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Life Imprisonment Without Parole: The Compatibility of Serbia's Approach with the European Convention on Human Rights

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Abstract
In this article, the author deals with the issue of life imprisonment without parole. Life imprisonment represents a new type of penalty in Serbian criminal law, in addition to standard imprisonment. The present state of the Serbian criminal legislation provides the possibility of parole for most criminal offences after 27 years of imprisonment served, while simultaneously explicitly prohibiting the possibility of parole for certain offences. The author elaborates the judgments of the European Court of Human Rights regarding life imprisonment, emphasizing rehabilitation as the primary goal of criminal sanctions. After that, the author explains the legislative solutions outlined in the Criminal Code of Republic of Serbia. Through the analysis of the crucial provisions of the Criminal Code, as well as other important and relevant laws, the author points out the shortcomings of the existing regulations in Serbia regarding life imprisonment, which flagrantly threatens to violate the offenders' human rights.

Keywords Life imprisonment · Parole · Rehabilitation · European court of human rights · Serbian criminal code

Introduction

One of the most important questions of criminal law is (and has always been) how to determine the best way of punishing the perpetrators of crimes, and what does society want to achieve by punishing the offender. Throughout history, the answers to these questions have varied from decade to decade and from one society to another. Ashworth and Horder emphasize that the aims of sentencing are not simply part of the background of criminal law—they have implications for the shape of criminal

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law itself (Ashworth and Horder 2013). In addition, it is important to distinguish the aims of the criminal justice system from the aims of sentencing (Ashworth 2010). However, the analysis of comparative legislation is not the only way to gain insights into different legal systems. Since its founding in 1959, the European Court of Human Rights (hereinafter: ECtHR) has been providing insights into individual legislative solutions, and remains capable of responding to contemporary human rights challenges across the member states of the Council of Europe (Londras and Dzehtsiarou 2015).

After the abolition of the death penalty, the main penalty in any legislation remains the penalty of imprisonment, which remains the most serious and significant criminal sanction. However, many countries were not satisfied by solely prescribing the penalty of imprisonment for certain duration. As a result, the penalty of imprisonment had historically been imposed worldwide for various reason and political ideas. In an attempt to appease the public opinion and to persuade the community that something is being done to protect it from crime, governments have passed laws that have infringed on the rights of those who have been convicted or are suspected of committing criminal offences, or who are considered to pose a danger of doing so (Dyer 2016). In some states, life imprisonment is not uncommon, while in others, such as Scandinavian countries, life-imprisoned offenders constitute only small percentages of the total prison populations (Schartmueller 2018). The problem in criminal law theory is the legal nature of life imprisonment, which, unlike other criminal sanctions, has its own legitimacy, which is drawn from the death penalty because it is considered as its substitute (Ćorović 2018). Another problem is life imprisonment without parole. In parole, the prisoner is released before the end of his or her prison term (Carmen 2010; Carmen and Hemmens 2017; Signorelli 2011; Gaines and Miller 2019) and it is used to encourage inmates to stay out of trouble and engage in rehabilitative efforts while in prison (Hall 2009). It can be granted to inmates who could demonstrate their willingness to conform their conduct to the requirements of the law (Sheb and Sheb 2011).

The life sentence by its nature is indeterminate, and life-imprisoned offenders are released back into the community having served a significant period in prison in many jurisdictions. Life imprisonment without parole is sometimes called a true life sentence because offenders are sentenced to spend the remainder of their natural lives in prison, although authors suggest that a better term for this sentence might be death by incarceration (Johnson and McGunigal-Smith 2008). However, is it acceptable to impose sentences that deliberately give the state the power to detain convicted offenders in prison until they die there and can such sentences be implemented justly (Smit and Appleton 2019)? The author believes that the answer is negative.

However, any form of release prior to the expiration of the sentence imposed by a court of law had always been viewed by the worldwide public with some scepticism, commonly being regarded as a form of unwarranted leniency or kindness to prisoners who may not deserve it, and there is commonly a concern that releasing offenders on parole poses a danger to the community (Freiberg et al. 2018). Additionally, as scholars often emphasize, controlling inmates who have no prospect of parole is problematic—the sentence arguably buys protection for the general public, partly

at the expense of all those within prison (Ashworth and Zedner 2014; Appleton and Grover 2007; Padfield 2002). It is not disputable that parole decision-making is largely a question of trying to predict human behaviour (Shute 2007). That is a very hard task for every parole board; however, it has to be undertaken in every case nonetheless. It could be said that, on the one hand, the absence of periodic review and impossibility of release suggests that the preventive element is subsidiary to the punitive, because the release is not an option even if it could be shown decisively that the prisoner no longer posed a risk; on the other, the sentence has a preventive aspect in that it is reserved for those considered to pose the gravest of risks and the bar on parole is aimed at protecting the public from them (Appleton and Grover 2007; Ashworth and Zedner 2014).

In jurisdictions in which the system of life imprisonment without the possibility of parole exists, there has been a reconsideration of such a solution, especially after the judicature of ECtHR in this matter (Hatheway 2017). As we shall see, in a series of cases centred around the decision in *Vinter and Others v. the United Kingdom*, the ECtHR seemed to hold that the European Convention on Human Rights (hereinafter: Convention) was violated if a prisoner was given a whole-life sentence without domestic law providing an established mechanism for on-going review of that sentence with the possibility of release and without the prisoner knowing what he or she had to do to be considered for release (Pildes 2018).

Therefore, one of the key issues in this matter is the point at which the convicted offender may seek parole. Different solutions regarding this matter are present in comparative legislation. In a majority of countries in which life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by the law and such a mechanism, integrated within the law and the practice of sentencing, is foreseen in the law—for example, 35 years in Albania (Criminal Code 1995), 15 years in Austria (Strafgesetzbuch 1974) and 15 years in Germany (Strafgesetzbuch 1971).

Firstly, there are two important decisions regarding the admissibility of applications. In *Streicher v. Germany* and *Meixner v. Germany*, the applicants requested suspensions of their sentences after 15 years of imprisonment. These applications were declared inadmissible as manifestly ill-founded, because the ECtHR found that the applicants were not deprived of hope of being released again (the German law provided for a parole system and they could therefore lodge a new request to be released on probation.[1] Then, for example, in *Iorgov v. Bulgaria (№ 2)*, there had been no violation of Article 3 because the applicant had served only 13 years of his life sentence, after which he had submitted an application for presidential clemency, which had been examined and rejected, while nothing prevented him for submitting a new application.[2] The ECtHR assumed this position in similar cases.[3] In *Lynch and Whelan v. Ireland*, the application was inadmissible due to the fact that, although the

[1] Streicher v. Germany, 2009; Meixner v. Germany, 2009.

[2] Iorgov v. Bulgaria (№ 2), 2010.

[3] *See* Todorov v. Bulgaria, 2011, Simeonovi v. Bulgaria, 2011, Dimitrov and Ribov v. Bulgaria, 2011 and Kostov v. Bulgaria, 2012.

average release time of prisoners sentenced for life had increased from the beginning of the XXI century, the sentences were *de facto* and *de jure* reducible.[4]

Slovakia is one of the countries in which a person sentenced to life imprisonment may be conditionally released after they had served at least 25 years of such sentence (Act 2005). Accordingly, in *Čačko v. Slovakia*, the ECtHR found no violation of Article 3 because a judicial review mechanism, rendering possible a conditional release after 25 years of sentence served, was introduced into the Slovakian legislation.[5] The reasoning of this judgment was later followed in the decision on admissibility in *Koky v. Slovakia*.[6]

The following analysis will address the ECtHR's judgments regarding life imprisonment. The author will then explain the new Serbian criminal legislation, and point to provisions that, in the author's understanding, are inconsistent with the case law of the ECtHR.

Life Imprisonment Without Parole Under the Convention

The key article of the Convention regarding life imprisonment is Article 3, which guarantees that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Provisions of Article 3 of the Convention allow for no derogation and prohibit inhuman or degrading punishment in absolute terms. This right's interpretation is the beginning and end of its delimitation and sets a line between lawful and unlawful State behaviour (Mavronicola 2015). Case law pertaining to life imprisonment continues to be developed further in what is a relatively fast process. Firstly, it should be emphasized that the ECtHR held in *Leger v. France* that very long sentences are not contrary to Article 3.[7] However, in *Weeks v. the United Kingdom*, the ECtHR stated that, while life imprisonment is not contrary to Article 3[8] (Dijk and Heringa 2001), this penalty has to be reducible in practice. A life sentence is not become irreducible by the mere fact that in practice it may be served in full.[9] In other words, life imprisonment as a form of punishment for particularly serious offences remains compatible with the Convention as long as it is *de facto* and *de jure* reducible (Sattar 2019).[10] The problem that arises is life imprisonment without parole or without any means by which it could become reducible. Accordingly, the ECtHR has undermined the legitimacy of life imprisonment without parole in its judgments, while simultaneously not touching upon the issue of life imprisonment with parole (Marchesi 2018). Certain countries in the world took the same approach (Novak 2017). As judge Pinto de Albuquerque pointed out in *Khamtokhu*

[4] Lynch and Whelan v. Ireland, 2013.

[5] Čačko v. Slovakia, 2014.

[6] Koky v. Slovakia, 2017.

[7] Leger v. France, 2006.

[8] Weeks v. the United Kingdom, 1987.

[9] Törköly v. Hungary, 2011.

[10] *See* Khamtokhu and Aksenchik v. Russia, 2017.

and Aksenchik v. Russia, life imprisonment without parole destroys any prospect of social reintegration.

The ECtHR elaborated on the right to parole in numerous judgments regarding life imprisonment cases, which will be analysed in this article. It is particularly important to note that three of these judgments are from 2019. Chronologically speaking, these are the most important of such judgments: *Kafkaris v. Cyprus, Vinter and Others v. the United Kingdom, Öcalan v. Turkey (№ 2), László Magyar v. Hungary, Harakchiev and Tolumov v. Bulgaria, Trabelsi v. Belgium, Bodein v. France, Murray v. Netherlands, Hutchinson v. the United Kingdom, Matiošaitis and Others v. Lithuania, Petukhov v. Ukraine (№ 2) and Marcello Viola v. Italy (№ 2)*. In his concurring opinion in *Matiošaitis and Others v. Lithuania*, Judge Kūris pointed out that one of the elements of this development, albeit not yet an outstanding one, is the slow but steady and purposeful movement from the admission—as in *Vinter and Others v. the United Kingdom*, which is, to a much greater extent than the post-Vinter case law, permeated with the spirit of the then still recent judgment in *Kafkaris v. Cyprus*—that the review of life imprisonment sentences should entail either the executive or judicial review, so that even the appearance of arbitrariness is avoided, to the effective rejection, whenever possible, of the executive alternative.

The first judgment relevant for this analysis is *Kafkaris v. Cyprus*, but the pivotal one is *Vinter and Others v. the United Kingdom*. In *Kafkaris v. Cyprus*, the ECtHR stated that in determining whether a life sentence in a given case can be regarded as irreducible, the ECtHR has to ascertain whether a life prisoner can be said to have any prospect of release. Accordingly, where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3.[11]

With reference to *Kafkaris v. Cyprus*, the ECtHR found in *Garagin v. Italy* that life sentences in Italy are reducible *de jure* and *de facto*, and thus it could not be said that the applicant in this case had no prospect of release or that his detention, albeit lengthy, amounted to inhuman or degrading treatment.[12] The fundamental requirement in the ECtHR's case-law under Article 3 of the Convention is that life sentences be *de facto* and *de jure* reducible. A life sentence does not become irreducible by the mere fact that in practice it may be served in full, and no issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible.[13]

However, the key case in this matter is *Vinter and Others v. the United Kingdom*.[14] This is one of the ECtHR's judgments where comparative law is called to establish the presence or the lack of the consensus among the States on the life imprisonment issue (Bercea and Mercescu 2017). The ECtHR explored the most significant international documents on this issue, as well as comparative criminal law systems with the sentence of life imprisonment. As Kanstantsin Dzehtsiarou points out, external legal sources used by the ECtHR in its reasoning include the

[11] Kafkaris v. Cyprus, 2008.

[12] Garagin v. Italy, 2008.

[13] Kafkaris v. Cyprus, 2008.

[14] Vinter and Others v. the United Kingdom, 2013.

provisions of international law, reports of international interstate and nongovernmental organizations, judgments of international and regional tribunals other than the ECtHR, and the laws and practices of the states outside the Council of Europe (Dzehtsiarou 2017). In addition, in *Vinter*, the ECtHR applied a gross disproportionality test to determine whether a sentence amounts to inhuman or degrading treatment contrary to Article 3 (Gray 2017). Through this judgment, the ECtHR emphasized that Article 3 must be interpreted as requiring reducibility of the sentence. Similarly to its position in numerous different cases, the ECtHR stated that the national authorities have to prescribe the form which that review should take.[15] The statement that, in cases where domestic law does not provide for the possibility of a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention is very important for national criminal legislations. This is particularly true when speaking of Serbian law. Although the ECtHR recommends 25-year limits, it must be taken into account that this means 25 years after the imposition of a life sentence. In many jurisdictions, a person can spend a couple of years in detention before the sentence is pronounced, but this period will not be calculated into the 25-year limit recommendation.

After this judgment, it became clear that there are two separate grounds which render the very imposition of a whole life sentence incompatible with Article 3: when a whole life sentence is grossly disproportionate and when, at the moment of imposition of the whole life sentence, it is not determined with sufficient clarity, neither in the sentence itself, nor in the relevant rules of national law, under what conditions a life prisoner can seek to reduce his / her whole life sentence in the future, and / or if there is no real prospect of release (Szydlo 2013). In sum, the ECtHR noted that detention with no possibility of release is contrary to human dignity (Schabas 2016). At this point, it is interesting to note that such attitude was also expressed by Pope Francis in 2014 (Almenara and Smit 2015).

This case had significant influence on the UK criminal legislation. In *Hutchinson v. the United Kingdom*, which is described as the ‘counter-revolution’ to the *Vinter and Others* ‘revolution’ (Tan 2017), the ECtHR concluded that the domestic system no longer shows the contrast that the ECtHR identified in *Vinter*, because the whole life sentence can be regarded as reducible and in accordance with Article 3 of the Convention.[16] Therefore, just 3 years after *Vinter*, the ECtHR accepted that the UK’s system of reviewing whole-life sentences is in compliance with Article 3 of the Convention (Hart 2015). This judgment points to the on-going expansion of the deference to domestic courts into a new direction (Cali 2018). However, Merris Amos emphasizes that the ECtHR and its jurisprudence operate as a disincentive where breaches of the Convention rights are contemplated; where a violation is found, the ECtHR will usually grant a remedy to the applicant, and this will be implemented by the United Kingdom, but will not result in any wider change, or it might be that a finding of no violation by the ECtHR supports the government’s position and helps it to resist reform on issues such as the regulation of political

[15] Vinter and Others v. the United Kingdom, 2013.

[16] Hutchinson v. the United Kingdom, 2017.

advertising or the policing of demonstrations, but instances where a judgment of the ECtHR instigates a process of change or progress in the United Kingdom are now very rare (Amos 2019).

One of the cases that raised a great amount of media attention was *Öcalan v. Turkey*[17] (Trilsch and Ruth 2006). In a first, lengthy judgment, the ECtHR concluded that the imposition of a death sentence, following an unfair trial, amounted to inhuman treatment in violation of Article 3 of the Convention (Clapham 2003). However, in *Öcalan v. Turkey (№ 2)*, the ECtHR examined the issue of release on humanitarian grounds as related to life imprisonment, because under Turkish law, in cases of illness or old age of a life prisoner, the President of the Republic may order their immediate or deferred release. The Turkish legislature had, at fairly regular intervals, adopted general or partial amnesty laws in order to help resolve major social problems, but there is no evidence that such a plan is being prepared to provide the applicant with a prospect of release. Such legislation is characterized by a lack of any mechanism for reviewing, after a specified minimum term of incarceration, life sentences imposed for crimes such as those committed by the applicant with a view of verifying the persistence of legitimate reasons for continuing his incarceration. Nevertheless, the ECtHR considered that release on humanitarian grounds did not correspond to the concept of "prospect of release" on legitimate penological grounds, and the life sentence imposed on the applicant could not be deemed reducible for the purposes of Article 3 of the Convention.[18] In addition, the ECtHR emphasized that "this finding of a violation cannot be understood as giving the applicant the prospect of imminent release. The national authorities must review, under a procedure to be established by adopting legislative instruments and in line with the principles laid down by the Court in … *Vinter and Others*, whether the applicant's continued incarceration is still justified after a minimum term of detention, either because the requirements of punishment and deterrence have not yet been entirely fulfilled or because the applicant's continued detention is justified by reason of his dangerousness".[19] The ECtHR took a similar approach in *Boltan v. Turkey*[20] and earlier, in *Kaytan v. Turkey* and *Gurban v. Turkey*.[21]

It is interesting to note that in Hungary, during the preparation of the new Hungarian Constitution, an extensive survey organized by the government showed wide support amongst the population for life imprisonment without the option of parole (Gellér 2013). In this country, life imprisonment sentences are not rare (Heka 2014), which is reflected in the number of applications against Hungary before the ECtHR. In the most famous judgment in this sphere, *László Magyar v. Hungary*, the ECtHR outlined the need for the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, and that such possibility will be sufficient to satisfy Article 3. In the Hungarian

[17] Öcalan v. Turkey, 2003.

[18] Öcalan v. Turkey (№ 2), 2014.

[19] Öcalan v. Turkey (№ 2), 2014.

[20] Boltan v. Turkey, 2019.

[21] Kaytan v. Turkey, 2015, Gurban v. Turkey, 2015.

legislation, imprisonment can last for life or for a definite time, with a possibility of an individual pardon. The problem of such a solution is in the fact that the Hungarian legislation did not empower the authorities or the President of the Republic to assess, whenever a prisoner requests pardon, whether his or her continued imprisonment is justified on legitimate penological grounds. Consequently, the ECtHR was not persuaded that the institution of presidential clemency, taken without being complemented by the eligibility for release on parole, can allow any prisoner to know what he or she has to do to be considered for release and under what conditions. Additionally, this law did not guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner.[22] According to this judgment, such regulations did not render life sentences in Hungary reducible.

As a way of complying with the ECtHR's standings in *László Magyar v. Hungary*, Hungary enacted new regulations, introducing the mechanism of an automatic review of whole life sentences. Under the new legislation, *ex officio* clemency proceedings have to be counducted in cases of persons sentenced to life imprisonment without the possibility of parole. It is further prescribed that the correctional facility detaining the convicted prisoner shall notify the minister of justice when the convicted prisoner has served 40 years of their sentence. After obtaining the preparatory documents, the minister has to notify the President of the *Kúria* of the commencement of the mandatory clemency proceedings. The Clemency Board is a five-member board participating in the mandatory clemency proceedings and reaching its decisions by a majority vote. Before the final decision, the Board has to hear the convicted prisoner. Based on this examination, the Board adopts a reasoned opinion containing a recommendation on the granting of clemency. The minister may not depart from this opinion. He then drafts the clemency application for the President of the Republic. However, in spite of the detailed process, this was not enough for the ECtHR. According to the ECtHR's position in *T.P. and A.T. v. Hungary*, the sole fact that the applicants can hope to have their progress towards release reviewed only after they have served 40 years of their life sentences is sufficient for the ECtHR to conclude that the new Hungarian legislation does not offer *de facto* reducibility of the applicants' whole life sentences, because such a long waiting period unduly delays the domestic authorities' review of "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".[23]

In *Bodein v. France*, the ECtHR pointed out that the petition for clemency, which is only a favor granted by the President of the Republic in a discretionary manner, should be excluded from its scope, because the government has not provided a single example of a person serving a life sentence who has been released by a presidential pardon. Additionaly, a 30-year period provided as a condition for review in Article 720-4 of the French Criminal Procedure Code goes beyond the institution of a dedicated mechanism guaranteeing a review no later than 25 years after the

[22] László Magyar v. Hungary, 2014.
[23] T.P. and A.T. v. Hungary, 2016.

imposition of a life sentence, with further periodic reviews thereafter.[24] However, in this instance, the applicant was not deprived of hope, because, after deducting the period of pre-trial detention, he would become eligible for a review of sentence 26 years after the sentence to life imprisonment had been pronounced, and theoretically, he could be released on parole. The ECtHR took the same stance in the decision on admissibility in *Vella v. Malta*.[25] Further, in *Petukhov v. Ukraine (№ 2)*, the ECtHR has held that, in assessing whether a life sentence is reducible *de facto*, it may be of relevance to take into account the statistical information on prior use of the review mechanism in question, including the number of persons who have been granted a pardon, and in the case where only one clemency request from a life prisoner has been granted in Ukraine, it shows that in practice life prisoners have negligible prospects of having their requests for clemency granted.[26]

Trabelsi v. Belgium is also a significant judgment, primarily due to the fact that Belgium blatantly disregarded interim measures issued by the ECtHR, which was shocking and disgraceful (Lavrysen 2014). In this case, the applicant was extradited to the United States, due to multiple charges (conspiracy to kill United States nationals outside of the United States, conspiracy and attempt to use weapons of mass destruction, conspiracy to provide material support and resources to a foreign terrorist organization and providing material support and resources to a foreign terrorist organization). This judgment further reiterates the requirement that the prospect of release must be a realistic one, so that the sentence is reducible both *de jure* and *de facto* (Foster 2015). In this case, the ECtHR dealt with the alleged violation consisted in having exposed the applicant, by extraditing him to the United States, to the risk of an irreducible life sentence without parole, in breach of the requirements of Article 3 of the Convention. Here, the US authorities did not provide possible release on parole in the event of a life sentence, whether mandatory or discretionary, but it can be inferred that there are several possibilities for reducing such a sentence. In this case, the sentence could be reduced on the basis of substantial cooperation by the prisoner in the investigation of his case and the prosecution of one or more third persons. The sentence can also be reduced for compelling humanitarian reasons. The ECtHR applied the reasoning from *Vinter* in the context of extradition proceedings and considered that the life sentence liable to be imposed on the applicant could not be described as reducible for the purposes of Article 3 of the Convention.[27] By exposing the applicant to the risk of treatment contrary to this provision, Belgium had responsibility under the Convention. According to Gieger, in a world where terrorist groups increasingly recruit members and execute attacks throughout the globe, such extradition restrictions can pose substantial dangers both at home and abroad (Gieger 2015). The author cannot agree with this attitude, regardless of the facts of the case. The fact that the ECtHR is establishing such an extradition restriction

[24] Bodein v. France, 2014.
[25] Vella v. Malta, 2019.
[26] Petukhov v. Ukraine (№ 2), 2019.
[27] Trabelsi v. Belgium, 2014.

does not mean that there will not be prosecution, since other states are just as able to carry out criminal proceedings.

Right to Rehabilitation Under the Convention

The right to rehabilitation is among very important justifications for imprisonment. Today, we can identify four classic grounds invoked by justice systems as justification for detention: punishment, deterrence, public protection and rehabilitation (Schabas 2015), but punishment raises complications in regards to interpretation of Article 3 of the Convention (Mavronicola 2015). Martufi emphasizes that, whilst the ECtHR regards the rehabilitative ideal as the corollary of several key rights of the individual protected by the Convention, the judges in Luxembourg are more prone to read rehabilitation in light of the state's interest to reduce reoffending and secure social protection (Martufi 2018). Kisić and King conclude that in the last few years, the ECtHR's motivation behind the sentencing decisions it reviews may be shifting away from solely punitive measures to focus on fairness, rehabilitation, and release of incarcerated persons (Kisić and King 2014). It is also interesting to note that neither the Convention nor its additional Protocols specifically refer to the aims of criminal punishment (Montaldo 2019).

In the past, the concept of rehabilitation has been a source of controversies and debates (Meijer 2017, p. 146) and the idea that punishment must serve the purpose of rehabilitating offenders has been subject to a number of criticisms (Martufi 2018). It is considered a disputed concept (Smit et al. 2014; Smit and Snacken 2009; Hamilton 2016), but with contemporary tendencies (Soković and Bejatović 2017). Rotman wrote about the constitutional right to rehabilitation (Rotman 1986). Daniel Hall defines the theory of rehabilitation as the proposition that, if the criminal is subjected to educational and vocational programs, treatment and counselling, and other measures, it is possible to alter the individual's behaviour to conform to societal norms (Hall 2009). Some authors point out that rehabilitation is the most humane goal of punishment, which reflects the view that crime is a social phenomenon caused not by the inherent criminality of a person, but by factors in that person's surroundings and such offender can be cured of their proclivities toward crime (Gaines and Miller 2019). The concept of rehabilitation is not explicitly enshrined in the Convention or in its Protocols, and has been developed by the case law of the ECtHR (see more in Martufi 2018). Finally, we have to take a standpoint that rehabilitation is linked with human dignity (Meijer 2017) and place rehabilitation at the forefront (Poremba 2020).

In a few notable cases, the ECtHR has dealt with the right to rehabilitation, especially in life imprisonment cases. When it comes to offenders who have been sentenced to life imprisonment, we do not essentially have hopes that they will be rehabilitated, but we believe that rehabilitation must be provided as a solution (Ćorović 2018). This right is not guaranteed by the Convention. However, in *Hutchinson v. the United Kingdom*, *Petukhov v. Ukraine (№ 2)* and *Khoroshenko v. Russia*, the ECtHR stated that emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their

penal policies.[28] In *Harakchiev and Tolumov v. Bulgaria*, the ECtHR took into account the irreducibility of life imprisonment, as well as the right to rehabilitation and presidential clemency and found Article 3 violated.[29] The system of presidential clemency did indeed exist, but no one serving a whole life sentence had been granted such clemency, and thus the whole life imprisonment was irreducible *de facto*. The ECtHR did not depart from this ruling in *Manolov v. Bulgaria*.[30]

In *Matiošaitis and Others v. Lithuania*, the ECtHR went further in the explanation of the issue of rehabilitation and emphasized that even those who commit the most abhorrent and egregious of acts nevertheless retain their essential humanity and carry within themselves the capacity to change. They retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. Furthermore, to deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.[31] Accordingly, without executive or judicial review of life sentences, it is not possible—and it is essentially pointless—to follow the progress towards rehabilitation made by the life prisoner. The prisoner, moreover, does not have any hope that would drive him in the effort to rehabilitate himself. After this judgment, in March of 2019, changes regarding life prisoners were made in Lithuanian legislation, allowing a life sentence to be changed to a fixed-term sentence and the prisoner concerned to be released on parole. The new regulations also set out the procedure to be followed in order to amend sentences, as well as the criteria that a life prisoner has to meet in order to qualify. The explanatory report noted that the criteria to be met were strict, and only persons who had achieved a "considerable improvement" in respect of all the criteria could have his or her life sentence changed to a fixed-term sentence. On the basis of this, the ECtHR decided to strike the application in *Dardanskiš and Others v. Lithuania* out of its list of cases, pursuant to Article 37 of the Convention.[32]

According to the ECtHR in *Murray v. Netherlands*, life prisoners are thus to be provided with an opportunity to rehabilitate themselves. The ECtHR emhasized that even though states are not responsible for achieving the rehabilitation of life prisoners, they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves. The obligation to offer a possibility of rehabilitation is to be seen as an obligation of means, not one of result.[33] The ECtHR further elaborated and took the position that states have a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation. The determination of the facilities or measures for rehabilitation is a procedural matter that falls upon domestic authorities (Tan 2017). Consequently, a failure to provide a life prisoner with

[28] Hutchinson v. the United Kingdom, 2017; Petukhov v. Ukraine (№ 2), 2019; Khoroshenko v. Russia, 2015.

[29] Harakchiev and Tolumov v. Bulgaria, 2014.

[30] Manolov v. Bulgaria, 2014.

[31] Matiošaitis and Others v. Lithuania, 2017.

[32] Dardanskiš and Others v. Lithuania, 2019.

[33] Murray v. Netherlands, 2016.

opportunity to rehabilitate themselves may accordingly render the life sentence *de facto* irreducible.[34]

As Judge Pinto de Albuquerque stated in his partly concurring, partly dissenting opinion in *Petukhov v. Ukraine (№ 2)*, after *László Magyar v. Hungary* and *Harakchiev and Tolumov v. Bulgaria*, the development of the case law reached what seemed to be a point of no return in 2016 with the *Murray* judgment, the Grand Chamber having circumscribed the State's positive obligation to ensure the existence of an effective and independent review mechanism.[35] In the latest judgment in this sphere, *Marcello Viola v. Italy (№ 2)*, the ECtHR considered that the sentence of life imprisonment imposed on the applicant under "Life Imprisonment and Parole in Serbia" section bis of the Prison Administration Act (*ergastolo ostativo*) restricted his prospects for release and the possibility of review of his sentence to an excessive degree. In this case, the applicant was sentenced to life imprisonment for membership in a mafia organization. The fact that he was a leader in the organization was seen as an aggravating circumstance. Under Italian law, he could cooperate with the police in order to gain any prospect of release; to that end, he had to provide the authorities with decisive information for the purposes of preventing further consequences of the offence or helping to establish the facts and identify the perpetrators of criminal offences. The applicant refused to cooperate. The ECtHR took into the account that these offences are a particularly dangerous phenomenon for society, but the efforts to tackle that scourge could not justify derogating from the provisions of Article 3 of the Convention. Furthermore, the ECtHR stated that the ultimate aim of resocialisation is to prevent reoffending and protect the society, and consequently reached the conclusion that this sentence could not be regarded as reducible for the purposes of Article 3 of the Convention.[36]

Accordingly, one of the ECtHR's standards regarding life imprisonment is the possibility of parole, which is closely linked to rehabilitation.

Life Imprisonment and Parole in Serbia

The Historical Development of the Life Imprisonment in Serbia

It can be said that the history of the development of criminal law essentially demonstrates the fact that the system of criminal sanctions is the most dynamic area of this branch of law. If we look at criminal law regulations of the last 200 years, we can easily observe the fact that new criminal sanctions are constantly being introduced, while the old ones, which no longer meet the needs of a certain society in its development, are being rejected. However, variations in the types of criminal sanctions were influenced by other factors, such as economic, political, cultural, and other circumstances (Srzentić et al. 1978). Since life imprisonment is by no means a novelty

[34] Murray v. Netherlands, 2016.

[35] Petukhov v. Ukraine (№ 2), 2019.

[36] Marcello Viola v. Italy (№ 2), 2019.

in the criminal legislation of the Republic of Serbia, the author believes it necessary to outline a brief retrospective of the development of the system of criminal sanctions and penalties.

In medieval Serbian criminal law, there were several terms for denoting a crime. In those days, criminal legislation was based upon the material conception of the criminal offence, according to which the criminal offence was a socially dangerous offence that could manifest itself in three forms, as *обида*, *преступленије* and *сагрешеније* (Pavlović 2005). However, the first hint and the announcement of the creation of modern criminal law in Serbia can be found in the Organization of District Courts of January 26, 1840 (Serb. lat. *Ustrojstvo okružnih sudova*, Serb. cyr. *Устројство окружних судова*). This legal act provides several forms of deprivation of liberty in Article 22: life imprisonment, life detention, temporary detention, temporary detention with heavier or lighter irons or without irons, and house and public imprisonment. It should be noted that this legal text was the first one in the history of Serbian criminal law that made a distinction between various forms of deprivation of liberty. In practice, as the judgments show, imprisonment referred to life imprisonment or temporary imprisonment with heavy or light irons (Mirković 2013). This was also the first introduction of life imprisonment into Serbian criminal law, in a form that was adapted to the circumstances in the country at the time.

In 1855, Prince Aleksandar Karađorđević initiated the procedure for the adoption of the first Criminal Code, which was enacted on March 29, 1860, after much hesitation and turmoil in the country. It was modelled on the Prussian Criminal Code of 1851, with features borrowed from other German codes, as well as the French codes (Pavlović 2005). In this legal text, the aim of penalties is primarily reflected in the offender's atonement for the committed crime, and then the offender's rehabilitation and general prevention. The penalties were: death penalty, various forms of deprivation of liberty (penal servitude, detainment and imprisonment), expulsion from profession, fine, corporal punishment, confiscation of certain items obtained by a criminal offence or used to commit a criminal offence, prohibition on practicing a certain profession, expulsion, loss of civic honour and police supervision. Penal servitude could last up to a maximum of 20 years, and Đorđe Cenić, the commentator of this legal text, pointed out that it's praiseworthy that Serbia had abolished life imprisonment much earlier than many of the more developed countries (Pavlović 2005). The commentator had essentially criticized the solutions of the Prussian Criminal Code, but the reason behind the abolition of life imprisonment in Serbia at the time was much simpler—Serbia did not have adequate facilities for a large number of convicted persons, which is why life imprisonment was replaced by the death penalty (Pavlović 2005).

The new Criminal Code of 1929 divided all penalties into two categories—primary and secondary penalties. Primary penalties were the death penalty, fine and imprisonment, while the loss of honorary rights and expulsion from profession were secondary. The penalty of imprisonment could be imposed in the form of penal servitude, detention, imprisonment and rigorous imprisonment (Jakšić and Davidović 2013).

The development of Yugoslav criminal law after the Second World War was marked by frequent and extensive changes. As a rule, almost all changes included

changes in the system of criminal sanctions, whereby new sanctions were accepted, old ones were abandoned, their content was changed, or regrouping into penalties or security measures was performed (Srzentić et al. 1978). In the first place, the Decree on Military Courts of 24 May, 1944 established a system of criminal sanctions that included eight primary and three secondary penalties: rigorous admonition, pecuniary fine, expulsion from residence, deprivation of rank, removal from official position, forced labour for a period of 3 months to 2 years, severe forced labour and death penalty. Besides the mentioned penalties, the court could order the loss of military or civilian honours and confiscation of property. The 1945 Type of Punishment Act outlined 13 different penalties and three educational measures: death penalty, loss of citizenship, imprisonment with forced labour, deprivation of liberty, forced labour without deprivation of liberty, loss of political and certain civil rights, loss of state and other public offices, loss or reduction of rank, prohibition to engage in certain activities or crafts, confiscation of property, fine, expulsion from residence, and the obligation to compensate the damage. The court could impose three different educational measures on minors: handing them over to their parents or other persons to take care of them, admonition by the court and remand to a correctional institution. Next, the general part of the Criminal Code of 1947 prescribed three types of criminal sanctions: penalties, health protection measures and educational-corrective measures. In essence, all penalties from the 1945 Type of Punishment Act had been retained, except for the loss of state or other public offices (Srzentić et al. 1978). Otherwise, health protection measures were applied to mentally incompetent persons or offenders with substantially diminished mental competence. They included referral to an institution for the mentally ill and referral to another institution for treatment. The death penalty was carried out by firing squad or by hanging. As seen above, there were several types of deprivation of liberty. The basic sentence of imprisonment could not be shorter than 6 months or longer than 5 years (Article 33). However, imprisonment with forced labour could last between 6 months and 20 years. It is an interesting fact that this law reintroduced the sentence of life imprisonment. Namely, the court could impose imprisonment with forced labour and for life, but only for criminal offences for which the death penalty was prescribed, if it found that the circumstances of the commission of the criminal offence and the personal characteristics of the perpetrator allow mitigation (Article 32).

The 1951 Criminal Code reduced the number of penalties to seven: death penalty, rigorous imprisonment, imprisonment, restriction of civil rights, prohibition of engaging in a certain profession, seizure of property and fine. This regulation provided for the possibility of substituting the death penalty with rigorous life imprisonment. At the same time, there was a possibility of replacing the death penalty with life imprisonment in situations in which the court considers that the death penalty should be replaced, as well as in cases in which the death penalty is replaced by an act of amnesty or pardon (see more in Ćorović 2018). The tendency to reduce the number of penalties was particularly evident in the 1959 and 1962 amendments to the Criminal Code, when the number of penalties had been reduced to five: death penalty, rigorous imprisonment, imprisonment, seizure of property and fine. In 1959, the possibility of replacing the death penalty with life imprisonment was ruled out. Instead, the death penalty could be replaced by 20 years of imprisonment.

The Criminal Code of the Socialist Federal Republic of Yugoslavia, which was passed on September 28, 1976, provided a system of four types of criminal sanctions. *Penalties* included death penalty, imprisonment, fine and seizure of property. Life imprisonment, abolished from criminal legislation, was not reintroduced by this law.[37]

There were several key events that led to the enactment of the 2005 Criminal Code. The SFRY had disintegrated, a civil war had been fought, the Federal Republic of Yugoslavia was formed, and in 2003 the state union of Serbia and Montenegro was created as the successor to the former state. Observed from the point of view of criminal legislation, it is important to note that, in the meantime, the death penalty and seizure of property were abolished, and the penal system became based on imprisonment and pecuniary fines. In 2006, Montenegro seceded from the state union with the Republic of Serbia. Only a year before, Serbia had passed a new Criminal Code, which came into force on January 1, 2006, and is still in force today, despite numerous amendments.

The 2005 Criminal Code and the Return of Life Imprisonment

The new Serbian Criminal Code came into force in 2006, and has since been amended more than once.[38] In order to analyse the given matter more closely, it is necessary to start by looking into the individual provisions of the Serbian Criminal Code. Article 4, Paragraph 2 of the said Code states that the general purpose of prescription and enforcement of criminal sanctions is to suppress acts that violate or endanger the values protected by criminal legislation.[39] The Serbian criminal legislation defines four types of criminal sanctions: penalties, cautions, security measures and rehabilitation measures. Within the framework of the general purpose of criminal sanctions, the purpose of penalties is fourfold:

[37] Then, *cautionary measures* were—and remain to this day—suspended sentence and judicial admonition. *Security measures* were: compulsory psychiatric treatment and confinement in a medical institution, compulsory psychiatric treatment without confinement, compulsory alcohol and drug addiction treatment, prohibition from practicing a certain profession, activity or duty, prohibition of public appearance, prohibition of driving a motor vehicle, confiscation of objects and expulsion of a foreigner from the country. Lastly, *juveniles* could be subjected to criminal sanctions in the form of disciplinary measures, measures of increased supervision and institutional measures.

[38] The Code begins by proclaiming the principle of legality and prescribes that no person may be punished or have another criminal sanction imposed upon them for an offence that did not constitute a criminal offence at the time it was committed, nor may penalty or any other criminal sanction be pronounced that did not legally exist at the time the criminal offence was committed (Article 1—*nullum crimen nulla poena sine lege*). Furthermore, the Code prescribes that penalties and cautions may only be imposed on an offender who is guilty of the committed criminal offence (Article 2). Article 3 further proclaims that the protection of the human being and other fundamental social values constitutes the basis for—and determines the scope of—defining individual criminal offences, imposing criminal sanctions, and enforcing them to a degree necessary for the effective suppression of these offences.

[39] Article 4, Paragraph 2 of the Criminal Code.

(1) to prevent the offender from committing criminal offences and deter them from future commission of criminal offences;
(2) to deter others from committing criminal offences;
(3) to express social condemnation of the criminal offence, enhance moral integrity and reinforce the general obligation of abiding by the law;
(4) to achieve fairness and proportion between the committed criminal offence and the severity of the imposed criminal sanction.[40]

There are presently four types of criminal sanctions. These are penalties, security measures, cautionary measures and educational measures. Since the primary subject of this article is life imprisonment, the following analysis will primarily be focused on penalties, while the other types of criminal sanctions will not be further elaborated. Presently, the Code defines five types of penalties: life imprisonment, imprisonment, pecuniary fine, community service and driver's license revocation.[41] Thus, unlike the legal texts mentioned above, the new Criminal Code clearly singles out life imprisonment as a new *type* of penalty. Imprisonment may only be pronounced as the principal penalty, while fines, community service and driver's license revocation may be pronounced as both principal and secondary penalties. If several penalties are prescribed for a single criminal offence, only one of them may be pronounced as the principal penalty.[42] The minimum term of imprisonment is 30 days, while the maximum is 20 years, and the term must be pronounced in full years and / or months; if the offender is sentenced to imprisonment for the duration of less than 6 months, the prison term may also be pronounced in days.[43] Prior to its most recent changes, the Code proscribed a special penalty of imprisonment for the duration of 30–40 years. This penalty could only be pronounced for the most serious criminal offences, or the most serious forms of criminal offences, and the duration of the term could only be pronounced in full years within the prescribed range. However, this penalty has now been replaced by life imprisonment, which does not have a fixed term; for certain criminal offences, this penalty can last for the rest of the convicted person's life, which raises serious concerns related to human rights.

Considering the above, it is also important to analyse the rules and principles of sentencing. In principle, the court determines the penalty for a criminal offender within the limits set forth by the law for the criminal offence in question, with regard to the purpose of penalties and taking into account all circumstances that could influence the severity of the penalty (extenuating and aggravating circumstances), particularly the following: the degree of culpability, the motives for committing the offence, the degree of endangering or damaging the values protected by criminal legislation, the circumstances under which the offence was committed, the previous life of the offender, his personal situation, his behaviour after the criminal offence had been committed, and particularly his attitude towards the victim of the criminal

[40] Article 42 of the Criminal Code.
[41] Article 43 of the Criminal Code.
[42] Article 44 of the Criminal Code. .
[43] Article 45, Paragraphs 1 and 2 of the Criminal Code.

offence, as well as other relevant circumstances related to the personality of the offender.[44] In situations in which the criminal offence is motivated by hate related to race, religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another person, the court shall consider such circumstances as aggravating, but only if the element of hate is not already prescribed as an explicit feature of the criminal offence in question.[45]

The basic principle in such criminal legislation was that every prison sentence could be mitigated. Article 56 explicitly prescribes that the court may impose upon a criminal offender a penalty reduced below statutory limits, or mitigate the penalty altogether, when such possibilities are allowed by the law; the penalty may also be reduced if the court finds that particularly extenuating circumstances are present and therefore determines that the purpose of criminal penalty may be sufficiently achieved by a reduced penalty.[46] However, penalty mitigation does have its limits, and the court can reduce penalties within the following ranges: if the minimum statutory penalty for a criminal offence is imprisonment for a term of 10 years or more, the prison sentence may be reduced to no less than 7 years of imprisonment; if the minimum statutory penalty is 5 years of imprisonment, the sentence may be reduced to 3 years of imprisonment; if the minimum statutory penalty is 3 years of imprisonment, the sentence may be reduced to 1 year of imprisonment; if the minimum statutory penalty is 2 years of imprisonment, the sentence may be reduced to 6 months of imprisonment; if the minimum statutory penalty is imprisonment for the duration of up to 1 year, the sentence may be reduced to 3 months of imprisonment; if the minimum statutory penalty is less than 1 year of imprisonment, the sentence may be reduced to 30 days of imprisonment; if the minimum prison sentence is not specified, imprisonment may be replaced by a pecuniary fine or community service; if the statutory penalty is a pecuniary fine with a specified minimum, the fine may be reduced to ten daily amounts and/or ten thousand dinars. Additionally, in situations in which the court is legally allowed to remit the penalty altogether, it may reduce the penalty without limitations.[47]

The Criminal Code prescribes several cases in which it is possible to remit the penalty altogether. The court may remit penalty to a perpetrator of a criminal offence only when such possibility is explicitly provided by the law. The court may also remit penalty to a perpetrator of a criminal offence committed without premeditation if the consequences of the offence affect the offender so strongly that inflicting a penalty would obviously not serve the purpose of punishment. The court may also remit penalty to a perpetrator of a criminal offence punishable by up to 5 years of imprisonment, provided that after the commission of the offence, and before learning that he has been uncovered, he should alleviate the consequences of the offence or compensate the damage caused by the criminal offence.[48] Finally, the court may

[44] Article 54, Paragraph 1 of the Criminal Code.

[45] Article 54a of the Criminal Code.

[46] Article 56 of the Criminal Code.

[47] Article 57 of the Criminal Code.

[48] Article 58 of the Criminal Code.

remit penalty to a perpetrator of a criminal offence punishable by up to 3 years of imprisonment or a fine if the offender has fulfilled all his obligations from an agreement reached with the victim.[49]

The amendments to this statutory text had taken two main directions: on the one hand, the amendments strengthened the penal policy for individual offences, either by increasing the penalties currently prescribed, or by prohibiting their reduction; on the other, they sought to harmonize the domestic criminal legislation with the European Union directives and standards.[50] However, many of these standards are not yet implemented into the Criminal Code, while some of its existing solutions are far from the EU standards. For example, the Criminal Code only partially implemented the 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. The section regarding economic offences is also partially incorrectly conceptualized and lacks harmonization with some of the key EU standards. The most extensive changes were made in 2009 and 2016, but the most recent changes to the Criminal Code—those of 2019—publically echoed most strongly among both the experts and the laity. These changes were initiated by the “Tijana Juric” Foundation, but they were also motivated by the need to prescribe harsher penalties for offenders who are recidivists and multiple recidivists. On the 9th of November 2017, the Foundation submitted the initiative to amend the Criminal Code, supported by exactly 158,460 Serbian voters’ signatures, to the National Assembly.

[49] Article 59 of the Criminal Code.

[50] During 2011, numerous public debates were sparked about abolishing the option of penalty reduction and mitigation for certain criminal offences. Academic workers and criminal law professors generally believed that such measures would not be implemented, but it happened nevertheless. First major changes stipulated that the penalty could not be reduced in cases of abduction (Article 134, Paragraphs 2 and 3), rape (Article 178), sexual intercourse with a helpless person (Article 179), sexual intercourse with a child (Article 180), extortion (Article 214, Paragraphs 2 and 3), unlawful production and circulation of narcotics (Article 246, Paragraphs 1 and 3), illegal border crossing (Article 350, Paragraphs 3 and 4) and human trafficking (Article 388). Furthermore, the penalty imposed upon an offender who had previously been convicted of the same kind / type of criminal offence could not be mitigated. Unfortunately, this was not the end of such provisions. They were later expanded to encompass aggravated murder (Article 114). Certain initiatives to further expand these provisions were never passed, such as the initiative by the Protector of Citizens (Ombudsman) to abolish the possibility of penalty reduction for sexual intercourse through abuse of position (Article 181), prohibited sexual acts (Article 182), pimping and procurement (Article 183), mediation in prostitution (Article 184), showing, procurement and possession of pornographic material and juvenile pornography (Article 185), inducing a minor to attend sexual acts (Article 185a), abuse of computer networks and other methods of electronic communication to commit criminal offences against sexual freedom of minors (Article 185b). The purpose of the proposed amendment was to exclude the possibility of penalty reduction for all criminal offences against sexual freedom. According to the Protector of Citizens, the existing provision unjustifiably privileges perpetrators of certain crimes against sexual freedom compared to perpetrators of other crimes in the same group; such a provision unjustifiably makes significant differences between penalizing different criminal offences against sexual freedom, which are punishable by the same or similar penalty (Citizens 2011). This initiative was not passed in the Serbian National Assembly, and is therefore not implemented in the Criminal Code. It seemed then that the erosion of the established criminal legislation system is finally finished; however, soon after that, new provisions were implemented regarding release on parole.

These legal provisions came into force on the 1st of December 2019 and brought about massive changes in the criminal justice system of Serbia.[51] The most important change in these amendments is the introduction of life imprisonment without parole for rape and murder of children, pregnant women and disabled persons. The author believes that such legislative solutions deliberately and clearly deviate from individual positions of the ECtHR.

Life Imprisonment Without Parole Under the Serbian Criminal Law

The enactment of legislative changes to the Criminal Code has been met with both positive and negative reactions of the public; at the same time, international reactions and comments mostly agreed that these changes do not meet the European standards of criminal reaction. Most of these complaints concern the way in which this new type of penalty was implemented into our penal system (the absence of a public debate on such an important issue of penal and criminal policy, the fact that it was motivated by an emotional reaction of the general public to a tragic event—the murder of a child several years earlier, and the media campaign to rally public support for amending criminal legislation), but valid objections to the current state of criminal legislation are in no way limited to these issues alone. Perhaps the reason for the absence of an expert public debate in a campaign that had essentially boiled down to the question of "who wants to protect maniacs and monsters" was to avoid very serious questions of criminal policy—what the lasting effects of this intervention will be and where our penal system is ultimately headed (Ignjatović 2019).

The changes followed the pre-established principle, prescribing the possibility of life imprisonment as an alternative to imprisonment for certain criminal offences. It is prescribed that the most severe criminal offences and the most severe forms of criminal offences may exceptionally be punished (in addition to imprisonment) by life imprisonment.[52] This effectively introduces life imprisonment as a new type of penalty (besides imprisonment, fine, community service and driver's license revocation) that cannot be imposed upon offenders younger than twenty-one in

[51] It's worth mentioning that one of the changes was the introduction of a new criminal offence—assault on an attorney, as requested by the Bar Association of Serbia. As said above, one of the reasons for amending the Criminal Code was the need to impose stricter penalties upon recidivists. It is presently prescribed that the court shall consider an earlier sentence an aggravating circumstance in situations in which less than 5 years have passed from the earlier sentence (either pronounced or served). In such cases, it is stipulated that the court may not reduce the penalty below statutory limits or mitigate the penalty, unless such possibilities are explicitly allowed by the law, or unless the law provides a possibility to omit the penalty altogether, but the court decides otherwise. In cases of multiple repeated offences, it is prescribed that for a criminal offence committed with premeditation and punishable by imprisonment, the court must pronounce a sentence above the middle of the statutory range, but under the following conditions: (1) if the offender had been sentenced at least twice to at least 1 year of imprisonment for criminal offences committed with premeditation; (2) if less than 5 years had passed between the day the offender was released from serving the pronounced sentence and the commission of a new criminal offence (Article 55a of the Criminal Code). For the purpose of aligning with international recommendations, the amendments of the Criminal Code stipulate a more detailed definition of financing terrorism (Article 393 of the Criminal Code).

[52] Article 44a, Paragraph 1 of the Criminal Code.

the moment the criminal offence is committed.[53] This is an important and justified rule. It should be noted that the legal text is not completely clear when it comes to the rules of imposing this penalty, at least considering the first paragraph of the Article 44a, while the second paragraph leaves no room for dilemmas in its interpretation. The first provision is controversial mainly because it is unnecessary. In a special section, the law clearly enumerates criminal offences in which it is possible to impose a sentence of life imprisonment. Therefore, such a provision raises the question of whether it is possible to impose a life sentence for some other forms of serious offences. Of course, due to the principle of legality, this is impossible, and this provision should thus be removed. In comparison to the other provisions of the complete text of the Criminal Code, which are quite clear, this provision does not have its application, and is therefore not needed. It is also stipulated that life imprisonment cannot be imposed in situations in which the sentence can be mitigated or if there is grounds to remit the penalty altogether.[54]

Life imprisonment may be imposed for the following criminal offences: aggravated murder, rape, if it results in the victim's death or if committed against a child, sexual intercourse with a helpless person, if it results in the victim's death or if committed against a child, sexual intercourse with a child, if it results in the child's death, sexual intercourse through abuse of position, if committed against a child and if it results in the child's death, assassination of the highest state officials, grave offences against the constitutional order and security of Serbia, genocide, crimes against humanity, war crimes against civilian population, war crimes against the wounded and the sick, war crimes against prisoners of war, use of prohibited means of warfare, unlawful killing and wounding of the enemy, war of aggression, terrorism, use of deadly device, destruction and damaging of a nuclear facility and endangering of persons under international protection.

Terminologically, life imprisonment is generally prescribed for those offences where the sentence of 30–40 years of imprisonment was previously imposed. The penalty of life imprisonment now completely replaces this penalty and assumes its purpose of being the penalty for the most severe criminal offences and most severe types of criminal offences. As such, the penalty of 30–40 years of imprisonment has ceased to exist in our criminal legislation.[55] As said above, the implementation of

[53] Article 44a, Paragraph 2 of the Criminal Code.

[54] Article 44a, Paragraph 3 of the Criminal Code.

[55] This is where the principle of legality is fully emphasized, since one of its elements is the application of a more lenient law. The Criminal Procedure Code of the Republic of Serbia provides two extraordinary legal remedies: the request for the protection of legality and the request for reopening criminal proceedings. In the first half of 2020, the appellate courts had been flooded with requests for reopening criminal proceedings, with the explanation that the removal of 30–40 years of imprisonment from the Criminal Code and the introduction of life imprisonment represents a legal basis for reopening criminal proceedings for persons sentenced to 30–40 years of imprisonment. The appellants claimed that they were serving a sentence that no longer exists in the criminal justice system of the Republic of Serbia, and that, instead of this sentence, they should be sentenced to 20 years of imprisonment (by the principle of applying the more lenient law). All such requests were rejected, with the explanation that the replacement of 30–40 years of imprisonment with life imprisonment is not a basis for reopening the proceedings, since their sentence was prescribed by law when they were convicted (for example, Judgment of the Kragujevac Appellate Court № Kz.2 238/2020 from 11.05.2020).

life imprisonment is not a novelty in comparative criminal legislation. The ECtHR has practically given the green light to the implementation of this sentence in many of its judgments. However, the main problem that occurs in Serbian criminal legislation is parole.[56]

Today, a convicted person who has served two thirds of the prison sentence can be released on parole if they have improved themselves to such a degree that it can be reasonably expected that they will be well-governed after their release, particularly until the pronounced term of imprisonment expires, and that they will refrain from committing new criminal offences during that period. In assessing whether they fulfil the conditions to be released on parole, the prospective parolee's performance of work responsibilities (with consideration of their ability to work) will be taken into account, as well as other circumstances indicating that they will not commit a new criminal offence while on parole. A convicted person may not be released on parole if they have been repeatedly punished for serious disciplinary offences while serving their sentence, and if they had their benefits and privileges revoked.[57] This solution was introduced in 2016—the earlier criminal legislation did not differentiate between serious and minor disciplinary offences (Drakić and Milić 2019). It should be emphasized that parole is still granted relatively rarely. The percentage of paroled convicts is significantly lower compared to other European countries and the countries of former Yugoslavia. However, despite this fact, the current criminal legislation completely prohibits parole for certain criminal offences.

When it comes to life imprisonment and parole, it is generally possible to grant parole to convicts sentenced for life, but this doesn't apply to all criminal offences. Furthermore, in addition to this, parole is only possible after the convicted person

[56] As a legal category, parole was first introduced to Serbian criminal legislation in May 1869, in a special law titled *The law on conditional release of convicts from penal facilities* (Serb. lat. *Zakon o uslovnom otpuštanju krivaca iz kaznitelnih zavedenja*, Serb. cyr. *Закон о условном отпуштању кривaца из казнителених заведења*). It is worth mentioning that between 1883 and 1885, parole in Serbia was granted in 784 individual cases, and revoked in only 12 cases (Pavlović 2007). The Execution of Imprisonment Act of 1929 introduced the Irish progressive system, which provided parole as the fourth phase of imprisonment for a smaller number of prisoners (only a quarter or a fifth of the total number of prisoners). It is interesting to note that the criminal laws of 1947 and 1951 provided possibilities of conditional release of persons sentenced to life imprisonment with forced labour after serving 15 years of imprisonment. After the Second World War, the first complete codification of Yugoslav criminal law (Criminal Code of 1951) also implemented parole. It could be granted to any convict (regardless of the type of criminal offence he was convicted of, or whether he was a recidivist or not) who had to that point served half of his imprisonment term. It's worth mentioning that a convict who had "especially excelled in his work and conduct" while serving his sentence could be released even before serving half of his sentence. At the time, the penalty of life imprisonment had also existed in the Yugoslavian criminal legislation; a convicted person sentenced for life could be granted parole after serving 15 years of their sentence, provided that their behaviour assured the authorities that they will no longer commit criminal offences (Ignjatović 2016). The Law on Execution of Criminal Sanctions from 1961 introduced a form of optional automatic parole, granted 1 month before the expiration of the sentence, provided that the convict had served at least three quarters of the sentence and behaved well, which was assessed by the director of the penal institution, and at his discretion. The percentage of parolees grew from year to year–from 21.2% in 1954 to 43% in 1960, and then to 52.6% in 1972 (Soković 2014).

[57] Article 46, Paragraph 1 of the Criminal Code.

had served at least 27 years of his life sentence.[58] In cases in which release from life sentence on parole is not explicitly excluded, it is stipulated that parole for a convicted person sentenced to life imprisonment shall begin on the day of their release and last for 15 years. The Criminal Code further prescribes that the court may not grant parole to persons convicted of aggravated murder of a child or a pregnant woman, rape, if it results in the victim's death, or if committed against a child, sexual intercourse with a helpless person, if it results in the victim's death, or if committed against a child, sexual intercourse with a child, if it results in the child's death, sexual intercourse through abuse of position, if committed against a child and if it results in the child's death,[59] and this is what raises the question of compliance of the new provisions with the standards established in the practice of the ECtHR.

Two key points emerge from the views expressed in the judicial practice of the ECtHR. Firstly, is the requirement of 27 years served in line with the ECtHR's standards? Secondly, is the prohibition of release from life sentence for a subjective list of criminal offences in accordance with the ECtHR's legal positions? Considering the positions expressed in the judicial practice of the ECtHR, the author believes that the answer to the first question is positive, and the answer to the second is negative. On the one hand, although the ECtHR did not assume a completely definitive, categorical position, it can still be concluded that the imprisonment term of 25 years represents the appropriate limit when reviewing a life sentence, and that the longer period of time the convicted person should serve in prison before being afforded the possibility of requesting parole is not in accordance with Article 3 of the Convention. However, in its judgments, the ECtHR primarily refers to the possibility of review after the *imposition* of the life sentence. In Serbian criminal law, the time spent in detention, or in serving the measure of prohibition to leave abode, as well as any other depravation of liberty in relation to a criminal offence shall be counted into the pronounced prison sentence, fine and community service.[60] Although various countries may have different points from which to calculate detention periods according to their specific domestic systems, the Serbian legislation in quite clear on this matter. Therefore, a period of 27 years goes beyond the internationally acknowledged standard of 25 years after the imposition of a life sentence, but this period begins on the date of incarceration. Consequentially, the author believes that this renders the sentence reducible. On the other hand, there are no dilemmas when it comes to the question of banning parole for certain offences. From the analysed judgments of the ECtHR, it is clear that such provisions are unacceptable from the aspect of human rights. Additionally, it is worth noting that the ECtHR states that the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.[61] This must be emphasized, because the sentiment that this will only become an issue many years in the future (when prisoners sentenced for life become eligible for parole)

[58] Article 46, Paragraph 2 of the Criminal Code.

[59] Article 181, Paragraph 5 and Article 46, Paragraph 5 of the Criminal Code.

[60] Article 63 of the Criminal Code.

[61] Vinter and Others v. the United Kingdom, 2013.

arose in Serbia after the penalty of life imprisonment had been introduced last year. As we can conclude from *Vinter*, it is quite the opposite. From the analysed judgments of the ECtHR, it is evident that the penalty of life imprisonment can still be in accordance with Article 3 of the Convention even when the option of conditional release does not exist. Theoretically, through pardon or amnesty, people sentenced to life imprisonment could be given hope that they will not spend their entire lives in prison. The Criminal Code of the Republic of Serbia acknowledges the institutes of amnesty and pardon. In order to prove that present legal solutions regarding life imprisonment are not in accordance with the ECtHR's standards, it is necessary to briefly analyse the provisions of three more laws: the Law on Amnesty, the Law on Pardon and the Law on Execution of Criminal Sanctions.

According to Article 109, persons under amnesty shall be released from prosecution and granted full or partial remittance of punishment, have the pronounced penalty replaced by a lighter penalty, have rehabilitation granted, or have particular or all legal consequences of conviction revoked.[62] The following security measures may be remitted by amnesty: prohibition to practice a profession, business activity or duty, prohibition to drive a motor vehicle and expulsion of foreigner from the country. Pardon is regulated in the next article—it serves to release a specifically named person from criminal prosecution and grant full or partial remittance of punishment, replace the pronounced penalty by a lighter penalty or a suspended sentence, grant rehabilitation, reduce the duration of legal consequences of conviction or repeal particular or all legal consequences of conviction. This institute may remit—or reduce the duration of—the following security measures: prohibition to practice a profession, business activity or duty, prohibition to drive a motor vehicle and expulsion of foreigner from the country.[63] In the end, the granting of amnesty or pardon must not prejudice any rights of any third parties deriving from the conviction.[64]

However, although the law provides the possibilities of amnesty and conditional release, the author believes that this cannot solve the problem of non-compliance of the legislation of the Republic of Serbia with the standards of the ECtHR. Firstly, amnesty laws in Serbia are *ad hoc* laws. The last Law on Amnesty was passed in 2012, and it released convicted persons from serving 25% of the prison sentence, while the persons convicted of murder, aggravated murder and serious cases of robbery and grand larceny had their prison sentences reduced by 10%. The amnesty did not apply to those sentenced to 30 to 40 years of imprisonment, nor to those convicted, among others, of crimes against humanity and other rights guaranteed by international law, crimes against sexual freedom, domestic violence, unlawful production and circulation of narcotics, criminal offences against the constitutional order and security, or of accepting and offering bribes. If we start from the premise that life imprisonment is prescribed for the most serious crimes and it replaces 30–40 years of imprisonment in this regard, we may conclude that amnesty would

[62] Article 109 of the Criminal Code.

[63] Article 110 of the Criminal Code.

[64] Article 111 of the Criminal Code.

not and will not apply to those sentenced to life imprisonment. Theoretically, of course, this is still a possibility, but an extremely unlikely one.

The Law on Pardon was passed in 1995 and has not been amended since. By means of a pardon, an individual legal act, the highest bodies of executive power change the effect of final court decisions in favour of the convicted person (Vuković and Bajović 2017). The procedure of granting a pardon shall be initiated by request or *ex officio*.[65] The convicted person submits the request for pardon, but it can also be submitted by the legal representative of the convicted person, their spouse, their relative in a direct line, as well as the sibling, adoptive parent, adoptee, guardian or custodian of the convicted person.[66] A petition for clemency has to be submitted to the court which carried out the trial in the first instance. A person serving a sentence submits the petition for clemency to the court through the administration of the institution in which they are serving the sentence. When forwarding the petition for pardon, the institution also submits to the court a report on the conduct of the convicted person and other information important for deciding the outcome of the request.[67] The court shall then forward the petition to the Ministry of Justice of the Republic of Serbia, together with its opinion on the justification of the petition.[68] After he considers and evaluates the petition, the Minister of Justice shall submit the petition, together with all the documents, and his own opinion, to the President of the Republic of Serbia.[69] The President decides on the pardon. In the Constitution of the Republic of Serbia is also prescribed that the President of the Republic grants pardons.[70] However, he is not obliged to pardon a convict even when the institution for the execution of criminal sanctions, the court and the Minister of Justice have given the opinion that the pardon would be justified. He is independent in deciding whether and for what reasons (and in what form) he will pardon the convict. The reasons could be punitive, political, emotional, legal, logical, etc. Such a wide discretion of the President is in line with the prevailing view in our theory that the institution of pardon represents a political act of his mercy. Therefore, the convicted person has the right to request pardon, claiming that he behaved well while serving his sentence and that he is rehabilitated, that he fulfilled his work obligations and that he achieved certain results in psychosocial treatment, but the President of the Republic has no obligation to pardon him (Ilić 2019). No appeal or other legal remedy may be filed against the decision made by the President of the Republic in the procedure for granting pardon. Therefore, the question arises as to whether this type of procedure meets the requirements of fairness at all. According to Serbian authors, the institute of pardon is rather “convenient” for different forms of abuse (Miladinović 2007). What is certain for now is the fact that, at the moment, there is no mechanism for granting pardons for persons sentenced to life imprisonment. Since the President

[65] Article 4 of the Law on Pardon.
[66] Article 5 of the Law on Pardon.
[67] Article 6 of the Law on Pardon.
[68] Article 9 of the Law on Pardon.
[69] Article 10 of the Law on Pardon.
[70] Article 122 of the Constitution.

and the government supported this legal solution (Service 2019), the author believes that there is no hope that persons sentenced to life imprisonment will be pardoned.[71] At this moment, such a possibility remains in the theoretical domain. In conclusion to all of the above, the author believes that the sentence of life imprisonment in the Republic of Serbia is irreducible *de jure* and *de facto*.

Right to Rehabilitation Under the Serbian Criminal Law

The abovementioned solution also represents an obstruction for effective rehabilitation. In the first place, the place and role of rehabilitation in the penological reaction to crime has changed significantly, both in the world and in Serbia—from abandoning the concept of rehabilitation in the 1970s to its current return to the centre of penological interest (Soković 2016). Primarily, the term *rehabilitation* has several meanings in the Serbian criminal legislation (Brkić 2008); in legal science, there are many different definitions of this term, many of which are incomplete because they deal exclusively with the aim of this institute (Jakšić 2014). However, there are also comprehensive ones that encompass both the material and formal concepts of rehabilitation (Samardžić 2017).

As an application of the program of treatment, rehabilitation certainly occupies a central place in the procedure of execution of a prison sentence, and the Law on Execution of Criminal Sanctions prescribes that, in order to realize the program of treatment, the convict is treated on the basis of determined capacities, needs and the degree of risk (Soković 2016). The Law on Execution of Criminal Sanctions of the Republic of Serbia emphasizes that the execution of criminal sanctions achieves the general and individual purpose of their imposition in order to successfully reintegrate convicts into the society.[72] We should connect this provision with the provision of Article 42, where it's prescribed that one of the purposes of imposing criminal sanctions is the rehabilitation of the offender.[73] Furthermore, the purpose of serving a prison sentence is for the convicted person to adopt socially acceptable values during the execution of the sentence, which is achieved by applying appropriate treatment programs, in order to facilitate inclusion in the living conditions after serving the sentence so that they would not commit offences in the future.[74] The law also specifically prescribes the obligation to respect the dignity of the convicted person,[75] as well as the prohibition of inhuman or degrading treatment.[76] Therefore, this law only deals with the purpose of serving a regular prison sentence, while there are no provisions that regulate the purpose of serving a life sentence. Moreover, the sentence of life imprisonment is not even mentioned in the context of rehabilitative

[71] Unfortunately, this is a step backwards, since even the Criminal Code of 1947 allowed the possibility of amnesty or pardon replacing the death penalty by life imprisonment with forced labor.

[72] Article 2 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

[73] Article 42 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

[74] Article 43 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

[75] Article 76 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

[76] Article 6 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

measures. It is explicitly prescribed that the convict is to be released from the penal institution on the day on which his sentence expires, and if the sentence expires on a Saturday, Sunday or on public holidays, the convict is released on the last working day that precedes such days.[77] The author also emphasizes the prescription that, in case the convict is to be released from the institution on the basis of a law on amnesty, the institution is obliged to release him no later than 24 h after receiving the decision on amnesty, unless otherwise provided by a law on amnesty. In the event that the convict is to be released from the institution on the basis of a decision on pardon, the institution is obliged to release him on the day of receiving the decision on pardon, and no later than 24 h from receiving the decision. In case the convict is to be released from the institution on the basis of a final decision on conditional release, the institution is obliged to release him on the same day after receiving the decision, and no later than within 24 h.[78] However, as explained above, these provisions do not apply to convicts serving life sentences; therefore, according to the Serbian criminal legislation, persons convicted to life imprisonment cannot be rehabilitated.

Therefore, with life imprisonment, the request for rehabilitation is unachievable, which makes it very obvious that life imprisonment without parole contradicts the purpose of criminal sanctions expressed through two legal texts. In the case of life imprisonment, rehabilitation is not the purpose of the sentence. The only purpose is retribution.

We believe that life imprisonment without parole is unacceptable and inconsistent with viewpoints regarding rehabilitation. Firstly, a person sentenced for life without the possibility of parole can never earn their freedom and be released. Secondly, they have no perspective in their life and they will have no desire to rehabilitate. For the purpose of a successful rehabilitation, a whole life prisoner is entitled to know what they have to do to be considered for release and under what conditions, including when exactly a review of their sentence will take place, or may be sought.[79] Their only hope lies in legislative changes, which may introduce an option of parole even for the most severe offences. According to Meijer, the right to rehabilitation is a positive obligation (Meijer 2017); therefore, in this case, the Serbian criminal legislation directly violates this obligation.

In the end, it is also important to note the possibility of application of Article 46 of the Convention. The ECtHR had also applied Article 46 in certain judgments. Due to certain controversial judgments, we can find arguments in favour of leaving the Convention and remitting the ECtHR (Pettigrew 2015; Greene 2016), among other reasons, because of the fact that there is widespread belief that different nations are subject to different treatment before the ECtHR (Pettigrew 2018). In Serbia, such demands do not exist in this moment, and this country could be very easily subjected to the application of the Article 46. In light of the recent legislative changes, and especially for the future ones, Article 46 of the Convention is particularly important,

[77] Article 178 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

[78] Article 183 of the Law on Execution of Criminal Sanctions of the Republic of Serbia.

[79] Vinter and Others v. the United Kingdom, 2013.

since it refers to the binding force and execution of judgments. A judgment in which the ECtHR finds a breach of human rights imposes upon the respondent State a legal obligation not only to pay the applicants the sums awarded as just satisfaction, but also to choose and implement, subject to supervision by the Committee of Ministers, the general and / or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the ECtHR and to redress, in so far as possible, the effects thereof. In order to help the respondent State fulfil its obligations under Article 46, the ECtHR may indicate the type of individual and/or general measures that might be implemented in order to put an end to the situation the ECtHR has found to exist. The State is obliged to also implement such measures with regard to other persons in the applicant's position by solving the problems that have led to the ECtHR's findings.[80]

In *László Magyar v. Hungary*, the ECtHR stated that the nature of the violation suggests that for the proper execution of the judgment, Hungary would be required to put in place a reform, preferably by means of legislation, of the system of review of life imprisonment sentences, and that the review mechanism should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds, and should enable prisoners sentenced for life to foresee, with some degree of precision, what they must do to be considered for release and under what conditions.[81] The ECtHR took a similar approach in *Petukhov v. Ukraine* (№ 2).

In *Harakchiev and Tolumov v. Bulgaria*, a particularly interesting fact was that Bulgaria would be required to reform, preferably by means of legislation, the legal framework governing the prison regime applicable to persons sentenced to life imprisonment with or without parole. That reform should entail (a) removing the automatic application of the highly restrictive prison regime currently applicable to all life prisoners for an initial period of at least 5 years, and (b) putting in place provisions envisaging that a special security regime can only be imposed—and maintained—on the basis of an individual risk assessment.[82] Then, in *Marcello Viola v. Italy* (№ 2), the ECtHR noted that the Contracting States enjoyed a wide margin of appreciation in deciding on the appropriate length of prison sentences, and that the mere fact that a life sentence might in practice be served in full did not mean that it was irreducible, so, consequently, the possibility of review of life sentences entailed the possibility for the convicted person to apply for release, but not necessarily to be released if he or she continued to pose a danger to society.[83]

There are presently ten applications related to life imprisonment still pending before the ECtHR [*Canword v. Netherlands*, *Lake v. Netherlands*, *László Magyar v. Hungary* (№ 2), *Varga v. Hungary*, *Kruchió v. Hungary*; *Bancsók v. Hungary*, *Lehóczki v. Hungary*; *Horváth v. Hungary*; *Á.K. and I.K. v. Hungary*; *Rostás v.*

[80] Àlišić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, 2012.

[81] László Magyar v. Hungary, 2014.

[82] Harakchiev and Tolumov v. Bulgaria, 2014.

[83] Marcello Viola v. Italy (№ 2), 2019.

Hungary]. As is evident, all of the above applications are against the Netherlands and Hungary, and the outcomes are likely to be known soon.

Conclusion

Life imprisonment is not a novelty in comparative legislation, nor is it contrary to the ECtHR's legal understandings. This article analyses the most important relevant judgments of this court, and provides a commentary of Serbian legislation. Simply put, any offender of any criminal offence, even the most severe, must be eligible for rehabilitation and parole. That which is unclear to many is a simple fact that this refers to a possibility of parole, not a mandatory parole. As Judge Power-Forde pointed out in her concurring opinion in *Vinter*: *Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that would be degrading*.[84] Although we could conclude that prescribing the possibility of parole for life imprisonment after 25 years of sentence imposing is a standard, comparative legislation clearly shows us that setting a lower threshold is not uncommon and is in particular not contrary to the ECtHR's standards. Consequentially, the author considers the option implemented by the Serbian criminal legislation to be a clear violation of Article 3 of the Convention.

The ECtHR is quite clear in its insistence that for any sentence pronounced there must be a mechanism for later review. To that end, it's worth noting that the ECtHR has established clear standards of the review mechanism for life imprisonment. Regardless of different legislative solutions, in order to be compatible with the Convention, a review mechanism should comply with the following five binding, relevant principles: (1) The principle of legality ("rules having a sufficient degree of clarity and certainty", "conditions laid down in domestic legislation"); (2) The principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria", which include resocialisation (special prevention), deterrence (general prevention) and retribution; (3) The principle of assessment within a pre-established time frame and, in the case of life imprisonment, "not later than 25 years after the imposition of the sentence and thereafter a periodic review"; (4) The principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner; (5) The principle of judicial review.[85] Judges Lemmens and Spano emphasize in their joint concurring opinion in *Matiošaitis and Others v. Lithuania* that this review mechanism must be formulated in a manner which mandates that the assessor, whether it

[84] Vinter and Others v. the United Kingdom, 2013.

[85] Petukhov v. Ukraine (№ 2), 2019.

is an executive or a judicial organ, examines after a certain period of time whether legitimate penological grounds justify continued imprisonment, and although the system of review does not necessarily have to be judicial in nature, it has to guarantee the independence and impartiality of the assessor, as well as certain procedural safeguards, and provide protections against arbitrariness.

However, the question still remains of what exactly is the reason for the Serbian criminal legislature to implement such parole policies for life imprisonment. The experiences of other countries were publicly available and more than clear. There were no debates regarding this issue in Serbia. Occasional disputes did arise, but they had no essential importance and no clear conclusions. Looking back to a few months ago, we can conclude that statements of both opponents of life imprisonment without parole and its supporters have generally remained unanswered. More precisely, the most common critique—that life imprisonment without parole is incompatible with the European standards—had often been answered with the statement that life imprisonment also exists in other countries. Proponents of both viewpoints generally revolved around a single verdict, that of *Vinter*, absolutely neglecting—or perhaps not knowing—that other relevant judgments of this court exist. In addition, it could often be heard that parole is not a problem at present, because not a single person had still been sentenced for life, and that many years will pass before the issue of parole for such a person could be raised. We have to remember that no Article 3 issue could arise if a life prisoner continues to pose a danger to society. However, it is theoretically possible that an investigation of life imprisonment could focus only on those instances where a sentence of life imprisonment is both imposed and carried out in full, but such an inquiry would, however, lose the important insight that what differentiates the life sentence from determinate sentences is that a prisoner serving life imprisonment does not have a guaranteed date of release and this uncertainty may have an impact on how the prisoner experiences the prison term (Smit 2002). Moreover, in light of the current political situation in Serbia, a person sentenced to life imprisonment could not even obtain a pardon.

We have to remember that penal populism has been responsible for the creation of much ill-considered and irrational criminal justice legislation in western democracies (Dyer 2016). The author believes that in Serbia, too, the essential reason for irrational criminal justice system reforms lies in criminal populism and the desire of leading politicians to push for legal solutions that are preferred by a certain number of voters, no matter the cost.

Compliance with Ethical Standards

Conflict of interest The author declares that there is no conflict of interest.

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