

Ref. CommHR/DM/sf 025-2019

Mr Stanisław KARCZEWSKI
Marshal of the Senate of the Republic of Poland

Strasbourg, 22 May 2019

Dear Marshal,

I am writing to you regarding the government's amendments to the Polish Criminal Code, adopted by the lower chamber of the Polish Parliament on 16 May 2019 (*ustawa o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*). Among other things, the adopted law proposes to amend Article 77 of the Criminal Code by providing that life prisoners previously sentenced to life or at least twenty years of imprisonment shall not be eligible for conditional release. It also allows courts to set aside the eligibility of the conditional release in cases where the nature and circumstances of the crime and the personal qualities of the offender indicate that the release would cause permanent danger for the life, health, liberty or sexual freedom of others. I note that the proposed amendments have been criticised by the Polish Ombudsman (*Rzecznik Praw Obywatelskich*), the Supreme Court, the Legislation Council to the Prime Minister (*Rada Legislacyjna przy Prezesie Rady Ministrów*), as well as the Legislative Bureau of the Senate's Chancellery (*Biuro Legislacyjne Kancelarii Senatu*), in light of Poland's Constitution and international human rights obligations.

With regard to the proposed changes, I would like to recall that in line with the case-law of the European Court of Human Rights (the Court), member States of the Council of Europe have a duty to take measures to protect members of the public from violent crime. As long as they do not contravene the standards of the Council of Europe and in particular the principles set forth in the European Convention on Human Rights (the Convention), states are in principle free to design their criminal justice systems and to impose life sentences on persons convicted of especially serious crimes.

However, the case-law of the Court requires that for a life sentence to be compatible with Article 3 of the Convention, which prohibits inhuman or degrading treatment or punishment, that sentence must be reducible. Put differently, there has to exist for the prisoner a *de iure* and *de facto* prospect of release (see e.g. *Vinter and Others v. the United Kingdom*, judgment (Grand Chamber) of 9 July 2013), however tenuous or distant that prospect may be. Moreover, Recommendation Rec(2003)22 to member states on conditional release (parole) of the Committee of Ministers of the Council of Europe clearly stipulates that the law should make conditional release available to all sentenced prisoners, including life-sentenced prisoners. While life sentences may in theory be reduced by presidential clemency, I note that the institution of presidential clemency in Poland may fall short of securing the prospect of release for the prisoner and the possibility of review of the sentence, required by the Court's case-law. However, the Court's case-law does not prohibit states from sentencing a person convicted of a serious crime to a penalty of indeterminate imprisonment allowing for the offender's continued detention where necessary for the protection of the public, for as long as they remain dangerous. Therefore, no issue under the Convention would normally arise in cases where a life prisoner who has the right to be considered for release would be refused such release on the ground that he or she continued to pose a danger to society (*László Magyar v. Hungary*, no. 73593/10, §49). I note that the above principles enjoy clear support in European and international law and practice, and that the majority of Council of Europe member States either do not impose life sentences at all, or at the very least provide for a review after a set period, which usually amounts to 25 years (*T.P. and A.T. v. Hungary*, nos. 37871/14 and 73986/14).

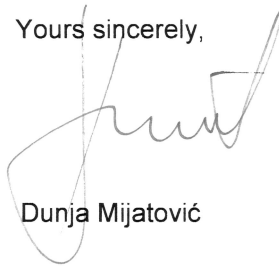
I am well aware that the unpopular question of protecting the fundamental rights of the most serious criminal offenders may naturally provoke emotional reactions and heated debates. However, I believe it is important not to lose sight of the fact that the Convention protects the rights of all human beings without exception, and that this includes criminals, even those most depraved. An important point made by the Court in this respect was that if a prisoner is incarcerated without any prospect of release, there is the risk that he or she could never atone for their offence. Consequently, whatever he or she would henceforth do in prison – good or bad – the punishment would remain fixed forever. This, I firmly believe, would be incompatible with the

humanitarian approach to prisoners' rehabilitation and the principle of human dignity firmly anchored in international human rights instruments and in Poland's Constitution.

I have also noted the rapid pace of the introduction of the proposed legislation, which – apart from the above-mentioned issues – encompasses a number of far-reaching changes to Poland's criminal law, including new categories of crimes and penalties. The Sejm has adopted the bill in just two days. I recall that the issue of similarly hurried enactment of legislation without inclusive debate has already been the subject of concern expressed by my predecessor after his last visit to Poland.

I would therefore like to encourage you to organise, in your capacity as Marshal of the Senate, a broader public debate in the Senate around this issue, as required when drafting legislation impacting on human rights, as well as to take the time needed to consult all relevant stakeholders and national and international legal experts so that any law adopted is fully compliant with the case-law of the European Court of Human Rights and the standards of the Council of Europe. I would also be grateful if you could ensure that a copy of this letter is shared with all esteemed members of the Senate. I look forward to continuing our constructive dialogue.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Dunja Mijatović', with a large, stylized flourish at the end.

Dunja Mijatović