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CONSEQUENCES OF INTRODUCING THE POSSIBILITY OF IMPOSING AN IRREDUCIBLE LIFE SENTENCE INTO THE CRIMINAL CODE WITH REGARD TO EXTRADITION AND THE EXECUTION OF THE EUROPEAN ARREST WARRANT

TOMASZ TYBURCY*
PIOTR ROGOZIŃSKI**

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Abstract

The Act of 7 July 2022, amending the Act – Criminal Code and certain other acts, introduced the possibility of imposing a sentence of life imprisonment without parole into the Criminal Code. The legislator provided for two grounds for the optional imposition of an irreducible life imprisonment sentence. The first (Article 77 § 3 of the Criminal Code) is based on formal grounds: a previous conviction for a specific type of crime (against life and health, freedom, sexual freedom, public security, or of a terrorist nature) to life imprisonment or imprisonment for a term of not less than 20 years. The second ground (Article 77 § 4 of the Criminal Code) operates on a substantive condition: the nature and circumstances of the act and the personal characteristics of the perpetrator indicate that the perpetrator's remaining at liberty would pose a permanent danger to the life, health, freedom, or sexual freedom of others. This article posits that the provisions of Article 77 § 3 and 4 of the Criminal Code are incompatible with Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment. As a result of the introduction of this type of punishment in Polish law, we may

* LLD, Faculty of Legal, Administrative and Security Sciences, Warsaw Academy of Applied Sciences (Poland), e-mail: tyburcy@vp.pl, ORCID: 0000-0001-8549-6460.

** LLD, Faculty of Law and Administration, University of Gdańsk (Poland) , e-mail: piotr.rogozinski@wp.pl, ORCID: 0000-0002-4052-2482.

unfortunately realistically expect other states to refuse to hand over individuals prosecuted for crimes punishable by such punishment or those already sentenced to such punishment.

Keywords: life imprisonment, life imprisonment without parole, parole, conditional release, prohibition of conditional release, European arrest warrant, extradition

INTRODUCTION

The Act of 7 July 2022 amending the Act – Criminal Code and certain other acts[1] constitutes the largest amendment to the 1997 Criminal Code. Its primary objective is to tighten criminal liability for the most serious crimes, particularly those against life, health, liberty, sexual freedom, and those committed by perpetrators of traffic accidents while intoxicated, under the influence of narcotics, or when the perpetrator fled the scene of the accident, as well as crimes committed by recidivists. This goal is achieved by changing the system of sanctions, i.e., by eliminating the type-separated penalty of 25 years' imprisonment, increasing the general upper limit of imprisonment from 15 to 30 years, raising the general limit of extraordinary aggravation of penalty from 20 to 30 years imprisonment, increasing the upper limits of sanctions for crimes punishable by 12 years' imprisonment to 15 years (up to 20 years in the case of crimes punishable by 15 years' imprisonment), raising the lower limits of sanctions for certain types of crimes, and creating new aggravated crimes (e.g., rape). The legislator also introduced the possibility of imposing life imprisonment without parole.

After the majority of the provisions of the above-mentioned act enter into force (i.e., 1 October 2023), non-reducible life imprisonment will be possible for certain crimes grouped in 'Chapter XVI Crimes against Peace, Humanity, and War Crimes' and 'Chapter XVII Crimes against the Republic of Poland', for the crimes of murder (Art. 148 § 1, 2, and 3 of the Criminal Code), intentional infliction of grievous bodily harm with fatal consequence (Article 156 § 3 of the Criminal Code), and for certain new aggravated crimes (rape) introduced in this act.[2]

In our view, this form of life imprisonment should not be termed 'absolute' life imprisonment. Indeed, any sentence of life imprisonment is absolute in nature, as it cannot be conditionally suspended. The correct term for this penalty is, therefore, 'irreducible life sentence (irreducible life imprisonment)', a term commonly used in European Court of Human Rights case law.[3]

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[1] Journal of Laws of 2022, item 2600. Most of the provisions of this law were supposed to enter into force on 14 March 2023. However, this date has been postponed until 1 October 2023.

[2] Article 197 CC:

§ 4. If the perpetrator commits rape against a minor under 15 years of age or the perpetrator of an act specified in § 1–3 acts with particular cruelty or the consequence of this act is severe damage to health, he shall be subject to imprisonment for a term not shorter than 5 years or to life imprisonment.

§ 5. If the consequence of the act specified in § 1–4 is the death of a human being, the perpetrator shall be subject to imprisonment for a term not shorter than 8 years or to life imprisonment.

[3] Cf. e.g. ECtHR judgment of 9 July 2013, *Vinter and others v. UK*, ECtHR judgment of 4 September 2014. *Trabelsi v. Belgium*.

The legislator has provided two grounds for the optional imposition of an irreducible life imprisonment sentence. The first of these (Article 77 § 3 of the Criminal Code) is based on a formal condition, i.e., a previous conviction for a specific type of crime (against life and health, freedom, sexual freedom, public security, or terrorism) to life imprisonment or a sentence of imprisonment for a term of not less than 20 years. On the other hand, the second ground (Article 77 § 4 of the Criminal Code) operates on a substantive condition, i.e., that the nature and circumstances of the act and the personal characteristics of the perpetrator indicate that the perpetrator's remaining at liberty would pose a permanent danger to the life, health, freedom, or sexual freedom of others.

The purpose of this study is to analyse the procedural consequences of introducing the penalty of life imprisonment in an irreducible form into the Criminal Code, particularly in the context of criminal proceedings in cases involving international relations. Current jurisprudence of the European Court of Human Rights (hereinafter 'ECtHR') suggests that this punishment is incompatible with Article 3 of the European Convention on Human Rights (hereinafter 'ECHR').[4] The filing of a complaint by the convicted individual will likely result in the ECtHR finding a violation of the ECHR, which, in light of Article 540 § 3 of the Code of Criminal Procedure, will be the basis for reopening proceedings in the convicted person's favour. It appears that convictions applying the provisions in question will be rare, as judges, aware of their incompatibility with Article 3 of the ECHR, are unlikely to apply them or will do so infrequently. However, this does not negate the other adverse effects of introducing these provisions for the Republic of Poland, which are independent of whether convictions under them will occur.

According to the authors, as a result of the introduction of Articles 77 § 3 and 4 of the Criminal Code, we may unfortunately realistically expect refusals to surrender persons prosecuted for crimes punishable by such a punishment or those already sentenced. It is highly probable that the procedural effect of refusal to surrender a person prosecuted under the application of active extradition *sensu largo*, both under classic extradition and the European arrest warrant (EAW), will occur with respect to suspects for crimes punishable by life imprisonment, i.e., in practice, for the crimes of murder, certain qualified types of rape, and causing grievous bodily harm with fatal consequence, or those sentenced under the application of Article 77 § 3 and 4 of the Code of Criminal Procedure.

1. INCOMPATIBILITY OF ARTICLE 77 § 3 AND 4 OF THE CRIMINAL CODE WITH ARTICLE 3 ECHR

It is aptly noted in legal literature that eliminating the possibility of conditional release absolutely precludes the achievement of one of the recognised objectives of punishment.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284.

> 'Psychiatrists, psychologists, as well as lawyers (and other specialists) highlight the impossibility of making a generally and absolutely negative prognosis regarding the convicted person in advance. This would be an expression of the assumption of absolute 'non-resocialisability'. This, in turn, is an apparent untruth, as it contradicts the concept of the human being, ontologically related to history and time, not as a 'closed being', but rather as a dynamic and constantly evolving category.'[5]

Experts in criminal law have repeatedly indicated that the introduction of the possibility of imposing an irreducible life imprisonment sentence in the Polish legal system violates Article 3 of the ECHR, which prohibits torture, inhuman or degrading treatment, and punishment. It is argued that presuming in advance that one refuses to assess the conduct of the convicted person by a body set up for that purpose renders the sentence imposed as characterised in Article 3 ECHR. This is not mitigated by the fact that the convicted person can apply for a pardon, as it is an extraordinary measure, and therefore the ECtHR has considered this type of regulation contradictory and in violation of Article 3 ECHR.[6]

Although Poland's choice of a particular system of punishment, including regulations on conditional release, is in principle outside the scope of ECHR control, the chosen system cannot violate the principles set forth in the ECHR, particularly Article 3, which prohibits torture, inhuman, and degrading treatment.

In *Vinter v. United Kingdom*[7] the European Court of Human Rights held that Article 3 of the ECHR, which prohibits inhuman or degrading punishment, must be interpreted as including a requirement of the reducibility of life imprisonment. This means an assessment allowing the national authorities to consider whether, during the course of the sentence, the convicted person's rehabilitation has progressed to such an extent that his further isolation is no longer justifiable on legitimate penological grounds.

It is highlighted in the literature that

> 'this finding was considered by the European Court of Human Rights itself as a breakthrough. In the subsequent *Trabelsi v. Belgium* judgment (judgment of 4 September 2014, 140/10, Legalis), the *Vinter* case was cited as changing the previous line of ECtHR jurisprudence. According to this line, the mere possibility of adjusting a life sentence, even subject only to the discretion of the head of state, was sufficient to consider that the requirements of Article 3 ECHR had been met'.[8]

R. Kierzynka aptly points out,

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[5] Wilk, L., 'Kara dożywotniego pozbawienia wolności a instytucje warunkowego zwolnienia i prawa łaski', *Prokuratura i Prawo*, 2008, No. 10, p. 19.

[6] Płatek, M., *Opinia prawna na temat Projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk 2154)*, pp. 20–21, https://orka.sejm.gov.pl/rexdomk8.nsf/0/EB55C-1136FABB1F0C1258232004C80B4/%24File/i331-18A.rtf [accessed on 21 November 2023]. This opinion was issued for bill in 2019, which contained a similar provision.

[7] ECtHR judgment of 9 July 2013, Application No. 66069/09, Legalis.

[8] Kierzynka, R., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 607r*, Legalis.

> 'since the *Vinter* judgment, the Strasbourg standard for commutation of a life sentence is therefore met only if the release is based on circumstances within the prisoner's control, i.e., an assessment of his attitude and behaviour. Furthermore, the Court states that a prisoner sentenced to life imprisonment must already know, at the time of the imposition of that sentence, what he must do to be considered for release and under what conditions, including the periods during which such a review would take place or could be requested. These standards are not met by a pardon, which can occur regardless of the assessment of the criminal's degree of rehabilitation. Therefore, the view must be shared that it concerns access to institutions equivalent to conditional release, as well as others, but only those to which access depends on an assessment of the attitude and behaviour of the convicted person himself'.[9]

In this context, J. Kluza's view appears incorrect. He posits that due to several judgments of the European Court of Human Rights (ECtHR) from a dozen years ago, which recognised the right of clemency of the head of state as sufficient to deem life imprisonment reducible (these were isolated judgments at that time, as the current line of jurisprudence had already prevailed), and consequently compatible with Article 3 of the ECHR, the jurisprudence of the ECtHR on this issue is not uniform.[10] However, as mentioned earlier, since the ECtHR's judgment on 9 July 2013 in the *Vinter* case, the Court's jurisprudence has been uniform. Consequently, Article 77 § 3 and 4 of the Criminal Code, in our opinion, will likely be found incompatible with Article 3 of the ECHR. It is doubtful that the ECtHR will shift its jurisprudence towards diminishing human rights protection, narrowing the established understanding of human dignity, the humanity of punishment, and the prohibition of inhuman and degrading punishment.

The Legislative Council to the Prime Minister, which gave its opinion on the draft amendment in question, aptly pointed out that

> 'the President of the Republic of Poland exercises the right of clemency in a discretionary manner, without being guided by a strictly defined set of criteria, and formally without the need to consider whether the convict (including those sentenced to life imprisonment) has achieved a sufficient degree of rehabilitation to allow his return to society. However, the case law of the European Court of Human Rights states in this context that if the provisions of national law governing the presidential right of clemency do not oblige the President to assess whether the continued imprisonment of a person sentenced to life imprisonment is justified on penological grounds, and if they do not set out the specific criteria or conditions to which the President must adhere in applying the right of clemency, and if they do not oblige the President to specify (disclose) the reasons for which he has applied or refused to apply the power of clemency, then the mere existence in national law of a presidential power of clemency is not sufficient to conclude that a sentence of life imprisonment without the possibility of parole is compatible with Article 3 of the Convention.'[11]

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[9] Ibidem.

[10] Kluza, J., 'Kara bezwzględnego dożywotniego pozbawienia wolności w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka', *Prokuratura i Prawo*, 2021, No. 1, p. 21 et seq.

[11] *Opinia Rady Legislacyjnej z dnia 29 października 2021 r. o projekcie ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (UD 281) z dnia 16 września 2021 r. i powołane tam wyroki ETPC*, https://www.gov.pl/web/radalegislacyjna/opinia-z-29-pazdziernika-2021-r-o-projekcie-ustawy-o-zmianie-ustawy--kodeks-karny-oraz-niektorych-innych-ustaw-ud-281-z-dnia-16-wrzesnia-2021-r [accessed on 21 November 2023].

It is generally accepted in ECtHR case law that the imposition of life imprisonment on an adult criminal is not incompatible with the Convention provided that it is not grossly disproportionate and if there is both the prospect of release and the possibility of a review of the sentence, both of which conditions must be met from the moment the sentence is imposed.[12]

The ECtHR stresses that a person sentenced to life imprisonment has the right to know, at the time of serving his sentence, what conditions he must fulfil to be entitled to apply for early release and under what conditions such release may take place, including the period of time to be served before he is entitled to apply for conditional release. If national law does not provide for any mechanism or possibility of review of life imprisonment, incompatibility with Article 3 already exists at the time such a sentence is imposed and not at a later imprisonment.[13]

The ECtHR takes the view that Article 3 ECHR must be interpreted as requiring the introduction of the possibility of a reduction of the sentence imposed, allowing national authorities to consider whether changes in the prisoner's life are so significant and the rehabilitation progress during the course of the sentence so substantial that further imprisonment is not justified on legitimate penological grounds. If national law does not provide for such a review, the entire sentence of life imprisonment will be incompatible with Article 3 ECHR.[14] Imposing a sentence of life imprisonment on an adult that cannot be reduced, thereby depriving that person of any hope of release, violates Article 3 ECHR.[15] A prisoner sentenced to life imprisonment should have a realistic chance of returning to society, which implies the need to guarantee such prisoners the opportunity to make progress towards early release.

If an irreducible life sentence is imposed, the convicted person may not be motivated to take steps towards his or her own rehabilitation, which could negatively impact other inmates and the state of security and order in the prison where the sentence is served. The prospect of conditional release is a very strong incentive for the convict to actively engage in the rehabilitation process. The disciplinary function of the possibility of conditional release and the fact that depriving a person of one of the most human feelings – hope – creates a situation likened to that of a 'caged animal', whose aggressiveness and desperation can only be curbed.[16]

It should be stressed that this provision does not necessitate granting the convict the right to conditional early release, but only guarantees the right to apply for it. Therefore, it is necessary to shape legal solutions concerning the execution of the sentence of imprisonment in such a way that the duration of its execution depends on the rehabilitation progress of the convicted person, including their attitude and decision to undergo rehabilitation measures, which is their right, not an obligation. Consequently, the decision not to grant conditional release must be based on

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12 ECtHR judgment of 26 April 2016, *Murray v. the Netherlands*, Application No. 10511/10.

13 ECtHR judgment of 20 May 2014, *László Magyar v. Hungary*, Application No. 73593/10; ECtHR judgment of 9 July 2013, op. cit.

14 ECtHR judgment of 3 February 2015, Application No. 57592/08.

15 ECtHR judgment of 2 September 2010, Application No. 36295/02.

16 Wilk, L., 'Kara dożywotniego…', op. cit., p. 19.

an analysis of the convicted person's situation while serving their sentence and not at the time of sentencing, as is implied by Article 77 § 3 and 4 of the Criminal Code.

In view of the incompatibility of the regulation in question with Article 3 of the ECHR, as confirmed by judgments of the ECtHR regarding analogous regulations in other countries, a Polish court imposing an irreducible life imprisonment sentence would expose itself to the application of a provision that is incompatible with higher-level regulations.

The possibility for the court to exclude the right to apply for conditional early release in the judgment reflects a profound lack of confidence in the penitentiary court and is based on the absurd assumption that the court imposing the penalty will make a better assessment of whether the convicted person's remaining at liberty, e.g., in 25 years' time, will pose a permanent threat to the life, health, freedom, or sexual freedom of others, than the penitentiary court, which will make such an assessment, e.g., after 25 years of serving the sentence.

It is rightly pointed out in the literature that it is

> 'the court possibly deciding on the question of conditional release in 25 years' time that will have relevant knowledge based on what are probably far greater diagnostic possibilities than those available to current science. Progress in medical science, particularly relating to the central nervous system and interference with brain functioning, is so rapid that it is indeed difficult to predict the possibilities in these areas in such a long time. Relying on current knowledge, therefore, as to the possibility of correcting certain features of a person's personality, with a view to a conditional release in 25 years' time, does not seem convincing. Even if such medical advances do not occur, judges adjudicating in the future will be well aware of this.'[17]

In this context, it is necessary to take the position that imposing a sentence of irreducible life imprisonment only realises the justice function of criminal law, and this in its most primitive form (revenge). The individual prevention and protective function can be fulfilled to an identical extent without imposing irreducible life imprisonment. General prevention is not achieved by irreducible life imprisonment, because potential perpetrators of crimes punishable by such a penalty will not be deterred from committing them by the fact that the penalty in question is imposed on other perpetrators. As a consequence, the normative solution introduced by the legislator appears not to meet the standards of criminal law, as it does not take into account to any extent other functions of criminal law than the justice function.

It is aptly pointed out in the literature that the process of rehabilitation of the criminal can only be successful if the convicted person actively participates in it. The prospect of parole is a very strong motivator for the convict to actively engage in the rehabilitation process. The institution of early conditional release is very

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[17] Bulenda, T., Klimczak, J., Woźniakowska-Fajst, D., 'Młodzi zabójcy skazani na karę dożywotnego pozbawienia wolności – sylwetka, czyn, polityka karania', in: Rzepliński, A., Ejchart-Dubois, M., Niełaczna, M. (eds), *Dożywotnie pozbawienie wolności. Zabójca, jego zbrodnia i kara*, Warszawa, 2017, Legalis.

important for maintaining discipline in prison. The lack of the possibility of parole causes convicts not to be sufficiently motivated to comply with the prison rules.[18]

It is also stressed that such a solution is extremely dangerous because the situation of fellow inmates and prison staff becomes difficult when a convict is deprived of hope, thereby contradicting the content of Article 67 of the Criminal Executive Code. This provision is oriented towards arousing in the convict the will to cooperate in shaping his attitudes and to abide by the law after serving the sentence.[19]

> 'The exclusion of the chances of parole distorts the sense of the work done by the penitentiary staff. Information that proper behaviour, work on oneself, participation in therapy, exemplary behaviour, rewards, no punishment, pro-social attitude – all this counts for nothing and is meaningless, has devastating effects. It damages penitentiary work, reduces security in prisons for both staff and inmates, and shows disregard for Article 40 of the Polish Constitution, Article 41(3) of the Polish Constitution, Article 53 § 1 of the Criminal Code, and also for Article 67 of the Criminal Executive Code. This solution is also contrary to Recommendation 102.2 of the European Prison Rules of the Council of Europe of 11 January 2006. Rule 102.2 points out that imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment. The *a priori* assumption that a sentenced prisoner is deprived for life of the chance to apply for conditional early release is a provision incompatible with Recommendation 102.2 of the European Prison Rules.'[20]

Therefore, there is no doubt that sentences issued based on Article 77 § 3 or 4 of the Criminal Code will be appealed to the ECtHR, which will declare Poland's violation of Article 3 of the ECHR and award compensation to the convicted person, although, as will be presented later in this article.

2. CONSEQUENCES OF THE INCOMPATIBILITY OF ARTICLE 77 § 3 AND 4 OF THE CRIMINAL CODE WITH ARTICLE 3 ECHR IN TERMS OF THE EXECUTION OF THE EUROPEAN ARREST WARRANT

There is also a serious risk that the consequence of this amendment will be that Member States will not consent to the execution of a European arrest warrant and will not be obliged to judge such perpetrators themselves. Dangerous killers, rapists, and perpetrators of grievous bodily harm with fatal consequences may find themselves at large. Indeed, the ECtHR, in its judgments in the cases of 9 July 2013, *Vinter and Others v UK*,[21] and 4 September 2014, *Trabelsi v Belgium*[22], ruled that the transfer of a suspect, even to a state not bound by the ECHR, without establishing

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[18] Zoll, A., in: Wróbel, W. (ed.), *Kodeks karny. Część ogólna. Tom I. Część II. Komentarz do art. 53–116*, Warszawa, 2016, thesis 7 to Article 77.

[19] Płatek, M., *Opinia prawna*…, op. cit., p. 21.

[20] Ibidem.

[21] Action No. 66069/09, Legalis.

[22] Action No. 140/10, Legalis.

whether and under what conditions parole would be possible in the event of a life sentence, violates Article 3 of the ECHR.

In addition, according to Article 607r § 1(6) of the Code of Criminal Procedure, 'the execution of a European arrest warrant may be refused if life imprisonment or another measure involving deprivation of liberty without the possibility of seeking a reduction of that sentence may be imposed for the crime to which the EAW relates in the country in which the European arrest warrant was issued.' The equivalents of this provision can be found in the legislation of other states, as it is an implementation of Article 5(2) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.[23] It should be noted that Article 607r § 1 point 6 of the Code of Criminal Procedure is a provision with rather general grounds for application, compared to the implemented provision. This is because it defines the negative prerequisite of its application as the lack of an opportunity to apply for a reduction of the life imprisonment sentence, while the above-mentioned provision of EU law is more precise, defining it, *inter alia*, as the right to apply for a pardon.

In the literature, two ways of interpreting the above-mentioned notion of 'opportunity to apply for its reduction', as referred to in Article 607r § 1 point 6 of the Code of Criminal Procedure, can be distinguished. The first position, which does not apply the standards arising from the ECtHR judgments (with regard to Article 3 of the ECHR), considers the right to request a pardon as a possibility to shorten such a sentence.[24] This broad understanding of the term may result from an interpretation referring to the wording of the implemented provision, which explicitly indicates that the possibility of non-application of the EAW is excluded when the suspect in the issuing state will have the right to application of measures of clemency. However, it seems that the notion of the 'application of measures of clemency' in this provision should be interpreted as such a right of clemency, the application of which is conditional on adequate progress in rehabilitation, and the convicted person at the time of sentencing to life imprisonment should be able to find out the conditions for conditional release. In Poland, however, the institution of pardon by the President of the Republic of Poland does not meet such conditions, which, in our opinion, renders the above-mentioned view erroneous.

Therefore, the opposite position, which takes into account the ECtHR case law, should be accepted. Consequently, the mere possibility of reducing the life imprisonment sentence, which depends solely on the discretion of the Head of State, is not sufficient to consider such a sentence as reducible and therefore not violating

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[23] OJ L 190, 18.7.2002, p. 1. According to its Article 5(2), if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.

[24] Steinborn, S., in: Grajewski, J. (ed.), *Kodeks postępowania karnego. Komentarz,* Vol. 2, Warszawa, 2013, pp. 864–865; Górski, A., Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 607r*, Legalis.

Article 3 of the ECHR. In Poland, the pardon takes place based on circumstances which are within the convict's control, i.e., the decision to pardon does not occur in connection with an assessment of his attitude and behaviour.[25]

If, in any of the EU countries, the equivalent of 607r § 1(6) of the Code of Criminal Procedure is also defined in such a general way (without specifying *expressis verbis* the right to clemency as the grounds for reducibility), there is a serious risk that these countries will be able to refuse to execute the European arrest warrant issued by Poland against suspects for crimes punishable by life imprisonment, i.e., crimes of murder, certain aggravated types of rape, and causing grievous bodily harm with fatal consequence. An analogous risk will arise with regard to the EU countries that have not implemented the Council Framework Decision in question.

When analysing the issue of the procedural aspect of the consequences of adopting the punishment of irreducible life imprisonment in the Polish legal system, a key issue is the extradition of perpetrators of crimes punishable by such punishment by other states to Poland. From a terminological point of view, this is the institution of extradition *sensu largo*, an aggregate term covering all types of forced surrender abroad or bringing from abroad of an accused person in order to conduct criminal proceedings against him.[26] The subject of interest here is active extradition, consisting of a request for the surrender of a criminal directed by the Polish authorities to the country where the person being prosecuted is located.[27] It includes classical extradition and the European arrest warrant.

Although the subject of the present discussion is the execution of the European arrest warrant with regard to the surrender of criminals punishable by irreducible life imprisonment, a moment's attention should also be paid to classical extradition. Extradition is an institution regulated by international conventions,[28] bilateral agreements or takes place on the principle of reciprocity. The Code norms are applied in a subsidiary manner to international agreements (cf. Article 615 § 2 of the Code of Criminal Procedure).

It should be pointed out that, in the area of interest here, the statutory regulation of active extradition provides for two prohibitions:

(1) a prohibition of prosecution, conviction or imprisonment, without the consent of the issuing State, for the purpose of executing a sentence for a crime committed before the date of surrender other than that for which the surrender occurred (Article 596 of the Code of Criminal Procedure);
(2) a prohibition of execution of penalties other than those imposed for the crimes in respect of which surrender has taken place, where it has been restricted at the

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[25] So aptly Kierzynka, R., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego…*, op. cit. Cf. also Nita-Światłowska, B., 'Możliwość orzeczenia kary dożywotniego pozbawienia wolności bez dostępu do warunkowego przedterminowego zwolnienia jako przeszkoda ekstradycyjna wynikająca z Europejskiej Konwencji Praw Człowieka', *Europejski Przegląd Sądowy*, 2017, No. 6, pp. 27–33.

[26] Cf. Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2020, p. 655.

[27] Cf. Grzegorczyk, T. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX/el., 2003, Vol. 1 to art. 593.

[28] In particular, the European Convention on Extradition of 13 December 1957 (Journal of Laws of 1994, No. 70, item 308–310), hereinafter 'ECE'.

time of surrender that with respect to the surrendered person, sentences already imposed shall be executed only for those crimes in respect of which surrender has taken place (Article 597 of the Code of Criminal Procedure).

Both of these prohibitions may apply to the situation of the adoption of an irreducible life imprisonment in the Polish legal system and the issue of extraditing a prosecuted or convicted person.

In the first case, there is the question of the issuing State prohibiting the prosecution, conviction, or deprivation of liberty for the purpose of executing a sentence in respect of a crime punishable by irreducible life imprisonment. The principle of speciality is not absolute, as the issuing state may also consent to proceedings against the surrendered person in respect of crimes other than those in relation to which the surrender took place.[29] However, if the issuing state, irrespective of whether it is a party to the ECHR, would consider – in accordance with the case law of the ECtHR – a sentence of irreducible life imprisonment to be incompatible with Article 3 of the ECHR and therefore incompatible with international law, it should then prohibit the prosecution, conviction or deprivation of liberty for the purpose of executing the sentence in respect of a perpetrator of a crime punishable by, or sentenced to, such a sentence. In practice, such an eventuality should realistically be anticipated. Attention must also be drawn here to the differences in the regulation of this prohibition that international agreements sometimes contain. For example, under Article 28(2) of the ECE, contracting parties may conclude between themselves bilateral or multilateral agreements in order to supplement the provisions of the ECE or to facilitate the application of the principles contained therein. Thus, these agreements may also mitigate the rigours provided for in Article 14 of the ECE by the principle of speciality.[30] Such a solution is contained, for example, in the Agreement signed on 17 July 2003 in Berlin between the Republic of Poland and the Federal Republic of Germany on supplementing and facilitating the application of the ECE.[31] According to Article 7(4) of that Agreement, in surrender proceedings, a prosecuted person may voluntarily declare into the record before a judge or prosecutor, after being instructed on the legal consequences of that declaration, in full knowledge of those consequences, his consent to waive the principle of speciality; such consent may not be revoked. According to Article 615 § 2 of the Code of Criminal Procedure in such a situation the provision of Article 596 of the Code of Criminal Procedure is not applicable.[32] In the situation under consideration, the decision would therefore lie in the hands of the prosecuted person themselves, but it is difficult to suppose that they would be willing to consent to incur liability for a crime punishable by irreducible life imprisonment.

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[29] Augustyniak, B., in: Świecki, D., *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany*, Vol. 3 to art. 596. LEX/el 2023; Steinborn, S., in: Paprzycki, L. (ed.), Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego, Vol. 2 to Article 596, LEX/el, 2015.

[30] Cf. Steinborn, S., in: Paprzycki, L. (ed.), *Komentarz aktualizowany...*, op. cit., Vol. 10 to Article 596, LEX/el, 2015.

[31] Journal of Laws 2004. No. 244, item 2451.

[32] Order of the Supreme Court of 21 January 2009, V KK 231/08, *Biuletyn Prawa Karnego Sądu Najwyższego*, 2009, No. 3, p. 72.

In the second case it is a prohibition on the execution of a life sentence imposed for a crime other than that for which the surrender took place, if it were to be considered irreducible under Polish law. The provision of Article 597 of the Code of Criminal Procedure refers only to the surrender of a person prosecuted for the purpose of enforcing a validly imposed imprisonment. It is applicable when, by a final sentence of a Polish court, the perpetrator has been sentenced for several crimes to imprisonment and, in order to be able to execute them, a request has been made to the foreign state for the surrender of the perpetrator, but the state has restricted at the time of surrender that the basis for the surrender is only some of these crimes.[33] It is therefore necessary to adapt the judgment in such a way that it is possible to enforce the imprisonment only for the crimes on which the surrender is based, which is done at the session. In the situation under consideration, the issuing State could, for the reasons indicated above, while allowing the execution of other custodial sentences imposed by a Polish court against a convicted person currently residing on the territory of that State, prohibit the execution of an irreducible life imprisonment sentence against the convicted person.

The prohibitions indicated above in points 1 and 2 are binding on the Polish authorities and may be used by other states considering irreducible life imprisonment to be contrary to international law – apart from the regime of surrender of persons prosecuted under the EAW – as instruments not allowing the execution of irreducible life imprisonment sentences imposed by Polish courts against Polish or other nationals, or even not allowing the initiation and conduct of criminal proceedings for crimes punishable by such sanctions.

Turning to the fundamental procedural instrument used within the framework of active extradition *sensu largo*, i.e., the EAW, it should first of all be noted that its key importance stems from the fact that it is applied in relations with the countries of the European Union (and some other countries[34]), i.e., with the countries with which Poland has the closest international relations, and thus it is the extradition instrument most frequently used in practice. For this reason, it is in the area of application of the EAW that the consequences of the adoption in Polish law of an irreducible life imprisonment sentence, which cannot be reconciled with international legal regulations, may be particularly visible and perceptible.

The regulations of Polish procedural law concerning the application to a Member State of the European Union for the surrender of a person prosecuted on the basis of a European arrest warrant are provided for in Chapter 65a of the Code of Criminal Procedure. It is understood that the provisions of this chapter regulate the proceedings related to the issuance of an EAW by a Polish court in connection with the need to ensure the presence of a person prosecuted for a crime under the jurisdiction of Polish criminal courts who is in the territory of a European Union

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[33] Steinborn, S., in: Paprzycki, L. (ed.), *Komentarz aktualizowany...*, op. cit., Vol. 2 to Article 597, LEX/el 2015.

[34] Cf. e.g. Council Decision of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ L 292, 21.10.2006, p. 1.

Member State. The execution of this warrant takes place in another state for the purpose of handing over the prosecuted person to Poland – and thus under foreign law. The consideration of the possible reasons for refusing to execute the EAW cannot, therefore, be made on the basis of dozens of legal systems, as this would not be operative or necessary. The point is that the obligation to introduce this procedural institution into the legislation of all Member States of the European Union was enforced by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, known as the 'Framework Decision'. Under Article 34(1) of the Framework Decision, Member States were required to take the necessary measures to comply with its provisions by 31 December 2003. The obligation to implement the Framework Decision in the laws of the Member States (as to its objectives, but with the choice of form and means of implementation for the Member States) was laid down in Article 34(2) of the Treaty on European Union in the version of the Treaty of Nice, which was repealed by the Treaty of Lisbon. However, a norm of an intertemporal nature (Article 9 of Protocol No. 36 to the founding Treaties[35]) preserved the legal effects of framework decisions until those acts were repealed, annulled, or amended in application of the new Treaties. It is important to point out, firstly, that in the light of the practice of the European Commission, transposition rules analogous to those of directives apply to framework decisions.[36] Secondly, it should be pointed out that the Court of Justice confirmed that framework decisions are binding, and the fact that the provisions of the Treaty on European Union at the time excluded the possibility of direct effect of framework decisions did not prevent national courts from being obliged to interpret domestic law in accordance with framework decisions (principle of indirect effect).[37] This is of crucial practical importance and has influenced, inter alia, the jurisprudence of national courts with regard to the EAW.[38] As an addendum, it should also be noted that, in the light of the case law of the Court of Justice, the principle of the primacy of EU law also applies to framework decisions.[39]

These remarks are all the more important because the issue of the procedural aspects of the surrender to Poland of persons prosecuted under the EAW for crimes for which an irreducible life sentence has been or may be imposed must be considered first and foremost against the background of the provisions of the Framework Decision, which Member States were obliged to implement. Indeed, the domestic regulations of these states must lead to the achievement of the result prescribed by the Framework Decision. Thus, pursuant to Article 5(2) of the Framework Decision, the execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the

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35 OJ C 202, 7.6.2016, p. 1.

36 Cf. Szwarc, M., 'Decyzje ramowe jako instrument harmonizacji ustawodawstwa karnego państw członkowskich', *Państwo i Prawo*, 2005, No. 7, p. 22.

37 Cf. Judgment of the CJ of 16 June 2005 in Case C-105/03 *Maria Pupino* [2005] ECR I-5285. 2005, pp. I-5285.

38 Cf. Kenig-Witkowska, M., Łazowski, A., in: Kenig-Witkowska, M. (ed.), *Prawo instytucjonalne Unii Europejskiej*, Warszawa, 2015, p. 201.

39 Judgment of the Court, 26 February 2013, Case C-399/11, *Melloni v Ministerio Fiscal*, Lex.

condition that if the crime on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant shall be subject to the condition that there are provisions in the legal system of the issuing Member State for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure. As mentioned above, this is only such a right of clemency, the application of which by the head of state directly depends, *inter alia*, on the behaviour of the convicted person himself,[40] and not purely discretionary – as in Polish law.

Despite the reference in Article 5(2) of the Framework Decision to a condition under the law of the executing Member State, the literature has expressed the view that, where the crime forming the basis of the EAW is punishable by life imprisonment, the execution of the warrant may only take place if the law of the issuing state allows for a review of the sentence upon request or at the latest after 20 years, or the application of the power of clemency. If the legal system of the issuing state does not provide for such possibilities, the execution of the EAW must be obligatorily refused.[41] It is noteworthy that this is the only ground for refusal which, based on the difference in legal regulations in the state of surrender and execution, does not refer to the fact of the content of the decision itself, but to the provisions of the enforcement law affecting the actual severity of the sanction imposed.[42]

The regulation introduced by the Polish legislator does not meet the criteria of reducibility and therefore, by virtue of national provisions implementing Article 5(2) of the Framework Decision, the EAW executing state may refuse to execute it. As argued in the case law, the executing state may request any information from the EAW issuing state and use the information known to it *ex officio* in order to verify whether there are serious and verified grounds for believing that a person subject to a European arrest warrant issued for the purpose of conducting criminal proceedings or executing a custodial sentence will, due to the conditions of his deprivation of liberty in the indicated state, be subject to a real risk of inhuman or degrading treatment.[43]

The Polish legislator implemented Article 5(2) of the Framework Decision in Article 607r § 1(6) of the Code of Criminal Procedure, which enables the court to refuse to execute the EAW if life imprisonment or another measure involving deprivation of liberty without the possibility to apply for its reduction may be imposed in the state of issuance of the European warrant for the crime to which the European warrant relates. It should be noted that, as in Article 5(2) of the

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[40] Cf. Nita-Światłowska, B., 'Możliwość orzeczenia…', op. cit., pp. 27–33, and Hermeliński, W., Nita, B., 'Kara dożywotniego pozbawienia wolności bez dostępu do warunkowego przedterminowego zwolnienia – refleksje w kontekście gwarancji wynikających z Europejskiej Konwencji Praw Człowieka', *Palestra,* 2018, No. 10, pp. 21–29.

[41] Barwina, Z., *Zasada wzajemnego uznawania w sprawach karnych*, Warszawa, 2012, p. 254.

[42] Ibidem, p. 254.

[43] Cf. e.g. judgment of the Court, 5 April 2016, ECLI:EU:C:2016:198; judgment of the Court of Appeals in Katowice of 3 February 2010, II AKz 38/10, *Orzecznictwo Sądu Apelacyjnego w Katowicach*, 2010, No. 1, item 24.

Framework Decision, refusal to execute the EAW on these grounds is optional. Nonetheless, it is rightly noted that considerations of safeguards justify the demand that, if it is found impossible to seek a reduction of life imprisonment, refusal to execute the EAW should be the rule.[44] It is also rightly argued in the doctrine that the wording of the implementation act should be interpreted in accordance with the provisions of the Framework Decision. Thus, although the wording of Article 607r § 1(6) of the Code of Criminal Procedure seems to imply that it applies only to an EAW issued for the purpose of conducting criminal proceedings against a prosecuted person, as it refers to the threat of a penalty, the wording of Article 5 of the Framework Decision should also be taken into account here, where it is clearly indicated that it refers to situations where an EAW was issued for the purpose of executing a sentence or prosecution. Taking also into account the aim of the regulation, it would be difficult to rationally justify providing this specific protection to a person against whom criminal proceedings are still pending, while omitting a convicted person against whom a life sentence has already been imposed. The provision of Article 607r § 1(6) should therefore be interpreted broadly, in accordance with Article 5 of the Framework Decision.[45]

Similarly, it is rightly pointed out that the wording of this provision is in accordance with the requirements of ECtHR case law. Indeed, the ECtHR has ruled that the transfer of a suspect, which must be clearly emphasised – and even to a state not bound by the ECHR, without establishing whether and under what conditions, in the event of a life sentence, it will be possible to apply for early release, violates Article 3 ECHR.[46]

SUMMARY

To sum up the above considerations, the consequence of declaring irreducible life imprisonment contrary to international law, in particular the prohibition of torture, inhuman and degrading treatment expressed in Article 3 of the ECHR, is the highly likely procedural effect of refusing to surrender a prosecuted person in the application of active extradition *sensu largo*, under both classical extradition and the EAW. With regard to the former institution, the issuing state, even without recognising the jurisdiction of the ECtHR, guided by its jurisprudence on violations of international law, may prohibit the prosecution for such crimes or the execution of an irreducible life sentence. Also in the context of the execution of the EAW, a full basis for refusing to surrender a prosecuted person in such situations is provided by Article 5(2) of the Framework Decision, which is subject to implementation in the domestic law

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[44] Steinborn, S., in: Paprzycki, L. (ed.), 'Komentarz aktualizowany...', op. cit., Vol. 15 to art. 607r k.p.k., LEX/el, 2015.

[45] Ibidem, Vol. 15 to *Article 607r*, Nita-Światłowska, B., *Komentarz do* art. 607r k.p.k., Vol. VII.4, Legalis.

[46] In the judgments delivered in the cases of 9 July 2013, op. cit. and of 4 September 2014, *Trabelsi v. Belgium* (Application No. 140/10, Legalis); cf. also Nita-Światłowska, B., 'Możliwość orzeczenia…', op. cit., pp. 27–33.

systems of the Council of Europe member states and should be directly applicable for guarantee reasons. Although it is not possible to clearly anticipate the development of the practice of international circulation concerning active extradition *sensu largo*, the formation of the ECtHR's line of jurisprudence on the definition of irreducible life imprisonment as not meeting the criteria of Article 3 of the ECHR, even taking into account the model of the institution of pardon functioning in Polish law, fills with pessimism as to the possibility of effective prosecution of perpetrators of such crimes by Polish law enforcement authorities and courts outside the country. As a result of the introduction of the punishment of irreducible life imprisonment in Polish law, we may unfortunately realistically expect the refusal of other countries to extradite those prosecuted for crimes punishable by such a punishment or sentenced to such punishments.

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