

# REEXAMINING THE JUSTIFICATION FOR INTRODUCING LIFE IMPRISONMENT IN SERBIAN CRIMINAL LEGISLATION

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**Abstract:** Amendments to the Criminal Code (CC) of the Republic of Serbia from 2019 modify the system of criminal sanctions with the introduction of a new penalty – life imprisonment. The punishment of life imprisonment is prescribed for the most serious crimes and the most severe types of serious crimes, and it, basically, replaces and abolishes the sentence of imprisonment of 30 up to 40 years, which was the most severe punishment within the existing penal system. The idea of introducing life imprisonment in criminal justice system was not new because the Draft amendment to the CC from 2015 contained a similar solution, but it was withdrawn from the procedure after a public hearing and expressed scientific and professional criticism and division. In a repeated process of amending the Law in 2019, performed without a public debate, the Draft contained a similar proposal, which was finally adopted. Bearing in mind the broader social context, the legislator's retributive attitude (reflected in frequent changes of criminal legislation and making the penal policy stricter), media content that spreads moral panic and reflects the message that only severe punishing is the way to oppose different forms of criminality and (projected) punitive attitude of the general public, the introduction of life imprisonment, presents a logical result of turbulent and unnecessary changes and experiments in the sphere of criminal legislation. This paper is devoted to reexamining the justification for the introduction of life imprisonment in criminal legislation of the Republic of Serbia by analyzing the new internal provisions and controversial norms, issues of (im)possibility for conditional release of the convicted sentenced to life imprisonment (with reviewing the relevant jurisprudence of the ECtHR in connection with possible violation of Article 3 of the ECHR) as well as to present comparative legal modalities and practices in imposing and implementing the sentence of life imprisonment.

**Keywords:** criminal sanctions, life imprisonment, prison sentence, conditional release.

## INTRODUCTION

The system of criminal sanctions in the Republic of Serbia was amended by adopting the Law on Amendments and Supplements to the Criminal Code from 2019 (Official Gazette RS, 35/2019) which introduced a new penalty – life imprisonment. The current system was based on the existence of four sentences: imprisonment, fines, community service and seizure of driver's license. The prison sentence, traditionally, occupies a central role in the system of criminal sanctions and it is prescribed for almost all incriminations. The most severe punishment in the system was the imprisonment up to 20 years, i.e. (long-term) imprisonment from 30 up to 40 years - for the gravest crimes or the most serious forms of crimes. The imprisonment from 30 up to 40 years was not isolated in the penal system, taking into consideration that it has different duration and some legal regime in relation to the prison sentence up to 20 years, but it could be argued that essentially, (albeit, not formally) Criminal Code (CC) recognizes two types of deprivation of liberty (Stojanović, 2017: 218). On the other hand, this practically means that there were two general maximum sentences of imprisonment: 20 years beyond which it is not possible to go even for joinder of offences, and, 40 years for the gravest crimes or the most severe forms of serious crimes (Đokić, 2016 : 223, 224;).

The imprisonment from 30 up to 40 years introduced by the Criminal Code from 2006 (Official Gazette RS, 85/2005) actually represents a substitute for the death penalty, abolished in the Republic of Serbia, at first by legislative activities on the federal level in 1993, and then in 2001 (when it was replaced by a prison sentence of 40 years), that is, in 2002, when it was abolished for the remaining criminal acts prescribed in the Serbian Criminal Law. The new Criminal Code has retained a similar concept - upper limit of 40 years for the gravest crimes or the most severe forms of serious crimes, but instead of its fixed duration, it established the long-term penalty range - maximum imprisonment from 30 up to 40 years. At the same time, after the abolition of the death penalty, most of the other contemporary national criminal legislation adopted a different approach – introduction of the life imprisonment.<sup>1</sup> This fact is put to the forefront by those who supported the introduction of **the** life imprisonment, emphasizing that it should be an exceptional punishment that replaces the death penalty (Stojanović, Kolarić, 2015: 6).

According to the data collected by the Statistical Office of the Republic of Serbia (Bulletin, 2015; Bulletin, 2018), from its introduction in 2006, until 2017, the

1 Out of 51 countries (or territories) in Europe, 42 of them, including now the Republic of Serbia, have sentence of a life imprisonment in their legislation. European countries in which it is not prescribed are: Andorra, Bosnia and Herzegovina, Croatia, Faroe Islands, Montenegro, Norway, San Marino and the Vatican. In the African continent, it is not prescribed in 3 out of 55 national systems, in Asia in 3 out of 29 countries. Only 2 out of 22 Caribbean states, 6 out of 8 Central American states, 1 out of 18 Oceania countries, 1 out of 4 North America and 7 out of 12 South American countries do not have a life sentence prescribed (Source: Van Zyl Smith, Appleton, 2019).

prison sentence of 40 years was imposed to 45 perpetrators of the crimes, while the imprisonment from 30 up to 40 years was imposed in other 127 cases. Therefore, the annual average was approximately 14 sentences ranged from 30 up to (or) 40 years. If in the observed period a total number of imposed imprisonment sentences was 102,964 (including those executed as “house arrest”), a simple calculation would show that the total number of 172 sentences of long-term imprisonment represents only 0.167% in the structure of imposed prison sentences.

The presented data indicate that the frequency of imposing the imprisonment from 30 up to 40 years certainly does not represent a reason for its exclusion from the penalty system,<sup>2</sup> neither trends of the rising number of violent crimes<sup>3</sup>, or “insufficient” retributive and punitive effectiveness of the long term imprisonment. However, it is too short period of time so that we can discuss or make any conclusion about the effectiveness and consequences of the long-term imprisonment.

We still do not know whether a decade and a half after the introduction of imprisonment from 30 up to 40 years, and a few more years after the abolition of the death penalty in the Republic of Serbia, the practice has shown that the system is “overly” humanistically oriented and whether it is necessary to introduce more severe penalties? Or, perhaps, the wrong approach was applied at the time when the death penalty was abolished and the life imprisonment was supposed to be a part of our newly established tradition after the abolition? Some authors claim that the introduction of the life imprisonment, theoretically, is, no doubt a more “straightforward” solution because naturally the capital penalty that is not to be estimated - only the court makes its decision (Stojanović, 2015: 6,7). Everything abovementioned raises another question - whether the new approach, which introduces the life imprisonment into our legislation, represents a progressive or regressive solution?

Before attempting to provide answers to these questions, it should be noted that, in 2015, the Draft Amendments to the CC were presented to the public, which also proposed the introduction of the life imprisonment. The Draft was withdrawn from the procedure after a public debate, because of the different views in public and the criticism from the most scientific and professional circles (for example, the judges of the criminal department of the Supreme Court of Cassation had a unique attitude against the introduction of the life imprisonment, Dragičević-Dičić, 2015:15). Therefore, at that moment, the idea of the introduction of the life imprisonment was abandoned.

<sup>2</sup> The provisions on imprisonment for a term from 30 to 40 years are exempt from the Criminal Code, so they will not be applied from 1 December 2019 and the entering into force of the amended provisions, except in cases of retroactive application of a milder law to the perpetrator.

<sup>3</sup> The total number of persons convicted for violent crimes is not increasing, moreover, it is decreasing. According to data (Bulletin, 2018), in 2008, 3.982 were convicted for crimes against life and limb, while in 2017 number was 1.913. For crimes against sexual freedom, in 2008, 265 were convicted, while 189 sentenced in 2017.

However, a series of grave crimes that have taken place over the past few years, especially the monstrous murders of children,<sup>4</sup> have determined the legislator's decision to introduce the life imprisonment, this time without holding a public debate on the Draft.

Several other factors were in support of the prediction that the sentence of life imprisonment will be incorporated into the system of criminal sanctions: frequent amendments of the CC that make the penalties of high number of crimes stricter and prohibit the mitigation of penalties, expanding the criminality zone and constantly introducing new criminal offences; creating and spreading moral panic through media content (Ignjatović, 2018: 145,146) and the officials claiming the repressive punishing to be the only effective way of combating crime; media sensationalism in displaying the content of criminal events, but also, (projected) retributive attitude of the general public on the punishing and the necessity of total and lasting isolation of the perpetrators of the most serious crimes. However, it is indisputable that the key factors for the rapidly implemented procedure in the amendments of the CC was the activism of family members of the murdered children and their submission of the national initiative (through the *Tijana Jurić* Foundation with over 158,000 signatures)<sup>5</sup> but also the media supporting the idea of introducing the life imprisonment as a mechanism for the prevention of the most serious crimes in which victims can be children.

The aim of this paper is to analyze the adopted provisions related to the sentence of the life imprisonment, as well as other "controversial" provisions related to the (varied) purpose of punishment, the right to conditional release and its „duration“, prohibition of conditional release for certain crimes, pardon as a mechanism to mitigate the sentence (with reviewing the jurisprudence of the European Court of Human Rights in relation to potential violations of the Article 3 of the European Convention on human rights), but also to present comparative legal modalities of prescription and practice of imposing the life imprisonment.

4 The public was horrified by the cases of murdering: Tijana Jurić, a 15-year-old girl from Subotica who was abducted, raped and killed in Bajmok on the night between July 25<sup>th</sup> and 26<sup>th</sup> 2014 while visiting her grandparents. Her body was found on August 7<sup>th</sup>, 12 days after the disappearance. The killer first hit the girl with his car, then he kidnapped and thrown a girl into the car, raped, then strangled, and hid the body on an improvised garbage dump near Sombor, 23 kilometers from the place where she was abducted. The killer Dragan Đurić, a butcher from Belgrade, sentenced to 40 years of imprisonment; Three-year-old Anđelina Stefanović, a girl from the village of Vratarnica near Zaječar, was murdered on July 9<sup>th</sup>, 2016. Murderer Vladica Rajković, a neighbor of the family, took the girl away from the celebration of a child's birthday into a nearby forest. According to the media, killer first rape the girl and then he took a stone and smashed the child's head. After executing a murder, killer changed his clothes and returned to the birthday party. He was caught and sentenced to imprisonment of 40 years; We will also mention the case of three-year-old Katarina Janković, girl raped and beaten up to death on July 17<sup>th</sup>, 2005, Killer, Mališa Jęftović, was the unmarried partner of the girl's mother Ana Filipović. The case of sexual abuse and brutal murder happened in the Zvezdara Forest in Belgrade. An autopsy revealed that the girl had bled because of a split of liver and injuries to other internal organs. The killer was convicted to 40 years of imprisonment, while the girl's mother was sentenced to 37 years for aiding.

5 More on Foundation and its activities on: <https://tijana.rs/fondacija/>, Access: May 30<sup>th</sup> 2019.

## LIFE IMPRISONMENT IN COMPARATIVE LAW AND PRACTICE

Life imprisonment as a penalty, according to its contents, denies (suspends) the possibility of a convicted person ever being released from a prison institution, if there are no legal basis for early or conditional release (parole) or for reconsidering the imposed penalty. Accordingly, the perpetrator shall be punished in proportion to the gravity of the committed crime and the degree of guilt, and permanently excluded from the society and, in regard to the principles of justice and proportionality, deprived of liberty for the rest of his life, which, practically, “postpones the death penalty by the time he spends in the prison institution”.

The sentence of life imprisonment is present in most countries in the world, in one of two basic modalities of prescription. Comparative legislation contains formal (*de jure*) and informal (*de facto*) sentences of life imprisonment. The formal, prescribed by the law, include: life imprisonment without parole (LWOP) – which is completely irreducible, life imprisonment without parole (LWOP) – which is practically irreducible, life imprisonment with parole (LWP) and symbolic life imprisonment. Informal penalties of life imprisonment include: long-term (time-specified) sentences of imprisonment the duration of which exceeds the life expectancy of the convicted person (including penalties the reduction of which can not be considered before the period of at least 35 years passes) and indefinite post-conviction preventive detention (Penal Reform International, 2016: 2) such as e.g. “forvaring” in Norway (Jacobsen, Hallgren-Sandvik, 2016:176) or “sicherungsverwahrung” (custody for the purpose of incapacitation) prescribed by § 66 StGB in Germany.

A comprehensive study of the life imprisonment from 2019, published by Dirk Van Zyl Smith and Chaterine Appleton, is presenting, among other things, the data of prescribing and imposing the life imprisonment on national and global level. Formal life imprisonment is a statutory penalty in 184 out of a total of 216 countries and territories in the world, while in only 32 countries this penalty is not prescribed by national legislation (the original number of 183 was published before the sentence was introduced in the Republic of Serbia). In practice, by the end of April 2014, life imprisonment was the most severe penalty in 149 out of 216 countries and territories, while in 51 of them, the death penalty was still in the statute book but a moratorium on the executions had been declared, or there had been no executions, in practice, in the last ten years.

The life imprisonment with parole (conditional release) – LWP - is the most common modality of this sentence globally. In 144 out of 183 counties, there are provisions that provide certain possibilities for the release of the convicted. In 65 countries a life imprisonment without parole (conditional release) -LWOP- is prescribed.

Data on the number of prisoners sentenced to life imprisonment, shown in the study, were collected in 2014. (in 2016. for the territory of the United States) from 114 countries in which life imprisonment was imposed, indicating that a total of 304.814 persons were serving the formal life imprisonment.

And 51 countries, which had 257.372 life-sentenced prisoners in them, provided data on the number of women serving life sentences. Women comprised 3.7 percent (9.648) of these life-sentenced prisoners.

Bearing in mind that the data had not been collected for a number of Asian countries (e.g. China, Vietnam, Philippines), the Middle East and Africa, the study estimated the total number of prisoners to life sentence to be 479,000, in 2014. If this figure was about 261,000 in 2000, it is easy to determine the trend of the increasing number of sentences to life imprisonment in the world. (Van Zyl Smith, Appleton, 2019: 87, 88).

According to the data on the total number of convicted and detained persons in the world in 2015, the prison population consisted of 10.357.134 persons (Walmsley, 2019: 18). Compared to the estimated number of prisoners sentenced to life imprisonment, we find that 4.62% of the total world prison population are persons convicted to life imprisonment.

In the national statistics, the largest number of formal sentences of life imprisonment was recorded in the United States with 161.957 convicted persons in 2016 (the total number of detainees was 2.121.600, Walmsley, 2019: 16). The United States had more life-sentenced prisoners than the other 113 countries. This does not mean that the United States had more than half of the life-sentenced prisoners in the world, for, as indicated, there are some major jurisdictions for which we were unable to obtain numerical information. The United States accounts for about 34% of the estimated total of the world's life-sentenced population. In California, there were 39.697 life-sentenced prisoners (including 5.090 serving LWOP) in 2016. If California were a single country, it would have more life-sentenced prisoners than any other country in the world, with the exception of India. In Florida, there were 13.005 prisoners serving life sentences: more than two-thirds of these (8.919 prisoners) were serving LWOP. In other states, this ratio is dramatically different. In the State of New York, for example, where there were 9,535 prisoners serving life sentences in 2016, only 275 were serving LWOP. Data collected by Nellis in 2017, showed that in California, Louisiana, and Utah, in 2016, one in three sentenced prisoners was serving either a formal life sentence or a de facto life sentence (Van Zyl Smith, Appleton, 2019: 89).

If one compares the United States with Europe, there were 27.213 life-sentenced prisoners in the whole of Europe, including Turkey and Russia, two countries that in large part go beyond the geographical boundaries of Europe. The difference becomes even more prominent when one realizes that the population of Europe is more than double that of the United States. The number of life-sentenced prisoners as a proportion to the national population of the United States in 2016 was 50.3 per 100.000, whereas in Europe in 2014, it was only 3.3 per 100.000. United Kingdom (England and Wales, Scotland, and Northern Ireland) and Turkey, with 8.661 and 6.687 life-sentenced prisoners, respectively, accounted for more than half, 56% of the total European life-sentenced prison population. High rates of life-sentenced prisoners per 100.000 of national population in 2014, were

found in the United Kingdom (13.4), Greece (9.2) and Turkey (8.6), but much lower in France (0.7), Poland (1.0), Russia (1.2), Germany (2.4) and Italy (2.7). The difference between France and the United Kingdom is remarkable. As a proportion to the national population, there were 18 times more life-sentenced prisoners in the United Kingdom than in France. These comparisons are particularly significant because both of these countries have long used life imprisonment as their ultimate penalty. When one compares these figures with those of the United States, the differences are even more astonishing. Again, as a proportion to the national population, there were seventy times more individuals serving life sentences in the United States than in France. Even compared to the United Kingdom, which had the highest rate and number of life-sentenced prisoners in Europe, the United States had almost four times more life-sentenced prisoners per head of population. (Van Zyl Smith, Appleton, 2019: 93-94). In 2017, the Council of Europe presented a report showing the exact number of persons sentenced to a life imprisonment. For example, in Albania there were 159, in Belgium 217, in Bulgaria 175, in Finland 200, in Poland 380, in France 489, in Germany 1.863, and in Turkey 7.303 convicted persons (Aebi, M. F, et al, 2017: 87).<sup>6</sup>

In the whole world, a total number of 64.306 persons are serving life imprisonment without parole, of which 53.290 are in the United States (or about 80% of all the prisoners in the world), and there are only 2.156 convicts in Europe, of which at least 24 are in Bulgaria, 50 in England and Wales, 41 in Hungary, 118 in Lithuania, 12 in Malta, 32 in the Netherlands, 126 in Turkey, and 1.753 in Ukraine (Van Zyl Smit, Appleton, 2019: 89-94).

In addition to the national criminal legislations, the life imprisonment was imposed before the International Military Tribunals in Nuremberg and Tokyo,<sup>7</sup> and, in a “specific” manner is prescribed in the sources of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,<sup>8</sup> and is also a part of the system of penalties prescribed by the Rome

<sup>6</sup> The country that in 2014 had the second largest number of life-sentenced prisoners (71.632) was India. However, given that the national population of India is more than 1 billion, this amounted to only 5.5 per 100.000 of the population. In other words, relatively speaking, the US life-sentenced prison population was 9.2 times greater than that of India. South Africa, which had a total life-sentenced prisoner population of 13,190. This amounted to 22.7 per 100.000, which is slightly less than half that of the United States.

<sup>7</sup> In accordance with its Statutes, International Military Tribunals could impose a death sentence or another sentence they consider to be justified. Three sentences of a life imprisonment were imposed before the Nuremberg Tribunal, while the tribunal in Tokyo imposed 12 life imprisonment sentences (to the half of the convicted persons).

<sup>8</sup> The Statutes of the Tribunals do not explicitly provide for the possibility of imposing a life imprisonment, but rather imprisonment (taking into account the practice of imposing imprisonment in national states). However, the provisions of the Statute have been derogated, the practice of national courts has not been accepted, and the sentence of a life imprisonment has been prescribed and imposed by the amendments to the other legal source of the Tribunals - Rules of Procedure and Evidence (adopted, amended by the judges of the Tribunal). In its practice, the International Criminal Tribunal for the Former Yugoslavia imposed 8 sentences of a life imprisonment, while the International Criminal Tribunal for Rwanda total number of sentences was 20.

Statute of the International Criminal Court (Grujić, 2010: 263). The Rome Statute proposes that a convict may be imposed by the Court: (a) imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) a penalty of life imprisonment when it is justified by the extreme gravity of the crime or the specific circumstances related to the personality of the convicted person.<sup>9</sup> Article 110, paragraph 3 of the Rome Statute proposes that when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.”

The length of 25-year period for persons sentenced to life imprisonment presents the “established standard” for considering the conditional release, which has repeatedly been pointed out by the jurisprudence of the European Court of Human Rights - if national legislation does not specify the period or the possibility of reviewing the sentence, or if the prescribed period is not shorter than the time limit proposed by the Rome Statute.<sup>10</sup>

## LIFE IMPRISONMENT IN SERBIAN CRIMINAL LEGISLATION

### Normative regulation of the life imprisonment

In the first part of the paper we pointed out that the sentence of life imprisonment, after the amendments of the CC, is part of the system of criminal sanctions in the Republic of Serbia. According to the Article 44a, for the gravest crimes or the most severe forms of serious crimes, a sentence of life imprisonment may be prescribed, in addition to the prison sentence. Legislator came up with a solution that the life imprisonment and prison sentence can only be imposed as the main sentences, but that life imprisonment can be prescribed only in addition to the time-specific prison sentence. Bearing in mind that the punishment of life imprisonment is not assessed, the new legal decision proposes that in every concrete case the court has the possibility to choose - to determine and impose a time-specific sentence of imprisonment or to impose a sentence of life imprisonment.

This fact may have a significant impact on the criminal policy of courts in the future period. Namely, before the amendments of the CC, in the case of in-criminations in which there was an opportunity to impose time-specific prison sentence or long term imprisonment, the court had the possibility to determine

<sup>9</sup> The Rome Statute of the International Criminal Court, UN Doc. A&CONF, 183/9, 17 July 1998.

<sup>10</sup> National (or territorial) legislations contain a variety of solutions, for example: Kosovo and Metohija (UN 1244) 40 years in prison before applying for conditional release, Argentina and Peru 35, Philippines, Cuba, Estonia 30, Serbia and Israel 27, Italy 26, Albania, Northern Macedonia, Poland, Russia, Slovakia, Spain, South Africa 25, Turkey 24, France 18, Belgium, Germany, Greece, Switzerland 15, Cyprus, Denmark, Finland, Sweden 12, South Korea, Japan 10, Botswana and Ireland 7.

and impose imprisonment up to the limits of the general (or specific) maximum or to impose a prison sentence from 30 up to 40 years. This practically meant that the court could “double-determine” within the “two general maximum” of imprisonment. However, the new decision limits the possibility of determination to a “single” general maximum of 20 years of imprisonment. Such a limitation will, logically, lead to the practice of imposing a greater number of sentences of life imprisonment in cases in which the court considers the prison sentence of 20 years not to be adequate and proportionate to the gravity of the crime and the degree of guilt of the perpetrator, and in which it does not have the possibility to impose severe time-specific prison sentences.<sup>11</sup> The logic of this conclusion will be reviewed in the first years of imposing the life imprisonment.

In addition to the fact that it is prescribed with a prison sentence, imposing the life imprisonment is limited on two more grounds. The punishment of life imprisonment, according to paragraph 2 of the Article 44a, cannot be imposed on a person who did not reach the age of twenty one at the time of committing the crime. The next paragraph of the same article stipulates that life imprisonment can not be imposed in cases in which the law proposes that the punishment can be mitigated (Article 56, paragraph 1, item 1) and when there is some basis for the exemption from the punishment. If the criminal policy is taken into consideration, the issues are indisputable – the first was related to the imposing of prison sentence from 30 up to 40 years, while the other derives from the nature and the consequences of applying the institutes of penalty mitigation and the exemption from the punishment.

### Supplementary content to the purpose of punishment - the principles of proportionality and justness

The general purpose of prescription and imposing of criminal sanctions, in Serbia’s legislation, is to suppress acts that violate or endanger the values protected by the criminal legislation (Art. 4, para. 2. CC), and the purpose of their execution is to achieve the general and individual purpose of them being imposed with the aim of successfully reintegrating the convicted persons into the society (Art. 2 LECS - ZIKS).<sup>12</sup> The purpose of the punishment referred to in the Article 42 of the CC, before the amendments, was (a) to prevent an offender from committing criminal offences and leave an impact on him not to commit criminal offences in the future; (b) to deter others from committing criminal offences; (c) to express social condemnation of the criminal offence, enhance moral strength and reinforce the obligation to respect the law, while the purpose of the execution of the prison sentence, referred to in the Article 43 of the ZIKS, is that, during the execution, the convicted person, by applying appropriate conduct programs,

<sup>11</sup> Not to lose sight of the fact that many judges pointed to the lack of a previous legal solution that prevented imposition of the imprisonment from 20 up to 30 years.

<sup>12</sup> Law of Enforcement of criminal sanctions, Official Gazette RS, 55/2014, 35/2019.

adopts socially acceptable values in order to be more easily included in life conditions after the execution of the sentence, so as not to do any criminal offenses in the future.

The life imprisonment is, according to its content, the punishment of an eliminating character which excludes the sentenced person from the society and incapacitates him in the prison institution for the rest of his life (if there is no possibility of conditional release or pardon), so, as a consequence, it cannot be expected that the purpose of this punishment and its implementation can be neither to achieve a successful reintegration of the convicted into the society or the acceptance of social values in order for him to be more easily included in life conditions after the execution of the sentence, nor to deter the convicted person of committing crimes in the future, or in the case of positive general prevention, to enhance the moral strength and reinforce the obligation to respect the law. Without raising the questions, due to the scope of this paper, of the purpose of punishment and the purpose of life imprisonment, we must point out that the Serbian legislator resorted to a “specific” decision that “complements” the purpose of the punishment. Namely, the new aim and purpose of the punishment, in the amended Article 42 of the CC, is attaining justice (fairness) and proportionality between the crime and the gravity of the criminal sanction.

Proportionality between criminal offense and punishment and satisfying the principle of justice in contemporary criminal law is achieved through the penal policy of the legislator by prescribing the type and (minimum and maximum) duration of the penalty for each individual incrimination. The range of prescribed penalties is the basis for proportionality and for determining the crimes gravity. The imposition of “classical” or “bekarian” thinking in defining the “new” purpose of punishing appears to be the result of the legislator extorted decision. The justice and proportionality between the crime and the gravity of the penalty, now as the proclaimed principle, on the one hand, attempts to create an impression of the necessity to return to a retributive and more punitive concept of punishment, while, at the same time, “justifying” the introduction of a severe sentence, such as life imprisonment. At the same time, the impossibility of social reintegration of the convicted person, as the proclaimed purpose of the execution, will be compensated by the principles of justice and proportionality, and during the process of the execution of life imprisonment, until the next renewal of the criminal legislation and until achieving adjustments for the proclaimed purpose of imposing and executing penalties.

### (Non)conditional release and duration of release

The introduction of life imprisonment requires the normative regulation of the application of various institutes, inter alia, the issue of conditional release of persons sentenced to this penalty. Conditional release by definition means the fulfillment of certain conditions. In almost all the models of the conditional re-

lease, there are assumptions of formal nature that relate to the part of the sentence which the convicted persons must endure before the release, as well as the material assumptions concerning the quality of the prisoner's conduct while serving the sentence and the assessments of fulfilling the purpose of the punishment (Soković, 2014: 41). The amended provisions regulate the formal conditions on the part of the sentence that persons sentenced to life imprisonment must serve before acquiring the right to apply for the conditional release, while the provisions on material conditions are predetermined according to all the categories of those sentenced to imprisonment.

However, the legislator decided on two mainly controversial solutions. The first is to forbid the conditional release of the convicted to life imprisonment for determined serious crimes, thus opening up the issue of compliance of this solution with numerous international documents on the protection of human rights and the rights and position of persons deprived of liberty, and, in particular, to the jurisprudence of the European Court of Human Rights relating to possible violation of the Art. 3 of the European Convention on Human Rights.<sup>13</sup> The second solution is concerned with the temporal duration of the conditional release of persons convicted to life imprisonment of 15 years, without regulating the issues of the rights of the convicted and the decision-making process after the expiration of this period.

Thus, CC in the Article 46, paragraph 2, provides an optional conditional release for persons sentenced to life imprisonment after serving 27 years in prison institution and if they fulfill the conditions necessary for the mandatory conditional release prescribed in paragraph 1 of the same article. Namely, a convicted may be released on parole by the court, if in the course of serving the prison sentence he has improved so that it is reasonable to assume that he will behave well while at liberty and particularly that he will refrain from committing a new criminal offence until the end of the imposed prison sentence. In deliberating whether to release the convicted person on parole, his conduct, while serving the sentence, shall be taken into consideration, his performance of work tasks relative to his abilities, and other circumstances indicating that the purpose of the punishment has been achieved. However, the court cannot release a convicted who, in the course of serving the sentence, is twice punished for serious disciplinary offenses and who is deprived of the granted privileges.

The questions arise why the legislator has opted for a period of 27 years of imprisonment before the conditional release and whether the material conditions can practically present a real obstacle to obtaining the right to release. In the first case, although there are comparable systems that propose a longer period of time and an "established" standard of maximum 25 years in international criminal law, in reality, the legislator has resorted to a mathematical model when determining

<sup>13</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. November 1950.

Article 3. Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

the formal condition for the release. It is easy to determine the logic behind the decision on the period. Namely, if the sentence of life imprisonment is more severe than a 40 year of prison sentence, the conditions for parole should be more stringent. In the case of imprisonment of 40 years, the right to parole was obtained after 2/3 of the sentence served, i.e. after 26 years and 8 months. The period of 27 years in the case of life imprisonment is by four months more stringent in relation to the maximum period in the imprisonment of 40 years.

In the second case, having in mind the elimination character of life sentence imprisonment and penological knowledge of the problems of persons condemned to long-term imprisonment, the gravity of the committed crime and the degree of guilt of the perpetrator, it is difficult to expect that in the sentenced period of 27 years convicted will be dedicated to treatment programs and resocialization, by accepting the values on the basis of which he can be involved in life when at liberty, respecting the rules of conduct in a prison institution. On the contrary, limitations related to the execution of two serious disciplinary offenses or the deprivation of the granted privileges to this category of the convicted, practically hinder them from the right to conditional release. If, at an early stage of the execution of the sentence, the convicted committed two serious disciplinary offenses or if his privileges were seized, the sentence becomes life imprisonment without the possibility of release.

The most controversial decision is provided in paragraph 5, which prohibits the conditional release of a person convicted for: aggravated murder (Art. 114, para. 1, p. 9), rape (Art. 178, para. 4), sexual intercourse with a Helpless Person (Art. 179, para. 3), sexual intercourse with a child (Art. 180, para. 3), and a sexual intercourse through abuse of position (Art. 181, para. 5), for which life imprisonment is prescribed by the latest amendments of CC.<sup>14</sup> After prohibiting the conditional release for those convicted of these crimes, a new form of life imprisonment was introduced – a life imprisonment without conditional release.

Bearing in mind the general international standards in the field of the rights of prisoners, as well as their resocialisation and social reintegration as the purpose of executing sentences proposed in numerous international acts, the question arises whether the sentence of life imprisonment without the possibility of conditional release, although prescribed in comparative law, is a negation of the principle of resocialization and social reintegration of the convicted. Is it a form of torture, an inhuman or degrading punishment and treatment? The jurisprudence of the European Court of Human Rights in relation to the potential violations of the Article 3 of the European Convention on Human Rights, is important in addressing this problem.

Namely, in one of the latest verdicts from 12 March 2019, in which, inter alia, the issue of life imprisonment without the possibility of conditional release was

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<sup>14</sup> The legislator did not provide the prohibition of conditional release for genocide, crimes against humanity or war crimes against the civilian population whose acts of execution can be same as those prescribed in this five incriminations.

considered, in the case *Petukhov v. Ukraine*, the Court affirmed, after referring to „relevant texts of the Council of Europe and other international legal texts on the imposition and review of life sentences and earlier judgments which pointed on the importance attached to rehabilitation, that there has been a violation of Article 3 of the Convention on account of the applicant’s irreducible life sentence“.<sup>15</sup> However, this is not a generally accepted opinion, nor there is a consistent policy of judicial practice.

For example, Grand Chamber Judgment from 12 February 2008 in the case *Kafkaris v. Cyprus* (Application no. 21906/04), pointed, in para. 97, that ”the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention.“

In the Grand Chamber Judgment of 9 July 2013, in the case *Vinter and Others v. United Kingdom* (Applications Nos. 66069/09, 130/10 and 3896/10), the Court made a distinction between three types of life sentence: ”(i) a life sentence with eligibility for release after a minimum period had been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole (that is, a sentence which is provided for in law, but which requires a judicial decision before it can be imposed); and (iii) a mandatory sentence of life imprisonment without the possibility of parole (that is, a sentence which is set down in law for a particular offence and which leaves a judge no discretion as to whether to impose it or not).“ In the first two forms of life imprisonment, no issue could therefore arise under Article 3 (or issue cannot arise at the moment when it is imposed), but the issue can be raised only with a compulsory life imprisonment without the possibility of conditional release if: ”(i) continued imprisonment could no longer be justified on any legitimate penological grounds; and (ii) that the sentence was irreducible *de facto* and *de jure*“. Yet, in para. 119 and 122, it is stated that ”the Court considers 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 significant enough, and so much 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... Each life prisoner is entitled to know, at the outset of his sentence, what he must do in order to be taken into consideration for release and under what conditions, including when a review of his sentence will take place or when it may be sought. Consequently, where domestic law does not provide any mechanism or possibili-

<sup>15</sup> Noting, in the para. 107 of the judgment, CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) Report to the Ukrainian Government (CPT/Inf (2018)41), which, in para. 81 indicates that: basic principle that, in order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee the safety of the outside community, the law should offer a realistic prospect of conditional release to all sentenced prisoners, including life-sentence prisoners and again calls upon the Ukrainian authorities to amend the legislation with a view to making conditional release (parole) available to all life-sentenced prisoners, subject to a review of the threat to society posed by them on the basis of an individual risk assessment. Reference is also made here to the CPT’s 25th General Report.

ty for review of the 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.“

An opinion that the other legal or factual possibility of acquitting a person sentenced to irreducible life imprisonment, as a mechanism whose potential application indicates that there will be no violation of Article 3 of the Convention, raised the issues of the conditions and procedures for determining the prospect (path/hope) to release the convicted. Is the institute of pardon a satisfactory mechanism that can ensure early release or reduction of sentences? Should those sentenced to life imprisonment have the possibility of rehabilitation as a basis for early release? Is that a logical question or an established standard?

The Court in case *Kafkaris v. Cyprus* states in para.103, that “the prospect of release for prisoners serving life sentences in Cyprus is limited, any adjustment of a life sentence being only within the President’s discretion, subject to the agreement of the Attorney-General...Notwithstanding, the Court does not find that life sentences in Cyprus are irreducible with no possibility of release; on the contrary, it is clear that in Cyprus such sentences are both *de jure* and *de facto* reducible.”

The Grand Chamber Judgment from 26 April 2016, in the case *Murray v. The Netherlands* (Application no. 10511/10) in para 104. stated that “life prisoners are thus to be provided with an opportunity to rehabilitate themselves. As to the extent of any obligations incumbent on States in this regard, the Court considers that even though States are not responsible for achieving the rehabilitation of life prisoners, they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves. Were it otherwise, a life prisoner could in effect be denied the possibility of rehabilitation, with the consequence that the review required for a life sentence to be reducible, in which a life prisoner’s progress towards rehabilitation is to be assessed, might never be genuinely capable of leading to the commutation, remission or termination of the life sentence or to the conditional release of the prisoner. In this connection the Court reiterates the principle – well established in its case-law – that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective.

The judgments we analysed indicate that there is no consistent attitude of life imprisonment without the right to conditional release as a form of violation of Article 3 of the Convention. In relation to the decisions proposed in the national criminal systems, the modalities that eventually provide for the possibility of early release have been evaluated differently. Undoubtedly, in the future, the jurisprudence of this court will discuss and decide the normative solutions provided in our legislation.

Finally, we must point out the solution proposed in paragraph 7 of the Article 46 of the CC, which refers to the duration of the conditional release. Namely, the legislator predicted that the release for persons sentenced to life imprisonment lasts 15 years. Such a solution is illogical and controversial. Namely, it is not clear why the legislator decided on the duration of the conditional release for

this penalty, contrary to the provisions related to the prison sentence. In addition, the provisions do not specify what happens with the convicted person after the expiration of the period of 15 years - whether he is again referred to serving the sentence or if there is a possibility of a new conditional release in 15 years. In any case, the legislation does not propose the rights of the convicted or the procedure in which a conditional release would be decided on after the expiration of 15 years. Future law changes are necessary and are to regulate these open issues. We are of the opinion that, if there are no possibility for the revocation of conditional release, there is no obvious reason to temporarily limit its duration.

## CONCLUSION

Reexamining the justification for introducing a sentence of life imprisonment in the criminal legislation of the Republic of Serbia after the adoption of the amended provisions and the abolition of the imprisonment from 30 to 40 years, after presenting the modality of life imprisonment in comparative legislation and practice, analysis of the normative content of the sentence of life imprisonment and “controversial” issues of changing the purpose of punishing, the application of the institute of conditional release and the prohibition of conditional release of the convicted to life imprisonment for certain crimes, the limited duration of release and presentation of the jurisprudence of the European Court of Human Rights in relation to potential violations of Article 3 of the Convention, we must finally point out the following facts and conclusions.

Proposing the sentence of life imprisonment in modern criminal law is not an exception, but a rule. It is prescribed in 184 legislations of 216 countries (or territories) in the world, in various modalities. Only 32 countries in the world have no prescribed life imprisonment. Out of 184 legislations that contain life imprisonment in the system of criminal sanctions, it is applied in practice within 149. On a global scale, the estimated number of persons serving life sentences was around 479,000 in 2014, which is slightly below 5% of the total prison population in the world. The sentence of life imprisonment is part of the international criminal law, it has been imposed by the international military and ad hoc tribunals, and is proposed in the Rome Statute of the International Criminal Court.

After the abolition of the death penalty, our criminal legislation was among the few contemporary (and progressive) systems which defined the imprisonment of 40 years and, a little later, from 30 to 40 years, as the most severe punishment, although, according to the literature, the introduction of life imprisonment presents a “cleaner” solution. The retributive concept of the legislator and the punitive attitude of the general public, regardless of the criticisms and disagreements in the professional public, contributed to the reform of the penal system and the introduction of the sentence of life imprisonment, without realizing the real scope and effectiveness of the long-term imprisonment.

The argument that the dangerous condition of the perpetrator of the most serious crimes constitutes the basis for his complete incapacitation in prison institution because it allows the protection of the society, cannot be accepted. Namely, dangerous condition is a category which has, when choosing a criminal sanction, significance only for security measures. A life imprisonment and its imposing must be based on the gravity of the crime and the degree of guilt of the perpetrator, the same as when it comes to any other punishment. (Stojanović, 2015: 7).

The introduction of life imprisonment will, undoubtedly, greatly affect the penal policy of the courts. Following the revision of the CC, the courts are limited to the general maximum of 20 years of imprisonment, which will, in the case of the gravest crimes and the most serious forms of serious crimes, lead to more frequent use of life imprisonment.

In this regard, it is important to emphasize that the prison system is not prepared for the treatment of this category of convicted persons, while the question of the purpose of punishing and executing sentences is additionally made complicated by predicting the new principles of justice and proportionality of punishment. Undoubtedly, the regime and conditions under which life sentence is served must be the same as for the other convicted population, without segregation on the basis of the imposed sentence, and the programs of treatment are directed towards achieving resocialization and potential social reintegration of the convicted persons.

Observed in the broader context, a sentence of life imprisonment with the conditional release after 25 years in prison (as the “established” standard) for all the categories of convicted persons is not a more severe sentence than 40 years’ imprisonment. The introduction, after the abolition of the death penalty in our legislation, would not lead to greater controversy or criticism.

However, the introduction of life imprisonment without considering the effectiveness of long-term imprisonment, with decisions that change the purpose of punishing, makes the terms for conditional release stricter, prohibits conditional release for certain offenses, determines the duration of conditional release, and cannot be considered progressive. On the contrary, having in mind numerous international acts in the field of human rights protection, as well as the practice of the European Court of Human Rights, many of the proposed solutions will be subject of reviewing and re-amending the law.

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