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Remission of sentences and the constitutionality of life imprisonment in Seychelles

Remisi hukuman dan konstitusionalitas hukuman penjara seumur hidup di Seychelles

Jamil Ddamulira Mujuzi
Faculty of Law, University of the Western Cape, South Africa
✉jdmujuzi@uwc.ac.za

ABSTRACT: *This article critically examines the legal framework surrounding life imprisonment in Seychelles, particularly in light of recent legislative and judicial developments. Historically, Seychelles' legal landscape allowed for the remittance of sentences for all prisoners except those serving life terms or convicted of severe drug offenses. Prior to 2021, ambiguity existed regarding whether life imprisonment necessitated incarceration for the entirety of an offender's life, leading to varied interpretations and inconsistent practices wherein some individuals were released after 15 to 20 years of imprisonment. This uncertainty was addressed by an important decision of the Seychelles Court of Appeal, which asserted that life imprisonment should indeed mean incarceration for the remainder of the convict's natural life. Subsequently, legislative amendments in 2021 codified this understanding within the Criminal Procedure Code, expressly defining life imprisonment as confinement for the duration of the offender's life. However, the article argues that such a statutory definition and practice may contravene fundamental human rights principles, particularly concerning human dignity and protection from inhuman or degrading treatment. Drawing on comparative jurisprudence from various African jurisdictions, decisions of the European Court of Human Rights, and standards articulated by international human rights bodies, the author contends that indefinite life imprisonment without the prospect of release violates prisoners' rights enshrined in international law. Furthermore, the author invokes the drafting history of Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR), emphasizing that the intent behind the provision was to safeguard against overly punitive sentences that deny any possibility of rehabilitation or eventual release. This historical context, according to the article, supports the argument that Seychelles' current approach to life imprisonment undermines its obligations under international human rights norms. Moreover, the Constitution of Seychelles grants the President discretionary powers under Article 60 to commute sentences, theoretically enabling the release of individuals sentenced to life imprisonment. This aspect introduces a layer of executive discretion that intersects with constitutional principles and international human rights standards, warranting further examination and critique. In conclusion, the article posits that Seychelles' statutory definition of life imprisonment raises constitutional and human rights concerns, advocating for a reevaluation of current practices in light of international legal standards and principles of justice.*

ABSTRAK: *Pasal 30 Seychelles Prisons Act menetapkan bahwa hukuman bagi semua narapidana, kecuali mereka yang dijatuhi hukuman penjara seumur hidup atau dihukum karena pelanggaran berat terkait narkoba, dapat diampuni. Pasal 31 Seychelles Prisons Act memberikan kewenangan kepada Pengawas untuk memberikan izin bebas bersyarat kepada narapidana. Sebelum tahun 2021, undang-undang Seychelles tidak membahas masalah apakah seseorang yang dijatuhi hukuman penjara seumur hidup harus menghabiskan sisa hidupnya di penjara. Akibatnya, narapidana yang dijatuhi hukuman penjara seumur hidup dapat dibebaskan setelah menjalani hukuman antara 15 dan 20 tahun. Tidak puas dengan pendekatan ini, Pengadilan Tinggi memutuskan bahwa hukuman penjara seumur hidup berarti hukuman penjara selama sisa hidup pelaku. Pada tahun 2021, KUHAP diubah untuk mendefinisikan hukuman penjara seumur hidup sebagai hukuman penjara selama sisa hidup pelaku. Pasal 60 Konstitusi memberi wewenang kepada Presiden untuk meringankan hukuman apa pun. Artinya, Presiden dapat menggunakan Pasal 60 untuk meringankan hukuman seumur hidup. Dalam artikel ini, penulis menggunakan data-data, antara lain, statistik dari Seychelles Prisons Service di mana Presiden telah menggunakan Pasal 60 sejak tahun 1999, yurisprudensi dari beberapa negara Afrika, European Court of Human Rights dan badan-badan hak asasi manusia internasional untuk menyatakan bahwa hukuman penjara seumur hidup sebagaimana didefinisikan dalam undang-undang Seychelles adalah inkonstitusional karena melanggar hak-hak narapidana atas martabat manusia dan tidak menjadi sasaran perlakuan yang tidak manusiawi dan merendahkan martabat. Penulis juga menggunakan sejarah penyusunan Pasal 10(3) Kovenan Internasional tentang Hak Sipil dan Politik untuk berpendapat, antara lain, bahwa hukuman penjara seumur hidup tanpa kemungkinan pembebasan bertentangan dengan kewajiban hak asasi manusia internasional Seychelles.*

Keywords:
remission of sentence; life imprisonment; constitutionality; prerogative of mercy; Seychelles

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1. Introduction

Seychelles has one of the lowest prison populations in Africa. As of 30 June 2023, there were 387 inmates in Seychelles' three prisons.[1] Section 30 of the Prisons Act[2] provides for the circumstances in which the sentences of most of the prisoners may be remitted. However, it excludes the sentences of the prisoners serving life sentences and those convicted of drug-related offences of an 'aggravated nature.' Section 31 of the Prisons Act empowers the prison authorities to grant a prisoner a license to be at large. Before 2021, Seychelles law was silent on the issue of whether a person sentenced to life imprisonment (lifer) had to spend the rest of his life in prison. As a result, lifers were being released after serving between 15 and 20 years. This prompted the Court of Appeal to hold that life imprisonment should mean imprisonment for the remainder of the offender's life. The Court also called upon the government to enact legislation defining the meaning of life imprisonment. In 2021, the Criminal Procedure Code was amended to define life imprisonment as imprisonment for the reminder of the offender's natural life (until his death). Article 60 of the Constitution empowers the President, through exercising his prerogative of mercy, to, inter alia, commute any sentence. This implies that the President could invoke Article 60 to commute the sentence of lifers.[3] Statistics from Seychelles Prison Service show that by January 2024, there were 33 lifers. 31 of them had been convicted of murder and two for drug offences.[4] Between 1999 and January 2024, the President, on the basis of Article 60, pardoned 129 prisoners. Of these, 11 were serving life sentences. Of the 11 lifers, only three were released between 2003 and 2024.[5] That is almost one lifer per decade. This means that Article 60 does not provide for a realistic possibility for lifers to be released. In this article, the author discusses the issue of remission of sentences generally. Against that background, the author relies on case law from Seychelles, some African countries and the European Court of Human Rights to argue that the sentence of life imprisonment in Seychelles is unconstitutional for violating the rights to dignity and to freedom from being subjected to inhuman and degrading treatment. The author also relies on the jurisprudence and practice of international human rights bodies to strengthen the argument on the unconstitutionality of the sentence of life imprisonment. Seychelles ratified the International Covenant on Civil and Political Rights (ICCPR). Article 10(3) of ICCPR provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' The author relies on the drafting history of Article 10(3) of the ICCPR to argue that life imprisonment without a realistic possibility/prospect of early release is contrary to Seychelles' international human rights obligations. The discussion will start with the issue of early release of offenders (which focuses on the remission of sentences and licence to be at large) before dealing with the question of life imperisonment.

2. Method

This article was written based on the analysis of the relevant case law and legislation from Seychelles and other countries. The author also relies on, amongst other sources, statistics from the Seychelles Prison Service and on the drafting history of Article 10(3) of the International Covenant on Civil and Political Rights.

3. Finding and Discussion

3.1. The early release of prisoners

In this part of the article, the author deals with two situations under the Prisons Act in which a prisoner can be released early from prison – before completing his sentence. These issues are remission of sentence and grant of license to be at large. These measures apply to offenders serving determinate sentences. The discussion will start with the remission of sentences.

1 https://www.prisonstudies.org/country/seychelles
2 Prisons Act, Chapter 180.
3 This should be distinguished from amnesty. The Constitution does not deal with the question of amnesty. Amnesty can be granted by the Truth, Reconciliation and National Unity Commission under section 3 of the Truth, Reconciliation and National Unity Commission Act, Act 9 of 2018. For a detailed discussion of the powers of the Commission, see *Seychelles People's Defence Forces v The Truth, Reconciliation and National Unity Commission* (MC 33/2020) [2020] SCSC 576 (31 July 2020). The government can also grant amnesty in specific circumstances, see *Valabhji v The Republic* (SCA CR 8 of 2022) [2023] SCCA 1 (10 February 2023) (the government granted amnesty for the surrender of unlicensed firearms and ammunition).
4 Email correspondence from Seychelles Prison Service, 22 January 2024 (on file with the author).
5 Ibid.

3.1.1. Remission of sentences

As a general rule, a prisoner is required to serve his full sentence in prison. However, there are exceptions to this rule – remission of sentence and grant of license to be at large. Remission of sentence is provided for under section 30 of the Prisons Act. Since this provision is going to be discussed in detail, it is necessary to reproduce it here verbatim. It states that:

> *(1) Subject to subsections (2) and (3), a person sentenced, whether by one sentence or by consecutive sentences, to imprisonment for a period exceeding 30 days, including a person sentenced to imprisonment in default of payment of a fine or other sums of money, may, on the ground of his industry and good conduct while in prison be granted a remission of one-third of the period of his imprisonment.*
>
> *(2) (a) Subsection (1) shall not apply to a prisoner— (a) serving a sentence of imprisonment for life; or*
>
> *(b) serving a sentence of imprisonment for an offence of an aggravated nature under the Misuse of Drugs Act, 1990; or*
>
> *(c) detained in custody during the President's pleasure.*
>
> *(3) Where a remission granted under subsection (1) to a prisoner results in the reduction of his period of imprisonment to a period less than 30 days, the prisoner shall not be released from prison until he has served a period of 31 days imprisonment.*
>
> *(4) For the purpose of giving effect to subsection (1), each prisoner on the commencement of his sentence shall be credited with the full period of remission which he would be entitled to under that subsection and shall only lose such remission as a punishment for idleness, lack of industry or other offence against prison discipline.*
>
> *(5) The preceding provisions of this section shall be without prejudice to the prerogative of mercy vested in the President under the Constitution.*

The following observations should be made about section 30. First, for a person to be granted remission, the sentence must exceed 30 days. However, lifers and those convicted of drug-related offences of an 'aggravated nature' under the Misuse of Drugs Act do not qualify for remission. The reason for excluding lifers from the remission provision could be that, as the discussion below illustrates in detail, the Prisons Act does not provide for the minimum number of years they are required to serve before being released. In other words, there is no basis to allocate the one-third credit under section 30(4) to such a prisoner. Another reason could also be that lifers are expected to remain in prison for the rest of their lives. The reason for excluding those sentenced for drug-related offences is that the legislature considers these offences to be very serious. As the Court of Appeal held in *Bouchereau & Others v Supt of Prisons & Others*,[6] 'it is rational that the State provides a deterrent for serious offences and the removal of remission in sentences can be legitimately construed as meeting that objective.'[7]

As mentioned above, a person who is serving a 'sentence of imprisonment for an offence of an aggravated nature under the Misuse of Drugs Act' does not qualify for remission. This raises the question of the meaning of the term an offence of 'aggravated nature.' The Misuse of Drugs Act of 1990 was silent on the issue of an 'offence of aggravated nature.' The Misuse of Drugs Act of 1990 was repealed by the Misuse of Drugs Act of 2016.[8] This Act includes two sections which deal with offences of aggravated nature. These are sections 7(4) and 48. Each of these sections is discussed in detail. Section 7(4) of the Misuse of Drugs Act of 2016 provides that '[w]here a person is convicted of an offence of trafficking in more than 1.5 kilograms of cannabis or cannabis resin or more than 250 grams of any other controlled drug, the court shall treat the offence as aggravated in nature.' In other words, once a person has been convicted of an offence that meets one of the requirements under section 7(4), the court is obligated to treat that offence as aggravated in nature. As a result, such a person does not qualify for remission of sentence. When imposing sentences on some offenders convicted under section 7(4) of the Act, courts have expressly mentioned that they do not qualify for remission.[9] Section 48(1) provides for a list of some of the

6 Bouchereau & Others v Supt of Prisons & Others [2015] SCCA 3.

7 Ibid, para 11.

8 Misuse of Drugs Act, Act 5 of 2016. This Act commenced on 1 June 2016 as per Misuse of Drugs Act, 2016 (Commencement) Notice (Statutory Instrument 34 of 2016)(30 May 2016).

9 See for example, R v Suki [2019] SCSC 1168 para 14; R v Cesar (Sentence) [2017] SCSC 174 para 5; Monthy v R [2018] SCCA 12 para 14 – 16; R v Chilaule [2018] SCSC 8310 para 9.

aggravating factors that a court is empowered to consider in determining a 'more serious sentence.' Section 48(2) provides that '[w]here one or more of the aggravating factors identified in subsection (1) is present to a significant extent, the court shall treat the offence as aggravated in nature.' Under section 48(2), the mere presence of one of the aggravating factors under section 48(1) does not in itself mean that the offence is one of an aggravated nature for the purpose of excluding the offender from remission.[10] The absence of one of the aggravating factors under section 48(1) means that the court is required to conclude that the offence is not of an aggravated nature.[11] For an offence to be of an aggravated nature, two requirements must be in place: one of the factors under section 48(1) must be present and in addition to that, the presence of that factor must be of a 'significant extent.' The Act does not describe or explain the meaning of 'a significant extent.' In cases where courts have invoked section 48 to find that the offenders do not qualify for remission, the courts do not explain why one of the aggravating factors was of a 'significant extent.'[12] This implies that the court considers the existence of one of the aggravating factors on its own to be sufficient to invoke section 48. Courts will have to revisit this approach otherwise the words 'significant extent' are rendered superfluous.

A combined reading of sections 7(4) and 48 shows that in cases where the offence of which the person has been convicted is not excluded from the remission provision, the seriousness or otherwise of the offence is irrelevant for the purposes of remission. In other words, it is the category of the offence (as determined by the legislature) that determines whether or not a person qualifies for remission after meeting the required conditions. It is against that background that the Supreme Court has often informed some of the people convicted of drug-related offences that they are 'entitled to remission as the offence is not aggravated in nature.'[13]

Second, for remission to be granted under section 30, two conditions must exist: industry and good conduct. In other words, the prisoner must be industrious and in addition, he/she must be of good conduct. It is not enough that the prisoner is industrious or that he/she is of good conduct. Both conditions must be met. It is therefore an oversight on the part of the Supreme Court in some of its decisions to create the impression that remission can be granted on the ground of good conduct alone.[14] Both the industry and the good conduct must have taken place 'while in prison.' That is while serving the sentence for which the remission is being considered. In other words, whatever he/she did before or after imprisonment does not count. The phrase 'while in prison' should be interpreted to cover all the activities that the prisoner conducts while serving a sentence whether in or outside prison. These include cases, where, for example, the prisoner is in hospital (under section 24 of the Prisons Act) or is undertaking prison labor outside prison (under section 28 of the Prisons Act). The Act does not define or describe both terms. However, the concepts overlap and in practice, it may be difficult to draw a clear line between the two. That said, industry relates to the constructive activities that a prisoner conducts in prison. For example, doing more work than he is required to do or working in certain sections/departments of the prison and participating in recreational/vocational/rehabilitation activities.[15] Good conduct means that a prisoner should obey the prison rules and regulations. Whereas the prisoner is generally in control of his conduct and decides how to behave, the same cannot be said of industry. Industry requires the prison authorities to make the opportunities available to the prisoners.

Third, the use of the word 'may' under section 30 creates the impression that the superintendent has the discretion to remit the sentence of a prisoner on the grounds of industry and good conduct. I argue that a combined reading of sections 30(1) and 30(4) indicates that if there is evidence of industry and good conduct, the superintendent has no discretion but to remit the prisoner's sentence. In other words, the word 'may' should be interpreted to mean 'shall.'[16] Should the superintendent decline to do so, the prisoner could go to court and successfully challenge the reasonableness, legality or rationality of his decision. Once the court has reviewed the superintendent's decision, he/she is obliged to remit the prisoner's sentence.

10 In Jules Labrosse v R [2017] SCCA 28 para 13, the court held that 'If no aggravating circumstances exists [sic], the convict will benefit from the amended provision in that he will be entitled to remission under the amended Prisons Act 6 of 2016.' This is not the correct interpretation of section 48(2). The correct interpretation is for a person to be excluded from remission, the aggravating factor has to be 'present to a significant degree.'

11 R v Jules [2018] SCSC 8132 para 4.

12 See R v Valencia & Anor [2020] SCSC 493; R v Munyao & Anor [2021] SCSC 947; R v Fred [2021] SCSC 1011; R v Khalidi Mikidadi [2022] SCSC 416; R v Dhalin Joubert & Others [2022] SCSC 637; R v Dos Anjos [2023] SCSC 370; R v Faiz Mubarak and Others [2023] SCSC 489.

13 R v Hoareau [2016] SCSC 482 para 8; R v Philoe [2016] SCSC 483 para 7. In R v Cadeau & Anor [2023] SCSC 760, the Court held that the offender was entitled to remission because of his medical condition.

14 R v Suki [2019] SCSC 1168 para 14; R v Jules [2018] SCSC 8132 para 16; R v Sameja & Anor [2020] SCSC 524 para 18.

15 For examples of 'industry', see sections 38 and 43 of the repealed Prison Act (1870)(Australia).

16 In Allisop v FIU [2016] SCCA 1, the Court explains the circumstances in which the word 'shall' can be permissible or imperative. The same logic applies to the word 'may.'

Emerging from the foregoing discussion is the question of whether a prisoner has a right to remission of sentence. This is an issue on which the Court of Appeal and other courts have been inconsistent. In many decisions, the Court of Appeal held that a prisoner does not have a right to remission of sentence and that '[r]emission is a privilege accorded to prisoners in certain circumstances.'[17] In other words, 'remission of sentence is a purely discretionary power vested in the Superintendent of Prisons'[18] and '[t]here cannot be an expectation of being entitled to remission of a sentence when one commits an offence.'[19] However, in one case in which the appellant challenged the Tribunal's decision dismissing his application that he should be considered for remission, the Court of Appeal observed that the appellant's 'attempt to equate the statutory right to remission under section 30 of the Prisons Act to the fundamental right to liberty guaranteed under article 18 of the Constitution is misconceived.'[20] This creates room for the argument that the Court was of the view that a prisoner has a statutory right to remission.

How does one reconcile these two conflicting Court of Appeal positions? In the author's view, since in a majority of cases the Court has held that a prisoner does not have a right to remission and in the case where it held that a prisoner has a right to remission it does overrule its earlier decisions (that a prisoner has no right to remission), the prevailing view is that a prisoner does not have a right to remission. However, that does not mean that the decision whether or not to grant remission can be exercised arbitrarily. For such a decision to be valid, it has to be reasonable.[21] This is so because in determining the sentence to impose on the offender, some judges inform the offenders that the sentence imposed on them is not heavy in the light of the fact that they will be granted remission which has the effect of reducing the number of years he/she will spend in prison.[22] As the Court of Appeal held, a prisoner's 'entitlement to remission depends obviously on his good behavior in prison.'[23] This means that prisoners have a legitimate expectation that should they do what is required of them in prison, their sentences will be remitted. However, at the time of imposing a sentence, a court does not have the power order that the offender 'will be entitled to remission.'[24] This is so because whether or not the offender's sentence will be remitted is determined by his conduct in prison.[25] As the Court of Appeal held, '[a]ny remission of a sentence… is in the discretion of Prison Service.'[26] Likewise, the Prisons Act does not provide for circumstances in which a court can remit the offender's sentence at the time of imposing the same. For example, in *R v Finesse*,[27] the court, after convicting the offender, sentenced him as follows:

> *I impose a term of imprisonment of 6 months for the offence. The Convict is entitled to remission of one-third (⅓) of his sentence that is 2 months and the time that he has served on remand from the 6th of April 2013 to the 6th of August 2013 shall count as the sentence so that is the 4 months which he has already served. That means he does not have to be incarcerated further.*[28]

In this case, the court practically usurped the powers of the superintendent and remitted the sentence without considering the issue of the prisoner's industry and good conduct. The prisoner had also not yet served his sentence. This approach is not supported by the Prisons Act.

Four and related to the above, under section 30(4) of the Prisons Act, the prisoner 'shall only lose such remission as a punishment for idleness, lack of industry or other offence against prison discipline.' The use of the

17 Bouchereau & Others v Supt of Prisons & Others [2015] SCCA 3 para 9. See also para 14. See also Bradburn & Anor v Superintendent of Prisons & Anor [2012] SCCC 4 (Constitutional Court). However, see Bouchereau & Anor v Superintendent of Prisons & Anor [2013] SCCC 7 para 25, where the Constitutional Court observed that 'remission is not an absolute right.' See Forte & Or v Attorney General [2019] SCCC 7 para 16.

18 Oreddy v R [1998] SCCA 48 p. 4. See also R v Legaie [2019] SCSC 1262 para 6; R v Brigilia [2020] SCSC 421 para 7.

19 R v Pasenji [2014] SCCA 25 para 17.

20 Geoffrey Antat v R [2018] SCCA 6 para 6. See also R v Chang-Tave & Others [2021] SCSC 980 para 18 where the Supreme Court held that '[a]ccused have a right to remission at the discretion of the Superintendent of Prisons. Copy of the sentence to be sent to the Superintendent of Prison.'

21 For the test of reasonableness, see Seychelles International Business Authority v Jouaneau & Anor [2014] SCCA 28 para 18.

22 Jean v R [2006] SCSC 28; R v Labiche and Ano [2016] SCSC 484.

23 Jefferson Marie v R [2018] SCCA 31 para 10.

24 In many cases, the court held that the offender was 'entitled' to remission. See R v Hoareau [2016] SCSC 482 para 8. See also Bristol v R [2017] SCSC 914 para 17; R v DR [2018] SCSC 8086 para 9; R v Lablache [2018] SCSC 8168 para 3; Oreddy v R [2018] SCSC 8241 para 11; R v Radegonde [2018] SCSC 8269 para 4; R v Kilindo [2018] SCSC 1159 para 3; R v Pool & Others [2023] SCSC 764. In R v Auma Bwire [2020] SCSC 418 para 5, the court held that the offender was entitled to remission and added that a copy of the order should be served on the Superintendent of Prisons.

25 Thus, in Rupert Suzette v R [2017] SCCA 31 para 29, the Court of Appeal in sentencing the offender held that 'any remission that the Appellant may be entitled to under the Prison Act shall also be discounted from the sentence presently given.'

26 Jefferson Marie v R [2018] SCCA 31 para 9.

27 R v Finesse [2017] SCSC 73.

28 Ibid para 2.

words 'other offence' creates the impression that idleness and lack of industry are also offences against prison discipline. It is argued that these are not offences unless the prison's conduct (idleness or lack of industry) is as a result of disobeying prison regulations. Therefore, the sentence should read 'or any offence against prison discipline.' A close examination of section 30(4) implies that before a prisoner loses such remission, a hearing must be conducted at which he should defend himself and explain why they should not lose the remission. If the body which has conducted the hearing finds that the prisoner, notwithstanding his defense, has to lose his remission, it should impose a 'punishment.' The punishment (in the form of losing remission) should be proportionate to the 'offence' committed by the prisoner. Thus, the less serious the transgression, the more lenient the sentence and vice-versa. A prisoner can only lose his remission based on one or more of the three grounds: idleness, lack of industry or any offence against prison discipline. Since the Act does not define these terms, it is for the prison authorities to define them. However, for the purpose of ensuring that prisoners know exactly what is expected of them, it would be a good idea for the prison regulations to define or describe these terms.

Five, once a prisoner's sentence has been remitted and he is released from prison, he is considered to have served the full sentence. Six, one-third of the sentence is the maximum period of remission that can be granted. This could be reduced depending on the prisoner's conduct in prison. If there are no grounds for remission, the prisoner has to serve his full sentence. Remission of the sentence is granted to all qualifying prisoners irrespective of their nationality. In other words, it applies to both Seychelles nationals or residents and foreign national prisoners. Related to the issue of remission of sentence, is the question of license to be at large. This is provided for under 31. It is to this issue that we turn.

3.1.2. License to be at large

Section 31 of the Act provides for the circumstances in which a prisoner may be granted a license to be at large. It states that:

> *(1) Where a prisoner who—*
>
> *(a) is serving a sentence of imprisonment of or exceeding 2 years; and*
>
> *(b) has served not less than one half of the sentence; and*
>
> *(c) has been of good behaviour while serving the sentence, the Superintendent may, with the approval of the Minister, grant the prisoner a licence to be at large in Seychelles or in any part of Seychelles as may be specified in the licence.*
>
> *(2) Any licence granted under subsection (1) may, with the approval of the Minister, be revoked or altered by the Superintendent.*
>
> *(3) Where a licence is granted under subsection (1), the prisoner shall be released from prison and shall not be liable to serve the unexpired period of the sentence in respect of which the licence is granted unless the licence is revoked under subsection (2) of this section or forfeited under section 33.*

The effect of section 31 is to empower the superintendent to release a prisoner on license once the prisoner has met all three requirements under section 31(1). Unlike in the case of remission where the prisoner has to have been industrious and of good conduct, for the purpose of license under section 31, the prisoner does not have to have been industrious. He is just required to be of good conduct. Of all the three conditions, a prisoner has control over one – good conduct. The conditions on which the license is granted are provided for under section 32 of the Act.[29] The use of the phrase 'shall be subjected to the following conditions' under section 32 means that each

29 Section 32 provides that

(1) A licence granted under section 31 to a prisoner (in this section and in section 33 referred to as the "licence holder") shall be in such form as may be prescribed and shall be subject to the following conditions—

(a) the licence shall contain the finger prints of the licence holder and shall be produced by the licence holder when called upon by a police officer to do so;

(b) the licence holder shall not associate with notoriously bad characters such as reputed thieves, house-breakers, receivers of stolen property and the like;

(c) the licence holder shall not lead an idle or dissolute life without visible means of earning an honest livelihood;

(d) the licence holder shall at the time of his release under section 31 (3) inform the Superintendent of his place of residence after release and shall after his release proceed to such place and, unless he is prevented by reasonable cause, report personally to the officer-in-charge of the police station nearest to his place of residence within 48 hours of his arrival at such place and notify him of his place of residence and shall continue to report to him personally once in every month thereafter during the unexpired period of the sentence in respect of which the licence is granted;

(e) where the licence holder intends to change his place of residence, he shall give 48 hours notice of his intention, either

license must, at a minimum, include all the conditions under section 32(1)(a) – (f). Therefore, the superintendent cannot exclude any of those conditions. However, based on section 31(1)(g), the superintendent, with the approval of the Minister, may stipulate additional conditions. Under section 31(2), the superintendent, with the approval of the Minister, may alter any of the conditions of the license (both mandatory and discretionary). It is important to take a close look at the circumstances in which the license may be revoked. This requires one to read sections 31(2) and 33 together. As mentioned above, section 31(2) empowers the superintendent, with the approval of the Minister, to alter or revoke a license issued under section 31. Section 33 provides that:

> *(1) A licence holder who fails to comply with any conditions of the licence granted to him under section 31 is guilty of an offence and, without prejudice to his liability to serve any unexpired period of the sentence in respect of which the licence is granted, shall be liable on conviction to imprisonment for three months and shall have the licence forfeited.*
>
> *(2) Where a licence granted under section 31 is revoked by the Superintendent under subsection (2) of that section, the licence holder may be arrested by any police officer without a warrant and produced before the Superintendent.*
>
> *(3) Where a licence granted under section 31 is forfeited by a court, the court shall commit the licence holder to the custody of the Superintendent.*
>
> *(4) Where a licence holder is produced before the Superintendent under subsection (2) or committed to his custody under subsection (3), the licence holder shall be liable to serve the unexpired period of the sentence in respect of which the licence was granted.*

A combined reading of sections 31(2) and 33 shows the following. One, before the superintendent revokes any license, there has to be evidence that the license holder has failed to comply with any of the conditions of the license. Two, the sections are silent on whether a license holder has a right to be heard before the superintendent revokes the license. Three, the license will be revoked even before the license holder is convicted of the offence of failing to comply with any of the conditions of the license. Therefore, the revocation of the license is an administrative process whereas the conviction is a judicial process. This also implies that even if the license holder is acquitted of an offence under section 33, the superintendent may still revoke the license. Four, since the license holder has no right to be heard before the license is revoked, a mere failure to comply with any of the conditions automatically leads to the revocation of the license. It is immaterial whether or not his failure to comply with any of the conditions was intentional. Failure to comply with any of the conditions of a license is a strict liability offence.[30]

Since the revocation of the license has the effect of depriving the license holder of his constitutional right to liberty, it is argued that the Act may have to be amended to provide that the license can only be revoked after the offender has been given a right to be heard by an independent and impartial body. The Act may also have to be amended to provide that a license should only be revoked once the court has convicted the license holder of an offence under section 33. This is so because the license holder could have a valid defense of why he failed to comply with the condition(s) in question. If the court acquits him of the offence, there is no ground on which the superintendent's decision to revoke the license should stand.[31] The acquittal should serve as proof that the license holder did not fail to comply with a condition. Likewise, if the court convicts the license holder of failure to comply with any conditions of the license, the superintendent and the Minister are obliged to revoke the license. However, his conviction does not mean that he is obliged to serve all the remaining part of his sentence. Even after conviction, the superintendent, with the approval of the Minister, can still grant another license to the same person. Put differently, he can be given a 'second chance.' This can be inferred from section 33(4) which states, in part that 'the license holder shall be liable to serve the unexpired period of the sentence in respect of which the

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personally or by letter, to the officer-in-charge of the police station to whom he is liable to report under paragraph (d) and where such change of residence is from one area of a police station to an area of another police station he shall also report and continue to report in accordance with paragraph (d) to the officer-in-charge of the police station closest to the place of residence to which he has changed his residence.

(f) where the licence granted under section 31 is a licence to be at large in a part of Seychelles, the licence holder shall not enter or reside in any other part of Seychelles during the unexpired period of the sentence in respect of which the licence is granted;

(g) any other conditions which the Superintendent may, with the approval of the Minister, specify in the licence.

(2) If a licence holder satisfies the Superintendent that he has lost the licence through no fault of his, he shall be issued with a duplicate of the licence.'

30 Strict liability offences do not carry 'with them mental elements.' See The Anti-Corruption Commission v Nair [2021] SCSC 1062 para 22; R v Lesperance & Others [2017] SCSC 842.

31 The Hollington rule does not apply in Seychelles. See for example, Esparon v Philo [2023] SCCA 15 paras 45 - 48.

license was granted.' Had the legislator wanted to take away the powers of the superintendent and the Minister to release such an offence on license again, section 34(4) would have excluded the word 'liable' and provided that 'the license holder shall serve the unexpired period of the sentence in respect of which the license was granted.' However, if the court sentenced the license holder to imprisonment for an offence under section 33, he cannot be released on license with respect to the first offence before he has served the minimum duration for which he qualifies for a remission in respect of the second offence. Since the maximum sentence for an offence under section 33 is three months' imprisonment, section 31 does not apply to such a sentence.

Finally, a license can be granted to any prisoner serving a sentence of two or more years irrespective of the offence of which he was convicted. This means that it excludes lifers (because their sentences are indeterminate) and those serving less than two years. It also excludes foreign offenders who are not resident in Seychelles. This is because, under section 31, a license at large can only be granted to a prisoner 'to be at large in Seychelles or in any part of Seychelles.' However, it includes those convicted of drug-related offences of an aggravated nature. A prisoner whose sentence has been remitted can also be granted a license to be at large. A prisoner whose sentence has not been remitted for lack of industry can also be granted a license at large based on his good conduct alone. The next part of the paper deals with the issue of life imprisonment.

3.2. The constitutionality of the sentence of life imprisonment

Article 15(2) of the Constitution prohibits the death penalty.[32] Therefore, life imprisonment is the severest sentence that a court can impose. The legislature has followed two different approaches to the issue of life imprisonment. The first approach is to provide for the sentence of mandatory life imprisonment. In such a case, when a court convicts a person of an offence, it is obligated to impose the sentence of life imprisonment.[33] In this case, aggravating or mitigating circumstances are immaterial.[34] The second approach is to give courts the discretion to decide whether or not to impose a life sentence (the maximum sentence).[35] In such cases, courts will consider factors such as the seriousness of the offence, the personal circumstances of the offender and the interests of society in deciding whether or not to impose the sentence of life imprisonment.[36] As mentioned above, the Prisons Act is silent on the circumstances in which a lifer can be released from prison. This creates the impression that life imprisonment means imprisonment for the offender's natural life. However, case law shows that before 2021, lifers were being released after serving a maximum of 20 years' imprisonment. For example, in *R v Pothin*,[37] the appellate court observed that:

> *In the course of hearing this appeal, it came to our knowledge that convicts sentence[d] to "life imprisonment" do not serve the entire sentence as imposed. It is common knowledge that such people are released after serving 10 to 15 years in prison. We are aware of the lawful powers available to other State Institutions when it comes to [the] pardoning or parole of such prisoners. However, convicts sentenced to life imprisonment are those convicted of very serious offences – offences that in other jurisdictions still carry capital punishment. In Seychelles, capital punishment has been abolished…The abolishing of capital punishment notwithstanding, serious crimes are still being committed and those convicted of such crimes are sentenced to the maximum possible prison incarceration. Without encroaching on the powers of other State Institutions we would nevertheless, like to draw the attention of all concerned that serious offences deserve serious and severed punishments. Life imprisonment is one such punishment. It is, therefore, in the interest of justice as well as that of the public that people convicted and sentenced to life imprisonment should serve [sic] their full term as ordered by the Court. The words "life imprisonment" or "life prison*

32 Article 15(2) provides that '[a] law shall not provide for a sentence of death to be imposed by any court.'

33 For example, section 194 of the Penal Code provides that '[a]ny person convicted of murder shall be sentenced to imprisonment for life.'

34 Basset v The Republic [2021] SCCA 42; Underwood & Anor v R [2023] SCCA 46 (in this case, they are not mentioned at all as the sentence is mandatory).

35 See for example, section 195 of the Penal Code which provides that '[a]ny person who commits the felony of manslaughter is liable to imprisonment for life.' See also sections 207, 208, 215, 217 and 218 of the Penal Code. See also section

36 R v Tarani & Anor [2018] SCSC 8052 para 5 (the court imposed the sentence of life imprisonment because the offender did not show 'exceptional' mitigating factors). In Rashid Liwasa v R [2018] SCCA 15 para 41, the court set aside the offender's sentence of life imprisonment because it was 'harsh, oppressive and manifestly excessive in the circumstances). In Neddy Micock & Anor v R [2019] SCCA 12 the Court of Appeal held that the Supreme Court was justified imposing the sentence of life imprisonment on the offender for 'deterrent' purpose.

37 R v Pothin [2007] SCSC 44.

term" should be given their ordinary and natural meaning. Prisoners sentenced to life imprisonment should serve their full terms without [the] intervention of a non-judicial authority. If the legislature was desirous of rationalising this aspect of the law, it should be encouraged to do it but until then, life imprisonment should mean life imprisonment.[38]

The above decision shows that the release of lifers was not based on a legislative provision. It was a practice adopted by the prison authorities. The court was of the view that since there was no law stipulating the minimum number of years a lifer had to serve before they could be released, life imprisonment should be given its natural meaning. The decision also implied that the court wanted the judiciary to play a role in the release of lifers.

In 2021, section 2 of the Criminal Procedure Code was amended[39] to expressly define 'imprisonment for life' to mean 'imprisonment for the duration of a person's natural life.' Apart from excluding lifers from being granted remission and license at large, section 41 of the Prisons Act provides that:

(1) The Superintendent shall submit to the Minister a special report on the general conditions of every prisoner serving a term of imprisonment for life or a term exceeding 3 years, at the end of every 2 years of such imprisonment.

(2) The Minister shall forward the report submitted under subsection (1) together with his observations thereon to the President and the President may, in the exercise of his powers under the Constitution, give such directions on the matter as he shall think fit.

(3) Notwithstanding subsection (1) the President may require the Minister to forward to him a report on any prisoner referred to in that subsection at intervals less than 2 years.

Section 41 is silent on the nature of directions that the President can give. However, nothing prevents the President from invoking his powers under Article 60 of the Constitution to pardon or commute the sentence of a lifer. Article 60(1) provides that:

The President may, after obtaining the advice of the advisory committee appointed under article 61 –

(a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;

(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or

(d) remit the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Republic on account of any offence.

As mentioned above, since the promulgation of the Constitution, the President has invoked Article 60 to pardon some offenders including 11 lifers. Some of these have been reported in case law or newspapers.[40] The Court of Appeal has also encouraged some offenders to apply to the President for clemency under Article 60.[41] The fact that the President has released very few lifers since 1999 shows that realistically, a lifer is more likely to die in prison. This raises the question of whether the sentence of life imprisonment in Seychelles is unconstitutional. To answer this question, one has to rely not only on Seychelles' domestic law but also on case law from other countries and regional and international human rights bodies.

Article 16 of the Constitution of Seychelles provides that '[e]very person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.' Article 44(1) of the Constitution provides, inter alia, that the rights under Article 16 are non-derogable. The Court

38 Ibid, para 23. See also Adrienne & Anor v Attorney General [2020] SCCC 398 para 23 one of the lawyers argued that ' a sentence of 20 years cannot be considered a reduction since convicts who are sentenced to life imprisonment tend to serve approximately 20 years which with remission means they serve only 13 to 14 years imprisonment.'

39 Section 2 of the Criminal Procedure Code was amended by the Statute Law Revision (Miscellaneous Amendments) (No. 2) (Act 49 of 2021).

40 See for example, Cedras v Republic [2017] SCCA 3 para 7 (the offender was serving a six-year prison term when he was released); Ramkalawan v Electoral Commission & Others [2016] SCCA 28 para 117 (two offenders were granted a presidential pardon on medical grounds). See also 'President Wavel Ramkalawan's second presidential press conference' 07 May 2021 (where the President reportedly pardoned one person who was convicted of drug-related offences). Available at https://www.nation.sc/articles/8881/president-wavel-ramkalawans-second-presidential-press-conference; see also President pardons 78 prisoners, 29 December 2016, available at https://www.nation.sc/archive/252377/president-pardons-78-prisoners

41 Isaac Bacco & Anor v R [2017] SCCA 22 para 25; Felicie v R [2016] SCCA 5 para 8 – 9.

of Appeal held that 'the constitutional right against torture, inhuman and degrading punishment, incorporates the principle that sentence must be proportionate to the seriousness of the offence.'[42] Article 16 protects several rights. These are the right to be treated with dignity worthy of a human being; the right to freedom from torture; the right not to be subjected to cruel treatment; the right not to be subjected to cruel punishment; the right not to be subjected to inhuman treatment; the right not to be subjected to inhuman punishment; the right not to be subjected to degrading treatment; and the right not to be subjected to degrading punishment. The question that one has to answer is whether life imprisonment without the realistic prospect of early release violates Article 16 of the Constitution. To answer this question, one is required to first understand the meaning of each of the relevant rights under Article 16. The discussion will start with the meaning of the concept of 'human dignity.'

3.2.1. The right to human dignity

The Constitution of Seychelles does not define or explain the concept of 'human dignity.' In *Ponoo v Attorney-General,*[43] the Constitutional Court referred to a dictionary to define this concept.[44] The Court adopted the same definition subsequently.[45] In *Geers v Government of Seychelles & Others*,[46] the Constitutional Court referred to Canadian case law and described the right to human dignity as follows:

> *Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within ... society.*[47]

The Court has adopted the same definition in subsequent case law.[48] It cannot be argued that a person who is imprisoned for the rest of his natural life feels self-respect and self-worth. He feels abandoned, marginalized, ignored and devalued by the society. This is because, amongst other things, he has no hope of leaving prison irrespective of his conduct during imprisonment. Whether or not he is a model prisoner or is fully rehabilitated is immaterial. His conviction that he is likely to be imprisoned for the rest of his natural life affects his physical and psychological integrity and empowerment. This is because, amongst other things, irrespective of his conduct in prison, he will never be released. Death is his only guaranteed hope of 'leaving' prison. The Constitutional Court and the Supreme Court have given examples in which the right to human dignity has been violated. These include cases where the police detained the applicant in inhumane conditions[49] and the police caused a person's death unlawfully.[50] The Court of Appeal held that it is a violation of the right to human dignity when every person who belongs to a specific group (such as victims or sexual assault are accomplices) is considered as less worth of belief (simply because they belong to that group).[51] The right to human dignity is 'unqualified.'[52] However, this does not mean that the police cannot regulate how people conduct themselves in public places.[53] The Court of Appeal held that a person alleging that his right to human dignity has been violated has to prove 'malice or abuse of authority' on the part of the perpetrator.[54] The above case law also shows that a violation of the right to

42 Cousin v R [2016] SCCA 2 para 16.
43 Ponoo v Attorney-general [2010] SCCC 4.
44 Ibid, p. 8, the Court held that 'The dictionary defines dignity as the quality of being worthy of self-respect, self-regard and self-worth. Dignity in humans involves the earning or the expectation of personal respect or of esteem. Human dignity is something that is inherently a person's God-given inalienable right that deserves to be protected and promoted by the Government and the community. Human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, states, laws, human rights and respect for persons originate in the dignity of man or his personhood. It is even said that dignity is the foundation, the cause and end of all social institutions. Thus all social institutions, governments, states, laws, human rights and respect for persons originate from the concept of dignity of man or his personhood. In this context any attempt to undermine the dignity of a human being would also undermine the very foundation and support upon which an orderly society is structured.'
45 Volcere v Minister for Home Affairs & Local Government & Others [2019] SCCC 2 para 126
46 Geers v Government of Seychelles & Others [2019] SCCC 3.
47 Ibid, para 123.
48 Volcere v Minister for Home Affairs & Local Government & Others [2019] SCCC 2 para 126.
49 Fanchette v Attorney-general [2011] SCCC 10.
50 Government of Seychelles v Rose & Others [2012] SCCA 30.
51 Jean Francois Adrienne & Anor v R [2017] SCCA 25. See also Lucas v R [2011] SCCA 38.
52 R v Esparon & Others [2014] SCCA 19 para 24.
53 Seychelles National Party & Others v Government of Seychelles & Anor; Dhanjee v Michel & Anor [2015] SCCC 2.
54 Valentin v Planning Authority & Others [2021] SCCA 5 para 13.

dignity is often accompanied by a violation of other rights such as the right to equality.[55] This is understandable because, as the Constitutional Court held in *Simeon v Attorney-General*,[56] '[h]uman dignity of all persons is independently recognized as both an attribute and a right in the Constitution and is woven, in a variety of other ways, into the fabric of our Bill of Rights.'[57] It is evident that life imprisonment without a realistic possibility of early release violates the right to human dignity and is therefore unconstitutional. This finding would have been enough to dispose of the issue. However, since other rights in Article 16 are also implicated, it is important to discuss whether or not life imprisonment without the possibility of release also violates them. The discussion will start with the right to freedom from torture.

3.2.2. The right to freedom from torture and cruel, inhuman or degrading treatment or punishment

As mentioned above, Article 16 of the Constitution prohibits torture. Seychelles ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[58] Article 1 of this Convention defines torture to mean:

> *[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

The Constitutional Court relied on the above definition to define the meaning of torture under Article 16 of the Constitution.[59] Based on the above definition, it is argued that life imprisonment without the realistic possibility of release does not amount to torture. This raises the next question of whether life imprisonment without a realistic prospect of early release, as a form of punishment, amounts to a violation of any of the other rights under Article 16.

Other rights protected under Article 16 are the rights against cruel, inhuman or degrading treatment or punishment. In *Simeon v Attorney-General*,[60] the Constitutional Court, while interpreting Article 16, referred to case law from South African courts and held that

> *[I]n the phrase "cruel, inhuman or degrading" the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these three characteristics. This imports notions of human dignity… The impairment of human dignity, in some form and to some degree, must be involved in all three concepts…[T]he measurement of the effect of a sentence is often a composite of many factors including but not limited to its length, nature and the conditions under which it is served.'*[61]

The distinctive nature of each of the rights explains why there are cases in which courts have held that the treatment or punishment in question amounted to one[62] or more than one of the rights under Article 16.[63] The Convention against Torture does not define cruel, inhuman or degrading treatment or punishment. In *Ponoo v Attorney-General,*[64] the Constitutional Court relied on the jurisprudence of the European Court of Human Rights to define inhuman and degrading punishment (which is prohibited under Article 3 of the European Convention on Human Rights). According to the Constitutional Court, this jurisprudence shows that:

[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of [Article] 3 (of the European Convention on Human Rights). The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim… [F]or a punishment or treatment associated with it to

55 Jean Francois Adrienne & Anor v R [2017] SCCA 25.
56 Simeon v Attorney-General [2010] SCCC 3.
57 Ibid, p. 14.
58 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
59 Ponoo v Attorney-general [2010] SCCC 4 p. 8.
60 Simeon v Attorney-general [2010] SCCC 3.
61 Simeon v Attorney-General [2010] SCCC 3 p. 14.
62 Peter Antat v The Attorney-General [2012] SCSC 29 (the plaintiff was awarded damages for torture inflicted on him by soldiers).
63 Fanchette v Attorney-General [2011] SCCC 10 (the detention of the applicant in a filthy police cell amounts to inhuman and degrading treatment).
64 Ponoo v Attorney-General [2010] SCCC 4.

be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in [Article] 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the convention to allow the special stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.[65]

The Court adopted the same definition in subsequent case law.[66] A similar distinction between torture and cruel, inhuman or degrading treatment or punishment has been adopted by the Committee against Torture.[67] The following observations are worthy of making about the above definition or description of inhuman or degrading treatment. First, unlike torture which can only be committed deliberately, inhuman or degrading treatment does not have to be committed deliberately. Second, for conduct to amount to torture, it must have caused 'very serious and cruel suffering.' In other words, it must have caused 'severe pain or suffering.' This is not a requirement for conduct to amount to cruel, inhuman or degrading treatment. In the latter context, the threshold is met when the treatment or punishment goes 'beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.' This raises the question of whether imprisonment without the realistic possibility of release does not meet this threshold – going 'beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.' To answer this question, one would have to first understand the inevitable element of suffering or humiliation that is connected with imprisonment in Seychelles. By its nature, imprisonment limits the offender's rights which include the right to freedom of movement (under Article 25 of the Constitution), the right to participate in government provided for under Article 24 of the Constitution (for example, in Seychelles a person serving a sentence of six months imprisonment or more does not vote in national or local elections),[68] the right to freedom of association and assembly (under Article 23 of the Constitution) and the right to work (Article 35 of the Constitution). The Court of Appeal held that '[t]he main purposes of punishment are deterrent, preventative, reformative and retributive.'[69] Therefore, any form of punishment, including imprisonment, should serve one or more of the above objectives. However, as the discussion below illustrates, rehabilitation is the most important aim of imprisonment. Once those objectives of punishment (if they are all applicable to any offender) have been achieved during the minimum period of imprisonment an offender is required to serve before being considered for early release (remission or license to be at large), his continued imprisonment ceases to be legitimate. The same applies to the cases of life imprisonment. A person's mental health is likely to be affected negatively if he believes that there is a real possibility that he may never be released from prison to regain his 'lost' rights, irrespective of whether he is fully rehabilitated and does not pose any danger to society.

The discussion above has shown that Seychelles courts have relied on international human rights instruments and foreign case law in defining or describing torture and cruel, inhuman or degrading treatment or punishment. Article 48 of the Constitution, which is reproduced below, empowers courts to do so. In the discussion below, the author refers to the relevant international, regional and national (foreign) case law and jurisprudence on the issue of life imprisonment without the realistic possibility of release. The author calls upon Seychelles courts to invoke Article 48 of the Constitution and rely on this jurisprudence and practice in finding that life imprisonment without the realistic possibility of release is unconstitutional. The discussion starts with an explanation of the importance of Article 48 in this context. Article 48 of the Constitution provides that:

This Chapter [on human rights] shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of—

(a) the international instrument containing these obligations;

(b) the reports and expression of views of bodies administering or enforcing these instruments;

(c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;

(d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

65 Ibid, p.9.

66 Geers v Government of Seychelles & Others [2019] SCCC 3 para 124.

67 General Comment No. 2 on the Implementation of Article 2 by States parties (CAT/C/GC/2) (24 January 2008) para 10.

68 Section 5(1)(c) of the Elections Act, Chapter 262. See also Boulle v Government of Seychelles (2011) SLR 235.

69 Alcindor v R [2015] SCCA 7 para 10. See also Crispin v R [2015] SCCA 29 para 9; Jumeau v R [2019] SCCA 30 para 41; Marengo v R [2019] SCCA 28 para 49.

It is beyond the scope of this paper to discuss Article 48 in detail.[70] The discussion will be limited to Articles 48(c) and (d). Under Article 48(c), courts are obliged to take judicial notice of, inter alia, the decisions of international and regional human rights bodies. It is not a requirement under Article 48(c) that those human rights bodies should be enforcing treaties to which Seychelles is a party. It is against this background that courts have taken judicial notice of the decisions of the European Court of Human Rights (as mentioned above when dealing with the definition of cruel, inhuman or degrading treatment). Article 48(d) requires courts to, inter alia, take judicial notice of the decisions of courts in democratic states. The Court of Appeal gave some of the criteria that could be used in determining a democratic state for the purpose of Article 48(d).[71] Based on Article 48(d), Seychelles courts have taken judicial notice of the decisions of courts from countries such as South Africa,[72] Mauritius,[73] and Zimbabwe.[74] It is therefore important to demonstrate how some regional human rights bodies or national courts have dealt with the question of life imprisonment without the realistic prospect of release.

In *Kafkaris v Cyprus*,[75] the Grand Chamber of the European Court of Human Rights dealt with the issue of whether the sentence of life imprisonment without a realistic prospect of release was contrary to Article 3 of the European Convention on Human Rights which prohibits torture or inhuman or degrading treatment or punishment. The applicant was convicted of murder and sentenced to life imprisonment because the Cypriot law, as that of Seychelles, provided that a person convicted of murder had to be sentenced to life imprisonment.[76] However, the law did not provide for the procedure that a person sentenced to life imprisonment could be released. In practice, lifers could only be released by the President while exercising his prerogative of mercy based on the recommendations of the Attorney-General.[77] However, the President was not bound by the Attorney-General's advice or recommendation that a lifer should be released early.[78] A lifer had to be imprisoned for the remainder of his life unless released by the President in exercise of his prerogative of mercy.[79] There was evidence that the President commuted the sentences of some lifers and they were released from prison.[80] The applicant argued that the sentence of life imprisonment without a realistic possibility of release violated Article 3 of the European Convention on Human Rights because, inter alia, 'the whole or a significant part of the period of his detention for life was a period of punitive detention that exceeded the reasonable and acceptable standards for the length of a period of punitive detention as required by the Convention.'[81] The applicant added that in the case of life imprisonment without the realistic possibility of release, the whole sentence was punitive and the lack of a clear framework for his possible release violated his right to be considered for release, his right to human dignity (by suppressing a realistic hope of release), his right to rehabilitation and eventual return to society after rehabilitation.[82] In response, the government argued that the applicant's sentence was not 'irreducible' as he could be released by the President in the exercise of the prerogative of mercy after considering several factors including the deterrent and retributive purposes of punishment and the need to protect the society against dangerous offenders.[83] The government added that:

[T]he appropriate test to apply was whether an applicant had been deprived of "all hope of obtaining an adjustment of his sentence": a test which entailed asking whether the sentence was reducible *de jure* and *de facto*. If a sentence of life imprisonment was reducible de jure, the mere fact that the prospects of early release were limited or that the decision about whether to grant early release depended on the discretion of the executive, even if that discretion was not subject to the review of the domestic courts, did not violate Article 3, provided that *de facto* there was a realistic possibility of that discretion being exercised in the future. A life prisoner would have

70 It has been discussed in detail recently, see JD Mujuzi 'Domestic Courts' Reliance on International Law to Interpret the Charter of Rights and Freedoms and/or other Domestic Law in the Seychelles' (2023) 12(1) *International Human Rights Law Review* 69–89

71 In Intershore Banking Corporation Ltd v Central Bank of Seychelles [2018] SCCA 4 para 42, '[t]he word 'democratic society' according to article 49 of the Constitution envisages a pluralistic society in which there is proper regard for the fundamental rights and freedoms and the rule of law.'

72 Jean Francois Adrienne & Anor v R [2017] SCCA 25.

73 Valabhji v The Republic [2023] SCCA 1.

74 Sullivan v Attorney General & Anor [2014] SCCA 29.

75 Kafkaris v Cyprus (Application no. 21906/04)(12 February 2008).

76 Ibid, para 33.

77 Ibid, paras 36 – 38.

78 Ibid, para 38.

79 Ibid, para 50

80 Ibid, paras 52 – 55.

81 Ibid, para 78.

82 Ibid, paras 80 – 82.

83 Ibid, paras 86 - 87.

to show either that early release was a legal impossibility or that there was no realistic prospect of early release in practice.[84]

The government added that in law and practice, the applicant had 'a continuing possibility of early release.'[85] The Court explained the concept of ill-treatment and held that Article 3 does not prohibit the imposition of a life sentence on an adult offender.[86] The Court added that its previous case law showed that 'the imposition of an irreducible life sentence on an adult may raise an issue under Article 3.'[87] Against that background, it explained that:

> *In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release …[W] here national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3.*[88]

The Court added that:

> *[A]lthough the Convention does not confer, in general, a right to release on licence or a right to have a sentence reconsidered by a national authority, judicial or administrative, with a view to its remission or termination…the existence of a system providing for consideration of the possibility of release is a factor to be taken into account when assessing the compatibility of a particular life sentence with Article 3.*[89]

The Court held, by majority, that the applicant's sentence did not amount to an irreducible life imprisonment as there was a procedure in terms of which the Attorney-General could advise or recommend to the President to release him early and there was evidence that the President had commuted the sentences of some offenders who had been sentenced to mandatory life imprisonment.[90] The Court concluded, by majority, that the facts of the case did 'not warrant a conclusion of inhuman and degrading treatment under Article 3.'[91]

The question that arises is whether a lifer has a realistic possibility of release. Based on the Court's decision above, two factors have to be considered in answering this question. The first factor relates to the existence of the law which provides for the circumstances in which such an offender can be released. The second one deals with the extent to which the law is being implemented in practice. Both conditions should be met if the sentence of life imprisonment is not to be categorized as irreducible. Therefore, for a court to find that a sentence of life imprisonment amounts to inhuman or degrading treatment, evidence should show that either in law and practice lifers cannot be released or that in practice they are not being released although the law provides for a slim possibility of release. It has been mentioned above that although Article 60 of the Constitution of Seychelles provides for circumstances in which the President may commute any sentence, including life sentences, there are very few cases instances in which he has pardoned lifers.[92] There is no law providing the procedure that a prisoner has to follow to apply for a presidential pardon. This creates room for the argument that the sentence of life imprisonment is irreducible unless the President pardons the offender. The offender doesn't know what is expected of him to qualify for a presidential pardon. One cannot rule out the possibility that the President may be influenced by the remarks the court made at sentencing to refuse to pardon a lifer.[93] Plainly put, the whole process

84 Ibid, para 89.
85 Ibid, para 90.
86 Ibid, para 95 – 96.
87 Ibid, para 97.
88 Ibid, para 98.
89 Ibid, para 99.
90 Ibid, para 100 - 105.
91 Ibid, para 107.
92 See for example, https://www.ohchr.org/en/press-releases/2018/07/committee-against-torture-considers-initial-report-seychelles 31 July 2018 (where it is reported that in 2016, the President pardoned 18 prisoners); https://www.nation.sc/archive/252377/president-pardons-78-prisoners, 29 December 2016 (where it is reported that the President pardoned 78 prisoners who have completed at least three-quarters of their sentence and have also exhibited good behaviour).
93 For example, in Alphonse v R [2017] SCCA 19 para 57, the appellant, who had been previously pardoned by the President after being sentenced to imprisonment for murder (the sentence for which he was pardoned is not mentioned in the facts of the case), was convicted of another gruesome murder. In sentencing him to life imprisonment for murder, the Court observed that 'Given the appalling violence in this case, we are not of the view that this is a case in which a pardon should ever be considered. We therefore

of presidential pardon is unpredictable.

In *Kafkaris v Cyprus*,[94] the Court held that by its nature, a sentence of imprisonment will involve some elements of suffering and humiliation. For a sentence to violate Article 3 of the European Convention on Human Rights 'the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.'[95] The Court added that prison conditions should meet the minimum acceptable international standards and that 'the manner and method of the execution of the measure do not subject him [prisoner] to distress or hardship exceeding the unavoidable level of suffering inherent in detention.' As mentioned above, the Seychelles Court of Appeal held that 'the constitutional right against torture, inhuman and degrading punishment, incorporates the principle that sentence must be proportionate to the seriousness of the offence.'[96] This principle, as explained above, applies not only at the time of the imposition of the sentence but also to how the sentence is served. Seychelles can hardly argue that life imprisonment for the remainder of the offender's life is an 'unavoidable level of suffering inherent in' imprisonment. There is a need for Seychelles to provide the minimum number of years an offender sentenced to life imprisonment has to serve before being considered for early release. If such an offender is rehabilitated, they should be released on remission.

In Vinter and others v The United Kingdom,[97] the Grand Chamber of the European Court of Human Rights dealt with the issue of whether life imprisonment without the possibility of release amounts to inhuman or degrading punishment. The facts of the case showed that in the United Kingdom, there were two types of life imprisonment: life imprisonment with the possibility of release by the parole board and 'whole life' where the offender could only be released by the Secretary of State. In the first scenario, at the time of sentencing, the court imposed the minimum term of imprisonment which had to be served before the offender could be released on parole. This minimum term was determined by the seriousness of the offence and it meant to serve 'the purposes of punishment and retribution.'[98] However, in cases where the judge was of the view that the 'seriousness of the offence was exceptionally high', he could make a 'whole life order.'[99] A prisoner against whom such an order was made could only be released at the discretion of the Secretary of State. This discretion could only be exercised 'on compassionate grounds when the prisoner is terminally ill or seriously incapacitated.'[100] The issue before the court was whether whole life orders were contrary to Article 3 of the European Convention on Human Rights.[101] The Court held that:

> *Article 3 must be interpreted as requiring reducibility of the 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 [whether] 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.*[102]

The Court added that each state has the discretion to determine the procedure and circumstances in which such a review should take place.[103] Against that background, the Court held that 'where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.'[104] The Court added that a person should know when he is expected to be released and what he is required to do to increase the chance of being released.[105] Knowing this information would enable the prisoner to participate in rehabilitation programs.[106] The Court emphasized that:

A whole-life prisoner is 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.

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appeal to the Pardon Advisory Committee, to which a copy of this judgment is now forwarded to take these facts on board when next considering pardons to be submitted to the President for the purpose of articles 60 and 61 of the Constitution.'

94 Kafkaris v Cyprus (Application no. 21906/04)(12 February 2008).

95 Ibid, para 96.

96 Cousin v R (SCA 21 of 2013) [2016] SCCA 2 (22 April 2016) para 16.

97 *Vinter and others v The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013).

98 Ibid, para 12.

99 Ibid, para 12.

100 Ibid, para 12.

101 Ibid, para 14.

102 Ibid, para 119.

103 Ibid, para 120.

104 Ibid, para 121.

105 Ibid, para 122.

106 Ibid, para 122.

Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.[107]

It is thus evident that the European Court of Human Rights is of the view that life imprisonment without the realistic possibility of release is inhuman and degrading treatment. However, a person can be imprisoned for the rest of his natural life if there are penological grounds to justify that imprisonment. The law should provide for the procedure and grounds on which the offender's continued imprisonment or otherwise is regularly reviewed. If, after review, the relevant body is of the view that imprisonment should continue, it should. The bottom line is that the offender needs to know what is expected of him to be released after serving the minimum period of imprisonment for deterrence and retribution purposes. In the light of the above criteria set by the European Court of Human Rights, it is argued that the sentence of life imprisonment in Seychelles amounts to inhuman and degrading treatment contrary to Article 16. This is because the law does not provide for the factors to be considered and the procedure to be followed for the offenders' release. This implies that lifers can continue to be imprisoned even if there are no penological grounds justifying their imprisonment. The argument that life imprisonment without the realistic possibility of release is inhuman and degrading is also buttressed by case law from some African countries such as Mauritius,[108] Namibia,[109] Zimbabwe,[110] and Kenya[111] where, although the respective constitutions empower the heads of state to invoke their prerogative of mercy and commute life sentences, courts have held that life imprisonment without the possibility of release violates the right to human dignity and the rights against inhuman and degrading punishment. Apart from judicial bodies, international human rights bodies have also expressed their views on the sentence of life imprisonment without the possibility of release.

The Committee against Torture has stated that legislation which provides for life imprisonment without the possibility of parole or review of the sentence for possible early release amounts to 'mental pain or suffering' contrary to Articles 2 and 4 of the Convention against Torture.[112] Against that background, it recommended that the state party 'should reconsider the introduction of the penalty of life imprisonment without parole and ensure that convicted persons currently serving such sentences are entitled to a judicial review of their sentences and are eligible for parole.'[113] There are other cases in which the Committee against Torture reiterated the view that life imprisonment without parole is contrary to Articles 2 and 4 of the Convention.[114] Other human rights bodies such as the Human Rights Committee,[115] the Committee on the Elimination of Racial Discrimination[116] and the Working Group on Arbitrary Detention[117] have also called upon states parties to abolish life imprisonment without a realistic possibility of release. Another important question to consider is whether life imprisonment without the realistic possibility of release is contrary to Article 10(3) of the International Covenant on Civil and Political Rights. It is to this issue that we turn.

3.3 Article 10(3) of the ICCPR and rehabilitation as the aim of imprisonment

Seychelles ratified the International Covenant on Civil and Political Rights in 1992. This means, inter alia, that it is required to ensure that its domestic law is not contrary to the provisions of this treaty. It has domesticated some of the provisions of the ICCPR in its domestic law.[118] There are many cases in which Seychelles courts have referred to the ICCPR when interpreting the Charter of Rights in the Constitution.[119] Article 10(3) of the ICCPR provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' Article 10(3) requires Seychelles to ensure that its prisons are meant

107 Ibid, para 122.
108 *de Boucherville v The State of Mauritius* [2008] UKPC 70.
109 In S v Tcoeib [1996] NASC 1.
110 Makoni v Prisons Commissioner & Anor [2016] ZWCC 8.
111 In Julius Kitsao Manyeso v Republic [2023] eKLR (7 July 2023) para 21, the Court of Appeal held that 'an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28.' In the same case, the court also held that a mandatory life sentence was unconstitutional.
112 CAT/C/SRB/CO/3 (CAT 2021) para 21.
113 CAT/C/SRB/CO/3 (CAT 2021) para 22.
114 CAT/C/POL/CO/7 (CAT 2019) para 13; CAT/C/ZAF/CO/2 (CAT 2019) para 19(c); CAT/C/USA/CO/3-5 (CAT 2014) (in the case of children); CAT/C/LTU/CO/3 (CAT 2014) para 12
115 CCPR/C/BGR/CO/4 (CCPR 2018) para 27 and 28; CCPR/C/USA/CO/4 (CCPR 2014) para 23; CCPR/C/SLE/CO/1 (CCPR 2014).
116 CERD/C/USA/CO/10-12 (CERD 2022) para 36.
117 A/HRC/42/39/ADD.1 (WG Arbitrary detention 2019) para 59.
118 For example, Article 19 of the Constitution includes some of the rights under Article 14 of the ICCPR.
119 See for example, Chang-Tave & Ors v The Republic & Anor [2020] SCCC 394; Sagwe v R [2016] SCCA 15; Rep v Dugasse & Others [2020] SCSC 519.

to rehabilitate offenders. The question that has to be answered is whether those offenders include lifers. To answer this question, it is necessary to refer to the drafting history of Article 10(3).

The drafting history of Article 10 shows that it applies to every person serving a prison sentence irrespective of which offence he committed. During the making of Article 10(3), the representative of Portugal wanted delegates to clarify the meaning of the word 'penitentiary.'[120] Accordingly:

> *He wished to know, however, exactly what was meant by the words "penitentiary system" in paragraph 3 of the Commission's text. Most countries drew a distinction between prisons properly so called and penitentiaries, where persons sentenced to long terms were usually confined. He was therefore not sure whether the term "penitentiary system" referred to "systems in force in penitentiaries", or whether a wider meaning should be ascribed to it.*[121]

In response to that question, the Australian delegate argued that Article 10(3) referred to prisoners and that '[i]n those circumstances, the term "penitentiary system" was perfectly appropriate as it referred to persons serving penances, whatever the institutions in which they did so.'[122] The United Kingdom delegate argued that he understood the words 'penitentiary system' to mean 'penal system' and that they should not be interpreted restrictively.[123] He added that Article 10(3) applied to 'prisoners.'[124] This view was emphasized by the French delegate who argued that Article 10(3) applied to prisons and '[t]he term would therefore cover everybody but persons detained for a few hours in the cells of a police station' who were covered under Article 10(1).[125] The American delegate argued that Article 10(3) 'laid down a definite rule, which provided a guide for penitentiary policy' and that each country was at liberty to determine 'the best means for the reformation and social rehabilitation of prisoners.'[126] The Irish and French delegates added that the obligation of state parties to rehabilitate offenders under Article 10(3) applies to both adult and juvenile prisoners.[127] The Spanish delegate supported Article 10(3) because in his country, 'the schools of thought according to which the purpose of detention was expiation or the protection of society were now obsolescent, and the only reason for [the] detention was considered to be the rehabilitation of the offender.'[128] This view was supported by the Peruvian delegate.[129] The Belgian delegate also argued that the term 'penitentiary' has the same meaning as 'prison.'[130] In response to the Spanish delegate's argument that rehabilitation was the only reason for imprisonment, the United Kingdom delegate argued that:

> *[T]he Spanish representative had omitted the theory, which still had many defenders, that punishment should act as a deterrent. That idea was reflected in penal and penitentiary practice and was countenanced by the draft Covenant, as was proved by article 8, under which hard labour was not [to] be considered as forced or compulsory labour within the meaning of the article.*[131]

The Iranian delegate argued that Article 10 was a very important provision as it 'referred to a special category of persons, namely, those whom society had condemned and who had temporarily lost the respect of their fellow citizens.'[132] The Japanese delegate emphasized that Article 10 does not apply to awaiting-trial detainees. It was only applicable to prisoners (those who had been convicted and sentenced).[133] The Bulgarian delegate supported Article 10(3) because its objective 'was to enable prisoners to resume their place in society as quickly as possible.'[134] The Peruvian delegate reiterated the fact that the purpose of Article 10(3) is to ensure the rehabilitation of offenders and that states could achieve this objective through different means.[135] Other delegates from countries such as Belgium, Cuba, Tunisia, France and Brazil also emphasized the fact that the objective of Article 10(3) is to ensure the rehabilitation of offenders.[136] The Spanish delegate explained that

120 General Assembly, 13th session, official records, 3rd committee, 867th meeting (30 October 1958) (A/C.3/SR.867) para 31.
121 Ibid, para 28.
122 Ibid, para 34.
123 Ibid, para 40.
124 Ibid, para 41.
125 Ibid, para 43.
126 General Assembly, 13th session, official records, 3rd committee, 868th meeting (30 October 1958) (A/C.3/SR.868) para 1
127 Ibid, para 5 (Irish) and 17 (French).
128 Ibid, para 6.
129 Ibid, paras 23 -26.
130 Ibid, para 10.
131 Ibid, para 21.
132 General Assembly, 13th session, official records, 3rd committee, 869th meeting (31 October 1958) (A/C.3/SR.869) para 5.
133 Ibid, para 8.
134 Ibid, para 12.
135 Ibid, para 15.
136 Ibid, paras 19, 20, 22, 23, 28 - 31.

although imprisonment was meant to serve other purposes such as 'to protect society by discouraging potential offenders', Article 10(3) had to expressly emphasize that 'rehabilitation was the primary, if not the only, aim of detention'. This is because 'however serious the offence and however desperate the case of the convicted person was in appearance, society had a duty to help in his rehabilitation.'[137] The Iranian delegate argued that he supported Article 10(3) because 'he was entirely in favor of the reform and social rehabilitation of prisoners who might return to an honorable place in society after having paid their debt.'[138] The Saudi Arabia delegate was of the view that Article 10(3) imposed a duty on state parties to rehabilitate 'all such persons [prisoners] without distinction.'[139] In other words, as the Tunisian delegate put it, state parties must do everything possible to rehabilitate prisoners.[140] The Greece delegate argued that he supported Article 10(3) because: '[p]eople's attitude towards penitentiary treatment had evolved from the primitive lex talionis, through the doctrine of punishment as a deterrent, to the modern idea that the main object should be the reformation of prisoners.'[141] He added that prisoners had to be treated humanely if they were to be rehabilitated to avoid recidivism.[142] It was emphasized that 'the purpose of deprivation of liberty was ultimate to protect society against crime and that that end could only be achieved if, upon his return to society, the offender was willing and able to lead a law-abiding and self-supporting life.'[143] The proposal by the Israeli delegate that Article 10(3) should expressly provide for every prisoner's 'right to penitentiary treatment directed towards his reformation and social rehabilitation' was not supported by other delegates.[144] This implies that Article 10(3) does not provide for the right to treatment for the purpose of reformation and social rehabilitation. Rather, it imposes an obligation on state parties to ensure that such treatment is provided.

The above drafting history shows, inter alia, that Article 10(3) applies to all prisoners irrespective of the sentence they are serving. Put differently, it is also applicable to lifers. This means that state parties to the ICCPR have an obligation to ensure that lifers are reformed and rehabilitated. Therefore, the main purposes of imprisonment should be the reformation and social rehabilitation of offenders. These can only be achieved through their treatment.[145] Put differently, treatment is the means to the end. Although the reformation and social rehabilitation of offenders remain the most important objectives of punishment under Article 10(3), other aims of punishment, such as deterrence and retribution are still valid. The purpose of rehabilitation is to reintegrate offenders into society. This reintegration can only take place after release. Even in cases of deterrence (as argued by some delegates), it is very unlikely that all prisoners will remain a danger to society for the rest of their lives. As the British delegate argued, it may not be possible for every state party to rehabilitate all prisoners. This is because of two reasons:

> *[F]irst, that the extent to which rehabilitation could be effected in prison was limited – for example, many Governments which wished to improve their penitentiary system were prevented from doing so by financial stringency; and secondly, that however much was being done to rehabilitate prisoners, there had so far been very limited success: there was still a lamentably high percentage of recidivism.*[146]

The above drafting history of Article 10(3) shows, amongst other things, that irrespective of which offence the prisoner committed, state parties have an obligation to ensure that he is rehabilitated. This does not mean that imprisonment should not serve other purposes of punishment such as deterrence and retribution.[147] However, rehabilitation should be the main objective. Rehabilitation is meant to ensure that the prisoner is ultimately

137 Ibid, para 21.
138 Ibid, para 24.
139 Ibid, para 25. He, however, expressed reservations on whether Article 10(3) was applicable to political prisoners.
140 Ibid, para 26.
141 General Assembly, 13th session, official records, 3rd committee, 880th meeting (12 November 1958) (A/C.3/SR.880) para 23.
142 Ibid, para 23.
143 Ibid, para 30.
144 General Assembly, 13th session, official records, 3rd committee, 881st meeting (13 November 1958) (A/C.3/SR.881) para 5.
145 The British delegate's suggestion that the word 'essentially' under Article 10(3) should be replaced with the words 'to the fullest possible extent' so as 'to encourage penitentiary authorities to make the greatest effort possible to bring about the reformation and social rehabilitation of the prisoners under their care' was not supported by other delegates. See General Assembly, 13th session, official records, 3rd committee, 881st meeting (13 November 1958) (A/C.3/SR.881) para 25. However, that remains the spirit of Article 10(3). See also General Assembly, 13th session, official records, 3rd committee, 882nd meeting (14 November 1958) (A/C.3/SR.882) para 31.
146 General Assembly, 13th session, official records, 3rd committee, 868th meeting (30 October 1958) (A/C.3/SR.868) para 22.
147 In General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)(1992) para 10, the Human Rights Committee stated that 'No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.'

released from prison when he is very unlikely to re-offend. For Seychelles to comply with Article 10(3) of the ICCPR, it has to ensure that rehabilitation programs are accessible to all offenders irrespective of the sentences they are serving. If there is evidence that a lifer has not been rehabilitated, this would be a strong ground for his continued imprisonment to deter him from committing more offences. If there is doubt on whether or not he has been rehabilitated, he can be released after serving the minimum period and a compulsory supervision order under section 34 of the Act is issued against. That minimum period should not be excessive.[148] If he is fully rehabilitated, such an order may not be necessary. In other words, as the Danish delegate argued during the making of the ICCPR, Article 10(3) requires 'the individual evaluation of each offender.'[149] Since rehabilitation is the most important consideration in determining whether a prisoner (including a lifer) should be released, the Prisons Act may have to be amended to provide expressly that an offender has a right to be rehabilitated.[150] This would put an obligation on the government to ensure that there are effective rehabilitation programs in each prison. Thus, life imprisonment without the possibility of release is contrary to Article 10(3). This is so because it defeats the purpose of rehabilitation as contemplated by the drafters of this provision. One of the objectives of the Seychelles Prison Service is to rehabilitate offenders and one of the purposes of rehabilitation is to reintegrate the offender into society.[151] This partly explains why the Seychelles Prison Service implements different rehabilitation programs in prisons. If life imprisonment means imprisonment for the offender's natural life, there is no need for him to participate in rehabilitation programs. The drafting history of Article 10 of the ICCPR shows that there was also consensus amongst delegates that Article 10 should be read with Article 7 of the Convention (which prohibits cruel, inhuman and degrading treatment or punishment). Thus, for imprisonment to achieve its objective of rehabilitation offenders, it should not amount to ill-treatment.

4. Conclusion

In this article, it has been argued that section 2 of the Criminal Procedure Code, which defines life imprisonment to mean imprisonment for the offender's natural life is contrary to Article 16 of the Constitution and therefore unconstitutional. The rights under Article 16 are absolute. The implication for this finding is that Seychelles has to amend the Prisons Act and provide for the number of years that an offender sentenced to life imprisonment has to serve before he can be considered for remission or issued with a license to be at large. Practice from international criminal law shows that people convicted of international crimes such as genocide, war crimes and crimes against humanity and sentenced to life imprisonment have to serve 25 years in prison before being considered for early release.[152] In European countries, lifers serve between 10 and 35 years before being released on parole.[153] Seychelles could use the 25-year period as a yardstick. Seychelles could also follow one of these approaches. The bottom line is that those sentenced to life imprisonment should have a realistic possibility of being released. The law should be as clear as possible both substantively and procedurally. The same arguments on the unconstitutionality of life imprisonment in Seychelles apply with equal force to other African countries in which life imprisonment means imprisonment for the remainder of the offender's natural life. These countries include Uganda.[154]

148 For example, in its concluding observations on Hungary's periodic report, the Human Rights Committee was 'concerned about the highly restrictive legal conditions for granting clemency to persons sentenced to life imprisonment without parole, which provide that an inmate may be considered for clemency only after 40 years of incarceration and that the President's final decision need not be justified.' Against that background, the Committee recommended that 'The State party should ensure that the procedure established in law for clemency in the case of prisoners serving a life sentence without parole allows for a meaningful opportunity for release, based on a timely, proper and non-arbitrary review.' See CCPR/C/HUN/CO/6 (CCPR 2018) para 39 and 40.

149 General Assembly, 13th session, official records, 3rd committee, 882nd meeting (14 November 1958) (A/C.3/SR.882) para 8.

150 Although, as seen above, the argument by the Israel delegate that Article 10(3) should provide for the right to treatment for the purposes of reformation and social rehabilitation. This does not prevent Seychelles from providing for this right as doing so would not be contrary to its obligation under the ICCPR.

151 R v CE [2021] SCSC 1066 para 4; R v Guillaume & Anor [2020] SCSC 550 para 12; R v Faiz Mubarak and Others [2023] SCSC 489 para 12(g).

152 Article 77 and 110 of the Rome Statute of the International Criminal Court (1998).

153 *Vinter and others v The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) para 68.

154 Section 4(1) of the Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019 provides that '[f] or purposes of any enactment prescribing life imprisonment or imprisonment for life, life imprisonment or imprisonment for life means imprisonment for the natural life of a person without the possibility of being released.' Ugandan courts have held that life imprisonment is an indeterminate sentence. See, for example, Atine v Uganda [2023] UGCA 149; Sundya Muhamudu and Others v Attorney General [2022] UGCC 7.

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