist offense to a life sentence or a prison sentence for not less than 20 years, it is difficult to assume that the perpetrator could take advantage from such a benefit (...) The ban on parole is intended to effectively protect society against particularly brutal crimes committed by persons who have already committed such acts in the past, and in the court's opinion there is a high probability which they will commit them again. The proposed solution should therefore be applied to the most dangerous perpetrators, in the case of whom both justice and preventive considerations speak against parole. In such cases, the elimination aspect of the custodial sentence is of primary importance"<sup>3</sup>.

This kind of argumentation should be considered inaccurate and simply populist. Conditional early release may be granted only when certain statutory conditions are met, and these are not only formal conditions, i.e. serving the part of the sentence specified by the law or court, but above all material conditions, i.e. a positive criminological forecast, which was mentioned earlier. Consequently, the institution of conditional early release does not in itself create a guarantee of such release on the part of the convict, and on the part of the court, the obligation to apply it. Serving a specific part of the sentence itself entitles the convict only to submit an application for early conditional release, and whether the court will accept this application or not depends on the conviction of the penitentiary court regarding the convict's criminological prognosis, if in the court's opinion this prognosis is negative, it is obvious that the application will not be considered (Konarska-Wrzosek, 2020, art. 77, t. 3).

The legislator's intervention motivated by the alleged need to "effectively protect the society against particularly violent crimes" was therefore unnecessary, because the mere possibility of applying for parole does not create a risk that a "particularly violent offender", unfit for life in freedom, will leave prison. This kind of argumentation of the drafters can only be interpreted as an attempt to win over the votes of the public opinion, after all, it is known that for a layperson who is ignorant of the realities of the court, unfamiliar with the provisions

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<sup>3</sup> Explanatory memorandum to the bill on 7 July 2022 r., Sejm paper no. 2024, pp. 37-38.

of criminal law and the conditions that must be met by the convict in order to be granted early parole, the prohibition of such release in the case of "particularly violent offenders" may seem justified.

The justification of the prohibition of the conditional release should also be assessed unequivocally on the grounds of the project promoter's belief that a person previously convicted by a final judgment for certain offenses to life imprisonment or to imprisonment for a period of not less than 20 years "by assumption" would rather not benefit from conditional early release. . Even if life experience shows that this may indeed be the case in many cases, it is impossible to assume *a priori* that social rehabilitation of such perpetrators is not possible at all, because there are always exceptions in life, and moreover, it is not the legislator, who speaks only in abstract terms, who is supposed to assess whether such a benefit is due to the convict or not, it is for this to be an independent court that has a specific person before it and makes decisions based on specific data.

In light of the well-established case law of the European Court of Human Rights, an irreducible life sentence is a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup>, which prohibits torture and inhuman or degrading treatment or punishment. In its September 4, 2014 judgment in *Trabelsi v. Belgium*, the Court emphasized that: „(...) Article 3 does not prevent life prison sentences from being, in practice, served in their entirety. What Article 3 does prohibit is that a life sentence should be irreducible *de jure* and *de facto*. Secondly, in determining whether a life sentence in a given case can be regarded as irreducible, the Court seeks to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3”<sup>5</sup>. It follows unequivocally that a life sentence in itself does not infringe art. 3 of the Convention, however, there has to be a procedure in domestic law allowing the convicted person to apply for a review of the legitimacy of its continued execution after a certain period of time, depending on his social rehabilitation progress. The Court also emphasized that the gravity of the offense or its circumstances may not preclude the possibility of applying for parole in the future<sup>6</sup>.

In *Vinter and Others v. United Kingdom*, the Court emphasized that: „ In the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. (...) Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his

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<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14

<sup>5</sup> ECHR judgment of 4.09.2014, 140/10, *TRABELSI v. BELGIUM*, LEX nr 1500623.

<sup>6</sup> *Ibidem*.

sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration”<sup>7</sup>. It should be emphasized that in the opinion of the Tribunal, art. 3 of the Convention is not affected by serving a life sentence in its entirety, because if the convict was refused early release from serving the remainder of the sentence, guided by considerations of protecting society, because the convict is still dangerous, has not made any or significant social rehabilitation progress, then it is most justified<sup>8</sup>.

It is worth emphasizing the position of the Tribunal that, already at the moment of imposing a life sentence, a convict must be aware of the existence of a mechanism to control its execution in the future and must know the principles of this mechanism, therefore he must know what he can do to influence his fate.

An irreducible life sentence is a violation of the prohibition of inhuman treatment under the Convention, because it deprives a person of any hope that his situation will change in the future. In this case, no work on oneself, participation in classes, therapy is of any importance, since nothing can influence further detention (Płatek, 2018). Taking hope away from convicts may also lead to an increase in aggressive behavior towards prison officers or fellow inmates, which would stop such a hopeless convict from, for example, killing a fellow prisoner or guard, since his situation cannot change anyway. At the same time, the prohibition of parole may carry the risk of an increase in suicide attempts by prison inmates.

On the contradiction of irreducible life imprisonment with art. 3 of the Convention, the Court has expressed its opinion on numerous occasions, e.g. in *Öcalan v. Turkey*<sup>9</sup>, *László Magyar v. Hungary*<sup>10</sup>, *Hutchinson v. The United Kingdom*<sup>11</sup>, *Harakchiev and Tolumov v. Bulgaria*<sup>12</sup>, *Murray v. The Netherlands*<sup>13</sup>, *Matiošaitis and Others v. Lithuania*<sup>14</sup>.

Under the Polish regulations, the prohibition of conditional early release is contrary to Article 3 of the Penal Code stating that the penalties and other measures provided for in the Penal Code are applied taking into account the principles of humanitarianism, in particular with respect for human dignity, as well Article 30<sup>15</sup> and 40<sup>16</sup> of the Constitution of the Republic of Poland. The principle of humanitarianism prohibits adjudicating penalties that violate human dignity, and such a penalty is life imprisonment without the possibility of conditional early release (Zaleski, 2021, art. 3, nb. 50-51). The principles of humanitarianism also do not allow for the use of general prevention in the negative sense, i.e. deterring other potential perpetrators

<sup>7</sup> ECHR (Grand Chamber) judgment of 9.07.2013 r., 66069/09, *VINTER AND OTHERS v. THE UNITED KINGDOM*, LEX nr 1424788.

<sup>8</sup> Ibidem; see more: Nowicki, 2021, art. 3.

<sup>9</sup> ECHR judgment of 18.03.2014 r., 24069/03, *ÖCALAN v. TURKEY*, LEX nr 1436124.

<sup>10</sup> ECHR judgment of 20.05.2014 r., 73593/10, *MAGYAR v. HUNGARY*, LEX nr 1460574.

<sup>11</sup> ECHR judgment of 3.02.2015 r., 57592/08, *HUTCHINSON v. THE UNITED KINGDOM*, LEX nr 1621694.

<sup>12</sup> ECHR judgment of 8.07.2014 r., 15018/11, *HARAKCHIEV I TOLUMOV v. BULGARIA*, LEX nr 1495585.

<sup>13</sup> ECHR (Grand Chamber) judgment of 26.04.2016 r., 10511/10, *MURRAY v. THE NETHERLANDS*, LEX nr 2023798.

<sup>14</sup> ECHR judgment of 23.05.2017 r., 22662/13, *MATIOŠAITIS I INNI v. LITHUANIA*, LEX nr 2288991.

<sup>15</sup> The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

<sup>16</sup> No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.

by imposing severe penalties, disproportionate to the seriousness of the act, unjust, i.e. treating the perpetrators as "scares", "show convicts" (Zaleski, 2021, art. 3, nb. 50-51; Konarska-Wrzosek, 2020, art. 53, nb. 35; Biuro Studiów i Analiz Sądu Najwyższego, 2021, pp.15-16).

The draftsman was certainly aware that the prohibition of conditional early release from the rest of the life sentence violates the guarantees under art. 3 of the Convention, this issue has been raised many times in the literature on the subject (Pilch, 2018, pp.35-50; Nita-Światłowska, 2017, pp. 27-33; Zaleski, 2021, art. 3, nb. 50-51), as in the opinions prepared to the draft of this act (Biuro Studiów i Analiz Sądu Najwyższego, 2021; Rzecznik Praw Obywatelskich, 2022) and to the previous draft of the act, also providing for such a ban in a similar form (Rzecznik Praw Obywatelskich, 2019; Płatek, 2018; Napiórkowski, 2018).

It is all the more surprising that when justifying the increase in the period after which, according to the new wording of art. 78 § 3 of the Criminal Code, it will be possible to conditionally release a person sentenced to life imprisonment, the drafter referred to the jurisprudence of the European Court of Human Rights, specifically the case of *Bodein v. France*<sup>17</sup>, in which the ECHR stated that the provisions of French law, which provide for three options the freedom of a person sentenced to life imprisonment, i.e. pardon by the president, release for "humanitarian" reasons related to the prisoner's health condition and the possibility of applying for early parole after 30 years of imprisonment do not violate Article 3 of the Convention. However, in this judgment the ECHR clearly reminded that a violation of Article 3 of the Convention is the lack of provision in domestic law for the possibility of reducing the penalty of life imprisonment under conditions previously known to the convicted person, on the basis of clearly defined premises (Warecka, 2014). It is worth emphasizing that, according to the jurisprudence of the Tribunal, the latter requirement is not met by the law of clemency as too discretionary, entirely discretionary, not based on any premises<sup>18</sup>.

At the same time, it should be recalled that in the judgment of October 4, 2016, *T.P. and A.T. v. Hungary*<sup>19</sup>, the Court held that the provisions of Hungarian law which allowed a life sentence prisoner to apply for parole only after 40 years violated Article 3 of the Convention, as it *de facto* deprived the prisoner of any hope of release. It is obvious that setting such a long period, after which it is possible to apply for conditional release, makes it in fact only apparent. It is worth noting that under the Polish regulations, i.e. art. 77 § 2 of the Penal Code, which allows, in particularly justified cases, to set stricter restrictions on the convict's use of conditional release, the jurisprudence pointed out that the imposed restriction should not in fact eliminate the possibility of early release, i.e. that it should not be of a purely apparent nature<sup>20</sup>. In the literature on the subject, it was emphasized that the conviction of a middle-aged man should be treated as an illusory chance of going free, with the proviso that he will be able to take advantage of conditional early release after 40 or 45 years (Konarska-Wrzosek, 2020, art. 77 t. 7). In the above-mentioned judgment, *T.P. and A.T. v. Hungary*, the Court noted that most Council of Europe States provide for a period of 25 years as required to obtain the right to apply

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<sup>17</sup> ECHR judgment of 13.11.2014 r., 40014/10, *BODEIN v. FRANCE*, LEX nr 1537689.

<sup>18</sup> See ECHR judgment of 20.05.2014 r., 73593/10, *MAGYAR v. HUNGARY*, LEX nr 1460574 or ECHR (Grand Chamber) judgment of 26.04.2016 r., 10511/10, *MURRAY v. THE NETHERLANDS*, LEX nr 2023798.

<sup>19</sup> ECHR judgment of 4.10.2016 r., 37871/14, *T.P. I A.T. v. HUNGARY*, LEX nr 2116810.

<sup>20</sup> Order of the Polish Supreme Court of 8.01.2014 r., IV KK 253/13, LEX nr 1428331; Judgment of the Court of Appeal in Wrocław of 30.08.2016 r., II AKa 154/16, LEX nr 2139392.

for parole, and that such a period is compatible with Article 3 of the Convention. Therefore, the extension of this period under the Polish regulations to 30 years should be critically assessed, because there is no substantive justification for such a long period

The changes adopted in the Polish Penal Code regarding the conditional early release from serving the rest of the life sentence are in clear contradiction to the Convention, they have no substantive justification, after all, crime in Poland is systematically decreasing, and the exclusions are only the implementation of a new, repressive criminal policy, openly populist, based on the lowest standards, i.e. creating fear of "particularly violent criminals" and "solving" created "problems" by tightening the severity of the criminal law in order to gain support from the public opinion (See more: Filar, 2011, pp. 7-12).

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