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# THE ANALYSIS OF SOME PROBLEMS IN ACHIEVING THE REHABILITATION PURPOSE OF PUNISHMENT

*In this work the author deals with contemporary problems in achieving the rehabilitation aim as a dominant purpose of prison sentence execution in majority of countries today. Rehabilitation is one of the major principle in treating of persons who are convicted to prison sentence and consists of numerous rules set in some international documents as well as in national legislations. In work is given an overview of the historical development of the rehabilitation model both in global and domestic level as well as modern approaches in realization of rehabilitation expectations. The author further analysis some retributive tendentions in modern legislation. One of the problem is the trend of imposing a life sentence which is particularly problematic in case of absence the possibility of parole for certain convicts. That form of life sentence is prescribed in Criminal Code of Republic Serbia, so the author considers the sustaintability of that provision, especially in the context of European Court of Human Rights's decisions.*

**Keywords: rehabilitation, prisons, punishment, retribution, life sentence**

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## 1. Introduction

Nowadays, the modern penalty system faces with a lot of challenges. There are a lot of questions that are waiting for the answers and a lot of dillemmas in the context of the future direction in the development of the sanctioning for criminal acts. If we analyze the global tendencies toward the treatment of crime perpetuators in the past few decades, it can be seen the two main conclusions. First one means introduction of restorative justice principle which is in line with so called alternative treatment in sanctioning for criminal acts as well as alternative solutions in conducting the criminal proceeding (plea bargaining for example).

Second one is completely on the opposite side and is close connected to the retribution concept and severe sanctioning in some cases ie. for some criminal acts, usually because of the nature of criminal act or fact who is a victim. That tendency means use of prison to a great manner, both as a criminal sanction and as a measure for guaranting the presence of the accused person during the criminal procedure ie. as a detention. In both situations, main goal of the states with high percentage of deprivation of liberty is keeping society safe. But the question is wheather fulfilling the prisons brings the achievement of safety. In most countries, the evidence is clear that there is no satisfaction in gaining the primary goal of incarceration. In the United States (US), two in three (68%) of people released from prison are rearrested within three years of release. In England and Wales, two in three (66%) of young people and nearly half of adults leaving prison will commit another crime within a year[1].

Beside the fact of uneffectiveness of imprisonment in many countries, to reduce crime rate there are tendency around the world of introducing the retributive elements in sanctioning for crimes without profound analysis of effectiveness of such approach usually because retributive oriented public expects that kind of measures and at the same time politicians strive to fulfill those expectations. In connection with that, integral part of the political story about the necessity of sharp confrontation to the different forms of criminal activity is indicating on „seriousness“ of the criminality issue (Ilić, 2017: 183). On the other hand very often the legislator doesn’t show consistency which means that by nature similar criminal acts don’t receive the similar treatment. Special treatment is especially present in dealing with convicts for sexual assaults (particularly when children

1 World Economic Forum, Prisons are failing. It’s time to find an alternative. Available at: https://www.weforum.org/agenda/2019/01/prisons-are-failing-time-for-alternative-sparkinside/ page accessed 01.03.2023.

are victims) and also when it comes to supression of extremism and terrorism, which is part of a popular counter-terrorism framework. In this second case, it is not important whether individuals are accused or convicted and there are no differences between mere extremist on the one side and terrorist activities on the other side, everything „deserves“ special treatment from prison staff.

Other problem which arises from retributive legislative solutions is the possibility of achieving the rehabilitation effect, having in mind that principle of rehabilitation still dominates, at least on paper, in treatment of convicts in many countries around the world and, more important, which is part of the most significant international documents in this field. Traditionally, in penology literature under criticism were put short term (to six months or one year longest) and long term (ten years or more)[2] prison sentences because neither both of them are capable in a large manner, to fulfill the expectations of rehabilitation. But without doubt, life sentence, to the greatest extent, calls into the question the possibility of achieving the rehabilitation. The longiness of life sentence, even with possibility of parole, creates strong limitations which unable positive results in rehabilitation. However, life sentence with the possibility of parole gives some kind of hope to convict that one day could be realesed. In that sense, life sentence without parole is strong negation of rehabilitation and shouldn’t be part of the legal provisions. Unfortunately, there are some countries, like Serbia, which decided to ignore that fact referring to the higher interest of protecting society from the most dangerous attacks on its values.

## 2. General notes on Rehabilitation concept

The rehabilitation as purpose of punishment is one of the basic principle of modern imprisonment execution system, together with individualisation in execution of imprisonment and humanity approach in treatment of convicts (Ignjatović, 2019: 181). The aim of rehabilitation model is to reform or resocialize criminals to conventional, law-abiding values (Hagan, 2008: 107). More detailed, rehabilitation is a process, intervention or programme to enable indviduals to overcome previous difficulties linked to their offending so that they can become law-abiding and useful members of the wider community (Burnett, 2008: 243). A broad array of programs have been used to bring about such changes, including

2 Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners defines a long-term prisoner as one who is serving a prison sentence or sentences totalling five years or more.

education, job training, psychological and medical treatment, prison ministries, and recreation (Pollock, 2006: 158).

In domestic literature, Milutinović pointed that rehabilitation means procedures of personality socialization of persons who have been already socialized, but in a negative manner. That is about persons who had gone through the socialization process, but that process negatively ended and which led to the conflict with the ruling system of social norms and rules of conduct (1977: 81). On the other hand, Atanacković argued that negative socialization is not possible, if person doesn't respect social norms and social values and doesn't behave according to the norms and values, there is no room for discussion on socialization at all. In other words, it is necessary to make distinction between „formed personality“ and „socialized personality“ and further formed personality could be socialized and nonsocialized. As a consequence of those distinction, between rehabilitation of formed and nonformed personality there are some differences, primarly in the ways of gaining the goals of elimination the criminal behaviour in future and preparation for integration in social life (Atanacković, 1988: 130, 131).

The history of rehabilitation doesn't start with modern prison system, a long time it is stated as a goal of corrections. The first systematic prison system, which was created in frame of Classical system – the Cellular Isolation system, within its two separate models: solitary confinement system and system of silence, was based on redemption, moral transformation and strong discipline. At that time, the accent was still on retribution as a purpose of punishment. In the mid-1800s, the idea of individualized treatment began to take hold and not all offenders could be expected to respond to prison programs in the same way. Captain Maconochie's mark system, which tied inmate behavior to privilages and early release, and Sir Walter Crofton's Irish system of phased release were early attempts to encourage rehabilitation by offering incentives for good behaviour (Pollock, 2006: 159). The both of the systems were called Combine Progressive system which idea was to combine retributive and rehabilitative elements at the same time. Even it might seemed to be the best solution for the inmates, the practical experiences weren't so good which influenced the abandoning of it and direction to the system which is based just on one principle. Everything was leading to the rehabilitation model.

The United Nations Standard Minimal Rules for the Treatment of Prisoners (hereinafter: SMRTP) (the Nelson Mandela Rules)[3], prescribes that all prisoners shall be treated with the respect due to their inherent dignity and value as human

3 Standard Minimum Rules for the Treatment of Prisoners Standard Minimum Rules], RES/663 C (1957) and RES/2076 (1977) 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 resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977,

beings. Further, no prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification (Rule 1). The SMRTP contains minimal conditions that should be provided in dealing with convicts and they are imagined to be, in every country which accepts them, as a ground for building the imprisonment execution system (Ignjatović, 2019: 181).

Among basic principles of Rules of general aplications, which contains SMRTP, in the context of rehabilitation, it should be emphasized the following rule: „The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life. To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners“ (Rule 4).

Beside SMRTP, since Republic of Serbia is part of the Council of Europe, another very important document which considers the position of convicts and other prisoners and, in connection with that, prescribes rules which oblige states, is European Prison Rules (hereinafter: EPR). In the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the EPR[4] it is stressed that the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ensuring prison conditions which do not infringe human dignity and which offer meaningful occupational activities and treatment programmes to inmates, thus preparing them for their reintegration into society. As it is obvious from the previous sentence, the most important outcome which should derive from the prisoners residence in prisons is reintegration into society.

The rehabilitation concept is present in Serbian legislative on execution of criminal sanction more than seven decades. At the beginning it was developed within the legislative of former Yugoslavia. The first regulation which contained

available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf, page accessed on 15.02.2023.

4 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers'Deputies).

progressive principles like idea of re-education, together with ideas of joint sentence serving and classification of convicts was Temporary Instruction on Penal Execution[5] (Atanacković, 1988: 262). According to the Instruction, the aim of the sentence is not only punishing the guilty, but also re-educating the condemned in spirit of loyalty to the motherland, work discipline and honorable attitude towards state and social relations, training the convicted for the conditions of common life and the consolidation of those features of his character that will keep him from further committing the crime (Knežić, 2017: 122). For the first time in 1948, the matter of execution of criminal sanction was regulated in law. That year it was brought the Law on Penal Execution[6] which developed in a greater manner the modern principles of penal execution but three years later another law in this matter was brought: Law on Execution of Penal Sentence, Security Measures and Educational-Corrective Measures[7], which achieved another step further in modernization of criminal sanction execution and in developing the idea of rehabilitation of convicts as a main purpose of execution of criminal sanctions. In that law it was mentioned for the first time the establishment of special service for post-penal assistance (Atanacković, 1988: 263, 264). Big step in further modernization of Yugoslavian and Serbian penitentiary system represented the Law on Execution of Criminal Sanctions from 1961[8] which introduced many new institutions and modern solutions as part of a realization the SMRP rules that Yugoslavia accepted. With no doubt the principle of rehabilitation dominated in penitentiary system of Yugoslavia and Serbia in that time. Kupčević-Mlađenović noted that rehabilitation priciple had programmatic character and the whole action in treatment of convicts were subordinated to its realization (1972: 180, 181). After the constutional reform in 1974 Serbia, as all other republics of former Yugoslavia, got its own Law on Execution of Criminal Sanction[9]. The purpose of penal sentence execution was achievement of rehabilitation and social rehabilitation of the crime perpetrator. More precisely it was prescribed that the purpose was preparation of convict for living and working in accordance with law and fulfillment the duties of man and citizen of socialist self-governing community (Atanacković, 1988: 275). That Law was replaced exactly two decades later with the homonymous

5 Temporary Instruction on Penal Execution (Cab. no.1199 from 27.september 1945).

6 Law on Penal Execution (Official Gazette FNRJ, no. 92/48).

7 Law on Execution of Penal Sentence, Security Measures and Educational-Corrective Measures (Official Gazette FNRJ, no. 47/51).

8 Law on Execution of Criminal Sanctions (Official Gazette FNRJ, no. 24/61).

9 Law on Execution of Criminal Sanctions (Official Gazette SRS, no. 26/77, 50/84, 46/86 and 16/87).

law[10] which didn't determine at all the purpose of penal sentence execution and it was replaced in 2005 with new Law on Execution of Criminal Sanctions[11] that contained the provision on purpose of criminal sanction execution[12]. That provision was unpropriate and was criticized in theory, as well as Amendments from 2009[13] that brought some changes in precribed purpose[14] but not enough (Ignjatović, 2018: 174). Finally, the current Law on Execution of Criminal Sanctions[15] contains the purpose of penal sentence execution as adoption of socially acceptable values through appropriate treatment programs during the execution of the sentence in order to facilitate inclusion in living conditions after the execution of the sentence so that the convicts would not commit crimes in the future. In such prescribed purpose it can be seen the importance of special prevention (Ilić, 2022: 128).

## 3. Criticism of Rehabilitation model

Despite dominant legislation solutions, both international and domestic, part of the theory is not so convinced that prisons are places where convicts could change themselves in a proper manner. Particular problem is the fact that some offenders are not able to be changed or they don't want to be changed. Finally, some of them are completely well socialized and there is no need for prison treatment of any kind. On the other hand successfull rehabilitation is connected to well organized prison system which further means qualifed prison staff, who are present in optimal number and treat each convict as a specific individual with unique combination of characteristics, provided all facilities important for realization of rehabilitation program and many other things. All of it is very hard to complish in many countries. In relation with that, some scholars put into the question the possibility of the imprisonment execution system to achieve the requirement of rehabilitation, especially because of the constant high rate of reo-

10 Law on Execution of Criminal Sanctions (Official Gazette RS, nos. 16/97 and 34/01).

11 Law on Execution of Criminal Sanctions (Official Gazette RS, nos. 85/2005 and 72/2009).

12 The precribed purpose was „implementation of legally binding and enforceable court decisions, protection of society from criminal acts and separation of perpetrators of crime from the social environment for the purpose of their treatment, care and training to take care of their own needs after the execution of the sanction“.

13 Law on Amendments and Additions to the Law on Execution of Criminal Sanctions (Official Gazette RS, no. 72/2009).

14 New purpose after amendments was: „suppression of acts that injure or threaten people and basic social values“.

15 Law on Execution of Criminal Sanctions (Official Gazette RS, nos. 55/14 and 35/19).

ffending in many countries. That is highly connected to the crime statistics which is one of the most important tool for the practitioners as well as scholars in analyzing the effectiveness of modern penalty system.

The truth is that crime statistics have been a part of the discourse of many states for over 200 years, but the advance of statistical methods permits the formulation of concepts and strategies that allow direct relations between penal strategy and the population. Earlier generations used statistics to map the responses of normatively defined groups to punishment; today one talks of "high-rate offenders," "career criminals," and other categories defined by the distribution itself. Rather than simply extending the capacity of the system to rehabilitate or control crime, actuarial classification has come increasingly to define the correctional enterprise itself (Feeley, Simon, 1992: 453, 454).

It seems that today the most important question is what is the evidence that prison treatment works. MacKenzie pointed out that strategies for reducing crime should be based on scientific evidence which refers to the need to use scientific evidence to make informed decisions about correctional policy (2006: 20). In other words, the dominant discourse on this is about evidence-based corrections. In the context of such approach much of the debate about rehabilitation hinges on whether treatment programs are effective in reducing recidivism (Cullen, 2012: 95, 96). In academic debate everything started with Robert Martinson's systematic assessment of the program evaluation literature from 1945 to 1967 whose account of the results was famously called the „nothing works“ essay because he concluded that „With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism“ (1974: 25, according to: Cullen, 2012: 96). Cullen claims that Martinson's study had a crucial influence in reframing the debate over rehabilitation because it consolidated complex arguments into a single, simple issue: if treatment programs do not work, then how can anyone continue to support rehabilitation as the guiding theory of corrections? Uttering the slogan that „nothing works“ was a powerful way to avoid broader policy concerns and to silence all argument. Both liberals and conservatives used Martinson's work in this way (Cullen, 2012: 96). But even Martinson modified his opinion, concluding after further research that treatment programs could be beneficial, neutral, or detrimential to recidivism, depending on the conditions under which they were provided (Martinson, 1979, according to Pollock, 2006: 160,161).

Some authors stated that by the last decade of the twentieth century, rehabilitation had renewed credibility calling it as a „new rehabilitationism“. This new approach is more focused on offending behaviour than on the whole person, and

the objective is to prevent reoffending with a view to increasing community security, rather than to rehabilitate an individual as an end in itself (Rayner, Robinson, 2005, according to Burnett, 2008: 243). One of the reason for such approach is raising of the demand for security in every aspect of the society - the securitization of the society which is further connected to the concept of risk society (Beck, 2011) ie. the tendency of construction the risks in modern society as globalized and common thing for majority of people and necessity to establish full control over them – culture of control (Garland, 2001). Under the rationale of „offender responsibilization“ contemporary penal regimes have undertaken widespread surveillance practices to assist rehabilitative capacities and reform risky forms of conduct (Monagham, 2012: 6).

One of the best example of two mentioned concepts: risk society and culture of control in the context of a „new rehabilitationism“ is in the case of terrorism and extremism. In many countries, within the „new era“ narrative on terrorism as a global threat, there are efforts as a part of the counter-terrorism policy, for introducing the specific way of dealing with persons not just convicted but also suspected for the acts of terrorism as well as extremism. That kind of hysteria over necessity of completely different and exclusive treatment of individuals, somehow connected to terrorism and extremism, is not in a compliance with the traditional and still worldwide present system of imprisonment execution where accent is on individual approach in treatment of convicts, which takes into account personal ability of change.

It can be said that the main reason of such narrative is about the otherness of terrorism and its perceived hostility to the „essence“ of liberal democracy that justifies increasingly vigilant measures taken by courts, police and correctional agencies. Perceived threats are to „our very way of life“ – however vague the threats may be – are understood in the most immediate and all-encompassing danger to collective security, and thus deserving of exemplary punishment (Monaghan, 2012: 8). Further, when governments justify the need to segregate and/or isolate inmates who have been charged or convicted of terrorism related offences from other prisoners, they commonly raise concerns about their correctional facilities becoming „breeding grounds“ or „universities“ for terrorism (Useem, Clayton, 2009: 562 according to: Jones, 2014: 74). The truth is that much of the discussion so far has been one-sided because an underlying assumption is that prisons are thought to be schools for terrorism (Jones, 2014: 75).

Second question which arises from the context of increasing incarceration of prisoners prosecuted for acts related to terrorism, what is the prison administration’s ability to adapt and provide solutions to this growing and specific form

of crime (Chantraine, Scheer, 2021: 261). In other words „what works“ for the terrorism? What kind of rehabilitation program? Is really necessary for the states to develop specific approach in dealing with terrorism or any other crime? These are questions that urgently need answers.

Particular requests for different treatment of terrorism is in line with so called „new penology“ as a new decision-making analysis used in the penal sector, which is essentially concerned with the identification, classification, categorization and management of delinquents and prisoners on the basis of their membership of a more-or-less ‘at risk’ group (Feeley, Simon, 1992 according to Cliquennois, 2013: 468). According to the two American theorists, Malcolm Feeley and Jonathan Simon, the new penological era inaugurates an amalgam of actuarial policies aimed at the effective control of selected risk groups and efficient system management, rather than embracing the traditional objectives of rehabilitation or punishment of individual offenders (Cheliotis, 2006: 313, 314). Also, some authors in Serbia analyzed the penal problemacy from the perspective of new penology. According to Soković, the task of the new penology is to manage crime, not to rehabilitate criminals, to “normalize” criminality, not to eliminate it. The goal is to maintain the integrity of the social control system, which does not include additional external ones social goals such as the elimination of crime and the reintegration of criminals. Hence, the new penology is less interested in the diagnosis and treatment of the individual criminal, and more in the identification, classification and management of criminal groups classified according to the degree of risk of their behavior in relative to the normed order. The new penology has no aspirations to rehabilitate and reintegrate, yet to manage the risk of future criminal behavior, primarily through various modalities of arresting the offender (Soković, 2011: 219).

If we put the problemacy of rehabilitation and its un(success) in reducing recidivism and generally control over crime in society in the phrame of different criminological perspectives, that was a moment when positivist theoretical approach in analyzing criminal phenomenon came into the crisis, surrounded together with different neoclassical tendencies on the one side and critical criminology on the other side. Focus of the positivists were always on individual or\and social characteristics that contribute to the commitment of the crime and in connection with that to the process of reducing those factors. From that point of view, treatment of convicts especially in prison facilities is the best way in achieving the goal of elimination causes of crime and final result – rehabilitation of the offenders and their successful reintegration in society.

The opposite theoretical approaches have different attitude on the importance of rehabilitation. Neoclassicists don't deal with causes of crime but practical questions of daily crime fight ie. „what works“ (Hagan, 1990 according to: Ignjatović, 2019: 65), which is in line with Martinson's conclusion of failure of rehabilitation model. These theorists have sparked an interest in the abandonment of treatment and rehabilitation and in a return to the classical punishment model and incapacitation of offenders, because simply criminals in jail can no longer victimize. On the other side, while the neoclassicists argue that less theory and more action is needed, they at times ignore the fact the basic theoretical underpinnings of their own theories are rooted in assumptions of eighteenth-century hedonism, utilitarianism, and free will (Hagan, 2008: 104). Beccaria, Bentham and other classicists gave precious contributions to the construction of modern criminal law but some of their findings aren't appropriate for apply in dealing with offenders today.

Also opposite then positivistic approach, the critical criminologists distinguish other problems connected to rehabilitation model. Despite the fact that critical criminology consists of different theoretical approaches (labeling theory, radical theory, new critical theory, feminist theory...) some of the characteristics are common and it can be summarized to following: crime is a label attached to behaviour, usually that of the less powerful in society and in connection with that the process of labeling is under the control of more powerful groups. Further, the conflict model rather than the consensus model explains the criminalisation process and crime is often understood as a rational response to inequitable conditions in capitalistic societies (Hagan, 2008: 176). Critical criminologists, but especially those who are part of the new critical approach, are responsible for some kind of diversification in treatment of offenders in generally. For example, Hulsman is one of the originator of the idea of restorative justice and his efforts were directed toward reduction of the prison sentences number and its replacement with a fine and also for introduction the model of "diversification of criminal procedure" which today dominates in modern criminal procedure due to its efficiancy (Ignjatović, 2019: 84). During the 1970, Hulsman conducted research on sentencing which brought him to the conclusion that is almost impossible from the criminal law system to be derived the legitimate sentence, taking into account the way that system functions (Hulsman, Bernat de Celis, 2010: 17). Hulsman is also well known for his request directed to reduction of crime number in positive legislatives because there are number of examples where some behaviour could be erased from criminal law without introducing any other mechanism to replace it (Hulsman, Bernat de Celis, 2010: 61) which means the decriminalization that is

the least popular process in contemporary's dynamic of criminal law which are dominantly retributive oriented. It should be mentioned another scandinavian author – Thomas Mathiesen who gave important contribution to the humanization of criminal politics in his country (Norway) and generally in Scandinavia but his influence was broader for sure. He worked within the framework of the Norwegian Association for Penal Reform which one of the basic principle was participation of current and former prisoners in work of that organization. That principle was important for the three reasons: permeation of theory and practise on prisons, maintenance of knowledge on prisons and prison life and increasing knowledge on prison life (Matisen, 2019: 54, 55).

Retributive philosophy is essential part of the advocating for severe sentences like death penalty or life sentence and which are negation of the rehabilitation requirement in treatment of offenders. That is connected to penal populism. Policies are populist if they are advanced to win votes without much regard for their effects. Penal populists allow the electoral advantage of a policy to take precedence over its penal effectiveness (Roberts et al., 2003: 5 according to: Hamilton, 2022: 3). John Pratt delivers a dire prognosis of the future of criminal justice under populism: „the fundamental expectations of and limits to punishment in democratic society are likely to crumble still further – in the name of a security and sense of well-being and safety that becomes ever more elusive and distant“ (2020: 294, according to Hamilton, 2022: 7).

In further text it will be considered the practical and theoretical problemacy of life sentence which is still very popular way of sanctioning the offenders around the globe. Special attention will be paid to the situation in Republic of Serbia because of the life sentence without possibility of parole, which was introduced into the Criminal Code (hereinafter: CC) in 2019, in relation to certain categories of offenders.

## 4. Life sentence and Rehabilitation – global overview

Life-sentence prisoner can be defined as one serving a sentence of life imprisonment. Life-sentence prisoners are those sentenced indeterminately as a rule because life sentence does not usually mean that a prisoners spends his or her whole life in prison (Solomon, 2008: 153). Legal solutions on life-sentence differ from country to country. In most countries who have been prescribed life sentence, possibility of parole is guaranteed as a right of life-sentence prisoners after some period of time spending in prison. Also some countries have several variations of life sentence. For example, in England and Wales life sentence prisoners

include those who have received mandatory, discretionary and automatic life sentences, and those who are detained under indeterminate public protection sentences (Solomon, 2008: 153).

The most recent worldwide data on life imprisonment, published in 2019, estimated that in 2014 there were 479,000 people serving a formal life sentence. However, this excludes informal life sentences – where the sentence imposed may not be called life imprisonment but may result in the person being detained in prison for life. Furthermore, data available at the national level point to an upward trend in the number of life sentences imposed and also increased punitiveness in length, conditions and the types of offences that can attract a life sentence (Global prison trends 2022: 17).

Life-sentences are part of all the national jurisdictions with the exception of Portugal, where the maximum sentence that can be imposed is 25 years. Nevertheless, even in Portugal, there are complaints of effective life sentences: be they due to a sentencing scheme of consecutive, aggregated sentences which in effect far exceed the 25 years stipulated by law, to the super-imposition of more sentences incurred while serving the original sentence, or the age of the prisoner at the time of the conviction, many are those who see themselves as serving a “life sentence” (even if they, theoretically, can be appealed, reduced and do admit leaves) (Maculan et al., 2013: 45).

In Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoner[16] (hereinafter: Recommendation Rec(2003)23 of the Committee of Ministers), it is emphasized that the abolition of the death penalty in member states has resulted in an increase in the use of life sentences and also in many countries, in the number and length of long-term sentences, which contribute to prison overcrowding and may impair the effective and human management of prisoners.

In general there are no special plans and life prisoners are treated in the same way as other prisoners. As for other inmates, their sentence plans should be drawn up individually, but due to a lack of resources, the possibility to participate in work, training, education or cultural activities is often limited also for lifers. In England and Wales, for example, the difficulty in enrolling in courses that would help to demonstrate risk diminution (due to lack of resources to provide

16 Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners (Adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers’ Deputies).

such courses in overcrowded prisons), makes release all the harder to achieve (Maculan et al., 2013: 46).

The sentencing framework in generally has become much tougher in recent years in many countries. In England and Wales for example, a whole life tariff should be applied to adults over the age of 21 who commit multiple murders; a terrorist murder; a murder of a child following abduction or involving sexual conduct; and a murder where the offender has been previously convicted of murder (Solomon, 2008: 154). Similar, US approach in sentencing stands out in the Western worlds which was observed by Michael Torny as „practices that many Americans endorse – capital punishment, three-strikes laws, prison sentence measured in decades or lifetimes – are as unthinkable in other Western countries as are lynchings and public torture in America“ (Barkan, 2009: 518).

Life sentence in its substance is problematic in the context of realization of the rehabilitation principle. Even if the concrete legislation prescribes possibility of parole, main question is wheather the achievement of rehabilitation is realistic aim in cases of life sentence convicts. If the answer is no, the further question is how to legitimize the existence of that sentence in majority of legislation taking into account that the principle of rehabilitation is one of the main pillars of the modern imprisonment execution system.

Recommendation Rec(2003)23 of the Committee of Ministers also stresses that the enforcement of custodial sentences requires striking a balance between the objectives of ensuring security, good order and discipline in penal institutions, on the one hand, and providing prisoners with decent living conditions, active regimes and constructive preparations for release, on the other. It is also stressed that legislation and practice concerning the management of life sentence and other long-term prisoners should comply with the requirements embodied in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention)[17] and the case-law of the organs entrusted with its application.

### *4. 1. Life sentence and Rehabilitation in Republic of Serbia*

Adequately arranged criminal justice system implies that all its elements are connected and coordinated. This concretely means that the three basic se-

17 Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms with Additional Protocols, with amendments and additions, Official Gazette of the Serbia and Montenegro - International Agreements 9/03, 5/05 and 7/05 - correction and Official Gazette of the RS - International Agreements 12/10 and 10/15.

gments of criminal justice system: material, procedural and executive, must start from the same principles, that is, serve the same goals. For the purposes of this work, in particular should be emphasized the importance of the connection between the substantive legal provisions contained in the CC concerning the general purpose of punishment and the corresponding provisions contained primarily in the Law on Execution of Criminal Sanctions[18] (hereinafter: LECS) as the basic law in the field of execution.

Law on Amendments and Additions to the CC in 2019[19] (hereinafter: LAA-CC/2019) brought some important changes in criminal law approach to certain crimes and certain perpetuators. These changes, among others, include: life sentence was introduced, the right to parole was revoked for perpetrators of certain crimes, stricter punishment was prescribed in case of reoffending, and the range of crimes for which a conditional sentence can be imposed was narrowed (Ilić, 2019: 123,124). We will here put the accent on the life sentence, especially life sentence without the possibility of parole, and generally new provisions concerning parole, all in the context of rehabilitation unachievability in Republic of Serbia.

The Article 44a prescribes that 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. In connection with that, 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 and also life sentence cannot be pronounced in cases when the law sets forth that a penalty can be mitigated (Article 56, paragraph 1, item 1 of CC) or when there is basis for acquittal. The fact is that life sentence replaced imprisonment for 30 to 40 years, which was once introduced as a substitute for the death penalty. If we just take into account that simple fact, without further analyses it is obvious that with this new solutions Serbian CC makes steps toward strengthening the retributive approach in punishment of criminals. It is with no doubt clear that the legislator cared to satisfy very quickly the aspirations of one part of the public without entering into the question the justification of this penalty and the replacement of the existing solution (Stojanović, 2020: 233).

The nature of the new CC provisions is also evidenced by the addition of Article 42, more precisely, the introduction of another goal that should be achieved through the purpose of punishment. Among existing purposes: to prevent an offender from committing criminal offences and deter them from future commission of

18 Law on Execution of Criminal Sanctions (Official Gazette RS, Nos. 55/14 and 35/19).

19 The Law on Amendments and Additions to the Criminal Code (Official Gazette RS, No. 35/19).

criminal offences (special prevention); to deter others from commission of criminal offences (general prevention) and to express social condemnation of the criminal offence, enhance moral strength and reinforce the obligation to respect the law, the new item 4 of the Article 42, introduced achieving fairness and proportionality between the committed act and the severity of the criminal sanction, as a new purpose of punishment. This new purpose of punishment is clear manifestation of retributivism which takes into account only the past fact – commited crime and seeks for proportionate sentencing, which is basically act of retaliation.

The main reason for the introduction of life sentence is the legislator's determination to prescribe it for the most serious crimes against life and limb and crimes against sexual freedom in cases where the death of a child, minor, pregnant woman or helpless person occurred as a result of the crime[20]. For the mentioned crimes the court may not release on parole a convicted person[21] ie. Republic of Serbia introduced life sentence without possibility of parole.

Such a solution caused a stormy reaction from the Serbian's professional public, which indicated, and still indicates, the unsustainability of such a solution from the point of view of Serbia's membership in the Council of Europe and, in accordance with that, the obligations assumed by signing the Convention which also refers to the obligation to respect decisions of the European Court of Human Rights (hereinafter: ECHR). According to the concept of the reintegration of convicts into society, which dominates the penological practice of European countries from the 1980s to the present day, and is also expressed in Council of Europe documents, prison isolation of a person sentenced to death must not be the sole purpose of applying the prison (life) sentence - not only because the personality of the convicted person and his danger to society change over time, but also because of problems in the management of the prison system in which convicts who are not motivated to respect the prison regime are held for a long time, and because of their advanced age they have increasing problems with health and special medical and social needs (the so-called phenomenon of "grey" prisons) (Mrvić-Petrović, 2022: 408). One of the most important question that arises is there any point in sending a convicted person to reception department, to make a plan of dealing with him and what would motivate him as to change the strictest regime (with which execution usually begins) to a milder one (Ignjatović, 2019: 133).

20 Reasoning of the Proposal of LAACC/2019. These are following crimes: Aggravated murder (Article 114, paragraph 1, item 9), Rape (Article 178, paragraph 4), Sexual intercourse with a helpless person (179, paragraph 3), Sexual intercourse with a child (Article 180, paragraph 3) and Sexual intercourse by abuse of position (Article 181, paragraph 5).

21 Article 46, paragraph 5 of the CC.

On the other hand, some authors point to the fact that even in case of life sentence with possibility of parole, some convicts don't really have a chance for release, because of the nature of provisions in the field of criminal sanction execution which means that there a slightly chance for positive report on parole from prison authorities in case of person convicted for severe crime with life sentence (Ilić, 2019: 167).

Imposing a life sentence on an adult perpetrator of a criminal offense is not prohibited by any provision of the Convention. This sentence can come under the "impact" of Article 3 of the Convention which relates to prohibition of torture if the convicted person has no prospect of being released, which means that there is no mechanism in national law to review the conviction of life sentence with the aim of its modification *in melius*, early or conditional release. In order to meet the standard set by Article 3 of the Convention, it is necessary, according to the position expressed in the judgment of *Vinter and Others v. the United Kingdom*[22], that the person convicted to life sentence has the right to know at the beginning of the life sentence what and under which conditions he must do in order his release to be considered, as well as to know when his sentence will be reviewed or when he can request it. If the domestic law does not provide any mechanism or possibility to review the life sentence, the non-compliance of that sentence with Article 3 of the Convention on this basis appears already at the moment of its imposition, and not during its serving (Ilić, 2019: 132). Review of a sentence is necessary because the grounds for detention (punishment, deterrence, public protection and rehabilitation) may change in relevance during lengthy imprisonment. It is obvious that provision on life sentence in CC is not compatible with the practice of the ECHR, i.e. that it represents a violation of Article 3 of the Convention, because our law does not know any other effective mechanism that would allow the review of this sentence after a certain period of time (Ćorović, 2021: 85).

Without fixing a time limit, the ECHR noted the support in European domestic and international law for a guaranteed review within the first 25 years of a sentence[23]. In one of the recent decision, Chamber judgment in the case of *Bancsók and László Magyar (no. 2) v. Hungary*[24] the ECHR held, unanimously, that there had been: a violation of Article 3 of the Convention. The case concerned the imposition of life sentences with eligibility for release on parole only after 40

22 ECHR *Vinter and Others v. the United Kingdom*, Nos. 66069/09, 130/10 and 3896/10, 09.07.2013.

23 Human Right Law Centre, available at: https://www.hrlc.org.au/human-rights-case-summaries/2017/8/23/european-court-of-human-rights-rules-that-irreducible-life-sentences-violate-human-dignity, page accessed on 15.03.2023

24 ECHR *Bancsók and László Magyar (no. 2) v. Hungary*, nos. 52374/15 and 53364/15, 28.01.2022.

years of imprisonment. The ECHR found that such sentences did not, in effect, offer any real prospect of release, and were thus not compatible with the Convention. The question is whether the solution in CC (convicted to life sentence, after twenty-seven years served in prison acquires the right to seek parole (Article 46, paragraph 2, alinea 1)) is in accordance with the ECHR practice. Turanjanin considers that Serbian provision is in line with the ECHR standards because the legal term of 27 years begins to run from the day of deprivation of liberty, while the stated standard of 25 years refers to the period after the sentencing of life imprisonment (2021: 22), taking into account that ECHR in its judgments “primarily calls for the possibility of re-examination after the sentencing to life imprisonment”, while in CC, the time spent in detention, in serving a measure of prohibition to leave the apartment, as well as any other deprivation of liberty in relation to a criminal offence shall be credited to the pronounced prison sentence, fine and community service (Article 63, paragraph 1). On the other hand, Ćorović thinks that mentioned provision has to be novelled by explicitly mentioning life imprisonment, which represents a special punishment in our law, as to avoid any dilemmas in that sense (2021: 84).

For the end of this section, it is interesed to be mentioned the case of Columbia in the context of life sentence. The Constitutional Court of Columbia ruled in September 2021 that the recent introduction of life sentence (with a possibility of review after 25 years) for the crimes of rape and sexual abuse of children was unconstitutional. The Court found that life sentences are contrary to human dignity, threaten the guarantee of resocialisation of convicted persons and are a setback that risks dehumanising the penal system[25](Global Prison Trends 2022: 17).

## 5. Conclusion

As a conclusion, the main question which arises from the previous analysis is what will happen with rehabilitation, what is the future of the concept that was imagined to be the best way of dealing with prison convicts in modern society. Does it have chance to survive? Further from this point, if rehabilitation is meant to go into the history, what will replace it.

Retribution elements are some how always present in most countries, their advocates are waiting for an ideal moment to start with the promotion of its superiority. It is so easy to reach for a retribution solution when public is not satisfied with crime state. There is always something which disturbs public, some sort

25 Corte Constitucional, Communicado 33, Septiembre 2 de 2021, Sentencia C-294/21.

of crime which has pottential to cause strong emotional reaction of the public. But illusion is that there is some kind of magical wand for solving the problem of crime. Like Dirkhaim said, crime is normal social fact, always present in societies, from the appereance of human kind. The only trick is to sustain the crime on the acceptable level, not to allow it to exceed the optimal level that corresponds to the characteristics of a certain society.

Announcing of introduction the more severe sanctions or some new harder forms of existing crimes or completely new crimes is one of the best way for gaining the political points. The fact is that the modern society is functioning basically on the ground of retributive philosophy and demand for sharper sanctioning of the offenders.

But the truth is that only with prevention efforts things will become better. If we successed to prevent crime, we are in good direction. One of the way of prevention is to influence the perpetrator not to reoffend and the best solution for gaining that goal is removing the conditions that lead to the commission of the previous crime. From that point of view, rehabilitation is still the best option we have.

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## ANALIZA NEKIH PROBLEMA U OSTVARIVANJU RESOCIJALIZACIJE KAO SVRHE KAŽNJAVANJA

*U radu autor se bavi savremenim problemima u postizanju cilja resocijalizacije kao dominantne svrhe izvršenja zatvorske kazne u većini zemalja danas. Resocijalizacija je jedan od osnovnih principa na kojem se zasniva tretman lica osuđenih na kaznu zatvora i sastoji se od brojnih pravila postavljenih u određenim međunarodnim dokumentima, ali koje čine i deo nacionalnog zakonodavstva. U radu je dat pregled istorijskog razvoja modela resocijalizacije kako u svetu tako i kod nas, kao i savremenih pristupa u razmatranju te problematike. Autor dalje analizira neke retributivne tendencije u savremenom zakonodavstvu. Jedan od problema je trend izricanja doživotne kazne, što je posebno problematično u slučaju odsustva mogućnosti uslovnog otpusta za pojedine osuđenike. Taj oblik kazne doživotnog zatvora je propisan Krivičnim zakonikom Republike Srbije, pa autor razmatra održivost te odredbe, posebno u kontekstu odluka Evropskog suda za ljudska prava.*

**Ključne reči: resocijalizacija, zatvori, kažnjavanje, retribucija, doživotni zatvor**