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

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

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

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

1. Introduction

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

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

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

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

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

2. Prison sentence

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

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

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

3. Long-term imprisonment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. European Court of Human Rights case law

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

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

Accordingly, Article 3 of the Convention had to be interpreted as requiring reducibility of life sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. Even though it was not the Court's task to prescribe the form (executive or judicial) which that review should take, nor was it for the Court to determine when that review should take place, the comparative and international law materials before the Court showed clear support for the institution of a dedicated

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

Finally, if the requested review was possible only after serving one part of a sentence, a prisoner serving a life sentence without parole should not have to wait for an indefinite number of years of his sentence before getting an opportunity to complain that the legal conditions related to his sentence do not comply with Article 3. A prisoner serving a life sentence without parole is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where the national law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of detention.

5.1. Khamtokhu and Aksenchik v. Russia[12]

(exemptions from life imprisonment are not discriminatory)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3. Hutchinson v. the United Kingdom[14]

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

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

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

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

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

5.4. Harakchiev and Tolumov v. Bulgaria[15]

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

The Court reiterated that the imposition of a life sentence, without the possibility of commutation, may lead to a violation of Article 3 of the Convention. However, a sentence of life imprisonment does not become a sentence "without the possibility of commutation" by the mere fact that in practice it can be served in full; for the purpose of Article 3 it is enough that such a sentence may be reduced *de jure* and *de facto*. In order for a sentence of life imprisonment to be in compliance with Article 3, it has to offer both the possibility of release and the possibility of review because a prisoner may not be incarcerated if there are no legitimate penological grounds for his continued detention, including his rehabilitation. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.

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

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

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

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

5.5. Murray v. The Netherlands[16]

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

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

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

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

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

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

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

5.6. Kafkaris v. Cyprus[17]

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

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

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

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

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

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

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

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

6. Conclusion

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

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

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

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

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