

ANITA NAGY

Conditional release

Introduction

The European Court of Human Rights has condemned Hungary for its adoption of real life imprisonment (also known as whole life imprisonment¹), and in response to this criticism, Hungary has made modifications to its Presidential pardon system. Before considering the new provision in greater detail, it is helpful to take a more general look at the Presidential pardon.

As is now well understood, a connection exists between prison overcrowding and the available methods of release from prison. In Hungary release from prison can occur in several ways:

- completion of the term of imprisonment
- conditional release
- interruption of imprisonment (temporary)
- presidential pardon
- reintegration custody (from 1 April 2015).

The Presidential pardon is a discretionary power. There are two types of Presidential pardon; a public pardon known as amnesty, and an individual pardon. Each of these can further be divided into two categories, procedural and enforcement pardons.

The public pardon can be granted by the Parliament² and applies to a certain group of either the accused or the imprisoned. Further, an amnesty

¹Case of Magyar v. Hungary, 73593/10 – Judgement (Third Section) 20, May 2014

² Váczy, P. (2013): *Kegyelem! A közkegyelem intézményéről és a semmisségi törvényekről* [Pardon! About the institute of amnesty and the rules of nullity]. In:

is usually connected with observing symbolic or political events, for instance, in order to commemorate the death of Imre Nagy, a public pardon was granted to a number of prisoners in honour of his death. However, this article focuses on the system for individual presidential pardons in Hungary.

The Procedure for an Individual Presidential Pardon

According to article 9, paragraph (4), section (g) of the Fundamental Law of Hungary, the President of the Republic has the right to grant individual pardons³.

“The President of the Republic shall (g) exercise the right to grant individual pardon.”

The minister responsible for justice is responsible for the following:

- 1) Preparing the case, with the help of the Pardon Department, and
- 2) Endorsing or countersigning the decision made by the President.

There are two ways to initiate the pardon procedure: it can be requested, or it can be initiated through official channels. In the case of a petition, the prisoner, the defence lawyer, the legal representative of a minor, or a relative of the accused or prisoner can apply for a pardon. Under these circumstances the petition for a pardon must be submitted to the court of first instance.

Upon submission, the court gathers the necessary documents, for instance the opinion of the probation officer, environment survey, police reports, and the opinion of the penitentiary institution. The court then sends the documents (the charge, the sentence, medical reports, and a pardon form⁴) to the minister within thirty days.

Tanulmányok a 70 éves Bihari Mihály tiszteletére. Universitas-Győr Nonprofit Kft., Győr, 553

³ Case of Magyar v. Hungary, 73593/10 – Judgement (Third Section) 20, May 2014

⁴ Decree of Ministry of Justice 11/2014. (XII. 13.) Section 123

But what happens when the minister does not support the application for a pardon? When this is the case, the minister is required to send the documents to the President of the Republic, as well as the minister's negative opinion. If there are medical reasons, it is possible for the minister to postpone or interrupt the punishment.

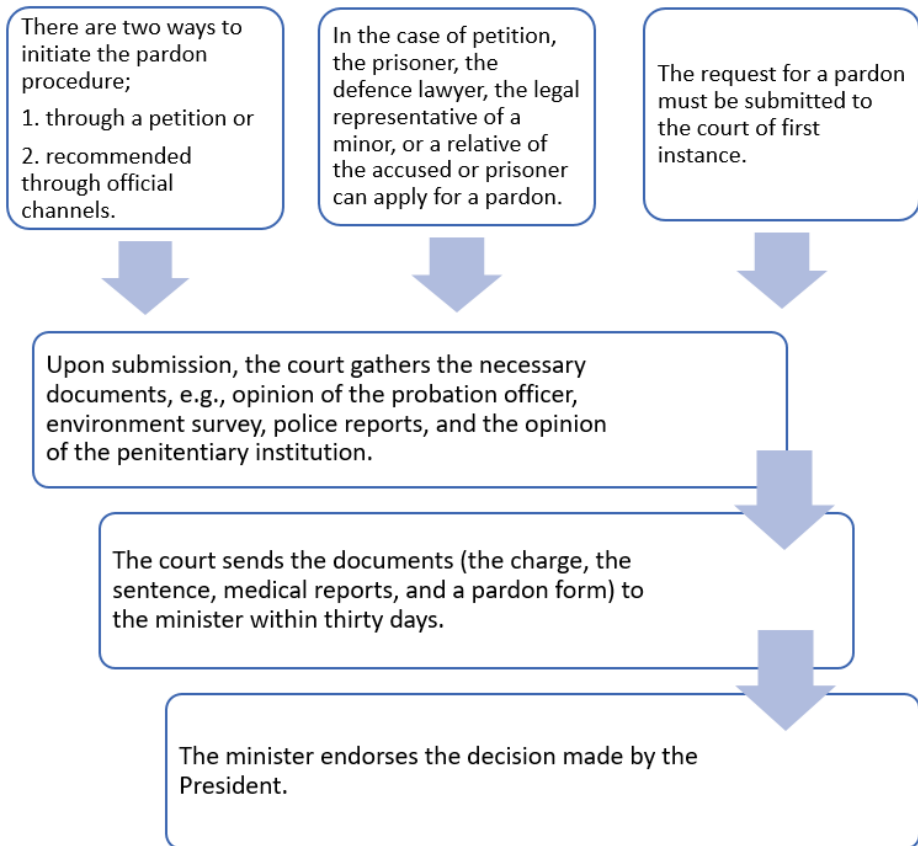


Figure 1
Flow chart of the procedure for a presidential pardon
Edited by the author

What does a declaration of pardon entail?

In the case of imprisonment, the text reads, for example, “*the remainder of the punishment is suspended for X years on probation.*” Further, the President’s decision consists of a number of different features:

- 1) Above all, the president has discretionary power to decide.
- 2) The President of the Republic shall not discuss the reasons for granting or denying a pardon.
- 3) The opinion of the minister does not bind the president, and
- 4) The decision becomes effective only with the endorsement of the minister.

Conditional release vs real life imprisonment

Most states that have abolished the death penalty have accepted life imprisonment as an appropriate alternative.

From March 1, 1999 the sentence of ‘real life imprisonment’⁵ came into force in Hungary⁶. According to paragraph 44 (1) of the Penal Code of Hungary, real life imprisonment is applicable to a list of certain types of cases. In eighteen cases the judge can use his/her judgement, including the following: genocide, crimes against humanity, apartheid, etc. In two cases,

⁵ Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole) recommends: a “..., the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners.” A life-sentence prisoner is one serving a sentence of life imprisonment.

⁶ Act IV of 1978 Section 45 on the Hungarian Criminal Code, as in force since 1 March 1999, provided as follows: “(1) If a life sentence is imposed, the court shall define in the judgment the earliest date of the release on parole or it shall exclude eligibility for parole. (2) If eligibility for parole is not excluded, its date shall be defined at no earlier than 20 years. If the life sentence is imposed for an offence punishable without any limitation period, the above-mentioned date shall be defined at no earlier than 30 years.” As in force at the material time and until 30 June 2013 when it was replaced by Act C of 2012 on the Criminal Code: “Imprisonment shall last for life or a definite time.”

real life imprisonment is compulsory⁷: a) multiple recidivism with violence, or (b) those who committed the crimes from the list above in a criminal organization. In another case when a person sentenced to life imprisonment commits a further crime, they are sentenced to life imprisonment again. In this case the actual sentence must be real life imprisonment⁸.

The European Court of Human Rights in the Case of Vinter and others v. The United Kingdom⁹ emphasizes: “... *there are currently nine countries where life imprisonment does not exist: Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum term of imprisonment in these countries ranges from twenty-one years in Norway to forty-five years in Bosnia and Herzegovina. In Croatia in a case of cumulative offences, a fifty-year sentence can be imposed.*

In the majority of countries where a sentence of life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by law. Such a mechanism, integrated within the law and practice on sentencing, is foreseen in the law of thirty-two countries: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium (15 with an extension to 19 or 23 years for recidivists), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (normally 18 but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20 unless the court orders otherwise), Ireland (an initial review by the Parole Board after 7 years except for certain types of murders), Italy (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25), Sweden (10), Switzerland (15 years reducible to 10 years), the former Yugoslav Republic of Macedonia (15), and Turkey (24 years, 30 for

⁷ Act C of 2012 on the Hungarian Criminal Code Section 44 (2)

⁸ Act C of 2012 on the Hungarian Criminal Code Section 45 (7)

⁹ Case of Vinter and others v. The United Kingdom, 66069/09, 130/10 and 3896/10 – Judgement (Third Section) 9 July 2013

aggravated life imprisonment and 36 for aggregate sentences of aggravated life imprisonment) ”.

There are five countries in Europe which make no provision for conditional release for life prisoners: Iceland, Lithuania, Malta, the Netherlands and Ukraine. These countries do, however, allow life prisoners to apply for commutation of life sentences by means of ministerial, presidential or royal pardon. In Iceland, although it is still available as a sentence, life imprisonment has never been imposed.

In addition to England and Wales, there are six countries which have systems of parole but which nevertheless make special provisions for certain offences or sentences in respect of which parole is not available. These countries are: Bulgaria, Hungary, France, Slovakia, Switzerland and Turkey.

Long-Term Imprisonment and Human Rights

There is a range of legal instruments defined by international organizations with provisions that either address the treatment and protection of persons deprived of their liberty or have relevance for this group of the population because they have a more general approach and regulate a variety of situations¹⁰. The prohibition of torture and inhuman or degrading punishment or treatment is not only a prominent right in the Universal Declaration of Human Rights (UDHR)¹¹, the International Covenant on Civil and Political Rights (ICCPR)¹² but it is also part of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR)¹³ as well as the purpose of the Convention against Torture and Other Cruel, Inhuman

¹⁰ Drenkhahn, K. (2014): International rules concerning long-term prisoners, In: Long-Term Imprisonment Human Rights, Drenkhahn, Kirstin, Dudeck, Manuela and Dünkel, Frieder (Eds.), Routledge, 31

¹¹ UDHR, GA Res 217A (III), 10 December 1948

¹² ICCPR, GA Res 2200A (XXI), 16 December 1966, entry into force 23 March 1976

¹³ ECHR, 4 November 1950, CETS 005, entry into force 3 September 1953

or Degrading Treatment or Punishment (UNCAT)¹⁴ and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)¹⁵.

In the European Union the rules on long-term imprisonment are primarily concerned with the protection of human rights of prisoners and originate from the Council of Europe and its bodies and not from the European Union (EU). Even so, there have been significant developments with regard to human rights protection in the EU. In 2009 the Charter of Fundamental Rights¹⁶ of the EU entered into force together with the Treaty of Lisbon, which means that there is now a legally binding set of human rights provisions for the EU by the EU (ART.6 (1) of the Treaty of the European Union¹⁷). However, the relevance of the Charter for prisoners' rights is still at best limited because although it addresses the EU institutions, bodies, offices and agencies and the member states, they are only bound by the Charter when they are implementing EU law (Art.51 (1)). There was admittedly an attempt to instigate the drafting of a European Charter of Prisoners' Rights by the European Parliament in 2004 and a resolution that called for strengthening prisoners' rights in 2011, but there is still no EU law on the treatment of prisoners¹⁸.

Then main actor in the promotion of human rights on the European level has been the Council of Europe, which consists of 47 member states including all EU member states. All Council of Europe member states have signed and ratified the ECHR. This Convention is the basic legal text of the Council of Europe as the protection of human rights is, in addition to the

¹⁴ UNCAT, GA Res 39/46, 10 December 1984, entry into force 23 March 1987

¹⁵ ECPT, 26 November 1987, CETS 126, entry into force 1 February 1989

¹⁶ EU Charter of Fundamental Rights (2010/C 83/02) on 7 December 2000, updated version of 12 December 2007, entry into force 1 December 2009

¹⁷ Treaty of Lisbon (2007/C 306/01) of 13 December 2007, entry into force 1 December 2009

¹⁸ European Parliament Recommendation to the Council on the rights of prisoners in the European Union (2003/2188(INI), 9 March 2004, P5_TA(2004)0142, European Parliament resolution on detention condition in the EU (2011/2897(RSP), 15 December 2011, P7_TA(2011)0585

development of democracy in Europe, the main aim of this organisation. Not only does the ECHR grant all persons within the jurisdiction of the signatory states individual rights and freedoms, it also provides for an individual complaints procedure (Art.34 ECHR) that may be instigated by any person, non-governmental organization or group of individuals who claim that their rights laid down in the ECHR have been violated by a state party. There are two additional mechanisms for substantiating good as well as undesirable practices in prison and thus for setting standards: *Recommendations to member states* and the work of the European Committee (CPT) for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments. The CPT was set up under Art.1 ECPT and started to work in late 1989 (CPT 1991:§7). The ECPT provides that the CPT as a mentoring body shall be established and regulates the CPT's organisation, competence and work. The most important recommendation concerning the conditions of confinement for long-term prisoners are Rec(2006)2 on the European Prison Rules (EPR) and Rec (2003)23 on the management by prison administration of life sentence and other long-term prisoners (Rec. on long-term prisoners). Among the wide range of recommendations concerning the deprivation of liberty, recommendation Rec(82)17 concerning custody and treatment of dangerous prisoners, Rec(82)16 on prison leave and Rec.(2003)22 on conditional release are the most relevant ones.

The CPT fulfils its preventive task through visits to all places within the jurisdiction of member states where persons are deprived of their liberty. It has unrestricted access to these places and may talk to inmates in private (Art.8 ECPT). After the visit the CPT enters into dialogue with the state party about its findings and any consequences in the state. The Committee drafts a report of the delegation's observations with recommendations to the state party. Although the ECtHR and the CPT have different missions, the ECtHR uses the work of the CPT and has relied on visit reports in cases of alleged violation of Art.3 ECHR.

Whole life sentences and European human rights jurisprudence

In the context of a life sentence, Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*” This 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. However, the European Court of Human Rights would emphasize that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, “the comparative and international law materials before [the Court] show clear support for the institution of a dedicated mechanism guaranteeing a review *no later than twenty five years* after the imposition of a life sentence, with further periodic reviews thereafter.” It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention¹⁹.

In the Case of Kafkaris v Cyprus²⁰, the ECtHR held that there had been no violation of Article 3 of the Convention. Concerning the length of the detention, while the prospect of release for prisoners serving life sentences in Cyprus was limited, this did not mean that life sentences in Cyprus were irreducible with no possibility of release. On the contrary, such sentences were both *de jure* and *de facto* reducible. A number of prisoners serving

¹⁹ Life imprisonment, In: Factsheet ECtHR October 2015, 1

²⁰ Case of Kafkaris v. Cyprus 21906/04-Judgement (Third Section) 12 February 2008

mandatory life sentences had been released under the President's constitutional powers and life prisoners could benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Accordingly, although there were shortcomings in the procedure in place and reforms were under way, the applicant could not claim that he had been deprived of any prospect of release or that his continued detention – though long – constituted inhuman or degrading treatment²¹.

In the Case of Vinter and others v. The United Kingdom²² the Grand Chamber of the European Court of Human Rights ruled that all offenders sentenced to life imprisonment had a right to both a prospect of release and review of their sentence. Failure to provide for these twin rights meant that the applicants had been deprived of their right under Article 3 of the European Convention on Human Rights to be free from inhuman or degrading treatment or punishment. The judgement stated *“If a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable”*.

Two principles established in this judgement require changes in the enforcement of whole life orders that prevent some prisoners sentenced to life terms from being considered for release.

- 1) Implicit in the right to a prospect of release is a right to an opportunity to rehabilitate oneself.
- 2) Implicit in the right to review of the continued enforcement of life sentence is a right to review that meets standards of due process²³.

²¹ Life imprisonment, In: Factsheet ECtHR October 2015, 1

²² Case of Vinter and others v. The United Kingdom, 66069/09, 130/10 and 3896/10 – Judgement (Third Section) 9 July 2013

²³ Smit, D. van Z., Weatherby, P., Creighton, S. (2014): Whole life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done? Human Rights Law Review 14, 59

The impact of this case: it does not prohibit actual whole life imprisonment for adult offenders convicted for murder in the light of Article 3 of the ECHR. Rather, it prohibits life imprisonment for adults only if there is no clarity under which conditions and when there is the possibility of reducibility of the sentence.

Since the Grand Chamber made this judgment, the issue of whole life orders has returned to the Court of Appeal of England and Wales in the case of *McLoughlin*²⁴. The Court found that the Secretary of State's discretion was limited to "exceptional grounds", which must be read in a way that is compatible with Article 3 of the ECHR. The Court was, therefore, of the opinion that English law did present the possibility of release even where a whole life order had been imposed and so did not violate the ECHR .

In 2015, the ECtHR in the Case of *Hutchinson v. UK*²⁵ confirmed that imposing whole life sentences on prisoners does not breach Article 3, where the national court in *McLoughlin* determined that the law in England and Wales is clear as to "possible exceptional release of whole-life prisoners" by the Secretary of State. Note, however, that life without parole still violates Article 3, and "whole life sentences" have to allow the possibility of release.

In the Case of *Magyar v Hungary*²⁶ the European Court of Human Rights held that the sanction of life imprisonment as regulated by the respondent state, which is *de jure* and *de facto* irreducible, amounts to a violation of the prohibition of degrading and inhuman punishment as prohibited by Article 3 ECHR. This is because it denies the convict any hope of being released in the future.

²⁴ *R v. McLoughlin, R v. Newell*: Court of Appeal, Criminal Division [2014] EWCA Crim 188, Criminal Justice Act 2003 (procedure for setting minimum terms of imprisonment in relation to mandatory life sentences)

²⁵ Case of *Hutchinson v. United Kingdom* 57592/08 3- Judgement (Third Section) February 2015

²⁶Case of *Magyar v. Hungary*, 73593/10 – Judgement (Third Section) 20, May 2014

The judgment was challenged by the Hungarian government, but the request for referral to the Grand Chamber was rejected. The judgment became final in October 2014. The Court reinstated its previous case law and as a point of departure emphasized that the imposition of life sentences on adult offenders for especially serious crimes such as murder is not in itself prohibited by or incompatible with the ECHR (paragraph 47). The Court pointed out that there were two particular but related aspects to be analysed. First, the ECHR will check whether a life sentence was *de jure* and *de facto* reducible. If so, no issues under the Convention arise (paragraphs 48-9). Second, in determining whether a life sentence was reducible, the Court will ascertain whether a life prisoner had any prospect of release. Where national law affords the possibility of review of a life sentence, this will be sufficient to satisfy Article 3, irrespective of the form of the review²⁷. Prisoners are entitled to know at the start of their sentence what they must do to be considered for release and under what conditions, including the earliest time of review (paragraph 53). The government tried to argue that the possibility of presidential pardon made the execution of the sentence in practice reducible, but the ECHR did not accept this argument²⁸. The Court also noted that the human rights violation

²⁷ Life-sentence prisoners should not be deprived of the hope to be granted release. Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the detention of persons who have no hope of release poses severe management problems in terms of creating incentives to co-operate and address disruptive behaviour, the delivery of personal development programmes, the organisation of sentence-plans and security. Countries whose legislation provides for real life sentences should therefore create possibilities for reviewing this sentence after a number of years and at regular intervals, to establish whether a life-sentence prisoner can serve the remainder of the sentence in the community and under what conditions and supervision measures. In: Explanatory Memorandum on Recommendation (2003)22 on conditional release (parole).

²⁸ The Government submitted that the applicant's life sentence was reducible both *de iure* and *de facto*; he had not been deprived of all hope of being released from prison one day. They argued that his sentence was therefore compatible with Article 3 of the Convention.

was caused by a systemic problem, which may give rise to similar applications, and therefore suggested a legislative reform of the review system for whole life sentences.

Hungary took two important steps in its response to the ECHR judgment:

1. It introduced a mandatory pardon procedure, where a convict has spent 40 years of his sentence,
2. It established a Pardon Committee.

Table 1 Guides us through what the compulsory pardon procedure actually entails, step by step²⁹.

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| <ol style="list-style-type: none">1. Convict has served 40 years of his/her sentence (and has declared that he/she wishes to request the compulsory pardon procedure)³⁰2. The minister must carry out the procedure within 60 days3. The minister informs the leader of the Curia, who appoints the five members of the Pardon Committee.³¹4. The majority opinion must be made within 90 days³² in an oral hearing (examining medical status, behaviour, risk ranking, etc.).5. The opinion must be sent to the President within 15 days, and the President then decides whether to grant the pardon. The final step is the endorsement of the minister responsible for justice. |
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²⁹ Made by Nagy, A. Associate Professor, University of Miskolc, Faculty of Law, Institute of Criminal Sciences, 12 June 2015, Miskolc MAB in Memory of Prof. Dr. Tibor Horváth Conference

³⁰ Act CCXL of 2014 on the Hungarian Criminal Enforcement Code Section 46/B

³¹ Act CCXL of 2014 on the Hungarian Criminal Enforcement Code Section 46/D

³² Act CCXL of 2014 on the Hungarian Criminal Enforcement Code Section 46/F

6. If a pardon is not granted at this time, the procedure must be repeated in two years.³³

Table 1
The compulsory pardon procedure
Edited by the author

Regarding the declaration of the ECHR, the Hungarian Constitutional Court made a declaration on April 17, 2014 (No. III/00833/2014) and a council of the Curia (Büntető Jogegységi Tanácsa) issued a declaration on July 1, 2015 (No. 3/2015. BJE).

Regarding the compulsory Presidential pardon procedure, these declarations stated that the Hungarian legal system now was in compliance with the requirements set forth by the European Court of Human Rights.

Conclusion

A new system for a compulsory presidential pardon procedure has been put into place to comply with the ECHR requirements. However, it can be argued that these measures are not sufficient to meet the requirements of the ECHR, because the requirement for the *endorsement of the minister responsible for justice* introduces a political element into the decision to grant a pardon.

Secondly, neither the Minister of Justice nor the President of the Republic had to *give reason* for their decision about such requests.

Thirdly, the ECtHR said, ... “ *the comparative and international law materials before the Court show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty five years after the imposition of a life sentence, with further periodic reviews thereafter ...* ”, but in Hungary it is 40 years.

³³ Act CCXL of 2014 on the Hungarian Criminal Enforcement Code Section 46/H