Srpsko udruženje
za krivičnopravnu teoriju
i praksu

Institut za kriminološka i
sociološka istraživanja
u Beogradu

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I SOCIOLOŠKA ISTRAŽIVANJA

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C O N T E N T S

PREDGOVOR

Zakonom o izmenama i dopunama Krivičnog zakonika iz 2019. godine, u sistem krivičnih sankcija uvedena je i kazna doživotnog zatvora. Međutim, i pre ovog zakonskog teksta bilo je pokušaja njenog uvođenja u republici Srbiji. Tako je deset godina nakon usvajanja osnovnog teksta Krivičnog zakonika 2005. godine predstavljen nacrt njegovih izmena i dopuna koji je predviđao uvođenje kazne doživotnog zatvora. Nacrt je, nakon javne rasprave, posebno kritika iznetih od strane naučne i stručne javnosti i nadasve podeljenih stavova po ovom pitanju, povučen iz procedure i od uvođenja kazne doživotnog zatvora u tom trenutku se odustalo, što samo po sebi govori o izuzetno visokom stepenu aktuelnosti ove problematike ne smo posmatrano sa krivičnopravnog, već i kriminološkog i kriminalno-političkog aspekta uopšte. Nije mali broj pitanja koja su i u teoriji i u praksi, u najmanju ruku, više nego diskutabilna kada je reč o ovoj krivičnoj sankciji. Među njima se posebno ističu tri:

Prvo, pitanje kriminalno-političke opravdanosti uvođenja kazne doživotnog zatvora u sistem krivičnih sankcija.

Drugo, tu je pitanje prava jedne države, posebno država koje pripadaju kontinentalnom pravnom sistemu da uvedu ovu krivičnu sankciju u svoj sistem krivičnih sankcija posmatrano sa aspekta relevantnih međunarodnih pravnih standarda sadržanih, pre svega, u Evropskoj konvenciji o ljudskim pravima i stavovima Evropskog suda za ljudska prava.

Treće, čini se i najaktuelnije pitanje, je pitanje načina normiranja ove krivične sankcije u krivičnom zakonodavstvu države koja se opredeli za njeno uvođenje u sistem krivičnih sankcija. Odgovor na ova i ne samo ova pitanja zahteva jednu širu naučno-stručnu raspravu o istim a tek potom, u zavisnosti od rezultata tih rasprava i zauzetih stavova struke po istim normiranje u konkretnom zakonskom tekstu. Uostalom ovo je i preduslov za adekvatnost bilo kakvih iole značajnijih izmena u krivičnom zakonodavstvu a ne samo kada se radi na intervencijama u istom koje se tiču tako značajne problematike kao što je kazna do-

životnog zatvora. Međutim, i pored neosporne neophodnosti takvog pristupa u zakonodavnim intervencijama ovog karaktera, čini se da on nije u potrebnom obimu ispoštovan kada je reč o Zakonu o izmenama i dopunama KZ Republike Srbije iz 2019. godine, tj. prilikom uvođena kazne doživotnog zatvora u njegov sistem krivičnih sankcija. Pre bi se moglo reći da je do ovih zakonskih intervencija došlo pod pritiskom javnosti, nakon nekoliko monstruoznih zločina čije su žrtve bile deca i njenog stava da se protiv takvih učinilaca krivičnih dela mora reagovati najstrožim krivičnim sankcijama i predviđanjem krivičnopravnih instrumenata koji će onemogućiti učiniocima takvih krivičnih dela da ih ikada više ponove. S ovim ciljem zalaganja su išla u pravcu ozakonjenja kazne doživotnog zatvora ako već nema mogućnosti uvođenja smrtne kazne u sistem krivičnih sankcija i zakonskog isključenja mogućnosti bilo kakvih kasnijih intervencija u sudskoj odluci kojom je izrečena kazna doživotnog zatvora učiniocima tako teških krivičnih dela uključujući tu i nemogućnost puštanja na uslovni otpust lica iz kaznenoporavne ustanove posle određenog vremena provedenog u istoj i ispunjenja drugih zakonom predviđenih uslova.

Nakon donošenja Zakona o izmenama i dopunama KZ iz 2019.godine, čije je osnovno obeležje uvođenje kazne doživotnog zatvora u sistem krivičnih sankcija, rasprave u stručnoj javnosti Srbije o ovoj problematici ne samo da nisu prestale, već su i dobile kako na svojoj aktuelnosti tako i na svom obimu. Najbolji dokaz ispravnosti ovakve jedne konstatacije je činjenica da nakon donošenja ovog zakonskog teksta u Republici Srbiji skoro da nije bilo ni jedne stručne rasprave iz krivičnopravne oblasti, a da na njoj jedno od pitanja nije bilo i pitanje kazne doživotnog zatvora, odnosno načina njenog normiranja u KZ. Najspornije pitanje koje je predmet ovih rasprava je rešenje KZ po kojem je isključena mogućnost licu osuđenom na kaznu doživotnog zastvora da, ispunjenjem određenih, zakonom predviđenih uslova, bude pušteno na uslovnu slobodu posle određenog vremena provedenog u kaznenoporavnoj ustanovi.

Ovo, ali i ne samo ovo pitanje, bilo je i povod da se na zahtev Ministarstva pravde Republike Srbije sačini i Ekspertski izveštaj u vezi sa pitanjima načina normirana kazne doživotnog zatvora u KZ. Izveštaj je sačinjen i predstavljen stručnoj javnosti ne samo Srbije, već i država regiona i predstavnika Misije OEBS-a u Srbiji na Ekspertskom sastanku održanom u Beogradu 25. septembra 2020. godine, u organizaciji Srpskog udruženja za krivičnopravnu teoriju i praksu i Instituta za kriminološka i sociološka istraživanja, u saradnji sa Ministarstvom pravde Republike Srbije i uz podršku MDTF-JSS projekta na temu „Kazna doživotnog zatvora i međunarodni pravni standardi.“

Jedan od rezultata rada ovog Ekspertskog sastanka je usvajanje Zaključaka u kojima su učesnici izrazili svoje stavove po pitanju načina i uslova normiranja kazne doživotnog zatvora ne samo u KZ već i uopšte. U želji da učini dostupnim, ne samo tekst Ekspertskog izveštaja i zaključaka usvojenih po sprovedenoj raspravi, već i druge radove pripremljene nakon održavanja sastanka, od strane njegovih učesnika, organizatori skupa kao suizdavači časopisa „Revija za kriminologiju i krivično pravo", predložili su Redakciji časopisa da jedan njegov tematski broj posveti upravo ovoj problematici, što je Redakcija i prihvatila. Tri su ključna razloga kojima su se predstavnici suorganizatora Ekspertskog sastanka, suizdavača časopisa i njegova Redakcija rukovodili preduzimajući ovaj korak.

Prvo, želja je da se na ovaj način, što šira stručna javnost, ne samo u Srbiji već i šire upozna sa stavovima učesnika Ekspertskog sastanka organizovane na navedenu temu kako po pitanju teksta Ekspertskog izveštaja tako i sa njihovim stavom po istom izraženom u usvojenim zaključcima.

Drugo, da se pomogne nadležnim organima Republike Srbije ukoliko se jednog dana budu opredelili za eventualno preispitvanje rešenja važećeg teksta KZ po pitanju normirane kazne doživotnog zatvora u kom pravcu bi to trebalo učiniti.

Treće, da se ukaže stručnoj javnosti i nadležnim organima država na čijim prostorima se koristi časopis, kako na aktuelnost problematike kazne doživotnog zatvora, tako i na način njenog normiranja da bi bio u skladu sa relevantnim međunarodnim pravnim standardima iz ove oblasti sadržanim pre svega u Evropskoj konvenciji o ljudskim pravima i stavovima Evropskog suda za ljudska prava.

Iskreno se nadamo da će svi ovi ciljevi kojima su se predlagači i Redakcija časopisa rukovodili prilikom predlaganja i donošenja odluke da ovaj broj časopisa bude posvećen problematici kazne doživotnog zatvora, biti realizovana u vremenu koje je pred nama i da će ova krivična sankcija u zakonodavstvima koja su se opredelila, i koja se opredele za njeno uvođenje u njihov sistem krivičnih sankcija, biti normirana u skladu sa relevantnim međunarodnim pravnim standardima a putokaz kako to postići, po našem mišljenju, predstavlja materijal publikovan u ovom broju časopisa.

U Beogradu,
Aprila meseca 2021.godine

Prof. dr Stanko BEJATOVIĆ
Dr Ivana STEVANOVIĆ

PREFACE

The Law on Amendments to the Criminal Code from 2019 introduced a life imprisonment into the system of criminal sanctions. However, even before this legal text, there were attempts to introduce this criminal sanction into the system of criminal sanctions of the Republic of Serbia. Thus, ten years after the adoption of the basic text of the Criminal Code in 2005, a draft of its amendments was presented, which provided for the implementing of a life imprisonment. After a intensive public debate, especially the criticism expressed by the scientific and professional public and above all divided views on this issue, the draft was withdrawn from the procedure and the introduction of life imprisonment was abandoned at that time, which in itself speaks of an extremely high level of relevance of the issue, not only from the criminal law perspective, but also from the criminological and criminal-political aspect in general. There are not a small number of issues that are, in theory and practice, at least more than debatable when it comes to the life imprisonment. Among them three have stood out:

Firstly, the question of the criminal-political justification of the introduction of life imprisonment into the system of criminal sanctions.

Secondly, the right of a state, especially states belonging to the continental legal system, to introduce this criminal sanction into their system of criminal sanctions should be discussed, viewed from the perspective of relevant international legal standards contained primarily in the European Convention on Human Rights and the legal opinions of the European Court of Human Rights.

The third and it seems to be the most current issue, is the question of how to regulate this criminal sanction in the criminal legislation of the state that opted for its introduction into the system of criminal sanctions. The answer to these and not only to these questions requires a broader scientific-professional discussion on the issue and then, depending on the results of these discussions, regulation in a specific legal text. After all, this is a precondition for the adequacy of any significant changes in the criminal legislation, not only when it comes to the interventions that contained such important issues as the life imprisonment is. However,

despite the indisputable necessity of such approach in legislative interventions of this character, it seems that it has not been applied when it comes to the Law on Amendments to the Criminal Code of the Republic of Serbia from 2019, ie. during the introduction of life imprisonment in the system of criminal sanctions. Rather, one could say that these legal interventions came under the public pressure after several monstrous crimes involving children as a victims and the public opinion that such perpetrators must face the most severe criminal sanctions after implementing criminal instruments that will prevent perpetrators of such crimes to ever repeat them again. To this end, the efforts went in the direction of legalizing the sentence of life imprisonment if there is no possibility of introducing the death penalty in the system of criminal sanctions and legally excluding the possibility of any subsequent interventions in the court decision sentencing perpetrators of such serious crimes, including the impossibility of release. on conditional release of a person from a penitentiary institution after a certain time spent in it and fulfillment of other conditions provided by law.

Having in mind that there is no possibility of introducing the death penalty in the system of criminal sanctions and legally excluding of the possibility to change court decision sentencing perpetrators of such serious crimes, including the impossibility of conditional release after a certain time and fulfillment of other conditions provided by law, the efforts went in the direction of legalizing the sentence of life imprisonment.

After the enactment of the Law on Amendments to the Criminal Code from 2019 with the introduction of the life imprisonment in the system of criminal sanctions as the main characteristic, academic discussions on this became more intense and the best proof for that thesis is the situation after the adoption of this legal text in the Republic of Serbia in which there was almost no expert discussion in the field of criminal law without consideration of the issue of life imprisonment. The most controversial issue that is the subject of these discussions is the decision of the legislator to exclude the possibility for a person sentenced to life imprisonment to be conditionally released after a certain time spent in a penitentiary institution, by fulfilling certain conditions prescribed by law.

This was the reason of making the Expert Report at the request of the Ministry of Justice of the Republic of Serbia regarding the issues of the manner of regulation the life imprisonment in the Criminal Code. The Expert Report was prepared and presented to the academic public not only in Serbia, but also in the countries of the region and representatives of the OSCE Mission to Serbia, at the Expert Meeting held in Belgrade on September 25th 2020 organized by the Serbian Association for Criminal Theory and Practice and the Institute for Criminology and sociological research, in cooperation with the Ministry of Justice of the

Republic of Serbia and with the support of the MDTF-JSS project on "Life imprisonment and international legal standards."

One of the results of the Expert Meeting is the adoption of conclusions in which the participants expressed their views on the manner and conditions of implementing life imprisonment not only in the Criminal Code but in general. In order to make available, not only the text of the Expert Report and the conclusions adopted after the discussion, but also the other papers prepared after the meeting the organizers of the meeting as co-publishers of the journal "Review of Criminology and Criminal Law" suggested Editorial Board to dedicate thematic edition to this very issue, which suggestion the Editorial Board accepted. There are three key reasons why the representatives of the co-organizers of the Expert Meeting, the co-publisher of the Journal and its Editorial Board decided to take this step.

Firstly, the desire to make available for the wider professional public, not only in Serbia but also more widely, the views of the participants of the Expert Meeting on this issue.

Secondly, to help the competent authorities of the Republic of Serbia in the eventual process of reconsidering the norms of the text in the Criminal Code regarding the regulation of the life imprisonment and in which direction it should be done.

Thirdly, to point out to the professional public and the competent authorities of the countries where the Journal is used, the actuality of the issue of life imprisonment and the way of its regulation in order to comply with relevant international legal standards primarily contained in the European Convention on Human Rights and the case law of the European Court of Human Rights.

We deeply belive that all these aims that guided the co-organizers of the Expert Meeting, the co-publisher of the Journal and its Editorial will be realized in the time ahead and that this criminal sanction will be implemented in accordance with the relevant international legal standards. The roadmap of how to achieve this, in our opinion, is the material published in this issue of the Journal.

PhD Ivana Stevanović
Prof. Stanko Bejatović

Belgrade, April, 2021

Prof. Vid Jakulin, PhD
Law Faculty, University of Ljubljana

COMPLIANCE OF THE PROVISIONS OF THE SERBIAN PENAL CODE GOVERNING CONDITIONAL RELEASE FROM LIFE IMPRISONMENT WITH THE RELEVANT INTERNATIONAL STANDARDS

Summary

Prohibition of torture and inhuman or degrading treatment or punishment undoubtedly derives from all **the main international human rights instruments**. Unlike the death penalty, which is undesirable and has already been abolished in the member states of the Council of Europe and the European Union, the sentence of life imprisonment is not in itself prohibited and does not constitute a violation of Article 3 of the European Convention on Human Rights if the legal order gives the convicted person hope that he or she will ever be released again.

When it comes to the **ECtHR jurisprudence** the life imprisonment itself is not prohibited and necessarily incompatible with the Article 3 of the Convention. A life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist from the imposition of the sentence. A life sentence has to be reducible *de iure* and *de facto* through the review which should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided. Access to judicial review on whether conditions and reasons (not) to be released have to be pre-established, objective and known to prisoners. Those reasons and conditions should be based on legitimate penological grounds and the review process itself should be accompanied by sufficient procedural guaranties. Since the penological grounds for the life prison vary through the time/ not necessarily exist all the time a review

process should provide for periodical check of their existence, starting no later than (approx) 25 years from the deprivation of a liberty. Considering this, prisoners cannot be denied the possibility of rehabilitation and thus the state has a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation.

Based on what have been said, the analysis shows that in order to comply with Article 3 of the Convention and the jurisprudence of the European Court of Human Rights, **national legislation** should provide for the possibility of early release from a penitentiary for persons sentenced to life imprisonment - through conditional release or some other effective remedy. Currently, that is not the case with the valid text of the RS Criminal Code.

Having this in mind, in order to prevent from the possible decision on noncompliance rendered by ECtHR, **we recommend two possible alternative solutions** to improve current situation and to ensure a full compliance with the Art. 3:

- **To amend Criminal Code** in order to enable all prisoners sentenced to life imprisonment to initiate parole procedure after expiring certain period previously determined in the Criminal Code together with objective criteria and adequate procedural guaranties to be applied in the procedure of rendering decision of such petition.
- To keep existing provisions of the Criminal Code, but **to amend Criminal Procedure Code** in order to introduce the Request for extraordinary mitigation of the sentence, as a procedural mechanism which allows reduction of the life imprisonment based on penological grounds, namely, the progress made in treatment which resulted in reasonable believe that the purpose of punishment could be achieved by sentence shorter that life imprisonment.

I. Introduction

By signing the contract No. SER-MDTFJSS-TF097118-SSS-CS-19-90 with the Ministry of Justice of the Republic of Serbia I undertook to examine the compliance of the provisions of the Serbian Penal Code governing conditional release from life imprisonment with the relevant international standards . Particular attention will be paid to relevant international standards based on the legal sources of the Council of Europe (CoE), the United Nations Organisation (UN), the European Union (EU) and the relevant case law of the European Court of Human Rights (ECtHR). The report will present the arrangements for conditional release from life imprisonment in the criminal codes of the four member states

of the Council of Europe and the European Union. The report will also present the possibility of adapting the Criminal Procedure Act of the Republic of Serbia.

In the light of the results of the comparison, a proposal will also be made to bring the relevant provisions of the Serbian Penal Code into line with international standards and the case law of the European Court of Human Rights.

The drafting of the report involved the participation of Prof. Dr. Stanko Bejatović and Asist. Prof. dr. Milica Kolaković - Bojović, to whom I would like to give my sincere thanks for their assistance.

II. International standards as derived from relevant documents of the United Nations Organisation, the European Union and the Council of Europe

Let us first look at the international standards deriving from the relevant legal acts of the United Nations Organisation, the European Union and the Council of Europe.

We have reviewed the following UN legal acts:

- Universal Declaration of Human Rights[1]
- International Covenant on Civil and Political Rights[2]
- Optional Protocol to the International Covenant on Civil and Political Rights[3]
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty[4]
- United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[5]
- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[6]

We have also reviewed the Charter of Fundamental rights of the European Union,[7] The Convention for the Protection of Human Rights and Fundamental

1 Adopted by the United Nations General Assembly on 10 December 1948 in Paris.

2 Adopted by the United Nations General Assembly Resolution 2200 A (XXI) on 16 December 1966, in force from 23 March 1976.

3 Adopted by the United Nations General Assembly Resolution 2200 A (XXI) on 16 December 1966, in force from 23 March 1976.

4 Adopted by the United Nations General Assembly Resolution 44/128 on 15 December 1989, in force from 11 July 1991.

5 Adopted by the United Nations General Assembly on 10 December 1984 in New York, in force from 26 June 1987.

6 Adopted by the United Nations General Assembly on 18 December 2002 in New York, in force from 22 June 2006

7 Official Journal of the European Union C 202/389 from 7.6.2016.

Freedoms (better known as the European Convention on Human Rights) with all the Protocols[8] and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment with both two protocols.[9]

The international standard prohibiting torture and inhuman or degrading treatment or punishment undoubtedly derives from these documents.[10] What the European Court of Human Rights considered a violation of Article 3 of the Convention will be clarified in a review of the case law of this Court.

Unlike the death penalty, which is undesirable[11] and has already been abolished in the member states of the Council of Europe and the European Union,[12] the sentence of life imprisonment is not in itself prohibited and does not constitute a violation of Article 3 of the European Convention on Human Rights if the legal order gives the convicted person hope that he or she will ever be released again.[13]

As early as 1977, the Constitutional Court of the Federal Republic of Germany faced the question of whether life imprisonment without the possibility of conditional release was in accordance with the Constitution of the Federal Republic of Germany. The Federal Republic of Germany abolished the death penalty with the May 1945 constitution. It was replaced by the sentence of life imprisonment. In 1977, the Constitutional Court of the Federal Republic of Germany had to decide whether the mandatory imposition of life imprisonment, without the possibility of conditional release provided for in Article 211 of the then applicable Criminal Code of the Federal Republic of Germany, was in accordance with the Constitution.[14] The Constitutional Court ruled that such an arrangement was

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8 Opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.

9 European Treaty Series No. 26, opened for signature on 26 November 1987 and came into force on 1 February 1989.

10 See e.g. Article 4 of the Charter of Fundamental Rights the European Union or Article 3 of the European Convention on Human Rights: "No one shall be subjected to torture or to inhuman and degrading treatment or punishment."

11 See: - Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

12 See: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Article 1: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

13 See e.g. judgment of the European Court of Human Rights in case »Harakchiev and Tulumov v. Bulgaria« (8 July 2014) and judgement of the Grand Chamber of the European Court of Human Rights in case "Hutchinson v. the United Kingdom" (17 January 2017).

14 **Section 211 Murder under specific aggravating circumstances (Mord)**
(1) Whoever commits murder under the conditions of this provision incurs a penalty of imprisonment for life.
(2) A murderer under this provision is someone who kills a person out of a lust to kill, to obtain sexual gratification, out of greed or otherwise base motives, perfidiously or cruelly or by means constituting a public danger or to facilitate or cover up another offence.

in conflict with Article one of the Constitution of the Federal Republic of Germany, which guarantees the right to human dignity.[15] Human dignity belongs to every individual, including to convicted persons. On this basis, the Constitutional Court adopted the position that every convicted person should at least have hope that he or she will ever be released again. The mere possibility of receiving pardon does not meet this condition. The legislator must determine by law the conditions under which and when a convicted person will be given the opportunity to be released.[16] Based on this Constitutional Court's decision, the German legislator amended the Criminal Code. In December 1981, Article 57a of the German Criminal Code was adopted, laying down the conditions for the conditional release of convicted persons sentenced to life imprisonment. Article 57a of the German Criminal Code will be presented below. In the cases dealt with after the amendment of the Criminal Code in 1981, the Federal Constitutional Court of the Federal Republic of Germany ruled that Article 57a of the German Criminal Code was in conformity with the Constitution.

III. Conditional release from life imprisonment in the Federal Republic of Germany, the Federal Republic of Austria, the Republic of Slovenia and the Republic of Hungary

To compare the arrangement of conditional release from life imprisonment, we chose the arrangement in the Federal Republic of Germany, the Federal Republic of Austria, the Republic of Slovenia and the Republic of Hungary. All four countries are members of the Council of Europe and of the European Union. The Federal Republic of Germany is one of the leading countries in the field of law not only in Europe but also in the world. The Federal Republic of Austria belongs to the circle of countries that have traditionally been under the influence of the German legal system. In addition, it is a country that belongs to the circle of countries with a European legal tradition and is also comparable to the Republic of Serbia in terms of population. The Republic of Slovenia has also traditionally

15 **Article 1 [Human dignity – Human rights – Legally binding force of basic rights]**
(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

16 See judgement in case 1BvL 14/76 from 21 June 1977. See also: Donald P. Kommers and Russel A. Miller: The Constitutional Jurisprudence of the Federal Republic of Germany, Third edition, revised and expanded, Duke University Press, Durham and London, 2012, pp. 363 - 368.

been under the influence of the German legal system; moreover, the Republic of Serbia and the Republic of Slovenia have been part of the former common state of Yugoslavia for more than 70 years and had the same legal system. Serbia and Slovenia shared a common legal system for more than 70 years. On the other hand, The Republic of Hungary is a country against which most appeals have been lodged with the European Court of Human Rights over its arrangements for conditional release from life imprisonment.

Conditional release from life imprisonment is regulated in Article 57a of the Criminal Code of the Federal Republic of Germany.[17] The court may conditionally release a person sentenced to life imprisonment in the following cases:

1. If the convicted person has served fifteen years of his or her sentence,
2. if a particularly high level of guilt does not prevent parole and
3. if the conditions referred to in points 2 and 3 of paragraph one of Article 57 of the Criminal Code are met.

In this regard, the provisions of the second sentence of paragraph one of Article 57 of the Criminal Code and paragraph six of this Article shall apply *mutatis mutandis*.[18]

The European Court of Human Rights has so far heard two appeals against a decision of German courts refusing parole to two convicts sentenced to life imprisonment (applicants). The applicants applied to the courts in the Federal Republic of Germany for parole after having served 15 years of their sentence of imprisonment. The competent German courts rejected their appeals because they considered that there was a high risk of re-committing criminal offences after their release. The applicants appealed to the European Court of Human Rights. They claimed that such a decision by the German courts violated Article 3

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17 **Suspension of remainder of imprisonment for life**
(1) The court suspends enforcement of the remainder of a sentence of imprisonment for life on probation where
1. 15 years of the sentence have been served,
2. the particular severity of the convicted person's guilt does not require its continued enforcement and
3. the conditions of section 57 (1) sentence 1 nos. 2 and 3 are met.
Section 57 (1) sentence 2 and (6) applies accordingly.
(2) Any deprivation of liberty suffered by the convicted person as a result of the offence qualifies as a sentence served within the meaning of subsection (1) sentence 1 no. 1.
(3) The probation period is five years. Section 56a (2) sentence 1, sections 56b to 56g and section 57 (3) sentence 2 and (5) sentence 2 apply accordingly.
(4) The court may fix terms not exceeding two years before the expiry of which an application by the convicted person for the suspension of sentence on probation is inadmissible.

18 The provisions of Articles 56a to 56g and Article 57 referred to in Article 57a are attached to this report.

of the European Convention on Human Rights (prohibition of inhuman and degrading treatment).

The European Court of Justice has ruled that both appeals were inadmissible as they were manifestly ill-founded. The Court established that the applicants had not been deprived of the hope that they would ever again be released because the German law governs parole and the applicants had the opportunity to lodge a new application for parole.[19]

In the Federal Republic of Austria, conditional release is governed by Article 46 of the Criminal Code. Conditional release from life imprisonment is regulated by paragraph six of the same Article.[20] A person sentenced to life imprisonment may be released on parole if he or she has served at least 15 years in prison and cannot be expected to repeat criminal offences.[21] The European Court of Justice has not yet heard an appeal against a decision of the Austrian courts alleging a violation of Article 3 of the European Convention on Human Rights in relation to life imprisonment.

In the Republic of Slovenia, conditional release is regulated by Article 88 of the Criminal Code. Conditional release from life imprisonment is regulated by paragraph three of the same Article.[22] A person sentenced to life imprisonment may be released on parole after having served 25 years in prison if it can be reasonably expected that he or she will not commit new criminal offence after release.[23] The European Court of Human Rights has so far not heard an appeal against the decision of Slovenian courts due to an alleged violation of Article 3 of the European Convention for the Protection of Human Rights in relation to life imprisonment.Speaking the truth, the courts of the Republic of Slovenia have not imposed a sentence of life imprisonment since its introduction in 2008.

The Republic of Hungary has an interesting arrangement for conditional release. An entire subsection of the 2012 Criminal Code (Act C of 2012) is dedicated to conditional release from life imprisonment.[24] The most controversial Article was Article 42, which also provided for life imprisonment without the po-

19 See Streicher v. Germany from 10 February 2009 (decision on the admissibility) and Meixner v. Germany from 3 November 2009 (decision on the admissibility).

20 A person who has been sentenced to imprisonment for life may only be released conditionally if the person has served a minimum of 15 years of the sentence and if it can be presumed that the person will not commit any further offences.

21 The provisions of Articles 46 and 50 to 52 referred to in Article 46 are attached to this report.

22 The convicted person who has been sentenced to life imprisonment may be released on parole after he has served twenty-five years in prison.

23 The provision of Article 88 is attached to this Report.

24 The provisions of Articles 42 to 45 are attached to this report.

ssibility of parole.[25] The crucial role was played by the judgment of the European Court of Human Rights in the case of László Magyar v. Hungary (judgment from 20 May 2014).

The applicant was convicted of murder, robbery and several other offences and was sentenced to life imprisonment without eligibility for parole. Although the Hungarian Fundamental law provided for the possibility of a presidential pardon, since the introduction of whole life terms in 1999, there had been no decision to grant clemency to any prisoner serving such a sentence. The applicant complained mainly that his imprisonment for life without eligibility for parole amounted to inhuman and degrading treatment as it was irreducible.

The Court held that there had been a violation of Article 3 of the Convention as concerned the applicant's life sentence without eligibility for parole. It was in particular not persuaded that Hungarian law allowed life prisoners to know what they had to do to be considered for release and under what conditions. In addition, the law did not guarantee a proper consideration of the changes in the life of prisoners and their progress towards rehabilitation. Therefore, the Court concluded that the sentence of the applicant could not be regarded as reducible, which amounted to a violation of Article 3.

Moreover, the Court held that this case disclosed a systemic problem which could give rise to similar applications. Therefore, for the proper implementation of the judgment, it invited Hungary, under Article 46 (binding force and execution of judgments) of the Convention, to put in place a reform of the system of review of whole life sentences to guarantee the examination in every case of whether continued detention is justified on legitimate grounds and to enable whole life prisoners to foresee what they must do to be considered for release and under what conditions. The Court also reiterated that States enjoyed wide discretion ("margin of appreciation") in deciding on the appropriate length of prison sentences for specific crimes. Therefore, the mere fact that a life sentence could eventually be served in full, did not make it contrary to Article 3 of the Convention. Accordingly, review of whole life sentences did not necessarily have to lead to the release of the prisoners in question.[26]

Following this judgment of the European Court of Human Rights, Hungary adopted a new legislation in 2015 to overhaul the entire system of life imprisonment. The Criminal Code has not been amended, but a compulsory pardon

25 Very similar is the provision of the paragraph 5 of Article 46 of Serbian Criminal Code (life imprisonment without conditional release for selected criminal offences).

26 European Court of Human Rights: Life imprisonment, Factsheet, December 2019, p. 5.

procedure has been introduced if a convict has served 40 years in prison (this does not mean that he must be pardoned, only a procedure in which it is decided whether the convict will be pardoned is mandatory). In addition, a pardon committee has been set up. The Hungarian Constitutional Court and the Council of the Curia have stated that with the introduction of compulsory presidential pardons, Hungarian legislation has become compliant with the requirements set by the European Court of Human Rights.[27]

However, even after the introduction of the new legislation in 2015, applications have been lodged with the European Court of Human Rights. In the case of T.P. and A.T. v. Hungary (nos. 37871/14 and 73986/14) the Court ruled on the compliance of the 2015 Hungarian regime with the European Convention on Human Rights (judgment from 4 October 2016).

This case concerned new legislation introduced in Hungary in 2015 for reviewing whole life sentences. The applicants alleged that despite the new legislation, which introduced an automatic review of whole life sentences – via a mandatory pardon procedure – after 40 years, their sentences remained inhuman and degrading as they had no hope of release.

The Court held that there had been a violation of Article 3 of the Convention. It found in particular that making a prisoner wait 40 years before he or she could expect for the first time to be considered for clemency was too long and that, in any case, there was a lack of sufficient safeguards in the remainder of the procedure provided by the new legislation. The Court was not therefore persuaded that, at the time of its judgment in the case, the applicants' life sentences could be regarded as providing them with the prospect of release or a possibility of review and the legislation was not therefore compatible with Article 3 of the Convention.[28]

Eight more appeals against Hungary are pending before the European Court of Human Rights.[29]

The example of Hungary shows what problems a country can have if its regulation does not comply with the standards deriving from international legal acts and the case law of the European Court of Human Rights.

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27 Nagy A.: Release from "Prison" in Hungary, Zbornik radova Pravnog fakulteta u Novom Sadu, No. 4/2015, pp. 2019-2020.

28 European Court of Human Rights: Life imprisonment, Factsheet, December 2019, p. 7.

29 European Court of Human Rights: Life imprisonment, Factsheet, December 2019, p. 10.

IV. ECtHR jurispridence toward the life imprisonment

The life imprisonment itself is not prohibited and necessarily incompatible with the Article 3 of the Convention. A life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist from the imposition of the sentence. A life sentence has to be reducible *de iure* and *de facto* through the review which should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided. Access to judicial review on whether conditions and reasons (not) to be released have to be pre-established, objective and known to prisoners. Those reasons and conditions should be based on legitimate penological grounds and the review process itself should be accompanied by sufficient procedural guaranties. Since the penological grounds for the life prison vary through the time/ not necessarily exist all the time a review process should provide for periodical check of their existence, starting no later than (approx) 25 years from the deprivation of a liberty. Considering this, prisoners cannot be denied the possibility of rehabilitation and thus the state has a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation.

European Court of Human Rights (hereinafter: ECtHR, Court) has established a comprehensive and clear jurisprudence[30] toward the life imprisonment sentence in the context of (non)breaching Art. 3 of the Convention.

The very first issue raised by the Court was an **allowance/prohibition of the life imprisonment itself.** In this regard, the Court has a strong position 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 (see *Kafkaris*, cited above, § 97, and references cited therein), provided that it is not grossly disproportionate (see *Vinter and Others*, cited above, § 102). The same position was reiterated in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.

However, this does not mean that the parties to the Convention are free to prescribe in their national legal systems a life imprisonment without fulfilling any further conditions without breaching the Art. 3 of the Convention. Contrary, the ECtHR has developed a set of clear and comprehensive criteria to be met in order

30 The full list of the decisions that have been analysed for the purpose of drafting this document, could be found at the end of this chapter.

to comply with the Art. 3 of the Convention in relation with *de iure* and *de facto* status of the life imprisonment. As the Court has found in *Vinter and Others* that **a life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review**, both of which must exist from the imposition of the sentence (see *Vinter and Others*, cited above, §§ 104-118 and 122). The same position Court took in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.[31]

When it comes to the prospect to release, probably, the most important requirement of the Court is a **reducibility of the life sentence *de iure* and *de facto*.** According to the ECtHR, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see *Kafkaris*, cited above, § 97). A life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98, and *Vinter and Others*, cited above, § 108).[32] In practice, this means that's not enough to include legal guarantees and mechanisms in the national legislation- they need to prove their functionality in practice. This opens further of issue of **whether the life sentence is reducible *de facto***. In assessing whether the life sentence is reducible *de facto* it may be of the relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon (see *Kafkaris*, cited above, § 103; *Harakchiev and Tolumov*, cited above, §§ 252 and 262; and *Bodein*, cited above, § 59).[33]

One of the issues that have been frequently raised by the Court is a **minimum time period elapsed before review is done.** In T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 42. the Court recalled that in *Bodein v. France* (no. 40014/10, 13 November 2014) it was called upon to examine the French system of reducibility of whole life sentences, in particular whether the possibility of a review of life sentences after thirty years of imprisonment remained compatible with the criteria established in *Vinter and Others*. In finding that it did, the Court gave particular weight to the fact that the starting point for the calculation of the whole-life term under French law included any deprivation of liberty, that is to say,

31 In the Pethukov v. Ukraine, the main focus of the case at hand was the clemency route. The Court therefore analysed whether the applicant in this case had at his disposal a real "prospect of release" through the opportunity to obtain presidential clemency. Ultimately, it found that he did not, and found that Ukraine had breached Article 3 as a result. (Petukhov v. Ukraine (No. 2), 12. March 2019, No. 41216/13)

32 The same in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.

33 *Ibidem*.

even the period spent in pre-trial detention. Since the applicant in that case was thus able to apply for parole twenty-six years after the imposition of his life sentence, the Court concluded that the punishment in his case was to be considered reducible for the purposes of Article 3 (see *Bodein*, cited above, § 61). Also, in par. 45, the Court noted that forty years during which a prisoner must wait before he can for the first time expect to be considered for clemency is a period significantly longer than the maximum recommended time frame after which the review of a life sentence should be guaranteed, established on the basis of a consensus in comparative and international law (see *Vinter*, cited above, § 120). It is also hardly comparable with the twenty-six-year period that the applicant in *Bodein* had to wait before being eligible to apply for parole (see § 42 above and *Bodein*, cited above, § 61).

In addition to the prospect to release itself , the Court has addressed a **type of review procedure, mostly from the perspective- judicial or non-judicial.** Therefore, the Court concluded that it is for the States to decide – and not for the Court to prescribe – what form (executive or judicial) that review should take (see *Kafkaris*, cited above, § 99, and *Vinter and Others*, cited above, §§ 104 and 120).[34] Consequently, the most frequently analysed mechanism was **a presidential clemency.** The Court has held that presidential clemency may thus be compatible with the requirements flowing from its case-law (see *Kafkaris*, cited above, § 102).[35] "In order to guarantee proper consideration of the changes and the progress towards rehabilitation made by a life prisoner, however significant they might be, the review should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided" (Petukhov v. Ukraine § 178). Here, the lack of any obligation to provide reasons for the clemency decision was a factor in finding a breach, which was further aggravated by a lack of access to judicial review (Petukhov v. Ukraine § 177-179)

When it comes to the requirements to be followed in order to keep review procedure in line with the Art. 3, the prisoner's right to a review entails an actual assessment of the relevant information, based on objective, pre-established criteria, accompanied by sufficient procedural guaranties. Thus, a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" as formulated in the *Kafkaris* judgment (see *Vinter and Others*, cited above, § 127, and *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, § 203, 18 March 2014). A Chamber of the Court held in a recent case that the assessment must be based on objective, pre-established criteria (see *Trabelsi v. Bel-*

34 *Ibidem*.

35 *Ibidem*.

gium, no. 140/10, § 137, ECHR 2014 (extracts)). The prisoner's right to a review entails an actual assessment of the relevant information (see *László Magyar*, cited above, § 57), and the review must also be surrounded by sufficient procedural guarantees (see *Kafkaris*, cited above, § 105, and *Harakchiev and Tolumov*, cited above, § 262).[36] Furthermore, an access to judicial review on whether conditions and reasons (not) to be released needs to be known to prisoners. To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided, and this should be safeguarded by access to judicial review (see *László Magyar*, cited above, § 57, and *Harakchiev and Tolumov*, cited above, §§ 258 and 262).[37] The Court also required that any prisoners should be able to have "precise cognisance" (*Trabelsi v Belgium* at [137]) of the conditions determining their release, from the outset of their sentence. Whilst the Ukranian rules provided "some guidance" (Petukhov v. Ukraine § 173) the Court was concerned with the vagueness of terms like "exceptional cases" and "extraordinary circumstances", as well as a lack of clarity concerning the applicable tariff period (Petukhov v. Ukraine § 175-176). This was enough to create a situation where "prisoners who receive a whole life sentence do not know from the outset what they must do in order to be considered for release and under what conditions" (Petukhov v. Ukraine § 174).

In *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 100, the Court has found that a prisoner cannot be detained unless there are legitimate penological grounds for incarceration, which include punishment, deterrence, public protection and rehabilitation. While many of these grounds will be present at the time when a life sentence is imposed, the balance between these justifications for detention is not necessarily static and might shift in the course of the execution of the sentence. The penological grounds for the life prison vary through the time-not necessary exist al the time. Therefore, review process should provide for periodical check of their existence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence, that these factors or shifts can be properly evaluated (*Vinter and Others*, cited above, § 111). The review required in order for a life sentence to be reducible should therefore allow the domestic authorities to consider whether, in the course of the sentence, any changes in the life prisoner and progress towards his or her rehabilitation are of such significance that continued detention is no longer justified on legitimate penological grounds (ibid., § 119). This assessment must be based on rules having a sufficient degree of clarity and certainty (ibid., §§ 125 and 129; see also *László Magyar v.*

36 *Ibidem.*

37 *Ibidem.*

Hungary, no. 73593/10, § 57, 20 May 2014, and *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 255, 257 and 262, ECHR 2014 (extracts)) and the conditions laid down in domestic legislation must reflect the conditions set out in the Court's case-law (see *Vinter and Others*, cited above, § 128). and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38. It is illustrating that, exploring the system of presidential clemency which exists in Ukraine, the Court concluded that this mechanism was "based on the principle of humanity, rather than… penological grounds" (Petukhov v. Ukraine, §180).

In line with the Court's position regarding penological grounds for the reduction of the life imprisonment is Finally, the principle strongly endorsed in *Murray v the Netherlands*, establishing that prisoners "cannot be denied the possibility of rehabilitation" and thus the state has "a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation" ([181]). Effectively, this means that the state must ensure, whatever conditions it chooses to set for prisoner release, that these conditions are obtainable in practice and that prisoners retain "a chance, however remote, to someday regain their freedom" (*Harakchiev and Tolumov v Bulgaria* at [264]). Given that the Applicant in the current case faced total segregation for 23 hours a day, the Court doubted whether he could ever have a legitimate opportunity to prove to the authorities that any of the penological grounds necessary for his release had been met (*Petukhov,* § § 182 and 183).

LIST OF REFERENCES

1. T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14.
2. Vinter and Others v. the United Kingdom, Nos. 66069/09, 130/10, 3896/10, 9.7.2013.
3. Murray. v. the Netherlands, 26. April 2016, No. 10511/10.
4. Harakchiev and Tolumov v. Bulgaria, 8. July 2014, Nos. 15018/11 i 61199/12.
5. Trabelsi v. Belgium, 4. September 2014, No. 140/10.
6. Kafkaris v. Cyprus, 12. February 2008, No. 21906/04.
7. Bodein v. France, 13. November 2014, No. 40014/10.
8. Petukhov v. Ukraine (No. 2), 12. March 2019, No. 41216/13.
9. Matiošaitis and Others v. Lithuania, 3. May 2017, Nos. 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 i 72824/13.
10. Öcalan v. Turkey (No. 2), 18. March 2014, Nos. 24069/03, 197/04, 6201/06 i 10464/07.
11. László Magyar v. Hungary, 20. May 2014, No. 73593/10.

12. Stafford v. the United Kingdom, 28. May 2002, No. 46295/99.
13. M. v. Germany, 17. December 2009, No. 19359/04.
14. Glien v. Germany, 28. November 2013, No. 7345/12.
15. Bergmann v. Germany, 7. January 2016, No. 23279/14.

V. Request for extraordinary reduction of the sentence as a way of reduce the sentence of life imprisonment sentenced by a final conviction judgment

One of the most current issues in the criminal policy of every state, including the Republic of Serbia, is the question: How to create a normative basis for mitigating the sentence imposed in a final court decision in cases where the circumstances of a specific criminal matter not only justify but also require it? The answer to the question posed in this way is indisputable and reads: Only with adequate standardization and adequate application of extraordinary legal remedies as the only way of judicial intervention in a final court decision-prejudice. Considering this as a key issue of this character of the positive criminal procedure legislation of the Republic of Serbia, the question is: Is this precondition in the valid text of its Code of Criminal Procedure (hereinafter: CPC RS) and if not what should be done to that end?

When it comes to this issue, first of all it should be stated the fact that unlike the previous criminal procedure legislation which was valid not only in the Republic of Serbia but also in all former Yugoslav republics as well as a number of other positive comparative criminal procedure legislations, recognizes only two extraordinary legal remedies (request for reopening of criminal proceedings and request for protection of legality). In connection with this, as well as the fact that the sentence imposed in a final court decision-judgment can be changed only in the procedure of extraordinary legal remedies, it is logical to put under the question whether the current system of extraordinary legal remedies in the RS CPC represent an adequate normative basis for a possible change of sentences imposed in this case life imprisonment? The issue gained special significance after two key interventions in the RS Criminal Code from 2019. Ie. after the introduction of a life sentence and the exclusion of the possibility of conditional release of a person convicted of certain criminal offenses - ie their individual forms.

The analysis of the issue raised above shows the following:

First, the existing system of extraordinary legal remedies in the RS CPC does not represent an adequate normative basis for the subsequent mitigation of not only life imprisonment, but also imprisonment in cases when the necessary

preconditions are met e.g. when the circumstances of a specific criminal matter indicate that in the time already spent of the convict in the penitentiary, the purpose of punishment from Article 42 of the RS Criminal Code has been achieved.

Secondly, having in mind the criminal policy reasons for justifying the prediction of mitigation of punishment pronounced in the final judgment, the most expedient way of resolving the previously raised issue is the standardization of a special extraordinary legal remedy in the RS CPC - the request for extraordinary mitigation of punishment.

Third, **adequate standardization of the request for extraordinary mitigation of sentence as an stand-alone extraordinary legal remedy would create an opportunity for a person sentenced to life imprisonment, to be subsequently sentenced to a lesser sentence within the RS Criminal Code due to circumstances that did not exist at the time verdict, as well as due to the impossibility of adequate assessment of all circumstances relevant for sentencing at the time of its imposition (case, for example, with circumstances related to the assessment of achieving the purpose of sentencing in a specific criminal matter under Article 42 of the RS CC).**

Fourth, the provision of the possibility of extraordinary mitigation of the sentence has a very great penological significance for the convicted person, not only for the convicted person but also for the institution where the life imprisonment sentence is served. This is primarily the case **if the circumstance/fact that should be taken into account in considering the submitted request for extraordinary mitigation of life imprisonment, is the assessment of whether the purpose of sentencing in a specific criminal matter has already been achieved at the time of deciding on the submitted request.** In view of this, special attention should be paid to this normative elaboration of the initiated extraordinary legal remedy as the most adequate way of mitigating the punishment in a final court decision.

Fifth, in order for the request for extraordinary mitigation of punishment to be in the function that is expected of it - in the function of an adequate penal policy, it must be standardized in a way that will enable it. In view of this, in its normative elaboration, special attention should be paid to the following issues:

The basis of the possibility of filing a request should be based on the occurrence of mitigating or mitigating circumstances that **did not exist before the judgment became final** - circumstances that arose only after that procedural moment **or existed but the court did not know about them at the time of sentencing e.g. the circumstances that indicate the already achieved purpose of punishment in a specific criminal matter**. Circumstances which were known to the court but which it did not take into account (did not assess them at all or did not assess them correctly even though they were known to it) cannot be grounds for mitigating the

sentence. Circumstances that should serve as a basis for extraordinary mitigation of punishment should be all circumstances that, according to the general part of the Criminal Code, affect a lesser measure or type of punishment and make the punishment in a specific criminal matter more lenient. As such, they can be both objective and subjective in nature, which is a matter of a specific criminal case;

– A circle of the holders of the right to file a request should be exhausted with the following: public prosecutor, convict and his defense counsel and persons authorized to file an appeal against the verdict in favor of the accused;
– Impossibility to submit a request for the sentence is served or a sentenced person died;
– Jurisdiction of the court to decide on the request;
– Procedural position of the public prosecutor in the procedure of deciding on the submitted request for extraordinary mitigation of sentence in cases when he is not its holder;
– Mechanisms to prevent abuse in the submission of applications by authorized holders;
– Basis of revocation of the court decision on the filed request for extraordinary mitigation of sentence;
– *Instituta beneficium cohaesionis* in extraordinary mitigation of a sentence.

Sixth, the decision on the submitted request for extraordinary mitigation of punishment is in the exclusive jurisdiction of the court and the assessment of the party that submitted the request is in no case binding on the court.

Seventh, in addition to what have been already said, few additional facts that should be taken into account in making a decision on the criminal policy justification of the standardization of requests for extraordinary mitigation of punishment in the RS CPC:

- **The grounds for the possibility of filing a request for extraordinary mitigation of sentence are different from the grounds for the possibility of filing a request for protection of legality**. Violation of the provisions of criminal procedure cannot be the basis for filing a request for extraordinary mitigation of punishment, which is one in a series of facts that these two extraordinary rights do not exclude each other. The same is the case with the request to repeat the criminal procedure.
- **Extraordinary mitigation of punishment does not exclude the possibility of granting pardon**. This is due to the fact that extraordinary mitigation of punishment is a procedural institute decided by a court that must adhere to the relevant provisions of the general and special part of the Criminal Code in deciding

on the submitted request, and pardon is an act of a non-judicial body issued at its discretion regardless of whether new circumstances have emerged, modifying the sentence imposed at will. **The same is the effect of extraordinary mitigation of sentence on the act of amnesty.**

- The results of the application of the initiated extraordinary legal remedy speak in favor not only of the justification of its standardization but also of the requirement as an important instrument of the **adequacy of the state response to crime**, especially in cases of imposing the most severe criminal sanctions (including the death penalty. life imprisonment).
- The institute of extraordinary mitigation of punishment is independent of the penological instruments of correction of the final sentence imposed on the perpetrator of the criminal offense. However, in addition to its independence**, it can also be an instrument of correction of non-foresight of adequate penological instruments of correction of a final sentence imposed on a perpetrator of a criminal offense**. The case of e.g. with the institute of parole.
- Adequately standardized request for extraordinary mitigation of sentence achieves everything that should be achieved by revision as an **extraordinary legal remedy provided for in the Rome Statute of the International Criminal Court**, which also provides for life imprisonment as a special criminal sanction.

VI. Conclusions and Recommendations

Prohibition of torture and inhuman or degrading treatment or punishment undoubtedly derives from all **the main international human rights instruments** and it is highly accepted and incorporated in the national legislations across the world. Variety of the legal traditions and the trajectories of their evolution have resulted in the significant varieties on how the main guaranties to prevent inhuman and degrading treatment of punishment, including those related to a life imprisonment, have been incorporated in national legislations. Unlike the death penalty, which is undesirable and has already been abolished in the member states of the Council of Europe and the European Union, the sentence of life imprisonment is not in itself prohibited and does not constitute a violation of Article 3 of the European Convention on Human Rights if the legal order gives the convicted person hope that he or she will ever be released again.

When it comes to the **ECtHR jurisprudence** the life imprisonment itself is not prohibited and necessarily incompatible with the Article 3 of the Convention. A life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist

from the imposition of the sentence. A life sentence has to be reducible *de iure* and *de facto* through the review which should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided. Access to judicial review on whether conditions and reasons (not) to be released have to be pre-established, objective and known to prisoners. Those reasons and conditions should be based on legitimate penological grounds and the review process itself should be accompanied by sufficient procedural guaranties. Since the penological grounds for the life prison vary through the time/ not necessarily exist all the time a review process should provide for periodical check of their existence, starting no later than (approx) 25 years from the deprivation of a liberty. Considering this, prisoners cannot be denied the possibility of rehabilitation and thus the state has a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation.

Based on what have been said, the analysis shows that in order to comply with Article 3 of the Convention and the jurisprudence of the European Court of Human Rights, national legislation should provide for the possibility of early release from a penitentiary for persons sentenced to life imprisonment - through conditional release or some other effective remedy. Currently, that is not the case with the **valid text of the RS Criminal Code**.

Having this in mind, in order to prevent from the possible decision on non-compliance rendered by ECtHR, we recommend **two possible alternative solutions** to improve current situation and to ensure a full compliance with the Art. 3:

1) **Amendments to the Criminal Code:**

The aim of these amendments will be to enable all prisoners sentenced to life imprisonment to initiate parole procedure after expiring certain period previously determined in the Criminal Code together with objective criteria and adequate procedural guaranties to be applied in the procedure of rendering decision of such petition.

2) **Amendments to the Criminal Procedure Code**

The main idea of this alternative is both- to keep existing provisions of the Criminal Code, but also to introduce correctional mechanism in compliance with international standards and ECtHR requirements. In accordance with this scenario, the Criminal Procedure Coe should be amended by the introduction of the Request for extraordinary mitigation of the sentence, as a procedural mechanism which allows reduction of the life imprisonment based on penological grounds, namely, the progress made in treatment which resulted in reasonable believe that the purpose of punishment could be achieved by sentence shorter that life imprisonment.

Annex no.I – Selected provisions of German Criminal Code

Übersetzung durch Prof. Dr. Michael Bohlander. Vollständige Überarbeitung und laufende Aktualisierung durch Ute Reusch

Translation provided by Prof. Dr Michael Bohlander. Translation completely revised and regularly updated by Ute Reusch

Stand: Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 2 des Gesetzes vom 19. Juni 2019 (BGBl. I, S. 844)

Version information: The translation includes the amendment(s) to the Act by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844)

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German Criminal Code

(Strafgesetzbuch – StGB)

Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844)

General Part

Chapter 1

The criminal law

Title 1

Scope of application

Section 1

No punishment without law

An act can only incur a penalty if criminal liability was established by law before the act was committed.

Section 2

Temporal application

(1) The penalty and any incidental legal consequences are determined by the law which is in force at the time of the act.

(2) If the threatened penalty is amended during the commission of the act, the law which is in force at the time the act is completed is to be applied.

(3) If the law in force at the time of the completion of the act is amended before judgment, the most lenient law is to be applied.

(4) A law which was intended to be in force only for a determinate time is, as a rule, still to be applied to acts committed whilst it was in force even after it ceases to be in force. This does not apply to the extent that a law provides otherwise.

(5) Subsections (1) to (4) apply accordingly to the confiscation and rendering unusable of objects.

Title 4

Suspension of sentence on probation

Section 56

Suspension of sentence

(1) If a person is sentenced to imprisonment for a term not exceeding one year, the court suspends enforcement of the sentence on probation if there are reasons to believe that the sentence itself will serve as sufficient warning to the convicted person and that the convicted person will commit no further offences even without having to serve the sentence. The court is, in particular, to take account of the convicted person's character and previous history, the circumstances of the offence committed, the convicted person's circumstances and conduct in the period following the offence, and the effects to be expected from the suspension.

(2) Under the conditions of subsection (1), the court may also suspend enforcement of a sentence of imprisonment not exceeding two years on probation if, after an overall evaluation of the offence and of the convicted person's character, special circumstances are deemed to exist. In making its decision, the court is, in particular, to take account of any efforts on the convicted person's part to make restitution for the harm caused by the offence.

(3) Enforcement of imprisonment for a term of at least six months is not suspended if the defence of the legal order so requires. Service provided by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice – www.gesetze-im-internet.de

(4) The suspension may not be limited to a part of the sentence. It is not ruled out by any crediting of time spent in remand detention or another form of deprivation of liberty.

Section 56a

Probation period

(1) The court determines the length of the period of probation. It may not exceed five years nor be less than two years.

(2) The probation period commences when the decision to suspend the sentence becomes final. It may subsequently be reduced to the minimum or extended to the maximum before its expiry.

Section 56b

Conditions

(1) The court may impose conditions on the convicted person which serve to make amends for the harm caused. No unreasonable demands may be made of the convicted person.

(2) The court may require the convicted person

1. to make every effort at restitution for the harm caused by the offence,

2. to pay a sum of money to a charitable organisation if this appears appropriate in the light of the offence and the offender's character,

3. to perform community service or

4. to pay a sum of money to the Treasury.

The court is, as a rule, only to impose a condition as required by sentence 1 nos. 2 to 4 if fulfilment of the condition poses no obstacle to the making of restitution for the harm caused.

(3) If the convicted person offers to render appropriate services for the purpose of making amends for the harm caused, the court typically preliminarily dispenses with imposing conditions if it is to be expected that the offer will be fulfilled.

Section 56c

Directions

(1) The court is to issue directions to the convicted person for the duration of the probation period if that person requires such assistance in order to abstain from committing further offences. No unreasonable demands may be made in respect of the convicted person's lifestyle.

(2) The court may, in particular, direct the convicted person

1. to follow instructions relating to residence, education, work or leisure, or to getting his or her financial affairs in order,

2. to report at certain times to the court or another authority,

3. not to make contact or associate with the injured party or specific persons or persons from a specific group who may induce the convicted person to commit further offences, nor to employ, train or accommodate them,

4. not to possess, carry or entrust to another for safekeeping certain objects which could induce the convicted person to commit further offences or

5. to meet maintenance obligations.

(3) A direction

1. to undergo medical treatment of an invasive nature or addiction treatment or

2. to take up residence in a suitable home or suitable institution

may only be given with the convicted person's consent. Service provided by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice – www.gesetze-im-internet.de

(4) If the convicted person gives assurances relating to his or her future conduct, the court typically provisionally refrains from issuing directions if it is to be expected that the assurances will be fulfilled.

Section 56d

Probation services

(1) The court places the convicted person under the supervision and guidance of a probation officer for all or part of the probation period if this appears necessary to prevent the convicted person from committing criminal offences.

(2) The court typically issues directions as required by subsection (1) if it suspends a sentence of imprisonment of more than nine months and the convicted person is under 27 years of age.

(3) The probation officer offers assistance and support to the convicted person. In consultation with the court, the probation officer monitors compliance with conditions and directions as well as with offers and assurances made and, at intervals determined by the court, reports on the convicted person's conduct. The probation officer must inform the court about serious or persistent breaches of the conditions, directions, offers or assurances.

(4) The probation officer is appointed by the court. The court may give the probation officer instructions in regard to the functions under subsection (3).

(5) The functions of a probation officer are exercised as a main occupation or in an honorary capacity.

Section 56e

Subsequent decisions

The court may also make, modify or set aside decisions pursuant to sections 56b to 56d at a later date.

Section 56f

Revocation of suspension of sentence

(1) The court is to revoke the suspension of the sentence on probation if the convicted person

1. commits an offence during the probation period, and thereby shows that the expectation on which the suspension was based has not been fulfilled,

2. grossly or persistently violates directions or persistently evades the probation officer's supervision and guidance, thereby giving reason to fear that the convicted person will re-offend or

3. grossly or persistently violates conditions.

Sentence 1 no. 1 applies accordingly if the offence was committed in the period between the decision to suspend the sentence being taken and its becoming final or, in the case of subsequent fixing of an aggregate sentence, in the period between the decision to suspend the sentence in a judgment which was included in the aggregate sentence and the date on which the aggregate sentence became final.

(2) The court is, however, not to revoke the suspension of the sentence on probation if it is of the opinion that it would suffice

1. to impose further conditions or issue further directions, in particular to place the convicted person under the supervision and guidance of a probation officer or

2. to extend the probation period or period of supervision of conduct.

In the cases under no. 2, the probation period may not be extended for more than one half of the originally imposed period.

(3) The convicted person is not to be compensated for services rendered in the fulfilment of conditions, offers, directions or assurances. If the suspension on probation is revoked, the court may, however, credit services towards the sentence which the convicted person has Service provided by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice – www.gesetze-im-internet.de rendered to comply with conditions issued under section 56b (2) sentence 1 nos. 2 to 4 or related offers in accordance with section 56b (3).

Section 56g

Remission of sentence

(1) If the court does not revoke the suspension of the sentence, the sentence is to be remitted after expiry of the probation period. Section 56f (3) sentence 1 applies.

(2) The court may revoke such remission if the convicted person has been sentenced to imprisonment for a term of at least six months for an intentional offence committed during the probation period. The revocation may only be declared within one year after expiry of the probation period and six months after the new judgment has become final. Section 56f (1) sentence 2 and (3) applies accordingly.

Section 57

Suspension of remainder of determinate sentence of imprisonment

(1) The court suspends enforcement of the remainder of a determinate sentence of imprisonment on probation if

1. two thirds of the imposed sentence, but at least two months, have been served,

2. this can be justified having regard to public security interests and

3. the convicted person consents thereto.

The decision is, in particular, to take into consideration the convicted person's character, previous history, the circumstances of the offence, the importance of the legal interest endangered should the convicted person re-offend, the convicted person's life circumstances and conduct whilst serving the sentence imposed, and the effects which such suspension are expected to have on the convicted person.

(2) After one half of a determinate sentence of imprisonment has been served, but at least six months, the court may suspend enforcement of the remainder of the sentence on probation if

1. the convicted person is serving a first sentence of imprisonment and the term does not exceed two years or

2. following an overall evaluation of the offence, the convicted person's character and development whilst serving the sentence imposed, special circumstances are deemed to exist

and the remaining conditions of subsection (1) are met.

(3) Sections 56a to 56g apply accordingly; the probation period, even if subsequently reduced, may not be less than the remainder of the sentence. If the convicted person has served at least one year of the sentence imposed before the remainder is suspended on probation, the court typically places the convicted person under the supervision and guidance of a probation officer for all or a part of the probation period.

(4) Where a sentence of imprisonment has been reduced by crediting time served, it is deemed to have been served within the meaning of subsections (1) to (3).

(5) Sections 56f and 56g apply accordingly. The court is also to revoke the suspension of the sentence if, in the period between the conviction and the decision to suspend the sentence, the convicted person has committed an offence which could for factual reasons not be taken into account by the court when deciding to suspend the sentence and which would have led to a denial of such suspension had it been known at that time; the judgment in those proceedings in which the underlying findings of fact were last examined counts as the conviction.

(6) The court may dispense with suspending enforcement of the remainder of a determinate sentence of imprisonment on probation if the convicted person makes insufficient or false Service provided by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice – www.gesetze-im-internet.de statements concerning the whereabouts of objects which are subject to confiscation of the proceeds of crime.

(7) The court may fix a term not exceeding six months before the expiry of which an application by the convicted person for the suspension of sentence on probation is inadmissible.

Section 57a

Suspension of remainder of imprisonment for life

(1) The court suspends enforcement of the remainder of a sentence of imprisonment for life on probation where

1. 15 years of the sentence have been served,

2. the particular severity of the convicted person's guilt does not require its continued enforcement and

3. the conditions of section 57 (1) sentence 1 nos. 2 and 3 are met.

Section 57 (1) sentence 2 and (6) applies accordingly.

(2) Any deprivation of liberty suffered by the convicted person as a result of the offence qualifies as a sentence served within the meaning of subsection (1) sentence 1 no. 1.

(3) The probation period is five years. Section 56a (2) sentence 1, sections 56b to 56g and section 57 (3) sentence 2 and (5) sentence 2 apply accordingly.

(4) The court may fix terms not exceeding two years before the expiry of which an application by the convicted person for the suspension of sentence on probation is inadmissible.

Annex No. II
– Selected provisions of Austrian Criminal Code

(German and English (unofficial translation))

Bedingte Entlassung aus einer Freiheitsstrafe

§ 46.

(1) Hat ein Verurteilter die Hälfte der im Urteil verhängten oder im Gnadenweg festgesetzten zeitlichen Freiheitsstrafe oder des nicht bedingt nachgesehenen Teils einer solchen Strafe, mindestens aber drei Monate verbüßt, so ist ihm der Rest der Strafe unter Bestimmung einer Probezeit bedingt nachzusehen, sobald unter Berücksichtigung der Wirkung von Maßnahmen gemäß §§ 50 bis 52 anzunehmen ist, dass der Verurteilte durch die bedingte Entlassung nicht weniger als durch die weitere Verbüßung der Strafe von der Begehung strafbarer Handlungen abgehalten wird.

(2) Hat ein Verurteilter die Hälfte, aber noch nicht zwei Drittel einer Freiheitsstrafe verbüßt, so ist er trotz Vorliegens der Voraussetzungen nach Abs. 1 solange nicht bedingt zu entlassen, als es im Hinblick auf die Schwere der Tat ausnahmsweise des weiteren Vollzuges der Strafe bedarf, um der Begehung strafbarer Handlungen durch andere entgegenzuwirken.

(Anm.: Abs. 3 aufgehoben durch BGBl. I Nr. 154/2015)

(4) Bei Entscheidungen nach Abs. 1 ist auf den Umstand Bedacht zu nehmen, inwieweit durch den bisherigen Vollzug der Strafe, insbesondere auch durch eine während des Vollzugs begonnene freiwillige Behandlung im Sinne von § 51 Abs. 3, die der Verurteilte in Freiheit fortzusetzen bereit ist, eine Änderung der Verhältnisse, unter denen die Tat begangen wurde, eingetreten ist, oder durch Maßnahmen gemäß §§ 50 bis 52 erreicht werden kann.

(5) Verbüßt ein Verurteilter mehrere Freiheitsstrafen, Strafteile oder Strafreste, so ist ihre Gesamtdauer maßgebend, sofern sie unmittelbar nacheinander verbüßt oder lediglich durch Zeiten unterbrochen werden, in denen er sonst auf behördliche Anordnung angehalten wird. Nach spätestens fünfzehn Jahren ist jedoch in jedem Fall über die bedingte Entlassung zu entscheiden. Wurde auf eine Zusatzstrafe erkannt (§§ 31, 40), so sind auch bei unterbrochenem Vollzug alle Strafen maßgebend, auf die beim Ausspruch der Zusatzstrafe Bedacht zu nehmen war; wurde der Verurteilte aus einer dieser Strafen bedingt entlassen, so ist bei Berechnung des Stichtages (§ 46 Abs. 1 und 2) sowie der noch zu verbüßenden Strafzeit die tatsächlich in Haft zugebrachte Zeit in Abzug zu bringen. Eine frühere Strafe, zu der eine Zusatzstrafe

verhängt wurde, hat jedoch außer Betracht zu bleiben, soweit der Verurteilte daraus vor Verbüßung der Hälfte der Strafzeit entlassen wurde.

(6) Ein zu einer lebenslangen Freiheitsstrafe Verurteilter darf nur bedingt entlassen werden, wenn er mindestens fünfzehn Jahre verbüßt hat und anzunehmen ist, dass er keine weiteren strafbaren Handlungen begehen werde.

Conditional release from prison

§ 46.

(1) If a convict has served half of the prison term imposed in the judgment or in the way of grace or the part of such a punishment that was not unconditionally looked after, but has served at least three months, the rest of the punishment must be conditionally determined by specifying a trial period as soon as under Taking into account the effect of measures in accordance with sections 50 to 52, it can be assumed that the convicted person is prevented from committing criminal acts by conditional release no less than by further serving the sentence.

(2) If a convicted person has served half, but not yet two thirds of a prison sentence, he must not be released conditionally, as long as the conditions of paragraph 1 exist, as an exception to the further execution of the sentence, given the seriousness of the crime needed to counteract the commission of criminal acts by others.

(Note: Paragraph 3 repealed by Federal Law Gazette I No. 154/2015)

(4) In the case of decisions pursuant to Paragraph 1, consideration should be given to the extent to which the sentence has been enforced to date, in particular also through voluntary treatment within the meaning of Section 51 Paragraph 3, which the convicted person has to continue at liberty is willing to change the circumstances under which the crime was committed, has occurred, or can be achieved by measures in accordance with sections 50 to 52.

(5) If a convicted person serves more than one sentence, sentences or remnants of sentence, their total duration is decisive, provided that they are served immediately one after the other or are only interrupted by times in which he is otherwise stopped by official order. In any case, a decision on the conditional release must be made after fifteen years at the latest. If an additional penalty was recognized (Sections 31, 40), all penalties that should be taken into account when pronouncing the additional penalty apply, even if enforcement is interrupted; If the convict was released from one of these punishments, the time actually spent in detention must be deducted when calculating the cut-off date (Section 46 Paragraphs 1 and 2) and the time to be served. An earlier sentence imposed, however, must be disregarded if the convict was released from it before serving half of the sentence.

(6) A person sentenced to life imprisonment may only be released under certain conditions if he has served at least fifteen years and it can be assumed that he will not commit any further criminal acts.

Erteilung von Weisungen und Anordnung der Bewährungshilfe

§ 50.

(1) Wird einem Rechtsbrecher die Strafe oder die mit Freiheitsentziehung verbundene vorbeugende Maßnahme bedingt nachgesehen oder wird er aus einer Freiheitsstrafe oder einer mit Freiheitsentziehung verbundenen vorbeugenden Maßnahme bedingt entlassen, so hat das Gericht ihm Weisungen zu erteilen oder Bewährungshilfe anzuordnen, soweit das notwendig oder zweckmäßig ist, um den Rechtsbrecher von weiteren mit Strafe bedrohten Handlungen abzuhalten. Dasselbe gilt, wenn der Ausspruch der Strafe für eine Probezeit vorbehalten wird (§ 13 des Jugendgerichtsgesetzes 1988) oder die Einleitung des Vollzuges einer Freiheitsstrafe, die wegen einer vor Vollendung des einundzwanzigsten Lebensjahres begangenen Tat verhängt worden ist, nach § 6 Abs. 1 Z 2 lit. a des Strafvollzugsgesetzes oder nach § 52 des Jugendgerichtsgesetzes 1988 für die Dauer von mehr als drei Monaten aufgeschoben wird.

(2) Bewährungshilfe ist stets anzuordnen, wenn ein Verurteilter 1. vor Verbüßung von zwei Dritteln einer Freiheitsstrafe (§ 46 Abs. 1), 2. aus einer Freiheitsstrafe wegen einer vor Vollendung des einundzwanzigsten Lebensjahres begangenen Tat, 2a. aus einer Freiheitsstrafe wegen einer strafbaren Handlung gegen die sexuelle Integrität und Selbstbestimmung, 3. aus einer mehr als fünfjährigen Freiheitsstrafe oder 4. aus lebenslanger Freiheitsstrafe bedingt entlassen wird. In den Fällen der Z 1 bis 2 ist von der Anordnung der Bewährungshilfe nur abzusehen, wenn nach der Art der Tat, der Person des Rechtsbrechers und seiner Entwicklung angenommen werden kann, dass er auch ohne eine solche Anordnung keine weiteren strafbaren Handlungen begehen werde.

(3) Weisungen sowie die Anordnung der Bewährungshilfe gelten für die Dauer des vom Gericht bestimmten Zeitraums, höchstens jedoch bis zum Ende der Probezeit, soweit sie nicht vorher aufgehoben oder gegenstandslos werden. Im Fall des Abs. 2 Z 3 ist Bewährungshilfe zumindest für das erste Jahr und im Fall der Abs. 2 Z 4 zumindest für die ersten drei Jahre nach der Entlassung anzuordnen.

Issuing instructions and ordering probation services

§ 50.

(1) If a criminal is condemned to the punishment or the preventive measure connected with deprivation of liberty or if he is released from a prison sentence or a pre-

ventive measure connected with deprivation of liberty, the court must give him instructions or order probation, as far as this is necessary or appropriate is to prevent the lawbreaker from further punishable acts. The same applies if the sentence is reserved for a trial period (section 13 of the Youth Court Act 1988) or the initiation of the execution of a prison sentence that was imposed on an act committed before the age of twenty-one according to section 6 (1) no.2 lit. a of the Prison Act or in accordance with Section 52 of the Youth Court Act 1988 for a period of more than three months.

(2) Probation assistance must always be ordered if a convict 1. before serving two thirds of a sentence (Section 46 (1)), 2. from a sentence for an act committed before the age of twenty-one, 2a. from a prison sentence for a punishable act against sexual integrity and self-determination, 3. from a more than five-year sentence or 4. from life imprisonment. In the cases of Z 1 to 2, the order of the probation officer can only be waived if it can be assumed based on the nature of the act, the person of the lawbreaker and his development that he would not commit any further criminal acts even without such an order.

(3) Instructions and the order of probation apply for the duration of the period determined by the court, but at most until the end of the probationary period, unless they are canceled beforehand or become irrelevant. In the case of paragraph 2 line 3, probation assistance must be ordered at least for the first year and in the case of paragraph 2 line 4 at least for the first three years after release.

Weisungen
§ 51.

(1) Als Weisungen kommen Gebote und Verbote in Betracht, deren Beachtung geeignet scheint, den Rechtsbrecher von weiteren mit Strafe bedrohten Handlungen abzuhalten. Weisungen, die einen unzumutbaren Eingriff in die Persönlichkeitsrechte oder in die Lebensführung des Rechtsbrechers darstellen würden, sind unzulässig.

(2) Dem Rechtsbrecher kann insbesondere aufgetragen werden, an einem bestimmten Ort, bei einer bestimmten Familie oder in einem bestimmten Heim zu wohnen, eine bestimmte Wohnung, bestimmte Orte oder einen bestimmten Umgang zu meiden, sich alkoholischer Getränke zu enthalten, einen geeigneten, seinen Kenntnissen, Fähigkeiten und Neigungen tunlichst entsprechenden Beruf zu erlernen oder auszuüben, jeden Wechsel seines Aufenthaltsortes oder Arbeitsplatzes anzuzeigen und sich in bestimmten Zeitabständen bei Gericht oder einer anderen Stelle zu melden. Den aus seiner Tat entstandenen Schaden nach Kräften gutzumachen, kann dem Rechtsbrecher auch dann aufgetragen werden, wenn das von Einfluß darauf ist, ob es der Vollstreckung der Strafe bedarf, um der Begehung strafbarer Handlungen durch andere entgegenzuwirken.

(3) Mit seiner Zustimmung kann dem Rechtsbrecher unter den Voraussetzungen des Abs. 1 auch die Weisung erteilt werden, sich einer Entwöhnungsbehandlung, einer psychotherapeutischen oder einer medizinischen Behandlung zu unterziehen. Die Weisung, sich einer medizinischen Behandlung zu unterziehen, die einen operativen Eingriff umfaßt, darf jedoch auch mit Zustimmung des Rechtsbrechers nicht erteilt werden.

(4) Das Gericht hat während der Probezeit Weisungen auch nachträglich zu erteilen oder erteilte Weisungen zu ändern oder aufzuheben, soweit dies nach § 50 geboten scheint.

(5) Für Weisungen im Zusammenhang mit der bedingten Nachsicht einer vorbeugenden Maßnahme nach § 45 gilt § 179a des Strafvollzugsgesetzes (StVG), BGBl. Nr. 144/1969, sinngemäß.

Instructions

§ 51.

(1) Instructions and prohibitions come into consideration as instructions, the observance of which seems suitable to prevent the offender from further acts threatened with punishment. Instructions that would constitute an unreasonable interference in the personal rights or in the life of the lawbreaker are not permitted.

(2) The lawbreaker can in particular be ordered to live in a certain place, with a certain family or in a certain home, to avoid a certain apartment, certain places or a certain way of dealing, to abstain from alcoholic beverages, a suitable one Knowledge, skills and inclinations to learn or practice the relevant profession as far as possible, to indicate every change of residence or place of work and to report to the court or another body at certain intervals. The lawbreaker can also be ordered to make amends for the damage he has suffered as a result if this affects whether the execution of the punishment is required to counteract the commission of criminal acts by others.

(3) With his consent, the lawbreaker can also be given the instructions under the conditions of paragraph 1 to undergo weaning treatment, psychotherapeutic or medical treatment. However, the instruction to undergo medical treatment, which includes a surgical intervention, may not be given with the consent of the lawbreaker.

(4) During the probationary period, the court must also issue instructions retrospectively or change or cancel instructions that have been issued, insofar as this appears to be required under § 50.

(5) Section 179a of the Prison Act (StVG), Federal Law Gazette No. 144/1969, applies mutatis mutandis to instructions in connection with the conditional forbearance of a preventive measure in accordance with Section 45.

Annex III – Selected provisions of Slovenian Criminal Code

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The unofficial consolidated version of the Criminal Code comprises:

- Criminal Code – KZ-1 (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 55/08 of 4 June 2008),
- Corrigendum to the Criminal Code – KZ-1 (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 39/09 of 1 July 2008),
- Act Amending the Criminal Code – KZ-1A (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 39/09 of 26 May 2009),
- Act Amending the Criminal Code – KZ-1B (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 91/11 of 14 November 2011),
- Criminal Code – Official consolidated version – KZ-1-UPB2 (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 50/12 of 29 June 2012),
- Corrigendum to the Official consolidated version of Criminal Code – KZ-1-UPB2p (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 6/16 of 29 January 2016),
- Act Amending the Criminal Code – KZ-1C (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 54/15 of 20 July 2015),
- Act Amending the Criminal Code – KZ-1D (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 38/16 of 27 May 2016),
- Act Amending the Criminal Code – KZ-1E (Official Gazette of the Republic of Slovenia [Uradni list RS], No. 27/17 of 2 June 2017).

CRIMINAL CODE

(KZ-1)

(Unofficial consolidated version No. 6)

GENERAL PART

Release on parole

Article 88

(1) The convicted person, who has served one half of his or her sentence of imprisonment, may be released from a penal institution provided that until the expiration of the period of time for which he or she was sentenced he or she does not commit another criminal offence.

(2) The convicted person who has been sentenced to over fifteen years' imprisonment, may be released on parole after he or she has served three quarters of the sentence.

(3) The convicted person who has been sentenced to life imprisonment may be released on parole after he has served twenty-five years in prison.

(4) The law shall determine the body responsible for the granting and denying of parole.

(5) A convicted person may be released on parole when it is reasonable to expect that he or she will not repeat the criminal offence. In considering whether to release the convicted person on parole, one shall take into accountin particular the possibility of re-offending, any criminal proceedings taking place against the convicted person for criminal offences committed before he or she started serving the prison sentence, the convicted person's attitude towards the criminal offence committed and towards the victim, the convicted persons's conduct during imprisonment, the outcome of treatment of addiction, and the conditions for the convicted person's reintegration into the society upon release from prison.

(6) Exceptionally, the convicted person who has served only one third of his or her sentence may be released on parole if he or she meets the condition referred to in paragraph five of this Article and if the special circumstances relating to his or her personality indicate that he or she will not repeat the criminal offence.

(7) The convicted person that is to be released on parole may be placed under custodial supervision by the body responsible for granting and denying parole. Custodial supervision shall be performed by a counsellor who shall have the same duties as in a suspended sentence with custodial supervision.

(8) The body responsible for granting and denying parole instructions may determine the following tasks to be performed by the convicted person on parole:

1) to submit himself or herself to medical treatment in an appropriate institution, including treatment of alcohol or drug addiction with his or her consent;
2) to attend vocational, psychological, or other consultation sessions;
3) to undergo training for a job or to take up employment suitable to his or her health, skills, or inclinations;
4) to spend income according to the duties relating to family support;
5) prohibition of association with certain persons;
6) prohibition of the establishment of direct and indirect contacts with one or more specificn persons, including the use of electronic means of communication;
7) restraining order to keep the perpetrator away from the victim or some other person;
8) prohibition of access to certain places.

(9) The provisions of this Article shall also apply to conditional release from house arrest. In assessing whether a convicted person should be conditionally released from house arrest, compliance with restrictions regarding house arrest shall be taken into account instead of the convicted person's behaviour during the serving of the sentence.

Annex No IV
– Selected provisions of Hungarian Criminal Code

Act C of 2012 on the Criminal Code (as in force on 31 March 2020)
This document has been produced for informational purposes only.
Act C of 2012 on the Criminal Code

The National Assembly, with a view to protecting the inviolable and inalienable fundamental rights of human beings, as well as the independence, territorial integrity, economy and national assets of the country, taking into account the obligations of Hungary under international and European Union law,

for the purpose of exerting the State's exclusive criminal jurisdiction, adopts the following Act:

GENERAL PART

CHAPTER I

FUNDAMENTAL PROVISIONS

Principle of legality

Section 1

(1) The criminal liability of the perpetrator shall be established only for an act which was punishable under an Act at the time of commission, except for acts punishable under the generally recognised rules of international law.

(2) No penalty shall be imposed and no measure shall be applied due to committing a criminal offence if it was not provided for by an Act at the time of commission or, if section 2 (2) is applied, of adjudication.

CHAPTER II

HUNGARIAN CRIMINAL JURISDICTION

Temporal scope

Section 2

(1) A criminal offence shall be adjudicated under the criminal law in force at the time of commission, with the exceptions specified in paragraphs (2) to (3).

(2) If an act is not a criminal offence under the new criminal law in force at the time of adjudicating the act, or is to be adjudged more leniently, the new criminal law shall apply.

(3) The new criminal law shall apply retroactively for adjudicating an act punishable under the generally recognised rules of international law if the act was not punishable under the Hungarian criminal law at the time of commission.

Territorial and personal scope

Section 3 (1) Hungarian criminal law shall apply to

a) criminal offences committed in Hungary,

b) criminal offences committed on vessels flying the flag of Hungary or on aircraft flying the flag of Hungary being outside the territory of Hungary,

Release on parole from life imprisonment

Section 42

(1) If life imprisonment is imposed, the court shall specify in its conclusive decision the earliest date of release on parole, or shall exclude the possibility of release on parole.

Section 43

(1) If life imprisonment is imposed by the court without excluding the possibility of release on parole, its earliest date shall be at least after twenty-five but not more than forty years. The earliest date of release on parole shall be specified in years.

(2) If life imprisonment is imposed, the period of parole shall be at least fifteen years.

Section 44

(1) If life imprisonment is imposed, the court shall be entitled to exclude the possibility of release on parole only with regard to the following criminal offences:

a) genocide [section 142 (1)],

b) crimes against humanity [section 143 (1)],

c) apartheid [section 144 (1) and (3)],

d) aggravated case of violence against a parlementaire [section 148 (2)],

e) violence against protected persons [section 149 (1) to (2)],

f) use of a weapon prohibited by an international treaty [section 155 (1)],

g) other war crimes (section 158),

h) aggravated case of homicide [section 160 (2)],

l) aggravated case of kidnapping [section 190 (3) to (4)],

j) aggravated case of trafficking in human beings [section 192 (6)],

k) changing the constitutional order by force [section 254 (1)],

l) aggravated case of destruction [section 257 (2)],

m) aggravated case of prisoner mutiny [section 284 (4)],

n) terrorist act [section 314 (1)],

o) aggravated case of unlawful seizure of a vehicle [section 320 (2)],

p) aggravated case of causing public danger [section 322 (3)],

q) aggravated case of mutiny [section 442 (4)],

r) aggravated case of violence against a military superior or a serving officer [section 445 (5)], if committed by violence against a person or thing.

(2) The possibility of release on parole shall be excluded if the perpetrator

a) is a violent multiple recidivist, or

b) committed the criminal offence specified in paragraph (1) in a criminal organisation.

Section 45

(1) If, while serving his sentence of life imprisonment, the convict is sentenced to fixed-term imprisonment to be served for a criminal offence committed before being sentenced to life imprisonment, the court shall postpone the earliest date of release on parole for the period of the fixed-term imprisonment to be served.

(2) If, while released on parole from his life imprisonment, the convict is sentenced to fixed-term imprisonment to be served for a criminal offence committed before being sentenced to life imprisonment, the court shall terminate the parole and postpone the earliest date of release on parole for the period of the fixed-term imprisonment to be served.

(3) If, while serving his sentence of life imprisonment, the convict is sentenced to fixed-term imprisonment for a criminal offence committed while serving his sentence of life imprisonment, the court shall postpone the earliest date of release on parole for the period of the fixed-term imprisonment, but for at least five and not more than twenty years.

(4) If, while released on parole from his life imprisonment, the convict is sentenced to fixed-term imprisonment for a criminal offence committed while serving his sentence of life imprisonment, the court shall terminate the parole and postpone the earliest date of release on parole for the period of the fixed-term imprisonment, but for at least five and not more than twenty years.

(5) If the convict is sentenced to fixed-term imprisonment for a criminal offence committed while released on parole from his life imprisonment, the court shall terminate the parole and postpone the earliest date of release on parole for the period of the fixed-term imprisonment, but for at least five and not more than twenty years.

(6) If the earliest date of release on parole from life imprisonment is postponed due to fixed-term imprisonment as per paragraph (1), (2), (4) or (5), the earliest date of release on parole shall be determined with regard to the period served in pre-trial detention and under criminal supervision and credited to the period of the fixed-term imprisonment.

(7) A convict shall not be released on parole if he is sentenced to life imprisonment once more. If his previous life imprisonment has not yet been enforced, the latter life imprisonment shall not be enforced.

Annex NoV- Factsheet – Life imprisonment

Factsheet – Life imprisonment

December 2019

This factsheet does not bind the Court and is not exhaustive

Life imprisonment

See also the factsheet on "Extradition and life imprisonment".

"… [I]n the context of a life sentence, Article 3 [of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment1,] 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 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.

However, the [European] Court [of Human Rights] would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing …, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, … the comparative and international law materials before [the Court] show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter ...

It follows from this conclusion 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.

… Furthermore, … [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. 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." (Vinter and Others v. the United Kingdom, judgment (Grand Chamber) of 9 July 2013, §§ 119-122).

Kafkaris v. Cyprus 12 February 2008 (Grand Chamber – judgment)

The applicant, who was found guilty on three counts of premeditated murder, complained about his life sentence and continuing detention. In particular, he alleged that his mandatory life sentence amounted to an irreducible term of imprisonment. He also submitted that his continuous detention beyond the date set for his release by the prison authorities was unlawful and that it had left him in a prolonged state of distress and uncertainty over his future.

The European Court of Human Rights held that there had been no violation of Article 3 of the Convention. Concerning the length of the detention, While the prospect of release for prisoners serving life sentences in Cyprus was limited, this did not mean that life sentences in Cyprus were irreducible with no possibility of release. On the contrary, such sentences were both de jure and de facto reducible. A number of prisoners serving mandatory life sentences had been released under the President's

1 Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) of the European Convention on Human Rights provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

constitutional powers and life prisoners could benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Accordingly, although there were shortcomings in the procedure in place and reforms were under way, the applicant could not claim that he had been deprived of any prospect of release or that his continued detention – though long – constituted inhuman or degrading treatment.

See also: Kafkaris v. Cyprus, decision on the admissibility of 21 June 2011 (which declared the application inadmissible because it was substantially the same as the previous one); Lynch and Whelan v. Ireland, decision on the admissibility of 18 June 2013.

Garagin v. Italy 29 April 2008 (decision on the admissibility)

The applicant was sentenced by two different Italian courts in 1995 and 1997 to twenty-eight and thirty years' imprisonment. He could expect to be released in March 2021, or sooner if granted remission of sentence. In 2006, however, the Rome Assize Court of Appeal, referring to the relevant case-law of the Court of Cassation, declared that the applicant should serve a life sentence.

The Court declared the application inadmissible as manifestly ill-founded. It observed in particular that in the Italian legal system a person sentenced to life imprisonment might be granted more lenient conditions of detention, or early relea-

se. Referring to the principles set forth in its Kafkaris v. Cyprus judgment (see above), the Court found that in Italy life sentences were reducible de jure and de facto. It could not be said, therefore, that the applicant had no prospect of release or that his detention in itself, albeit lengthy, amounted to inhuman or degrading treatment. The mere fact of giving him a life sentence did thus not attain the necessary level of gravity to bring it within the scope of Article 3 of the Convention.

Streicher v. Germany 10 February 2009 (decision on the admissibility)

Meixner v. Germany 3 November 2009 (decision on the admissibility)

Sentenced to life imprisonment, the applicants requested a suspension of their sentence after fifteen years' imprisonment. The competent court refused the request, on the grounds that there was a high risk of the applicants again committing crimes when released.

The Court declared both applications inadmissible as manifestly ill-founded, finding that the applicants were not deprived of hope of being released again, as German law provided for a parole system and they could therefore lodge a new request to be released on probation.

Léger v. France 30 March 2009 (Grand Chamber – strike-out judgment)

The applicant was sentenced to life imprisonment in 1966, no minimum term being set. He alleged in particular that in practice his continued detention for more than 41 years was tantamount to a whole-life sentence and therefore constituted inhuman and degrading treatment. Released on licence with effect from October 2005 until October 2015, the applicant died in July 2008.

In its Chamber judgment of 11 April 2006, the Court held, by five votes to two, that there had been no violation of Article 3 of the Convention. Noting in particular that, after 15 years of imprisonment, the applicant had been able to request his release on licence at regular intervals and had been protected by procedural safeguards, the Chamber found that he could not therefore assert that he had been deprived of all hope of obtaining partial remission of his sentence, which was not irreducible. Accordingly, the applicant's prolonged detention had not as such, however long it had been, constituted inhuman or degrading treatment.

In September 2006 the Panel of five judges of the Grand Chamber accepted the applicant's request that the case be referred to the Grand Chamber2. In its judgment of 30 March 2009 the Grand Chamber noted that the applicant had been found dead in his home on 18 July 2008 and that the ensuing request to pursue the proceedings in his place had been submitted by someone who had provided no evidence either of her status as an heir or a close relative of the applicant, or of any legi-

timate interest. Nor did the Grand Chamber consider that respect for human rights required the examination of the case to be continued, given that the relevant domestic law had in the meantime changed and that similar issues in other cases before the Court had been resolved. It therefore decided to strike the case out of its list of cases, in application of Article 37 (striking out applications) of the Convention

Iorgov (no. 2) v. Bulgaria 2 September 2010 (judgment)

Convicted of murder in 1990, the applicant's original death sentence was commuted to life imprisonment without commutation in 1999. He complained in particular that his sentence, which had denied him any possibility of early release, had been inhuman and degrading.

The Court held that there had been no violation of Article 3 of the Convention. The applicant, having been sentenced to life imprisonment without commutation, could admittedly not be released on licence under domestic law, since that measure was applicable only to prisoners serving fixed-term sentences. Nor could his sentence be commuted to a fixed-term sentence. Nevertheless, the possibility of an adjustment of his sentence, and of his eventual release, did exist in domestic law in the form of a pardon or commutation by the Vice-President. It followed that a life sentence without commutation was not an irreducible penalty de jure. In the applicant's case, the Court observed that, by the time he had lodged his complaint in August 2002, he had served only thirteen years of his life sentence. Moreover, he had submitted an application for presidential clemency, which had been examined and rejected by the appropriate committee. Neither the legislation nor the authorities prevented him from submitting a new application to the Vice-President. Accordingly, it had not been proved beyond reasonable doubt that the applicant would never have his sentence reduced in practice and it had not been established that he was deprived of all hope of being released from prison one day.

See also, among others: **Todorov v. Bulgaria** and **Simeonovi v. Bulgaria,** decisions on the admissibility of 23 August 2011; **Dimitrov and Ribov v. Bulgaria,** decision of 8 November 2011; **Iordan Petrov v. Bulgaria,** judgment of 24 January 2012; **Kostov v. Bulgaria,** decision on the admissibility of 14 February 2012.

Törköly v. Hungary 5 April 2011 (decision on the admissibility)

This case concerned a life sentence without any eligibility on parole before 40 years.

The Court declared inadmissible as being manifestly ill-founded the applicant's complaint that the sentence in question amounted to inhuman and degrading treatment. Although the applicant would only become eligible for conditional release in 2044, that is, when he would be 75 years old, it considered that the judgment

imposed on the applicant guaranteed a distant but real possibility for his release. In addition, the Court noted that the applicant might be granted presidential clemency even earlier, at any time after his conviction. It therefore concluded that the life sentence was reducible de jure and de facto.

2. Under Article 43 (referral to the Grand Chamber) of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final.

Vinter and Others v. the United Kingdom 9 July 2013 (Grand Chamber – judgment)

The three applicants in this case had been given whole life orders, meaning they could not be released other than at the discretion of the Justice Secretary, who would only do so on compassionate grounds (for example, in case of terminal illness or serious incapacitation). They complained that their imprisonment for life amounted to inhuman and degrading treatment as they had no hope of release.

The Grand Chamber held that there had been a violation of Article 3 of the Convention, finding that the requirements of that provision had not been met in relation to any of the three applicants. The Court considered in particular that, for a life sentence to remain compatible with Article 3, it had to be reducible, or in other words there had to be a prospect of the prisoner's release and the possibility of a review of the sentence. It noted that there was clear support in European and international law and practice for those principles, with the large majority of Convention Contracting States not actually imposing life sentences at all or, if they did, providing for a review of life sentences after a set period (usually 25 years' imprisonment). In the applicants' case, the Court noted that domestic law concerning the Justice Secretary's power to release a person subject to a whole life order was unclear. In addition, prior to 2003 a review of the need for a whole life order had automatically been carried out by a Minister 25 years into the sentence. This had been eliminated in 2003 and no alternative review mechanism put in place. In these circumstances, the Court was not persuaded that the applicants' whole life sentences were compatible with the Convention. In finding a violation in this case, however, the Court did not intend to give the applicants any prospect of imminent release. Whether or not they should be released would depend, for example, on whether there were

still legitimate penological grounds for their continued detention and whether they should continue to be detained on grounds of dangerousness. These questions were not in issue in this case and were not the subject of argument before the Court.

Öcalan v. Turkey (no. 2) 18 March 2014 (judgment)

The applicant, the founder of the PKK (Kurdistan Workers' Party), an illegal organisation, complained mainly about the irreducible nature of his sentence to life imprisonment, and about the conditions of his detention in İmralı Prison (Bursa, Turkey). Following the August 2002 abolition in Turkey of the death penalty in peace time, the Ankara State Security Court had in October 2002 commuted the applicant's death sentence to life imprisonment.

The Court held that there had been a violation of Article 3 of the Convention as regards the applicant's sentence to life imprisonment without any possibility of conditional release, finding that, in the absence of any review mechanism, the life prison sentence imposed on the applicant constituted an irreducible sentence that amounted to inhuman treatment. The Court observed in particular that, on account of his status as a convicted person sentenced to aggravated life imprisonment for a crime against State security, it was clearly prohibited for him to apply for release throughout the duration of his sentence. Moreover, whilst it was true that under Turkish law the President of the Republic was entitled to order the release of a person imprisoned for life who was elderly or ill, that was release on compassionate grounds, different from the notion of "prospect of release". Similarly, although the Turkish legislature regularly enacted laws of general or partial amnesty, the Court had not been shown that there was such a governmental plan in preparation for the applicant or that he had thereby been offered a prospect of release.

See also: **Kaytan v. Turkey**, judgment of 15 September 2015; **Gurban v. Turkey**, judgment of 15 December 2015; **Boltan v. Turkey,** judgment of 12 February 20193.

3. This judgment will become final in the circumstances set out in Article 44 § 2 (final judgments) of the European Convention on Human Rights.

László Magyar v. Hungary 20 May 2014 (judgment)

The applicant was convicted of murder, robbery and several other offences and was sentenced to life imprisonment without eligibility for parole. Although the Hungarian Fundamental law provided for the possibility of a presidential pardon, since the introduction of whole life terms in 1999, there had been no decision to grant clemency to any prisoner serving such a sentence. The applicant complained mainly that his imprisonment for life without eligibility for parole amounted to inhuman and degrading treatment as it was irreducible.

The Court held that there had been a violation of Article 3 of the Convention as concerned the applicant's life sentence without eligibility for parole. It was in particular not persuaded that Hungarian law allowed life prisoners to know what they had to do to be considered for release and under what conditions. In addition, the law did not guarantee a proper consideration of the changes in the life of prisoners and their progress towards rehabilitation. Therefore, the Court concluded that the sentence of the applicant could not be regarded as reducible, which amounted to a violation of Article 3.

Moreover, the Court held that this case disclosed a systemic problem which could give rise to similar applications. Therefore, for the proper implementation of the judgment, it invited Hungary, under Article 46 (binding force and execution of judgments) of the Convention, to put in place a reform of the system of review of whole life sentences to guarantee the examination in every case of whether continued detention is justified on legitimate grounds and to enable whole life prisoners to foresee what they must do to be considered for release and under what conditions. The Court also reiterated that States enjoyed wide discretion ("margin of appreciation") in deciding on the appropriate length of prison sentences for specific crimes. Therefore, the mere fact that a life sentence could eventually be served in full, did not make it contrary to Article 3 of the Convention. Accordingly, review of whole life sentences did not necessarily have to lead to the release of the prisoners in question.

Harakchiev and Tolumov v. Bulgaria 8 July 2014 (judgment)

This case essentially concerned life imprisonment without commutation, which was introduced in Bulgaria in December 1998 following the abolition of the death penalty, as well as the strict detention regime in which life prisoners are held. The two applicants were serving sentences of life imprisonment, the first applicant without commutation, the second with commutation. They both complained of their conditions of detention and of the lack of an effective domestic remedy. In addition, the first applicant maintained that his sentence of life imprisonment without commutation amounted to inhuman and degrading punishment as it implied that he could never be rehabilitated and would have to spend the rest of his life in prison.

The Court held that there had been a violation of Article 3 of the Convention, as concerned the first applicant's inability to obtain a reduction of his sentence of life imprisonment without commutation from the time when it became final. Confirming in particular that the mere imposition of a sentence of life imprisonment was not in itself contrary to the prohibition of inhuman and degrading treatment set out in Article 3 of the Convention, the Court however went on to say that from the ti-

me when the applicant's sentence had become final – November 2004 – to the beginning of 2012, his sentence of life imprisonment without commutation had amounted to inhuman and degrading treatment as he had neither had a real prospect of release nor a possibility of review of his life sentence, this being aggravated by the strict regime and conditions of his detention limiting his rehabilitation or self-reform. During that time, the presidential power of clemency that could have made the applicant's sentence reducible and the way in which it was exercised was indeed opaque, lacking formal or even informal safeguards. Nor were there any concrete examples of a person serving a sentence of life imprisonment without commutation being able to obtain an adjustment of that sentence. Furthermore, whilst there was no right to rehabilitation under the Convention, State authorities were required to give life prisoners a chance, however remote, to someday regain their freedom. For that chance to be genuine and tangible, life prisoners had to be given a proper opportunity to rehabilitate themselves. In that context, although a State had a lot of room for manoeuvre ("wide margin of appreciation") to decide on such things as the regime and conditions of a life prisoner's incarceration, those points could not be considered as a matter of indifference. The Court cautioned, however, that the finding of violation could not be understood as giving the applicant the prospect of imminent release. Lastly, the Court did note though that, following reforms in 2012, the manner in which presidential power of clemency was being exercised was now clear, allowing for the prospect of release or commutation. Since that time, therefore, the applicant's imprisonment without commutation could, at least formally, be regarded as reducible4.

See also: **Manolov v. Bulgaria**, judgment of 4 November 2014.

Čačko v. Slovakia 22 July 2014 (judgment)

The applicant in this case alleged that his life sentence without the possibility of release on parole amounted to inhuman and degrading punishment as he saw no prospect of obtaining a presidential pardon or having his sentence commuted. He also maintained that he had not been able to obtain effective judicial review of his life sentence under the national law and practice.

The Court held that there had been no violation of Article 3 of the Convention. It noted in particular that a judicial review mechanism rendering possible a conditional release of whole-life prisoners in the applicant's position after 25-years of service of their term was introduced in January 2010, a relatively short time after the applicant's conviction and the introduction of the application before the Court in October 2008, and that during a substantial part of that period the applicant continued his attempts to obtain redress before the national courts. The Court also held

that there been no violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3 of the Convention.

See also: **Koky v. Slovakia,** decision on the admissibility of 16 May 2017.

Bodein v. France 13 November 2014 (judgment)

This case concerned in particular the applicant's sentence to life imprisonment without any possibility of sentence reduction. The applicant alleged that his sentence was contrary to Article 3 of the Convention inasmuch as, in his view, he had been offered no possibility of any kind of sentence adjustment or any form of release measure.

The Court reiterated, in particular, that a life sentence was compatible with Article 3 of the Convention if it was reducible, or in other words if there was a possibility of reviewing the sentence, of which the prisoner had to be apprised of all the terms and conditions at the outset of his or her sentence. In addition, the form of such review, as well as the question of how much of the sentence had to be served before a review could take place, were matters within the States' own margin of appreciation. Lastly, a clear trend was nevertheless emerging in comparative and international law in favour of a mechanism guaranteeing a review of life sentences at the latest 25 years after their imposition. In the present case, the Court held that there had been no violation of Article 3 of the Convention, finding that French law provided a facility for reviewing life sentences which was sufficient, in the light of the room for manoeuvre ("margin of

4. In this case the Court also held that there had been a violation of Article 3 of the Convention, in respect of both application, on account of the regime and conditions of their detention, and a violation of Article 13 (right to an effective remedy) of the Convention as concerned the lack of effective domestic remedies. Moreover, under Article 46 (binding force and execution of judgments) of the Convention, the Court held that to properly implement this judgment Bulgaria should reform, preferably by means of legislation, the legal framework governing the prison regime applicable to persons sentenced to life imprisonment with or without parole by addressing, in particular, the imposition of a highly restrictive prison regime and isolation automatically on all life prisoners.

appreciation") left to States in in the criminal justice and sentencing fields, to conclude that the sentence imposed on the applicant was reducible for the purposes of Article 3. The Court noted, indeed, that French law provided for judicial review of the convicted person's situation and possible sentence adjustment after 30 years' incarceration. The Court took the view that such review, which was geared to asse-

ssing the prisoner's dangerousness and considering how his conduct had changed while he served his sentence, left no uncertainty as to the existence of a "prospect of release" from the outset of the sentence. In the applicant's case, after deducting the period of pre-trial detention, he would become eligible for a review of his sentence in 2034, that is to say 26 years after the Assize Court had sentenced him to life imprisonment, and if appropriate, could be released on parole.

See also: **Vella v. Malta**, decision (Committee) of 19 November 2019.

Murray v. the Netherlands 26 April 2016 (Grand Chamber – judgment)

This case concerned the complaint by a man convicted of murder in 1980, who consecutively served his life sentence on the islands of Curaçao and Aruba (part of the Kingdom of the Netherlands) – until being granted a pardon in 2014 due to his deteriorating health –, about his life sentence without any realistic prospect of release. The applicant – who in the meantime passed away5 – notably maintained that he was not provided with a special detention regime for prisoners with psychiatric problems. Although a legal mechanism for reviewing life sentences had been introduced shortly after he lodged his application with the Court, he argued that, de facto, he had no perspective of being released since he had never been provided with any psychiatric treatment and therefore the risk of his reoffending would continue to be considered too high to be eligible for release.

The Court held that there had been a violation of Article 3 of the Convention. It underlined in particular that under its case-law States had a large room for manoeuvre ("margin of appreciation") in determining what measures were required in order to give a life prisoner the possibility of rehabilitating himself or herself. However, although the applicant had been assessed, prior to being sentenced to life imprisonment, as requiring treatment, no further assessments had been carried out of the kind of treatment that might be required and could be made available. Consequently, at the time he lodged his application with the Court, any request by him for a pardon was in practice incapable of leading to his release. Therefore his life sentence had not de facto been reducible, as required by the Court's case-law under Article 3 of the Convention.

T.P. and A.T. v. Hungary (nos. 37871/14 and 73986/14) 4 October 2016 (judgment)

This case concerned new legislation introduced in Hungary in 2015 for reviewing whole life sentences6. The applicants alleged that despite the new legislation, which introduced an automatic review of whole life sentences – via a mandatory par-

don procedure – after 40 years, their sentences remained inhuman and degrading as they had no hope of release.

The Court held that there had been a violation of Article 3 of the Convention. It found in particular that making a prisoner wait 40 years before he or she could expect for the first time to be considered for clemency was too long and that, in any case, there was a lack of sufficient safeguards in the remainder of the procedure provided by the new legislation. The Court was not therefore persuaded that, at the time of its judgment in the case, the applicants' life sentences could be regarded as providing them with the prospect of release or a possibility of review and the legislation was not therefore compatible with Article 3 of the Convention.

5. Two of his relatives subsequently pursued his case before the Court.

6. The legislation was introduced in order to comply with the László Magyar v. Hungary judgment of 2014 (see above) in which the Court found that the system for reviewing whole life sentences in Hungary should be reformed.

Hutchinson v. the United Kingdom 17 January 2017 (Grand Chamber – judgment)

In 1984 the applicant was convicted of aggravated burglary, rape and three counts of murder, the trial judge sentencing him to a term of life imprisonment with a recommended minimum tariff of 18 years. In 1994 the Secretary of State informed the applicant that he had decided to impose a whole life term and, in May 2008, the High Court found that there was no reason for deviating from this decision given the seriousness of the offences committed. The applicant's appeal was dismissed by the Court of Appeal in October 2008. Before the European Court, he alleged that his whole life sentence amounted to inhuman and degrading treatment as he had no hope of release.

The Grand Chamber held that there had been no violation of Article 3 of the Convention. It reiterated in particular that the Convention did not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. However, to be compatible with the Convention there had to be both a prospect of release for the prisoner and a possibility of review of their sentence. In the present case, the Grand Chamber considered that the UK courts had dispelled the lack of clarity in the domestic law on the review of life sentences. The discrepancy identified in in the Vinter and Others judgment of 9 July 2013 (see above) between the law and the published official UK policy had notably been resolved by the UK Court of Appeal in a ruling affirming the statutory duty of the Secretary of State for Justice to exercise the power of release for life prisoners in such a way that it was compatible with the Convention. In addition, the Court of Appeal had brought cla-

rification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention could no longer be justified. The Grand Chamber also highlighted the important role of the Human Rights Act, pointing out that any criticism of the domestic system on the review of whole life sentences was countered by the HRA as it required that the power of release be exercised and that the relevant legislation be interpreted and applied in a Convention-compliant way. The Grand Chamber therefore concluded that whole life sentences in the United Kingdom could now be regarded as compatible with Article 3 of the Convention.

Matiošaitis and Others v. Lithuania 23 May 2017 (judgment)

The applicants, who have all been sentenced to life imprisonment, claimed in particular that there was no realistic prospect of their sentences being commuted, and that they were therefore imprisoned with no prospect of release. They complained that this punishment amounted to treatment which was in violation of Article 3 of the Convention.

The Court held that there had been a violation of Article 3 of the Convention in respect of six of the applicants, finding in particular that, at the time of the present judgment, the applicants' life sentences could not be regarded as reducible for the purposes of Article 3. As to the two other applicants, the Court decided to strike their applications out of its list of cases, under Article 37 (striking out applications) of the Convention, as the circumstances lead to the conclusion that they did not intend to pursue their application.

Petukhov v. Ukraine (no. 2) 12 March 2019 (Chamber judgment)

This case mainly concerned a prisoner's complaint that Ukrainian law did not provide for release on parole for life prisoners. The applicant, who had been serving a life sentence since 2004, submitted that the only possibility for him to be released was through a procedure of presidential clemency. He alleged that, under that procedure, it was not clear what life prisoners had to do to be considered for release and under what conditions.

The Court held that there had been a violation of Article 3 of the Convention because the applicant had no prospect of release from or possibility of review of his life sentence. In particular, presidential clemency, the only procedure for mitigating life sentences in Ukraine, was not clearly formulated, nor did it have adequate procedural guarantees against abuse. Furthermore, life prisoners' conditions of detention in Ukraine made it impossible for them to progress towards rehabilitation and for the authorities to therefore carry out a genuine review of their sentence. Moreover,

given the systemic nature of the problem, the Court held under Article 46 (binding force and execution of judgments) of the Convention that Ukraine should reform its system of reviewing whole-life sentences by examining in every case whether continued detention was justified and by enabling whole-life prisoners to foresee what they had to do to be considered for release and under what conditions.

Marcello Viola v. Italy (no. 2) 13 June 2019 (Chamber judgment)

The applicant, who was involved in a series of incidents between two rival Mafia clans from the mid-1980s until 1996, complained in particular that his life sentence was irreducible and afforded him no prospect of release on licence.

The Court held that there had been a violation of Article 3 of the Convention. It reiterated in particular that human dignity lay at the very essence of the Convention system and that it was impermissible to deprive persons of their freedom without striving towards their rehabilitation and providing them with the chance to regain that freedom at some future date. Thus, the Court considered that the sentence of life imprisonment imposed on the applicant under section 4 bis of the Prison Administration Act (ergastolo ostativo) restricted his prospects for release and the possibility of review of his sentence to an excessive degree. Accordingly, his sentence could not be regarded as reducible for the purposes of Article 3 of the Convention. Under Article 46 (binding force and execution of judgments) of the Convention, the Court further noted that the Contracting States enjoyed a wide margin of appreciation in deciding on the appropriate length of prison sentences, and that the mere fact that a life sentence might in practice be served in full did not mean that it was irreducible. Consequently, the possibility of review of life sentences entailed the possibility for the convicted person to apply for release but not necessarily to be released if he or she continued to pose a danger to society.

Dardanskiš v. Lithuania and 15 other applications 18 June 2019 (decision on the admissibility)

The applicants, who had all been sentenced to life imprisonment and were serving their sentences in Lithuania, all complained that, at the time they had brought their applications, Lithuanian law had not been amended to bring it in line with the European Court's case-law on life imprisonment. They submitted that their imprisonment for life amounted to inhuman and degrading treatment as they had no hope of release.

The Court decided to strike the applications out of its list of cases, pursuant to Article 37 (striking out applications) of the Convention, finding that the life-sentence commutation procedure and its requirements, as very recently adopted by the Lit-

huanian authorities7, constituted an adequate and sufficient remedy for the applicants' complaint. It concluded that the matter giving rise to the complaint could therefore now be considered to be "resolved" within the meaning of Article 37 § 1 (b) of the Convention. Finally, no particular reason relating to respect for human rights required the Court to continue its examination of the application under Article 37 § 1 in fine.

7. In March 2019 legislative changes regarding life prisoners were made to Lithuanian law, allowing a life sentence to be changed to a fixed-term sentence and the prisoner concerned to be released on parole. The legislation also set out the procedure to be used in order to amend sentences, as well as the criteria that a life prisoner has to meet in order to qualify. The explanatory report noted that the criteria to be met were strict, and only persons who had achieved a "considerable improvement" in respect of all the criteria could have his or her life sentence changed to a fixed-term sentence.

Pending applications

Canword v. the Netherlands (no. 21464/15) and **Lake v. the Netherlands** (no. 2445/17)

Applications communicated to the Government of the Netherlands on 20 October 2017

László Magyar v. Hungary (no. 2) (no. 53364/15)

Application communicated to the Hungarian Government on 4 September 2018

Similar applications pending: **Varga v. Hungary** (no. 39734/15) and **Kruchió v. Hungary** (no. 43444/15), communicated to the Hungarian Government on 8 December 2017; **Bancsók v. Hungary** (no. 52374/15) and **Lehóczki v. Hungary** (no. 53441/15), communicated to the Hungarian Government on 13 March 2018; **Horváth v. Hungary** (no. 12143/16), communicated to the Hungarian Government on 12 May 2018; **Á.K. and I.K. v. Hungary** (no. 35530/16), communicated to the Hungarian Government on 14 May 2018; **Rostás v. Hungary** (no. 26804/18), communicated to the Hungarian Government on 6 September 2018.

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DOŽIVOTNI ZATVOR I USLOVNI OTPUST U KRIVIČNOM PRAVU SRBIJE: NEKA PITANJA I DILEME

Doživotni zatvor je uveden u krivično zakonodavstvo Srbije izmenama i dopunama Krivičnog zakonika iz 2019. godine. Njime je zamenjena dotadašnja kazna zatvora od 30 do 40 godina. Posebnu pažnju je privuklo zakonsko rešenje koje omogućava doživotni zatvor bez uslovnog otpusta za određena krivična dela. Takvo rešenje se smatra protivnim članu 3 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. Ipak, zabrana uslovnog otpusta uvedena je u pravo Srbije još 2013. godine, donošenjem Zakona o posebnim merama za sprečavanje vršenja krivinih dela protiv polne slobode prema maloletnim licima. Međutim, tada se naučna i stručna javnost nije u odgovarajućoj meri upustila u ocenu opravdanosti predmetne zabrane, koja sama po sebi otvara brojna pitanja. Zbog toga se prilikom razmatranja problematike doživotnog zatvora i uslovnog otpusta, odnosno njegove zabrane, mora voditi računa i o ranije uspostavljenom pravnom okviru, kao i o pitanjima koja jedna takva zabrana stvara, bez obzira da li se odnosi na doživotni ili „vremenski" zatvor.

Ključne reči: doživotni zatvor, uslovni otpust, zabrana uslovnog otpusta.

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1. Uvod

Izmenama i dopunama Krivičnog zakonika (KZ) iz maja meseca 2019. godine,[1] koje su stupile na snagu 01. decembra iste godine, u krivično zakonodavstvo Republike Srbije uvedena je kazna doživotnog zatvora (član 44a KZ).[2] Iz Predloga zakona o izmenama i dopunama KZ iz 2019. godine, može se zaključiti da je ova kazna uvedena na inicijativu Fondacije „Tijana Jurić", koja je podneta Narodnoj Skupštini Republike Srbije tokom 2017. godine, a koju je podržalo 158.460 građana Srbije.[3] Otuda se navedene izmene kolokvijalno nazivaju *Tijanin zakon*. Međutim, i pre toga se razmišljalo o uvođenju doživotnog zatvora kod nas, tako da je ova kazna našla svoje mesto još u Nacrtu zakona o izmenama i dopunama KZ iz 2015. godine,[4] ali ne i u sledujućem Predlogu izmena i dopuna KZ iz 2016. godine,[5] koji je na posletku i usvojen, takođe 2016. godine.[6] Doživotnim zatvorom zamenjena je ranija kazna zatvora od 30 do 40 godina, koja u srpskom KZ nominalno nije bila predviđena kao posebna kazna, već kao poseban raspon kazne zatvora za najteža krivična dela, odnosno najteže oblike teških krivičnih dela. U osnovi, smisao doživotnog zatvora je, kao i prijašnjeg zatvora od 30 do 40 godina, da bude(u) supstitut(i) smrtnoj kazni, tako da se njen (njihov) legitimitet crpi iz „nepostojanja i nelegitimiteta druge kazne (smrtne kazne)", što je, posmatrano teorijsko-koncepcijski, sporno (Ćorović, 2018: 196-197). Nezavisno od navedenog prigovora, moglo bi se tvrditi da je doživotni zatvor kao zamena za smrtnu kaznu „čistije rešenje" od zatvora u trajanju od 30 do 40 godina, jer simbolički u većoj meri odražava „princip srazmernosti i pravednosti kada je reč o najtežim slučajevima teških krivičnih dela" (Stojanović, 2015: 6). Međutim, smrtna kazna je kod nas ukinuta 2002. godine, što je, u stvari, bio i najpogodniji momenat za uvođenje doživotnog zatvora, ali se tada smatralo da je kazna zatvora od 40 godina „dovoljno duga da se društvo

1 Zakon o izmenama i dopunama KZ, Službeni glasnik RS, br. 35/2019.

2 Krivični zakonik, *Službeni glasnik RS*, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

3 Predlog zakona o izmenama i dopunama Krivičnog zakonika iz 2019., https://www.srbija.gov.rs/prikaz/358229, stranici pristupljeno 02.02.2021. Predlog izmena Krivičnog zakonika Fondacije „Tijana Jurić", http://www.parlament.gov.rs/upload/archive/files/cir/pdf/akta_procedura/2017/Predlog%20izmene%20Krivicnog%20zakonika%2003052017.pdf, stranici pristupljeno 05.02.2021.

4 Nacrt zakona o izmenama i dopunama Krivičnog zakonika, https://www.paragraf.rs/dnevne-vesti/080515/080515-vest13.html, stranici pristupljeno 19.03.2021.

5 Predlog zakona o izmenama i dopunama Krivičnog zakonika iz 2016., http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2769-16%20-Lat..pdf , stranici pristupljeno 19.03.2021.).

6 Zakon o izmenama i dopunama KZ, *Službeni glasnik RS*, br. 94/2016.

zaštiti od najtežih kriminalaca“ (Ignjatović, 2019: 124). Pogodan trenutak za uvođenje doživotnog zatvora mogla je biti i 2005. godina, u fazi donošenja važećeg KZ, „jer je vremenska distanca od brisanja smrtne kazne iz sistema kazni bila manja“ (Kolarić, 2019: 25). Očigledno je da se u međuvremenu promenio stav zakonodavca u odnosu na iznalaženje adekvatne zamene za smrtnu kaznu, s tim da je na ovu promenu najmanje uticalo iskustvo u primeni prethodno postojećeg rešenja (zatvora od 30 do 40 godina), s obzirom da se u tom relativno kratkom vremenskom periodu nisu ni mogli sagledati njegovi efekti, tako da se stiče utisak da je na „raspoloženje“ zakonodavca u pravcu uvođenja doživotnog zatvora „veći uticaj bio spolja, od javnosti, nego li iz oblasti nauke i struke“ (Radulović, 2020: 78).

Uvođenje doživotnog zatvora izazvalo je veliko interesovanje ne samo stručne, već i opšte javnosti. Za dobar deo stručne javnosti problematično je to što je isključena mogućnost primene uslovnog otpusta u slučajevima osude za određena krivična dela, a za koja je alternativno uz kaznu zatvora propisan i doživotni zatvor. To praktično znači da krivično pravo Republike Srbije poznaje doživotni zatvor bez mogućnosti uslovnog otpusta, što se smatra upitnim sa stanovišta člana 3 (zabrana mučenja)[7] Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (Evropska konvencija).[8] Međutim, zabrana uslovnog otpusta uvedena je u naše pravo pre izmena i dopuna KZ iz 2019., još 2013. godine, kada je donesen Zakon o posebnim merama za sprečavanje vršenja krivinih dela protiv polne slobode prema maloletnim licima,[9] poznat kao *Marijin zakon*, u pogledu krivičnih dela koja su njime obuhvaćena (Jovašević, 2017: 59-60).[10] Stručna javnost se, uglavnom, nije

7 Ovaj člana glasi: „Niko ne sme biti podvrgnut mučenju, ili nečovečnom ili ponižavajućem postupanju ili kažnjavanju“.

8 Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, izmenjene u skladu sa Protokolom broj 11, Protokola uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 4 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda kojim se obezbeđuju izvesna prava i slobode koji nisu uključeni u Konvenciju i Prvi Protokol uz nju, Protokola broj 6 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne, Protokola broj 7 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 12 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda i Protokola broj 13 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne u svim okolnostima, *Službeni list SCG - Međunarodni ugovori*, br. 9/2003, 5/2005 i 7/2005 - ispr.; *Službeni glasnik RS - Međunarodni ugovori*, br. 12/2010 i 10/2015.

9 Zakon o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima, *Službeni glasnik RS*, br. 32/2013.

10 Član 3 Marijinog zakona glasi: „Ovaj zakon se primenjuje na učinioce koji su prema maloletnim licima izvršili sledeća krivična dela: 1) silovanje (član 178. st. 3. i 4. Krivičnog zakonika); 2) obljuba nad nemoćnim licem (član 179. st. 2. i 3. Krivičnog zakonika); 3) obljuba sa detetom (član 180. Krivičnog zakonika); 4) obljuba zloupotrebom položaja (član 181. Krivičnog zakonika); 5) nedozvoljene polne radnje (član 182. Krivičnog zakonika); 6) podvođenje i omogućavanje vršenja polnog

obazirala na zabranu uslovnog otpusta ustanovljenu potonjim zakonom.[11] Zbog toga se pri razmatranju problematike doživotnog zatvora bez uslovnog otpusta mora voditi računa i o tome kakve sve posledice samo postojanje zabrane uslovnog otpusta, koja se „apsolutno vezuje" za određenu grupu krivičnih dela, može proizvesti na polju tumačenja i primene krivičnog prava. Jer, i da KZ nije predvideo zabranu uslovnog otpusta kod doživotnog zatvora, postojale bi odgovarajuće dileme u tom pravcu.

2. Normativno uređenje doživotnog zatvora u krivičnom zakonodavstvu Srbije

Doživotni zatvor predstavlja jednu od kazni koje poznaje srpski KZ, pored kazne zatvora, novčane kazne, rada u javnom interesu i oduzimanja vozačke dozvole (član 43). Može se izreći samo kao *glavna kazna* (član 44 stav 1 KZ). Postavlja se pitanje da li se neka druga kazna, kao sporedna, može izreći uz doživotni zatvor? Po logici stvari, u obzir bi mogla doći samo novčana kazna – tako je, na primer, zamislivo da se licu koje je izvršilo teško ubistvo iz koristoljublja uz doživotni zatvor, a na osnovu člana 48 stav 2 KZ, izrekne i novčana kazna (Vuković, 2021: 445-446).[12] Ovakvi slučajevi bi mogli imati odgovarajuće kriminalno-političko opravdanje. Ali i pored toga, izricanje novčane kazne kao sporedne uz doživotni zatvor nije opravdano (Stojanović, 2019: 230). Naime, kod odredaba o odmeravanju jedinstvene kazne za krivična dela u sticaju je

odnosa (član 183. Krivičnog zakonika); 7) posredovanje u vršenju prostitucije (član 184. stav 2. Krivičnog zakonika); 8) prikazivanje, pribavljanje i posedovanje pornografskog materijala i iskorišćavanje maloletnog lica za pornografiju (član 185. Krivičnog zakonika); 9) navođenje maloletnog lica na prisustvovanje polnim radnjama (član 185a Krivičnog zakonika); 10) iskorišćavanje računarske mreže ili komunikacije drugim tehničkim sredstvima za izvršenje krivičnih dela protiv polne slobode prema maloletnom licu (član 185b Krivičnog zakonika)".

11 Jedan deo teoretičara posvetio se kritici celokupnog koncepta Marijinog zakona (Ristivojević, 2013: 319-337). Nakon uvođenja zabrane uslovnog otpusta ovim zakonom, pojedini autori konstatuju: „Tako smo došli u situaciju da, protivno trendovima u modernim krivičnim naukama uvodimo zabranu uslovnog otpusta za učinioce određenih krivičnih dela, po uzoru na neke države u sastavu SAD-a" (Ignjatović, 2016: 57-58). Uvođenje zabrane uslovnog otpusta Marijinim zakonom, za krivična dela za koja je, u to vreme, KZ dopuštao režim tzv. fakultativnog uslovnog otpusta, okarakterisano je „kao jedan od pokazatelja da se nije dovoljno vodilo računa da je Zakon o posebnim merama samo deo šire normativne celine, čiji bi delovi trebalo da budu međusobno usaglašeni" (Miladinović-Stefanović, 2014: 571). Na kraju, pojedini autori eksplicitno navode da je donošenjem Marijinog zakona 2013. godine „povučen pogrešan potez" kada je osuđenim licima na kaznu zatvora koja potpadaju pod predmetni zakon „ukinuto pravo na uslovni otpust" (Ilić, G. 2019: 126.).

12 Predmetna odredba glasi: „Za krivična dela učinjena iz koristoljublja novčana kazna kao sporedna kazna može se izreći i kad nije propisana zakonom ili kad je zakonom propisano da će se učinilac kazniti kaznom zatvora ili novčanom kaznom, a sud kao glavnu kaznu izrekne kaznu zatvora".

propisano da će se, u slučaju da je za neko krivično delo u sticaju utvrđen doživotni zatvor, izreći samo ta kazna (član 60 stav 2 tačka 1 KZ), tj. kazna doživotnog zatvora (sistem apsorpcije). U tom smislu, ukoliko će se za sticaj (tj. više krivičnih dela) izreći samo doživotni zatvor, onda bi bilo „nelogično da drugačije važi i kada se odmerava kazna za samo jedno krivično delo" (Vuković, 2021: 446). Pored ove argumentacije, može se reći i da odredba člana 48 stav 2 KZ govori o izricanju novčane kazne za krivična dela iz koristoljublja samo kada sud „kao glavnu kaznu izrekne kaznu zatvora". Prema tome, ova odredba ne predviđa mogućnost izricanje novčane kazne uz doživotni zatvor.

Prema članu 44a stav 1 KZ doživotni zatvor se može *propisati*: a) *izuzetno*, b) *samo za najteža krivična dela i najteže oblike teških krivičnih dela* i c) *samo uz kaznu zatvora*, što znači da se *ne može propisati kao jedina kazna* za odgovarajuće krivično delo. Iz analize posebnog dela KZ proizlazi da je doživotni zatvor propisan za sledeća krivična dela: teško ubistvo (član 114); najteži oblici silovanja (član 178 stav 4),[13] obljube nad nemoćnim licem (član 179 stav 3),[14] obljube nad detetom (član 180 stav 3)[15] i obljube zloupotrebom položaja (član 181 stav 5);[16] ubistvo predstavnika najviših državnih organa (član 310); najteži oblici teškog dela protiv ustavnog uređenja i bezbednosti Srbije (član 321 st. 2 i 3);[17] najteži oblik udruživanje radi vršenja krivičnih dela – samo za organizatora grupe ili organizovane kriminalne grupe (član 346 stav 5);[18] genocid (član 370); zločin protiv čovečnosti (član 371); najteži oblici ratnih zločina protiv civilnog stanovništva (član 372 stav 3),[19] ranjenika i bolesnika (član 373 stav 2),[20] ratnih zarobljenika (član 374 stav 2),[21] zatim upotrebe nedozvoljenih sredstava borbe (član 376 stav 2),[22] protivpravnog ubijanja

13 Kvalifikatorna okolnost: smrt pasivnog subjekta ili je delo izvršeno prema detetu.

14 Kvalifikatorna okolnost: smrt pasivnog subjekta ili je delo izvršeno prema detetu.

15 Kvalifikatorna okolnost: smrt deteta.

16 Kvalifikatorna okolnost: smrt deteta.

17 Kvalifikatorna okolnost: da je pri vršenju taksativno nabrojanih krivičnih dela protiv ustavnog uređenja i bezbednosti Republike Srbije učinilac sa umišljajem lišio života jedno ili više lica (stav 2), odnosno da su određena taksativno navedena krivična dela iz ove grupe izvršena za vreme ratnog stanja, oružanog sukoba ili vanrednog stanja (stav 3).

18 Kvalifikatorna oklnost: da je reč o grupi ili organizovanoj kriminalnoj grupi koja ima za cilj vršenje krivičnih dela za koje se može izreći kazna zatvora od dvadeset godina ili doživotni zatvor.

19 Kvalifikatorna okolnost: da je naređeno da se za vreme rata, oružanog sukoba ili okupacije prema civilnom stanovništvu vrše ubistva ili izvršenje takvog dela.

20 Kvalifikatorna okolnost: da je naređeno da se za vreme rata, oružanog sukoba ili okupacije prema ranjenicima i bolesnicima vrše ubistva ili izvršenje takvog dela.

21 Kvalifikatorna okolnost: da je naređeno da se prema ratnim zarobljenicima vrše ubistva ili izvršenje takvog dela.

22 Kvalifikatorna okolnost: da je poginulo više lica.

i ranjavanja neprijatelja (član 378 st. 3 i 4),[23] agresivnog rata (član 386 stav 2), terorizma (član 391 stav 4),[24] upotrebe smrtonosne naprave (član 391v stav 3),[25] uništenja i oštećenja nuklearnog objekta (član 391g stav 3)[26] i ugrožavanja lica pod međunarodnom zaštitom (član 392 stav 2).[27]

Od svih navedenih krivičnih dela za koje je propisan doživotni zatvor, u teoriji se spornim smatraju slučajevi najtežih oblika krivičnih dela silovanja, obljube nad nemoćnim licem, obljube nad detetom i obljube zloupotrebom položaja (Ilić, V., 2019: 157). Naime, kod ovih krivičnih dela je kao kvalifikatorna okolnosti, između ostalog, navedena i smrt pasivnog subjekta. Nije sporno da se u tim situacijama radi o krivičnom delu kvalifikovanom težom posledicom, što znači da se sama smrt pasivnog subjekta kao teža posledica pripisuje učiniočevom nehatu, dok su osnovna krivična dela iz kojih je ova posledica proizašla umišljajna. Time je, prema propisanim kaznama, izjednačeno teško ubistvo, koje je uvek umišljajno, sa najtežim slučajevima silovanja, obljube nad nemoćnim licem, obljube nad detetom i obljube zloupotrebom položaja iz kojih se proistekla smrt može pripisati učiniočevom nehatu (Škulić, 2019: 64; Ilić, V., 2019: 158). Štaviše, u tome se vide i „neki elementi objektivne odgovornosti" (Škulić, 2019: 64). Iako je ovaj prigovor prilično osnovan, odnosno postojeće zakonsko rešenje je kriminalno-politički dubiozno, ono postoji u još nekim pravima, kao što je slučaj sa nemačkim KZ (Ilić, V., 2019: 158; Vuković, 2021: 445).[28]

Doživotni zatvor *ne može se izreći licu koje u vreme izvršenja krivičnog dela nije navršilo dvadeset jednu godinu života* (član 44a stav 2 KZ). Za izricanje ove kazne relevantne su godine starosti učinioca u vreme izvršenja krivičnog dela, a ne u vreme suđenja. Povodom ovog ograničenja, regulativa iz

23 Kvalifikatorna okolnost: da je ubistvo izvršeno na svirep način ili iz koristoljublja ili da je ubijeno više lica (stav 3), odnosno da je učinilac kršeći pravila međunarodnog prava za vreme rata ili oružanog sukoba naredio da u borbi ne sme biti preživelih pripadnika neprijatelja ili vođenje borbe protiv neprijatelja na toj osnovi (stav 4).

24 Kvalifikatorna okolnost: da je pri izvršenju neke od terorističkih aktivnosti učinilac sa umišljajem lišio života jedno ili više lica.

25 Kvalifikatorna okolnost: da je učinilac pri izvršenju dela sa umišljajem lišio života jedno ili više lica.

26 Kvalifikatorna okolnost: da je učinilac pri izvršenju dela sa umišljajem lišio života jedno ili više lica.

27 Kvalifikatorna okolnost: da je pri vršenju dela nastupila smrt jednog ili više lica.

28 Odredba § 176b nosi naziv „*Sexueller Mißbrauch von Kindern mit Todesfolge*"/ „Seksualna zloupotreba dece sa smrtnom posledicom". Odredba glasi: „*Verursacht der Täter durch den sexuellen Mißbrauch (§§ 176 und 176a) wenigstens leichtfertig den Tod des Kindes, so ist die Strafe lebenslange Freiheitsstrafe oder Freiheitsstrafe nicht unter zehn Jahren*"/ „Ako izvršilac seksualne zloupotrebe (§§ 176 i 176a) bar lakomisleno uzrokuje smrt deteta, kazniće se doživotnim zatvorom ili od najmanje deset godina". Lakomislenost (*Leichtfertigkeit*) predstavlja veći stepen svesnog i nesvesnog nehata koji odgovara gruboj nepažnji (nehatu) iz građanskog prava (Lackner, Kühl, 2011: 131). Odredba § 176b nemačkog KZ predstavlja krivično delo kvalifikovano težom posledicom – *erfolgsqualifizierte Delikt* (Lackner, Kühl, 2011: 822).

domaćeg krivičnog kodeksa „ide mnogo dalje od međunarodnih dokumenata, prakse Evropskog suda za ljudska prava i drugih evropskih država" (Kolarić, 2015: 655). Tako je, na primer, u članu 37 stav 1 tačka a) Konvencije o pravima deteta[29] predviđeno: „Ni smrtna kazna, ni doživotni zatvor, bez mogućnosti oslobađanja, neće biti dosuđeni za dela koja izvrše osobe mlađe od 18 godina". Prema tome, najznačajniji dokument koji se odnosi na prava deteta (tj. lica mlađih od 18 godina u smislu ove Konvencije) ne isključuje doživotno kažnjavanje lica mlađih od 18 godina, pod uslovom da postoji „mogućnost oslobađanja". U nekoliko odluka se Evropski sud za ljudska prava (ESLJP) bavio problematikom doživotnog zatvora prema maloletnicima: u predmetu *Weeks protiv Velike Britanije*, predstavka broj 9782/82, Sud je našao da je doživotni zatvor izrečen sedamanaestogodišnjaku prihvatljiv „samo zato što on ima realne izglede da bude oslobođen i zahtevao je da dodatne proceduralne garancije budu date za razmatranje njegovog oslobađanja" (Kolarić, 2015: 654); u predmetu *V v. protiv Velike Britanije*, predstavka broj 24888/94, naglašen je „značaj predviđanja jasnog i relativno kratkog minimalnog perioda nakon koga se oslobađanje mora razmotriti, posebno u slučajevima gde je prestupnik bio veoma mlad u vreme izvršenja dela" (Kolarić, 2015: 654). Prema istraživanju CRIN-a (*Child Rights International Network*) doživotni zatvor se može izreći maloletnicima u pravima sledećih evropskih država: Kipra, Francuske i Velike Britanije (CRIN, 2015: 36).

U stavu 3 člana 44a KZ predviđena su još dva ograničenja za izricanje ove kazne. Naime, doživotni zatvor se ne može izreći u slučajevima kada *zakon predviđa da se kazna može ublažiti* (član 56 stav 1 tačka 1 KZ) ili *kada postoji neki od osnova za oslobođenje od kazne*. U tom smislu, postojanje nekih od *zakonskih osnova ublažavanja kazne* (prekoračenje nužne odbrane ili krajnje nužde, bitno smanjena uračunljivost, kompulzivna sila i pretnja, otklonjiva pravna zabluda, pokušaj, pomaganje) ili *oslobođenja od kazne* (prekoračenje granica nužne odbrane usled jake razdraženosti ili prepasti izazvane napadom, krajnja nužda pod naročito olakšavajućim okolnostima, nepodoban pokušaj, dobrovoljni odustanak, sprečavanje krivičnog dela od strane saučesnika, kao i odgovarajući zakonski osnovi iz posebnog dela koji su predviđene za određene inkriminacije) isključuju mogućnost izricanja doživotnog zatvora. Može se postaviti pitanje da li se navedeno ograničenje odnosi i na ona krivična dela za koja je zaprećen doživotni zatvor, a kod kojih je ublažavanje isključeno po posebnoj zakonskoj odredbi (misli se na teško ubistvo iz člana 114 i krivična dela iz čl. 178, 179 i 180, a prema članu 57 stav 2 KZ). Ispravno je uzeti da se odredbe člana 44a stav 3 i člana 57 stav 2 KZ „nečelno ne potiru",

29 Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, *Službeni list SFRJ - Međunarodni ugovori*, br. 15/90, *Službeni list SRJ - Međunarodni ugovori*, br. 4/96 i 2/97.

tako da se u navedenim situacijama doživotni zatvor ne bi mogao izreći (Vuković, 2021: 446). Tako na primer, za pokušaj silovanja deteta (član 178 stav 4 KZ) kazna se ne bi mogla ublažiti primenom člana 57 stav 2 KZ, ali se učiniocu ne bi mogla izreći kazna doživotnog zatvora.[30]

Opisana ograničenja kriminalno-politički svakako su opravdana, ali otvaraju niz praktičnih problema. Naime, svojevremeno je, povodom Nacrta izmena i dopuna KZ iz 2015. godine, na sednici Krivičnog odeljenja Vrhovnog kasacionog suda, održanoj dana 09.06.2015. godine, iznet jedinstven predlog da se kazna doživotnog zatvora ne uvodi u naš sistem kazni (Dragičević-Dičić, 2015: 15), a tim povodom su iskazana i određena, veoma bitna zapažanja, koja zaslužuju da budu citirana: „u praksi (je) bilo slučajeva da neko ubije jedno lice, pri tome rani više lica, što se u prihvaćenoj sudskoj praksi kvalifikuje kao pokušaj teškog ubistva, odnosno teškog ubistva iz člana 114. tačka 11, koja se odnosi na umišljajno lišenje života više lica. Po odredbi Nacrta zakonika za ovakvo krivično delo, iako se radi o krivičnom delu teškog ubistva ne bi se mogla izreći kazna doživotnog zatvora, već maksimalno 20 godina zatvora. Posebno će biti značajni krivični postupci za teška ubistva, izvršena na svirep ili podmukao način, od kojih neka već zaokupljuju pažnju javnosti, gde je utvrđena bitno smanjena uračunljivost izvršioca. U tim slučajevima kazna doživotnog zatvora se ne može izreći. Data ograničenja će u svakom slučaju umanjiti željeni efekat uvođenja kazne doživotnog zatvora“ (Dragičević-Dičić, 2015: 14-15).

Pored navedenih problema sa kojima će se sudovi zasigurno suočavati u praksi, mogu se identifikovati i određeni problemi koji se svode na relaciju doživotni zatvor – mere bezbednosti. Naime, učiniocu koji je *tempore criminis* postupao u stanju bitno smanjene uračunljivosti, a pri tome je kod njega utvrđeno postojanje ozbiljne opasnosti ponavljanje težeg krivičnog dela, kao i potreba da se, radi otklanjanja ove opasnosti, leči u zdravstvenoj ustanovi, sud ne bi mogao izreći doživotni zatvor (ukoliko je učinio krivično delo sa tako zaprećenom kaznom) i uz tu kaznu meru bezbednosti obaveznog psihijatrijskog lečenja i čuvanja u zdravstvenoj ustanovi iz člana 81 KZ. Ovo iz razloga što bitno smanjena uračunljivost predstavlja zakonski osnov za ublažavanje kazne, čime je u smislu prethodno rečenog isključena mogućnost primene doživotnog zatvora. Iz ovoga proizlazi nespojivost doživotnog zatvora i navedene mere bezbednosti. Mogla bi se zastupati teza da za kumulativnim izricanjem ove dve krivične sankcije nema potrebe, jer je trajanje obaveznog psihijatrijskog lečenja i čuvanja u zdravstvenoj ustanovi regulisano po sistemu apsolutno neodređenog trajanja, tj. sud će obustaviti

30 Ipak, sporno je u teoriji da li se odredba člana 57 stav 2 KZ odnosi na tzv. zakonsko ublažavanje kazne (o tome, Ćorović, 2020: 167-169; Vuković, 2021: 490-491).

ovu meru kada utvrdi da je prestala potreba za lečenjem i čuvanjem učinioca u zdravstvenoj ustanovi, s tim da ona, ukoliko je izrečena uz kaznu zatvora, može trajati i duže od ove kazne. To znači da predmetna mera bezbednosti faktički može trajati doživotno, ukoliko lečenje ne daje rezultate koji opravdavaju njenu obustavu (o ovome, Stojanović, 2015: 7-8).

Kada se razmatra ova problematika ne treba smetnuti sa uma da je jedan od bioloških osnova neuračunljivosti i bitno smanjene uračinljivosti „druga teža duševna poremećenost" u koju spadaju, između ostalog, poremećaji nagona, uključujući i seksualne nagone (Delić, 2009: 128, 135-137). Imajući u vidu da je doživotni zatvor naročito „interesantan" kod odgovarajućih krivičnih dela protiv polne slobode, nije teško pretpostaviti koncept i pravac odbrane u krivičnim postupcima za navedena krivična dela, s ciljem izbegavanja izricanja najstrožije kazne. U tim situacijama učiniocu bi više odgovaralo da bude osuđen na vremenski zatvor i meru bezbednosti obaveznog psihijatrijskog lečenja i čuvanja u zdravstvenoj ustanovi, jer bi se protekom izrečene kazne zatvora, koja bi u tim slučajevima mogla maksimalno iznositi 20 godina, mogao naći na slobodi ukoliko se proceni da ne postoji potreba daljeg lečenja (vreme provedeno u zdravstvenoj ustanovi uračunava se u izrečenu kaznu zatvora prema članu 81 stav 5 KZ).

Može biti upitna i mogućnost izricanja mera bezbednosti obaveznog lečenja narkomana i obaveznog lečenja alkoholičara uz doživotni zatvor. Član 80 stav 4 KZ dopušta kumulativno izricanje ovih sankcije, jer je u njemu propisano da se predmetne mere mogu izreći, između ostalog, ako je učiniocu izrečena kazna (u koje spada i doživotni zatvor). Međutim, pitanje je koliko bi one mogle trajati uz ovu kaznu? Naime, u čl. 83 i 84 KZ koji normiraju mere bezbednosti obaveznog lečenja narkomana i obaveznog lečenja alkoholičara nije predviđeno njihovo trajanje uz doživotni zatvor, već samo uz zatvor, novčanu kaznu, uslovnu osudu, sudsku opomenu i oslobođenje od kazne. S druge strane, izricanje ovih mera bezbednosti je obavezno („sud će") ukoliko su ispunjeni zakonom postavljeni uslovi. Izlaz iz ove situacije bi se mogao iznaći u tumačenju da izricanje mera iz čl. 83 i 84 KZ ipak nije dopušteno uz doživotni zatvor, jer odredbu člana 80 stav 4 KZ, koja dopušta izricanje obaveznog lečenja narkomana i obaveznog lečenja alkoholičara uz „kaznu", treba razumeti kao *lex generalis*, dok bi odredbe čl. 83 i 84 KZ predstavljale l*ex specialis*, a po njima opisana mogućnost nije predviđena. U svakom slučaju, osuđenik kome je izrečen doživotni zatvor, a pri tome je zavisnik od opojnih droga odnosno alkohola, ima prava na lečenje od bolesti zavisnosti na osnovu odredaba o zdravstvenoj zaštiti osuđenika, prema članu 114 Zakona o izvršenju krivičnih sankcija (ZIKS).[31]

31 Zakon o izvršenju krivičnih sankcija, *Službeni glasnik RS*, br. 55/2014 i 35/2019.

Nesporno je da se uz doživotni zatvor može izreći mera bezbednosti oduzimanja predmeta, jer to proizlazi iz opšte odredbe člana 80 stav 4 KZ, s tim da odredba člana 87 KZ, koja bliže uređuje ovu meru, ne sadrži nikakva ograničenja u tom pogledu. Kada je reč o ostalim merama bezbednosti, naročito onim prohibitivnog karaktera (koje se sastoje iz odgovarajućih zabrana), pitanje mogućnosti njihovog izricanja uz doživotni zatvor čini se suvišnim, jer učinilac izdržava kaznu „doživotno". Međutim, u članu 80 stav 7 KZ je propisano da će se za krivična dela u sticaju izreći mera bezbednosti ako je utvrđena makar za jedno od tih krivičnih dela. Pri tome, nekada je izricanje neke od ovih mera bezbednosti obavezno. Na primer, izricanje zabrane upravljanja motornim vozilom za teško delo protiv bezbednosti javnog saobraćaja (član 297 KZ). Zamisliva je situacija da je neko lice u realnom sticaju izvršilo navedeno delo i, na primer, teško ubistvo; ukoliko mu je za teško ubistvo utvrđen doživotni zatvor, isti će u jedinstvenoj kazni apsorbovati kaznu za teško delo protiv bezbednosti javnog saobraćaja, ali i dalje ostaje „obavezna" mera bezbednosti zabrane upravljanja motornim vozilom, koja se u smislu pomenutih odredaba mora izreći uz doživotni zatvor. Ovo može imati nekog smisla usled činjenice da osuđenik može ranije „izaći" sa izdržavanja doživotnog zatvora (po osnovu uslovnog otpusta, amnestije ili pomilovanje, odnosno naknadnog revidiranja pravnosnažne presude po osnovu vanrednog pravnog leka, kada mu se doživotni zatvor preinači u vremenski). Ipak, bilo bi korisno da ova pitanja budu predmet neke zakonodavčeve buduće novele, odnosno potrebno je bliže urediti odnos između doživotnog zatvora i mera bezbednosti.

U članu 108 KZ je predviđeno da *krivično gonjenje i izvršenje kazne za krivična dela za koja je propisana kazna doživotnog zatvora ne zastareva*. Navedena odredba, prema tome, nezastarivost krivičnog gonjenja i izvršenja kazne vezuje za *propisanu kaznu* doživotnog zatvora. U tom smislu, ne samo da ne zastareva izvršenje izrečene kazna doživotnog zatvora, već ni izvršenje vremenske kazne zatvora koja je izrečena za krivično delo za koje je propisan doživotni zatvor (na primer, za teško ubistvo nije iskorišćena mogućnost izricanja doživotnog zatvora, već je izrečen zatvor od 15 godina). Postavlja se pitanje ustavnosti predmetne odredbe o nezastarivosti krivičnog gonjenja i izvršenja kazne za krivična dela za koja je propisan doživotni zatvor (Vuković, 2021: 446), jer je u članu 34 stav 6 Ustava propisano da krivično gonjenje i izvršenje kazne ne zastareva jedino za ratni zločin, genocid i zločin protiv čovečnosti, kao i da se, na osnovu člana 20 stav 1 *lex superior*-a, ljudska prava zajemčena Ustavom mogu zakonom ograničiti samo ukoliko ograničenje dopušta Ustav.

3. Doživotni zatvor i uslovni otpust – zabrana uslovnog otpusta u krivičnom zakonodavstvu Srbije

Kada je reč o uslovnom otpustu kod doživotnog zatvora, KZ je predvideo dva režima. Načelno, osuđeni kome je izrečen doživotni zatvor stiče pravo na uslovni otpust nakon *izdržanih 27 godina zatvora* (član 46 stav 2 alineja prava). U ovom slučaju, reč je o *fakultativnom uslovnom otpustu*, [32] jer je predviđeno da „sud može" uslovno otpustiti osuđenog na kaznu doživotnog zatvora pod uslovima koji su predviđeni u članu 46 stav 1 KZ. Do uslovnog otpuštanja u ovoj situaciji može doći ako se osuđeni *u toku izdržavanja kazne tako popravio* da se može sa *osnovom očekivati da će se na slobodi dobro vladati*, a naročito da *do isteka vremena trajanja uslovnog otpusta*, koji prema članu 47 stav 7 KZ kod doživotnog zatvora traje *petnaest godina od dana uslovnog otpuštanja*, ne učini novo krivično delo.[33] Pri oceni da li će osuđenog uslovno otpustiti sud uzima u obzir: 1) njegovo vladanje za vreme izdržavanja kazne, 2) izvršavanje radnih obaveza, s obzirom na njegovu radnu sposobnost, 3) druge okolnosti koje ukazuju da osuđeni dok traje uslovni otpust neće izvršiti novo krivično delo.

Drugi režim se odnosi *na zabranu uslovnog otpusta* u slučaju osude za sledeća krivična dela (član 46 stav 5 KZ): teško ubistvo (član 114 stav 1 tačka 9),[34] silovanje (član 178 stav 4), obljuba nad nemoćnim licem (179 stav 3), obljuba sa detetom (član 180 stav 3) i obljuba zloupotrebom položaja (član 181 stav 5). U ovom slučaju zabrana nije vezana za propisanu ili izrečenu kaznu, *već za krivično delo koje je predmet osude*, tj. ona se odnosi „na *bilo ko-*

32 Pored fakultativnog uslovnog otpusta u našem pravu postoji i *obavezni uslovni otpust*, koji je regulisan u članu 46 stav 1 KZ. U stvari, obavezni uslovni otpust bi trebalo da bude pravilo. Da je reč o obaveznom uslovnom otpustu proizlazi iz same dikcije člana 46 stav 1 KZ, u kojem stoji formulacija „sud će uslovno otpustiti", s tim da ova formulacija ne znači i automatizam u otpuštanju, jer osuđeni mora ispunjavati zakonom predviđene uslove. Kod fakultativnog uslovnog otpusta iz člana 46 stav 2 KZ, koji se odnosi samo na određene kategorije osuđenika, stoji formulacija „sud može uslovno otpustiti" (više Ćorović, 2015: 102-105), što znači da su sudu data šira diskreciona ovlašćenja nego u prvom slučaju. U vezi sa fakultativnim uslovnim otpustom se navodi da je zakonodavac time „želeo da pošalje jasnu poruku da izvršioci pojedinih kategorija izuzetno teških krivičnih dela ne mogu ''preuranjeno'' dobiti drugu šansu pod istim uslovima kao kada je reč o ostalim osuđenicima". Međutim, dodaje se i sledeće: „bez propisivanja preciznih kriterijuma na osnovu kojih bi sud trebalo da napravi razliku u oceni postignutog napretka za osuđenike iz obe pomenute kategorije, čini se da odredba stava 2. nema naročitog značaja na polju primene, osim što otvara prostor za arbitrernost" (Kolaković-Bojović, 2017: 146-147).

33 U odredbi člana 46 stav 1 KZ stoji formulacija „...naročito da *do isteka vremena za koje je izrečena kazna* ne učini novo krivično delo". Kada je reč o doživotnom zatvoru navedena formulacija nema smisla, jer sam uslovni otpust ne traje doživotno, već 15 godina od dana kada je osuđeni uslovno otpušten.

34 Radi se o lišenju života deteta ili bremenite žene.

ju kaznu zatvora koja bude izrečena učiniocu nekog od navedenih krivičnih dela" (Ilić, G., 2019: 126). Međutim, za sva nabrojana krivična dela je, kako je navedeno, propisan doživotni zatvor. To znači da osuđeni kojem je za neko od navedenih krivičnih dela izrečen doživotni zatvor, potpada pod režim zabrane uslovnog otpusta.

Pre nego što se razmtri problematika na relaciji doživotni zatvor - uslovni otpust, potrebno je malo bliže ukazati na samu zabranu uslovnog otpusta u našem pravu. U srpskom pravu mogu se razlikovati *relativna* i *apsolutna zabrana uslovnog otpusta*. Naime, izmenama i dopunama KZ iz 2012., odnosno 2016. godine, uvedeno je pravilo da se ne može se uslovno otpustiti osuđeni koji je tokom izdržavanja kazne dva puta kažnjavan za teže disciplinske prestupe i kome su oduzete dodeljene pogodnosti.[35] Disciplinske mere izrečene za teže disciplinske prestupe brišu se iz evidencije disciplinskih mera u roku od tri godine od dana njihovog izricanja (o tome, Drakić, Milić, 2019a: 407-408), pod uslovom da osuđenom u tom periodu ne bude izrečena nova disciplinska mera (član 175 ZIKS). Brisanjem disciplinske mere, osuđeno lice „izlazi" iz režima zabrane uslovnog otpusta. Zbog toga je ova zabrana relativna (o tome, Milić, 2020: 371). Apsolutna zabrana uslovnog otpusta uvedena je pomenutim Marijinim zakonom iz 2013. godine. Prema članu 5 stav 2 ovog Zakona lica osuđena za krivična dela koja potpadaju pod njegov režim ne mogu se uslovno otpustiti. U ovom slučaju se zabrana vezuje za vrstu krivičnog dela na koju je učinilac osuđen. Zabrana je apsolutna, jer ova lica nikako ne mogu „izaći" iz režima zabrane, tako da ona moraju u celosti izdržati kaznu (Milić, 2020: 371). Izmenama i dopunama KZ iz 2019. godine, a povodom pomenute odredbe člana 46 stav 5 KZ, samo je proširena apsolutna zabrana ublažavanja kazne. Preciznije rečeno, sva krivična dela koja su pomenuta u članu 46 stav 5 KZ, osim teškog ubistva iz člana 114 stav 1 tačka 9 KZ, već su obuhvaćena Marijinim zakonom. Prema tome, i bez odredbe člana 46 stav 5 KZ osuđenici za krivična dela iz člana 178 stav 4, člana 179 stav 3, člana 180 stav 3 i člana 181 stav 5 KZ lišeni su mogućnosti uslovnog otusta na osnovu člana 5 stav 2 Marijinog zakona. Novele KZ iz 2019. godine su samo omogućile, usled uvođenja doživotnog zatvora, da apsolutna zabrana važi doživotno.

35 Pre toga, izmenama i dopunama KZ iz 2009. godine, bila je uvedena zabrana uslovnog otpuštanja za lice koje pokušalo da pobegne ili je pobeglo iz zavoda za izvršenje kazne zatvora u toku izdržavanja kazne. Izmenama i dopunama KZ iz 2012. godine ova odredba je promenjena, tako da se zabrana uslovnog otpusta odnosila na osuđenog koji je tokom izdržavanja kazne dva puta kažnjavan za disciplinske prestupe i kome su oduzete dodeljene pogodnosti. Izmenama i dopunama KZ iz 2016. precizirano je da se disciplinsko kažnjavanje koje isključuje mogućnost uslovnog otpusta odnosi na teže disciplinske prestupe.

Apsolutna zabrana uslovnog otpusta sama po sebi može stvoriti odgovarajuće praktične probleme u slučaju kada je neko lice osuđeno za više krivičnih dela u sticaju, od kojih jedno povlači zabranu uslovnog otpusta, a druga ne povlače ovu zabranu. Pitanje je, *pod koji režim spada izrečena jedinstvena kazna*? Na primer, izvršeno je krivično delo silovanja maloletnika iz član 178 stav 3 KZ (delo potpada pod Marijin zakon), za koje je utvrđena kazna zatvora od 7 godina, i krivično delo ubistva iz člana 113 KZ (dozvoljen je uslovni otpust), za koje je utvrđena kazna zatvora od 12 godina, pa je izrečena jedinstvena kazna od 18 godina i 6 meseci. Da li u ovom slučaju osuđeni ima pravo na uslovni otpust? U ovom primeru je, čak, utvrđena veća kazna za krivično delo za koje je dopušten uslovni otpust, od krivičnog dela za koje je isključena njegova primena. Slično pitanje bi se moglo javiti i ukoliko su učiniocu za sticaj dva krivična dela, od kojih je za jedno dopušten uslovni otpust (teško ubistvo iz člana 114 stav 1 tačka 1 KZ), a za jedno nije (član 178 stav 4 KZ), utvrđene dve kazne doživotnog zatvora, pa mu se primenom odredaba o odmeravanju kazne za sticaj, po sistemu apsorpcije, izrekne jedinstvena kazna doživotog zatvora. Da li u ovom slučaju jedinstvena doživotna kazna podleže uslovnom otpustu ili ne? Za razliku od prethodnog primera, gde je zaista teško dati logičan i pravno valjan odgovor na postavljeno pitanje, u ovoj drugoj situaciji bi se, ipak, „našao izlaz iz problema“. Naime, ako je za dva krivična dela utvrđen doživotni zatvor, od kojih za jedno delo važi zabrana uslovnog otpusta, onda će zabrana važiti i za jedinstvenu kaznu doživotnog zatvora, po principu *argumentum a fortiori – minore ad maius*. Međutim, ovim nije rešen problem ukoliko bi, u ovom poslednjem primeru, učiniocu za teško ubistvo iz člana 114 stav 1 tačka 1 KZ bila utvrđena kazna doživotnog zatvora (gde je dopušten uslovni otpust), a za delo iz člana 178 stav 4 KZ (gde važi zabrana uslovnog otpusta), vremenska kazna zatvora. Jedinstvena kazna bi i u ovom slučaju bila doživotni zatvor, ali se postavlja pitanje da li je dopušten uslovni otpust? Ili, zamislimo situaciju da je učinilac ubio dva lica, od kojih je jedno bremenita žena ili dete, pa je tim povodom osuđeno na doživotni zatvor. Da li u ovom slučaju osuđeni ima pravo na uslovni otpust, jer će se njegove radnje kvalifikovati kao teško ubistvo više lica iz člana 114 stav 1 tačka 11 KZ, za koje nije predviđena zabrana uslovnog otpusta, ali je, s druge strane, nesporno da ono u sebi sadrži krivično delo iz člana 114 stav 1 tačka 9 KZ, za koje je predmetna zabrana predviđena.

Postojanje doživotnog zatvora bez mogućnosti uslovnog otpusta protivno je članu 3 Evropske konvencije za zaštitut ljudskih prava i osnovnih sloboda (detaljno, Turanjanin, 2021: 4-9). Za ovu prolematiku je naročito od značaja presuda ESLJP u predmetu *Vinter i drugi protiv Ujedinjenog Kraljevstva*

(predstavke br. 66069/09, 130/10 i 3896/10),[36] u kojem je postavljen zahtev za postojanjem mehanizma za preispitivanje doživotnog zatvora nakon 25 godina (§§ 119-122). U ovoj odluci je naglašeno da tamo gde domaće pravo ne predviđa nikakav mehanizam ili mogućnost preispitivanja doživotnog zatvora, inkompatibilitet sa članom 3 nastaje još u trenutku izricanja doživotnog zatvora, a ne u kasnijim fazama izdržavanja kazne (poslednja rečenica § 122). Navedeno je i da se u kontekstu doživotnog zatvora član 3 mora tumačiti kao zahtev za „smanjivošću" kazne („*as requiring reducibility of the sentence*"), u smislu revizije koja domaćim vlastima omogućava da razmotre da li su promene kod osuđenika na doživotni zatvor značajne, kao i da je napredak u rehabilitaciji postignut upravo tokom izdržavanja kazne, čime se nastavak lišenja slobode više ne može pravdati na legitimnim penološkim osnovama (§ 119). U osnovi ESLJP, a povodom člana 3 Evropske konvencije, postavlja zahtev da doživotni zatvor bude *de iure* i *de facto* podložan smanjenju (redukovanju), odnosno da osuđenik ima pravo da zahteva otpuštanje sa ove kazne, što ne znači da će se njegovom zahtevu obavezno udovoljiti, tako da se njegov zahtev može odbiti uz obrazloženje da je osuđenik i dalje opasan po društvo, kako je istaknuto u presudi *Laszlo Magyar protiv Mađarske* (predstavka br. 73593/10 - §49).[37] U potonjoj presudi je rečeno i da će, ukoliko domaće pravo daje mogućnost preispitivanja doživotnog zatvora u pogledu njegove zamene, smanjenja, ograničavanja ili uslovnog otpuštanja osuđenika, biti zadovoljeni uslovi iz člana 3 Evropske konvencije (§ 50 uz pozivanje na predmet *Kafkaris*). Ukoliko domaće pravo ne predviđa mogućnost takvog preispitivanja, doživotni zatvor neće biti u skladu sa standardima člana 3 Konvencije (§ 50). U ovom predmetu (§§ 54-59), kao i u predmetu *Öclan protiv Turske* (predstavka 24069/03, 197/04, 6201/06 i 10464/07 §§ 201-207)[38] navedeno je da mogućnosti davanja pomilovanja i amnestije ne ukazuju na „smanjivost" doživotnog zatvora, pa je u tim slučajevima, tj. gde su samo predviđeni ovi mehanizmi prema osuđeniku na doživotni zatvor, povređen član 3 Evropske konvencije.

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36 *Vinter and Others v. The United Kingdom*, (Applications nos. 66069/09, 130/10 and 3896/10), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122664%22]}, stranici pristupljeno 07.03.2021.

37 *Laszlo Magyar v. Hungary*, (Application no. 73593/10), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-144109%22]}, stranici pristupljeno 07.03.2021.

38 *Öclan v. Turkey*, (Aplications nos. 24069/03, 197/04, 6201/06 and 10464/07). https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2224069/03%22,%22197/04%22,%226201/06%22,%2210464/07%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-142087%22]}, stranici pristupljeno 07.03.2021.

U srpskom pravu osuđenici na doživotni zatvor bez uslovnog otpusta mogu biti obuhvaćeni aktima amnestije i pomilovanja, što znači da i u ovom slučaju postoje zakonske mogućnosti da se takvi osuđenici ipak nađu na slobodi. Međutim, u smislu prethodno rečenog, radi se o aktima političke milosti koji ne predstavljaju garanciju „smanjivosti" doživotnog zatvora, pa ovi instituti ne odražavaju zahteve iz člana 3 Evropske konvencije u skladu sa tumačenjima ESLJP suda (o tome da pomilovanje kod nas ne zadovoljava ni *de facto* ni *de iure* uslove smanjivosti videti Ilić, G., 2019: 139). Nadalje, osuđenici na doživotni zatvor (bez obzira da li imaju pravo na uslovni otpust ili ne) ne mogu biti prevremeno otpušteni u smislu čl. 184 i 184a ZIKS, jer se ovi instituti vezuju za vremenske kazne zatvora.[39]

Prema tome, doživotni zatvor sam po sebi nije protivan članu 3 Evropske konvencije, ali jeste u slučaju da nacionalno zakonodavstvo ne predviđa odgovarajući mehanizam koji daje mogućnost da se ova kazna preispita nakon izvesnog vremena. Inače, problematikom doživotnog zatvora bavili su se i ustavni sudovi Italije i Nemčke još 70-tih godina prošlog veka. U Italiji se postavilo pitanje kompatibilnosti doživotnog zatvora sa članom 27 stav 3 njenog Ustava, koji u navedenoj odredbi propisuje rehabilitacionu funkciju osude. U svojoj odluci br. 264 iz 1974. godine Ustavni sud Italije je odbacio ovu sumnju navodeći da „svrha kazne nije samo da rehabilituje učinioca, nego i da zaštiti društvo i neutrališe opasnost koju poseduju određeni učinioci za neodređeni period" (Manna, Infante, 2000: 40). Međutim, u pravu Italije osuđenici na doživotni zatvor imaju prava na uslovni otpust nakon izdržanih 26 godina (Manna, Infante, 2000: 41, 52). Savezni ustavni sud Nemačke je u svojoj odluci iz 1977. godine takođe stao na stanovištu da doživotni zatvor sam po sebi nije protivan ustavu sve dok se osuđenom „ostavlja ''konkretna i u osnovi realna mogućnost'' da u jednom trenutku ponovo postane slobodan građanin" (Đokić, 2016: 227).

Može se postaviti pitanje, u vezi sa prihvaćenim rešenjem u srpskom pravu, da li je zakonom predviđeni rok od 27 godina, nakon kojeg osuđeni na doživotni zatvor stiče pravo da traži uslovni otpust (član 46 stav 2 alineja prva KZ),

39 Prema članu 184 stav 1 ZIKS direktor Uprave za izvršenje krivičnih sankcija može prevremeno otpustiti osuđenog sa izdržavanja kazne najviše *šest meseci do isteka kazne*, ako je *izdržao devet desetina kazne*, zbog dobrog vladanja osuđenog i postignutih rezultata u programu postupanja, na predlog upravnika zavoda; prema članu 184a stav 1 ZIKS sudija za izvršenje krivičnih sankcija može po predlogu upravnika zavoda prevremeno otpustiti osuđenog sa izdržavanja kazne zatvora *najviše 12 meseci do isteka kazne*, ako je osuđeni izdržao *jednu polovinu kazne zatvora*, zbog teške bolesti, teškog invaliditeta ili starosti, ako bi dalje izvršenje kazne predstavljalo nehumano postupanje (o ovom institutu više, Drakić, Milić, 2019b: 93-94). Jasno je iz navedenih odredaba da se radi o osuđenicima na „vremensku" kaznu zatvora.

kompatibilan sa standardima postavljenim u pomenutom predmetu *Vinter i drugi protiv Ujedinjenog Kraljevstva*, jer se u ovoj odluci govori o postojanju „mehanizma za preispitivanje doživotnog zatvora nakon 25 godina". Domaći autori koji su se bliže bavili ovom problematikom drže da u ovom slučaju nije odstupljeno od standarda ESLJP. Ovaj stav baziraju na tome da se ESLJP u svojim presudama „prvenstveno poziva na mogućnost preispitivanja nakon *izricanja* kazne doživotnog zatvora", dok se u srpskom krivičnom pravu *vreme provedeno u pritvoru*, na izdržavanju mere zabrane napuštanja stana, kao i svako drugo lišenje slobode u vezi sa krivičnim delom *uračunava* u izrečenu kaznu zatvora, novčanu kaznu i rad u javnom interesu (član 63 stav 1 KZ). To znači da zakonski rok od 27 godina počinje da teče od dana lišenja slobode, dok se navedeni standard od 25 godina odnosi na period nakon izricanja kazne doživotnog zatvora (Turanjanin, 2021: 22). Navedeno tumačenje se dobrim delom oslanja i na argumentaciju iz predmeta *Bodein protiv Francuske*, predstavka broj 40014/10, koja je kasnije prihvaćena u predmetu *Vella protiv Malte*, predstavka br. 73182/12 (o tome, Turanjanin, 2021: 8-9). Naime, u prvonavedenom predmetu, raspravljalo se o roku od 30 godina koji propisuje francusko pravo za preispitivanje kazne doživotnog zatvora, s obzirom da je taj rok očigledno duži od standarda koji je određen na pomenutih na 25 godina. ESLJP je stao na stanovištu da podnosilac predstavke u tom slučaju nije lišen nade, kao i da je isti, uračunavanjem vremena provedenog u istražnom pritvoru, stekao pravo na preispitivanje kazne doživotnog zatvora nakon 26 godina od njegovog izricanja, što znači da bi teoretski ipak mogao biti pušten na uslovni otpust (Turanjanin, 2021: 9).

Ovo tumačenje se čini prihvatljivim, ali može biti sporno to što član 63 stav 1 KZ reguliše uračunavanje vremena provedenog u pritvoru, na izdržavanju mere zabrane napuštanja stana kao i svakog drugog lišenja slobode u vezi sa krivičnim delom u izrečenu kaznu zatvora, novčanu kaznu i rad u javnom interesu, tako da ne spominje kaznu doživotnog zatvora. Otuda bi predmetna odredba morala biti novelirana, tako što bi se u njoj izričito naveo i doživotni zatvor, koji predstavlja posebnu kaznu u našem pravu. S druge strane, član 424 Zakonika o krivičnom postupku[40] izričito predviđa da osuđujuća presuda sadrži i odluku o uračunavanju pritvora ili već izdržane kazne, tako da, s obzirom na situaciju nastalu uvođenjem doživotnog zatvora, odredbe materijalnog i procesnog prava u tom delu nisu saglasne.

40 Zakonik o krivičnom postupku, *Službeni glasnik RS*, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

4. Zaključna razmatranja

Samo uvođenje doživotnog zatvora u sistem krivičnih sankcija Republike Srbije ne predstavlja „problematično" rešenje. Poznaje ga oko 85 % država i posebnih teritorija u svetu (Radulović, 2020: 83). Po svojoj suštini i stepenu retributivnosti doživotni zatvor se ne razlikuje puno (ako se uopšte i razlikuje) od ranije postojećeg zatvora od 30 do 40 godina (više, Ćorović, 2018: 208-210). Moglo bi se reći da u odnosu na zatvor od 30 do 40 godina doživotni zatvor ima simbolički značaj, jer doprinosi da se umire „preterana represivna nastojanja laičke javnosti, koja uporno zagovara prihvatanje što oštrijih mera u borbi protiv kriminaliteta" (Đokić, 2016: 235).

Iz prethodnog izlaganja jasno je da se mogu uočiti dva značajnija sporna rešenja u vezi sa ovom kaznom. Prvo, da je doživotni zatvor propisan za odgovarajuće slučajeve krivičnih dela kvalifikovanih težom posledicom, gde smrt pasivnog subjekta, kao teža posledica, proizlazi iz nehatnog postupanja učinioca. Ovo rešenje je kriminalno-politički prilično sporno, na šta je već ukazivano u domaćoj literaturi, iako se slični primeri mogu naći i u uporednom pravu. Naravno, činjenica da slični slučajevi postoje u uporednom pravu, pa čak i kada je u pitanju nemačko krivično zakonodavstvo, koje nam je u mnogim slučajevima služilo kao uzor, nije dovoljan argument da se isto to (kod nas je čak i šire postavljeno) uvede i u krivično zakonodavstvo Republike Srbije.

Drugo, što je više problematično, jeste postojanje doživotnog zatvora bez uslovnog otpusta. Očigledno je da ova zakonska mogućnost nije kompatibilna sa praksom ESLJP, odnosno da predstavlja kršenje člana 3 Evropske konvencije, jer naše pravo ne poznaje neki drugi delotvorni mehanizam koji bi omogućio preispitivanje ove kazne nakon određenog vremenskog perioda. Okolnost da je doživotni zatvor bez uslovnog otpusta protivan članu 3 Evropske konvencije, ujedno znači da je protivan i članu 25 stav 2 Ustava Srbije.[41] Nadalje, takvo rešenje je u koliziji i sa propisanom svrhom kažnjavanja iz člana 42 KZ, u delu u kojem se proklamuje specijalna prevencija (tačka 1 navedenog člana koja glasi: „sprečavanje učinioca da čini krivična dela i uticanje na njega da ubuduće ne čini krivična dela"), odnosno sa odredbom člana 43 ZIKS koja govori o svrsi izvršenja kazne zatvora (odredba glasi: „Svrha izvršenja kazne zatvora je da osuđeni tokom izvršenja kazne, primenom odgovarajućih programa postupanja, usvoji društveno prihvatljive vrednosti u cilju lakšeg uključivanja u uslove

41 Ustav Republike Srbije, *Službeni glasnik RS*, br. 98/2006. Navedena odredba glasi: „Niko ne može biti izložen mučenju, nečovečnom ili ponižavajućem postupanju ili kažnjavanju, niti podvrgnut medicinskim ili naučnim ogledima bez svog slobodno datog pristanka".

života posle izvršenja kazne kako ubuduće ne bi činio krivična dela"). Istina, potonji član ZIKS govori o svrsi izvršenja kazne zatvora, ne i doživotnog zatvora. Štaviše, ZIKS u svojim odredbama, isto kao i Zakon o izvršenju kazne zatvora za krivična dela organizovanog kriminala,[42] uopšte ne pominje doživotni zatvor. Međutim, imajući u vidu da je reč o izvršnom propisu, da KZ ne određuje posebnu svrhu doživotnog zatvora, kao i da u najvećem broju slučajeva dopušta uslovni otpust kod ove kazne (što podrazumeva da se osuđeni tokom izdržavanja kazne popravio), trebalo bi uzeti da se odredba člana 43 ZIKS shodno primenjuje i na doživotni zatvor. U tom smislu može se konstatovati da se jedino u slučajevima kada je data mogućnost uslovnog otpusta, doživotni zatvor može upodobiti sa specijalnopreventivnim ciljevima kazne. Na ovaj način se doprinosi rešavanju problematike inkompatibiliteta doživotnog zatvora i rehabilitacione funkcije kazne (Manna, Infante, 2000: 41).

Ipak, problematiku zabrane uslovnog otpusta ne treba vezivati samo za doživotni zatvor. Kod doživotnog zatvora predmetna zabrana je „najupečatljivija". Pri tome, ovde mislimo na apsolutnu zabranu uslovnog otpusta koja se vezuje za osudu za odgovarajuća krivična dela. Takva zabrana je i u slučaju vremenske kazne zatvora nespojiva sa navedenim specijalnopreventivnim učincima kazne. Njome se stavljaju van snage sve one odredbe materijalnog i izvršnog krivičnog prava koje govore o resocijalizaciji (rehabilitaciji ili reintegraciji) osuđenika, a dovodi se u pitanje i jednakost osuđenika pred zakonom. Prema tome, glavni problem u našem sistemu, a povodom problematike o kojoj govorimo, leži upravo u apsolutnoj zabrani uslovnog otpusta. *Uklanjanjem ove zabrane rešili bi se brojni problemi o kojima je bilo reči*.

Postojanje uslovnog otpusta kod doživotnog zatvora ne znači i to da će osuđeni obavezno biti pušten nakon izdržanih 27 godina. U ovom slučaju uslovni otpust je, prema članu 46 stav 2 KZ, fakultativan, tj. postoji diskreciono ovlašćenje suda da molbu osuđenika odbije ukoliko ne stekne uverenje da će se on na slobodi dobro vladati. Prema tome, osuđeni ima pravo da traži uslovni otpust, ali to ujedno ne znači da će ga i dobiti.

Do uvođenja doživotnog zatvora, u režimu fakultativnog uslovnog otpusta nalazio se zatvor od 30 do 40 godina. Nakon njegovog uvođenja (član 6 stav 1 Zakona o izmenama i dopunama KZ iz 2019.), osude na kaznu zatvora od 30 do 40 godina su „automatski prešle" iz režima fakultativnog u režim obaveznog uslovnog otpusta. To znači da „će sud" uslovno otpustiti sva lica koja su osuđena na zatvor od 30 do 40 godina ukoliko su ispunjeni uslovi iz člana 46 stav 1 KZ

42 Zakon o izvršenju kazne zatvora za krivična dela organizovanog kriminala, Službeni glasnik RS, br. 72/2009 i 101/2010.

(pod uslovom da podnesu molbu), odnosno u ovim slučajevima sud nema odgovarajuća diskreciona ovlašćenja kao u slučaju fakultativnog uslovnog otpusta iz člana 46 stav 2 KZ.[43] Naravno, obavezni uslovni otpust (član 46 stav 1 KZ) ne znači da se isti „odobrava po automatizmu, već nakon što sud utvrdi da je svaki pojedinačni osuđenik ostvario propisani napredak. Fokus je, dakle, na individualnom a ne na generalnom pristupu" (Kolaković-Bojović, 2017: 147). Međutim, ipak je reč o režimu koji je povoljniji po osuđenike. Imajući u vidu da se osude na zatvor od 30 do 40 godina odnose na krivična dela za koja je sada propisan doživotni zatvor, pitanje je koliko je opravdano da te osude sada budu u blažem režimu uslovnog otpusta, tj. režimu iz člana 46 stav 1 KZ.

Na kraju, potrebno je reći da je povodom doživotnog zatvora ostalo da se urede brojna pitanja u materijalnom i izvršnom krivičnom zakonodavstvu. Pre svega, neophodno je urediti odnos između ove kazne i mera bezbednosti, te revidirati odredbu člana 63 KZ, tako što će se izričito propisati da se pritvor i svako drugo lišenje slobode povodom krivičnog dela uračunava i u izrečenu kaznu doživotnog zatvora. S druge strane, neprihvatljivo je da izvršna krivična legislative uopšte ne spominje doživotni zatvor. Imajući u vidu da je doživotni zatvor posebna kazna (za razliku od zatvora od 30 do 40 godina), bilo bi korisno da ona dobije posebno mesto u ZIKS, odnosno da se barem urede specifičnosti pravnog položaja osuđenika na ovu kaznu.[44]

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43 U presudi Vrhovnog kasacionog suda, Kzz 587/2019 od 13.06.2019. godine, stoji: „Pri tome se posebno ukazuje da primena odredbe člana 5. KZ odnosno primena blažeg zakona na učinioca krivičnog dela je moguća samo do pravnosnažnog okončanja predmetnog krivičnog postupka, a *prilikom odlučivanja o ispunjenosti uslova za uslovno otpuštanje primenjuju se odredbe zakona koji te uslove propisuje i važi u vreme izvršenja kazne odnosno donošenja odluke o uslovnom otpustu*". (https://sudskapraksa.sud.rs/sudska-praksa, pristup 18.03.2021).

44 Za sve kazne iz našeg prava, osim doživotnog zatvora, predviđena su posebna pravila o njihovom izvršenju. Tako ZIKS reguliše izvršenje kazne zatvora (čl. 43-186), novčane kazne (čl. 187-193) i oduzimanja vozačke dozvole (član 194), dok je izvršenje rada u javnom interesu regulisano Zakonom o izvršenju vanzavodskih sankcija i mera (Službeni glasnik RS, br. 55/2014 i 87/2018; čl. 38-43). ZIKS takođe sadrži pravila o izvršenju mera bezbednosti (istina ne svih), ali i o izvršenju sankcija za prekršaj, kao i mere pritvora. Zanimljivo je da je izvršenju kazne zatvora za prekršaje posvećeno 17 članova (čl. 215-232), dok se doživotni zatvor uopšte ne spominje.

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LIFE IMPRISONMENT AND PAROLE WITHIN THE CRIMINAL LAW OF SERBIA: CERTAIN ISSUES AND DILEMMAS

Life imprisoment was introduced to Serbian Criminal legislation with the amendments of Criminal Code from 2019. These amendments replaced the former penalty of imprisonment from 30 to 40 years. Special attention was drawn by the fact that the new legislation allows the possibility of life imprisonment without the possibility of parole for committing certain crimes. This legal solution is considered not to be in accordance with the Article 3 of the European Convention for for the Protection of Human Rights and Fundamental Freedoms. Still, the prohibiton of parole was introduced to Serbian criminal law in 2013, with the adoption of the Law on the special measures for the prevention of crimes against sexual freedom towards minors. However, at that time the academic community did not give the attention it deserved to the justification of this prohibition, which by itself generates many concerns. That is why, when discussing the problematics of life imprisonment and parole, and its prohibition, one has to bear in mind the previously structured legal frame, as well as the concerns that such a prohibition creates, regardless of whether it not it relates to life imprisoment or timely limited imprisonment.

Key *words:* *life imprisonment, parole, prohibiton of parole.*

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LIFE IMPRISONMENT AND PAROLE IN SERBIA – (UN) INTENTIONALLY MISSED OPPORTUNITY[1]

Triggered by the cruel rape and murder of a 15-year-old girl in July 2014, the public campaign was launched in order to change penal policy for a sexual violence committed against children in Serbia. Widely supported by general public, but strongly disputed by legal experts and professionals, amendments to the Criminal Code have been adopted in May 2019 introducing the life sentence without parole for the most serious crimes committed against children. This influenced the decision of the author to further explore how this public policy action fits to the relevant international standards, but also to the framework built based on the ECtHR interpretation of the Art. 3 of the ECHR in terms of the life prison. Aware of the current lack of public debate and the initiatives to improve relevant provisions of the Criminal Code, this paper shads a light on the gaps in human rights protection, especially in terms of the rehabilitation and reintegration of prisoners as the undetachable element of a purpose of punishing.

Key Words: penal policy, life sentence, conditional release, parole, evidence-based policy making

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1. Introduction

Amended nine times in 13 years since it came into the force in 2006, the Criminal Code of Serbia[2] (hereinafter: CC) has uncovered a clear lack of the penal policy course on a side of policy makers in Serbia. The trend of frequent changes, together with their questionable coherence and often obvious contradictions, could only be partially explained by the need and pressures to, within the framework set by the legislator in 2005, accommodate all requirements of newly adopted international standards or requirements arising from the negotiation process with European Union (hereinafter: EU), but rather triggered by factors different from the real needs and scientific evidence gathered through the theoretical and empirical research and agreed among academic and professional community. It could be frequently heard that, these factors which trigger penal policy in Serbia could be found on the ground of populist policy-making.

In order to explore, to what extent these claims are valid or not, we decided to analyze the recent amendments to the Criminal Code in light of the relevant international standards dealing with penal policy and enforcement of penal sanctions, to check their compatibility with the directions developed based on the synergy of academic expertise and the best practices and further interpreted through the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR). Considering that, when the picture is clear in term of how the particular part of the penal policy should look from the stand point of the legally binding instruments, the next, very important step, was to look for the best modalities of the penal policy to address the challenges and shortcomings typical for the Serbian society, but within the previously explored legal standards and ECtHR jurisprudence. Taking this into account, we also explored on how the CC amendments fit to the penal policy attitudes of the scientific, professional and NGO community in Serbia.

For this step, expertise of the academic community and professionals is of the key importance. Inputs coming from these sources should be considered all together, having in mind the different angles of their views (legal theory, empirical researches, court jurisprudence and the treatment of prisoners). In parallel, there is an NGO community which should not be left behind considering its dedication to human rights defending. However, policy inputs coming from this source should be taken more carefully and overview through the lens of professionals, having in mind that the human rights activism does not necessarily mean an expertise, but rather dedication to certain topis and/or issues.

2 Official Gazette of the Republic of Serbia, no. 85/05, 88/05 - corrected, 107/05 - corrected, 72/09, 111/09, 121/09, 104/13, 108/14, 94/16 and 35/19.

2. Recent Amendments to the Criminal Code

Despite the fact that the significant changes have been brought into the Serbian penal system by the Amendments to the Criminal Code of Serbia adopted in May 2019,[3] the greatest attention of professional and the general public was attracted by the introduction of a life sentence[4], which has replaced a sentence of imprisonment from 30 to 40 years (that used to be maximum penalty), but also by the removal of a parole for certain crimes- mostly (sexual) violence against children.

More precisely, according to Article 46 of the newly amended CC "**the court shall release on parole** a convicted person who has served two thirds of the prison sentence 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, consideration shall be given to his conduct during serving of the sentence, performance of work tasks relative to his work abilities, and other circumstances indicating that the convicted person will not commit a new criminal offence during release on parole. A convicted person who was given two sanctions for serious disciplinary offences or whose awarded benefits that have been withdrawn shall not be released on parole." In addition to the described above, following the same requirements "**the court may release on parole** a person imposed to a life sentence, but who has served twenty-seven years or convicted of the most serious crimes, namely, crimes against humanity and other right protected by international law (Articles 370 through 393a), sexual criminal offences (Articles 178 through 185b), criminal offence of offences domestic violence (Article 194, paragraph 2 to 4), criminal offence of unlawful production and circulation of narcotics (Article 246 paragraph 5), criminal offences against the constitutional order and security of the Republic of Serbia (Article 305 through 321),

3 E.g. "three strikes principle" which seems to result in controversial grooving in prison population wherever applied.

4 CC (art. 43) recognizes five types of penal sanctions: 1) Life sentence; 2) Imprisonment; 3) Fine; 4) Community service; 5) Revocation of driver's license. While life sentence and imprisonment may be pronounced only as principal sanctions, a fine, community service and revocation of driver's license may be pronounced as principal and as secondary sanctions. If several sanctions are prescribed for a single criminal offence, only one may be pronounced as principal sanction. (art. 44) According to Article 44a of CC, in exceptional cases, life sentence may be pronounced along with imprisonment, for the most severe criminal offences and the most severe forms of severe criminal offences. A life sentence cannot be pronounced to a person who, at the time of commission of a criminal offence is less than twenty-one years of age. A life sentence cannot be pronounced in cases when the law sets forth that a penalty can be mitigated (Article 56, paragraph 1, item 1) or when there is basis for acquittal.

criminal offence of taking bribe (Article 367) and criminal offence of giving bribe (Article 368); or convicted by special departments of competent courts, in proceedings administered in line with the competence defined by the law, governing the organization and competence of state authorities in combating organized crime, corruption and terrorism; or finally convicted more than three times to an imprisonment but none of the convictions were deleted or the requirements for the deletion were not met." This Court decision on the parole may be preconditioned by the fulfilment of any of the obligations specified in Article 73[5]

However, despite the decision of the legislator to keep the possibility for the convicted person to request parole even for the most serious crimes listed above, or even for convicted to a life prison, according to the amendments (Article 46(5)), **the parole is not applicable to those who committed** an aggravated murder of a child of pregnant woman (Article 114((1)9)), rape with a fatal consequence (Article 178(4)), sexual intercourse with a helpless person with a fatal consequence (179 (3)), sexual intercourse with a child with a fatal consequence (Article 180(3)) and sexual intercourse by abuse of position with a fatal consequence (Article 181(5)). For these crimes, a ban on conditional release was introduced, regardless of the sentence that was imposed - whether it was an imprisonment for a certain period of time, or it was a matter of a life sentence.

Such amendments were preceded by short, but intensive (un)official public debate and unanimously unsupported by scientific and professional community, who were explaining that such a course is not in line with the relevant international standards. In the absence of round tables and conferences to discuss this issue in depth, (un)expectingly, the representatives of the policy makers (the Ministry of Justice and the National Parliament) transferred this debate in media representing it using populist narratives on the fight for children wellbeing vs. monsters and killers. This depersonalization of the persons accused of committing (doubtless serious) crimes against children, resulted in the remodeling of the public discourse where anybody publicly speaking about proposed amendments was expected to speak from the position "*pro* or *contra* monsters", rather than based on scientific or professional evidence.

5 1) Reporting to competent authority for enforcement of protective supervision within periods set by such authority; 2) Training of the offender for a particular profession; 3) Accepting employment consistent with the offender's abilities; 4) Fulfillment of the obligation to support family, care and rising of children and other family duties; 5) Refraining from visiting particular places, establishment or events if that may present an opportunity or incentive to re-commit criminal offences; 6) Timely notification of the change of residence, address or place of work; 7) Refraining from drug and alcohol abuse; 8) Treatment in a competent medical institution; 9) Visiting particular professional and other counselling centers or institutions and adhering to their instructions; 10) Eliminating or mitigating the damage caused by the offence, particularly reconciliation with the victim of the offence.

3. What should be considered as a relevant evidence to guide the life sentence related penal policy?

This question could, but should not be answered impulsively prior to look at the relevant provisions of Serbian Constitution. Why is that? Partially, due to earlier mentioned theoretical disputes related to the relevance and (non)hierarchy of evidences in social sciences, but mostly, due to pretty obvious unclearness related to formal, legal character of some evidence against its unformal/guiding/consultative nature. It still seems that a large number of citizens, and even the legal professionals still do not understand the very nature and (non)obligatory status of a certain international legal instruments, consider them to be more like a source of standards and/or guidelines rather than sources of legally binding instruments.

In accordance with the Serbian Constitution[6] (art. 194), the Serbian legal and institutional system is governed by the Constitution, ratified international treaties and generally accepted principles of international law and Serbian laws. Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. (art. 16) Since the art. 167 provides that the Constitutional Court shall decide on the compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties, it's clear that national legislation is subordinated to the ratified international treaties and generally accepted principles of international law that are, as the integral part of the domestic legal order, directly applicable by Serbian authorities, together with the provisions of the domestic legislation.

What does it mean in the practice, when it comes to rendering the decisions by judiciary? According to art. 142. par. 2 of the Constitution, courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international treaties. Even listed following the different order compared with hierarchy of the sources of law, they are still all there. However, according to art. 145. par.2, court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law, which means (if we read this article separately from the previously listed articles), that the court decisions cannot be based on the generally accepted rules of international law. However, it seems that is rather omission of the legislator than the intention not to introduced it after clearly included in arts. 16, 142 and 194.

6 Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/06).

Serbia has ratified the main international human rights instruments (universal and regional) relevant for the penal policy. Among others, Serbia has ratified the main UN instruments such as the International Covenant on Civil and Political Rights[7], International Convention on the Elimination of All Forms of Racial Discrimination[8], Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9], Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Convention on the Rights of the Child[10], Convention for Protection of all Persons from Enforced Disappearances.[11]

The jurisprudence of the international human rights treaty bodies is of great relevance in terms of the penal policy standards[12] in parallel with the set of non-binding/guiding (so called- soft law) instruments[13] developed to facilitate implementation of the legally binding instruments and they should be taken into account when developing penal policy.

In addition to this, Serbia has ratified relevant regional legal instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms followed by its protocols[14] (therefore, the Serbian authorities are also guided by the ECtHR jurisprudence) and European Convention

7 International Covenant on Civil and Political Rights (Official Gazette of the SFRY – International Treaties, no. 7/71)

8 International Convention on the Elimination of All Forms of Racial Discrimination (Official Gazette of the SFRY – International Treaties, no. 31/67)

9 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette of the SFRY – International Treaties, no. 9/91).

10 UN Convention on the Rights of the Child (Official Gazette of the SFRY – International Treaties, nos. 15/90 and 2/97; Official Gazette of the FRY no. 7/02).

11 Convention for Protection of all Persons from Enforced Disappearances (Official Gazette RS– International Treaties, no. 1/11)

12 UN Committee against Torture (CAT), the UN Human Rights Committee (HRC), UN Committee on Enforced Disappearances (CED), the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Committee on the Elimination of Discrimination against Women (CEDAW), UN Committee on the Rights of a child (CRC).

13 Among others, Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of The United Nations High Commissioner for Human Rights Geneva, 2004, Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by General Assembly resolution 45/110 of 14 December 1990, Committee on the Rights of the Child General Comment No. 24 (2019), replacing General Comment No. 10 (2007) on children's rights in juvenile justice, Geneva, 18 September 2019; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990.

14 European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the SaM – International Treaties, no. 9/03).

for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[15], but also a various CoE treaties which deals with the rights and the protection of particularly vulnerable categories such as children, victims of a family violence, war crime victims, etc.[16] As mentioned for the universal instruments, important role in developing penal policy also play non-binding instruments and jurisprudence of the regional treaty bodies.[17]

Further to the aforementioned international instruments, by the ratification of the Stabilisation and Association Agreement (hereinafter: SAA)[18] Serbia committed itself to align its legislation and practices with relevant EU instruments that are not subject to ratification. Therefore, these instruments are not legally binding yet- however, Serbia has committed itself to align its policy (legislation and practice) with them.

To conclude, in addition to the directly applicable ratified international treaties which, according to the Constitution constitute an integral part of the national legal system, there is a many source of standards which, in the absence of their binding character, but also due to the fact that they have been developed based on the best comparative practices and the expert knowledge, should be considered as the superior evidence to frame the national penal policy.

4. International standards- is it the sentencing of life imprisonment without the possibility of parole prohibited *per se*?

The answer to the question raised in the tittle of this chapter is rather simple: The only human rights treaty standards that refer specifically, to life impri-

15 Law on Ratification of the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as amended by Protocol 1 and Protocol 2 to the Convention, "Official Gazette of Serbia and Montenegro - International Agreements", no. 9/2003.

16 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg, 25.I.1974; Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence (Official Gazette of the SaM – International Treaties, no. 12/13); Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence (Official Gazette of the SaM – International Treaties, no. 12/13); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007 (Lanzarote Convention).

17 e.g. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum. Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules[III], Adopted by the Committee of Ministers on 11 January 2006, at the 952nd meeting of the Ministers' Deputies and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies)

18 Stabilization and Association Agreement, available at: https://www.mei.gov.rs/eng/documents/agreements-with-eu/stabilisation-and-association-agreement, last accessed on August 13rd 2020.

sonment concern the use of life imprisonment without the possibility of release is Article 37 of the UN Convention on the Rights of the Child (hereinafter: CRC) which prohibits life imprisonment without the possibility of parole for offences committed by people below the age of 18: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."[19] Considering the status of the CRC in the legal system of Serbia, this provision could be directly applied even in the absence of the earlier mentioned Article 44 of the CC which prohibits life sentence to be imposed to a person below twenty one years of age.

However, following the principle that not everything which is not explicitly forbidden, automatically allowed under any conditions, there are several important provisions of the international standards to be followed, together with the jurisprudence of the treaty bodies.

Therefore, also directly applicable and instructive in terms of the right to be released is the Rome Statute of the International Criminal Court, which ensures that parole is available even in cases of a life imprisonment imposed for the gravest crimes: war crimes, crimes against humanity and genocide. Article 110(3) of the Statute provides that sentences of life imprisonment, which is the maximum sentence available to the court, must be reviewed by the Court when the person has served two-thirds of the sentence, or 25 years in the case of life to determine whether it should be reduced. "Such a review shall not be conducted before that time." As earlier described, even this requirement has been followed by the Article 46 of the CC.

In addition to these two instruments which directly address the issue of a life sentence, this issue can be also approached through the general human rights standards, more precisely, through the prohibition of the inhuman or degrading treatment, as referred in Article 10(1) of the International Covenant on Civil and Political Rights[20] (hereinafter: CCPR) which states: "All deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[21] Article 10(3) of the CCPR tackles this issue from the very

19 UN Convention on the Rights of the Child (Official Gazette of the SFRY – International Treaties, nos. 15/90 and 2/97; Official Gazette of the FRY no. 7/02).

20 International Covenant on Civil and Political Rights (Official Gazette of the SFRY – International Treaties, no. 7/71)

21 "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

purpose of a penal sanction, stipulating that the "penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." This has been underlined in the Nelson Mandela Rules[22] saying that "persons deprived of their liberty shall retain their non-derogable human rights and all other human rights and fundamental freedoms, recalled that the social rehabilitation and reintegration of persons deprived of their liberty shall be among the essential aims of the criminal justice system, ensuring, as far as possible, that offenders are able to lead a law-abiding and self-supporting life upon their return to society." The Rule 107 of the Mandela Rules emphasizes that "from the beginning of a prisoner's sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner's rehabilitation and the best interests of his or her family". Furthermore, provisions of the arts. 88-89, 93, 96, 102, of the Mandela Rules govern the way on how the rehabilitation and reintegration should be fostered.

5. ECHR jurisprudence, life imprisonment and Art. 3 of the Convention

European Court of Human Rights has established a comprehensive and clear jurisprudence toward the life imprisonment sentence in the context of (non) breaching Art. 3 of the Convention.

The very first issue raised by the Court was an **allowance/prohibition of the life imprisonment itself.** In this regard, the Court has a strong position 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 (see *Kafkaris*, cited above, § 97, and references cited therein), provided that it is not grossly disproportionate (see *Vinter and Others*, cited above, § 102). The same position was reiterated in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.

However, this does not mean that the parties to the Convention are free to prescribe in their national legal systems a life imprisonment without fulfilling any further conditions without breaching the Art. 3 of the Convention. Contrary,

22 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015.

the ECtHR has developed a set of clear and comprehensive criteria to be met in order to comply with the Art. 3 of the Convention in relation with *de iure* and *de facto* status of the life imprisonment. As the Court has found in *Vinter and Others* that **a life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review**, both of which must exist from the imposition of the sentence (see *Vinter and Others*, cited above, §§ 104-118 and 122). The same position Court took in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.[23]

When it comes to the prospect to release, probably, the most important requirement of the Court is a **reducibility of the life sentence *de iure* and *de facto*.** According to the ECtHR, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see *Kafkaris*, cited above, § 97). A life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98, and *Vinter and Others*, cited above, § 108).[24] In practice, this means that's not enough to include legal guarantees and mechanisms in the national legislation- they need to prove their functionality in practice. This opens further of issue of **whether the life sentence is reducible *de facto***. In assessing whether the life sentence is reducible *de facto* it may be of the relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon (see *Kafkaris*, cited above, § 103; *Harakchiev and Tolumov*, cited above, §§ 252 and 262; and *Bodein*, cited above, § 59).[25]

One of the issues that have been frequently raised by the Court is a **minimum time period elapsed before review is done.** In T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 42. the Court recalled that in *Bodein v. France* (no. 40014/10, 13 November 2014) it was called upon to examine the French system of reducibility of whole life sentences, in particular whether the possibility of a review of life sentences after thirty years of imprisonment remained compatible with the criteria established in *Vinter and Others*. In finding that it did, the Court gave particular weight to the fact that the starting point for the calculati-

23 In the Pethukov v. Ukraine, the main focus of the case at hand was the clemency route. The Court therefore analysed whether the applicant in this case had at his disposal a real "prospect of release" through the opportunity to obtain presidential clemency. Ultimately, it found that he did not, and found that Ukraine had breached Article 3 as a result. (Petukhov v. Ukraine (No. 2), 12. March 2019, No. 41216/13)

24 The same in *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 99 and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38.

25 *Ibidem*.

on of the whole-life term under French law included any deprivation of liberty, that is to say, even the period spent in pre-trial detention. Since the applicant in that case was thus able to apply for parole twenty-six years after the imposition of his life sentence, the Court concluded that the punishment in his case was to be considered reducible for the purposes of Article 3 (see *Bodein*, cited above, § 61). Also, in par. 45, the Court noted that forty years during which a prisoner must wait before he can for the first time expect to be considered for clemency is a period significantly longer than the maximum recommended time frame after which the review of a life sentence should be guaranteed, established on the basis of a consensus in comparative and international law (see *Vinter*, cited above, § 120). It is also hardly comparable with the twenty-six-year period that the applicant in *Bodein* had to wait before being eligible to apply for parole (see § 42 above and *Bodein*, cited above, § 61).

In addition to the prospect to release itself, the Court has addressed a **type of review procedure, mostly from the perspective- judicial or non-judicial.** Therefore, the Court concluded that it is for the States to decide – and not for the Court to prescribe – what form (executive or judicial) that review should take (see *Kafkaris*, cited above, § 99, and *Vinter and Others*, cited above, §§ 104 and 120).[26] Consequently, the most frequently analysed mechanism was **a presidential clemency.** The Court has held that presidential clemency may thus be compatible with the requirements flowing from its case-law (see *Kafkaris*, cited above, § 102).[27] "In order to guarantee proper consideration of the changes and the progress towards rehabilitation made by a life prisoner, however significant they might be, the review should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided" (Petukhov v. Ukraine § 178). Here, the lack of any obligation to provide reasons for the clemency decision was a factor in finding a breach, which was further aggravated by a lack of access to judicial review (Petukhov v. Ukraine § 177-179)

When it comes to the requirements to be followed in order to keep review procedure in line with the Art. 3, the prisoner's right to a review entails an actual assessment of the relevant information, based on objective, pre-established criteria, accompanied by sufficient procedural guaranties. Thus, a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" as formulated in the *Kafkaris* judgment (see *Vinter and Others*, cited above, § 127, and *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04,

26 *Ibidem*.

27 *Ibidem*.

6201/06 and 10464/07, § 203, 18 March 2014). A Chamber of the Court held in a recent case that the assessment must be based on objective, pre-established criteria (see *Trabelsi v. Belgium*, no. 140/10, § 137, ECHR 2014 (extracts)). The prisoner's right to a review entails an actual assessment of the relevant information (see *László Magyar*, cited above, § 57), and the review must also be surrounded by sufficient procedural guarantees (see *Kafkaris*, cited above, § 105, and *Harakchiev and Tolumov*, cited above, § 262).[28] Furthermore, an access to judicial review on whether conditions and reasons (not) to be released needs to be known to prisoners. To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided, and this should be safeguarded by access to judicial review (see *László Magyar*, cited above, § 57, and *Harakchiev and Tolumov*, cited above, §§ 258 and 262).[29] The Court also required that any prisoners should be able to have "precise cognisance" (*Trabelsi v Belgium* at [137]) of the conditions determining their release, from the outset of their sentence. Whilst the Ukranian rules provided "some guidance" (Petukhov v. Ukraine § 173) the Court was concerned with the vagueness of terms like "exceptional cases" and "extraordinary circumstances", as well as a lack of clarity concerning the applicable tariff period (Petukhov v. Ukraine § 175-176). This was enough to create a situation where "prisoners who receive a whole life sentence do not know from the outset what they must do in order to be considered for release and under what conditions" (Petukhov v. Ukraine § 174).

In *Murray v. the Netherlands* ([GC], no. 10511/10, 26 April 2016), par. 100, the Court has found that a prisoner cannot be detained unless there are legitimate penological grounds for incarceration, which include punishment, deterrence, public protection and rehabilitation. While many of these grounds will be present at the time when a life sentence is imposed, the balance between these justifications for detention is not necessarily static and might shift in the course of the execution of the sentence. The penological grounds for the life prison vary through the time- not necessary exist al the time. Therefore, review process should provide for periodical check of their existence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence, that these factors or shifts can be properly evaluated (*Vinter and Others*, cited above, § 111). The review required in order for a life sentence to be reducible should therefore allow the domestic authorities to consider whether, in the course of the sentence, any changes in the life prisoner and progress

28 *Ibidem.*

29 *Ibidem.*

towards his or her rehabilitation are of s uch significance that continued detention is no longer justified on legitimate penological grounds (ibid., § 119). This assessment must be based on rules having a sufficient degree of clarity and certainty (ibid., §§ 125 and 129; see also *László Magyar v. Hungary*, no. 73593/10, § 57, 20 May 2014, and *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 255, 257 and 262, ECHR 2014 (extracts)) and the conditions laid down in domestic legislation must reflect the conditions set out in the Court's case-law (see *Vinter and Others*, cited above, § 128). and T.P. and A.T. v. Hungary, 4. October 2016, Nos. 37871/14, 73986/14. par. 38. It is illustrating that, exploring the system of presidential clemency which exists in Ukraine, the Court concluded that this mechanism was "based on the principle of humanity, rather than… penological grounds" (Petukhov v. Ukraine, §180).

In line with the Court's position regarding penological grounds for the reduction of the life imprisonment is Finally, the principle strongly endorsed in *Murray v the Netherlands*, establishing that prisoners "cannot be denied the possibility of rehabilitation" and thus the state has "a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation" ([181]). Effectively, this means that the state must ensure, whatever conditions it chooses to set for prisoner release, that these conditions are obtainable in practice and that prisoners retain "a chance, however remote, to someday regain their freedom" (*Harakchiev and Tolumov v Bulgaria* at [264]). Given that the Applicant in the current case faced total segregation for 23 hours a day, the Court doubted whether he could ever have a legitimate opportunity to prove to the authorities that any of the penological grounds necessary for his release had been met (*Petukhov,* § § 182 and 183).

To summarize the previous elaboration of the relevant ECtHR jurisprudence as one of the most relevant evidence to feed the life imprisonment related penal policy:

The life imprisonment itself is not prohibited and necessarily incompatible with the Article 3 of the Convention. A life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist from the imposition of the sentence. A life sentence has to be reducible *de iure* and *de facto* through the review which should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided. Access to judicial review on whether conditions and reasons (not) to be released have to be pre-established, objective and known to prisoners. Those reasons and conditions should be based on legi-

timate penological grounds and the review process itself should be accompanied by sufficient procedural guaranties. Since the penological grounds for the life prison vary through the time/ not necessarily exist all the time a review process should provide for periodical check of their existence, starting no later than (approx) 25 years from the deprivation of a liberty. Considering this, prisoners cannot be denied the possibility of rehabilitation and thus the state has a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation.

6. Conclusions

Considering all what have been said of the requirements defined in the international standards against the provisions of the recently amended Criminal Code, it hard to find a scientific or professional evidence in favor of the decision to exclude the right to parole for the certain category of prisoners in situation where there is no a substitute mechanism established in order to ensure properly that all of the substantial elements of the purpose of a penalty (special and general prevention, but also rehabilitation and reintegration) are granted in practice.

This brings us to the two questions: Why such a provision has been introduced in the CC at all and how the current legal gap between relevant evidence and the CC provisions could be bridged?

Answer to the first question may look a less important since the damage has been already accrued. However, we do see an important difference between scenarios where such a decision was made due to ignorance and the omission of the policy makers to consult scientific and professional community prior to accept the proposal coming from the literally one NGO built on the serious tragedy of the family which lost the child due to sexual assault and murder and the intentional decision to put aside all relevant evidence that needs to be taken into account in the process of policy making. If established as a practice, this second scenario leads far away from democratic processes and the evidence-based policy making.

It seems that there are two possible ways out of this situation- to admit the mistake and to go into the process of a new amendments as soon as possible or to wait for the first decision of the ECtHR (which will certainly come sooner or later). Aware of the sensitivity of the decision to initiate new amendments since the admission of the mistakes is not so desirable at the political level, we are afraid that this decision is going to wait for the “external instruction” of the ECtHR.

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SENTENCE OF LIFE IMPRISONMENT IN THE LAW OF BOSNIA AND HERZEGOVINA AND CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the system of measures of societal reaction towards the perpetrators of criminal offences, all the modern criminal laws, including the new legislation of Bosnia and Herzegovina, recognise sentences in the first place. They are the main types of criminal sanctions whose purpose can be achieved to the fullest, and that is the protection of society and social goods from all forms and types of injury and threat caused

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by the commission of criminal offences. Given that in the structure of criminal offences occur those with serious consequences, violating the highest social values, committed with a severe form of guilt by a repeat offender, in concurrence or by a group or organised crime group, it is logical that all penal systems recognise the harshest sentence - long-term or life imprisonment - especially after the abolition of the death sentence - capital punishment, for the severest forms of crimes. The paper analyses issues related to the harshest sentence, long-term, or life imprisonment in Bosnia and Herzegovina, with the special emphasis on the European Court of Human Rights case law.

Key words: criminal offence, sentence, prison, long-term imprisonment, court.

1. Introduction

The death penalty has existed for a long time since ancient history as part of the penal system of numerous countries for the most serious crimes (Tomić, 1978: 62-75). It was the harshest, capital punishment in all penal systems in which it had existed for several centuries before (Tomić, 1979: 209-221).

The capital punishment was one of the oldest sentences in criminal law, in addition to corporal punishments and fines (Tomić, 1982: 54-64). It used to be executed in a very severe manner including a prior torture. Even today, the punishment in the countries in which it exists is executed in several ways, for instance, execution by shooting, hanging, poisoning, guillotine, electrocution, etc. However, today no torture is applied prior to execution, rather, where the death penalty still exists, an attempt is made to do it painlessly and humanely (Tomić, 1982: 89-97).

The death penalty used to be prescribed for a big number of serious crimes as well as for incorrigible perpetrators (with elements of violence, repeat offenders or in concurrence with other crimes). Strong criticism against medieval inhumane law voiced by philosophers, humanists, Enlighteners and classical criminology proponents (Beccaria, Feuerbach, Bentham, etc.) led to a reduction in the number of criminal offences carrying this capital punishment and a mitigation of punishment. The issue of abolishing the death penalty, which was raised by Beccaria, led to the creation of a strong abolitionist movement producing a broad discussion about the problem of the death penalty in which various professions took part (Tomić, 2001: 332-355). Having regard to the reasons for and against the death penalty, in Europe prevailed the abolitionist movement.

In Bosnia and Herzegovina, the death penalty was erased from the penalty system in 1998. Instead of the capital punishment, a sentence of long-term impris-

onment (deprivation of liberty for the period of between 21 and 45 years) may be prescribed for the most serious types of crime, alternatively with a prison sentence.[1]

2. Prison sentence

The punishment of the deprivation of liberty (prison) includes the deprivation of the freedom of movement of the perpetrator of the criminal offence for a certain period of time defined in the court verdict. The deprivation of liberty takes a central place in all contemporary penal systems. It is this punishment that the biggest number of criminal offences carry because it offers the biggest number of opportunities for achieving the purpose of punishment (resocialisation of the perpetrator of the criminal offence, including special prevention).

Punishments of the deprivation of liberty were introduced in the criminal law at Beccaria's proposal. They were first introduced in the French Criminal Code of 1791, and later assumed by Code Penal of 1810, from where they permeated other legislations too (Vidović, 1979: 303-323). Incarceration which had been employed until then included the existence of the perpetrator of a criminal offence and the death penalty or some other corporal punishment executed against them. In comparison with other corporal punishments comprising of torture and mutilation, which left the perpetrators permanently disabled, introducing the punishments of the deprivation of liberty was a great progress.

Even back then, various punishments of the deprivation of liberty were introduced: a) prison sentence for the period defined in the verdict by a competent court, b) life imprisonment, c) hard labour, and d) imprisonment with or without chains (Vidović, 1981: 163-181). Recently, some new forms of the deprivation of liberty have emerged: a) house arrest with and without electronic monitoring, b) weekend detention, and c) juvenile detention as a specific punishment of the deprivation of liberty for older juveniles who have committed criminal offences.

3. Long-term imprisonment

In the countries which, influenced by abolitionist ideas, eliminated the death penalty, a question was raised in what way and by what means the society, that is, the state, could protect itself from the most dangerous forms of un-

1 In some criminal laws, life imprisonment was imposed for the most serious forms of crime after the abolition of the death penalty (Austria, Germany, Sweden, Switzerland, France, China, Israel, Bulgaria, Albania, Italy, Greece).

lawful and anti-social behaviour by individuals and groups committing criminal offences, particularly in the cases concerning professional delinquents or recidivists, or those engaged in organised crime. A number of countries accepted long prison terms (long-term, and even life imprisonment) as a substitute for the death penalty.[2] These punishments are considered to be able to achieve an efficient protection of society from crime. However, parallel to the introduction of long-term imprisonment, jurisprudence questions the applicability and usefulness of this type of prison sentence (Jovašević, 2018: 205-206).

Numerous objections are made against the punishment of long-term (life) imprisonment, including the following (Radovanović, 1975: 250):

1) This punishment is not humane. Namely, it is inhumane in the same way as the death penalty which it is supposed to substitute. By its application, a convict is practically sentenced to death which does not, to be fair, come immediately but through the deprivation of freedom for a long time. The death is quiet and slow, yet definite.

2) Such a punishment may not achieve the goals of general prevention (Grozdanić, Škorić, Martinović, 2011: 209-213). Namely, it is believed that if any punishment can have a generally preventive effect, it is definitely the death penalty. Given that even besides its existence in numerous criminal and legal systems, since the dark ages until almost the present day, serious criminal offences have been committed by repeat offenders, it is obvious that its terrifying influence is exaggerated nevertheless. The same goes for the punishment of long-term (life) imprisonment. A lot of doubt is present in the possibility for the general preventive effect of this punishment. All the more so because there is always a possibility that such a convict may escape or because, due to changed political or other circumstances, there is a possibility to substitute it with an act of amnesty or pardon with a more lenient sentence.

3) This punishment may not achieve the purpose of special prevention. If special prevention implies the correction and resocialisation of a convicted person, how can one expect this purpose to be fulfilled in relation to the convicted person who is certain he will not be released from prison until the end of his life or be released only when he is very old. Namely, the convicted person has no active atti-

2 When the direct application of Article 1 of Protocol no. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms excluded the possibility of imposing the death penalty to the perpetrator of a criminal offence for which the death penalty is alternatively prescribed with a prison term with a general maximum of 15 years, the court was authorised to impose a 20-years prison sentence on the perpetrator of such offence. Since the person convicted for murder was handed down a 20-year prison sentence, such a decision on the sentence did not breach the law to the detriment of the accused (judgement of the Supreme Court of the Republika Srpska, Kž. 146/2003 of 25 March 2004).

tude whatsoever towards the treatment employed against him. He does not have any encouraging possibility of becoming actively involved in his own treatment regardless of his behaviour during the life and work under prison circumstances and the observance of house rules and other rules - he may not deserve early release from a penal institution (parole) nor the utilisation of statutory means.

4) Even though it is believed this punishment may efficiently protect society from crime by eliminating the perpetrators of serious criminal offences and placing them in a penal institution for a long time, such persons are still not totally deprived of the possibility to commit a criminal offence, be it against other convicts or penitentiary administration workers (educators, medical staff, prison guards) or against prison property (Vidović, 1981:163-170).

In the contemporary criminal law, numerous negative effects of the punishment of long-term (life) imprisonment are resolved by applying the institute of parole, probation, etc.

4. Long-term and life imprisonment in the criminal law of Bosnia and Herzegovina

The criminal law of Bosnia and Herzegovina is a complex criminal justice system. Namely, there are four criminal codes in application in this country. They are: a) the Criminal Code of Bosnia and Herzegovina - CC BiH[3], b) Criminal Code of the Federation of Bosnia and Herzegovina - CC FBiH[4], c) Criminal Code of the Brčko District of Bosnia and Herzegovina - CC BDBiH[5] and d) Criminal Code of the Republika Srpska – CC RS[6] of 2017.

All these criminal codes recognise the punishment of the deprivation of liberty (prison term). This punishment means depriving a person convicted by a court judgement from the freedom of movement for a certain period of time and placing them in a penitentiary (Selinšek, 2007: 264-267). It is the only punishment of the deprivation of freedom achieving the protection of society from crime and resocialising the offenders. From this viewpoint, it appears as the basic and most significant punishment in the criminal justice system. It is foreseen

3 Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18.

4 Official Gazette of the Federation of Bosnia and Herzegovina, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 76/14, 46/16, 75/17.

5 Official Gazette of the Brčko District of Bosnia and Herzegovina, 33/10, 47/14, 26/12, 13/17, 50/18.

6 Official Gazette of the Republika Srpska, 64/17, 104/18, 15/21.

for the biggest number of criminal offences as the only punishment or is substituted with a fine.

Prison sentence may be pronounced as the main punishment, only when it is prescribed by law for a certain offence and may not be shorter than 30 days nor longer than 20 years (Article 42 CC BiH, Article 43 CC FBiH and Article 43 CC BDBiH). Prison sentence is imposed in whole years and months, up to six months, and in whole days (Petrović, Jovašević, 2005: 321-335). Such a prison sentence may not be handed down to a juvenile perpetrator of a criminal offence (given that this category of persons is prescribed juvenile prison sentences). Juvenile prison is by its purpose, nature, duration and manner of execution a special type of the deprivation of freedom.

The punishment of long-term imprisonment may also be prescribed for the most serious forms of premeditated crimes (Ar. 42b CC BiH, Ar. 43b CC FBiH and Ar. 53b CC BDBiH) (M. Simović, V. Simović, Todorović, 2010: 422-423). It is a prison sentence lasting between 21 and 45 years. A long-term prison sentence may not be prescribed as the only main sentence for an individual criminal offence, but always in alternation with a prison sentence (Petrović, Jovašević, Ferhatović, 2016: 88-97).

The CC BiH, CC FBiH and CC BDBiH exclude the possibility of pronouncing a sentence of long-term imprisonment to a young adult (the person who was not 21 at the time of committing the criminal offence), or to a pregnant woman.[7] The sentence of long-term imprisonment is always pronounced only in whole years.

In the case of handing down long-term imprisonment in the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina, amnesty and pardon may be granted only after three fifths of the punishment have been served. In addition, sentences of long-term imprisonment may not be deleted from the criminal record (Article 121, paragraph 4 CC BiH, and Article 125, paragraph 4 CC BDBiH).

Article 6 of the Law on Amendments to the CC RS of 2021 stipulates new sentences, namely, life imprisonment, where the previous sentence of long-term

7 Certain foreign criminal laws recognise several types of the deprivation of liberty – imprisonment and life imprisonment: the Criminal Code of Macedonia in its Article 35; the Criminal Code of the Russian Federation in Article 44; Criminal Code of Israel in Article 41; Austrian Criminal Code in Article 18; Bulgarian Criminal Code in Article 37, and Albanian Criminal Code in Article 29. The Greek Criminal Code in Article 51 stipulates life imprisonment, imprisonment in penal institutions and imprisonment in correctional institutions, while the Chinese Criminal Code in its Article 33 recognises life imprisonment, imprisonment with an unchangeable period from six months to 15 years, and public security supervision from three months to two years.

imprisonment is replaced by life imprisonment, the previous sentence of banning one from operating a motor vehicle is replaced by the sentence of confiscating the driver's licence, while the former sentence of banning one from operating a motor vehicle is prescribed as a new security measure.

The new Article 45 CC RS prescribes that the sentence of life imprisonment may be handed down for the most serious crimes and most serious forms of serious crimes, and that it may not be prescribed as the sole punishment for a certain crime. This sentence may not be handed down to the perpetrator who did not reach twenty-one years of age at the time of perpetrating the criminal offence, a pregnant woman, the perpetrator whose mental competence was significantly reduced at the time of committing the criminal offence (Article 31, paragraph 1) or for an attempted criminal offence. The convicted person who has been handed down the sentence of life imprisonment may be released on parole after having served twenty-five years under the conditions laid down in Article 47, paragraph 1 of the CC RS (that he showed exemplary behaviour while in prison, was hard-working and took an active part in the process of resocialisation, so that he may be expected to behave well when released, and particularly not commit a new criminal offence until the end of the sentence imposed).

Introduction of the new sentence, the sentence of life imprisonment for the gravest criminal offences and the gravest forms of serious crimes has produced a series of amendments to the CC RS. Thus, the new amendments to the code prescribe the sentence of life imprisonment for the following crimes: aggravated murder; sexual intercourse with a child under the age of 15 if the child died due to the offence; assassination of a representative of the highest authorities of the Republika Srpska; the gravest forms of crime against the constitutional order of the Republika Srpska if the offender acted to deprive one or more persons of life with intent at the time of perpetrating the crime; terrorism if the acts resulted in great destruction or death of one or more persons, or if the offender deprived a person of life with intent at the time of committing the crime; taking hostages if the offender killed an abducted person with intent at the time of committing the crime, and committing a crime as part of a criminal organisation who, acting together, commit a crime recognised by the Code.

For individual criminal offences for which prison sentence of minimum five or three years is prescribed, without specifying a special maximum, an amendment has been made by prescribing a special maximum of twenty years. This was necessary given that the previous prison sentence maximum was twenty years, and since the prison sentence was increased to 30 years with the lat-

est amendments, it was necessary to prescribe the maximum sentence for those crimes.[8]

Regardless of the criminal code applied in Bosnia and Herzegovina, a sentence of long-term imprisonment is supposed to achieve a certain purpose (objective), just like the other sentences. The purpose of punishment under Article 39 CC BiH and Article 42 CC BDBiH is determined (Vranj, Bisić, 2009: 15) as follows: a) to express the community's condemnation of a perpetrated criminal offence, b) to deter the perpetrator from perpetrating criminal offences in the future and encourage their rehabilitation, c) to deter others from perpetrating criminal offences, and d) to raise awareness of citizens of the danger of criminal offences and of the fairness of punishing the perpetrators.

The CC FBiH in its Article 42 defines the purpose of punishment in a slightly different manner: a) to express the community's condemnation of a perpetrated criminal offence, b) to deter the perpetrator from perpetrating criminal offences in the future, c) to deter others from perpetrating criminal offences, and d) to increase the consciousness of citizens of the danger of criminal offences and of the fairness of punishing the perpetrators (Pavišić, Grozdanić, Veić, 2007: 217-219).

Finally, the CC RS in its Article 43 stipulates that the purpose of punishment is in the framework of the general purpose of criminal sanctions (Jovašević, Mitrović, Ikanović, 2017: 279-281): a) to deter the perpetrator from perpetrating criminal offences in the future and encourage their rehabilitation, and to deter others from perpetrating criminal offences, and b) to express the community's condemnation of a perpetrated criminal offence, to develop and build responsibility and awareness in citizens of the danger and damage of criminal offences and the justification of punishment, as well as the need to obey the law.

All the aforementioned legal solutions imply that punishment has a law-defined purpose desired to be achieved by prescribing, pronouncing and executing it (Vešović, 1987: 11-17). That is primarily the general purpose which is common to all the criminal sanctions. It is reflected in the prevention of unlawful acts (criminal offences) violating or threatening the values protected by the criminal law. Secondly, punishment also has a specific purpose, and that is (Jovašević, Ikano-

8 Secondary sources of law relevant to the subject of regulation were used for defining the latest amendments to the CC RS: (1) Directive *(EU) 2017/541* of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, (2) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, and (3) Directive *2008/99/EU* of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

vić, 2012: 224-226): a) special (Novoselec, 2004: 342-348), and b) general prevention (Horvatić, 2003: 163-169).

The Law on the Execution of Criminal Sanctions, Detention and Other Measures of Bosnia and Herzegovina[9] in Article 118 stipulates the purpose of the execution of prison sentence as follows: a) to punish the offender as determined by the Court, b) to enable prisoners, through a system of modern educational measures, to adopt socially acceptable values with the aim of easier social reintegration when released, c) to behave in accordance with law, and d) to behave as responsible law-abiding citizens.

Article 10 of the Law on the Execution of Criminal Sanctions of the Federation of Bosnia and Herzegovina[10] defines the purpose of the execution of sentences of imprisonment, long-term imprisonment and juvenile imprisonment in a uniform manner. This means that the purpose of execution of the imposed sentence of long-term imprisonment is for a convicted person, during his term, through a modern system of correctional measures: a) to adopt acceptable values with the view of easier rehabilitation in the community when released, b) to behave in accordance with law, and c) to act as a law-abiding citizen.

The Law on the Execution of Criminal and Misdemeanour Sanctions of the Republika Srpska[11] states somewhat differently in its Article 3 that the purpose of the execution of criminal sanctions is: a) to execute final and binding court decisions, b) to protect the society from criminal offences, and c) to remove the perpetrators of criminal offences from the community for the purpose of their rehabilitation, medical treatment and training for life when released, in line with the law and social norms. Unlike other executive criminal codes applied in Bosnia and Herzegovina, this law devotes its entire Chapter IX titled "Execution of Long-Term Prison Sentence" to the execution of the harshest sentence. According to this legal solution (Article 197), a long-term prison sentence is executed in a closed-type institution. Persons serving this kind of sentence are classified into special correctional groups with one correctional officer per 20 inmates. The inmates serving a long-term prison sentence face the following restrictions during their penitentiary treatment as well (Article 198): a) they cannot have any work assignments on the chores done outside the institution compound until they start using the facilities used outside the institution compound, and b) their letters and telephone calls may be controlled, which they must be informed about.

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9 Official Gazette of Bosnia and Herzegovina, 12/10.

10 Official Gazette of the Federation of Bosnia and Herzegovina, 44/98, 42/99, 12/09.

11 Official Gazette of the Republika Srpska, 63/18.

5. European Court of Human Rights case law

The European Court of Human Rights (the Court) often reiterates that the Contracting States enjoy a wide margin of appreciation in deciding on the appropriate length of prison sentences for specific crimes and that they must be free to pronounce life sentences to adult offenders for particularly serious criminal offences. However, handing down life sentences without parole to adults may be problematic under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Upon determining whether it may be considered that the life sentence in the given case was such that it could not be commuted, the Court tried to determine whether it could be said that the prisoners had any chances of being released. If the national legislation affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, that is enough to meet the requirement from Article 3.

There was an array of reasons why, in order for the life sentence to still be compatible to Article 3, there had to be possibilities of release and review. First, it is obvious that a prisoner may not be deprived of freedom if there are no legitimate penological grounds. The balance between the justification of the deprivation of freedom is not necessarily constant and may change during a serving of the sentence. Those factors and changes can be properly assessed only by a review at an adequate point of serving a sentence. Second, deprivation of freedom without any prospect of release or review carries the risk of the prisoner never having a chance to atone for his criminal offence, no matter how he may behave in prison or how extraordinary his progress towards rehabilitation may be. Third, it would be irreconcilable with human dignity for the state authorities to deprive a person of freedom forcibly without as much as offering him a chance to someday regain his freedom. In addition, the European and international law today clearly support the principle of giving all prisoners, including prisoners serving a life sentence, a possibility of rehabilitation and a chance of release if they rehabilitate.

Accordingly, Article 3 of the Convention had to be interpreted as requiring reducibility of life 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 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. Even though it was not the Court's task to prescribe the form (executive or judicial) which that review should take, nor was it for the Court to determine when that review should take place, the comparative and international law materials before the Court showed clear support for the institution of a dedicated

mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter. Life imprisonment without parole does not measure up to the standards of Article 3 of the Convention if the domestic law does not provide for such reviews.

Finally, if the requested review was possible only after serving one part of a sentence, a prisoner serving a life sentence without parole should not have to wait for an indefinite number of years of his sentence before getting an opportunity to complain that the legal conditions related to his sentence do not comply with Article 3. A prisoner serving a life sentence without parole 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. Consequently, where the national 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 detention.

5.1. Khamtokhu and Aksenchik v. Russia[12]

(exemptions from life imprisonment are not discriminatory)

The applicants are Russian nationals serving life sentences after convictions of multiple serious offences. Both men are sentenced to life imprisonment under Article 57 of the Russian Criminal Code stipulating that life imprisonment may be imposed for particularly serious offences. However, the same provision prohibits the imposition of life imprisonment on women, persons who were under 18 years of age at the time they committed an offence and men who were at least 65 years old at the time the verdict in the case was imposed.

The applicants complained to the Court that, as males serving life sentences for their criminal offences, they were subjected to discriminatory treatment vis-à-vis certain other categories of convicted offenders who were exempt from life imprisonment by operation of law. The applicants cited Article 5 of the Convention (Right to liberty and safety) in conjunction with Article 14 (Prohibition of discrimination).

The Court reiterated that in order for an issue to arise under Article 14 there had to be a difference in treatment of persons in analogous or relevantly similar situations. Such a difference in treatment was discriminatory if it had no objective

12 Application no. 60367/08, judgement of the Grand Chamber of 24 January 2017

and reasonable justification. The Court noted that the applicants had been given life sentences, whereas women offenders, juvenile offenders and offenders aged 65 or over convicted of the same or comparable offences would not have been given a sentence of life imprisonment under the relevant domestic law. It followed that the applicants had been in an analogous situation to all other offenders who had been convicted of the same or comparable offences, and that they had been treated differently on grounds of sex and age. The Court found that the justification for that difference in treatment, namely to promote principles of justice and humanity (which required that the sentencing policy take into account the age and "physiological characteristics" of various categories of offenders), had been legitimate.

Furthermore, the Court was satisfied that the means employed to achieve those principles of justice and humanity, namely exempting certain categories of offenders from life imprisonment, had been proportionate. In coming to that conclusion, the Court took into account the practical operation of life imprisonment in Russia, both as to the manner of its imposition and to the possibility of subsequent review. It reiterated that imposing a life sentence on an adult offender for a particularly serious crime was not in itself prohibited or incompatible with the European Convention, and noted in that connection that life imprisonment was reserved in the Russian Criminal Code for only particularly serious crimes. The Court was satisfied that the applicants had been sentenced to life imprisonment following an adversarial trial; the outcome of their trials had been decided on the specific facts of their cases and their sentences had been the product of individualised application of the criminal law by the trial court. Furthermore, they would be eligible for early release after the first 25 years of their sentence provided that they had fully abided by the prison regulations in the previous three years. The Court considered that it was quite natural that national authorities, whose duty it was to consider the interests of society as a whole, should have considerable room for manoeuvre ("margin of appreciation") when deciding on matters such as penal policy.

It was not the Court's role to decide the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction. One of the factors for determining the extent of this room for manoeuvre lied in establishing whether there was a European consensus or not regarding the imposition of life imprisonment. The Court observed that there was a consensus not to impose life imprisonment on juvenile offenders in all the Contracting States, without exception, and to provide for a subsequent review in those jurisdictions which did so for adult offenders. Beyond this, however, there was no established consensus between Contracting States on life sentencing.

Some States had established a specific sentencing regime for offenders who had reached the age of between 60 and 65. Other States had decided to exempt women offenders who were pregnant at the time of the offence or at the time of sentencing. Yet another group of States, including Russia, had extended this approach to all women offenders. Nor could the Court see any grounds for considering that the relevant Russian law excluding offenders aged 65 or over from life imprisonment had not been reasonably and objectively justified, the possibility of a sentence reduction or release carrying all the more weight for elderly offenders.

As concerned the applicants' complaints about the difference in treatment as compared to women offenders, the Court accepted that there was a public interest in exempting women offenders from life imprisonment. It noted in particular various European and international texts addressing the need for women to be protected against gender-based violence, abuse and sexual harassment in the prison environment as well as statistical data submitted by the Government showing a considerable difference between the total number of male and female prison inmates. The Court found that the Russian authorities had not exceeded its room for manoeuvre to decide on such matters. It was difficult to criticise the Russian legislature for exempting certain groups of offenders from life imprisonment, that exemption representing, all things considered, social progress in penological matters. Therefore, the Court concluded that the exemptions at issue in the present case had not been discriminatory within the meaning of Article 14 taken in conjunction with Article 5. There had therefore been no violation of Article 14 of the Convention, taken in conjunction with Article 5, as concerned the difference in treatment on account of either age or sex.

5.2 Vinter and Others v. the United Kingdom [GC][13]

(Violation of Article 3 of the Convention was found as a whole life sentence was imposed in the manner that a release was only possible in case of terminal illness or serious incapacitation)

The Grand Chamber agreed that any grossly disproportionate sentence would amount to ill-treatment contrary to Article 3 of the Convention, even though such a condition would only be met on rare or unique occasions. In this specific case, the applicants did not claim their whole life orders without parole were grossly disproportionate. Instead, they argued that the lack of procedural possibility for

13 Applications nos. 66069/09, 130/10 and 3896/10, and Judgement of 9 July 2013 [Grand Chamber].

review amounted to ill-treatment not only, as the Grand Chamber found, when a prisoner's continued imprisonment could no longer be justified on legitimate penological grounds, but from the very moment the sentence was imposed.

The Government stated before the Court that the objective of the 2003 Act was to remove the executive authorities from the process of deciding on the sentence of life imprisonment and that was the reason to revoke a review by the Secretary of State which was previously done after twenty-five years' imprisonment. However, the Court believes that it would be more in line with the objective of the law to provide a review after twenty-five years' imprisonment within judiciary, instead of completely revoking it.

The Court pointed out that determining a violation in the applicant's cases should be understood as a prospect of their immediate release. Whether they would be released or not would depend on, for instance, whether there were still any legitimate penological grounds for their continued incarceration and on whether they should remain incarcerated on the basis of the danger they posed. These issues were not analysed in this case and arguments about them were not presented to the Court.

5.3. Hutchinson v. the United Kingdom[14]

(conditions for re-examining the sentence of life imprisonment are in compliance with the Convention)

The Court concluded that there were no shortcomings in the British system as to the clarity of conditions for review of the sentence, that is, whether or not the persons serving a life sentence knew what they had do to be considered for release and under what conditions. Namely, the power of release under the Human Rights Act should be guided by the entire applicable case law of the Court (present and future). Finally, as regards the timeframe for review based on Article 30 of the 1997 Crime Sentences Act, the Secretary of State may order a release "at any time".

It can therefore be concluded that the fact that the national system allows launching a review at any time in the interest of the prisoner, given that he is not obliged to wait for a certain number of years for the first or any other review. In this case, the applicant did not state that he was at any time prevented or dissuaded from filing a request to the Secretary of State to take him into consideration

14 Application no. 57592/08, judgement of the Grand Chamber of 17 January 2017

for release. This way, the national system, grounded on the regulations (Criminal Sentences Act and Human Rights Act), case law (of the British courts and the Court) and the published official policy (in the Life Prisoners manual) is no longer non-compliant with the Convention the way it was determined in the *Vinter* case.

5.4. Harakchiev and Tolumov v. Bulgaria[15]

(the prison regime applied to life prisoners does not provide appropriate possibilities for their rehabilitation in order to obtain a reduced sentence)

The Court reiterated that the imposition of a life sentence, without the possibility of commutation, may lead to a violation of Article 3 of the Convention. However, a sentence of life imprisonment does not become a sentence "without the possibility of commutation" by the mere fact that in practice it can be served in full; for the purpose of Article 3 it is enough that such a sentence may be reduced *de jure* and *de facto*. In order for a sentence of life imprisonment to be in compliance with Article 3, it has to offer both the possibility of release and the possibility of review because a prisoner may not be incarcerated if there are no legitimate penological grounds for his continued detention, including his rehabilitation. 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.

While it is clear that the sentence handed down to the first applicant could be reduced *de jure* since the law was amended in 2006, the state of affairs prior to that date is not fully clear. However, regardless of the possibility of reducing the sentence *de jure*, the Court was not convinced that the sentence could be reduced *de facto* throughout the relevant period or that the first applicant could have known there was a mechanism allowing him a review of the possibility for release or commutation.

The manner in which the Bulgarian president executed his powers of pardon was not clear because there were no publicly available statements on the policy, while individual pardon decisions were not clarified. This procedure was lacking formal or even informal safeguards, nor were there any concrete examples that a person serving a sentence of life imprisonment without commutation was able to obtain an adjustment of that sentence during that time.

15 Applications nos. 15018/11 and 61199/12, judgement of 8 July 2014

Even though the Convention does not guarantee the right to rehabilitation in itself and even though pursuant to Article 3 the authorities do not have an absolute duty to provide rehabilitation and reintegration programmes to prisoners, it requires from the authorities to offer life prisoners a chance, however remote, to someday regain their freedom. For that chance to be genuine and tangible, authorities also have to give life prisoners a proper opportunity to rehabilitate themselves. Although states have a wide margin of appreciation to decide on such things as the regime and conditions of a life prisoner's incarceration, those points cannot be considered as a matter of indifference. The first applicant was subjected to a particularly severe prison regime, which entailed almost complete isolation and very limited possibilities for social contact. The deleterious effects of that impoverished regime, coupled with the unsatisfactory material conditions in which he was kept, must have seriously damaged his chances of reforming himself and thus entertaining a real hope that he might one day achieve and demonstrate his progress and obtain a reduction of his sentence. To that should be added the lack of consistent periodical assessment of his progress towards rehabilitation. Consequently, it cannot be said that his sentence of life imprisonment could *de facto* be reduced in the period following the reforms enforced in 2012.

5.5. Murray v. The Netherlands[16]

(life imprisonment was de facto not subject to mitigation, pursuant to Article 3 of the Convention)

The Grand Chamber, unlike the Chamber, deliberated on the applicant's complaints related to the sentence of life imprisonment and the detention conditions as one issue.

The Court found that the need for mental treatment of the applicant established through medical examination in the criminal proceedings should not have been ignored due to putting the applicant in a regular prison, instead of a closed-type clinic. Furthermore, the very fact that the sanction imposed on the applicant did not include any treatment did not relieve the State from the duty to provide psychiatric treatment to the applicant while serving his sentence. The Court pointed out that States had the duty to provide appropriate medical care to prisoners with health issues, including mental health issues.

16 Judgement of 26 April 2016, application no. 10511/10.

The applicant's complaints that he was not provided psychiatric treatment were confirmed in the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the visits carried out to prisons on Curaçao and Aruba, establishing the lack of psychiatric treatment. In addition, there was no record in the applicant's medical records either that he had had any kind of psychiatric or psychological treatment.

The Court noticed that the principle of prisoner rehabilitation, since 1999 at the latest, was directly recognised in the applicable national law. Those provisions read that provisional release served as a preparation of the prisoner for return to society. Although some measures from that legislation were applied in the applicant's case (transfer to Aruba to maintain contacts with his family, a possibility to work in prison) and his behaviour significantly improved, the risk from repeating the criminal offence was still considered too high that he could be released on the basis of pardon or provisional release. Opinions of the national courts advising his release imply there was a close link between the existence of such rick on one hand, and the lack of treatment on the other.

The Court reiterated that States had a large margin of appreciation in determining what measures were required in order to give a life prisoner the possibility of rehabilitating himself or herself. However, although the applicant had been assessed, prior to being sentenced to life imprisonment, as requiring treatment, no further assessments had been carried out of the kind of treatment that might be required and could be made available. Consequently, any request by him for a pardon was in practice incapable of leading to his release. Therefore, the Grand Chamber made a unanimous decision that there had been a violation of Article 3 of the Convention.

5.6. Kafkaris v. Cyprus[17]

(the Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution)

While the prospect of release for prisoners serving life sentences in Cyprus was limited, this did not mean that life sentences in Cyprus were irreducible with no possibility of release. On the contrary, such sentences were both *de jure*

17 Judgement of 12 February 2008, Application no. 21906/04.

and *de facto* reducible. A number of prisoners serving mandatory life sentences had been released under the President's constitutional powers and life prisoners could benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Accordingly, although there were shortcomings in the procedure in place and reforms were under way, the applicant could not claim that he had been deprived of any prospect of release or that his continued detention – though long – constituted inhuman or degrading treatment.

Even though amendments of the applicable law, thwarting his hopes of release, had definitely caused the applicant's distress, it did not reach such an extent as to fall under the application of Article 3. Given the chronology of events, the applicant could not really justifiably hope to be released from prison in 2002, because the court of first instance clearly stated the quality of the sentence it was imposing, while the relevant national law provisions were passed around six years before the day mentioned by the prison authorities as the day he would be released. That is why all the hope the applicant might have had about an early release probably started fading when, after amendments to the national law were made, he realised he would serve a sentence of life imprisonment. Even though a sentence of life imprisonment, without setting a minimum period to be served, always carries distress and uncertainty about the life in prison, it is an inseparable part of the nature of the imposed sentence, and having regard to the prospects for release under the applicable system, it does not require making a conclusion about inhuman or degrading treatment.

In terms of availability and predictability, the Court noted that, at the time the applicant committed the offences, it was clear that the Criminal Code prescribed a penalty of life imprisonment for premeditated murder, it was also equally clear that both the executive and the administrative authorities, citing the prison regulations, started from the presumption that the penalty was equal to the prison sentence of twenty years and that all prisoners, including those sentenced to life imprisonment, were entitled to a reduced sentence for good behaviour. Although the Court upheld that those regulations concerned the execution of the sentence, not the sentence itself - the difference between the scope of the penalty of life imprisonment and the manner of its execution was not immediately obvious.

Prisoners sentenced to life imprisonment in question were not released on the basis of prison regulations or their sentence, but by the president of the Republic who used his discretionary constitutional powers. In addition, in the applicant's case, the court of first instance exclusively dealt with the correct interpretation of the sentence of life imprisonment and imposed the sentence of imprisonment for life. Having regard to a number of factors the president took into

account while using his discretionary power, such as the nature of the offence and the public trust in the criminal justice system, it cannot be said that the usage of such discretionary powers constituted the violation of Article 14.

6. Conclusion

After several centuries of existing in criminal laws around the world, the death penalty was finally replaced in the penal system by a prison sentence in the late 20th century. Namely, in the prevention of crime and seeking an efficient response to the most serious forms of unlawful, socially dangerous behaviour by individuals or groups, a conclusion has been made that a prison sentence is the most efficient measure from the viewpoint of special, as well as general prevention. Thus, all the contemporary criminal laws, including the laws of Bosnia and Herzegovina, in the penalty system that is supposed to achieve a protective, guarantee role of criminal law - the protection of social goods and values - recognises a penalty of imprisonment as well. This is, of course, a pluralistic penalty system recognising several different types and measures of punishment.

Among the punishments is the penalty of deprivation of freedom. It appears in several forms. Despite all the objections that may be more or less justifiably raised against the penalty of long-term or life imprisonment, the most severe one (an alternative to the death penalty) has been recognised by numerous legislations, including recently that of the Republika Srpska.

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KAZNA DOŽIVOTNOG ZATVORA U PRAVU BOSNE I HERCEGOVINE I PRAKSI EVROPSKOG SUDA ZA LJUDSKA PRAVA

U sistemu mjera društvene reakcije prema učiniocima krivičnih djela sva savremena krivična zakonodavstva, uključujući i novo zakonodavstvo Bosne i Hercegovine, na prvom mjestu poznaje kazne. To su osnovne vrste krivičnih sankcija kojima se na najpotpuniji način može ostvariti njihova svrha, a to je zaštita društva i društvenih dobara od svih oblika i vidova povrede i ugrožavanja vršenjem krivičnih djela. Budući da se u strukturi krivičnih djela javljaju ona sa teškim posljedicama, kojima se povređuju najznačajnije društvene vrijednosti, koja se vrše sa teškim oblikom krivice, od strane povratnika, u sticaju ili od strane grupe ili organizovane kriminalne grupe, logično je što svi kazneni sistemi poznaju i najtežu kaznu - kaznu zatvora u dugotrajnom ili doživotnom trajanju, i to (posebno poslije ukidanja smrtne, kao kapitalne kazne za najteže oblike teških krivičnih djela. U radu se analiziraju pitanja vezana za najtežu kaznu – kaznu dugotrajnog, odnosno doživotnog zatvora u Bosni i Hercegovini sa posebnim osvrtom na praksu Evropskog suda za ljudska prava.

Keywords: *krivično djelo, kazna, zatvor, dugotrajni zatvor, sud.*

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KAZNA DOŽIVOTNOG ZATVORA BEZ PRAVA NA USLOVNI OTPUST

U uvodnom delu rada ukazano je na dileme koje postoje u vezi sa kaznom doživotnog zatvora, a zatim se definiše pojam kazne i određuje svrha kažnjavanja, uz navođenje osnovnih karakteristika kazne doživotnog zatvora. Posebna pažnja je posvećena kazni doživotnog zatvora kod krivičnih dela kod kojih nije moguć uslovni otpust, uz ukazivanje na propuste zakonodavca uz sugestiju kako bi uočeni propusti mogli da se isprave. Obrađen je institut uslovnog otpusta, Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda u kontekstu kazne doživotnog zatvora, a zatim je dat kritički osvrt na zaključke Ekspertskog sastanka održanog u Beogradu 25. septembra 2020. godine. Tu se daje objašnjenje zašto nije potrebno menjati postojeće rešenje u našem krivičnom zakonodavstvu, uz napomenu da čak i kada bi se prihvatio stav iz tih zaključaka, da treba promeniti postojeće rešenje, u radu se ističe da način na koji se predlaže da se to uradi nije prihvatljiv jer se cilj (za koji se autor ovog rada ne zalaže) ne bi postigao predlozima iz tog zaključka. Inače, cilj rada je bio da se pronađu kvalitetni argumenti za postojeće rešenje u našem krivičnom zakonodavstvu, po kome za pojedina krivična dela ili najteže oblike teških krivičnih dela može da se izrekne kazna doživotnog zatvora bez prava na uslovni otpust. Takođe, cilj je bio

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i da se ukaže da zaključci Ekspertskog sastanka održanog u Beogradu 25. septembra 2020, a naročito predlozi sadržani u tim zaključcima nisu prihvatljivi kada je reč o našem krivičnom zakonodavstvu.

Ključne reči: kazna, doživotni zatvor, uslovni otpust, ljudska prava, krivično pravo.

1. Uvod

Od ukidanja smrtne kazne do danas polemiše se u naučnoj, stručnoj i opštoj javnosti, koja je to kazna koja bi adekvatno zamenila ukinutu smrtnu kaznu. Tako se nailazi na ideje da to bude kazna zatvora od 40 godina, kazna zatvora od 30 do 40 godina, dugotrajni zatvor ili doživotni zatvor. S obzirom na to da se naš zakonodavac, nakon kazne zatvora od 40 godina, odnosno kazne zatvora od 30 do 40 godine, u decembru 2019. opredelio za doživotni zatvor, polemika je nastavljena ali ovog puta na temu da li je prihvatljiva kazna doživotnog zatvora bez prava na uslovni otpust, uopšte ili kod pojedinih krivičnih dela. Naravno, postoji i čitav niz drugih spornih pitanja koja se odnose na doživotni zatvor, počev od toga kojim licima se može, odnosno ne može izreći kazna doživotnog zatvora, za koja dela ili teške oblike kojih dela je to moguće, u kakvim uslovima treba da se izdržava kazna doživotnog zatvora, da li je maksimum kazne zatvora od 20 godina uz doživotni zatvor adekvatan maksimum kazne zatvora, pa sve do toga da li se na lica koja su osuđena na ovu kaznu mogu odnositi bilo kakve privilegije, pored već spornog uslovnog otpusta, pre svega amnestija i pomilovanje. Svakako, najspornije pitanje je da li kazna doživotnog zatvora bez prava na uslovni otpust kod pojedinih krivičnih dela sme da egzistira u krivičnom pravu naše zemlje, odnosno da li je to u skladu sa Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda i odlukama Evropskog suda za ljudska prava u Strazburu.

2. Pojam kazne i svrha kažnjavanja

Kaznom se učinilac krivičnog dela lišava određenih dobara. Ta dobra moraju biti dovoljno značajna (život, sloboda, imovina) da bi učinilac krivičnog dela i potencijalni učinioci shvatili u kojoj meri društvo osuđuje krivično delo koje je učinjeno (Ignjatović, 2000: 251). Kazna se definiše kao "zakonom predviđena represivna mera koja se s ciljem suzbijanja kriminaliteta primenjuje prema učiniocu krivičnog dela na osnovu odluke suda nakon sprovedenog krivičnog postupka" (Stojanović, Škulić, Delibašić, 2018: 110).

Postoje tri teorije koje određuju svrhu kažnjavanja, apsolutna, relativna i mešovita. Kod apsolutne teorije kazna je odmazda za učinjeno delo, tj. svrha kazne je vraćanje zla za učinjeno zlo, relativna teorija svrhu kazne vidi u prevenciji, koja može biti generalna ili specijalna, dok mešovita teorija smatra da je svrha kazne i retribucija i prevencija (Stojanović, Škulić, Delibašić, 2018: 110-111). Krivični zakonik polazi od mešovite teorije i precizira da je opšta svrha propisivanja i izricanja svih krivičnih sankcija suzbijanje dela kojima se povređuju ili ugrožavaju vrednosti zaštićene krivičnim zakonodavstvom (član 4 stav 2 KZ), kao i da je, u okviru opšte svrhe krivičnih sankcija, svrha kažnjavanja: 1) sprečavanje učinioca da čini krivična dela i uticanje na njega da ubuduće ne čini krivična dela; 2) uticanje na druge da ne čine krivična dela; 3) izražavanje društvene osude za krivično delo, jačanje morala i učvršćivanje obaveze poštovanja zakona; 4) ostvarivanje pravednosti i srazmernosti između učinjenog dela i težine krivične sankcije (član 42 KZ).

Kada je reč o retributivnoj svrsi kažnjavanja, treba imati u vidu da je ostvarivanje pravednosti i srazmernosti učinjenog dela i težine krivične sankcije, što predstavlja svojvrsni vid retribucije, kao svrhe kažnjavanja, propisano kada je uvedena i kazna doživotnog zatvora.[1] Ideja da se prihvati filozofija retribucije, kod našeg zakonodavca, koja počiva na uverenju da kazna mora biti osveta za štetu nanesenu drugima, u skladu je sa stavom i uverenjem javnosti i političkih struktura mnogih zemalja, gde je to, kao i kod nas, poslednjih decenija, postalo vladajuće shvatanje, uz sve manju orjentisanost na rehabilitaciju (Stevanović, 2016: 429).

Takođe, u poslednje vreme sve češće se ističe da su retribucija i zastrašivanje sastavni delovi kazne i da se to ne može, ne sme i ne treba negirati. Država treba i mora da kažnjava adekvatnim kaznama učinioce krivičnih dela, jer je ona garant bezbednosti svih građana. Negiranjem potrebe za pravednom odmazdom, praktično se abolira učinjeno, a zločincu se pristupa kao da je reč o bolesniku kojeg treba lečiti (Dragojlović, Bingulac, 2019: 71), što nije prihvatljivo kada je reč o učiniocu krivičnog dela, koje u svom opštem pojmu sadrži i krivicu.

3. Kazna doživotnog zatvora

Za razliku od prethodnog zakonskog rešenja koje je poznavalo četiri vrste kazni, sadašnje rešenje propisuje pet vrsti kazni: 1) doživotni zatvor; 2) kaznu zatvora; 3) novčanu kaznu; 4) rad u javnom interesu; i 5) oduzimanje vozačke dozvole (član 43 KZ). Mada bi se i za prethodno zakonsko rešenje moglo tvrditi da je postojalo pet vrsti kazni, s obzirom na to da je kazna zatvora od 30 do 40 godina

1 "*Službeni glasnik RS*", broj 35/19.

predstavljala više posebnu vrstu kazne zatvora, nego izuzetak od opšteg maksimuma kazne zatvora, sada nema nikakve dileme da kazna doživotnog zatvora predstavlja posebnu vrstu kazne.

Za najteža krivična dela i najteže oblike teških krivičnih dela može se uz kaznu zatvora izuzetno propisati i kazna doživotnog zatvora. Kada je reč o izricanju ove kazne, postoje ograničenja, jer se ona ne može izreći licu koje u vreme izvršenja krivičnog dela nije navršilo dvadeset jednu godinu života. Takođe, ne može se izreći u slučajevima kada zakon predviđa da se kazna može ublažiti (član 56. stav 1. tačka 1) ili kada postoji neki od osnova za oslobođenje od kazne (član 44a KZ). Zakonodavac potencira da se kazna doživotnog zatvora može propisati samo izuzetno, a, uz to, teleološkim tumačenjem dolazi se do toga da taj izuzetni karakter doživotne kazne zatvora važi i za njeno izricanje (Stojanović, 2020: 233).

Kao što i sam naziv ove kazne govori, kod nje osuđeni ostaje u zatvoru do kraja života. Naravno, od ovoga pravila postoje odstupanja koja se ogledaju pre svega u mogućnosti primene nekog od tri instituta: uslovnog otpusta, amnestije ili pomilovanja.

4. Doživotni zatvor kod krivičnih dela kod kojih nije moguć uslovni otpust

Prema Krivičnom zakoniku postoji pet krivičnih dela kod kojih sud ne može uslovno otpustiti osuđenog, bez obzira na to na koju kaznu su osuđeni. To su: teško ubistvo iz člana 114 stav 1 tačka 9, silovanje iz člana 178 stav 4, obljuba nad nemoćnim licem iz člana 179 stav 3, obljuba sa detetom iz člana 180 stav 3 i obljuba zloupotrebom položaja iz člana 181 stav 5 Krivičnog zakonika, a za svih pet krivičnih dela pored kazne zatvora, propisana je i kazna doživotnog zatvora. Ovde se odmah postavljaju dva pitanja, na koje ne može da se da odgovor koji bi se branio valjanim argumentima. Naime, zbog čega je takvo ograničenje dato baš za ova krivična dela i zbog čega takvo ograničenje ne postoji kod krivičih dela koja su nesporno teža od ovih (pre svega po posledici koju prouzrokuju), na primer, genocid, ratni zločini ili agresivni rat.[2]

2 Laička javnost često ne shvata koja su krivična dela objektivno teža. Tako se svojevremeno novinarka obratila autoru ovog teksta za objašnjenje u vezi sa propisanom kaznom za pojedina krivična dela, pa je na kritički osvrt autora, rekla da je za nju daleko teže kad neko siluje ili ubije dvogodišnje dete nego kad izvrši genocid ili ratni zločin (!?). Nakon objašnjenja da, na primer, genocid ili ratni zločin protiv civilnog stanovništva može da sadrži stotine, pa čak i hiljade silovane ili ubijene dece, obećala je da će korigovati stavove koje iznosi u novinama za koje piše.

Pored toga, treba reći da jedino kod teškog ubistva (član 114 stav 1 tačka 9) nije sporan način na koji je propisana kazna doživotnog zatvora jer je za postojanje tog krivičnog dela, pored umišljajne radnje ubistva, potrebno da uzrast pasivnog subjekta (dete), odnosno stanje pasivnog subjekta (bremenita žena) budu takođe obuhvaćeni umišljajem učinioca. U suprotnom, ako ove kvalifikatorne okolnosti ne bi bile obuhvaćene umišljajem učinioca, ne bi se radilo o teškom već o običnom ubistvu iz člana 113 Krivičnog zakonika.

Međutim, kod ostala četiri krivična dela, ukoliko prihvatimo da je propisivanje kazne doživotnog zatvora opravdano,[3] postoji problem ukoliko je reč o smrtnoj posledici pasivnog subjekta kao kvalifikatornoj okolnosti. Naime, za postojanje najtežeg oblika nekog od ovih krivičnih dela, a samim tim i mogućnosti da se izrekne kazna doživotnog zatvora, potrebno je da je smrtna posledica obuhvaćena nehatom učinioca. U suprotnom, ako je smrt obuhvaćena umišljajem učinioca, na osnovu izričite odredbe člana 27 Krivičnog zakonika, radilo bi se o sticaju osnovnog oblika krivičnog dela i krivičnog dela ubistvo iz člana 113 Krivičnog zakonika, a to dalje znači da jedinstvena kazna ne bi mogla da bude doživotni zatvor. Naime, u tom slučaju jedinstvena kazna zatvora bi se kretala u rasponu od deset godina i jednog meseca do dvadeset godina zatvora. Ovakvo rešenje se može argumentovano kritikovati.

Rešenje tog problema bi bilo da se propiše još jedan oblik teškog ubistva, koji bi činio onaj ko drugog liši života prilikom izvršenja silovanja, obljube nad nemoćnim licem, obljube sa detetom ili obljube zloupotrebom položaja (Stojanović, 2020: 585). Tada bi i u tom slučaju (smrtna posledica obuhvaćena umišljajem izvršioca) mogla da se izrekne kazna doživotnog zatvora. Kada je kod ovih krivičnih dela reč o kvalifikatornoj okolnosti koja se ogleda u uzrastu pasivnog subjekta, tj. da je reč o detetu, nije sporno da ta okolnost mora biti obuhvaćena umišljajem učinioca. U suprotnom, ne bi se radilo o najtežem već o nekom drugom obliku krivičnog dela, pa ne bi ni mogla da se izrekne kazna doživotnog zatvora.

5. Uslovni otpust

Osuđenog koji je izdržao dve trećine kazne zatvora sud će uslovno otpustiti sa izdržavanja kazne, ako se u toku izdržavanja kazne tako popravio da se može sa osnovom očekivati da će se na slobodi dobro vladati, a naročito da do isteka vremena za koje je izrečena kazna ne učini novo krivično delo. Pri oceni

3 Kod ovih krivičnih dela do smrtne posledice dolazi usled nehata, pa se samim tim postavlja pitanje da li je neophodno propisati najstrožu kaznu. Propisivanje kazne doživotnog zatvora za ova dela se po pravilu u literaturi kritikuje, upravo zbog činjenice da se ne radi o umišljajnom lišenju života.

da li će se osuđeni uslovno otpustiti uzeće se u obzir njegovo vladanje za vreme izdržavanja kazne, izvršavanje radnih obaveza, s obzirom na njegovu radnu sposobnost, kao i druge okolnosti koje ukazuju da osuđeni dok traje uslovni otpust neće izvršiti novo krivično delo. Ne može se uslovno otpustiti osuđeni koji je tokom izdržavanja kazne dva puta kažnjavan za teže disciplinske prestupe i kome su oduzete dodeljene pogodnosti (član 46 stav 1 KZ). Ukoliko ispunjava ove uslove, sud može uslovno otpustiti osuđenog koji je osuđen na kaznu doživotnog zatvora, ako je izdržao dvadeset sedam godina (član 46 stav 2 KZ), ali ne može uslovno otpustiti osuđenog za krivična dela: teško ubistvo (član 114. stav 1. tačka 9), silovanje (član 178. stav 4), obljuba nad nemoćnim licem (179. stav 3), obljuba sa detetom (član 180. stav 3) i obljuba zloupotrebom položaja (član 181. stav 5), bez obzira na to na koju kaznu je osuđen (član 46 stav 5 KZ).

Suština uslovnog otpusta je u tome da se deo kazne ne izvršava, tako da se ne može prihvatiti shvatanje da je uslovni otpust samo faza u izvršenju kazne zatvora, odnosno da se kazna zatvora izvršava i za vreme dok je uslovno otpušteni na slobodi. Najbolji pokazatelj za to je činjenica da se ukoliko dođe do opoziva uslovnog otpusta, vreme koje je osuđeni proveo na uslovnom otpustu ne uračunava u izdržanu kaznu (Stojanović, 2010: 258). Kada se govori o uslovnom otpustu, po pravilu se ne potencira da on ima komponentu praštanja učiniocu krivičnog dela, jer mu se kazna smanjuje. Upravo je ta komponenta sporna sa stanovišta širih društvenih interesa i oštećenog krivičnim delom, pa se to uvek mora imati u vidu kada se analizira ustanova uslovnog otpusta (Škulić, 2016: 365).

Kada je reč o uslovnom otpustu, treba imati u vidu i rešenja iz Zakona o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima[4] (tzv. Marijin zakon). Ovim zakonom propisuju se posebne mere koje se sprovode prema učiniocima krivičnih dela protiv polne slobode izvršenih prema maloletnim licima (lica mlađa od 18 godina), a sam zakon se primenjuje na učinioce koji su prema maloletnim licima izvršili sledeća krivična dela: 1) silovanje (član 178. st. 3. i 4. KZ); 2) obljuba nad nemoćnim licem (član 179. st. 2. i 3. KZ); 3) obljuba sa detetom (član 180. KZ); 4) obljuba zloupotrebom položaja (član 181. KZ); 5) nedozvoljene polne radnje (član 182. KZ); 6) podvođenje i omogućavanje vršenja polnog odnosa (član 183. KZ); 7) posredovanje u vršenju prostitucije (član 184. stav 2. KZ); 8) prikazivanje, pribavljanje i posedovanje pornografskog materijala i iskorišćavanje maloletnog lica za pornografiju (član 185. KZ); 9) navođenje maloletnog lica na prisustvovanje polnim radnjama (član 185a KZ); 10) iskorišćavanje računarske mreže ili komunikacije

4 "*Sl. glasnik RS*", broj 32/2013.

drugim tehničkim sredstvima za izvršenje krivičnih dela protiv polne slobode prema maloletnom licu (član 185b KZ).

Ovaj zakon (član 5), pored toga što zabranjuje ublažavanje kazne učiniocu krivičnog dela obuhvaćenog ovim zakonom, odnosno pored toga što isključuje institut zasterelosti krivičnog gonjenja i izvršenja kazne za ova dela, eksplicitno propisuje da se lice osuđeno na kaznu zatvora za krivično delo na koje se odnosi ovaj zakon ne može uslovno otpustiti (stav 2). Dakle, znatno pre decembra 2019, kada su izvršene izmene Krivičnog zakonika, bila je propisana zabrana uslovnog otpuštanja osuđenih lica, između ostalih i za krivična dela silovanje (član 178. st. 3. i 4. KZ); 2) obljuba nad nemoćnim licem (član 179. st. 2. i 3. KZ); 3) obljuba sa detetom (član 180. KZ); 4) obljuba zloupotrebom položaja (član 181. KZ),[5] pa je takvo propisivanje Krivičnim zakonikom iz 2019. nepotrebno, odnosno, nema potrebe u dva zakona propisivati istu zabranu.

6. Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda i kazna doživotnog zatvora

Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda propisuje (član 3) zabranu mučenja, odnosno da niko ne sme biti podvrgnut mučenju, ili nečovečnom ili ponižavajućem postupanju ili kažnjavanju. S tim u vezi, postavlja se pitanje da li je kazna doživotnog zatvora bez prava na uslovni otpust nečovečno kažnjavanje. Razmatrajući predstavku trojice osuđenika (*Case of Vinter and Others v. The United Kigdom*, 9 July 2013), Evropski sud za ljudska prava u Strazburu je zauzeo stav da je kazna doživotnog zatvora u suprotnosti sa članom 3 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda ako takva kazna ne ostavlja mogućnost da se osuđeni po utvrđenoj zakonskoj proceduri posle izvesnog vremena nađe na slobodi (Đokić, 2016: 229-230).

Imajući u vidu ovakav stav suda, postavlja se pitanje da li je trenutno važeće rešenje u Krivičnom zakoniku saglasno sa Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda i stavom koji zastupa Evropski sud za ljudska prava u Strazburu. Uz napomenu da sam stav ovog suda nije nesporan, odnosno uz činjenicu da sudije Evropskog suda za ljudska prava nisu nepogrešivi ljudi, odnosno da i oni mogu po pojedinim pitanjima zauzeti pogrešan stav, što podrazumeva potrebu da isprave svoju grešku, treba reći da u našem pravnom sistemu,

5 Krivični zakonik iz decembra 2019. propisuje zabranu uslovnog otpusta i za lica koja su osuđena za krivično delo teško ubistvo iz člana 114 stav 1 tačka 9 Krivičnog zakonika.

pored uslovnog otpusta postoje i druge mogućnosti da se osuđeno lice, pa i ono koje je osuđeno na doživotni zatvor, nađe na slobodi iako nije izdržalo kaznu na koju je osuđeno. To su pre svega amnestija i pomilovanje, ali i vanredni pravni lekovi, zahtev za ponavljanje krivičnog postupka i zahtev za zaštitu zakonitosti.

Kada je reč o licima koja su osuđena na kaznu doživotnog zatvora, za dela za koja nije moguće da budu uslovno otpuštena, u svetlu odluke Evropskog suda za ljudska prava koja je navedena, posebno je značajan zahtev za ponavljanje krivičnog postupka, koji pored ostalih razloga za ponavljanje postupka propisuje i slučaj ako se iznesu nove činjenice ili podnesu novi dokazi kojih nije bilo kada je izricana kazna zatvora ili sud za njih nije znao iako su postojali, a oni bi očigledno doveli do blaže krivične sankcije (član 473 stav 1 tačka 6 ZKP). Imajući u vidu da se pod pojmom "nove činjenice" mogu smatrati i penološki razlozi, koje zagovornici uslovnog otpusta potenciraju i ističu u prvi plan, kada zagovaraju mogućnost uslovog otpusta kod kazne doživotnog zatvora, može se konstatovati da se ta ideja može ostvarivati i kroz ovaj vanredni pravni lek. S obzirom na to da se procedura postupanja po ovom vanrednom pravnom leku precizno reguliše Zakonikom o krivičnom postupku[6] (čl. 470-481), odnosno da je "ostavljena mogućnost da se osuđeni po utvrđenoj zakonskoj proceduri posle izvesnog vremena nađe na slobodi", nema razloga ne tvrditi da je upravo zahvaljujući ovom vanrednom pravnom leku ispunjen zahtev koji u navedenoj presudi postavlja Evropski sud za ljudska prava u Strazburu.

7. Kritički osvrt na zaključke Ekspertskog sastanka održanog u Beogradu 25. septembra 2020. godine

Učesnici Ekspertskog sastanka (predstavnici krivičnopravne teorije i prakse Srbije, Slovenije, Hrvatske, BiH, Crne Gore i Makedonije) održanog u Beogradu 25. septembra 2020, u organizaciji Srpskog udruženja za krivičnopravnu teoriju i praksu i Instituta za kriminološka i sociološka istraživanja, na temu „Kazna doživotnog zatvora i međunarodni pravni standardi", usvojili su sledeće zaključke:[7] 1. Predviđanje kazne doživotnog zatvora u nacionalnom krivičnom zakonodavstvu načelno nije u suprotnosti sa članom 3 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, ni praksom Evropskog suda za ljudska prava; 2. Prema relevantnim međunarodnim pravnim standardima i praksom ESLjP države u čijem krivičnom zakondavstvu je predviđena kazna doživotnog zatvora treba da predvide

6 "*Sl. glasnik RS*", br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 i 35/2019.

7 Autor ovog teksta nije podržao donete zaključke i glasao je protiv njihovog usvajanja.

instrumente kojima se pruža mogućnost svakom licu osuđenom na kaznu doživotnog zatvora da bude pušteno na slobodu posle određenog vremena provedenog u kazneno-popravnoj ustanovi i ispunjenja drugih zakonom predviđenih uslova, unapred poznatih osuđenom licu i zasnovanih na penološkim razlozima, o čijoj se ispunjenosti odlučuje u pravičnom postupku; 3. U važećem tekstu Krivičnog zakonika nisu predviđeni krivičnoporavni instrumenti koji bi dali mogućnost svakom licu osuđenom na kaznu doživotnog zatvora za sva dela za koja se ona može izreći (odnosno pojedine njihove oblike), da, ispunjenjem određenih zakonom predviđenih uslova, bude pušteno na slobodu posle određenog vremena provedenog u ustanovi za izvršenje krivičnih sankcija; 4. Učesnici Ekspertskog sastanka su saglasni sa stavom iznetim u Izveštaju eksperta prof. dr Vida Jakulina da su dva moguća načina za usaglašavanje odredaba Krivičnog zakonika o kazni doživotnog zatvora sa međunarodnim pravnim standaradima, članom 3 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda i sudskom praksom ESLjP po ovom pitanju, i to: a) Izmene i dopune Krivičnog zakonika s ciljem davanja mogućnosti svakom licu osuđenom na kaznu doživotnog zatvora da pokrene postupak puštanja na uslovni otpust nakon isteka vremena utvrđenog u Krivičnom zakoniku, i preciziranje objektivnih kriterijuma i odgovarajućih proceduralnih garancija za adekvatno donošenja odluke po podnesenoj molbi, uslova pod kojima se osuđeno lice pušta na uslovni otpust i posledica nepoštovanja uslova pod kojima je pušten na uslovni otpust; b) Zadržati postojeće odredbe Krivičnog zakonika o kazni doživotnog zatvora ali izvršiti izmene i dopune Zakonika o krivičnom postupku s ciljem uvođenja novog - posebnog vanrednog pravnog leka - Zahteva za vanredno ublažavanje kazne kao procesnog mehanizma koji omogućava naknadno preispitivanje izrečene kazne doživotnog zatvora, u kojem bi kao jedan od osnova za mogućnost njegovog ulaganja bio i penološki razlog, odnosno već postignuta svrha kažnjavanja u toku izdržavanja izrečene kazne doživotnog zatvora - uz konkretizaciju i drugih pitanja ovog vanrednog pravnog leka (npr. nemogućnost podnošenja zahteva po osnovu procene o već postignutoj svrsi kažnjava pre dvadeset i pet godina izdržane kazne doživotnog zatvora).

Na ovom mestu prvo treba reći da važeće rešenje u krivičnom zakonodavstvu nije u suprotnosti sa međunarodnim pravnim standardima, pa samim tim nije ni potrebno da se bilo šta menja radi usaglašavanja. Drugo, mora se istaći da predlog izmena Krivičnog zakonika, koji je usvojen na Ekspertskom sastanku održanom u Beogradu 25. septembra 2020, ne bi suštinski ništa promenio, jer bi i dalje važila zabrana puštanja na uslovni otpust lica koja su osuđena na kaznu doživotnog zatvora, jer bi i dalje važila zabrana propisana u Zakonu o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima, koji je, kada je reč o ovim krivičnim delima, *lex specijalis* u odnosu

na Krivični zakonik.[8] Treće, ideja da se "izvrše izmene i dopune Zakonika o krivičnom postupku s ciljem uvođenja novog - posebnog vanrednog pravnog leka - zahteva za vanredno ublažavanje kazne", je neprihvatljiva jer već postoji vanredni pravni lek koji ima upravo onu sadržinu koju predlaže prof. dr Vid Jakulin, a koji predlog je prihvaćen u okviru zaključaka Ekspertskog sastanka.

Svakako treba naglasiti i to da ideja koja polazi od teze da se učinioci krivičnih dela mogu popraviti, odnosno da bi ih trebalo pustiti na uslovni otpust iz "penoloških razloga", nije prihvatljiva kada je reč o licima koja su izvršila neko od krivičnih dela prema deci (licima mlađim od 14 godina), a pre svega krivična dela protiv polne slobode, jer ne postoji nikakva mogućnost da se to sa sigurnošću utvrdi. Naime, da li se neko ko je izvršio takvo krivično delo (toliko teško da mu je pravnosnažnom presudom izrečena kazna doživotnog zatvora), možemo znati tek kada se takvo lice nađe na slobodi, odnosno kada bude bilo ponovo u kontaktu sa decom. Njegovo eventualno "dobro" ponašanje u zatvoru nije pokazatelj da se popravio i u odnosu na decu, jer u zatvoru nije ni bilo u kontaktu sa decom. Dakle, tek po izlasku na uslovni otpust može se saznati da li se takav osuđenik zaista popravio, a to dalje znači da je za to saznanje potrebno rizikovati bezbednost dece, a nema dovoljno valjanih argumenata da se takav svojevrsni socijalni eksperiment (sam po sebi opasan po decu) dopusti ili prihvati. Drugim rečima, puštanjem takvog osuđenika na uslovni otpust, tek kada on bude u kontaktu sa decom, znaćemo da li se zaista popravio, pa ako nije, cena tog i takvog eksperimenta je život najmanje jednog deteta. To je svakako prevelika cena, koju niko ne bi smeo da pristane da plati.

8. Zaključak

Kada je reč o najnovijim rešenjima u Krivičnom zakoniku koja su uvedena u decembru 2019. nesporno je da gotovo svi noviteti izazivaju ozbiljnu polemiku u naučnoj, stručnoj ali i opštoj javnosti. Mišljenja su podeljena i ne postoji nijedno novo rešenje oko kojeg bi se svi saglasili da je dobro i da će doneti boljitak u bilo kojoj oblasti društvenog života. Često su mišljenja drastično različita, a ponekad i suprotna. Tako se postavlja i čitav niz ozbiljnih pitanja koja se odnose na kaznu doživotnog zatvora, počev od toga da li je ta kazna uopšte legitimna, preko toga kome i kada može da se izrekne, pa sve do toga kako će se ona izvršavati, i s tim u vezi, da li se lice osuđeno na kaznu doživotnog zatvora može uslovno otpustiti.

8 Predložene izmene bi se praktično odnosile samo na krivično delo ubistvo iz člana 114 stav 1 tačka 9 Krivičnog zakonika jer jedino to krivično delo nije obuhvaćeno Zakonom o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima.

Činjenica je da se može navesti mnogo prigovora novouvedenim rešenjima, kao i to da su nastala kao posledica penalnog populizma, koji podrazumeva pridobijanje glasača na izborima pooštravanjem propisanih kazni i zagovaranjem oštrije kaznene politike. Polazi se od ideje da je prosečan građanin sklon retributivnom odgovoru na zločin, zloupotrebljava se indukovani strah, koristi se manipulacija, a u svemu tome svoj doprinos pružaju mediji i nevladin sektor, pa uz jednostranost i nekompetentnost, koji su prisutni u ovom procesu, rezultati su prilično loši. Ljudi se ne osećaju ništa sigurnije, naprotiv, strah od zločina je sve veći a društvo troši sve više novca na finansiranje kaznenog mehanizma (Ignjatović, 2017: 28-29).

Međutim, mora se reći i to da postoji dosta neosnovanih prigovora i kritika. Često se u literaturi ističe da su najnovija rešenja u Krivičnom zakoniku loša, a da su loša zato što su, između ostalog, doneta pod pritiskom laičke javnosti (po pravilu se navodi inicijativa koju je podnela Fondacija Tijana Jurić), kojom se lako manipuliše, pogotovo kada je reč o krivičnim delima u kojima su žrtve deca, tim pre ako je reč o krivičnim delima protiv polne slobode. Tom prilikom se gubi iz vida činjenica da je svrha kažnjavanja ostvarivanje pravednosti i srazmernosti između učinjenog dela i težine krivične sankcije (član 42 tačka 4 KZ), a da svako, bez obzira na to da li jeste ili nije laik za krivično i krivično procesno pravo, jako dobro zna šta je pravedno i srazmerno kada je reč o ubistvu deteta, bremenite žene ili nekom krivičnom delu protiv polne slobode usled kojeg je došlo do smrti deteta. S tim u vezi, jako je važno da se naglasi neprihvatljivost nipodaštavanja stavova laičke javnosti i njihovih zahteva za srazmernost i pravednost (što je po njima kazna doživotnog zatvora bez prava na uslovni otpust), jer se presude ne donose u ime naučne i stručne javnosti, već u ime daleko brojnije populacije, tj. u ime naroda koji u ogromnoj većini čini upravo "laička javnost". Pošto se presuda donosi u ime tog i takvog naroda, onda se njegova želja ne sme i ne može ignorisati, naprotiv, mora se uvažiti.

Pokušaj ignorisanja želje laičke javnosti, koja čini ogromnu društvenu većinu u poređenju sa naučnom i stručnom javnošću, obesmišljava svrhu kažnjavanja koja se eksplicitno navodi u Krivičnom zakoniku kao izražavanje društvene osude za krivično delo (član 42 tačka 3). Upravo je laička javnost, kao najveći deo društva, pozvana da kroz kaznu izrazi društvenu osudu za konkretno krivično delo, pa se to mora uzeti u obzir, a u krajnjoj liniji i poštovati, čak i kada se ta javnost beskompromisno zalaže da se za pojedina krivična dela propiše, a po potrebi i izrekne kazna doživotnog zatvora, bez prava na uslovni otpust. Pri tome se mora imati u vidu da cilj kazne doživotnog zatvora bez prava na uslovni otpust, koji je propisan kod pojedinih krivičnih dela izmenama i dopunama iz decembra 2019. nije kazna sama za sebe, kako se to ponekad u literaturi predstavlja, nego

zaštita dece. Taj cilj se svakako uklapa u svrhu kazne koju Krivični zakonik vidi, između ostalog, i u sprečavanju učinioca da čini krivična dela (član 42 tačka 1 KZ). S tim u vezi, treba imati u vidu i činjenicu, koju borci za prava osuđenih često zaboravljaju, da velika prava za izvršioca krivičnog dela, mogu biti, a vrlo često i jesu, velika nepravda za oštećene.

Kada je reč o predlogu izmena Krivičnog zakonika, koji je usvojen na Ekspertskom sastanku održanom u Beogradu 25. septembra 2020, a koji se svodi na uvođenje mogućnosti da se osuđenom na kaznu doživotnog zatvora odobri uslovni otpust, treba reći da se time ne bi suštinski ništa promenilo. Naime, tada bi i dalje važila zabrana puštanja na uslovni otpust lica koja su osuđena na kaznu doživotnog zatvora za određena krivična dela, odnosno i dalje bi važila zabrana propisana u Zakonu o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima, koji je, kada je reč o ovim krivičnim delima, *lex specijalis* u odnosu na Krivični zakonik. Takođe, ideja usvojena na istom skupu, da se "izvrše izmene i dopune Zakonika o krivičnom postupku s ciljem uvođenja novog - posebnog vanrednog pravnog leka - zahteva za vanredno ublažavanje kazne", koji bi omogućio licima osuđenim na kaznu doživotnog zatvora da se eventualno puste na ulovni otpust, nije prihvatljiv, jer već postoji vanredni pravni lek, zahtev za ponavljanje krivičnog postupka (član 473 stav 1 tačka 6 ZKP), koji ima upravo takvu sadržinu.

Na ovom mestu treba reći i to da ideja koja polazi od teze da se učinioci krivičnih dela mogu popraviti, odnosno da bi ih trebalo pustiti na uslovni otpust iz "penoloških razloga", nije prihvatljiva kada je reč o licima koja su izvršila neko od krivičnih dela prema deci (licima mlađim od 14 godina), a pre svega krivična dela protiv polne slobode, jer ne postoji nikakva mogućnost da se to sa sigurnošću utvrdi. Naime, da li se neko ko je izvršio takvo krivično delo (toliko teško da mu je pravnosnažnom presudom izrečena doživotna kazna zatvora), možemo znati tek kada se takvo lice nađe na slobodi, odnosno kada bude bilo ponovo u kontaktu sa decom. Njegovo eventualno "dobro" ponašanje u zatvoru nije pokazatelj da se popravio i u odnosu na decu, jer u zatvoru nije ni bilo u kontaktu sa decom. Dakle, tek po izlasku na uslovni otpust može se saznati da li se takav osuđenik zaista popravio, a to dalje znači da je za to saznanje potrebno rizikovati bezbednost dece, a nema dovoljno valjanih argumenata da se takav svojevrsni socijalni eksperiment (sam po sebi opasan po decu) dopusti ili prihvati. Drugim rečima, puštanjem takvog osuđenika na uslovni otpust, tek kada on ponovo bude u kontaktu sa decom, znaćemo da li se zaista popravio, pa ako nije, cena tog i takvog eksperimenta je život najmanje jednog deteta. To je svakako prevelika cena, koju niko ne bi smeo da pristane da plati.

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LIFE IMPRISONMENT WITHOUT THE RIGHT TO PAROLE

The introductory part of the paper indicates dilemmas regarding life imprisonment punishment. Further it defines the concept of punishment and determines the purpose of punishment, stating the essential characteristics of life imprisonment punishment. The life imprisonment punishment for criminal offenses in which conditional release is not possible has been taken under special consideration, indicating the legislator's omissions, and offering suggestion, so that the observed omissions could be corrected. The legal institute of conditional release, the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the context of life imprisonment punishment, were discussed, followed by a critical review of the conclusions of the Expert Meeting held in Belgrade on September 25, 2020. An explanation has been given as to why it is not necessary to change the existing solution in our criminal legislation; with notice that even if the position derived from these conclusions should be accepted, that the existing legal solution ought to be changed, proposed implementation would not be acceptable, because the intent (which the author of this paper does not advocate for) would not be achieved by the proposals from that conclusions, as it is emphasized in this paper. Furthermore, the purpose of this paper is to find plausible arguments for the existing solution in our criminal legislation, meaning that for certain criminal offenses or the most serious forms of heinous crimes, offenders can be sentenced to life imprisonment without the right to parole. In addition, the objective is to specify that the conclusions of the Expert Meeting which was held in Belgrade on September 25, 2020, and especially the proposals attained from those conclusions are not admissible in relation to our criminal law.

Key words: *sentence, life imprisonment, parole, human rights, criminal law.*

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USLOVNI OTPUST KOD KAZNE DOŽIVOTNOG ZATVORA – KRITIČKO PREISPITIVANJE NOVIH NORMATIVNIH REŠENJA U SRPSKOM KRIVIČNOM ZAKONODAVSTVU–

Zakon o izmenama i dopunama Krivičnog zakonika Republike Srbije iz 2019. godine, koje su stupile na snagu 1. decembra iste godine, izmenio je sistem krivičnih sankcija i, umesto dugotrajne kazne zatvora od trideset do četrdeset godina, kao najstrožu kaznu predvideo kaznu doživotnog zatvora. Iako ova kazna ne predstavlja izuzetak u savremenom uporednom krivičnom zakonodavstvu, način njenog uvođenja izazvao je polemiku stručne javnosti i, istovremeno, zahtevao je izmenu i drugih odredaba materijalnog krivičnog prava kako bi bila omogućena njena primena. Među novim normativnim rešenjima koja se odnose na primenu kazne doživotnog zatvora mnoga se mogu smatrati spornim. Cilj ovog rada je da se primenom dogmatskog, normativnog i komparativnog metoda, kritički preispitaju zakonske novele u delu koje se odnose na kaznu doživotnog zatvora, kao i da se predlože rešenja kojima bi se ublažile posledice primene inoviranih i nekonzistentnih odredaba, posebno u odnosu na (ne)mogućnost primene instituta uslovnog otpusta prema licima kojima je izrečena kazna doživotnog zatvora.

Ključne riječi: kazna doživotnog zatvora, uslovni otpust, zabrana uslovnog otpuštanja

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1. Uvodna razmatranja

Izmenama i dopunama Krivičnog zakonika[1] iz 2019. godine u srpsko krivično zakonodavstvo uvedena je kazna doživotnog zatvora, kao najstroža kazna u sistemu krivičnih sankcija, uz istovremeno ukidanje dugotrajne kazne zatvora u trajanju od trideset do četrdeset godina. Ovim novelama potvrđen je kontinuitet višegodišnjeg procesa nekonzistentnih i prečestih izmena i dopuna krivičnog zakonodavstva (tzv. krivičnopravni ekspanzionizam) kojima se širi retributivni koncept kažnjavanja. U suštini, u pitanju je afirmacija neoklasičnog principa pravičnog, strogog i srazmernog kažnjavanja učinilaca, u literaturi označenog kao "just desert" (Hirsch, 1985: 29), koji prevaspitavanje i socijalnu reintegraciju prestupnika potiskuje u drugi plan, a kao primarni cilj i svrhu kažnjavanja reafirmiše "zasluženu" i pravičnu kaznu srazmernu težini izvršenog krivičnog dela (Grujić, 2019: 1110).

Kazna doživotnog zatvora ne predstavlja izuzetak u uporednom krivičnom pravu, naprotiv, predviđena je najvećem broju savremenih krivičnopravnih sistema. U uporednom zakonodavstvu predviđena je u sto osamdeset četiri države, dok samo trideset dve (ili geografske, teritorijalne, celine) ne poznaju ovu kaznu (Van Zyl Smit, Appleton, 2019: XII). Stoga, uvođenje kazne doživotnog zatvora u srpsko krivično zakonodavstvo sa komparativno-pravnog aspekta ne treba posmatrati kao rešenje koje se može smatrati neopravdanim ili izlišnim.

Međutim, postupak njenog uvođenja u sistem karakterisao je nedostatak javne rasprave o neophodnosti i opravdanosti uvođenja kazne doživotnog zatvora (slično onoj iz 2015. godine kada je predstavljen Nacrt zakona o izmenama i dopunama Krivičnog zakonika sa rešenjem koje je predviđalo uvođenje ove kazne), snažni uticaj porodica dece žrtava najtežih krivičnih dela (Грујић, 2020: 158, f. 11),[2] medijski kreirani punitivni stav opšte javnosti, kao i stvaranje moralne

1 "Službeni glasnik Republike Srbije" broj 85/2005, 88/2005 – ispr. 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

2 Javnost je bila zgrožena slučajevima: ubistva Tijane Jurić, petnaestogodišnje devojčice iz Subotice, koja je u noći između 25. i 26. jula 2014. godine, oteta, silovana i ubijena u Bajmoku, dok je bila u poseti svojoj babi i dedi. Njeno telo pronađeno je 7. avgusta, 12 dana nakon nestanka. Ubica je svojim autom prvo udario devojčicu, potom je oteo i ubacio u auto, silovao, potom zadavio a telo sakrio na improvizovanom smetlištu u blizini Sombora, 23 kilometara od mesta gde je oteta. Ubica Dragan Đurić, mesar iz Beograda, priznao je ubistvo i osuđen je na kaznu zatvora u trajanju od 40 godina; trogodišnje Anđeline Stefanović, devojčice iz sela Vratarnica kod Zaječara, koja je ubijena 9. jula 2016. godine, tako što je ubica Vladica Rajković, komšija porodice ubijene, devojčicu odveo sa proslave dečijeg rođendana u obližnju šumu i počeo da napastvuje. Kako su preneli mediji, prilikom silovanja devojčici su ispadali unutrašnji organi. Ubica je potom uzeo kamen i smrskao detetovu glavu, nakon čega se presvukao i vratio na proslavu rođendana. Uhvaćen je i osuđen na kaznu zatvora u trajanju od 40 godina. Pomenućemo i slučaj trogodišnje Katarine Janković koju je 17. jula 2005. godine silovao i tukao do smrti Mališa Jeftović, nevenčani partner devojčicine

panike (Игњатовић, 2018: 148). Ovi razlozi, ali i nemogućnost sagledavanja realnih efekata kazne od trideset do četrdeset godina zatvora pre njenog ukidanja i zamene kaznom doživotnog zatvora, dovodi do zaključka da se uvođenje kazne doživotnog zatvora u krivičnom zakonodavstvu Republike Srbije može smatrati regresivnim pristupom.

Ovakvo rešenje je, s jedne strane, zakasnelo jer kazna doživotnog zatvora nije uvedena prilikom konačnog aboliranja smrtne kazne u našem krivičnom zakonodavstvu 2002. godine,[3] kao ni prilikom usvajanja novog Krivičnog zakonika 2005. godine, ali, s druge strane, i, istovremeno, ishitreno, jer iznenadno uvođenje pokazuje populističku težnju zakonodavca da zadovolji porodice dece žrtava svirepih zločina koji su se dogodile prethodnih godina i opštu javnost, jer dosadašnje iskustvo ukazuje da je javnost uvek izražavala potrebu za što represivnijim kažnjavanjem (Stojanović, 2015: 7).

U literaturi se iznosi i stav da je malo intervencija u oblasti krivičnog prava izazvalo toliko sporova i kontroverzi kao usvajanje izmena i dopuna Krivičnog zakonika iz 2019. godine jer se reakcije nisu svele samo na potpisivanje peticija, kritičke tekstove i istupanja u medijima, nego je bilo i upozorenja međunarodnih subjekata da neka od rešenja koje su u Noveli sadržana ne odgovaraju onom što bismo mogli popularno nazvati ”evropski standardi kaznene reakcije” (Игњатовић, 2019: 119).

Poseban problem predstavljaju normativna rešenja koja se odnose na primenu instituta uslovnog otpusta kod kazne doživotnog zatvora, i to na nekoliko nivoa. Prvi problem odnosi se na nemogućnost uslovnog otpuštanja osuđenih na kaznu doživotnog zatvora za pet krivičnih dela - taksativno navedenih u zakonu. Dakle, uveden je modalitet kazne doživotnog zatvora bez mogućnosti uslovnog otpusta. Pri tome je nesporno da postoje druga krivična dela čija radnja izvršenja može obuhvatiti i neku od radnji kod pomenutih dela, ali i krivična dela koja se, prema svojoj prirodi ili načinu izvršenja, mogu smatrati težim krivičnim delima od navedenih (npr. genocid, zločin protiv čovečnosti), ali se zakonodavac odlučio da zabranu mogućnosti uslovnog otpuštanja osuđenih na kaznu doživotnog zatvora predvidi isključivo za ta krivična dela. Drugi problem tiče se vre-

majke Ane Filipović. Slučaj seksualnog iživljavanja, zverstva nad nemoćnim detetom i ubistvo (dete su mrtvo odneli u Klinički centar “Zvezdara” tvrdeći da je devojčica pala sa kreveta i povredila se) dogodio se u Zvezdarskoj šumi u Beogradu. Obdukcija je pokazala da je devojčica iskrvarila zbog rascepa jetre i povrede drugih unutrašnjih organa. Ubica je osuđen za krivično delo teško ubistvo izvršen na svirep način na kaznu zatvora od 40 godina, dok je devojčicina majka osuđena za pomaganje u izvršenju dela na 37 godina zatvora.

3 Smrtna kazna je abolirana prvo zakonodavnim aktivnostima na saveznom nivou 1993. godine, odnosno 2001. godine (kada je i zamenjena kaznom zatvora u trajanju od 40 godina), odnosno 2002. godine kada je ukinuta i kod preostalih krivičnih dela propisanih republičkim zakonom.

menskog perioda izdržane kazne zatvora nakon kojeg osuđeni može da pokrene postupak puštanja na uslovni otpust kod drugih krivičnih dela kod kojih je predviđena kazna doživotnog zatvora. Zakonodavac se odlučio za period od dvadeset sedam godina izdržane kazne, iako je u velikom broju uporednih zakonodavstava (i međunarodnim izvorima), ukoliko ne kraći, period izdržane kazne ne duži od dvadeset pet godina. Treći problem se tiče vremenskog trajanja uslovnog otpusta kod lica osuđenih na kaznu doživotnog zatvora. Naime, zakonodavac je, bez ikakvog smislenog obrazloženja ili logike, odlučio da uslovni otpust kod ove kategorije osuđenih lica traje petnaest godina. Osim temporalnog ograničenja, ne predviđaju se druge materijalne (ni procesne) odredbe na osnovu kojih bi se moglo zaključivati o daljem položaju i statusu uslovno otpuštenih lica osuđenih na kaznu doživotnog zatvora. Četvrti problem može predstavljati činjenica da se, prema članu 46. stav 1. Krivičnog zakonika, uslovno ne može otpustiti lice koje je za vreme izdržavanja kazne dva puta kažnjavano za teže disciplinske prestupe ili kome su oduzete dodeljene pogodnosti. Nedostatak motivacije kod osuđenog na kaznu doživotnog zatvora da poštuje pravila kućnog reda u zavodu, i izvesnost disciplinske odgovornosti, može biti odlučujuća činjenica za onemogućavanje primene instituta uslovnog otpuštanja, bez obzira na rokove za brisanje disciplinskih mera iz evidencije predviđene članom 175. stav 2. Zakona o izvršenju krivičnih sankcija.[4]

U najvećem broju država u kojima čini deo sistema kazni predviđa se mogućnost (ranijeg, prevremenog, ili) uslovnog otpusta lica osuđenih na kaznu doživotnog zatvora. Nesporno je da u uporednom pravu postoje i retki izuzeci od ovog pravila. Međutim, paradigma zaštite ljudskih prava, posebno zaštite prava lica lišenih slobode, kao i mehanizmi njihove zaštite (npr. jurisprudencija Evropskog suda za ljudska prava), ukazuju da mogućnost uslovnog otpusta lica osuđenih na kaznu doživotnog zatvora u nacionalnim zakonodavstvima već predstavlja ”uspostavljeni standard”.

Posmatrano sa penološkog aspekta, sprovođenje tretmana i postupanje sa osuđenima na kaznu doživotnog zatvora i ideja njihove resocijalizacije i socijalne reintegracije, u direktnoj je korelaciji sa postojanjem mogućnosti njihovog uslovnog otpuštanja osuđenog lica sa izdržavanja kazne. Zbog toga je propisivanje mogućnosti uslovnog otpuštanja osuđenih na kaznu doživotnog zatvora, kao stvaranje njima vidljivog ”puta ka slobodi” (eng. *path to release*), neophodna pretpostavka u postupku izvršenja kazne.

4 ”Službeni glasnik Republike Srbije” broj 55/2014 i 35/2019.

2. Kazna doživotnog zatvora u srpskom i uporednom krivičnom zakonodavstvu – normativna rešenja, modaliteti kazne i primena u praksi -

Kazna doživotnog zatvora predstavlja, prema svom sadržaju, kaznu eliminatornog karaktera jer se osuđeno lice lišava slobode (u penitencijarnoj ustanovi) za sve vreme trajanja njegovog života. Ona predstavlja ”odloženu smrtnu kaznu” ili ”smrtnu kaznu na rate”. Prema logici stvari, učinilac krivičnog dela se kažnjava srazmerno težini izvršenog krivičnog dela (zločina) i stepenu krivice, kaznom koja ga trajno isključuje (eliminiše) iz društva i koja se, u skladu sa principima pravednosti i srazmernosti, izvršava lišavanjem slobode osuđenog do kraja života, odnosno praktično „odlaže smrtnu kaznu vremenom koje osuđeni provede u zatvoru“ (Grujić, Blagić, Bojanić, 2019: 343).

Prema usvojenim legislativnim rešenjima u našem zakonodavstvu, kazna doživotnog zatvora se može izreći za najteža krivična dela i najteže oblike teških krivičnih dela, i to samo kao glavna kazna. Prema članu 44a KZ za najteža krivična dela i najteže oblike teških krivičnih dela može se, uz kaznu zatvora, izuzetno propisati i kazna doživotnog zatvora. Kazna doživotnog zatvora i kazna zatvora mogu izreći samo kao glavne kazne, ali se zakonodavac prilikom zakonskog regulisanja odlučio za rešenje kojim se kazna doživotnog zatvora propisuje samo uz vremenski određenu kaznu zatvora. Imajući u vidu da se kazna doživotnog zatvora ne odmerava, novo zakonsko rešenje predviđa da sud, u svakom konkretnom slučaju, ima mogućnost izbora - da odmerava i izriče vremenski određenu kaznu zatvora ili da odredi i izrekne kaznu doživotnog zatvora (Грујић, 2020: 161). Izuzetak od njenog izricanja predviđen je u stavovima 2. i 3. člana 44a Krivičnog zakonika, tj. ukoliko učinilac u vreme izvršenja krivičnog dela nije navršio dvadeset jednu godinu života, kao i u slučajevima kada zakon predviđa da se kazna može ublažiti ili kada postoji neki od osnova za oslobođenje od kazne.

Kazna doživotnog zatvora se može izreći i kod sticaja krivičnih dela ukoliko je za jedno od krivičnih dela predviđena najstroža kazna prema članu 60. stav 1. Krivičnog zakonika, kao i u slučaju da je sud za krivična dela utvrdio kaznu zatvora i maloletničkog zatvora, na osnovu stava 4. istog člana.

Prva (i za sada jedina) kazna doživotnog zatvora u Srbiji izrečena je 5. januara 2021. godine pred Višim sudom u Nišu optuženom Ninoslavu Jovanoviću, poznatijem pod nadimkom ”malčanski berberin”, za silovanje i otmicu deteta.[5]

5 Dostupno na: http://www.politika.rs/sr/clanak/470174/Malcanski-berberin-osuden-na-dozivotnu-kaznu-zatvora, pristup 1. mart 2021. godine.

Kazna doživotnog zatvora predviđena je u većini država u svetu, u nekom od dva osnovna modaliteta propisivanja. U uporednom zakonodavstvu postoje formalne (*de jure*) i neformalne (*de facto*) kazne doživotnog zatvora. U formalne, propisane zakonom, spadaju: kazna doživotnog zatvora bez mogućnosti prevremenog otpusta (eng. LWOP) - koja se ne može preispitivati (eng. *fully irreducible*), kazna doživotnog zatvora bez mogućnosti prevremenog otpusta (eng. LWOP) - koja praktično ne može preispitivati (eng. *practically irreducible*), kazna doživotnog zatvora sa mogućnošću prevremenog otpuštanja (eng. LWP) i simbolična kazna doživotnog zatvora. U neformalne kazne doživotnog zatvora spadaju: dugotrajne (vremenski određene) kazne zatvora čije trajanje prevazilazi period očekivanog životnog veka osuđenog (u koje spada kazne kojima smanjenje ne može biti razmatrano pre proteka roka od najmanje 35 godina) i vremenski neograničene mere zatvaranja lica nakon izdržane kazne zatvora - neodređeni preventivni pritvor nakon osude (Penal Reform International, 2016: 2), kao što su „*forvaring*" (eng. *secure custodial supervision*) u Norveškoj (Jacobsen, Hallgren-Sandvik, 2016: 176) ili „*sicherungsverwahrung*" (eng. *custody for the purpose of incapacitation*) iz § 66 StGB u Nemačkoj.

U najobimnijem istraživanju o kazni doživotnog zatvora iz 2019. godine, koji su sproveli profesor Dirk Van Zyl Smit i Chaterine Appleton između ostalog, navode podaci o načinu propisivanja kazne doživotnog zatvora na globalnom nivou. U istraživanju se navodi da od 216 država (ili teritorija) u svetu njih 184 ima propisanu kaznu doživotnog zatvora, dok samo u 32 ova kazna nije propisana nacionalnim zakonodavstvom (originalni broj od 183 objavljen je pre nego što je kazna uvedena u Republici Srbiji, prim. autora). Od tog broja 149 država (ili teritorija) faktički i primenjuje kaznu doživotnog zatvora, dok je u 51 od njih propisana i smrtna kazna (u kojima postoji moratorijum na izvršenje ili nije bilo izvršenja smrtne kazne u poslednjih 10 godina).

Doživotna kazna zatvora sa mogućnošću uslovnog opuštanja predstavlja najčešći modalitet ove kazne. U 144 od 183 u kojima je propisano postoje odredbe kojima je predviđena određena mogućnost otpuštanja osuđenog. U 65 država izriču se kazne doživotnog zatvora bez mogućnosti opuštanja (u jednom broju postoje oba modaliteta: sa ili bez mogućnosti uslovnog otpusta).

Podaci o broju osuđenih na kaznu doživotnog zatvora prikazani u istraživanju prikupljeni su u 2014. godini (u 2016. godini za teritoriju SAD) u 114 država u kojima se primenjuje kazna doživotnog zatvora pokazuju da se ukupno 304.814 lica nalazilo na izdržavanju formalnih kazni doživotnog zatvora. Imajući u vidu da podaci nisu prikupljeni za određeni broj država Azije (npr. Kina, Vijetnam,

Filipini), Bliskog Istoka i Afrike, u istraživanju se predstavlja procenjeni ukupan broj osuđenih na kaznu doživotnog zatvora u svetu na 479.000 u 2014. godini (Грујић, 2020, prema: Van Zyl Smit, Appleton, 2019: 87, 88). Prema podacima na svetu je u 2015. godini zatvorenička populaciju činilo 10.357.134 lica (Walmsley, 2019: 18). U poređenju sa procenjenim brojem osuđenih na kaznu doživotnog zatvora može se zaključiti da gotovo 4,62% zatvorske populacije na globalnom nivou predstavljaju osuđeni na doživotni zatvor (Grujić, Blagić, Bojanić, 2019: 343).

U nacionalnim statistikama najveći broj formalnih kazni doživotnog zatvora beleži se u SAD sa 161.957 osuđenih lica u 2016. godini (ukupan broj zatvorenih lica u SAD u 2016. godini iznos je 2.121.600). Taj broj pokazuje da je u SAD osuđeno više lica na kaznu doživotnog zatvora nego u preostalih 113 država iz kojih su prikupljeni podaci. To ne znači da se preko polovine osuđenika nalazi u SAD jer, ukoliko se uzme uzimajući u obzir procenjeni broj od 479.000 lica na izdržavanju kazne doživotnog zatvora, znači da se oko 34% svetske populacije osuđenih na kaznu doživotnog zatvora nalazi u SAD.[6]

U poređenju sa SAD, u državama Evrope bilo je ukupno 27.213 osuđenika na kaznu doživotnog zatvora u 2014. godini, uključujući Rusiju i Tursku čije se teritorije u velikoj meri geografski nalazi van Evrope. Kvota osuđenih lica na kaznu doživotnog zatvora (u odnosu na 100.000 građana) u 2016. godini u SAD iznosi 50,3 u SAD, odnosno „samo“ 3,3 u Evropi. Najveći broj osuđenih u Evropi zabeležen je u Ujedinjenom Kraljevstvu (8.661) i Turskoj (6.687), a taj broj čini 56% svih osuđenih na kaznu doživotnog zatvora u Evropi. Najveća kvota osuđenih na kaznu doživotnog zatvora zabeležena je u Ujedinjenom Kraljevstvu 13.4, Grčkoj 9.2 i Turskoj 8.6, a znatno manje u Francuskoj 0.7, Poljskoj 1.0, Rusiji 1.2, Nemačkoj 2,4 i Italiji 2.7. (Грујић, 2020, према Van Zyl Smit, Appleton, 2019: 93-94).

Savet Evrope je 2016. godine predstavio izveštaj u kome precizno prikazuje ukupan broj lica osuđenih na kaznu doživotnog zatvora. Tako je npr. u Albaniji bilo 159 osuđenih lica, u Belgiji 217, u Bugarskoj 175, u Finskoj 200, u Poljskoj 380, u Francuskoj 489, u Nemačkoj 1863, u Turskoj 7.303 (Aebi et. al, 2017: 87).

6 U Kaliforniji je u 2016. godini bilo 39.697 osuđenih na kaznu doživotnog zatvora, od čega je 5.090 izdato kazna bez mogućnosti uslovnog otpusta. Ukupan broj osuđenih u Kaliforniji bio je veći od broja prikupljenih za svaku pojedinačnu državu u svetu, osim Indije. Na Floridi je bilo 13.005 osuđenika od kojih je 8.919 izdržano kaznu doživotnog zatvora bez mogućnosti uslovnog otpusta. U državi Nju Jork zabeleženo je 9.535 osuđenih lica na doživotnom zatvoru, od čega je „samo“ 275 njih izdržavalo kaznu bez mogućnosti uslovnog otpusta.

3. Uslovni otpust kod kazne doživotnog zatvora – normativna rešenja u srpskom zakonodavstvu

Nastao kao oblik penološkog eksperimenta mornaričkog kapetana Machonochi-ja na ostrvu Norfolk 1840. godine (Игњатовић, 2018: 177), uslovni otpust je nakon nešto više od jedne decenije od pojave postao jedna od faza progresivnog sistema izvršenja kazne zatvora (u Engleskoj od 1853. godine, u Irskoj od naredne). Ideja progresije u postupku izvršenja kazne zatvora vrlo rano prihvaćena je i u Srbiji i poseban zakonski tekst o uslovnom otpustu usvojen je 1869. godine (Димовски, Поповић, 2018: 47). Ubrzo je uslovni otpust doživeo transformaciju od penološkog eksperimenta do značajnog instituta opšteg dela krivičnog prava.

U uporednom krivičnom pravu postoji više modaliteta uslovnog otpusta, često kritikovanih ili osporavanih u teoriji i nedovoljno primenjivanih u praksi. Gotovo u svim modelima uslovnog otpuštanja pretpostavke formalne prirode odnose se na deo kazne koji osuđena lica moraju izdržati pre uslovnog opuštanja, a materijalne pretpostavke se tiču kvaliteta vladanja osuđenika u toku izdržavanja kazne i na tome zasnovane procene o ispunjenosti svrhe kažnjavanja (Соковић, 2014: 39). Ipak, nesporno je da mogućnost ranijeg puštanja slobodu iz penitencijarne ustanove u slučajevima uspešne resocijalizacije predstavlja jedan od najsnažnijih motivacionih elemenata prihvatanja programa postupanja i ponašanja osuđenog u ustanovi za vreme izdržavanja kazne. Značaj postojanja mogućnosti uslovnog otpuštanja osuđenih (i) na kaznu doživotnog zatvora predstavlja civilizacijsko dostignuće, pravnu i deklarativnu potvrdu humanosti savremenih kaznenih sistema, posmatrano sa aspekta zaštite osnovnih ljudskih prava, i, istovremeno, penološku paradigmu kroz koju se može realizovati ideja resocijalizacije.

Normativno regulisanje instituta uslovnog otpusta u srpskom krivičnom zakonodavstvu karakterišu učestale izmene modaliteta i obima primene. Važeće odredbe Krivičnog zakonika koje se odnose na primenu instituta uslovnog otpusta kod osuđenih na kaznu doživotnog zatvora predviđaju da se rešenja koja se smatraju spornim.

Kao prvo, prema članu 45. stav 5. Krivičnog zakonika, ne postoji mogućnost uslovnog otpuštanja lica osuđenih na kaznu doživotnog zatvora za pet taksativno navedenih krivičnih dela: teško ubistvo (član 114. stav 1. tačka 9), silovanje (član 178. stav 4), obljuba nad nemoćnim licem (179. stav 3), obljuba sa detetom (član 180. stav 3) i obljuba zloupotrebom položaja (član 181. stav 5). Dakle, za navedene oblike krivičnih dela praktično postoji modalitet doživotnog zatvaranja bez mogućnosti uslovnog otpusta, što otvara pitanje usaglašenosti ovog rešenja sa brojnim međunarodnim dokumentima o zaštiti ljudskih prava

i pravima i položaju lica lišenih sloboda, ali, posebno, jurisprudencijom Evropskog suda za ljudska prava u vezi sa potencijalnim kršenjem člana 3. Evropske konvencije u ljudskim pravima (Grujić, 2019: 350-353).

Ovako određen krug krivičnih dela kvalifikovanih teškom posledicom – silovanje deteta ili nastupanje smrti deteta, bremenite žene ili lica u podređenom položaju predstavlja posledicu pritisaka članova porodica dece žrtava brutalnih zločina i inicijatora izmena zakona, medijski promovisanim stavovima o nepopravljivim seksualnim predatorima i potrebi njihove trajne eliminacije iz društva. Sporno rešenje predstavlja i klasifikacija krivičnih dela kod kojih je zabranjena mogućnost uslovnog otpuštanja osuđenih na kaznu doživotnog zatvora. Naime, postoji i čitav niz drugih najtežih krivičnih dela ili najtežih oblika teških krivičnih dela kao npr. drugi kvalifikovani oblici teškog ubistva iz čl. 114. KZ, ubistvo predstavnika najviših državni organa (čl. 310. KZ) ili teška dela protiv ustavnog uređenja i bezbednosti Srbiji (čl. 321. KZ) kod kojih postoji mogućnost uslovnog otpuštanja lica osuđenih na kaznu doživotnog zatvora ili, pak, krivičnih dela protiv čovečnosti i drugih dobara zaštićenih međunarodnim pravom npr. genocid (čl. 370. KZ) ili zločini protiv čovečnosti (čl. 371. KZ) kod kojih radnja izvršenja može da sadrži radnje krivičnih dela navedenih u članu 46. stav 5. pri čemu bi osuđena lica na kaznu doživotnog zatvora imala mogućnost uslovnog otpusta. Ovakvo rešenje ne može se smatrati ni u kom slučaju kriminalno-politički opravdanim, a sudska praksa će, zasigurno, pokazati sve praktične nedoslednosti ovakvog normativnog rešenja (Грујић, 2020: 164, 165).

Kao drugo, Krivični zakonik u članu 46. stav 2. predviđa fakultativni uslovni otpust za lica koja su osuđena na kaznu doživotnog zatvora, nakon izdržanih 27 godina zatvora i ukoliko ispunjavaju uslove koji su neophodni kod obaveznog uslovnog otpusta iz stava 1. istog člana. Naime, sud može osuđenog uslovno otpustiti sa izdržavanja kazne ukoliko se u toku izdržavanja tako popravio da se može sa osnovom očekivati da će se na slobodi dobro vladati, a posebno da do isteka vremena za koje je izrečena kazna ne učini novo krivično delo. Sud pri oceni da će se osuđeni uslovno otpustiti uzeti u obziru njegovo vladanje za vreme izdržavanja kazne, izvršavanje radnih obaveza, s obzirom na njegovu radnu sposobnost, kao i druge okolnosti koje ukazuju na osuđeni dok traje uslovni otpust neće izvršiti novo krivično delo. Postavlja se pitanje zbog čega se zakonodavac odlučio za period od 27 godina izdržane kazne zatvora pre mogućnosti uslovnog otpuštanja osuđenog na kaznu doživotnog zatvora i da li materijalni uslovi praktično mogu da predstavljaju realnu prepreku za ostvarivanje prava na podnošenje molbe za uslovni otpust. Iako postoje uporedni sistemi koji predviđaju vremenski period i „uspostavljaju“ standard od maksimalnih 25 godina izdržane

kazne, kao što je slučaj i sa Rimskim statutom Međunarodnog krivičnog suda, zakonodavac je, u stvarnosti, pribegao matematičkom modelu prilikom utvrđivanja formalnog uslova za uslovno otpuštanje. Jednostavno je utvrditi njegovu logiku tokom određivanja perioda. Naime, ako je kazna doživotnog zatvora stroža od kazne zatvora u trajanju od 40 godina, uslovi za uslovno otpuštanje bi morali biti stroži. Kod kazne zatvora u trajanju od 40 godina pravo na podnošenje molbe za uslovni otpust bi se sticao nakon izdržane 2/3 kazne, odnosno proteka perioda od 26 godina i 8 meseci izdržane kazne. Period od 27 godina kod doživotnog zatvora je za 4 meseca stroži u odnosu na maksimalni period kod kazne zatvora u trajanju od četrdeset godina.

Treći problem vezan za onemogućavanje uslovnog otpusta osuđenih na kaznu doživotnog zatvora predstavlja činjenica da sud, prema stavu 1. istog člana, ne može uslovno da pusti osuđenog koji je tokom izdržavanje kazne dva puta kažnjavan za teže disciplinske prestupe i kome su oduzete određene pogodnosti. Imajući u vidu eliminatorni karakter kazne doživotnog zatvora i penološka shvatanja o problemima lica osuđenih na dugotrajne kazne zatvora, teško je očekivati da se osuđeni period od 27 godina posveti tretmanu i programima resocijalizacije, prihvatajući i usvajajući vrednosti na osnovu kojih se može uključiti u život na slobodi, poštovanju pravila ponašanja i života u zatvorskoj ustanovi, naprotiv. Ograničenje koje se odnosi na izvršenje dva teža disciplinska prestupa ili oduzimanje dodeljenih pogodnosti, bez obzira na mogućnost brisanja disciplinskih mera iz evidencije, ovu kategoriju osuđenika praktično lišava mogućnosti ostvarivanja prava na uslovno otpuštanje (Grujić, 2019: 349, 350).

Moramo ukazati i na četvrto sporno rešenje predviđeno u stavu 7. člana 46. KZ, koje se odnosi na vremensko trajanje uslovnog otpusta za lica osuđena na kaznu doživotnog zatvora. Naime, zakonodavac je predvideo da uslovni otpust kod lica osuđenih na ovu kaznu traje petnaest godina. Takvo rešenje je nelogično i sporno. Naime, nejasno je zbog čega se zakonodavac odlučio za vremensko trajanje uslovnog otpusta kod ove kazne, suprotno odredbama koje se odnose na kaznu zatvora i kod koje ne postoji ograničenje u pogledu trajanja uslovnog otpusta. Pri tome, sporno je i to što odredbama zakona nije precizirano šta se dešava sa osuđenim licem nakon proteka roka od 15 godina na slobodi. Da li se nakon tog perioda ponovo upućuje na izdržavanje kazne ili se preispituje mogućnost novog uslovnog otpuštanja u periodu od 15 godina. U svakom slučaju, ne postoji propisana procedura po kojoj bi se ponovno odlučivalo o uslovnog otpustu nakon perioda od 15 godina na slobodi ili o statusu lica kome je istekao uslovni otpust (Грујић, 2020: 165, 166).

4. Zaključna razmatranja

Imajući u vidu prethodnu kritiku normativnih rešenja koja se odnose na (ne)mogućnost primene instituta uslovnog otpusta kod lica osuđenih na kaznu doživotnog zatvora, vremenski period izdržane kazne pre nego što lice osuđeno na kaznu doživotnog zatvora (za krivična dela kod kojih postoji mogućnost uslovnog otpuštanja) može da podnese molbu za uslovni otpust, kao i vremenski ograničeno trajanje uslovnog otpusta za lica osuđena na kaznu doživotnog zatvora, a bez predstavljanja relevantne sudske prakse Evropskog suda za ljudska prava po pitanju kršenja člana 3. Evropske konvencije u ljudskim pravima u odnosu na nemogućnost ranijeg ili uslovnog otpuštanja lica osuđenih na kaznu doživotnog zatvora zbog obima ovog rada, želeli smo da ukažemo na sledeće neophodne buduće izmene krivičnog zakonodavstva.

Postoji potreba da se izmenama Krivičnog zakonika Republike Srbije omogući pravo na podnošenje molbe za uslovni otpust svih lica osuđenih na kaznu doživotnog zatvora bez obzira na izvršeno krivično delo. Imajući u vidu da je ova kazna predviđena za najteža krivična dela i najteže oblike teških krivičnih dela, dolazimo do apsurdne situacije, nelogične, neodržive i suprotne principu jednakosti građana pred zakonom, da se, bez obzira na realan stepen društvene opasnosti najtežih krivičnih dela, uslovni otpust zabranjuje osuđenim licima na kaznu doživotnog zatvora samo u odnosu na određeno svojstvo žrtve ili tip krivičnog dela. Iako je praksa Evropskog suda za ljudska prava u određenom meri nekonzistentna po pitanju postojanja osnova za prevremeno, ranije ili uslovno otpuštanje osuđenih kojima je izrečena kazna doživotnog zatvora, nesumnjivo je da će trenutno važeće normativno rešenje biti osnov za pokretanje postupaka pred ovim sudom upravo zbog kršenja člana 3. Evropske konvencije o ljudskim pravima.

Izmena materijalnog krivičnog zakona u delu koji se odnosi na ukidanje nemogućnosti uslovnog otpuštanja osuđenih na kaznu doživotnog zatvora dovešće naše zakonodavstvo u red savremenih i humano orijentisanih sistema u kojima se omogućava zaštita osnovnih prava svih građana, uključuju i lica osuđena na kaznu doživotnog zatvora.

Omogućavanje prava da osuđeno lica podnese molbu za uslovni otpust nikako ne znači da će lice biti po automatizmu biti otpušteno sa izdržavanja kazne, naprotiv. Sud će, u svakom konkretnom slučaju, utvrđivati da li je, eventualno, ostvarena resocijalizacija osuđenog i da li se sa osnovom može očekivati da lice neće izvršiti novo krivično delo dok se nalazi na uslovnom otpustu. Ogromna je razlika između ukidanja prava na podnošenje molbe za uslovni otpust osuđenog lica na kaznu doživotnog zatvora i automatskog uslovnog otpusta nakon određenog broja godina izdržane kazne.

Ideje o tome da se izmenama krivično procesnog zakonodavstva omogući ranije otpuštanje osuđenih na kaznu doživotnog zatvora, kroz npr. uvođenje novih vanrednih pravnih lekova, nisu prihvatljive jer bi se njima zaobišla primena materijalno pravnih odredaba u odnosu na osuđene na kaznu doživotnog zatvora za krivična dela kod kojih ne postoji mogućnost uslovnog otpusta, čime bi se omogućilo arbitrarno odlučivanje u pojedinačnim slučajevima i time onemogućilo sistemsko rešenje ovog pitanja.

Prilikom budućih novela Krivičnog zakonika neophodno je razmotriti pitanje dela izdržane kazne nakon koje bi osuđena lica na kaznu doživotnog zatvora mogla da podnesu molbu za uslovno otpuštanje. U radu plediramo da rok, umesto sadašnjih dvadeset sedam godina, bude dvadeset pet godina što je u skladu sa rešenjima u najvećem broju savremenih krivičnih zakonodavstava, izvorima međunarodnog krivičnog prava i penološke prakse.

Kao poslednje, predlažemo da se ukine temporalni karakter uslovnog otpusta kod kazne doživotnog zatvora. Uslovni otpust ne treba vremenski ograničavati jer može biti opozvan u slučaju da lice na uslovnoj slobodi izvrši novo krivično delo. Vremensko ograničavanje trajanja uslovnog otpusta bez propisivanja postupka ili utvrđivanja statusa osuđenog lica nakon isteka tog roka predstavlja rešenje koje je u budućim novelama neophodno brisati iz Krivičnog zakonika.

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CONDITIONAL RELEASE ON SENTENCE OF LIFE IMPRISONMENT - CRITICAL REVIEW OF NEW NORMATIVE SOLUTIONS IN SERBIAN CRIMINAL LEGISLATION –

The amendments and supplements of the Criminal Code of 2019 introduced into Serbian criminal legislation a life imprisonment as the most severe sentence in the criminal sanctions system. These novelties confirm the continuity of a multi-year process of (inconsistent) changes in criminal legislation that tightens the legislature's criminal policy, broadens the limits of criminal repression, supplements the purpose of punishment, narrows the possibility of mitigating the punishment, in other words, continues to expand the retributive concept of punishing. The introduction of the life imprisonment required the amendments of several other provisions of the Criminal Code, including those relating to the purpose of punishment, impossibility of conditional release of persons sentenced to this life imprisonment, as well as the duration limit on conditional release. In most states where it forms part of the sentence system the possibility of (early, or) conditional release of prisoners is provided. It is indisputable that there are also rare exceptions to this rule. However, the paradigm of human rights protection, in particular the protection of the rights of persons deprived of their liberty, as well as the mechanisms for their protection (e.g. the jurisprudence of the ECHR), indicate that the possibility of conditional release of persons sentenced to life imprisonment in national legislations already represents an "established standard". From a penological point of view, the implementation of treatment and treating of the prisoners sentenced to life imprisonment and the idea of their resocialization and social reintegration, is directly correlated with the possibility of their conditional release. Therefore, prescribing the possibility of conditional release of prisoners sentenced to life imprisonment, as visible to them "a path to release", is a necessary prerequisite for the execution of the sentence.

Keywords: *life imprisonment, conditional release, prohibition of conditional release*

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KAZNA DOŽIVOTNOG ZATVORA U EVROPSKOM SISTEMU ZA ZAŠTITU LJUDSKIH PRAVA

Izricanje kazne doživotnog zatvora nije u suprotnosti sa ljudskim pravima popisanim Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda. Međutim, izrečena kazna doživotnog zatvora i sistem njenog provođenja moraju ispunjavati određene standarde da bi bili kompatibilni sa zahtjevima iz člana 3. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. Predmet našeg istraživanja jesu upravo navedeni standardi koje države ugovornice imaju poštovati u pogledu provođenja kazne doživotnog zatvora. Uvod u predmet istraživanja dat je u obliku penološkog osvrta na kaznu doživotnog zatvora kao i prikaza međunarodnopravnih standarda uspostavljenih pod okriljem Ujedinjenih Nacija i Vijeća Evrope koji se odnose na izricanje i provođenje kazne doživotnog zatvora. Centralni dio rada predstavlja istraživanje sudske prakse Evropskog suda za ljudska prava, koja se odnosi na kaznu doživotnog zatvora. U tom kontekstu, centralni dio rada tretira pitanje odnosa kazne doživotnog zatvora i apsolutno zaštićenog ljudskog prava na zabranu

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mučenja te pitanje slobodnog polja procjene država članica Vijeća Evrope kod propisivanja mehanizma revizije kazne doživotnog zatvora. Namjera autora usmjerena je u pravcu analize strasburške sudske prakse u pitanjima kompatibilnosti kazne doživotnog zatvora sa zahtjevima iz člana 3. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda te prikaz standarda koje je iznjedrila strasburška sudska praksa u pogledu provođenja i mehanizma revizije kazne doživotnog zatvora.

Ključne reči: kazna doživotnog zatvora, revizija kazne, slobodno polje procjene, zabrana mučenja.

1. Penološki osvrt na kaznu doživotnog zatvora

Kazna lišenja slobode prošla je dug evolutivni put od ideje retribucije i osvete do ideje resocijalizacije i reintegracije delinkventa u društvo. Okretanje kormila ka savremenom shvatanju penitensijarnog sistema imalo je za posljedicu kreiranje moderne penološke misli u čijem se centru nalazi ideja rehabilitacije osuđenih osoba. Učenje osuđenika društveno prihvatljivom ponašanju, kroz metode proučavanja ličnosti osuđenih osoba i klasifikacije lica, ima za cilj izgraditi stvaranje društvene odgovornosti kod osuđene osobe kako bi se reintegrisale u društvo kao njegov koristan član.[1] Jedna od posljedica navedenih filozofskih ideja modernog penitensijarnog sistema jeste ukidanje smrtne kazne iz sistema krivičnih sankcija.

Potaknute navedenim idejama sociološko-penološkog humanizma mnoge države svijeta ukinule su smrtnu kaznu nakon čega je ostalo otvoreno pitanje na koji način država može zaštititi društvo od od najtežih krivičnih djela. Odgovor na ovo pitanje za većinu savremenih krivičnih zakonodavstava bio je uvođenje kazne doživotnog zatvora (Petrović, Jovašević, 2006: 45.). Smatra se da se kaznom doživotnog zatvora može postići zaštita društvenih vrijednosti od najopasnijih počinitelja krivičnih djela (Ibid, 45). S druge strane, kazna doživotnog zatvora, posebice bez propisanog mehanizma revizije, daje jako niske ili skoro nikakve mogućnosti za ostvarivanje specijalne prevencije budući da osuđenik u tom slučaju nema nikakav motiv koji bi ga podsticao na resocijalizaciju i popravljanje.

Savremene ideje ljudskih prava apostrofirale su isticanje vrijednosti dostojanstva svakog čovjeka, te nastoje standard ljudskog dostajanstva involvirati u savremenu filozofiju penitensijarnog sistema. U tom kontekstu, međunarodno pravo

1 Izučavanje ličnosti osuđene osobe kao i klasifikacija osuđenih lica u kazneno-popravnim ustanovama predstavljaju jedne od glavnih mehanizama putem kojih se nastoje ostvariti načela penitensijarne individualizacije. Vidi više u: Mlađenović-Kupčević, 1972: 133-145.

ljudskih prava iznjedrilo je brojne principe i standarde koje bi nacionalna zakonodavstva trebala inkorporirati u svoj penitensijarni sistem u cilju zaštite i poštovanja ljudskog dostojanstva svake osuđene i pritvorene osobe.

2. Međunarodno pravo ljudskih prava i kazna doživotnog zatvora

2.1. Standardi uspostavljeni pod okriljem Ujedinjenih Nacija

Konceptualno, ljudska prava[2] predstavljaju inherentna prava koja imaju svi ljudi na temelju činjenice da su ljudi. Ta prava proizlaze iz liberalnog stava da je čovjek autonomno i racionalno biće, koje svojim rođenjem u zajednici dobija određena prava koja mu se ne mogu oduzeti (Dimitrijević et al, 2007: 38). Koncept ljudskih prava ne proizlazi iz pozitivnog zakona već iz moralnog porijekla, drugim riječima - „koncept ljudskih prava počiva na etici i moralu" (Shaw, 2008: 266). Temelji se na ideji da sva ljudska bića uživaju ljudska prava bez obzira na rasu, kožu, boju kože, spol, naciju, vjeru ili druge ljudske razlike. U skladu s tim, ljudska su prava univerzalna i podjednako se primjenjuju na sve ljude bez diskriminacije.[3]

Period 19. i 20. stoljeća predstavlja eru realizacije ideja o ljudskim pravima, koja je uveliko potaknuta ekonomskim i socijalnim prilikama tada u svijetu. Vođene navedenim idejama, Ujedinjene Nacije (u daljem tekstu: UN) su prva međunarodna organizacija koja je formalno proklamovala ljudska prava usvojivši Univerzalnu deklaraciju o ljudskim pravima iz 1948. godine. [4] Iako se član 5. Univerzalne deklaracije o ljudskim pravima, koji normira zabranu mučenja, nečovječnog postupanja i kažnjavanja, ne odnosi *explicite* na osuđene i pritvorene osobe, on je bio polazna osnova za dalje normiranje prava osuđenih i pritvorenih osoba pod okriljem UN.

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2 U literaturi postoji mnogo definicija ljudskih prava. Tako naprimjer, u Enciklopediji Međunarodnog prava iz 1995. godina ljudska prava definišu se kao: *„slobode, imuniteti i beneficije koje bi prema prihvaćenim savremenim vrijednostima koje bi sva ljudska bića trebala imati po pravu društva u kojem žive.*" Vidi: Enciklopedija Međunarodnog prava, 1995: 342.
Nadalje, Rebecca Wallace and Olga Martin- Ortega u svojoj knjizi „Međunarodno pravo" ljudska prava definišu kao „*fundamentalna, neotuđiva i esencijalna prava nastala iz potrebe da se zaštite pojedinci od državnog autoriteta*". Vidi: Wallace, Martin-Ortega, 2016: 242.
Filozof Alan Gewirth smatra da kao ljudi imamo „*ljudska prava na one stvari koje su neophodne da bismo djelovali kaomoralni djelatnic*i". Vidi: Gewirth, 1984: 56.

3 O konceptu jednakosti ljudi i zabrani diskriminacije vidi više u: Dimitrijević et al, 2007: 110-126.

4 Univerzalna deklaracija o ljudskim pravima, proklamovana od strane Generalne skupštine UN u Parizu, 10.12.1948, Rezolucija Generalne skupštine 217 A.

Tako, 1966. godine UN usvaja Međunarodni pakt o građanskim i političkim pravima (u daljem tekstu: MPGPP)[5], koji pored opće zabrane mučenja iz člana 7., u članu 10. normira i obavezu čovječnog postupanja sa osobama lišenim slobode kao i obavezu poštovanja ljudskog dostojanstva svake osobe lišene slobode. Ono što posebno valja naglasiti jeste da MPGPP u istoj odredbi nameće obavezu državama da svoje penitesijarne sisteme grade na principima društvene rehabilitacije osuđenih osoba.[6] U cilju osiguranja primjene MPGPP osnovan je Odbor za ljudska prava kao tijelo zaduženo za praćene aktivnosti država kako bi se osigurao visok stepen primjene navedenih standarda.

Prava osuđenih i pritvorenih osoba, pod okriljem UN, kodifikovana su 1955. godine donošenjem Standardnih minimalnih pravila za postupanje sa zatvorenicima koja su revidirana 2016. godine, tzv. „Pravila Nelson Mendele" (u daljem tekstu: Mendelina pravila).[7] Svrha Mendelinih pravila je postavljanje „općeprihvaćenih dobrih načela i prakse u postupanju sa zatvorenicima i upravljanju zatvorima"[8] koji počivaju na standardima poštovanja ljudskog dostojanstva i zabranje mučenja, neljudskog ili ponižavajućeg postupanja i kažnjavanja.[9]

Pored navedenog, UN je kontinuirano radio na unapređivanju položaja osuđenih osoba donošenjem mnoštva međunarodnorodnopravnih akata koja tretiraju pitanja organizacije penitensijarnog sistema i postupanja sa zatvorenicima.[10] Ono što je posebno važno spomenuti u ovom kontekstu jeste Konvencija protiv mučenja i drugih okrutnih, neljudskih ili ponižavajućih postupaka ili kažnjavanja iz 1984. godine[11] i Fakultativni protokol uz ovu Konvenciju iz 2002.

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5 Međunarodni pakt o građanskim i pokitičkim pravima, Generalna skupština UN, donešen Rezolucijom 2200 A(XXI) 16.12.1966. godine, stupio na snagu 23.3.1976. godine, Serija Ugovora Vol. 999, str. 171.

6 Član 10. stav 3. MPGPP: „Kazneno-popravni režim podrazumijevat će takvo postupanje s osuđenicima čiji je bitan cilj njihovo prevaspitavanje i ponovno uključenje u društvo. Maloljetni prijestupnici biti će odvojeni od odraslih i podvrgnuti režimu koji odgovara njihovom dobu i njihovom pravnom položaju."

7 Standardna minimalna pravila Ujedinjenih nacija za postupanje sa zatvorenicima (Mendelina pravila), Ujedinjene nacije, A/RES/70/175, usvojena 8.1.2016. godine.

8 Standardna minimalna pravila Ujedinjenih nacija za postupanje sa zatvorenicima (Mendelina pravila), Uvodna napomena 1.

9 Mendelina pravila, Pravilo 1.

10 Npr vidi: Skup načela za zaštitu svih osoba u bilo kojem obliku pritvora ili zatvora, Generalna skupština UN, usvojeni 9.12.1988. godine, A/RES/43/173; Temeljna načela za postupanje sa zatvorenicima, Generalna skupština UN, usvojena 28.3.1991. godine, A/RES/45/111; Načela medicinske etike za zdravstveno osoblje, posebno liječnike za zaštitu zatvorenika i pritvorenika protiv mučenja i ostalih nehumanih ili ponižavajućih kažnjavanja i postupanja, Generalna skupština UN, Rezolucija 37/194, usvojena 18.12.1982. godine.

11 Konvencija protiv mučenja i drugih okrutnih, neljudskih ili ponižavajućih postupaka ili kažnjavanja, Generalna skupština UN, usvojena 10.12.1984. godine, stupila na snagu 26.6.1987. godine, Serija Ugovora, Vol. 1465, 85.

godine.[12] Navedena Konvencija predstavlja pravnobavezujući međunarodnopravni akt na svjetskom nivou koji je posvećen pitanjima zabrane torture.

2.2. Standardi uspostavljeni pod okriljem Vijeća Evrope

„Evropa je bez sumnje trenutno predvodnik u postavljanju standarda u svijetu", navodi se u Priručniku za zatvorske službenike izdatom od strane Vijeća Evrope (Murdoch, Jiricka, 2016: 10). Vijeće Evrope, kao regionalna međunarodna organizacija, već dugi niz godina aktivno radi na uspostavljanju načela sociološko-penološkog humanizma, udarajući jake temelje principu poštovanja ljudskog dostojanstva u svim sferama penitensijarnog sistema. Navedene napore Vijeće Evrope, najprije, ostvaruje putem Evropske konvencije za zaštitu ljudskih prava (u daljem tekstu: EKLJP)[13] i Evropskog suda za ljudska prava (u daljem tekstu: ESLJP). Drugi blok zaštite prava zatvorenika predstavljaju Evropska konvencija o sprječavanju mučenja i neljudskog ili ponižavajućeg postupanja i kažnjavanja[14] i Evropski odbor za sprječavanje mučenja i neljudskog ili ponižavajućeg postupanja ili kažnjavanja (u daljem tekstu: CPT). Upoređujući navedene stubove zaštite, treba istaknuti da je ESLJP institucija koja predstavlja konačnu instancu u sistemu zaštite ljudskih prava u Evropi, dok CTP predstavlja proaktivno tijelo koje ima za cilj zaštitu ljudskih prava kroz metodu monitoringa na licu mjesta, dajući preporuke državama članicama o unapređenju ljduskih prava unutar specifične sfere (Ibid, 10-12).

Potom, u navedenom sistemu zaštite svakako treba spomenuti i Komitet ministara Vijeća Evrope koji ima veoma bitnu ulogu u praćenju izvršavanja obaveza koje je ESLJP u svojim presudama naložio državama članicama. Veliki doprinos razvoju prava osoba lišenih slobode ovaj Komitet dao je donošenjem Evropskih zatvorskih pravila[15], koja počivaju na načelima poštovanja ljudskih prava osoba lišenih slobode i njihove reintegracije u društvo.[16] Ne smije se zaboraviti ni uloga Komesara za Vijeće Evrope koji ima opću nadležnost proklamovanja ljudskih prava i podizanja svijesti o važnosti poštovanja istih kroz svoje preporuke i mišljenja.

Kazna doživotnog zatvora uvedena je u krivično zakonodavstvo evropskih zemalja nakon ratifikacije Protokola 6 uz EKLJP kojim se ukinula smrtna kazna.

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12 Fakultativni protokol uz Konvenciju protiv mučenja i drugih okrutnih, neljudskih ili ponižavajućih postupaka ili kažnjavanja, Generalna skupština UN, donešen 9.1.1993. godine, stupio na snagu 22.6.2006. godine, A/RES/57/199.

13 Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, Vijeće Evrope, stupila na snagu 4.11.1950. godine, ETS 5.

14 Evropska konvencija o sprječavanju mučenja i neljudskog ili ponižavajućeg postupanja i kažnjavanja, Vijeće Evrope, stupila na snagu 1.2.1989. godine, ETS126.

15 Evropska zatvorska pravila, Komitet ministara Vijeća Evrope, 11.1.2006. godine, Rec (2006)2.

16 I dio, Temeljna načela, Evropska zatvorska pravila.

Većina država odlučila je smrtnu kaznu zamijeniti kaznom doživotnog zatvora, smatrajući da je to adekvatna sankcija za počinitelje najtežih krivičnih djela. Od tada pa do danas ESLJP je u svojoj bogatoj sudskoj praksi razvio određene standarde sociološko-penološkog humanizma u kontekstu kazne doživotog zatvora.

3. Sudska praksa ESLJP i kazna doživotnog zatvora

Generalno posmatrano, među državama članicama Vijeća Evrope ne postoji jedan općeprihvaćen obrazac u vezi sa provođenjem kazne doživotnog zatvora i propisivanjem uslova za preispitivanje opravdanosti izvršavanja kazne doživotog zatvora nakon proteka određenog roka. U tom kontekstu, države članice Vijeća Evrope imaju slobodno polje procjene prilikom odlučivanja o dužini zatvorskih kazni, njihovom provođenju i propisivanju uslova smanjivosti navedene kazne, sve u cilju pravovremene zaštite društva od kriminaliteta. Međutim, generalni stav institucija Vijeća Evrope jeste da evropska kaznena politika treba da akcenat stavi na rehabilitacijsku svrhu zatvora.[17]

U pogledu kazne doživotnog zatvora, prava iz EKLJP se „aktiviraju“ u slučajevima kada nacionalno zakonodavstvo ne poznaje niti jednu mjeru putem koje je moguće, nakon proteka određenog vremena, preispitati daljnju opravdanost izvršenja kazne doživotnog zatvora, odnosno kada ne postoji ni nada da bi osuđenik nekada, ispunjenjem određenih uvjeta, mogao ponovo biti slobodan. U tom pogledu, u nastavku rada problematizirat ćemo dva pitanja: kada je kazna doživotnog zatvora suprotna standardima zabrane mučenja, neljudskog ili ponižavajućeg postupanja i kažnjavanja iz člana 3. EKLJP i koliko je zapravo široko slobodne polje procjene država članica Vijeća Evrope kod ispitivanja opravdanosti daljnjeg izvršenja kazne doživotnog zatvora?

3.1. Kazna doživotnog zatvora versus zabrana mučenja, neljudskog ili ponižavajućeg postupanja ili kažnjavanja

Zabrana mučenja je *ius cogens* norma međunarodnog prava[18] i apsolutno ljudsko pravo koje je u evropsko-kontinentalnom sistemu za zaštitu ljudskih pra-

17 To je, između ostalog, stav i ESLJP iznešen u predmetu Vinter et al. protiv Ujedinjenog Kraljevstva, App. No 66069/09, 130/10 i 3896/10, presuda od 9.7.2013. godina, para 110-123.

18 Međunarodni sud pravde je u predmetu Belgija protiv Senegala iz 2012. godine, zauzeo stav da zabrana mučenja spada u peremptorne norme međunarodnog prava, odnosno da predstavlja jus cogens normu. Takav status, prema *ius cogens* Međunarodnog suda pravde, te da takav zaključak proizilazi iz bogate međunarodne prakse i *opinio juris* država u međunarodnoj zajednici. Vidi: Međunarodni sud pravde, Pitanja koja se odnose na obavezu procesuiranja ili ekstradicije, Belgija protiv Senegala, presuda od 20.07.2012. godine, para 99. Kada govorimo o definiciji *ius cogens* norme, potrebno je pogledati odredbu člana 53. Bečke konvencije o pravu međunarodnih ugovora

va zagarantovano članom 3. EKLJP.[19] Filozofija društvenog popravljanja, koja je zvijezda vodilja moderne evropske penitensijarne politike, i ljudsko dostojanstvo koje se nalazi u samom središtu vrijednosti koje zagovara EKLJP su suprotni filozofiji kazne doživotnog zatvora bez bilo kakve mogućnosti umanjivanja te kazne. Stoga, osnovno pitanje koje se postavlja kada se ispituje povreda člana 3. EKLJP u kontekstu kazne doživotnog zatvora jeste: „Ima li ikakve nade da zatvorenik jednog dana, uz ispunjenje određenih uvjeta, bude pušten na slobodu?" Ukoliko nacionalno pravo ne poznaje niti jedan sistem revizije ili mogućnost preispitivanja kazne doživotnog zatvora, u tom slučaju biće povrijeđen član 3. EKLJP. (*Vinter et al protiv Ujedinjenog Kraljevstva*, para 122).

Sociološko-penološki humanizam i orijentiranost ka ličnosti osuđene osobe zapravo stoje na stanovištu da penološki razlozi za izricanje kazne doživotnog zatvora nisu statični, što je i ESLJP istakao u predmetu *Vinter i ostali protiv Ujedinjenog Kraljevstva* rekavši da se *„ravnoteža između tih zahtjeva može mijenjati u toku kazne*" (*Vinter et al protiv Ujedinjenog Kraljevstva*, para 111).[20]

Ovdje je potrebno naglasiti da će kazna doživotnog zatvora ispunjavati uslove iz člana 3. EKLJP ukoliko se ona u praksi, ipak, izdrži u potpunosti. U predmetu *Laszlo Magyar protiv Mađarske*[21] ESLJP naglasio je da „*činjenica da bi kazna doživotnog zatvora mogla u potpunosti biti izdržana nije u suprotnosti sa članom 3. EKLJP*." (*Laszlo Magyar protiv Mađarske*, para 49.). Suštinski posmatrano, da bi kazna doživotnog zatvora ispunjavala standarde iz člana 3. EKLJP ona mora biti *de jure* i *de facto* smanjiva[22], međutim preispitivanje iste ne mora nužno dovesti do oslobađanja zatvorenika.[23]

Ovdje je također važno naglasiti dva bitna momenta – vremenski period u kome doživotni osuđenik ima pravo znati koje uslove mora ispuniti da bi se jednog dana mogao pustiti na slobodu i vremenski period koji mora proći da bi

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koji definiše *jus cogens* normu kao normu „*što ju je prihvatila i priznala čitava međunarodna zajednica država kao normu od koje nije dopušteno nikakvo odstupanje i koja se može izmijeniti samo novom normom općega međunarodnog prava iste prirode."* Ujedinjene Nacije, Bečka konvencija o pravu međunarodnih ugovora, 23.05.1969. godine, Serija Ugovora, Broj 1155, 331.

19 Također, propisano je Konvencijom o zabrani mučenja i drugog okrutnog, neljudskog ili ponižavajućeg postupanja ili kažnjavanja iz 1984. godine potom Univerzalnom deklaracijom o ljudskim pravima iz 1948. godine, Međunarodnim paktom o građanskim i političkim pravima iz 1966. godine te Ženevskom konvencijom o zaštiti žrtava rata iz 1949. godine.

20 ESLJP je u pomenutom predmetu istakao da kazna doživotnog zatvora s vremenom postaje sve veća, ukoliko ne postoji mehanizam preispitivanja ili ublažavanja iste. Drugim riječima, što zatvorenik duže živi, duža mu je kazna. (*Vinter et al protiv Ujedinjenog Kraljevstva*, para 112)

21 *Laszlo Magyar protiv Mađarske*, App. No 73593/10, presuda od 20.5.2014. godine.

22 Između ostalih vidi presudu *Kafkaris protiv Kipra*, App No. *21906/04, presuda od 12.2.2008. godine,* para 98.

23 Ovaj stav potvrđen je u predmetu *Torkloy protiv Mađarsk*e, App. No. 4413/06, presuda od 5.4.2011.

doživotni zatvorenik mogao tražiti reviziju kazne. Ukoliko nacionalno zakonodavstvo ne garantuje niti jedan mehanizam revizije kazne doživotnog zatvora, takva kazna doživotnog zatvora nije kompatibilna sa zahtjevima iz člana 3. EKLJP i njena nekompatibilnost nastaje već u momentu izricanja takve kazne.[24] Dakle, osuđena osoba ima pravo u momentu izricanja kazne doživotnog zatvora znati koje uslove mora ispuniti da bi se jednog dana mogla pustiti na slobodu.

U pogledu minimalnog perioda koja bi trebao proći do podnošenja zahtjeva za reviziju kazne, ESLJP je u pomenutom predmetu *Vinter et al protiv Ujedinjenog Kraljevstva* istaknuo da bi to trebalo biti najkasnije 25 godina nakon izrečene kazne.[25] Stoga, doživotni zatvorenik ima pravo da u momentu izricanja kazne doživotnog zatvora zna koji su uslovi za smanjenje kazne odnosno uslovnog otpusta i kad bi se trebalo izvršiti preispitivanje kazne odnosno kad bi mogao podnijeti zahtjev za preispitivanje.

3.2. Slobodno polje procjene država članica Vijeća Evrope kod propisivanja mehanizma revizije kazne doživotne kazne – Kome povjeriti preispitivanje?

Mehanizam revizije odnosno politika prijevremenog otpusta osuđenika na kaznu doživotnog zatvora nalazi se u rukama državnog aparata i, u pravilu, izvan opsega nadzora koji provodi ESLJP. Država ima slobodno polje procjene (manevarski prostor) da legislativno uredi sistem revizije kazne doživotnog zatvora.[26] U okvire slobodnog polja procjene spada i propisivanje oblika mehanizma revizije, dakle država je slobodna da odredi da li će to biti sudski, upravni ili izvršni oblik preispitivanja kazne doživotnog zatvora. (*Torkoly protiv Mađarske*, para 2).[27] Da bi bio u skladu sa zahtjevima iz člana 3. EKLJP, mehanizam revizije kazne mora biti legislativno propisan na jasan i nedvosmislen način, počivati na legitimim penološkim osnovama i u praksi biti djelotvoran.

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24 *Vinter et al protiv Ujedinjenog Kraljevstva*, para. 122.

25 *Vinter et al protiv Ujedinjenog Kraljevstva*, para 68 i dalje.

26 Vidi predmet *Kafkaris protiv Kipra,* para 104.

27 „Tamo gdje nacionalno zakonodavstvo pruža mogućnost preispitivanja kazne doživotnog zatvora s ciljem njenog ublažavanja, otpusta, ukidanja ili uslovnog otpuštanja zatvorenika, bez obzira na nesudski karakter postupaka koje treba slijediti, to će biti dovoljno da ispuni zahtjeve iz člana 3.“ *Torkoly protiv Mađarske*, App. No 4413/06, presuda od 5.4.2011. godine, para 2.

U predmetima *Petukhov protiv Ukrajine*[28] i *Matiošaitis et al protiv Litvanije*[29] postavilo se pitanje da li predsjedničko pomilovanje koje je bilo jedina mogućnost revizije kazne u tim državama ispunjava zahtjeve iz člana 3.EKLJP. Generalno posmatrano, predsjedničko pomilovanje kao oblik revizije kazne *per se* ispunjava uslove iz člana 3. EKLJP, međutim sama procedura revizije u okviru predsjedničkog pomilovanja mora biti decidno propisana, lišena proizvoljnosti, sa jasnim uslovima koje osuđenik mora ispuniti kako bi dobio pomilovanje. U konačnici, predsjedničko pomilovanje mora počivati na legitimnim penološkim osnovama u koje ne potpadaju slučajevi puštanja na slobodu iz humanih i suosjećajnih razloga. (*Matiošaitis et al protiv Litvanije*, para 132.)

Da bi bilo u skladu sa zahtjevima iz člana 3. EKLJP, predsjedničko pomilovanje mora počivati na proceduri u okviru koje se procjenjuje da li je daljnje zatvaranje osuđenika opravdano legitimnim penološkim osnovama te na temelju takve analize mora biti obrazloženo. U takvom sistemu, prema riječima ESLJP iznesenim u gore predmetu *Laszlo Magyar protiv Mađarske*, osuđenik mora moći predvidjeti šta mora učiniti da bi se razmotrilo njegovo puštanje na slobodu. (Laszlo *Magyar protiv Mađarske*, para 53.) S tim u vezi neophodno je da sam sistem revizije putem predsjedničkog pomilovanja bude razumljiv i transparentan. U pomenutom predmetu *Petukhov protiv Ukrajine* jedini mogući sistem revizije kazne bio je predsjedničko pomilovanje koje je propisivalo da za teška krivična djela lica mogu biti pomilovana samo u slučaju postojanja „izvanrednih okolnosti“ koja nisu bila definisana u samoj proceduri. Ovakav mehanizam revizije kazne ESLJP ocijenio je kao nekompatibilan sa članom 3. EKLJP jer nije jasno i razumljivo šta se podrazumijeva pod navedenim standardnom i koji su to penološki razlozi koje izvršna vlast uzima u obzir prilikom revizije kazne doživotnog zatvora.(*Petukhov protiv Ukrajine,* para 173.)

Ovdje je bitno napomenuti da prilikom razmatranja da li predsjedničko pomilovanje ispunjava zahtjeve iz člana 3. EKLJP, ESLJP uzima u obzir i druge faktore kao što su statistika o broju datih pomilovanja i postojanje dovoljno procesnih garancija u toku postupka ispitivanja zahtjeva za pomilovanje.[30]

Shodno prethodnoj analizi, uočavamo da strasburška praksa podržava kako sudski tako i izvršni mehanizam revizije kazne doživotnog zatvora, stavljajući

28 *Petukhov protiv Ukrajine*, App no. 43374/02, presuda od 21.10.2010. godine

29 *Matiošaitis et al protiv Litvanije*, App. No, *22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, presuda od 23.8.2017. godine.*

30 U tom kontekstu predsjedničko pomilovanje ne smije biti samo izraz samilosti nego revizija kazne izdata na temelju ispitivanja legitimnih penoloških razloga u konkretnom slučaju.

pri tome akcenat na kvalitetu aranžmana koji je država odabrala a ne na njegovu formu. Kvalitet u tom slučaju podrazumijeva jasnu proceduru odabranog mehanizma revizije, njegovu transparentnost, razumljivost, jasnoću te postojanje jasnih penoloških osnova na kojima počiva navedeni mehanizam revizije. U suštini, sve dok država ugovornica omogućava određeni mehanizam preispitivanja kazne koji ima za cilj njeno ublažavanje i uslovni otpust koji počiva na legitimnim penološkim osnovama, takav mehanizam ispunjava zahtjeve iz člana 3. EKLJP bez obzira radi li se o sudskom ili nesudskom mehanizmu revizije kazne.

Na temelju navedenog zaključujemo da država uživa jako široko polje procjene u normiranju svoje kaznene politike u pogledu mehanizma revizije kazne doživotnog zatvora pod uvjetom da su načini i metode koje država propisuje u skladu sa zahtjevima propisanim EKLJP odnosno uspostavljenim u praksi ESLJP.

4. Zaključak

Filozofija savremenog kažnjavanja stoji na stanovištu da nijedan kazneno-popravni sistem ne smije imati za cilj samo i isključivo odštetu. Slijedom toga, evropska kaznena politika težište stavlja na rehabilitacijsku svrhu zatvora i u tom kontekstu daje podršku jednakoj primjeni alata rehabilitacije i reintegracije na zatvorenike osuđene na doživotnu kaznu zatvora. ESLJP, kao čuvar ljudskih prava na evropskom tlu, nastoji uspostaviti „najmanji zajednički sadržalac“ svih vrijednosti i standarda koje države ugovornice imaju uzeti u obzir prilikom organizovanja sistema izdržavanja kazne doživotnog zatvora. Na pijedastalu svih vrijednosti iz EKLJP nalazi se ljudsko dostojanstvo, stoga je nespojivo sa zahtjevima EKLJP da država lišava slobode bez ikakve nade da osuđenik jednog dana, ispunjenjem određenih uvjeta, ponovo povrati slobodu i bude reintegrisan u društvo.

U tom kontekstu, države ugovornice moraju pružiti normativnu i stvarnu mogućnost da kazna doživotnog zatvora bude smanjiva i ta mogućnost u praksi mora biti djelotvorna. Uslovi i procedura za reviziju kazne moraju biti jasno formulisani, precizno određeni, transparentni, razumljivi te počivati na legitimnim penološkim osnovama. Država ima slobodno polje procjene da propiše formu i model mehanizma revizije, poštujući navedene standarde. U konačnici, ESLJP upućuje da bi revizija kazne doživotnog zatvora trebala nastupiti najkasnije 25 godina nakon izrečene kazne. O navedenim uslovima osuđenik mora biti upoznat na početku izrdržavanja kazne doživotnog zatvora kako bi znao šta mora učiniti da bi jednog dana mogao biti pušten na slobodu.

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Međunarodni pravni akti:

- Evropska konvencija o sprječavanju mučenja i neljudskog ili ponižavajućeg postupanja i kažnjavanja
- Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda
- Fakultativni protokol uz Konvenciju protiv mučenja i drugih okrutnih, neljudskih ili ponižavajućih postupaka ili kažnjavanja
- Konvencija protiv mučenja i drugih okrutnih, neljudskih ili ponižavajućih postupaka ili kažnjavanja
- Međunarodni pakt o građanskim i političkim pravima
- Načela medicinske etike za zdravstveno osoblje, posebno liječnike za zaštitu zatvorenika i pritvorenika protiv mučenja i ostalih nehumanih ili ponižavajućih kažnjavanja i postupanja
- Skup načela za zaštitu svih osoba u bilo kojem obliku pritvora ili zatvora,
- Standardna minimalna pravila Ujedinjenih nacija za postupanje sa zatvorenicima (Mendelina pravila),
- Temeljna načela za postupanje sa zatvorenicima
- Univerzalna deklaracija o ljudskim pravima

Sudska praksa

– *Matiošaitis et al protiv Litvanije*, App. No, *22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, presuda od 23.8.2017. godine.*
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LIFE IMPRISONMENT IN THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

Sentencing to life imprisonment is not in contrast with human rights issued in European Convention for the protection of Human Rights and Fundamental Freedoms. However, the sentenced imposed to life imprisonment and system to of its execution must meet certain standards to be compatible with requirements stated in Article 3 of European Convention. The subject of our research paper are mentioned standards that Contracting States have to respect in terms of enforcing the sentence of life imprisonment. Introduction to the subject of the research is given in the form of penological review of life imprisonment as well as review of internationally established legal standards under the umbrella of the United Nations and the Council of Europe that relate to sentencing and enforcement of life imprisonment. In focus of this research paper is case law of the European Court of Human Rights that refer to life imprisonment. In that context, the focus of this research paper deals with the issue of the relationship between life imprisonment and prohibition of torture as human right that is absolutely protected and the issue of the Contracting States's margin in appreciation in prescribing the form and conditions of revision of the sentence. The intention of the authors is focused on the legal analysis of Strasbourg case law on issue of compatibility of life imprisonment with the requirements of the Article 3 of the European Convention and to present the standards generated by Strasbourg case law regarding the implementation and mechanism of revision of life imprisonment.

Key words: *sentence to life imprisonment, revision of the sentence, margin of appreciation, prohibition of torture.*

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PRILOG RASPRAVI O KAZNI DOŽIVOTNOG ZATVORA I MEĐUNARODNIM PRAVNIM STANDARDIMA

Parcijalne izmene krivičnog zakonodavstva već duže izazivaju polemiku stručne javnosti. Po pravilu njima se remeti krivično zakonodavstvo koje treba, i moralo bi biti, sistem usuglašen pre svega sa samim sobom. Reakcija stručne javnosti uzrokovana je izostankom javnih rasprava, koje bi morale, ne samo prethoditi izmenama, već biti i uvažene. Predmet rada je kritički osvrt na predlog mogućih načina prevazilaženja zakonodavnih propusta povezanih sa kaznom doživotnog zatvora za dela za koja je isključen uslovni otpust. Takođe i sa zatvorskim kaznama za krivična dela za koja je uslovni otpust isključen. Namera je da se podstakne stručna javnost na pronalaženje najboljih rešenja za prevazilaženje krivičnopravno neodržive zabrane uslovnog otpusta osuđenih na kazne doživotnog zatvora bez prava na uslovni otpust. Autor ocenjuje da pomilovanje, u našem takonodavstvu, ne predstavlja delotvoran pravni lek, pa ni alternativu uslovnom otpustu.

Ključne reči: doživotni zatvor, uslovni otpust, zahtev za vanredno ublažavanje kazne, pomilovanje.

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1. Osnov za raspravu

Srpsko udruženje za krivičnopravnu teoriju i praksu i Institut za kriminološka i sociološka istraživanja, u saradnji sa Ministarstvom pravde Republike Srbije, uz podršku MDTF - JSS organizovao je ekspertski sastanak čija tema je „kazna doživotnog zatvora i međunarodni pravni standardi". Organizatori su, uz poziv, predložili usvajanje sledećih zaključaka:

Predviđanje kazne doživotnog zatvora u nacionalnom krivičnom zakonodavstvu načelno nije u suprotnosti sa članom 3 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, ni praksom Evropskog suda za ljudska prava.

Prema relevantnim međunarodnim pravnim standardima i praksi ECHR[1] države u čijem krivičnom zakonodavstvu je predviđena kazna doživotnog zatvora treba da predvide instrumente kojima se pruža mogućnost svakom licu osuđenom na kaznu doživotnog zatvora da bude pušteno na slobodu posle određenog vremena provedenog u kazneno popravnoj ustanovi i ispunjenja drugih zakonom predviđenih uslova, unapred poznatih osuđenom licu i zasnovanih na penološkim razlozima, o čijoj se ispunjenosti odlučuje u pravičnom postupku.

U važećem tekstu Krivičnog zakonika nisu predviđeni krivičnopravni instrumenti koji bi dali mogućnost svakom licu osuđenom na kaznu doživotnog zatvora za sva dela za koja se ona može izreći (odnosno pojedine njihove oblike) da, ispunjenjem određenih zakonom predviđenih uslova, bude pušteno na slobodu posle određenog vremena provedenog u ustanovi za izvršenje krivičnih sankcija.

Učesnici ekspertskog sastanka su saglasni sa stavom iznetim u izveštaju eksperta prof. Dr Vida Jakulina da su dva moguća načina za usaglašavanje odredaba Krivičnog zakonika o kazni doživotnog zatvora sa međunarodnim pravnim standardima, članom 3 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda i sudskom praksom ESLjP po ovom pitanju i to:

a) Izmene i dopune Krivičnog zakonika s ciljem davanja mogućnosti svakom licu osuđenom na kaznu doživotnog zatvora da pokrene postupak puštanja na uslovni otpust nakon isteka vremena utvrđenog u Krivičnom zakoniku, i preciziranje objektivnih kriterijuma i odgovarajućih proceduralnih garancija za adekvatno donošenje odluke po podnesenoj molbi, uslova pod kojima se osuđeno lice pušta na uslovni otpust i nepoštovanja uslova pod kojima je pušten na uslovni otpust.

b) Zadržati postojeće odredbe Krivičnog zakonika o kazni doživotnog zatvora ali izvršiti izmene i dopune Zakonika o krivičnom postupku s ciljem uvođenja novog posebnog vanrednog pravnog leka – Zahteva za vanredno ublažavanje

1 Evropski sud za ljudska prava

kazne kao procesnog mehanizma koji omogućava naknadno preispitivanje izrečene kazne doživotnog zatvora, u kojem bi kao jedan od osnova za mogućnost njegovog ulaganja bio i penološki razlog, odnosno već postignuta svrha kažnjavanja u toku izdržavanja izrečene kazne doživotnog zatvora – uz konkretizaciju i drugih pitanja ovog vanrednog pravnog leka (tj. nemogućnost podnošenja zahteva po osnovu procene o već postignutoj svrsi kažnjavanja pre dvadeset pet godina izdržane kazne doživotnog zatvora).

Zaključci su preneti u celini, pošto su osnov polemike koja sledi.

2. O zakonodavnim rešenjima u našem zakonodavstvu

Krivični zakonik iz 1951. godine nije predviđao kaznu doživotnog zatvora kao samostalnu kaznu, već je članom 29 bilo određeno da se umesto smrtne kazne predviđene zakonikom može izreći strogi zatvor u doživotnom trajanju. Osuđenik koji je umesto na smrtnu kaznu (zamenom iste) osuđen na kaznu doživotnog strogog zatvora mogao se uslovno otpustiti ukoliko je izdržao 15 godina strogog zatvora a uslov otpusta je trajao 10 godina. Izmenama iz 1959. godine Krivični zakonik potpuno briše kaznu doživotnog zatvora, pa i mogućnost zamene smrtne kazne kaznom doživotnog zatvora, već se smrtna kazna mogla zameniti maksimalnom zatvorskom kaznom u trajanju od 20 godina. Kasnijim izmenama, do izmena u 2019. godini, nije bila predviđena kazna doživotnog zatvora.

Izmenama i dopunama Krivičnog zakonika od 21.5.2019. godine, koje su stupile na pravnu snagu 1.12.2019. godine, članom 43 stav 1 uvedena je potpuno nova kazna, kazna doživotnog zatvora, ali je članom 44a propisano i ograničenje za njeno izricanje, odnosno da se ne može izreći učiniocima mlađim od 21 godine, niti u slučajevima kada zakon predviđa da se kazna može ublažiti ili kada postoji neki od osnova za oslobođenje od kazne. Članom 46 stav 2 KZ propisano je da se osuđeni na ovu kaznu može uslovno otpustiti ako je izdržao najmanje 27 godina zatvora a stavom 5 da sud ne može uslovno otpustiti osuđenog za krivična dela: teško ubistvo (član 114 stav 1 tačka 9), silovanje (član 178 stav 4), obljuba nad nemoćnim licem (član 179 stav 3), obljuba sa detetom (član 180 stav 3) i obljuba zloupotrebom položaja (član 181 stav 5) KZ.

„Visina zaprećenih kazni za pojedine oblike krivičnih dela, ili teških dela kao posebno predviđenih, morala bi da prati gradaciju dela po težini. Posebno kada se radi o teškim delima, za koja su zaprećene najteže kazne. Dobar primer je krivično delo teškog ubistva, koje je zbog svoje težine i zaprećene kazne, iz ranijeg kvalifikovanog oblika ubistva izdvojeno u posebno delo. Međutim zakonodavac izmenama koje su stupile na snagu 1.12.2019. godine odstupa od prethodnog,

tako što za kvalifikovane oblike osnovnih krivičnih dela iz članova 392 stav 3; 178 stav 4; 179 stav 3; 180 stav 3 i 181 stav 5 KZ predviđa najtežu kaznu doživotnog zatvora. Pobrojana su samo dela kod kojih je kazna doživotnog zatvora propisana za kvalifikovane oblike dela. Propisivanje najteže zakonom predviđene kazne za kvalifikovane oblike osnovnih dela gotovo da nije poznato u uporednom pravu. Zaprećena najteža kazna je dovoljan razlog da nametne potrebu izdvajanja kvalifikovanih oblika krivičnih dela, za koja je ta kazna zaprećena, u posebna dela ili jedno delo koje bi obuhvatilo teške slučajeve pobrojanih dela" (Jocić, 2020). Tako je postupljeno kod propisivanja krivičnih dela: teška dela protiv zdravlja ljudi, teška dela protiv opšte sigurnosti, teška dela protiv bezbednosti javnog saobraćaja.

Pored ove pravne manjkavosti još je problematičnija odredba člana 46 stav 5 KZ odnosno zabrana uslovnog otpusta za krivična dela pobrojana u ovoj odredbi. Često se zanemaruje da se zabrana ne odnosi samo na kaznu doživotnog zatvora, već i na kazne zatvora izrečene za ova krivična dela. Zato što posebnu pažnju zaslužuje kada je za neko od ovih dela izrečena kazna doživotnog zatvora. Potpuno je opravdana teza da kazna doživotnog zatvora nije samo nova kazna (s obzirom da je u našem pravnom sistemu nije bilo 60 godina) već nov penološki institut. Svrhu propisane kazne doživotnog zatvora i zabrane uslovnog otpusta za pobrojana krivična dela, nemoguće je dovesti u korelaciju sa članom 2 Zakona o izvršenju krivičnih sankcija kojim je propisano da se izvršenjem krivičnih sankcija ostvaruje opšta i individualna svrha njihovog izricanja u cilju uspešne reintegracije osuđenih u društvo, jer u ovim slučajevima reintegracije u društvo nema.

Struka je bila gotovo jednoglasna da su izmene KZ u ovom delu neustavne kao i da su suprotne ratifikovanim međunarodnim konvencijama i opšteusvojenim međunarodnim standardima. Usvojene izmene KZ i reakcija struke ocenjene su kao razgovor gluvih. Autor je bio član komisije za prethodnu izmenu KZ. Održan je pripremni sastanak komisije na kojem nam je profesor pravnog fakulteta, predsednik komisije, objasnio da su izmene neophodne radi usklađivanja sa međunarodnim konvencijama i preporukama i pobrojao više desetina istih. Sledila je priča o predstojećem radu komisije. Međutim, ono što je usledilo je da više ni jedan jedini sastanak komisije nije održan ali je predlog izmena osvanuo pa potom i usvojen u Skupštini. Stoga se autorstvo izmenjenih odredaba KZ nije moglo pripisati zakonodavnoj komisiji. Ostalo je nepoznato ko je njihov autor. Na osnovu razgovora sa pojedinim članovima poslednje komisije za izmenu KZ i na osnovu oglašavanja člana komisije u sredstvima javnog informisanja ni ovoga puta nije bilo suštinski drugačije. Komisija se doduše sastala dva puta. Na tekst predloženih izmena KZ članovi komisije su dostavili pisane primedbe i

predloge (pa i u odnosu na zabranu uslovnog otpusta za navedena krivična dela) ali u konačnom predlogu izmena Zakonika, ni jedna nije uvažena. Predlog izmena KZ nije dostavljen ni jednom sudu, pa ni Vrhovnom kasacionom sudu, ni jednom tužilaštvu, ni advokatskoj komori niti pravnim fakultetima. Stoga je ocena da je reakcija struke zakasnela potpuno osnovana ali je osnovana i ocena da struka nije ni bila u prilici da pravovremeno reaguje.

Međutim, istovetno zakonodavno rešenje je bilo sadržano u Nacrtu izmena i dopuna Krivičnog zakonika 2015. godine. Takvom zakonodavnom rešenju se Vrhovni kasacioni sud protivio navodeći: „ako maksimalna kazna zatvora ostane zatvor od 20 godina, a uvede se doživotni zatvor kao najteža kazna, može se realno očekivati da će se sudovi teže opredeljivati za doživotni zatvor, obzirom da je smanjena mogućnost individualizacije kazne, jer između kazne zatvora od 20 godina i doživotnog zatvora sud nema mogućnosti da odmeri kaznu koja će biti duža od 20 godina, ali ne takva da bude doživotni zatvor" (Bilten Vrhovnog kasacionog suda, 2015). Nesumnjivo da je predlagaču ovaj stav morao biti poznat.

Nasuprot ovome u obrazloženju Predloga o izmenama i dopunama 2019. godine se navodi samo „u skladu sa inicijativom Fondacije „Tijana Jurić" predviđeno je da sud ne može uslovno otpustiti osuđenog za krivična dela određena tom inicijativom" (Dimovski, 2019:99). Utisak je da je navedeno obrazloženje istovremeno stručni i vrednosni sud predloženih izmena.

3. Povod ekspertskom sastanku

Održani ekspertski sastanak je signal mogućih, novih izmena KZ, odnosno izmena izmenjenog. Možda je već vreme za samoinicijativno otvaranje javnih rasprava o mogućim izmenama jer, iskustveno, nema garancija da će, ukoliko do izmena dođe, istima prethoditi javna rasprava. Van sumnje je tačka 1 zaključka da kazna doživotnog zatvora u nacionalnom zakonodavstvu načelno nije u suprotnosti sa članom 3 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda. Sporna je usklađenost pre svega kazne doživotnog zavora (ali i zatvorskih kazi) sa zabranom uslovnog otpusta osuđenih za krivična dela pobrojana u članu 46 stav 5 KZ, sa odgovarajućim međunarodnim standardima.

Moguće rešenje, predloženo pod tačkom 4b zaključaka je neprihvatljivo, držeći se predložene formulacije, iz sledećih razloga:

1) Uvođenje novog pravnog leka: zahteva za vanredno ublažavanje kazne predstavljalo bi zakonodavni ping pong. Zahtev za vanredno ublažavanje kazne

smo već imali u našem zakonodavstvu sa oznakom predmeta – KZU, prema sudskom poslovniku. Zato se ne bi radilo o „novom" pravnom leku već o vraćanju starog pravnog leka. Zakonodavno brisanje jednog pravnog leka pa potom njegovo ponovno uvođenje predstavlja nedovoljnu promišljenost zakonodavca.

2) Isti institut, vanredno ublažavanje kazne, već postoji sada u članu 473 stav 1 tačka 6 ZKP pa ni po ovom osnovu ne bi bio nov pravni lek. Ukoliko bismo ga uveli kao „nov" onda bi imali dva vanredna ublažavanja kazne. Uz to, lica osuđena na kaznu zatvora ili doživotnog zatvora za dela za koja je zabranjen uslovni otpust ni sada nisu lišena prava na podnošenje zahteva za ponavljanje postupka zbog novih činjenica ili novih dokaza kojih nije bilo kada je izricana kazna ili sud za njih nije znao iako su postojali, a oni bi očigledno doveli do blaže krivične sankcije. Dakle, ne postoji zabrana izricanja, u ponovljenom krivičnom postupku, blaže kazne licima osuđenim na kaznu zatvora ili doživotnog zatvora za dela za koja je zabranjen uslovni otpust, ako se steknu uslovi propisani navedenom odredbom.

3) U samom nazivu „novog" pravnog leka ali i u pojmu vanrednog ublažavanja kazne je naknadno ispitivanje izrečene kazne i izricanje blaže kazne. Suštinski je isto određenje i u odredbi člana 473 stav 1 tačka 6 ZKP. Dakle, postojeća kazna se ublažava ili zamenjuje blažom kaznom. Ukoliko bi se kazna doživotnog zatvora **ublažila** (ostala ista ali u kraćem trajanju) onda bi nova osuda glasila, besmisleno, na polovinu ili dve trećine doživotnog zatvora. Ukoliko bi se **zamenila blažom kaznom** onda bi osuda morala glasiti na maksimalnih 20 godina zatvora. Ni jedno od ovih rešenja nije prihvatljivo.

4) Penološki razlozi koji bi po predloženom zaključku bili osnov zahteva za vanredno ublažavanje kazne su već sadržani u institutu uslovnog otpusta, članu 46 stav 1 KZ. Neprihvatljivo je da se isti osnov, već postojeći, uvede i u predloženi nov institut. Penološki razlozi nisu osnov izmene kazne, niti njenog ublažavanja. Kazna ostaje ista a osuđeni iz penoloških razloga stiče beneficije.

5) Predlog uslova primene predloženog zahteva za vanredno ublažavanje kazne je neprihvatljiv. Osuđeni na kaznu zatvora za krivična dela za koja nije dozvoljen uslovni otpust bi zahtev za vanredno ublažavanje kazne mogao podneti posle 25 godina izdržane kazne zatvora. Međutim osuđeni na kaznu doživotnog zatvora za delo za koje nije zabranje uslovni otpust prema odredbi člana 46 stav 2 prva alineja, pravo na uslovni otpust stiče protekom 27 godina iz-

držane kazne zatvora. Dakle, osuđeni na „kvalifikovan" doživotni zatvor bio bi beneficiran u odnosu na osuđenog na „običan" doživotni zatvor. Takođe bi bio beneficiran i u odnosu na aktuelne osuđenike na kaznu zatvora u trajanju od 40 godina, koji uslovni otpust mogu tražiti po proteku 26,6 godina izdržane kazne zatvora. Da je ostala važeća kazna zatvora u trajanju od 40 godina to bi bila teža kazna od kazne doživotnog zatvora za dela za koja je uslovni otpust isključen, pa bi se branioci zalagali za kaznu doživotnog zatvora a ne kaznu zatvora u trajanju od 40 godina, jer se pre stiče pravo na uslovni otpust. Kod postojećeg stanja zakonodavstva i predloženim izmenama, osuđeni na kaznu doživotnog zatvora, sada bez prava na uslovni otpust, bi posle 25 godina izdržane kazne zatvora podneo zahtev, pa ako su ispunjeni uslovi, kazna bi mu bila zamenjena kaznom zatvora u trajanju od maksimalnih 20 godina zatvora. Osuđeni bi u tom slučaju, uslovno rečeno, više „preležao" 5 godina zatvora, pa bi stekao pravo i na naknadu štete.

6) Pod predloženim uslovima kazna doživotnog zatvora bi se delila na lakši i teži doživotni zatvor.

7) Neprihvatljivo je da se samo za jednu kaznu uvodi jedan, poseban, vanredni pravni lek.

8) Razlozi pri kraju tačke b. da se novi pravni lek uvodi zbog nemogućnosti korišćenja postojećih, je logički neprihvatljiv. Umesto uvođenja novog pravnog leka zbog nemogućnosti, bolje je otvoriti mogućnost.

9) Smeštanjem ovog pravnog leka u procesno zakonodavstvo, onako kako je predloženo, narušio bi se sistem krivičnog zakonodavstva. Kod ocene ispunjenosti uslova za primenu ovog pravnog leka, konkretno za uslovni otpust osuđenog lica za delo iz člana 46 stav 5 KZ primenjivao bi se ZKP, dok bi se za ostale osuđenike. na ocenu ispunjenosti uslova za uslovni otpust, primena ovog instituta nužno naslanjala ne odredbe KZ.

10) Sve i da se u ZKP uvede predloženi pravni lek morao bi se izmeniti i KZ, bar odredba člana 46 stav 5 KZ kako bi bilo moguće da se, za u toj odredbi navedena krivična dela, primeni uslovni otpust. Zato je nelogičan i pravno neodrživ navod predloženog zaključka, na samom početku „zadržati postojeće odredbe Krivičnog zakonika o kazni doživotnog zatvora..."

11) U predloženom zaključku se navodi „uvođenje novog vanrednog pravnog leka – Zahteva za vanredno ublažavanje kazne..." Već je rečeno da bi se nužno morala izmeniti (bar brisati) odredba člana 46 stav 5 KZ kako bi za navede-

na krivična dela uslovni otpust bio moguć, odnosno otklonjena zabrana uslovnog otpusta. U Srbiji je već doneta prva prvostepena presuda kojom je učinilac osuđen na kaznu doživotnog zatvora za delo za koje uslovni otpust nije dozvoljen. Izmenjeni KZ bi za osuđenog bio blaži, povoljniji. Samo teorijski: „Primena novog blažeg zakona nije moguća u postupku vanrednog ublažavanja kazne". (Pravno shvatanje Krivičnog odeljenja Vrhovnog suda Srbije od 26. decembra 1994. godine). Identičan stav se primenjuje i kod ponavljanja krivičnog postupka.

4. Obaveza preispitivanja kazne - pravo na nadu

Stavovi ECHR su jasni. Kazna doživotnog zatvora nije suprotna Evropskoj konvenciji o zaštiti ljudskih prava i osnovnih sloboda, niti je u suprotnosti sa praksom ECHR. Kaznu doživotnog zatvora, da bi ispunila prethodna dva uslova njene dozvoljenosti, mora *de iure* i *de facto* da prati mogućnost da osuđeni bude pušten na slobodu, mora biti smanjiva. Isto važi i za zatvorske kazne za navedena krivična dela. Mora postojati, kako normativna, tako i realna mogućnost preispitivanja trajanja kazne i na legitimnim penološkim razlozima zasnovana nada da će osuđeni biti pušten na slobodu ukoliko se tokom trajanja zatvora ispuni svrha kažnjavanja i kazna prestane da bude opravdana. Opšti penološki cilj je na rehabilitaciji a ne na represiji. Ukoliko je zabranjen uslovni otpust, kazna doživotnog zatvora gubi svrhu rehabilitacije i predstavlja isključivo represiju. Zatvorskim ustanovama se oduzima „šargarepa", jedno od sredstava za odbranu od destruktivnog ponašanja ovih osuđenika, odnosno zaštite bezbednosti u tim zavodima. U stručnoj literaturi je većinski stav da kazna doživotnog zatvora, posebno kada ne postoji mogućnost preispitivanja njenog trajanja, predstavlja odloženu smrtnu kaznu,odnosno civilnu smrt.

Izostavljanjem mogućnosti puštanja na uslovni otpust osuđenih na kaznu doživotnog zatvora povređuje se pravo na nadu osuđenih lica, kao i pravo na ljudsko dostojanstvo. Kršenje prava na nadu osuđenih na kaznu doživotnog zatvora za krivična dela za koja uslovni otpust nije dozvoljen često se shvata kao floskula, jer je u podsvesti težina dela za koje su učinioci osuđeni. Da bi to pravo približili realnosti razmotrimo da li pravo na nadu imaju bolesni od neizlečivih bolesti ili njihovo lečenje zbog toga treba prekinuti ili da li decu sa mentalnim invaliditetom ne treba obrazovati jer je domet obrazovanja ograničen ili im osnovano dati pravo na nadu da će biti izlečeni ili da će granica u obrazovanju biti pomerena.

5. Drugačiji stavovi

Ima zagovornika, doduše usamljenih, da je pomilovanje dovoljan institut za preispitivanje kazne doživotnog zatvora, da obezbeđuje pravo na nadu licima osuđenim na kaznu doživotnog zatvora bez prava na uslovni otpust. Zagovornici ovog rešenja potporu za svoj stav nalaze u uporedno pravnim zakonodavnim rešenjima i stavu ECHR da je pomilovanje u nekim od zemalja delotvoran pravni lek. Ne u svim. Da bi pomilovanje bilo ocenjeno kao delotvoran pravni lek neophodna je analiza ukupnog pravnog sistema pojedinih zemalja, uključujući i pravnu tradiciju kao i u praksi potvrđene delotvornosti pomilovanja. Navedeni stav ne smatramo prihvatljivim u našem pravnom sistemu.

Odluka o ispunjenim penološkim uslovima predstavlja deo kaznene politike, posmatrane kao celine. Uslovni otpust predstavlja sudski odgovor na delotvornost u sudskom postupku izrečene kazne, na postignutu svrhu kažnjavanja. Takođe, u postupku primene uslovnog otpusta je obezbeđena dvostepenost u odlučivanju. Pomilovanje predstavlja vansudski odgovor.

Čini se da je besmisleno u krivičnom, sudskom postupku propisati zabranu uslovnog otpusta, potpuno zanemariti postignutu svrhu kažnjavanja a dozvoliti pomilovanje zbog postignute svrhe kažnjavanja.

Uslov da propisana kazna doživotnog zatvora bude saglasna Konvenciji i praksi ECHR je i da predviđeni pravni lek i *de facto* pruža mogućnost da osuđeni, kod ispunjenih uslova, bude pušten na slobodu. Postupak mora pružiti dovoljno garancija da je pravni lek delotvoran, primenljiv u praksi. Pomilovanje u našem zakonodavstvu taj uslov neće ispuniti. Predsedničko pomilovanje ni u odredbama Krivičnog zakonika ni u Zakonu o pomilovanju ne predviđa uslove, razloge, za davanje pomilovanja. Zato nije ispunjen ni uslov, zahtev, da unapred, odnosno već u trenutku presuđenja, osuđenom licu budu poznati zakonom predviđeni uslovi puštanja na slobodu. U suprotnom, ako domaće zakonodavstvo ne obezbeđuje nijedan mehanizam ili mogućnost preispitivanja kazne doživotnog zatvora, neusaglašenost te kazne sa članom 3 Evropske povelje po ovom osnovu se pojavljuje već u trenutku njenog izricanja, a ne u trenutku njenog izdržavanja. Za ocenu delotvornosti pomilovanja kod nas dovoljno je navesti da je od 2013. godine do 2018. godine Predsednik Republike odlučivao o 127 molbi za pomilovanje osuđenih na kaznu zatvora u trajanju od 15 godina zatvora ili težu kaznu i da ni jedna nije uvažena (Ilić, 2019:130).

Zakon o pomilovanju bi naravno morao biti temeljno izmenjen da bi se uopšte razmatrala mogućnost ocene ovog instituta kao delotvornog pravnog leka. Te izmene mora pratiti i izmena KZ. Zakonom o pomilovanju je predviđeno

da se pomilovanje daje u skladu sa krivičnim zakonom, sada KZ. Ovakvo zakonodavno rešenje nameće potrebu izmene KZ i uklanjanje zabrane uslovnog otpusta za navedena krivična dela, odnosno otvaranje mogućnosti puštanja na uslovni otpust, jer u suprotnom pomilovanje ne da ne bi bilo u skladu sa Krivičnim zakonikom, već suprotno njemu. Time dolazimo na isto, odnosno na neophodnost brisanja zabrane uslovnog otpusta za navedena krivična dela, kako bi pomilovanje moglo bilti dato. U tom slučaju bi bila dovoljna primena KZ da bi bili ispunjeni uslovi Konvencije i prakse ECHR.

Sporno je i što zakon o pomilovanju ne predviđa mogućnost preispitivanja odluke o pomilovanju, dvostepenost, iako se njome odlučuje o pravima trećih lica.

6. Zaključak

Verovatno je svima jasno da je najbolje rešenje ono najednostavnije: brisati zabranu uslovnog otpusta za krivična dela za koja je zabrana propisana. Traženje drugih rešenja nije ništa drugo nego li izbegavanje priznanja da se prenaglilo sa sadašnjim zakonodavnim rešenjem. Druga, zaobilazna, rešenja mrežu zakona čine razvučenom i slabom. Moguće rešenje je da se osuđenim licima za ova krivična dela, ukoliko budu uslovno otpuštena, uz uslovni otpust odredi dugotrajna, pa i doživotna, odgovarajuća mera bezbednosti, kao zaštita od mogućeg recidiva. Ovim stavom se opredeljujemo za zaključak predložen pod a) tačke 4, uz opasku da isti ne može biti ograničen samo na kaznu doživotnog zatvora, **već se mora odnositi i na zatvorske kazne za dela navedena u članu 46 stav 5 KZ.** Ukoliko bi se izmena odnosila samo na kaznu doživotnog zatvora, kako je u zaključku predloženo, onda bi osuđenici na zatvorsku kaznu, primera radi u trajanju od 20 godina, ostali bez prava na uslovni otpust, što bi takođe bilo protivno Evropskoj konvenciji o ljudskim pravima i praksi Evropskog suda.

Predlog da osuđeni na kaznu doživotnog zatvora za krivična dela za koja sada uslovni otpust nije dozvoljen, to pravo stekne protekom 25 godina računajući od početka izdržavanja kazne, zasnovan je na presudi Evropskog suda Vinter i drugi protiv Ujedinjenog Kraljevstva (odluka od 9. jula 2013. godine) u kojoj se navodi da je nužno da nacionalna zakonodavstva predvide mehanizam preispitivanja opravdanosti penološkim razlozima nastavka izdržavanja kazne i to ne duže od 25 godina, računajući od početka izdržavanja kazne. Ukoliko bi se predlog usvojio a zadržala postojeća rešenja u KZ, dolazimo u situaciju izloženu pod tačkom 5 ovog rada, odnosno da se pravo na uslovni otpust osuđenih na kazne doživotnog zatvora stiče posle 25 ili posle 27 godina a za kaznu zatvora

u trajanju od 40 godina posle 26,6 godina, sve računajući od početka izdržavanja kazne. Ne postoje kriminalno politički razlozi za ove razlike, niti je sticanje prava na uslovni otpust protekom 27 godina ili 26,6 godina u skladu sa odlukom Evropskog suda. Zato, ukoliko se pristupi izmenama krivičnog zakonodavstva opravdano bi bilo da se za sve ove kazne propiše pravo na sticanje uslovno otpusta protekom jedinstvenog roka od 25 godina, računajući od početka izdržavanja kazne zatvora.

Konačno, izmena Krivičnog zakonika u delu koji je predmet ovog rada je neophodna i ne mora se čekati odluka Ustavnog suda Srbije ili Evrpskog suda za ljudska prava da bi se izmene njima pravdale. Posebno što ovo nije jedini propust zakonodavca u Krivičnom zakoniku (primera radi videti odredbu o višestrukom povratu, koja za razliku od odredbe o običnom povratu ili za razliku od odredbe o kazni doživotnog zatvora ne sadrži deo „izuzev kada zakon predviđa da se kazna može ublažiti ili da se učinilac može osloboditi od kazne") pa bi to bila prilika i za otklanjanje i drugih propusta.

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CONTRIBUTION TO THE DEBATE ON THE SENTENCE OF LIFE IMPRISONMENT AND INTERNATIONAL LEGAL STANDARDS

The latest amendments to the Criminal Code of the Republic of Serbia have quite a lot of controversy among the professional public. The subject of this paper is a critical review of various propositions for overcoming legislative omissions in relation to the sentence of life imprisonment without conditional release for certain criminal offences. Furthermore, this paper deals with prison sentences for crimes for which the conditional release is legally excluded. The intention is to encourage the professional public to find the best solutions for overcoming legally untenable prohibition of conditional release for people sentenced to life imprisonment. The author estimates that pardon, in our legislation, does not represent an effective legal remedy, nor an alternative to conditional release.

Keywords: *life imprisonment, conditional release, motion for an extraordinary reduction of sentence, pardon.*

IZEŠTAJ O ODRŽANOM EKSPERTSKOM SASTANKU „KAZNA DOŽIVOTNOG ZATVORA I MEĐUNARODNI PRAVNI STANDARDI “

Srpsko udruženje za krivičnopravnu teoriju i praksu i Institut za kriminološka i sociološka istraživanja, u saradnji sa Ministarstvom pravde Republike Srbije, a uz podršku MDTF-JSS organizovali su Ekspertski sastanak na temu „*Kazna doživomnog zamvora i međunarodni pravni smandardi*.“

Ekspertski sastanak je, uz poštovanje svih epidemioloških mera, održan u petak 25. septembra 2020. godine sa početkom u 10,00 časova u Velikoj sali Hotela PALACE, Topličin Venac 23, Beograd.

Zbog potrebe poštovanja epidemioloških mera broj učesnika ekspertskog sastanka je bio ograničen na 25 učesnika koji sastanku prisustvuju u samoj sali Hotela Palace, dok su se ostali učesnici priključili radu putem Skype aplikacije.

Učesnici skupa bili su najeminentniji eksperti u oblasti krivičnog prava, kako članovi akademske zajednice, tako i predstavnici pravosuđa iz regiona.

Ekspertski sastanak je otvoren uvodnim rečima predstavnika organizatora, nakon čega je usledilo predstavljanje Ekspertskog Izveštaja koji je uz podršku MDTF-JSS-a izradio Prof. dr Vid JAKULIN, redovni profesor Pravnog fakulteta Univerziteta u Ljubljani sa timom saradnika. Zbog trenutne epidemiološke situacije, prof. Jakulin je prezentaciju održao putem Skype aplikacije.

Nakon prezentacije izveštaja, usledila je diskusija učesnika koji su se izjašnjavali o predlogu zaključaka skupa ali i isticali nove predloge, poput inicijative da, kako nalazi Ekspertskog izveštaja, tako i stavovi drugih učesnika, budu objavljeni u tematskom broju naučnog časopisa Revija za kriminologiju i krivično pravo.

Po završetku diskusije, učesnici su se saglasili o sledećem tekstu zaključaka Ekspertskog sastanka:

„Učesnici Ekspertskog sastanka (predstavnici krivičnopravneteorije i prakse Srbije, Slovenije, Hrvatske, BiH, Crne Gore i Makedonije) održanog u Beogradu 25. septembra 2020. godine, u organizaciji Srpskog udruženja za krivičnopravnu teoriju i praksu i Instituta za kriminološka i sociološka istraživanja a uz podršku MDTF-JSS, na temu „KAZNA DOŽIVOTNOG ZATVORA I MEĐUNARODNI PRAVNI STANDARDI“ na osnovu naučne i stručno-kritičke analize:

1. Izveštaja eksperta prof. dr Vida Jakulina
2. Relevantnih izvora međunarodnih standarda Ujedinjenih nacija, Evropske unije i Saveta Evrope
3. Odgovarajućih odredaba krivičnog zakonodavstva Republike Srbije, Savezne Republike Nemačke, Savezne Republike Austrije, Republike Slovenije i Mađarske
4. Prakse Evropskog suda za ljudska prava koje se odnose na kaznu doživotnog zatvora,

usvojili su sledeće

Z A K LJ U Č K E

1. Predviđanje kazne doživotnog zatvora u nacionalnom krivičnom zakonodavstvu načelno nije u suprotnosti sa članom 3. Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, ni praksom Evropskog suda za ljudska prava.
2. Prema relevantnim međunarodnim pravnim standardima i praksom ESLjP države u čijem krivičnom zakondavstvu je predviđena kazna doživotnog zatvora treba da predvide instrumente kojima se pruža mogućnost svakom licu osuđenom na kaznu doživotnog zatvora da bude pušteno na slobodu posle određenog vremena provedenog u kazneno-popravnoj ustanovi i ispunjenja drugih zakonom predviđenih uslova, unapred poznatih osuđenom licu i zasnovanih na penološkim razlozima, o čijoj se ispunjenosti odlučuje u pravičnom postupku.
3. U važećem tekstu Krivičnog zakonika nisu predviđeni krivičnoporavni instrumenti koji bi dali mogućnost svakom licu osuđenom na kaznu doživotnog zatvora za sva dela za koja se ona može izreći (odnosno pojedine njihove oblike), da, ispunjenjem određenih zakonom predviđenih uslova, bude pušteno na

slobodu posle određenog vremena provedenog u ustanovi za izvršenje krivičnih sankcija.

4. Učesnici Ekspertskog sastanka su saglasni sa stavom iznetim u Izveštaju eksperta prof. dr Vida Jakulina da su dva moguća načina za usaglašavanje odredaba Krivičnog zakonika o kazni doživotnog zatvora sa međunarodnim-pravnim standaradima, članom 3. Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda i sudskom praksom ESLJP po ovom pitanju, i to:

   a) Izmene i dopune Krivičnog zakonika s ciljem davanja mogućnosti svakom licu osuđenom na kaznu doživotnog zatvora da pokrene postupak puštanja na uslovni otpust nakon isteka vremena utvrđenog u Krivičnom zakoniku, i preciziranje objektivnih kriterijuma i odgovarajućih proceduralnih garancija za adekvatno donošenja odluke po podnesenoj molbi, uslova pod kojima se osuđeno lice pušta na uslovni otpust i posledica nepoštovanja uslova pod kojima je pušten na uslovni otpust.

   b) Zadržati postojeće odredbe Krivičnog zakonika o kazni doživotnog zatvora ali izvršiti izmene i dopune Zakonika o krivičnom postupku s ciljem uvođenja novog - posebnog vanrednog pravnog leka - Zahteva za vanredno ublažavanje kazne kao procesnog mehanizma koji omogućava naknadno preispitivanje izrečene kazne doživotnog zatvora, u kojem bi kao jedan od osnova za mogućnost njegovog ulaganja bio i penološki razlog, odnosno već postignuta svrha kažnjavanja u toku izdržavanja izrečene kazne doživotnog zatvora - uz konkretizaciju i drugih pitanja ovog vanrednog pravnog leka (npr. nemogućnost podnošenja zahteva po osnovu procene o već postignutoj svrsi kažnjava pre dvadeset i pet godina izdržane kazne doživotnog zatvora).“

U Beogradu,
30. septembra 2020. godine

Prof. dr Stanko BEJATOVIĆ
Dr Ivana STEVANOVIĆ

REPORT ON THE EXPERT MEETING "LIFE IMPRISONMENT AND THE INTERNATIONAL LEGAL STANDARDS"

The Serbian Association for Criminal Law Theory and Practice and the Institute of Criminological and Sociological Research in cooperation with the Ministry of Justice of the Republic of Serbia and with the support of MDTF-JSS was organized an expert meeting on the topic "LIFE IMPRISONMENT AND THE INTERNATIONAL LEGAL STANDARDS."

The expert meeting was held in accordance with the recommended epidemiological measures on Friday, September 25th 2020, starting at 10:00 AM in the Great Hall of the Hotel PALACE, Topličin Venac No. 23, Belgrade.

Due to epidemiological situation the number of participants was limited to 25 participants who attend the meeting in person, while other participants joined the meeting using the Skype application. The participants were the most eminent experts in the field of criminal law, both members of the academic community and representatives of the judiciary from the region.

The expert meeting was opened with introductory speech given by the representatives of the organizers and after that the presentation of the Expert Report prepared by Vid Jakulin, full professor at the Faculty of Law, University of Ljubljana and his team of associates with the support of MDTF-JSS. Due to the current epidemiological situations, professor Jakulin gave the presentation via Skype application.

After the presentation the participants have discussed the proposed conclusions of the meeting and pointed out new proposals, such as the initiative to publish the findings of the Expert Report and the views of other participants in the thematic issue of the Journal of Criminology and Criminal Law.

At the end of the discussion the participants agreed on the following conclusions of the Expert Meeting:

"Participants of the Expert Meeting (representatives of criminal law theory and practice of Serbia, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro and North Macedonia) held in Belgrade on September 25th 2020, organized by the Serbian Association for Criminal Law Theory and Practice and the Institute for Criminological and Sociological Research with the support of MDTF-JSS, the topic "LIFE IMPRISONMENT AND THE INTERNATIONAL LEGAL STANDARDS." based on scientific and professional critical analysis contained in:

1. Expert Report prepared by made by professor Jakulin
2. Relevant sources of international standards of the United Nations, the European Union and the Council of Europe
3. Relevant provisions of the criminal legislation of the Republic of Serbia, the Federal Republic of Germany, the Federal Republic of Austria, the Republic of Slovenia and Hungary
4. The case law of the European Court of Human Rights relating to life imprisonment

adopted the following

CONCLUSIONS

1. In general, introduction the life imprisonment in national criminal law is not contrary to the Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, nor to the case law of the European Court of Human Rights.
2. In accordance with the relevant international legal standards and the practice of the ECtHR, states that implemented life imprisonment in their criminal law should provide for instruments enabling any person sentenced to life imprisonment to be released after a period of time spent in a penitentiary institution and fulfillment of other conditions prescribed by law, known in advance to the convicted person and based on penological reasons, in a fair legal procedure.
3. The current text of the Criminal Code does not provide instruments that would give the possibility to any person sentenced to the life imprisonment for all criminal offences that it can be imposed (or certain forms of them) to be released by fulfilling certain conditions prescribed by law after a certain time spent in the penitentiary institution.

4. The participants of the Expert Meeting have agreed with the attitude expressed in the Expert Report of professor Jakulin that there are two possible ways to harmonize the provisions of the Criminal Code on life imprisonment with the international legal standards, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the ECtHR on this issue, namely:
   a) To amend Criminal Code in order to enable all prisoners sentenced to life imprisonment to initiate parole procedure after expiring certain period previously determined in the Criminal Code, together with objective criteria and adequate procedural guaranties to be applied in the procedure of rendering decision of such petition.
   b) To keep existing provisions of the Criminal Code, but to amend Criminal Procedure Code in order to introduce the Request for extraordinary mitigation of the sentence, as a procedural mechanism which allows reduction of the life imprisonment based on penological grounds, namely, the progress made in treatment which resulted in reasonable believe that the purpose of punishment could be achieved by sentence shorter that life imprisonment."

Belgrade, September 30th 2020

Ivana Stevanović PhD
Prof. Stanko Bejatović

UPUTSTVA ZA AUTORE

Revija za kriminologiju i krivično pravo je naučni časopis sa tradicijom dugom 58 godina, čiji su suizdavači Institut za kriminološka i sociološka istraživanja i Srpsko udruženje za krivičnopravnu teoriju i praksu. Prema kategorizaciji časopisa Ministarstva prosvete nauke i tehnološkog razvoja Revija je kategorisana kao M51 (Vrhunski časopis nacionalnog značaja) i objavljuje članke iz oblasti krivičnog prava, kriminologije, penologije, viktimologije, maloletničke delinkvencije i drugih nauka koje proučavaju etiologiju, fenomenologiju, prevenciju i suzbijanje kriminaliteta. Osim toga časopis je indeksiran i u prestižnoj globalnoj bazi HeinOnline.

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1 Dr Jovan Jovanović je docent na Fakultetu...u Beogradu. E-mail: jovan@primer.net

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