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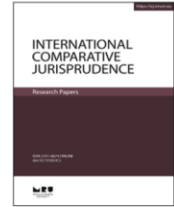
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International Comparative Jurisprudence



POLITICS, POWER AND PAROLE IN STRASBOURG: DISSOCIATIVE JUDGEMENT AND DIFFERENTIAL TREATMENT AT THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract. In the judgement rendered by the Grand Chamber of the European Court of Human Rights in *Hutchinson v. United Kingdom* (2017) states were seemingly confirmed as enjoying a wide margin of appreciation with regard to review and release from life prison terms. However, as this paper contends, after the decision of the second section of the European court in *Matiošaitis and Others v. Lithuania* (2017), that margin of appreciation is wider for the more influential and politically powerful jurisdictions than for newer states before the court, those more susceptible and amenable to policy dictation, who are subject to a differential measure of state discretion.

Keywords: European Court of Human Rights; Life Sentences; Comparative Jurisprudence; Criminal Justice Politics

Introduction

In *Matiošaitis and Others v. Lithuania* (2017) the second section of the European Court of Human Rights (ECHR) unanimously upheld the claims of six applicants that their life sentences were in violation of Article 3 of the European Convention on Human Rights. Article 3, which prohibits torture and inhuman or degrading treatment or punishment, was found to have been violated on the basis that the applicants life sentences were not de jure or de facto reducible. That is to say, a violation was found when the life sentences of the applicants were deemed to be whole life with no real prospect of release given the judged inadequacy of Lithuanian relief and review measures of life sentences.

The decision of the second section is the latest in a litany of judgements emanating from Strasbourg regarding the issue of life sentences. The pivotal decision in this line of jurisprudence came in *Vinter and Others v. United Kingdom* (2013) which has been the bedrock upon which a contradictory and erratic corpus of jurisprudence has been built; the decision rendered in *Matiošaitis and Others v. Lithuania* is merely the latest addition to an increasingly uncertain and shaky construct of case law. In *Matiošaitis and Others v. Lithuania*, the ECHR has further muddied the clarity of Strasbourg thinking by contradicting the judgement rendered earlier in the year by the Grand Chamber in *Hutchinson v. United Kingdom* (2017) even though, as this paper contends, the two cases are comparable. The real difference between the two, it is submitted, is of the political power of the respective nations and the level of threat that they pose to the court by virtue of remaining or withdrawing from its remit.

Part one of this paper overviews the increasingly chequered jurisprudence of the European Court of Human Rights regarding life sentences, and the prospect of release from those sentences. Part two of the paper then presents the case of *Matiošaitis and Others v. Lithuania*, before part three highlights the deficiencies in the decision of the court when compared with the operation and regulation of life sentences in England & Wales. Finally, the paper concludes

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by looking to the ramifications of the decision reached in *Matiošaitis and Others* and the possible future of the court itself.

In its totality, through a contextual, qualitative analysis of judgements issued by the ECHR, this paper aims to highlight the differential treatment of nations before the court. Focusing specifically on life sentence cases from Lithuania and the United Kingdom, the political context in which those cases were heard, and the reaction to them, directed towards the court, it is asserted that the political standing of nations influence the court's judgements. This is nowhere more clearly demonstrated than in a comparative analysis of *Matiošaitis and Others v. Lithuania and Hutchinson v. United Kingdom*.

1. A patchwork of ECHR jurisprudence

In *Vinter and Others v. United Kingdom* (2013) the Grand Chamber of the ECHR found a violation of Article 3 regarding the inadequacy of release and review mechanisms in England and Wales regarding prisoners sentenced to whole life imprisonment. The applicants asserted that their whole life prison terms breached the convention by virtue of the irreducible nature of their tariff. Then, as now, the power to release a whole life sentenced prisoner rests with the Secretary of State who exercises his power under Section 30 of the Crime (Sentences) Act 1997. The criteria that must be met by a prisoner to be considered for release is articulated in chapter 12 of the Indeterminate Sentence Manual ("the lifer manual") issued by the Secretary of State as Prison Service Order 4700, and is restricted, in its wording, to compassionate release when a prisoner is terminally ill.

The criteria for compassionate release on medical grounds for all indeterminate sentence prisoners (ISP) are as follows:

- 1) the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]), or the ISP (Indeterminate Sentenced Prisoner) is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke;
- 2) the risk of re-offending (particularly of a sexual or violent nature) is minimal;
- 3) further imprisonment would reduce the prisoner's life expectancy;
- 4) there are adequate arrangements for the prisoner's care and treatment outside prison;
- 5) early release will bring some significant benefit to the prisoner or his/her family (Prison Service Order 4700).

In *Vinter*, the Grand Chamber doubted that such limited criteria could offer a prisoner a real prospect for release. Although previous Home Secretaries had pledged a review of whole of life sentences, a ministerial 25 year review, followed by further reviews at five year intervals (Kandelia 2011:77), the proposed *Vinter* review would entail a more thorough, penological assessment. Given that penological justifications for imprisonment can shift over time, the *Vinter* court asserted that a periodic review, suggested at the point of twenty five years imprisonment, should take place to determine if it is still penologically justifiable to keep an offender imprisoned.

In addition, the court asserted that clear criteria for review should be in place at the time a whole life sentence is imposed so that a prisoner will be aware of what he or she must do over the course of their imprisonment to be considered for release. Without such a mechanism, and established objective criteria against which release decisions are measured, a breach of Article 3 occurs.

After the *Vinter* decision, critique from Britain was forceful. The political response was characterised by a strong anti-European sentiment at grass roots level, as well as from the political elite, with senior political officials, including the Prime Minister, publicly stating in the media their disappointment at the ruling and even questioning the future of remaining within the remit of the Strasbourg court (Kirkup 2013; Watt and Travis 2013). At that time, the Home Secretary went so far as to announce a national need for a plan to 'deal with' the ECHR (BBC News 2013). At the same time, politicians, despite the decision of *Vinter*, continued to restate their historical promises that for some offenders 'life will mean life' (Watt and Travis 2013; Kern 2014; Dyer 2002). Further underscoring

the political position, in campaigning for the general election, the Conservative party published a position paper, 'Protecting Human Rights in the UK', which asserted the will of the party, if in power, to break links with the Strasbourg court. Accusing the European court of going beyond its remit, of usurping domestic sovereignty, the paper asserted a 'mission creep' of the ECHR in areas of prisoner voting rights, prisoner extradition, and whole life prison terms (explicitly citing *Vinter*) (Conservatives 2014:3).

The legal reply to *Vinter* was *R v. McLoughlin* (2014) which explicitly rejected the *Vinter* court's assessment and clarified the domestic position: "It is entirely consistent with the rule of law that such requests [for release] are considered on an individual basis against the criteria that circumstances have exceptionally changed so as to render the original punishment which was justifiable no longer justifiable. We find it difficult to specify in advance what such circumstances might be, given that the heinous nature of the original crime justly required punishment by imprisonment for life. But circumstances can and do change in exceptional cases. The interpretation of s.30 we have set out provides for that possibility and hence gives to each such prisoner the possibility of exceptional release" (Lord Thomas, *R v. McLoughlin* 2014 at 36).

The following year, after months of increasingly anti-European vitriol aimed at the Strasbourg court, in 2015 the fourth section of the ECHR heard the case of *Hutchinson v. United Kingdom* (2015) where, again, a violation of Article 3 of the European convention was alleged, owing to the irreducibility of the applicant's whole life tariff. Despite the contention that *Hutchinson* was a replica of *Vinter*, the Strasbourg court found no breach of the Convention and dismissed the applicant's claim, even though there been absolutely no policy or legal change relating to procedures governing the release of whole life prisoners in the UK post *Vinter*. The fourth section of the court seemed content to accept the legal reply offered in *McLoughlin*. In particular, the court relied upon the declaration that the Secretary of State was legally bound to act compatibly with Convention rights, including Article 3, by virtue of the Human Rights Act (1998). It was of no consequence to the ECHR that there had been no revision of the "Lifer Manual" (Prison Service Order 4700). The 'exceptional circumstances' that the Court of Appeal referred to in *McLoughlin* would be elucidated by the circumstances of each case, and subject to judicial review (even though no examples of such judicial review were, or have ever been, offered to Strasbourg). For the Court of Appeal, no further explanation of release procedures for whole life prisoners was needed since the meaning of 'exceptional circumstances' would naturally evolve under common law. Even though no whole life tariff prisoner has ever been released in the UK, the majority of judges in *Hutchinson* were satisfied. The dissenting opinion of Judge Kalaydjieva, however, succinctly summarises the incongruity of the *Hutchinson* verdict in light of the preceding *Vinter* judgement and the lack of change in British procedures: "...the majority in the present case failed to express any view as to whether, how and at what point the interpretation of the domestic law established in *Bieber* (2009) and *R v. Newell*; *R v. McLoughlin* (2014) changed, ceased to apply or made the applicant's situation more compatible with the principles laid down by the Grand Chamber in examining the situation of the applicants in *Vinter*" (Dissenting opinion of Judge Kalaydjieva, *Hutchinson v. United Kingdom* 2015).

What had changed, however, was the strength of political and public opinion that the ECHR was undermining British sovereignty, and that a plan of withdrawal from its remit needed to be considered. After the fourth section delivered its judgement, the case was then referred to the Grand Chamber, and its judgement was delivered in January 2017. Instead of correcting the fourth section's decision, it was affirmed, in contradiction to *Vinter*. In the Grand Chamber the applicant asserted that the clarification offered in *R v. McLoughlin* was, in substance, identical to that previously offered by the same court in previous cases that predated the *Vinter* judgement (*R v. Bieber* (2008) and *R v. Oakes* (2012)).

So, it was asserted that the Secretary of State would review whole life tariffs at the 25 year point, and then periodically after, assessing sentences with reference to the principles of retribution and deterrence. Even though the lifer manual was "restrictive" the Grand Chamber placed great emphasis on the fact that the power of the Secretary of State to order release from a whole life order is bound by the Human Rights Act (1998). Regarding the interpretation of legislation, Article 3 of the Act states, "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"

(Human Rights Act 1998 s.3). In addition, section 6, regarding the acts of public authorities, states “It is unlawful for a public authority to act in a way which is incompatible with a Convention right” (Human Rights Act 1998 s.6). In the shadow of that binding legislation, on the argument that release decisions are a matter for the judiciary, the Grand Chamber affirmed its position that it is for each State to determine whether sentence review is conducted by the executive. The Grand Chamber was mindful that the Secretary of State could order release of a whole life tariff prisoner at any time, despite no such order having ever been made, and it was not for the court to speculate how efficiently such a system, which it acknowledged was minimally regulated, might operate in practice (*Hutchinson v. United Kingdom* 2017 at 69).

With no change to policy or law in the UK, the claims made in *Vinter* remain valid, there is no case law that illuminates any meaning given to exceptional circumstances, whilst the ‘Lifer Manual’ – the only document accessible to whole life prisoners to inform them what is required to be considered for release – has not been revised for clarity, and still specifies terminal illness. Both the fourth section and Grand Chamber in *Hutchinson* were, on the face of it, appeased by the elucidation of the law offered in *McLoughlin* even though, in reality, that is no elucidation at all; the life sentenced prisoner still does not know, at the time of sentence, or at any point, what they can do to improve their chances of a favourable ministerial review, other than develop a terminal illness. The lack of domestic change though needs to be recognised in the context of the extremely negative and hostile political reaction by Britain to the *Vinter* decision, with the UK going so far as to threaten withdrawal from the remit of the court (*Kirkup* 2013; *Watt and Bowcott*, 2014) and setting out proposals to do so (*Conservatives* 2014).

2. Life in Lithuania

Following the *Hutchinson* judgement in the Grand Chamber, in May the same year, in *Matiošaitis and Others v. Lithuania* (2017) the second section of the European Court of Human Rights found a violation of Article 3 of the European Convention regarding all six applicants and the contested irreducible nature of their life sentences. In Lithuania, as a matter of law, those subject to a life sentence are not eligible for parole (Article 158 § 1 (3) of the Criminal Code) and thus, in essence, all those in receipt of the sentence are subject, ostensibly, to a whole life term.

Until December 1998 the penalty for aggravated murder in Lithuania was a prison term of eight to fifteen years, or the death penalty. At that time the Seimas (the Lithuanian Parliament) amended Article 105 § 2 of the old Criminal Code so that aggravated murder became punishable by ten to twenty years ‘deprivation of liberty’, or by life imprisonment (today, the range of ‘deprivation of liberty’ is eight to twenty years (*Matiošaitis and Others v. Lithuania* (2017) at 65)). Life imprisonment, as well as an available penalty for aggravated murder can also be imposed for crimes against humanity, crimes against public security, and crimes against the independence of the state (*Matiošaitis and Others v. Lithuania* (2017) at 65).

Possible avenues of relief from a life sentence take various forms in Lithuania. Firstly, a convicted person can benefit from an amnesty passed by the Seimas, thus relieving them from serving part of, or even their entire sentence. Seven amnesties have been declared by the Seimas since 1990, mostly applying to less serious offences and exempting intentional crimes such as aggravated murder. Indeed, the amnesties issued in 1998, 2000, and 2002 explicitly excluded life sentenced prisoners. As a second possible avenue of relief, however, a person may be discharged from their sentence if suffering from a terminal illness. Taking into account the ‘personality’ of the prisoner, the gravity of their offence, their conduct during their period of imprisonment, the length of time already served, and the nature of the illness, the court can decide to release a prisoner, but can also subject them to compulsory treatment. Should the prisoner convalesce and recover then they can be recalled to serve the remainder of their sentence. The same provision applies to those who develop a mental disorder that renders them incapable of understanding the nature of, or controlling their actions. Lastly, and the provision most relied upon by Lithuania in defending their position at the European court, a prisoner can benefit from a presidential pardon. Since November 2011, a prisoner may ask for a presidential pardon after serving ten years of their sentence. Pardon pleas are first assessed by the Pardon Commission, comprised of high ranking state officials, but whose recommendations are not binding upon the President. In granting a pardon the President will take into account, “...the nature and gravity of

the crime committed by the convict, the personality and behaviour of the convict, his/her attitude towards work, how much of the sentence has already been served, whether compensation for pecuniary damage caused by the crime has been paid, the opinions of the administration of the correctional institution, non-governmental organisations and former employers, and other circumstances” (Matiošaitis and Others v. Lithuania (2017) at 78).

On the public facing website of the Lithuanian President, pardons are described as, “...an individual act of justice with regard to a specific person, which is based on humanity. The act of pardon is not a document contesting the validity and lawfulness of a court judgement. It is not a legal act. It is, rather, a moral act of attempting to alleviate the personality of a convicted person. The granting of a pardon features efforts to combine justice with mercy so that laws and the interests of society, third parties and aggravated parties are not violated. <...> Although murderers and other perpetrators of violent crime can hardly expect to be granted pardon, laws enable all convicts to appeal for it. Even persons imposed [sic] a life sentence may appeal for pardon” (Matiošaitis and Others v. Lithuania (2017) at 79).

The Lithuanian government submitted to the court that thirty five life prisoners had requested presidential pardon, twenty of whom had made requests multiple times. It noted that, of prisoners subject to a fixed term of imprisonment for murder or aggravated murder, in 2011 nine prisoners, in 2012 four prisoners, and in 2013 nine prisoners had been granted a pardon by the President.

So, the presidential pardon takes into account the attitude and behaviour of the prisoner and, in that regard, in the Matiošaitis judgement, the court took pains to lament the conditions of confinement for life sentenced prisoners, quoting at length the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “...prisoners were subject to a regime of small group isolation, and certain of them to solitary confinement, for many years. This, combined with quasi total absence of a programme of activities (such as work or education) for the vast majority, can easily lead to personal degeneration of the prisoners concerned. Several of the prisoners met by the delegation claimed that they were seriously affected by the lack of human contacts with other inmates and staff. It is noteworthy in that regard that, since August 2000 [to 2004], four life sentenced prisoners had committed suicide”. (CPT 2006 cited in Matiošaitis and Others v. Lithuania (2017) at 116).

Although successive reports cited by the court noted some improvements, the conditions of confinement remained a considerable concern. Whilst the court may rightly be concerned by the conditions that prisoners are subject to in Lithuania it is contended here that this is a separate issue and should not, as appears to have been, conflated with life sentence release mechanisms. The justification offered by the court for giving such weight to how prisoners are kept is based on the “deleterious effect” of conditions which “must have seriously weakened the possibility of the applicants reforming” and in turn damages their hope that they may display their progress and obtain a reduction of sentence (Matiošaitis and Others v. Lithuania (2017) at 179). This is, of course, a rather grand assumption and appears to be heavily reliant on the earlier reports of the CPT. In the most recent report cited in the court’s judgement, the CPT noted, “In addition to the activities described in the report on the 2008 visit (1½ hours of outdoor exercise, some possibility of work outside the cell, education, etc.), life sentenced prisoners can now use a computer for up to three hours per day, like any other inmate. They can also have access to higher education. The prison organised every month a conference/debate with a speaker at which all the prisoners, including life sentenced inmates, were invited to participate. Possibilities of association with other life sentenced prisoners also existed during religious services, certain sport activities as well as during the knitting group” (CPT 2016 cited in Matiošaitis and Others v. Lithuania (2017) at 118).

The labouring view of the second section was that the applicants were impeded by the conditions they were kept in to demonstrate their reform and progress. However, an overview of the applicants and their behaviour suggests wilful actions that, as Judge Kūris notes in his separate concurring opinion, would disqualify them from release in any legislative setting, Mr Matiošaitis: “refused to work, explaining in writing that he would not work with prisoners belonging to a lower caste”; “had not made serious resolutions” as to his guilt; “a knife, sharpened pieces of tin, needles and other prohibited objects were found in his cell”. Mr S Katkus: admitted his guilt only “partly”; “had

been found slightly inebriated”. Mr Beleckas: had “been found in possession of a mobile phone, which was forbidden under the prison regulations”; had “no remorse about the crimes he had committed and had not made any serious resolutions”; “committed a number of other small violations of the prison rules”; was “likely to attempt to escape”; “prohibited objects had been found in his cell”. Mr Lenkaitis: “had committed four disciplinary violations, including use of physical violence against another inmate and possession of prohibited objects”; “had only partly acknowledged his guilt”. Mr Kazlauskas: after being transferred to Pravieniškės Correctional Institution “to serve the remainder of his life imprisonment sentence ... the applicant attempted to kill another prisoner by stabbing him with a knife [and was] convicted of attempted murder”; “partly acknowledged his guilt but had shown no remorse at all for his crimes” (concurring opinion of Judge Kūris in *Matiošaitis and Others v. Lithuania* (2017) at 16).

Any argument that the applicants were railing against the conditions of their captivity by behaving in such ways and accruing such disciplinary infractions is hard to maintain given the severity of those behaviours. Moreover, it is asserted, conditions do not prevent a prisoner from showing remorse for their crimes; the admission of guilt and genuine remorse must preface any genuine rehabilitative efforts on the part of the prisoner without which the penological justifications for continued detention are strengthened. As such, the second section’s reference to conditions serves only to further muddy the clarity of its judgement.

The court was quite right, however, to dismiss amnesties and terminal illness as adequate release mechanisms. With respect to the latter, terminal illness is not something that can be consciously brought about by the prisoner and it would be perverse to expect a prisoner to hope for a life threatening illness to achieve release. In addition, should the prisoner recover they would then face the prospect of being recalled to prison to complete their prison term (and the court can order that the prisoner undergoes medical treatment against their will). A scenario not unlike that found in the United States where a prisoner can be forcibly medicated to render him competent for execution, it presents ethical concerns that, although beyond the scope of this paper, could form the basis of a separate legal challenge. With respect to amnesties granted by the Seimas, the court was correct to similarly dismiss that potential mechanism as offering a realistic prospect for release. Of the seven amnesties issued since 1990, none had applied to life sentenced prisoners and the Lithuanian government had not provided the Strasbourg court with any information or evidence that any new amnesty law would be drafted to include life sentenced prisoners and afford the complainants some measure of hope for release. With both amnesty and illness dismissed as credible avenues for relief from a life sentence the second section was left to evaluate the Presidential pardon as the most effective mechanism for reducing a life sentence.

Firstly the applicants challenged the criteria against which pardon applications are measured which, they asserted, was vague and open ended. That lack of clarity, they asserted, was compounded by the lack of information and reasoning given to applicants when their plea was rejected. When the rationale for a plea rejection was not forthcoming the applicant remained unsure what he or she must do, and how they should seek to improve their situation to secure a favourable response to their plea. Citing the *Vinter* decision, the applicants further asserted that they were entitled to know, at the time their sentence was imposed, what they can do to be considered for release. With no such knowledge, and no rehabilitation plans in place, the applicants had been left in “ultimate uncertainty and despair” (*Matiošaitis and Others v. Lithuania* (2017) at 131).

In *László Magyar v. Hungary* (2014) the second section of the court was similarly critical of the criteria governing Presidential pardons. The remedial suggestion was legislation that would enable prisoners to see ‘with some degree of precision’ what was required of them in order to be considered for release (*László Magyar v. Hungary* 2014 at 71). The fifth section of the court was more explicit in what was required with regard to guidance, referring to “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” (*Trabelsi v. Belgium* 2014 at 137). In Lithuania, by contrast, such objective criteria have existed for over twenty years. Indeed, the court, in a marginal concession to the Lithuanian authorities, explicitly noted that the criteria for Presidential pardon had remained the same since regulations were adopted in 1993 and, moreover, they were publicly accessible.

Indeed, the government contended that the criteria against which pleas for pardon are judged was explicit, clear, and known to the applicants. If shortcomings could be identified in the process, regarding the lack of reasoning given to applicants when their pleas were rejected, these were remedied by the “extraordinary frequency” that an applicant could submit a fresh plea (six months after refusal). The Lithuanian government further noted that until a presidential pardon was granted to a life sentenced prisoner in 2012, only five pleas had been submitted by such prisoners. With regard to rehabilitative efforts that would heighten the chances of a successful plea for pardon the government noted a new provision, Article 137 of the Code for the Execution of Sentences, which established that social rehabilitation of prisoners shall be conducted under an individual plan. This provision served to underlie the government’s contention that prisoners were afforded the means of rehabilitation, which would be relevant in examining pleas for pardon. Yet the applicants contended that without being given reasons as to why a plea might be rejected they were left uncertain as to what was required of them. The court found substance to their argument. Again, however, it is pertinent to remember the conduct of the applicants. As Judge Kūris notes in his concurring opinion, “[if a life prisoner] does not know what to do in order to be eligible for earlier release, albeit by way of presidential pardon, here – in a nutshell – are some tips. Begin by erasing the criminal sub-culture from your personality by not regarding other people as belonging to lower castes. Fully admit your guilt for the crimes committed. Feel remorse for [what] you have done. Make serious resolutions about it. Do not commit disciplinary violations. Do not hide prohibited objects in your cell, especially knives or sharpened pieces of tin. Do not consume alcohol in prison – it is illegal. Do not behave in such a way that the authorities have reasonable grounds to believe that you will attempt to escape. And, of course, do not use physical violence against anyone. Trying to kill someone is also a no-no. Is it “capricious” to expect that persons spending their life behind bars ought to know this?” (concurring opinion of Judge Kūris in *Matiošaitis and Others v. Lithuania* (2017) at 17).

Even in light of such behaviours the second section chose to return their focus to the conditions of confinement, “In the court’s view, the deleterious effects of such life prisoners’ regime must have seriously weakened the possibility of the applicants reforming and thus entertaining a real hope that they might one day achieve and demonstrate their progress and obtain a reduction of their sentence” (*Matiošaitis and Others v. Lithuania* (2017) at 179).

In a further measure of flawed reasoning by the majority, the *Matiošaitis* court stated that it considered the presidential power of pardon to be a modern day equivalent of the royal prerogative of mercy (at 173) whilst previously having noted the objective criteria against which pleas were judged, “allowing the President to assess whether a life prisoner’s continued imprisonment is justified on legitimate penological grounds” (*Matiošaitis and Others v. Lithuania* (2017) at 168). Moreover, the Grand Chamber had already decreed in *Vinter* that any review of a life sentence must decide whether remain penological justifications for keeping a prisoner detained; by the second section’s own admission, the presidential review of a plea is corresponded with penological justifiability. One primary justification being prisoner rehabilitation, which the majority chose to focus upon being reduced by conditions rather than giving serious consideration to the behaviour of the applicants, as would be done in any application for Presidential pardon.

Setting aside the flaws in the court’s reasoning, the second section recalled *Hutchinson* to contrast with the situation in Lithuania. In the former they noted, “[regarding] the applicant’s criticism of the domestic system, the Court considers that these are countered by the effect of the Human Rights Act... the Secretary of State is bound by section 6 of that Act to exercise the power of release in a manner compatible with Convention Rights ... Although the Court has not been provided with any examples of judicial review of a refusal by the Secretary of State to release a life prisoner, it is nonetheless satisfied that a significant judicial safeguard is now in place” (*Hutchinson v. United Kingdom* (2017) at 51 and 53).

It should be recalled, however, that the President of Lithuania is considered part of the executive (just as the Secretary of State in the UK). Indeed, a ruling of the Constitutional Court in May 2010 reiterated that the President of the Republic is part of the executive (*Matiošaitis and Others v. Lithuania* (2017) at 109). In the UK, the executive is legally obliged to discharge his duties in accordance with the European Convention on Human Rights. Similarly,

the convention has the same legal force in Lithuania and forms part of its legal system; decrees of the President must not be in contradiction with the convention (*Matiošaitis and Others v. Lithuania* (2017) at 110). So it is contradictory to assert that in the UK the power to release is regulated but not so in Lithuania. The Hutchinson court was satisfied that the Secretary of State's decision not to release a life sentenced prisoner was subject to judicial review, yet the UK could not provide an example of such. Additionally, whilst the *Matiošaitis* court noted that in the past four years, since a successful applicant for pardon was made by a life sentenced prisoner, there had not been another it failed to note that in the UK there had not been any release of whole life tariff prisoner since there was public acknowledgement of the tariff in 1994.

Yet, the second section returned to the views of the CPT, observing their view that "discretionary release from imprisonment, as with its imposition, was a matter for the courts and not the executive" (*Matiošaitis and Others v. Lithuania* (2017) at 174). However, the Grand Chamber in *Hutchinson* found no such issue with regard to the UK and the power vested in the Secretary of State to release a whole life sentenced prisoner. To compound the flawed reasoning of the second section, in Lithuania one could assert that the President stands, at least to some degree, at a distance from populist opinion, the same cannot be said for the Secretary of State in the UK who has, in the past, kept whole life prisoners detained in response to overwhelming public pressure to do so (for a full discussion see Pettigrew 2016a). It would seem that the second section blindly relies upon the flawed decision of the Grand Chamber in *Hutchinson* whilst ignoring how the Lithuanian system exceeds the safeguards and review procedure in the United Kingdom.

3. The dissociative nature of similar circumstances

The UK, like Lithuania, was forced to formulate a policy for those offenders who would otherwise have been executed before a change in the law abolished capital punishment. In a duplication of the situation found in the UK regarding those sentenced to a whole life tariff, the applicants in *Matiošaitis* were, on the basis of the severity of their crimes and, in the absence of the death penalty, denied opportunity for parole.

In reviewing both jurisdictions, it should not be contested that release from a whole life sentence through terminal illness is not a viable relief mechanism. What is objectionable, however, is that terminal illness remains the only specified release mechanism from a whole life prison term in the UK, yet it is summarily dismissed in Lithuania. That, as a release mechanism, it should be found, quite rightly, to be inadequate in the context of Lithuania, should also be found in regard to Britain.

With regard to pardoning, the Secretary of State in the UK occupies a similar position to the President of Lithuania. In both positions the incumbent has the power to order the release of a prisoner or substitute their life sentence with a determinate sentence. In a striking parallel between the UK and Lithuania, the applicants in *Matiošaitis*, just as the applicants in *Hutchinson*, asserted that the lack of reasoning given to them when a request for a pardon was rejected left them unsure how they could improve themselves, and what measures they could take to improve their chance of a favourable review. The second section in *Matiošaitis* accepted that the criteria against which pardons were evaluated were, in fact, clear and not ambiguous as the applicants had contended. Contrasting this position to the UK where no criteria have been specified, instead the Court of Appeal stated "we find it difficult to specify in advance what such circumstances might be, given that the heinous nature of the original crime justly required punishment by imprisonment for life" (*Lord Thomas, R v. McLoughlin* 2014 at 36). Yet the Grand Chamber in *Hutchinson* reached a different judgement than the second section in *Matiošaitis*.

The court noted the information regarding pardons on the website for the Lithuanian President's Office and, particularly, the assertion that "murderers and other perpetrators of violent crime can hardly expect to be granted pardon". This public facing website, a source for information and guidance on the topic does not, however, act in a legally binding manner nor is it even presented in the context of legal discussion or policy debate. Notwithstanding, as the second section referred to it, it would be misleading not to note that it is simultaneously stipulated on the website that "laws enable all convicts to appeal for it even persons imposed [sic] a life sentence may appeal for pardon". In the UK, however, as noted by the court in *Hutchinson*, the corresponding governmental webpage

describes whole life sentences as meaning “...no minimum term [is] set by the judge, and the person’s never considered for release” (cited in *Hutchinson v. United Kingdom* (2017) at 69). The corresponding position in the UK though is perhaps best illustrated in the sentencing remarks of judges in cases where a whole life tariff was imposed, prior to the Grand Chamber decision in *Hutchinson*, but after *Vinter*, “[this offence] is of such a high level of exceptional seriousness that it can only properly be marked by a whole life sentence. That is the sentence which I pass. You will, therefore, only be released, if ever, by the Secretary of State exercising executive clemency on humanitarian grounds to permit you to die at home. Whether or not that occurs will be a matter for the holder of that office at the time” (*R v. Mair* 2016). “The sentence therefore upon the counts of murder is a sentence of life imprisonment; I decline to set a minimum term; the result is a whole life sentence and the defendant will die in prison” (*R v. Port* 2016).

So, judges in the UK are issuing whole life sentences in the knowledge and faith that they have a literal meaning, that there will be no pardon, and the only marginal chance of relief comes in the form of terminal illness. Lithuania, however, offers more, and it can reasonably be asserted that complainants in the Baltic state have more hope of their sentence being reduced than their counterparts in Britain.

The applicants in *Matiošaitis* asserted that they were left unsure as to what was required of them when no reasoning was given when a plea for Presidential pardon was rejected. This has long been the case in the UK where there is documentation of prisoners, even though publicly reviled, being considered a ‘success story’ of the prison system, yet they were always denied relief from their whole life tariff (for a full discussion see Pettigrew 2016b). Moreover, in its finding of a violation, the second section asserted that a review of sentence should entail either the executive giving reasons or judicial review (*Matiošaitis and Others v. Lithuania* (2017) at 181). Yet, in the UK the executive does not give reasons for a denial of relief from a whole life tariff and there is ample evidence to suggest that his role as a politician has, in the past, led him to be subservient to populist punitiveness (Pettigrew 2016b). In *Matiošaitis*, the applicants, in support of their claim, noted that only one life sentenced prisoner had been successful in requesting a plea and having their sentence commuted to a determinate term (thus making them eligible for parole). Contrasting the UK, where no whole life sentenced prisoner has secured a favourable review of their tariff, Lithuania at least has a precedent for such success, which the UK does not. Despite that contradiction, the court found in favour of the applicants in *Matiošaitis* but against the applicant in *Hutchinson*.

It would seem then that, in comparison, there is less merit in the claims of the applicants in *Matiošaitis* than in *Hutchinson*, despite a favourable outcome for the applicants in the former and a rejection of the applicants’ claims in the latter. It is contended that the difference between the two jurisdictions lies not in the intrinsic details of their review and release mechanisms of life sentences, but in their respective stature and influence before the Strasbourg court. As noted in the concurring opinion of Judge Kūris, “The Lithuanian authorities clearly had to be aware of the prevailing – and very strong – trend in the post-*Vinter* development of the Court’s case law pertaining to the alleged irreducibility of life imprisonment. They were obliged not to dismiss this trend, but to take it into account, even if this enters into the domain of proactive penal policy rather than being strictly confined to the domain of the law of the Convention, as interpreted in the pre-*Vinter* case law” (concurring opinion of Judge Kūris in *Matiošaitis and Others v. Lithuania* (2017) at 8, author’s emphasis).

Lithuania might be content to allow Strasbourg to drive their legislation and penal policy but, given the reaction to the *Vinter* judgement, contextualised in a series of decisions that resonated negatively in Britain regarding voting rights for prisoners, artificial insemination, and prisoner extradition, for example, the United Kingdom vociferously resists all interference by a supranational authority. As Lord Mance has noted, “I have heard it said that, when the Strasbourg court disagrees with a decision taken in France, the blame is directed at the French decision maker, whereas, in the United Kingdom, it would be directed at the Strasbourg court” (cited in the dissenting opinion of Judge Kalaydjieva, *Hutchinson v. United Kingdom* 2015 at 38). The Lithuanian authorities, however, were happy to see the outcome of *Matiošaitis* at the Strasbourg court. The Vice Minister of Justice had stated before the second section heard the case that it would be useful to consider any new grounds for life prisoners release only after the court delivered its judgement (*Matiošaitis and Others v. Lithuania* (2017) at 60). However, despite Judge Kūris

asserting that the Lithuanian authorities had to be aware of the prevailing case law of the Strasbourg court, it is reasonable to assume that those authorities could legitimately have expected a different judgement given the preceding decision of the Grand Chamber in *Hutchinson* earlier in the year. The pivotal difference between Lithuania and Britain though is how receptive the two nations are to ‘alien’ jurisprudence being imposed upon them. Noted in the dissent of Judge Pinto De Albuquerque in *Hutchinson* are the words of Lord Hoffman, which succinctly depicts the attitude of the United Kingdom toward the ECHR and the imposition of their interpretation of human rights, “when we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others” (cited in the dissenting opinion of Judge Pinto De Albuquerque, *Hutchinson v. United Kingdom* 2015 at 39). In his interpretation of Britain’s position, Judge Pinto De Albuquerque notes how that position has evolved, “...the impact of national law on the Convention should be maximised, whereas the impact of the Convention on domestic law should be minimised, if not downright rejected, sometimes even with an explicit call for solutions that are supposedly home-grown and sensitive to Britain’s legal inheritance... the margin [of appreciation] should be wider for those States which are supposed “to set an example for others” and narrower for those States which are supposed to learn from the example” (dissenting opinion of Judge Pinto De Albuquerque, *Hutchinson v. United Kingdom* 2015 at 40).

Of course, when the Strasbourg court accedes to such sentiment it creates a two tier system of justice which places the future of the court in jeopardy.

4. The Future

“...examination of [this] case could – and should – have brought about a different result, namely that no violation of Article 3 was to be found. However, under the Court’s case law as it has been developed to the present day (most recently in *Hutchinson*), such a finding is no longer possible” (concurring opinion of Judge Kūris in *Matiošaitis and Others v. Lithuania* (2017) at 2).

The reason for a contradictory finding between *Hutchinson* and *Matiošaitis* lies in the standing of the answering jurisdictions at the court. In the UK, intentions to repeal the Human rights Act, which binds the UK to act in accordance with the European Convention, have been often stated in the media, including by the current Prime Minister, and with increased force and substance after *Vinter* (Travis 2013; Conservatives 2014; Stone 2015; Stone 2016; Asthana & Mason 2016). Should a founding member leave the remit of the court then human rights can come to be increasingly viewed as available for selection. Yet, if the differential treatment of states should continue, as evidence here in the context of life sentencing, then the very foundations and principles of the court are undermined. So too is its future.

Indeed, *Hutchinson* was not the first instance of the ECHR capitulating to hardened domestic opinion that contradicts the court’s findings and philosophy. With regard to voting rights for prisoners, for example, (*Hirst v. United Kingdom No 2* 2005) the court found a breach of the convention yet, even after years of the UK failing to implement the judgement, it was not sanctioned in anyway. Such a hands off approach to Britain is suggestive of a policy of diplomatic restraint, giving credence to the assertion that “officials in Strasbourg do not wish to antagonise any further the UK’s increasingly fraught relations with the ECHR” (Bowcott 2012). Already, some states have observed an approach of favour and discrepancy. Following the British refusal to capitulate to the ECHR after the decision in *Hirst*, Russia introduced legislation that allows the judgements of Strasbourg to be overruled (BBC News 2015), after Russia’s own ban on prisoner voting was also found to be a violation of the European Convention (*Anchugov and Gladkov v. Russia* (2013)). Given how many cases before the European court involve applicants from Russia, the significance of such a law should not be readily dismissed, posing a serious threat to the future of human rights in Europe and beyond.

Whilst it is acknowledged that jurisprudence has to evolve and one ruling can repeal another it should do so according to principle and not to political pressure. The lack of change between *Vinter* and *Hutchinson* suggests

the case law of the Strasbourg court is reactive to the latter even though the ECHR should be immune to such pressures. Its highlighted susceptibility, however, is compounded when it treats less influential states with a different yardstick. The development of differential treatment may have temporarily secured the remit of the court by appeasing Britain but, if it continues to advance and embed itself, then the long term future of the court cannot be so easily guaranteed.

Conclusions

The analysis presented here demonstrates differential treatment between nations at the ECHR. In particular it is found that the political standing of nations in the remit of the court is a determinant in how much leniency nations are afforded with the decisions rendered by the ECHR. In so finding it is clear that the margin appreciation has come to be a cover for such treatment and the perversion of that doctrine undermines the very principles on which the court was founded.

References

- Asthana, A. Mason, R. (2016) 'The UK must leave European Convention on Human Rights, says Theresa May', *The Guardian*, April 25
- BBC News (2013) 'Theresa May: Tories to Consider Leaving European Convention on Human Rights', March 9
- BBC News (2015) 'Russia passes law to overrule European human rights court', December 4
- Bowcott, O. (2012), 'Votes for Prisoners: UK Told it Must Implement ECHR Decision', *The Guardian*, December 10
- Conservatives (2014), 'Protecting Human Rights in the UK', Conservative Party Paper [available online at https://www.conservatives.com/~media/files/.../human_rights.pdf] [last accessed September 22, 2017]
- Dyer, C. (2002) 'Death saves Blunkett from release controversy', *The Guardian*, November 16
- ECtHR, Anchugov and Gladkov v. Russia [2013] 11157/04
- ECtHR, Hirst v. The United Kingdom (NO. 2) [2005] 74025/01
- ECtHR, Hutchinson v. the United Kingdom [2017] 57592/08
- ECtHR, Hutchinson v. United Kingdom [2015] [Section iv] 57592/08
- ECtHR, László Magyar v. Hungary [2014] 73593/10
- ECtHR, Matiošaitis and Others v. Lithuania [2017] [Section II] 22662/13
- ECtHR, Trabelsi v. Belgium [2014] 140/10
- ECtHR, Vinter and Others v. United Kingdom [2013] 66069/09
- EWCA Crim 1601, R v. Bieber (aka Coleman) [2008]
- EWCA Crim 188, R v. Ian McLoughlin & R Lee William Newell [2014]
- EWCA Crim 2435, R v. David Oakes and Others (2012)
- EWCA, R v. Mair [2016] T20167250
- EWCA, R v. Port [2016] T20157419
- Kandelias, S. (2011) 'Life Meaning Life: Is There Any Hope of Release for Prisoners Serving Whole Life Orders?', *The Journal of Criminal Law*, 75, 70–87.
- Kern, S. (2014) 'European Court Undermining British Sovereignty', Gatestone Institute [available online at <http://www.gatestoneinstitute.org/4134/echr-uk>] [last accessed September 22, 2017]
- Kirkup, J. (2013) 'Britain May Need to Withdraw from European Convention on Human Rights, says Cameron', *The Telegraph*, September 29
- Pettigrew, M. (2016a) 'Myra Hindley: Murderer, Prisoner, Policy Architect. The Development of Whole Life Prison Terms in England and Wales', *International Journal of Law, Crime and Justice*, 47, 1-9
- Pettigrew, M. (2016b) 'Public, Politicians, and the Law: The Long Shadow and Modern Thrall of Myra Hindley', *Current Issues in Criminal Justice*, 28(1), 51-66
- Stone, J. (2015) 'The Tory plan to scrap the Human Rights Act just moved one step closer', *The Independent*, September 8
- Stone, J. (2016) 'Plans to replace Human Rights Act with British Bill of Rights will go ahead, Justice Secretary confirms', *The Independent*, August 22
- Travis, A. (2013) 'Conservatives promise to scrap Human Rights Act after next election', *The Guardian*, September 30
- Watt, N. Bowcott, O. (2014) 'Tories Plan to Withdraw UK from European Convention on Human Rights', *The Guardian*, October 3
- Watt, N. Travis, A. (2013) 'Tory Ministers Condemn ECHR Ruling on Whole-Life Prison Sentences', *The Guardian*, July 9

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