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Review Scientific Article
Received: 14 October 2021
Accepted: 22 November 2021
UDK: 343.265.2(497.11:492)
343.846(497.11:492)
https://doi.org/10.47152/rkkp.60.1.3

CONDITIONAL RELEASE: POSSIBILITIES AND OBSTACLES IN SERBIA AND THE NETHERLANDS

This paper analyses the concept of conditional release in the Netherlands and Serbia, to provide a comparative overview of the two legal systems, and to suggest how legal solutions could be improved. Conditional release is functionally correlated with imprisonment as the main criminal sanction, entailing the deprivation of liberty, whilest, it is also an alternative to imprisonment. It creates the possibility for the convicted person to be released from prison before they have fully served their sentence, provided that certain conditions are met. While serving the sentence, the convicted person is obliged to act upon the individual plan to rehabilitate, focus on work, and minimize the risk of re-offending. Since there are different categories of convicted persons in the penal environment, this paper will also examine whether all these categories of convicted persons deserve to be released on parole or whether perhaps conditional release is reserved only for privileged ones.

Keywords: conditional release/parole, imprisonment, criminal proceedings, court, public prosecutor.

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1. Introduction

At first glance, as a specific concept of criminal law, conditional release has secondary importance because it is used after the criminal proceedings have ended in a final judgment and after the offender has served a certain part of his/her sentence of imprisonment. However, this concept has a multidimensional role and importance from both the perspective of the offender being given a chance to be released before the expiry of his/her sentence and from that of competent judicial authorities that need to perform a detailed and valid risk assessment to be able to decide whether to give the offender an opportunity to return to life in a free society, as well as from the perspective of the goals of the state concerning suppressing crime.

There are various trends in the practical application of conditional release, which also raise certain dilemmas of normative and practical nature. This concerns variable conditions that a convicted person needs to fulfil to be eligible to apply for conditional release on parole. These conditions are the function of parole; subject-matter jurisdiction of the adjudicating judicial authorities and their role in the procedure; supervision of the process of monitoring the convicted person's conduct during the serving of a sentence; reliable criteria indicating that the convicted person has rehabilitated to such extent that he/she will no longer manifest criminogenic behaviour; as well as the purposefulness of imposing certain obligations that the offender would need to fulfil while on parole; and his/her adequate social reintegration.

This paper analyses all of the above dilemmas and aims to address relevant issues concerning conditional release in the Dutch and Serbian legal system. Furthermore, this paper provides an insight into how conditional release is governed by both legal systems, identifying the advantages and disadvantages of both systems while determining improvements on legal provisions and jurisprudence.

2. Normative framework in The Netherlands

2.1. Overview of the historical development of conditional release: from conditional release to early release and back again[1]

The conditional release dates back as far as the Code of Criminal Procedure (1886) itself does. However, over the course of over a century, the views on punishment and a subsequent return to society have constantly shifted in the Netherlands.

1 This part of the article is an updated version of an article that previously appeared in *Strafblad 3*, July 2017, p. 241 et seq.

Whereas the practice of attaching conditions to the conditional release with regard to behaviour, gradually dissipated up until 1987 and even led to a system of early release without conditions. In recent years, there has been a move towards imposing more and more conditions, as well as increasingly stringent ones. As a result, conditional release has become a system that in the first place attempts to protect society; while the gradual return of detainees to society is becoming a second-place concern.

This chapter deals with the history of the conditional release and the establishment of the *Centrale Voorziening voorwaardelijke invrijheidstelling*[2] as part of the Public Prosecution Service, which imposes conditions and supervises the adherence to these. The conditional release in practice is also briefly discussed, based on a few examples.

In 1886, the Criminal Code stipulated that a convicted person, who had been given a custodial sentence of at least three years and had served three-quarters of that sentence, could be released subject to certain conditions. Almost 30 years later, the regulation was applied to sentences of 9 months and over, while anyone who had served two-thirds of their sentence could be released on parole. When the conditional release was introduced, the number of suspects who were indeed released earlier, subject to certain conditions, increased steadily, as Dutch parliamentary history shows. In the 1950s, this applied to over half of the cases, while in 1970, the percentage was as high as 90 per cent. In 1976, the law included the possibility of appealing against the decision to refuse, suspend or revoke release to the Parole Appeals Division of the Arnhem Court of Appeal. The case law of that court subsequently only made it possible to refuse release in exceptional cases.[3] In 2005, the government noted that 'conditional release had effectively changed from a favour to a right of the detainee.' In addition, the Dutch Probation Service did not consider the supervisory task to be compatible with the relationship of trust with a convicted individual, and the Public Prosecution Service gave little priority to revocation in the event of a violation of the conditions.

This prompted the legislator to bring the law into line with practice, and thus early release (*vervroegde invrijheidstelling*) was introduced in 1987.[4] This did not happen without a struggle – the votes in the Senate were 31 in favour and 30 against – and early release has never been fully accepted since its introduction. In 1992, a motion was passed in the House of Representatives calling for a review of the regulation.[5] A year later, the Minister and State Secretary of Justice indicated

2 CVvi; i.e. the central facility for conditional release.

3 Parliamentary Papers II 2005/06, 30 153, No. 3, p. 4.

4 Act of 26.11.1986, Bulletin of Acts and Decrees 593.

5 *Parliamentary Papers II*, 1991/92, 22 536, 2.

that they were considering replacing the automatic 'Yes, unless' with 'No, unless' for certain groups of detainees.[6] In 1994, as a result of several violent escapes and escape attempts, attempting to avoid a custodial sentence was included in the law as a ground for postponing or denying early release.[7] Three years later, the Minister promised a policy memorandum that would address early release.[8] This memo, *Sancties in Perspectief* (Sanctions in Perspective), was published in 2000[9] and called for the renewed introduction of the conditional release. Two committees were created to implement this, the *Commissie Herziening Vervroegde Invrijheidstelling* (or Vegter Committee; i.e. the 'Committee for the Revision of Early Release') and the *Commissie Vrijheidsbeperking* (or Otte Committee; i.e. the 'Restriction of Freedom Committee'). Their reports from 2002 and 2003[10] gave rise to the legislative proposal entitled *Wijziging van het Wetboek van Strafrecht en enige andere wetten in verband met de wijziging van de vervroegde invrijheidstelling in een voorwaardelijke invrijheidstelling* (Amendment of the Criminal Code and a number of other laws in connection with changing early release into conditional release), which became law in 2008. The early release thus ended up being a short-lived initiative.

2.2. Purpose of conditional release

With the reintroduction of conditional release, the legislature intended to contribute to an increase in social safety, partly by reducing the risk of recidivism due to convicted individuals being under the supervision of the judicial system.[11] '*The government now wants to restore the significance of early release as an instrument for protecting society and preventing recidivism. By making early release conditional again, the return to society can take place in a more controlled manner, and the risks sometimes associated with release can be better*

6 *Parliamentary Papers II*, 1993/94, 22 999, 11, p. 8.

7 Act of 4.4.1994, Bulletin of Acts and Decrees 593.

8 *Parliamentary Papers I*, 1997/98, 24 263, 62f.

9 *Parliamentary Papers II*, 2000/2001, 27 419, 1.

10 Report of the Restriction of Freedom Committee, *Vrijheidsbeperking door voorwaarden. De voorwaardelijke veroordeling en haar samenhang met de taakstraf, de voorlopige hechtenis en de voorwaardelijke invrijheidstelling* (Restricting Freedom through Conditions. The conditional sentence and its relationship with community service, pre-trial detention and conditional release), Ministry of Justice, The Hague, 2003, and the Report of the Committee for the Revision of Early Release, entitled *Voorwaarden voor een veilige terugkeer* (Conditions for a safe return), Ministry of Justice, The Hague, 2002.

11 *Parliamentary Papers II*, 2005/06, 30 153, 3, p. 1.

reduced. '[12] The main features of the new regulation are that conditional release will apply to sentences in excess of one year, it will not apply to partially suspended custodial sentences, it will take place after completion of two-thirds of the sentence.[13] It will always be subject to the general condition that the convicted person does not commit criminal offences and, if necessary, it will also be subject to special conditions. The probation period is equal to the period for which the release is granted, but shall be at least one year concerning the general condition imposed. Release may be postponed or denied, and it may be revoked if the conditions are breached.

The proposal received a lot of political support, although there was also criticism. For example, the proposal was not considered far-reaching enough, especially according to the CDA (right-wing Christian Democrats) and the VVD (a right-wing Liberal party). The CDA, for example, wanted longer probationary periods and a lighter criterion for postponing or denying conditional release. More importantly, however, in the view of the CDA and VVD, a convicted person would need to earn their release: the 'Yes, unless' principle should be replaced by 'No, unless'. This would mean a regulation, therefore, that allows conditional release in case of good behaviour. The legislature, however, disagreed. Reference was made to the opinion of the Vegter Committee from 2002: '... having matters informed by the behaviour during detention is, however, not a goal of the conditional release regime. To design the regulation in this way could lead to detainees artificially adapting their behaviour, which would have no relevance for behaviour after detention.' It was also pointed out that behaviour during detention already has consequences in the form of disciplinary punishments and consequences for the course of detention and leave. If the conditional release subsequently is not imposed, in part due to behaviour during detention, this group of prisoners would be back on the street without any form of supervision or any means of corrective intervention once the (full) sentence was completed. The 'earn your conditional release model' could also lead to the imposition of lower sentences, since at the time of sentencing or judgment, the courts would not (or no longer) be able to foresee whether the convicted individual would be eligible for conditional release. Therefore, to avoid a significant increase in the sentence, a lower sentence might be imposed that, if the convicted individual were to behave well, would nevertheless lead to a conditional release. This would be undesirable, according to the legislature's final verdict. Even today, when there are renewed calls to grant

12 *Parliamentary Papers II*, 2005/06, 30 153, 3, p. 5.

13 More precisely: for sentences between one and two years, the release will take place if the convicted individual has served one year and a third of the then remaining sentence.

conditional release only if the inmate has earned it, these arguments seem to be valid ones for not doing so.

The SGP (a conservative Protestant party) also voiced some criticism, albeit of an entirely different nature. The party wanted to know how to avoid history repeating itself, that is, how to avoid the conditional release once again being automatically conferred and thus becoming a right instead of a favour. The PvdA (the Dutch Labour Party) expressed a similar opinion and wondered how to prevent the Public Prosecution Service from giving too little priority to revoking conditional release if conditions were breached, as was the case before. They contended that this was one of the reasons why it went 'wrong' last time round. The Public Prosecution Service has taken on the challenge, this will be discussed further in the paper. First, a brief outline of the legal regulation is detailed.

2.3. The legal regulation of conditional release

The conditional release may be granted after two-thirds of the sentence has been served, on the understanding that the conditional release period may not exceed two years.[14] For example, someone who is convicted to a three years prison sentence will be released after two-thirds, i.e. two years served. Someone who is convicted to a nine years sentence, however, will not be released after two-thirds since that would mean the period of conditional release would be three years; he or she will have to serve seven years before being eligible for conditional release. However, it is possible to postpone or even abandon the conditional release.[15] If the conditional release is granted, it is always subject to the legal condition that no new criminal offences are committed. In addition, special conditions may be attached to the conditional release.[16] These conditions include an obligation: not to make contact with certain persons or institutions or to have others make such contact; not to be at or in the immediate vicinity of a certain location; to be present at a certain location at certain times or for a certain period; to report to a certain authority at certain times; to abide by a prohibition on using

14 Section 2:10 of Book 6 of the Code of Criminal Procedure. The situation is somewhat more nuanced, however. For sentences of up to one year, there is no conditional release. If part of the sentence is imposed conditionally, no conditional release is allowed, and foreigners without legal residence will not be eligible for it. The system of conditional release does not apply for juveniles, the rationale being that their incarceration is all about reintegration anyway (school, therapy etc. are integral parts of the incarceration.

15 Sections 2:12 and 2:13 of Book 6 of the Code of Criminal Procedure.

16 Section 2:11 of Book 6 of the Code of Criminal Procedure.

narcotics or alcohol; to cooperate with blood or urine tests to ensure compliance with this prohibition; to agree to being admitted to a care institution; to undergo treatment by an expert or care institution; to stay in an assisted living facility or social care institution; to participate in a behavioural intervention; to abide by a prohibition to perform voluntary work of a certain nature; to abide by having their right to leave the Netherlands restricted; to provide full or partial compensation of the damage caused by the offence or to make an arrangement for the payment of the compensation in instalments; to move out of a certain area; and to agree to other conditions concerning their behaviour.[17] The latter condition makes it clear that the law gives the Public Prosecution Service a great deal of latitude in setting conditions. The Dutch National Board of Prosecutors-General has also installed an advisory board to assist the Central Facility for Conditional Release in making their decisions. This board consists of behavioural experts. Their advice is obligatory in complex cases, but not binding. Complex cases are defined to be any case with an aspect of terrorism, cases of sex offenders sentenced to two years or more, cases in which during the criminal proceedings that led to the conviction, the convicted has refused psychological evaluation and cases in which the judge has imposed a special measurement to protect the safety of others or the general safety of property[18] *and* the sentence is six years or more.[19]

If a probationer does not comply with the conditions, the Public Prosecution Service has three options for responding: by changing the conditions, by issuing a warning or by revoking the conditional release.[20] This could concern the entire period or part of it. The latter is preferable since once a conditional release has been partially revoked, a new conditional release will be granted, which means that conditions can once again be imposed that promote a gradual return to society. If there are serious reasons to suspect that the convicted individual has behaved in such a way that the conditional release will be revoked, the Public Prosecution Service may order their arrest and suspend the conditional release.[21]

Convicted individuals can lodge an objection with the court that adjudicated in the first instance concerning the Public Prosecution Service decisions on postponing, denying or revoking a conditional release.[22]

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17 Section 2:11(3) of Book 6 of the Code of Criminal Procedure.

18 Section 38z of the Code of Criminal Procedure.

19 Directive of the National Board of Prosecutors-General concerning conditional release, st-crt-2021-33409.

20 Section 2:13a of Book 6 of the Code of Criminal Procedure.

21 Section 2:13b of Book 6 of the Code of Criminal Procedure.

22 Section 6:8 of Book 6 of the Code of Criminal Procedure.

3. The Central Facility for Conditional Release and Practice

As previously stated, the Public Prosecution Service has taken the task of implementing and enforcing the conditional release seriously, and it has set up a department that is fully dedicated to making conditional release decisions, including requests for postponing or denying conditional release. It also supervises compliance with the conditions and, where necessary, issues warnings or requests for suspending or revoking the conditional release. That department is the *Centrale Voorziening voorwaardelijke invrijheidstelling* (CVvi), which has existed since mid-2008. The CVvi handles around 1,150 cases annually. In about 800 cases, special conditions are imposed. In the other cases, only the general condition of not committing criminal offences applies.[23]

In the context of this article, an outline of the possible conditions is particularly important. Therefore, the reasons for postponing or denying conditional release, as well as the options for revoking conditional release, are not discussed. If there are no grounds for postponing or denying the conditional release, the CVvi decides whether special conditions should be imposed, and if so, which. It uses advice from the prison where the detainee was being held, from the probation service and from the section of the Public Prosecution Service where the criminal case was originally heard. In the light of the legislative history, the conditions must be aimed at reducing recidivism and protecting society. The position of the victim is given particular importance.

<Example: special conditions in connection with reoffending>

During his detention is is clear that mr. Z. really benefits from clarity and structure. Concerning the problems he experiences in various areas of his life (Z. hardly has any work experience, has a low IQ, has financial problems, lacks a (positive) social network and has a history of substance abuse), the probation service indicated in its advice that imposing special conditions is necessary. The risk of recidivism is judged to be high. The CVvi decision includes their prohibiting his substance abuse, imposing outpatient treatment and the obligation to stay in an assisted living facility. This is how an attempt is made to successfully reintegrate the probationer by providing him with structure.

<Example: a special condition in connection with the interests of victims>

In the criminal case on which the aforementioned conditional release case is based, the matters Z. was convicted of included extortion and robbery. The

23 CVvi's own data (2017), unpublished.

Public Prosecution Service has informed the victims about the imminent release. They were also asked if they would like to express any wishes they may have about that release. In response to this request, one of the victims stated that she was very afraid of Z. A location ban was therefore included in the conditional release decision.

On behalf of the Public Prosecution Service, the probation service supervises compliance with the conditions. If a condition is breached, the probation service can issue an official warning, but this can also be a reason to inform the CVvi, especially if the breach is a serious. For example, in the case of a one-off, such as a late arrival at a mandatory interview with the probation service, than a warning from the probation service may suffice. However, if there is a violation is more serious such as that of a substance abuse ban, this must be reported to the CVvi. As indicated above, the Public Prosecution Service can respond to a breach of conditions in three ways, one of which is by changing the conditions.

<Example: changing conditions after a breach>

Convicted individual I. left the house after an argument with his partner and cut off his ankle bracelet. Subsequently, he could not be reached by the probation service by phone. A day after sabotaging his electronic ankle monitor, he reported to the probation service saying that he realised that he had made a big mistake. The probation service contacted the CVvi and said that it would like to continue the supervision, but that this was not possible under the current special conditions. I. wanted to continue living with his partner, but the probation service felt that the condition 'admission to an assisted living facility or social care institution' should be added to the conditional release decision. Because I. had adhered to his conditions right up to when he sabotaged his ankle bracelet and a firm warning seemed sufficient at this point, the CVVI amended the decision and added assisted living.

4. The normative framework in Serbia

4.1. The conditions for release on parole

The normative framework governing release on parole in Serbia has been changed several times through the amendments to the Criminal Code,[24]as well as through the ancillary criminal legislation based on the principle of casuistry. Even

24 The Criminal Code (CC), Official Gazette RS, No.85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16, 35/19.

though modern trends in criminal law calls for the introduction of more lenient conditions for release on parole, by analysing relevant provisions of substantive law, it is found that Serbian lawmakers have resorted to an opposite method of tightening these conditions. According to the original text of the Serbian Criminal Code, in order to be released on parole, it used to suffice that the convicted person had served one half of the sentence. In addition to the modification of the formal condition, prohibition of release on parole was gradually introduced in particular cases, for instance, if a convicted person had attempted to escape or had escaped from prison while serving the sentence,[25] or in cases of serious criminal offences,[26] along with an itemized list of criminal offences where release on parole is not allowed.[27]

Release on parole is subject to restrictions in terms of fulfilment of formal and substantive conditions. The formal condition refers to the time already served in prison, i.e. the convicted person is required to serve two-thirds of the sentence, whereas the substantive condition refers to an expert evaluation of whether the criminal sanction has served its general purpose relative to its impact on preventing the convicted person from re-offending in the future. This evaluation is, in fact, a qualified report on the convicted person's conduct in the penal environment during serving of sentence, and a prediction that he/she has rehabilitated to such extent that it may be reasonably assumed that he/she will conduct himself/herself properly at liberty, and particularly that he/she will not commit a new criminal offence prior to the expiration of the time to which he/she was sentenced. It is hard to establish with certainty whether this condition has been met, and, therefore, this insufficiently precise criterion gives room for arbitrariness and unequal treatment (Sokolović, 2014:42). It is a well-known fact that excellent conduct of a convicted person during serving of sentence may not necessarily have anything to do with his/her rehabilitation and it often serves the purpose of maintaining prison discipline, to ensure that the inmates are obedient, rather than being a means of stimulating them to participate in their resocialization and rehabilitation (Stojanović, 2015:10). Therefore, the following statutory parameters in evaluating a convicted person's good conduct and predictability are taken into consideration.[28] As an explicit exemption, a convicted person who during serving

25 The Law on the Amendments to the Criminal Code, Official Gazette RS, No.72/09.

26 The Law on the Amendments to the Criminal Code, Official Gazette RS, No.121/12.

27 The Law on the Amendments to the Criminal Code, Official Gazette RS, No.35/19.

28 According to the Article 46, paragraph 1 of the CC, these are the parameters: the conduct of the convicted person during serving of sentence, the performance of the work duties, as well as other circumstances indicating that the convicted person will not commit a new criminal offence while on parole.

of sentence has been disciplined twice for serious misconduct[29] and had his/her privileges revoked[30] may not be released on parole.

Apart from these general rules, activation of conditional release is envisaged for certain categories of convicted persons depending on the type of penalty, the severity of the offences they were convicted of, and the number of final convictions.[31] The court has the discretion to deny the petition for release on parole even if the convicted person has fulfilled the formal and substantive conditions, i.e. even if the penitentiary where he/she is serving the sentence has provided a positive pre-release report if the court finds in its rationale that the progress achieved in the convicted person's rehabilitation in the penal environment is dissatisfactory.

Unlike the above cases, the prohibition of release on parole is envisaged if the offenders are convicted of the most serious criminal offences, which carries a sentence of at least ten years of imprisonment or life imprisonment.[32] One may note that the provisions on the conditional release are contradictory because, on the one hand, the conditional release may be applied when a person is sentenced to life imprisonment, while, on the other hand, it is excluded in case of qualified forms of criminal offences against life and limb and those against sexual freedoms. This catalogue of criminal offences was expanded by

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29 Article 157, paragraph 1, subparagraphs 1-23 of the Law on the Execution of Criminal Sanctions, Official Gazette RS, No. 55/14, 35/19.

30 Pursuant to Article 129, paragraph 2 of the Law on the Execution of Criminal Sanctions, the privileges include: free pass into town; a visit to the family members and relatives on weekend and holidays; an incentive leave from the penitentiary institution up to seven days during a year; the use of annual vacation outside of the penitentiary institution. The privileges shall be granted or revoked by the prison warden.

31 According to the Article 46, paragraph 2 of the CC, the court may release on parole life-sentence prisoners after they have served twenty-seven years, as well as prisoners convicted of the following criminal offences: crimes against humanity and other goods protected by international law as referred to in Articles 370-393a of the CC; criminal offences against sexual freedoms as referred to in Article 178-185b of the CC; qualified forms of a criminal offence of domestic violence as referred to in Article 194, paragraphs 2-4 of the CC; unlawful production and putting in the circulation of narcotics as referred to in Article 246, paragraph 5 of the CC; criminal offences against the constitutional order and security of the Republic of Serbia; giving or receiving a bribe, those convicted by the judgment of competent courts and their special departments for combating organized crime, corruption and terrorism, as well as those finally convicted more than three

32 times to unconditional prison sentence and no expunction was made or there are no conditions to expunge any of the sentences.
These criminal offences are the following: aggravated murder as referred to in Article 114, paragraph 1, subparagraph 9 of the CC; rape as referred to in Article 178, paragraph 4 of the CC; sexual intercourse with a helpless person as referred to in Article 179, paragraph 3 of the CC; sexual intercourse with a child as referred to in Article 180, paragraph 3 of the CC; and sexual intercourse through abuse of position as referred to in Article 181, paragraph 5 of the CC.

Article 5, paragraph 2 of the Law on Special Measures to Prevent Criminal Offences Against Sexual Freedoms of Children,[33] which casuistically refer to adult perpetrators of sex crimes.[34]

From the human rights perspective, the prohibition of release on parole of persons convicted of the above mentioned criminal offences raises *prima facie* doubt concerning the equality of all citizens before the law (Ilić, 2019, 157). From the international law perspective, such a solution is in contravention of the Recommendation of the Council of Europe Committee of Ministers on conditional release,[35] whereby conditional release should be made available to all sentenced prisoners, including life-sentence prisoners. Caution should be exercised with respect to the statutory prohibition of conditional release also due to the prohibition of torture and inhuman and degrading treatment as guaranteed under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which safeguards the right to human dignity. In its judgment in *Vintner and others v. UK*[36], in the context of examining inhuman punishment, the European Court of Human Rights found that it was important for the national legislation to regularly and effectively re-examine the grounds for further detention of such prisoners and that the requirements for their conditional release cannot be restrictive without justified reasons (Beširević et al., 2017:86).

On the other hand, when juvenile offenders are sentenced to juvenile prison, the conditions for their release on parole are not as rigorous as those for adults. Thus, juvenile offenders may be released on parole if they have served one-third of the sentence, but not before the expiry of six months if, subject to success in enforcement of the sanction, it may be reasonably expected that they will conduct themselves properly upon release on parole and will refrain from committing

33 *Official Gazette RS*, No.32/13.

34 To that effect, prison sentence may not be suspended for persons convicted of the following criminal offences: rape as referred to in Article 178, paragraphs 3 and 4 of the CC; sexual intercourse with a helpless person as referred to in Article 179, paragraphs 2 and 3 of the CC; sexual intercourse with a child as referred to in Article 180 of the CC; sexual intercourse through abuse of position as referred to in Article 181 of the CC; prohibited sexual acts as referred to in Article 182 of the CC; pimping and procuring as referred to in Article 183 of the CC; mediation in prostitution as referred to in Article 184, paragraph 2 of the CC; showing, procuring and possessing pornographic material and abuse of a minor for pornographic purposes as referred to in Article 185 of the CC; inducing a minor to attend sexual acts as referred to in Article 185a of the CC; abuse of computer networks or other means of technical communication for committing criminal offences against sexual freedom of a minor as referred to in Article 185b of the CC.

35 Rec. (2003) 22 of 24.9.2003: https://rm.coe.int/16800ccb5d, accessed on 27.4.2021.

36 Nos.66069/09, 130/10, 3896/10, 3896/10, 9.7.2013, http://hudoc.echr.coe.int/eng?i=001-122664, accessed on 27.4.2021.

criminal offences.[37] Educational measures may also be imposed on them, such as enhanced supervision and special obligations they have to fulfil.

4.2. The procedure

The procedure for release on parole shall be initiated by a petition filed by the convicted person or his/her defence counsel with the court which is adjudicated in the first instance.[38] The public prosecutor does not have the legal capacity to file a petition for release on parole. In addition to his competence to prosecute perpetrators of criminal offences, the public prosecutor also has the competence to protect the constitutionality and legality, and, upon initiative of the penitentiary institution in which the convicted person is serving his/her sentence, the public prosecutor should also have the competence to review the fulfilment of conditions for release on parole and initiate the procedure *ex officio*. Neither is this power delegated to the penitentiary institution, which is unfavourable from the perspective of the protection of the rights of convicted persons, obligations of the state authorities to take care of the essence of the restricted right, the importance of the purpose of this restriction, the nature and scope of the restriction of human rights,[39] and both general and individual purposes of execution of criminal sanctions in the form of successful social reintegration of convicted persons,[40] even though the penitentiary institution keeps the records of convicted persons[41] and monitors the process of their reformation.[42]

Once the petition for conditional release has been filed, the non-trial chamber of the court shall perform a preliminary review of the formal conditions and should it find that the petition was filed by an unauthorized person, or that the convicted person has not served two-thirds of the sentence,[43] or that

37 Article 32 of the Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles, Official Gazette RS, No.85/05.

38 Article 563 of the Criminal Procedure Code, Official Gazette RS, No.72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21, 62/21.

39 Article 20, paragraph 3 of the Constitution of the Republic of Serbia, Official Gazette RS, No.98/06.

40 Article 2 of the Law on the Execution of Criminal Sanctions.

41 Articles 9 and 10 of the Law on the Execution of Criminal Sanctions.

42 Rulebook on the Treatment, Individual Treatment, Classification and Re-classification of Convicted Persons, Official Gazette RS, No.66/15.

43 The Special Department of the Appellate Court in Belgrade in its Ruling Kž Po1-Uo.br.46/18 of 5.7.2018. rejected the defence counsel's appeal to the ruling of the trial court to dismiss a petition for release on parole because the court found that the defendant had not served two-thirds of his prison sentence, and the fact that he was pardoned by the President of the Republic and thus released from serving a part of his sentence does not mean that the said part of the sentence of imprisonment for which the defendant was released should be credited to the time served because his sentence had not been commuted.

the convicted person attempted to escape or did escape from prison during serving of sentence, it shall issue a ruling rejecting the petition. Otherwise, the non-trail chamber of the court shall seek from the penitentiary institution in which the convicted person is serving the sentence to submit a report on the conduct of the convicted person and on other circumstances indicating whether the purpose of the punishment has been achieved[44] or a report by a commissioner of an administrative authority responsible for the execution of non-custodial sanctions.[45] Once the penitentiary institution has submitted its report, the presiding judge of the non-trial chamber shall issue an order to schedule a hearing to decide on the petition for release on parole. The following parties shall be summoned to the hearing: the convicted person if the presiding judge deems that his/her presence is necessary, the defence counsel, the public prosecutor and, in case of a positive report, a representative of the penitentiary institution in which the convicted person is serving the sentence.[46] Since the presence of the defence counsel is not required, the hearing may be held even if the council fails to appear.

The hearing on the petition for release on parole shall commence with the presentation of the defence counsel's or the convicted person's arguments in favour of release on parole, and if they are not present, it shall commence by the presiding judge briefly explaining the reasons for which the petition was filed. Thereafter, the public prosecutor shall state his/her position on the convicted person's petition, by explaining the fulfilment of statutory requirements for release on parole, and propose that the petition be granted or denied. The public prosecutor's opinion and proposal are not binding on the court, as they are simply an additional element for consideration. After that, the representative of the penitentiary institution shall explain the report on the conduct of the convicted person and provide argumentation for his position regarding compliance with the individual treatment programme and justification of conditional release. Although the penitentiary institution's report is not binding on the court either, it is relevant for an appropriate and effective evaluation of success and progress in the convicted person's conduct during the treatment programme in the penitentiary institution.

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44 Article 47, paragraph 2 of the Law on the Execution of Criminal Sanctions.

45 Article 1, paragraph 2 of the Law on the Execution of Non-Custodial Sanctions and Measures, Official Gazette RS, No.55/14, 87/18.

46 The Criminal Department of the Supreme Court of Cassation, at its session held on 4.4.2014, in its replies to the disputed issues of law which were raised by lower courts, took the position that a hearing to decide on the petition for release on parole may be held even if the representative of the relevant penitentiary institution is not present if the representative was duly notified and if the motion on the justifiability of the reasons for release on parole is fully and clearly reasoned, and this shall be deemed appropriate from the point of view of procedural economy; https://www.vk.sud.rs/sites/default/files/attachments/3%20KO%204.04.2014..pdf, accessed on 22.6.2021.

Immediately after the hearing is over, the chamber shall issue a ruling denying or granting the convicted person's petition for release on parole, especially taking into consideration the risk assessment concerning the convicted person, the success in the implementation of his/her treatment programme, prior convictions, life circumstances, family post-penal care and expected impact of the parole. In its ruling to grant the petition, the court may order that the convicted person must fulfil certain obligations that are subject to protective supervision, whereby support is given to the convicted person with his/her active participation[47] and obligations[48] to restore material gain acquired through the commission of the offence, compensate the damage, etc. The convicted person may be placed under electronic monitoring,[49] although it is elusive what a professional in charge of handling the remote monitoring device is supposed to supervise (Vuković, 2016:191) because such an offender is not subjected to the same regime as those who are placed under house arrest either before or after sentencing. An appeal to the ruling of the first instance court on the petition for release on parole, which may be lodged by the public prosecutor, the convicted person and his/her defence counsel, shall be decided by a higher court.

In case of release on parole from juvenile prison, a juvenile offender may file such a petition with the juvenile council of the trial court which had adjudicated his/her case. Before rendering the decision, the president of the juvenile council shall, as appropriate, orally question the juvenile offender, his/her parents, representatives of the guardianship authority and other persons, and shall obtain a report and opinion from the juvenile correctional facility concerning the justification of release on parole. Oral questioning of the juvenile offender shall be mandatory if the matter at hand is the release on parole after the offender has served two-thirds of the sentence, unless the juvenile council finds, based on available documentation, that the conditions for release on parole are fulfilled.[50]

5. Serbian jurisprudence

Even though it does not have the status of law, in the Republic of Serbia, jurisprudence is very relevant because court decisions establish guidelines that may impact the disposition of similar cases. Decisions on granting parole are

47 Article 73 of the CC.

48 Article 65, paragraph 2 of the CC.

49 Article 46 of the Law on the Execution of Non-Custodial Sanctions and Measures, pursuant to which electronic monitoring may not be longer than one year or longer than the duration of the parole itself.

50 Article 144 of the Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles.

rendered in a separate procedure, leading to some sort of modification of a final judgment. Each of these decisions is inherent to the circumstances of a particular case, the type of criminal offence, the defendant's personality and the achieved level of resocialization. One may say that the decisions of both the trial court and the appellate court when deciding on appeal, is a factual issue that is evaluated differently on a case by case basis, which is sometimes conducive to the lack of uniformity of jurisprudence and, therefore, to inequality of convicted persons before the law, (Đuričić, 2021: 240) whereby legal certainty is affected.

When evaluating fulfilment of conditions for granting parole, competent authorities should establish whether the convicted person during serving of the prison sentence has rehabilitated to such an extent that it may be reasonably expected that he will conduct himself properly at liberty, rather than review the facts due to which he was convicted (Pantelić, 2018:43). The trial court denied a defence counsel's petition for release on parole for grave offences against traffic safety[51], and that of failure to render aid to a person injured in a traffic accident[52] because it was impossible to find whether the impact of the punishment was such that the convicted person would conduct himself properly at liberty and that he would not commit a new criminal offence given the fact that this particular case was about a person who had been convicted by final judgment of two criminal offences and having in mind the nature and severity of the criminal offences he had committed, the sentence imposed on him and the planned expiry of his sentence. However, the appellate court overturned this ruling because the finding of the trial court was presumptive and without proper evaluation of the penitentiary institution's report from which it transpired that the offender was a person with low-risk behaviour, that during his serving of sentence he had progressed to open group, that he had manifested adapted behaviour, that he had not been disciplined, that he had treated the officials with respect, that no inclination towards embracing the norms and values of criminally oriented convicted persons had been observed in him, that he had achieved individual goals which had been set for him, that he had had good interpersonal relations with other inmates, that he had been very responsible in performing his work duties, for which he had even been rewarded, that he had confessed to having committed the criminal offences and expressed remorse, that he had correctly used non-custodial rights and vacations, and also that he was not a manipulative personality.[53]

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51 As referred to in Article 297, paragraph 4, taken in conjunction with Article 289, paragraph 3 of the CC, and in conjunction with paragraph 1 hereof.

52 As referred to in Article 296, paragraph 1 of the CC.

53 Ruling of the Appellate Court in Niš, Kž-Uo.br.77/16 of 11.10.2016, http://www.ni.ap.sud.rs/pretraga/%D0%9A%D0%B6-%D0%A3%D0%BE/77/2016, accessed on 23.6.2021.

Moreover, neither the defendant's prior convictions for criminal offences against life and limb and property crimes nor the fact that he had previously also served time in prison, may not serve as arguments to the effect that during his serving of sentence he had failed to rehabilitate and that he would not re-offend, given the fact that the report of the penitentiary institution in which he served his sentence indicated that he had voluntarily arrived in prison to serve his sentence, that he had behaved in line with applicable penal rules and that he had functioned properly with other inmates and achieved all individual goals that had been set for him.[54] When deciding on the petition for release on parole, the trial court is not obliged to evaluate whether the purpose of the punishment has been achieved both in terms of special and general prevention, but should rather review the facts and circumstances whereby it can conclude that the convicted person will not commit a new criminal offence while on parole. The allegations that the convicted person is a special kind of re-offender, that other criminal proceedings for the same criminal offence of unlawful production and circulation of narcotics[55] are being conducted against him, that the risk was assessed to be medium and that the penitentiary institution's report on his conduct is positive, are not applicable parameters to deny his petition for release on parole.[56]

However, irrespective of compliance with the formal requirement concerning the length of the sentence already served - three years and ten-month for the criminal offence of aggravated theft,[57] no reasons have been found that would justify release on parole of a convicted person who is a re-offender and for whom a high risk of re-offending was established, he was assigned to group B1 of a prison ward of closed type, and his treatment programme in the penal environment has not been finalized, while implementation of the set goals is ongoing.[58] Also denied was a convicted person's petition for release on parole from serving a one-year sentence of imprisonment for the criminal offence of unauthorized possession of narcotics,[59] following a hearing which was not attended by the convicted person or by the representative of the penitentiary institution because the pre-release report was negative. Such a decision of the trial court was based on the assessment that, for the time being, there were no reasons that would justify the conditional release of the convicted person as it transpired from the pre-release report that he

54 Ruling of the Appellate Court in Kragujevac KŽ-uo-269/20 of 28.12.2020.

55 As referred to in Article 246, paragraph 1 of the CC.

56 Ruling of the Appellate Court in Kragujevac KŽ-uo-242/20 of 25.11.2020.

57 As referred to in Article 204, paragraph 3 of the CC taken in conjunction with paragraph 1, sub-paragraph 1 hereof.

58 Ruling of the Second Basic Court in Belgrade Spk.br.133/17, Kuo br.21/20 of 31.3.2020.

59 As referred to in Article 246a, paragraph 1 of the CC.

had been assigned to semi-open group of a prison, he had no work engagement, a high risk of re-offending was established, he was partially motivated to change his criminogenic behaviour, implementation of individual goals was underway, he was adapted to functioning in the penal environment, he had neither been disciplined nor rewarded, his attitude towards other inmates and officials was correct, and after the security measure of compulsory treatment for drug addiction had been lifted he was transferred from the Special Prison Hospital to prison to continue serving his sentence, which was the reason why the implementation of his treatment programme in the penal environment had only just begun.[60]

There is a dilemma as to the method of evaluation of the fulfilment of the substantive requirement for conditional release of convicted persons whose two-thirds of prison sentence had expired while they were still in detention due to the length of the criminal proceedings against them for the criminal offence of money laundering as referred to in Article 231, paragraph 2 of the CC taken in conjunction with paragraph 1 hereof. It is beyond dispute that time spent in detention shall be credited to the prison sentence,[61] but the question is how to assess the risk of re-offending and the convicted person's conduct in the penitentiary institution during the serving of sentence, which did not occur? In the above situation, the penitentiary institution is unable to submit a report on the level of achievement of the treatment programme or justify a conditional release. The court held that these facts had no impact on the powers of the court to conclude based on the report on the offender's conduct while in detention, according to which the offender had complied with the house rules and had not infringed disciplinary rules, that it might be reasonably expected that the convicted person would conduct himself properly at liberty and that he would not commit a new criminal offence until the expiry of his sentence and even though he had demonstrated exemplary behaviour and had not committed other criminal offences, no other criminal proceedings were conducted against him, particularly bearing in mind his poor health and family circumstances, i.e. the fact that he was a father of three underage children.

The courts are not too strict when it comes to conditional release in the context of non-custodial sanctions. Thus, the court granted a petition for release on parole from a sentence of eight months of house arrest without electronic monitoring for the criminal offence of reset as referred to in Article 221, paragraph 1 of the CC because the offender had served two-thirds of his sentence, and while he was serving the sentence he accepted his obligations, realized the consequences of his criminal offence and had so far behaved properly during the

60 Ruling of the Second Basic Court in Belgrade K.br.347/20, Kuo br.3/21 of 22.1.2021.

61 Article 63, paragraph 1 of the CC.

enforcement of his sanction, he had complied with the rules, sanction enforcement programme and his agreements with the Probation Service, he had successfully completed his resocialization programme and had achieved everything that he could during the service of his sentence of house arrest.

6. Conclusions and recommendations

The comparative analysis presented in this paper indicated the significance of conditional release for society, public safety and prisoners. Convicted persons are given a chance to be released back into society, conditionally, to continue or rebuild their lives. The normative framework, which prescribes formal and substantive conditions, is just the first step in establishing an efficient system of conditional release. The second step refers to the development of the programs to reduce recidivism and to minimize the criminal risk.

In the Netherlands, the Public Prosecution has an active and important role in making conditional release decisions. This competence lies with the special department of the central facility for conditional release. The department decides the requests for granting, postponing or denying conditional release and supervises compliance with the conditions for every person who is released on parole. The absolute majority of probationers are obliged to comply with conditions that are specially designed for them and examined in detail. During the conditional release period their behaviour is under surveillance and there are efficient procedural mechanisms in case that the probationer violates conditions of release. Unfortunately, that's not the case in Serbia, where almost all probationers, whom the court granted release on parole, are not controlled by authorities and this system should be provided for. For a future analysis it could be interesting to examine if the Serbian Probation Service might play a role in observing the probationers behaviour, as it does in the Netherlands.

The Dutch system also takes care of the victims, and people who decide on conditional release are always mindful of the crimes that were committed by probationers. Following the analysis, it is the author's opinion that this is not the focus in Serbia. Serbian authorities focus on incarceration. In contrast to this, the Dutch approach shows an alternative aim of exterminating the substantial cause of the crime, including contributions made to support probationers and a focus on reintegration into society. It is the author's opinion that the possibility to change the condition and coherent methods can guarantee effective rehabilitiation.

On the other hand, one could argue that the Dutch system places too much power in the hands of the prosecutors, as has been argued by defence lawyers.

The courts are granted almost no room to manoeuvre; as long as the decision of the Central Facility for conditional release is deemed 'not unreasonable' it will stand. The question of whether a better decision could have been made is not of any relevance. In Serbia, courts play a significant role in the proceedings, as courts used to do in the Netherlands as well. It has been a deliberate choice of the lawmaker to change this, whether or not that was a sensible choice from a human rights point of view remains to be seen.

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