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AUTORE: Paulo Pinto de Albuquerque\*

## LIFE IMPRISONMENT AND THE EUROPEAN RIGHT TO HOPE\*\*

### 1.

My speech will address the issue of life imprisonment in the light of the European Court of Human Rights (the Court) case-law and the possible consequences that it might entail for the criminal policies of Member States of the Council of Europe. I will speak in a personal capacity and my opinion does not bind the Court.

### 2.

The most important penological issue on the European agenda today is life imprisonment. Until recently, the Court's position was that Article 3 did not prevent life prison sentences: they could be imposed and, in practice, served in their entirety. What Article 3 prohibited, according to the Court, was that a life sentence should be irreducible de jure and de facto. In determining whether a life sentence in a given case can be regarded as irreducible, the Court used to ascertain whether a life prisoner can be said to have any "prospect of release". Where national law afforded the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this would be sufficient to satisfy Article 3. This was the *Kafkaris* standard (see § 98 of this judgement).

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\* Professor Doctor at the Catholic University of Lisbon and Judge at the European Court of Human Rights. — [palbu@fd.lisboa.ucp.pt](mailto:palbu@fd.lisboa.ucp.pt)

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The Court added that the possibility of early release, even where such a decision was only at the discretion of the Head of State or the hope of Presidential clemency in the form of either a pardon or a commutation of sentence was sufficient to establish such a prospect.

### 3.

In *Vinter and Others*, the Court re-examined the problem of how to determine whether, in a given case, a life sentence could be regarded as reducible. It considered this issue in the light of the prevention and rehabilitation aims of the penalty.

It is usually said that criminal punishment of mentally fit offenders may have one or more of the following five purposes: (1) positive special prevention (resocialization of the offender), ie preparing the offender to lead a law-abiding life in the community after release; (2) negative special prevention (incapacitation of the offender), i.e. avoiding future breaches of the law by the sentenced person by keeping him or her away from the community; (3) positive general prevention (reinforcement of the breached norm), i.e. strengthening social acceptance and compliance with the breached provision; (4) negative general prevention (deterrence of would-be offenders), ie avoiding future breaches of that provision by other members of the community; and (5) retribution, ie atonement of the guilty act of the offender.

In *Vinter and Others*, the Grand Chamber held that a “whole life order” (ie an irreducible life sentence) irretrievably breaches Article 3 of the European Convention on Human rights (the Convention), because it contradicts the purpose of resocialization. The Court clearly made a choice as to the preponderant aim of imprisonment: it is positive special prevention (resocialization of the offender). Under this light, irreducible life sentence is akin to inhuman treatment in view of the dissocializing and therefore dehumanizing effects of long term imprisonment. In fact, this also holds true for any sort of open-ended, indeterminate sentence, sentence of fixed term that exceeds a normal life span or extremely long determinate sentence.

The Court pointed out that if a life sentence was to be regarded as reducible, it should be subject to a review which allowed the domestic authorities to consider whether any changes in the life prisoner were so significant, and such progress towards rehabilitation had been made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds (see § 119 of *Vinter and Others*). Furthermore, the Court explained for the first time that a whole-life prisoner was entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence would take place or could be sought. Consequently, where domestic law did not provide any mechanism or possibility for review of a whole-life sentence, the incompatibility with Article 3 on this ground already arose at the moment of the imposition of the whole-life sentence and not at a later stage of incarceration (see § 122 of *Vinter and Others*).

There has been a considerable reaction to the *Vinter and Others* judgment and the following judgment of the Court of Appeal in *McLoughlin and Newell* in British blogs and online papers. Most of these reactions

underline the contradiction between these two judgments and foresee further adverse reaction by the European Court (see article of Carl Gardner, 18.2.2014, speaks of a “ping-pong fight” between the two courts; article of Lyndon Harris, of 19.2.2014, article of Ben Fitzpatrick of 28.2.2014, article of Rosalind English of 18.2.2014, articles in the Guardian and Blomberg, among others).

#### 4.

In the recent *Oçalan v. Turkey no. 2* case, the European Court was again faced with the principled question of the compatibility of life sentence without parole imposed on mentally fit offenders with the European Convention on Human Rights. There were two novelties in this case in comparison to the *Vinter and Others* judgment. This time the question was raised by the sentence applied to the convicted leader of a terrorist organization, and the scope of the case also included the very strict prison regime applied to the applicant, and in particular the restrictions in the access to family relatives and legal assistance and the lack of proper medical care. The discussion of the fundamental problem of life sentence had, in the *Oçalan no. 2* case, the benefit of the knowledge of the particular contours of the prison regime applied to the applicant from June 1999 to March 2012.

After a global examination of the material detention conditions, the regime of isolation of the applicant, the contacts with the outside world, including the contacts with the applicants family relatives and lawyers, the access to the media and phone calls, the relationship between the applicant and the prison medical doctors, the Court concluded that the prison regime was in the breach of Article 3 at least with regard to a substantive part of its initial part. In addition, the court reiterated the *Vinter and Others* case-law, and found a violation of Article 3 on account of the irreducible life sentence imposed on the applicant. Consequently, the Court instructed the respondent State to establish the necessary legal instruments that permit to put in place a parole mechanism, and thereby assess the penological needs for the continuation of the applicant’s detention.

#### 5.

In view of both *Vinter and Others* and *Oçalan no. 2*, what should be expected in the near future?

The following logical step now could be to ask if life imprisonment in itself is compatible with Article 3. It may be argued that, even if there were a proven correlation between life imprisonment and lower crime rates, or at least lower murder and other violent crime rates, which is doubtful, punishing the offender for the purposes of deterrence of other people’s behavior and the strengthening of the social authority of the legal norm would in any case reduce the offender to an instrument of a state strategy, which is inadmissible under the Convention. Moreover, such a principled question must be decided having in account the broader picture given by comparative law. The fact that several European and non-European countries have taken the ultimate step of abolishing life imprisonment evidences that societies of

different continents with different cultures can strive without it. The examples of Andorra (articles 35 and 58 of the criminal code), Bosnia and Herzegovina (section 42 of the criminal code), Croatia (articles 44 and 51 of the new criminal code), Montenegro (article 33 of the criminal code), Portugal (article 41 of the penal code), San Marino (article 81 of the penal code), Serbia (article 45 of the criminal code) and Spain (articles 36 and 76 of the criminal code; recent counter-reform not yet in force), and outside Europe, Angola (article 66 of the Constitution), Brazil (article 5, XVII, of the Constitution), Bolivia (article 27 of the penal code), Cape Verde (article 32 of the Constitution), China (article 41 of the criminal code of the autonomous region of Macau), Colombia (article 34 of Constitution), Costa Rica (article 51 of the penal code), Dominican Republic (article 7 of the penal code), East Timor (article 32 of the Constitution), Ecuador (article 51 and 53 of the penal code), El Salvador (article 45 of the penal code), Guatemala (article 44 of the penal code), Honduras (article 39 of the penal code), Mexico (article 25 of the federal penal code), Mozambique (article 61 of the Constitution), Nicaragua (article 52 of the penal code), Panama (article 52 of the penal code), Paraguay (article 38 of the penal code), São Tomé and Príncipe (article 37 of the Constitution) and Uruguay (article 68 of the criminal code), show that there has been a broad and consistent international trend on this subject, and that cannot be ignored.

## 6.

Other than this principled question, two major consequences result from *Vinter and Others*, one pertaining to the right to parole and the other to the transferral of prisoners to third, non-European States.

In the light of *Vinter and Others*, States must establish a mechanism of review of the justification of continued imprisonment according to the penological needs of the prisoner sentenced to a “whole life order”. If a parole mechanism must be available to those convicted of the most heinous crimes, a fortiori it must be available to the other prisoners. In other words, the Convention guarantees a right to parole, including to those convicted of the most serious crimes. This means that prisoners have a vested and enforceable right to be paroled if and when the legal requisites of parole are present, not that all prisoners should necessarily be granted parole. Moreover, parole is not a release from the sentence, but a modification of the form of state interference with the sentenced person’s liberty, by way of supervision of his or her life at large. And this supervision may take a very tight form, with strict conditions attached, according to the needs of each paroled person.

If the contracting parties to the Convention do have some discretion while regulating the parole mechanism, their margin of appreciation certainly remains under the Court’s supervision. Otherwise unrestrained discretion could provide a practical way of nullifying their international obligation to guarantee the possibility of parole. Thus, there are three basic requirements for an effective protection of the prisoner’s right to parole under the Convention. First, the parole mechanism must be under the authority of a court or at least under full judicial review both of the factual and the legal elements of the decision. Any parole mechanism that reserves to a governmental or administrative authority the last word on the review of the

sentence would put the liberty of the prisoner in the hands of the executive and devoid the judiciary of its ultimate responsibility, thus entrusting judicial powers to the executive and breaching the principle of separation of powers. That would fly in the face of a democratic system where deprivation of liberty is the most important task of judges, not the executive. Hence, a review by a minister or any subordinate official of the administration is not sufficiently independent to comply both with the universal and the European human rights standards. Moreover, decisions to keep prisoners in or recall them to prison must be taken with all procedural guarantees, such as for example that they are not taken without according prisoners an oral hearing and adequate access to their files.

Second, the parole review must take place within a pre-determined, reasonable time-frame. The legal regime for reducibility of the sentence has to be in place at the time of imposing the prison sentence. When the law does not establish a “minimum term” (or tariff) of service of the penalty before parole is considered, the trial court is required to set it, but this period of time must not be of such duration that it would be tantamount to a de facto bar of review of the prisoner’s sentence during his or her natural life. Neither the law nor the courts may establish a minimum period of prison service that converts the reducible sentence into a disguised form of an irreducible life sentence, such as, for example, a whole or natural life tariff. Minimum periods over 20 years of prison service (EU 2002/584 European arrest warrant Framework decision), or 25 years (article 110 Rome Statute), are problematic. In case parole is not determined in the initial review, the prisoner’s situation should be reviewed at reasonable, not too widely spaced intervals. For the same reason, recalled prisoners should also benefit from the same review in regular intervals.

Third, the criteria to assess the appropriateness of parole must be established by law in a clear and foreseeable manner and be based primarily on special preventive considerations and secondarily on general preventive considerations. Considerations of general prevention alone should not justify refusal of parole or recall to prison. The criteria should not be limited to the mental or physical infirmity or closeness of death of the prisoner.

## 7.

*Vinter and Others* has consequences with regard to the extradition/expulsion/transfer to non-European countries. The Court has already drawn all the logical consequences of *Vinter and Others* in the recent *Trabelsi v. Belgium* case in this regard.

The applicant had been extradited to the United States, where he was prosecuted on charges relating terrorism, punishable with maximum discretionary whole-life prison. The sentence was discretionary in that the judge could impose a lighter penalty, with the option of imposing a fixed-term sentence. The Court interpreted the US legal provisions referred to in the diplomatic note provided by the US authorities as not providing for possible release on parole in the event of a life sentence, whether mandatory or discretionary, but inferred that there were several possibilities for reducing such a sentence. The sentence could be reduced on the basis of substantial cooperation on the part of the prisoner in the investigation of his case and the prosecution of one or more third persons. It could also be reduced for

compelling humanitarian reasons. Furthermore, prisoners might apply for commutation of their sentence or for a Presidential pardon under the US Constitution.

The Court further noted that the US authorities had at no point provided an assurance that the applicant would be spared a life sentence or that, should such a sentence be imposed, it would be accompanied by a reduction or commutation of sentence. It considered that in any case the US authorities' explanations concerning sentencing and their references to the applicable provisions of US legislation on sentence reduction and Presidential pardons were very general and vague and could not be deemed sufficiently precise.

On the central issue in the case, which involved establishing whether, over and above the assurances provided, the provisions of US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the *Vinter and Others* criteria, the Court considered that while the said provisions point to the existence of a "prospect of release" within the meaning of the *Kafkaris* judgment none of the procedures provided for amounted to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds. By so doing, the Court did not accept a double standard policy, which would require a parole mechanism for a person serving a life sentence in Europe, but would admit extradition for a person who had the prospect of serving an irreducible life sentence outside of Europe. It is true that the European Court cannot impose its standards on non-European countries, but in *Trabelsi* the Court only imposes its standards on the requested European country, not on the requesting non-European country. In other words, the European Court only requires the requested European country not to extradite when the defendant may face a life sentence without a conditional release (parole) mechanism, and imposes no obligation on the non-European requesting country.

Under these conditions, the Court concluded that the life sentence liable to be imposed on the applicant could not be described as reducible for the purposes of Article 3 of the Convention within the meaning of the *Vinter and Others* judgment. By exposing the applicant to the risk of treatment contrary to this provision the Government engaged the respondent State's responsibility under the Convention, and therefore the applicant's extradition to the United States of America amounted to a violation of Article 3 of the Convention.

## 8.

Subsequent to the Court's consideration of section 30 in *Vinter and Others* the Court of Appeal delivered a judgment in which it expressly responded to the concerns detailed in Grand chamber's judgment.

In *R v. Newell* and *R v McLoughlin* the Court of Appeal held that it was irrelevant that the Lifer Manual had not been revised, since it was clearly established in domestic law that the Secretary of State was bound to exercise his power under section 30 in a manner compatible with Article 3. If an offender subject to a whole life order could establish that "excep-

tional circumstances” had arisen subsequent to the imposition of the sentence, the Secretary of State had to consider whether such exceptional circumstances justified release on compassionate grounds. Regardless of the policy set out in the Lifer Manual, the Secretary of State had to consider all the relevant circumstances, in a manner compatible with Article 3. Any decision by the Secretary of State would have to be reasoned by reference to the circumstances of each case and would be subject to judicial review, which would serve to elucidate the meaning of the terms “exceptional circumstances” and “compassionate grounds”, as was the usual process under the common law. In the judgment of the Court of Appeal, domestic law therefore did provide to an offender sentenced to a whole life order hope and the possibility of release in the event of exceptional circumstances which meant that the punishment was no longer justified.

## 9.

Recently, a chamber of the Court did accept the national court’s interpretation of domestic law as sufficient to comply with the requirements of Article 3 (*Hutchinson v. the United Kingdom*, 3 February 2015, not final). The issue in the case of Mr Hutchinson was not whether the Court “must accept the national court’s interpretation of the domestic law” as clarified in the process of “progressive development of the law through [the] judicial interpretation” provided by the Court of Appeal after *Vinter and Others* as being the correct one, but whether or not in 2008 the applicant was in fact “entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought” as required by the principles established in *Vinter and Others*. It is not clear whether the Court of Appeal expressed an *ex tunc* trust or an *ex nunc* hope that, even though to date the Secretary of State for Justice has not amended the content of the Lifers Manual after *Vinter and Others*, he was, is and always will be “bound to exercise his power ... in a manner compatible with Article 3” (see the separate opinion of Judge Kalaydjieva).

The *R v. Newell* and *R v McLoughlin* holdings, as the previous ones from that same court, raise rather serious linguistic, logical and legal questions: according to the Court of Appeal, the law of England and Wales does provide for reducibility, since the “compassionate release on medical grounds” (terminal illness, bedridden person) set out in the lifer manual, although “exceptional”, are not too restrictive and indeed have a “wide meaning that can be elucidated, as is the way the common law develops, on a case by case basis”.

My questions are the following: What does “compassion” have to do with “risk assessment”, the “prospect of the offender’s resocialization” or the “lack of continuing penological grounds for on-going imprisonment”? The law in England refers explicitly to compassion and medical grounds, but the case law in Strasbourg mentions totally different criteria: penological needs to keep someone in prison. Is the alleged “wide meaning” of compassionate grounds according to the Court of Appeal so wide that it has no connection with the plain meaning of the word “compassion”? What can be more unpredictable than a discretionary legal provision to release in exceptional circumstances which is converted by means of a ju-

dicial interpretation into an obligation to release with a “wide meaning”? What can be more unclear than “exceptional grounds” with a “wide meaning”? Where are the “objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence” in order to have a real chance of rehabilitating him or herself? Aren’t the courts doing the business of legislators and reforming the law or at least giving the impression that they do so?

These are some of the puzzling questions that the post-*Vinter* dialogue between the Court and the national jurisdictions has not yet fully resolved. It might be argued that, had the Secretary of State considered the Lifer Manual as invalid, like the Court of Appeal appears to think, he would have amended it by now. Consequently, since he did not, this must be because he finds it good law. Thus, one argument may be put forward that if *Vinter and Others* found that English law was not clear, it is even less so now. What should prevail? The Court of Appeal inventive reading of a literally incompatible law with the Strasbourg law? Or the Secretary of State tacit acceptance of that same law as good law? Are the slightly broader release grounds in *Trabelsi*, which include substantial cooperation in prosecuting third parties, in addition to humanitarian grounds, in line with the stricter release grounds of *Hutchinson*?

One thing is sure: The existence of a clear and predictable legal framework which enshrines the right to an individual sentence plan aimed at preparing the prisoner to lead a law-abiding life and the right to be paroled in accordance with his or her penological needs, including for those who have committed the most “heinous crimes”, is an international obligation of member states of the Council of Europe, in the light of the Court’s case-law and specifically of rehabilitative ideology underlying *Vinter and Others*. To think otherwise would have a seismic effect. The Convention is not a commitment à la carte and the European system of protection human rights would collapse if it started to be understood that way.

## 10.

Is the *ergastolo* compatible with the Convention? We know that the *ergastolano* may benefit of *semilibertà*, *liberazione anticipata* and *liberazione condizionale*. The Court has assessed it in accordance with the standard of *de iure* and *de facto* reducibility of the sentence (vide *Scoppola* (n. 10249/03, decisionedel8/9/2005: applicant in his sixth year of service of sentence) e *Garagin* (n. 33209/07, decisione del 29/4/2008). Yet some questions remain: The *liberazione condizionale* after 26 years of effective service of the penalty is compatible with the resocialization imperative? Is the *semilibertà* after 21 years of effective service of the penalty compatible with this imperative?

The judgment no. 264 of 1974 of the Italian Constitutional Court declared the constitutional legitimacy of the *ergastolo*, on the basis of the “*teoria polifunzionale della pena*”, which included not only rehabilitation but also retribution and general deterrence, and the “*comprimibilità in concreto*” of this penalty, which requires the practical possibility of transforming the perpetual penalty into a non-perpetual penalty. The fact is that the same Constitutional Court has abandoned the “pluri-functional theory” of the prison purposes in favour of a clearly rehabilitative discourse. In this light is it still appropriate to hold that *ergastolo* is compatible



with the rehabilitative purpose of prison? Moreover, is it proportionate to keep a perpetual penalty which is constitutional only if the law admits the possibility of denying its perpetual character?

Moreover, the Italian Constitutional Court in its judgment 168 of 1994 prohibited the life sentence, even with *liberazione condizionale*, for minors. The argument was that there is an “*incompatibilità insanabile tra la pena perpetua e la minore età, facendo leva sulla particolare importanza che la funzione rieducativa della pena assume rispetto ai minori e agli obblighi costituzionali di tutela dell’infanzia e della gioventù.*” The question now is: isn’t the same reasoning applicable to adults in the light of the Winter obligation to provide the means for resocialisation to adults?

Even more delicate questions are raised by the *ergastolo ostativo*, which is excluded from those benefits based on an absolute presumption of prisoner’s dangerousness due to his or her links to organized crime. One must evidently not forget the Italian Constitutional Court Judgments 357 of 1994 with regard to the impossible cooperation (*collaborazione impossibile*), 68 of 1995 with regard to the irrelevant cooperation (*collaborazione ininfluyente*), and 161 of 1997 with the readmission to *liberazione condizionale* for *ergastolani* after its revocation, and Legge 23 dicembre 2002, n. 279, on *collaborazione impossibile* due to limited participation in the crime or full confession. These developments have all softened the previous legal regime. But the question of principle remains. It is true that, according to the Italian Constitutional Court Judgment 135 of 2003, the presumption foreseen in article 4 bis of Law 354 of 1975, in its formulation of Law 152 of 1991, is not absolute and permanent, since the *ergastolano* may at any time change his or her own situation by cooperating, with the consequence of the cessation of the perpetual nature of the *ergastolo ostativo*. Is this reasoning compatible with the requirements of *Vinter and Others* and *Trabelsi*?

The problem is twofold.

First, there are situations where the *ergastolano* may be resocialised but not willing to cooperate or reasonable grounds, such as when he fears for his or her own safety or his or her family’s safety or because he or she has family ties with the criminal organisation members. Or there may even be cases where the *ergastolano* may be willing to cooperate in confessing the crime and giving back the proceeds of the crime, but not in denouncing the members of the criminal organization to which he or she belongs. In this case, is it proportionate to require from the *ergastolano* cooperation in order to permit his or her conditional release? Is this regime compatible with the *Trabelsi* standard, which did not accept a system of reduction of the sentence on the basis of substantial cooperation on the part of the prisoner in the investigation of his case and the prosecution of one or more third persons?

Second, since the State has the burden to provide means of resocialization for prisoners, it must also have the additional burden of investigating why the means provided were not successful. The mere non-cooperative conduct of the prisoner is not enough ground for the State to give up the purpose of resocialization and, consequently, the State retains the obligation to investigate and evaluate the reasons of the non-cooperative conduct in the light of the particular circumstances of life of each individual prisoner.

Some efforts have been made to reform prison penalties, like the *progetto della commissione giustizia del Senato*, of Senatore Roland Riz, 1996, the *progetto della commissione Carlo Federico Grosso*, 1998, the *progetto della commissione Giuliano Pisapia*, 2006, and the *progetto della commissione Francesco Palazzo*, 2013, but all have until now failed. The Palazzo proposal, to introduce a relative presumption, which could be reversed by the judge whenever “*siano stati acquisiti elementi tali da escludere l’attualità di collegamenti con la criminalità organizzata, terroristica o eversiva*”, would take in account the situation of those ergastolani who are resocialised, but did not cooperate because they feared for their own and their family’s safety or because they have family or other links with the criminal organisation members. This solution would soften the rigidity of the actual legal framework, putting the burden on the judge to investigate the reasons of the prisoner’s non-cooperation with the authorities. In practical terms, such relative presumption would differ little from the *ergastolo ordinario*. In these cases, it is also a rule of experience that the penological needs of the prisoner decrease when he or she cooperates with the authorities (by confessing, denouncing other criminal agents or giving back the proceeds of the crime) and increase when he or she does not. The point is that, according to the Palazzo proposal, no automatic correlation would be established between the non-cooperation of the *ergastolano* and the penological need to keep him or her in prison and therefore an ergastolano could be released in *liberazione condizionale* when he or she did not cooperate, but the judge found out evidence of his or her resocialization.

## 11.

My final words are of hope. Against the retributionist agenda of some Governments, the Court took a firm position on the resocialization of the offender as the primary purpose of prison. I hope that national authorities now understand the message and shape their criminal policies accordingly, not by building more prisons, extending prison terms and increasing the prison population, but by drawing a balanced mix of judicial and non-judicial (including social security, administrative and prison) policies which aim at fully implementing the human rights standards of Strasbourg.