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EVALUATION OF THE NEW HUNGARIAN CRIMINAL CODE IN LIGHT OF THE RECENT CASE-LAW OF ECHR

1. Introduction: about Strasbourg's objections in general

Act C of 2012 on the new Criminal Code entered into force on 1st of July 2013, resulting that is shall be applied for approximately five years. It was a clear purpose during the codification of the new codex that it should on one hand completely harmonize with the frame of other national regulations and Hungarian legal traditions, whilst give answers to the new challenges occurred since the adoption of the former criminal code. It was also a priority that the new criminal code should comply with international standards, especially to meet the requirements of the EU and the international treaties ratified by Hungary.

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Concerning this last issue, the European Convention on Human Rights (hereinafter: Convention) bears utmost significance since on 6th of November 1990 Hungary as the first county from the countries of the late so-called 'Eastern block' joined to the treaty, and after on overall revision of the national legal environment, transforming the Convention into the Hungarian legal system in April 1993.

Obviously, this was not a single action, which would not mean any further obligation for Hungary. On the contrary Hungary with becoming participant of the Convention undertook a permanent and continuous duty to comply with the Convention's provisions and the standards deriving from the ever-evolving case-law of the European Court of Human Rights (hereinafter: ECHR) affecting several fields of law, especially criminal law. This obligation, however, not only mean a formal compliance with the criteria of the Convention but shall be effective and guarantee the practical implementation of such standards. Resulting that ECHR's principles and decisions could and shall be referred before and directly applied by the Hungarian courts as well, apparently Hungarian judgements shall not only comply with national provisions but also with ECHR's case-law.

Therefore, during the codification of the new Criminal Code it was a clear purpose to create a criminal codex which would be able to guarantee compliance with the criteria of the Convention and ECHR both on regulatory and practical levels as well.

After the 5th anniversary of the 'new' Hungarian Criminal Code, it may be worth analyzing that the new criminal codex and the legal practice based on it have been able to effectively achieve the above goals and adapt to the ever-developing practice of ECHR. According to our standpoint the evaluation of the Hungarian regulation regarding life imprisonment, being one of the most serious

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and controversial criminal substantive law issues, could be deemed an adequate indicator of the practical realization of the Convention's requirements.

2. ECHR's case-law related to life imprisonment in general

At first, it may be considered that the issue of life imprisonment is an extremely sensitive field of law, being subject to several different considerations as after the exclusion of death penalty from Hungarian national legal system by the Constitutional Court, it has become the most serious sanction. The introduction of the so-called 'whole life imprisonment' – excluding the possibility of an earlier conditional release – was a step taken by the legislator with the aim to protect society from those perpetrators who had committed serious conducts, extremely violating the basic principles of social norms which suggest that their subsequent resocialization back to the society seems to be hopeless. It is indisputable, however, that several authors state that 'this question has already been solved at the time of joining the Convention', whilst according to others 'domestic legislation – stubbornly – intends to go into a completely different direction than the one deriving from ECHR's recent case-law'.

The objective assessment of the above conclusions may require an overall review of the ECHR's related and dynamically developing case-law and the principles, requirements based on it. Therefore, in the following the decisions defining the adequate interpretation of Article 3 of the Convention concerning the question of life imprisonment will be briefly presented, also laying down the frames of an acceptable national regulation.

Although in the Kafkaris v. Cyprus case (Grand Chamber judgment on 12 February 2008) the ECHR did not establish the violation of Article 3, but stated important conclusions concerning our topic. The ECHR emphasized in the judgement that separately the applicability of life imprisonment as a possible

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sanction is not in breach of the Article 3. However, ECHR also established as a primary principle that Article 3 prohibiting torture and inhuman or degrading treatment or punishment shall be interpreted as requiring reducibility of the life 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. Apparently, this could not be deemed equivalent with that the detainee shall in any event be actually released as the Convention also obliges the contracting states to protect their citizens with all available measures from unlawful attacks against their life. It follows that it is not the ECHR's task to prescribe the form (executive or judicial) which that review should take and for the same reason, it is not for the Court to determine actually when that review should take place. Therefore, basically the contracting states can freely define their own domestic regulation regarding this issue, with the only compulsory criterion that the possibility of the future review of life sentences' justification shall not be excluded. It may seem that the ECHR accepted effective and sufficient review in this case that the prisoners serving mandatory life sentences could be released under the President's constitutional powers based on the General Prosecutor's proposal for that. It is important to highlight in this regard, that prior to concluding to this, the ECHR also evaluated the elaboration of the applicable domestic regulation and the actual frequency of its application. According to the Court's analyzation it was established that the applicable national law included detailed provisions regarding the mechanism of and conditions for an alleged release or reduction, resulting that life prisoners were entitled to know, at the outset of their sentence, what they shall do to be considered for release and under what conditions. Moreover, concerning the

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actual practice of this reductive measure, an actual legal practice of it could be demonstrated showing that it had been literally applied in several cases. Therefore, the ECHR concluded that life sentences were both de jure and de facto reducible. This results that the possibility of release from life imprisonment could be qualified sufficient from the aspect of Article 3 even if it is only based on the decision of the President, providing that it is predictable and is based on detailed regulation guaranteeing its actual application.

It was emphasized in the Court's several other decisions – e.g. Harakchiev and Tolumov v. Bulgaria (judgement of 8 July 2014), Čačko v. Slovakia (judgement of 22 July 2014), Murray v. the Netherlands (Grand Chamber judgment on 26 April 2016), Hutchinson v. the United Kingdom (Grand Chamber judgment on 17 January 2017) – as principle that life imprisonment shall be reducible de iure and de facto as well resulting that contracting states shall guarantee the possibility of an institutional review both on regulatory level and in the legal practice as well. This general principle was further clarified in the Vinter and Others v. the United Kingdom case (Grand Chamber judgment of 9 July 2013) with establishing that Court supports 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, guaranteeing the realistic possibility of conditional release. Accordingly, a clear trend has emerged in comparative and international law in favour of a mechanism guaranteeing a review of life sentences at the latest 25 years after imposition. On the contrary, the Court found in the Bodein v. France case (judgment of 13 November 2014) that excursion from this general deadline may also be justified in light of the room for manoeuvre ('margin of appreciation') left to contracting states in the criminal justice and sentencing fields, if ECHR's

criteria are met. Based on this even French law was accepted by the Court which provided for judicial review of the convicted person's situation and possible sentence adjustment only after 30 years' incarceration.

In brief, considering the general principles and requirements emerging from ECHR's case-law it could be concluded that the sole possibility of the application of life imprisonment may not violate Article 3 or any other provision of the Convention, strictly provided that this sanction is actually – both de iure and de facto – reducible. However, the actual reducibility of the sanction could be only be deemed guaranteed if the deadline of the institutional review approaches 25 years at the latest as set out in the Vinter case and does not substantively exceed this limit.

3. ECHR' recent decisions related to the Hungarian regulation and legal practice of life imprisonment

Based on the above, the compliance of the Hungarian regulation and legal practice related to life imprisonment with the above general principles of the Convention will be assessed in the following with the presentation of the ECHR's recent decisions related to Hungary.

Although the factual criminal conduct had been committed prior to the new Criminal Code entering into force and it is not strictly related to the issue of whole life sentence, but it may be worth beginning the assessment with the presentation of Törköly v. Hungary case (decision on the admissibility on 5 April 2011). The applicant's claim was based on a life sentence without any eligibility on parole before 40 years. As this case occurred prior to the Vinter case, the Court declared it inadmissible as being manifestly ill-founded the applicant's complaint that the sentence in question amounted to inhuman and degrading treatment. The Court concluded to that despite of the fact that

pursuant to the judgement the applicant would only become eligible for conditional release in 2044 – when he would be 75 years old which results that practically the conditional release has become only a formal, unrealistic possibility for him – , the objected judgment imposed on him guaranteed a distant but real possibility for his release. In addition, the Court noted that the applicant might be granted presidential clemency even earlier, at any time after his conviction. Therefore, it could be established that the life sentence was reducible de jure and de facto. The Court highlighted that reducibility could be deemed guaranteed even in such cases when considering the perpetrator's age and health conditions it is probable that the deadline for the alleged conditional release will exceed the perpetrator's expected life time, this does not result the de facto irreducibility of the sanction.

Moreover, it is worth mentioning that the Court even referred to the fact – slightly in contrast with its subsequent case-law – that the possibility for an alleged presidential clemency was also open for the perpetrator. However, at time being ECHR had not yet examined the legal practice, the actual application of this measure. Considering the decisions' conclusions. it seemed that the Hungarian regulation with guaranteeing the possibility, a reasonable prospect of conditional release even with such a long waiting time fulfilled the criteria of the Convention both from de iure and de facto.

ECHR draw a substantively more sophisticated picture in its decision related to László Magyar v. Hungary case (judgement of 20 May 2014). The applicant based his claim on that the effective Hungarian regulation did not comply both de iure and de facto with the requirements of Article 3 resulting that his sanction was irreducible.

The reasoning of the claim was founded on that the criteria for an institutional review of the life sentence had not been defined, resulting that even

▪ Evaluation Of The New Hungarian Criminal Code In Light Of The Recent Case-Law Of ECHR / Ádám Gergely Békés, Tamás Gépész // Часопис Національного університету «Острозька академія». Серія «Право». – 2018. – № 2(18) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2018/n2/18bgaloe.pdf.

the good behavior or any other beneficial personal changes could not guarantee such review which is apparently in contrast with the principles established in the Vinter case. Moreover, he highlighted that although Hungarian Fundamental law provided for the possibility of a presidential pardon, since the introduction of whole life terms in 1999, there had been no decision to grant clemency to any prisoner serving such a sentence (this was also mentioned in a study of Dániel Karsai, representing the applicant, demonstrating the statics of such decisions between 2002 and 2013).

The applicant also referred that the refusal of applications for presidential mercy was not bound to proper reasoning, only ministerial – meaning political – countersign was required. Based on these considerations the applicant complained mainly that his imprisonment for life without eligibility for parole amounted to inhuman and degrading treatment as it was practically irreducible.

The Court found the applicant's reasons grounded and established the violation of the Convention. Furthermore, ECHR considered that the objected provisions and the actual legal practice show systematic problems in the Hungarian regulation, therefore invited Hungary to introduce reforms of the system of review of whole life sentences to guarantee the examination in every case of whether continued detention is justified on legitimate grounds and to enable whole life prisoners to foresee what they must do to be considered for release and under what conditions. However, the Court also reiterated that contracting states enjoyed wide discretion ("margin of appreciation") in deciding on the appropriate length of prison sentences for specific crimes, resulting that the mere fact that a life sentence could eventually be served in full, did not make it contrary to Article 3 of the Convention. Accordingly, review of whole life sentences did not necessarily have to lead to the release of the prisoners in question.

- Evaluation Of The New Hungarian Criminal Code In Light Of The Recent Case-Law Of ECHR / Ádám Gergely Békés, Tamás Gépész // Часопис Національного університету «Острозька академія». Серія «Право». – 2018. – № 2(18) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2018/n2/18bgaloe.pdf.

The cited decision of ECHR apparently forced the Hungarian legislator under Article 46 to introduce reforms. The real question was to which extent will criminal substantive and enforcement rules be changed for the compliance with the criteria of the Convention. Erzsébet Kadlót and Dániel Karsai stated concerning the situation that 'the Hungarian state should have understood that it is high time to create a new institutional system guaranteeing the real possibility of conditional release'. The question is whether the required conformity with the Convention's criteria has successfully been achieved?

In reflection to the decision, Sections 46/A-46/H were introduced into the Code on the Enforcement of Sanctions, Measure and certain Coercive Measures and Administrative Punishments which introduce an automatic, compulsory review of life sentences, at least formally ensuring irreducibility of the sanction. Consequently, Hungary seems to accomplish the obligation set out in the Magyar case's judgement. Contrary to that, both the legislator and the judicial practice decidedly intended to omit actual and substantive changes. Therefore, certain authors even stated that 'the afterlife of the decision is scandalous', whilst others established that 'the Hungarian Constitutional Court and Supreme Court proved in several related decisions that are incapable of enforcing European standards and did not intend to comply with the requirements of the European human rights' control mechanism'. However, what has happened actually?

On one hand, the Supreme Court in the review process executed directly after the cited ECHR's decision, based on the new law enforcement rules defined the earliest time of conditional release in 40 years. In the disputable reasoning of the decision the Supreme Court concluded that in case of an alleged collusion of national law and the Convention, domestic law enjoys application primacy, further to that the decisions of ECHR could not be directly referred and applied

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before national courts. Moreover, the Supreme Court's in its decision ensuring uniformity No. 3/2015, established in principle that 'the exclusion of the possibility of conditional release related to life sentences is a part of the Hungarian constitutional legal system, resulting that – when the legal criteria set out by statutory law are met – its judicial application could not be prohibited by any international treaty'. Practically, the Supreme Court confirmed and proved adequate the status quo emerged after the introduction of the new regulation of review procedure.

The substantive evaluation of the new regime has been delivered soon by the ECHR in the judgement of T.P. and A.T. v. Hungary case (nos. 37871/14 and 73986/14, judgement of 4 October 2016). The applicants alleged that despite the new legislation, which introduced an automatic review of whole life sentences – via a mandatory pardon procedure – after 40 years, their sentences remained inhuman and degrading as they had no hope of release. Their reasoning was based on that the ECHR has already concluded in principle in the judgement of the Magyar case that the acceptance or refusal of the application shall include proper reasoning. The precondition of this is that clemency shall be provided based on an accurate and transparent system of criteria, being available and understandable for the applicants as well. Furthermore, they also referred to the 25-years deadline defined in the Vinter-judgement.

Contrary to that, the Hungarian government argued that the new provisions are in full compliance with the ECHR's criteria as they ensure the reducibility of life sentences both de iure and de facto. Moreover, the Hungarian representatives referred also to the Törköly-case judgement that the possible application of life sentence as sanction could not result the breach of the Convention and also referred to the principle of 'room for manoeuvre'. Further to that they cited several decisions (Kafkaris-judgement, Harakchiev and

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Tolumov-judgement) according to which ECHR is not entitled to define the exact form and deadline of the review procedure. Moreover, they argued that the 40-years deadline for review is justified by the circumstances of the crimes triggering the application of life sentence and the punitive function of criminal law sanctions. Furthermore, the Hungarian government highlighted that even in case of those who have been punished by a life sentence but without the exclusion of conditional release, the possibility of such release is also exclusively granted after having served at least 25-40 years in imprisonment. Consequently, to define the deadline for the automatic review under 40 years may result a paradox benefit for those serving whole life sentence. Regarding this issue, the Hungarian representatives also argued that the criteria defined in the Vinter-judgement could only be deemed as suggestions for the contracting states as it was well demonstrated by the Bodein-judgement. At last, they reminded that the possibility to lodge an individual application for presidential clemency is also granted for the detainees.

The Court in its judgement mainly reiterated the criteria deriving from the Murray and Vinter-judgements. Therefore, the Court accepted the Hungarian government reference to the margin of appreciation. However, the Court established a conclusion bearing utmost significance concerning this issue: that this right of the contracting states is not limitless. Therefore, according to the standpoint of the Court an unreasonably long waiting period for review exceeds the borders of ‘room for manoeuvre’, even if it is a considerably wide right. The 40-years period was separately considered extremely long and excessive, resulting that – independently from the further provisions of the review – does not ensure a real reducibility of life sentence. Furthermore, the Court pointed out that the new law enforcement rules do not define exact and objective criteria to be assessed during the review procedure, furthermore the proposal of the

clemency committee is not binding for the president making the final decision. Further to that there is no obligation for the decision about the clemency to include proper reasoning, not to mention that neither is objective deadline defined for meeting such decision. The Court was not therefore persuaded that, at the time of its judgment in the case, the applicants' life sentences could be regarded as providing them with the prospect of release or a possibility of review and the new legislation was not therefore compatible with Article 3 of the Convention. Consequently, ECHR's clear view was that the recently adopted new legislation is in breach of Article 3 of the Convention.

The Hungarian Justice Department published after the decision a press release emphasizing that the judgement is worrisome from professional aspects and that it does not comply with the ECHR's other case-law (e.g. Bodein-judgement). The judgement became final on 3 March 2017, but the related Hungarian regulation remained unchanged, the Constitutional Court even explicitly refused a constitutional complaint lodged against the new law enforcement rules based upon the Court's decision.

4. Conclusions: an obligation for reforms?

During the evaluation of the above it may be worth considering that the Court has already emphasized its standpoint in several other decisions – both regarding the compliance with Article 3 and Article 8 of the Convention – that 'emphasis on rehabilitation and reintegration has become a mandatory factor that the member states need to take into account in designing their penal policies'. This principle obliges Hungary to take the necessary reforms concerning the regulation of whole life sentence, especially the issues of institutional review, to ensure that the decision about the conditional release will be concluded based on an objective system of criteria, assessing also the alleged

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beneficial changes of the perpetrator's personality, during a predictable, transparent and consistent procedure being available and understandable for the perpetrator. Obviously, the effective regulation does not comply with the requirements of ECHR: on one hand, due to the deficiencies of the review procedure from legal aspect (de iure), and on the other hand due to the 40-years waiting period from factual aspect (de facto). According to the Court's standpoint this results that the possible reduction of life sentences, the perpetrators' last prospect of release has apparently become illusory which is fully incompatible with the prohibition of torture as defined by Article 3 of the Convention.

The judgement in the T.P. and A.T. case should (have) warn(ed) the Hungarian legislator that the revision of the effective regulation is necessary, especially considering that 'uncomfortable changes may surprise those national legislators and legal practitioners who endlessly insist on the untouchability of national criminal law'. Contrary to that, the regulatory reform has not yet taken place. The further development of this practice may not only lead to the Court's disapprobation and several further default judgements, but also involves the danger of substantively negating the fundamental human rights and guarantees ensured by the Convention.

In overall, according to our standpoint, the 5th anniversary of the new Criminal Code seems to be a great opportunity to deduct the necessary consequences from ECHR's recent case-law and with the implementation of substantive reforms eliminate the effective regulation's deficiencies, simultaneously ensuring that the new Criminal Code would fully comply with the criteria required by the Convention and ECHR.

▪ Evaluation Of The New Hungarian Criminal Code In Light Of The Recent Case-Law Of ECHR / Ádám Gergely Békés, Tamás Gépész // Часопис Національного університету «Острозька академія». Серія «Право». – 2018. – № 2(18) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2018/n2/18bgaloe.pdf.

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- Evaluation Of The New Hungarian Criminal Code In Light Of The Recent Case-Law Of ECHR / Ádám Gergely Békés, Tamás Gépész // Часопис Національного університету «Острозька академія». Серія «Право». – 2018. – № 2(18) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2018/n2/18bgaloe.pdf.

16. Vinter and Others v. the United Kingdom case (Grand Chamber judgment of 9 July 2013)

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ECHR's latest case-law related to the new Hungarian criminal code, specifically the issue of life imprisonment was summarized in the article. Prior to that the general principles of the Convention and ECHR were demonstrated briefly. In order to draft a whole picture of the recent situation concerning life imprisonment and the possibility of conditional release, we have also mentioned the reactions to ECHR's decisions. Finally, the conclusions deriving from ECHR's recent case-law were summarized accompanied by the authors' legal standpoint and proposals.

Key words: international criminal law, European law.

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