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Original scientific paper

Life Imprisonment in Serbia: Current Legislation, Theoretical Issues, and International Legal Standards

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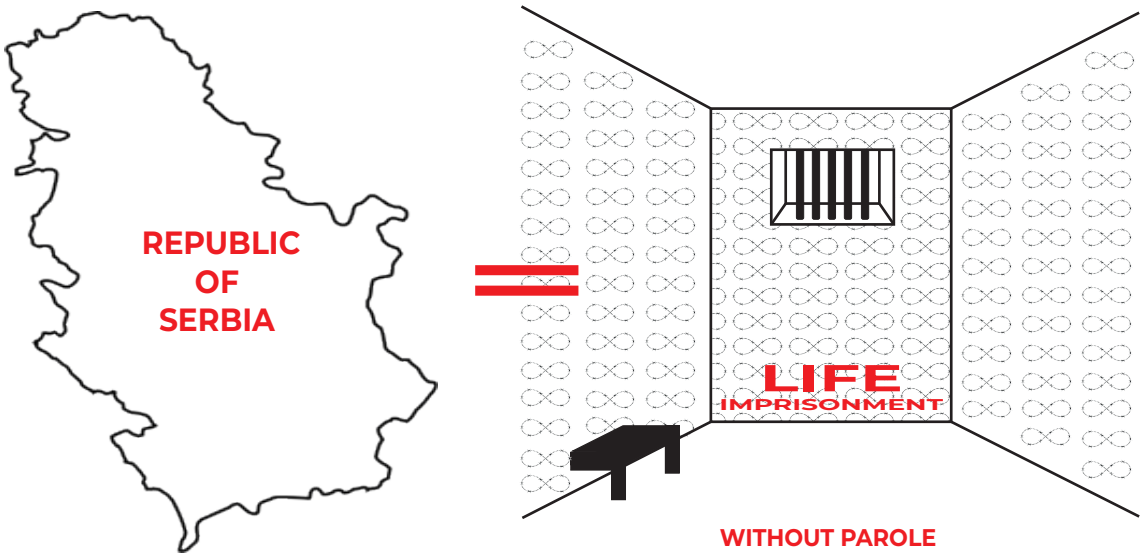
Abstract: The subject of this paper is the analysis of the novelties regarding life imprisonment in the Criminal Code of Serbia that have been in force since December 1, 2019. The accent falls on the criminal law dimension of these amendments, especially based on the basic principles and their influence on the whole system according to the other provisions of positive law in Serbia. We give the reasons pro and contra life imprisonment as such and the proposal of its special forms and legal solutions (e. g. life without possibility of parole). Moreover, our review touches upon some legal and philosophical aspects that potentially occur in the adoption and implementation phase, both in the national and international law.

Keywords: life imprisonment, principles of criminal law, parole, pardon, international standards.

Graphical abstract



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INTRODUCTION

Despite that the Amendments to the Criminal Code (ACC) of May 21, 2019 envisaged a number of other changes in the General and Special part of the Criminal Code of Serbia (CC) (Criminal Code, 2005/2019), judging by numerous discussions, both the professional and lay people were mostly interested in the adoption/reestablishment of life imprisonment.

Even though a legal analysis of the provisions that came into force on December 1, 2019 is the most significant one, we cannot disregard other topics concerning punitive policies, executions, but also certain social, psychological and even philosophical dilemmas that life imprisonment carries with it, especially in the context of the phenomenon of "criminal interventionism" (Bodrožić, 2020). In this way, during the entire decision-making process, a greater number of participants appear, especially in the so-called "media cases" (this is the epithet that serious crimes regularly obtain), which puts great pressure on all participants in the proceedings. Moreover, life imprisonment itself, the crimes for which this sanction can be imposed and the possibility of parole are issues that divide the nation, in the same manner as discussions about euthanasia or abortion (Smith, 2000).

In this paper, we will endeavour to provide some general postulates that are relevant to prescribing and implementation of this sanction, particularly bearing in mind the purpose of punishment, the basic principles of criminal law and the rights guaranteed by the Constitution and their protection pursuant to the international law rules, mainly through the practice of the European Court of Human Rights (ECtHR). In this regard, an analysis of the Serbian lawmaker's decision will be conducted and certain conclusions and assumptions regarding the further existence and implementation of life imprisonment in our legal system will be provided.

CERTAIN THEORETICAL ISSUES ABOUT LIFE IMPRISONMENT THROUGH THE PRINCIPLES OF CRIMINAL LAW

Principle of Legality

According to Art. 1 of the CC, "no one may be punished or other criminal sanction imposed for an offence that did not constitute a criminal offence at the time it was committed, nor may punishment or other criminal sanction be imposed that was not applicable at the time the criminal offence was committed". The basic criterion set by this principle is prescribing life imprisonment as a special type of sanction. It is practically a rule without exception in all civilized societies, which also our legislator adheres to in the Art. 43 and Art. 44a of the CC.

The place where the principle of legality can be questioned is the requirement for clear definition of the conditions under which life imprisonment is imposed and implemented (Van Zyl Smit & Appleton, 2019). This primarily concerns the mechanisms for the possibility of the release of convicted persons through the norms regulated by the institutes of

parole (especially where the possibility of parole is not stipulated) and pardon (lex certa and lex stricta). In further perspective, these issues would formally be resolved at first glance through the ECtHR's case law regarding the prohibition of torture under Art. 3 of the European Convention on Human Rights (European Convention on Human Rights, 2003/2015). However, due to the broad reach of this provision, it is realistic to expect that the consideration of Art. 3 of the the European Convention on Human Rights rarely touches upon the principle of legality in the stated sense, as was done in the case of Kafkaris v. Cyprus. In this case the violation of Art. 7 was found with a slightly "diplomatic reasoning" that stated that the law based on which the applicant was convicted did not provide a clear and understandable insight of the terms, scope of the sentence and its execution. Moreover, the Grand Chamber did not decisively declare that the applicant had been given a harsher sentence retroactively, which would mean a violation of the lex praevia segment of the principle of legality (Van Zyl Smit, 2010). Furthermore, the heritage of the legal state implies not only the protection of the most valuable goods by the criminal law, but also the protection of citizens from the criminal law. Therefore, it is impermissible that the state denies their citizens the minimum human dignity reflected at least in the hope that the perpetrator may sometimes be released from custody.

Proscribing life imprisonment as a separate sanction, the Serbian system of punishments is now clearer because it visibly delimits the "classical" prison from the special one, having in mind that the sentence of 30 to 40 years was not singled out as a separate type of sentence but as a particular form of imprisonment (Škulić, 2016). Also, it limits the application of sentences to the most serious acts and the most severe forms, all of which it has so far been possible to punish with 30 to 40 years in prison (to 16 offences). Life imprisonment is an alternative, in no way an exclusive sentence. So, it can only be prescribed within the sentence of imprisonment. In practice, it will not be easy to impose it, especially when there is no possibility of parole. However, life imprisonment also applies to a new body of acts for which the harshest sentence could not be imposed before the novel, as outlined by the initiative to the ACC (four offences more: Art. 178 para. 4 of the CC, Art. 179 para. 3 of the CC, Art. 180 para 3 of the CC and Art. 181 para. 5 of the CC). In addition to each of these acts, an alternatively prescribed sentence of at least 10 years in prison (which prescribed a special minimum which prior to the changes was the only punishment, with the upper limit representing a general maximum of 20 years in prison). This particular group of offences plus offence from Art. 114 para. 1 point 9 represents the most contentious part of those amendments – the inability to receive parole, respectively, the most severe form of punishment – irreversible life imprisonment.

Principle of Legitimacy

The principle in Art. 3 of the CC claims that "protection of a human being and other fundamental social values constitute the basis and scope for defining of criminal acts, imposing of criminal sanctions and their enforcement to a degree necessary for suppression of these offences". If we take a look at the crimes for which life imprisonment is considered, it is clear that the objects of protection (life and limb, sexual freedom, constitutional order and security of the Republic of Serbia, humanity and other rights protected by international law) are protected most adequately (and most severely) by criminal law. Consequently, for these forms of unlawful conduct the criminal law is prima and ultima ratio.

However, the application of sanctions is another part of examining legitimacy and it is assessed according to the necessity and the need for a specific type of sanction to suppress these particularly serious crimes. The selection of offences relating to the sentencing of life imprisonment suggests such forms of injury to the most important goods for which such a response is proportionate to their weight (seriousness). The legislator had the right idea, choosing those particularly serious violations (with somewhat dubious forms of command responsibility and ordering) that resulted in death attributable to the intention of the perpetrator, but also to the negligence in another group of crimes (sexual offences), or because of the specific characteristic of the passive subject (child) (Ilić V., 2019).

The sentence of life imprisonment is not in itself illegitimate. The respect of this principle is being challenged by a stipulated form of life imprisonment without parole since that raises the open question of whether pardon and amnesty are instruments good enough to respect the stance of the ECtHR in the Grand Chamber's 2013 decision (Ilić V., 2019). According to that decision, life imprisonment cannot be stipulated and imposed without the right of the convicted person to serve a shorter sentence on some grounds, and that the time after which the release of the convicted person should be considered cannot be longer than 25 years. This stance should be indisputable (Stojanović, 2015: 7; Kolarić, 2015a: 647).

In this context, the purpose of punishment should be kept in mind all the time, especially in terms of special and general prevention, and its integrative function. It is pointed out that from a penological standpoint, special prevention would be achieved through the resocialization of the perpetrator and their improvement (which is dubious in the variant of life imprisonment without parole) and a general prevention would be achieved through intimidation. At last, the retribution would be a response to the harm done with a just and proportionate punishment (with reservation regarding the subjective interpretation of these conditions). These summary principles are also formulated by the judge in his separate opinion, Pinto de Albuquerque, about decision by the Grand Chamber of the ECtHR in the case of Murray v. Netherlands from 2016 (Van Zyl Smit & Appleton, 2019). In any case, the legitimacy to the life imprisonment is given by the respect of some basic postulates of the penology, which in large involve serious work with convicts with the participation of various experts: criminologists, psychologists, lawyers, sociologists, etc. (Griffin, 2018).

Principle of Guilt

The psychological attitude of the perpetrator towards the act for which he received a socio-ethical reprehension by this severe sentence can only affect the determination of sentence. According to the manner of prescribing life imprisonment in the Serbian positive legal system – that it can be prescribed always and only with the sentence of imprisonment – this means that the degree of guilt will be determined in accordance with all mitigating and aggravating circumstances. If the latter prevail, the court will then be left to opt between a time sentence and life imprisonment.

The prognosis of crimes being further committed due to the danger that the perpetrator poses to the society should not be the only reason for life imprisonment. Protecting the public is not a primary concept here, given that the offenders, who may commit a more

serious criminal offence in order to eliminate this risk, are treated through the application of security measures and the institute of incompetence. It should be underlined that the notion of danger in criminal law is not always synonymous with layman understanding of this word. The same goes for the understanding of "moral guilt" (Mill, 2001). Furthermore, creating a phenomenon of moral panic is contributed by events and phenomena that provoke a strong emotional reaction (Ilić, 2017). For these reasons, it is not justified to defend the sentencing with life imprisonment by claiming that an offender is a "madman or a maniac and therefore, he will repeat the act" - in that case it is adequate to apply other sanctions and to examine their capacity (Appleton & Grøver, 2007: 603). In addition, the public disturbance as a reason for ordering detention is a fairly indeterminate basis, also in the criminal procedural law.

Some provisions may call into question the penalty on the basis of a free judge's belief, even the principle of guilt. As such, life imprisonment cannot be imposed when the law stipulates that the penalty can be mitigated (Art. 56 para. 1 of the CC) and only when it comes to mitigation by law, not judicial. It even cannot be imposed when there are any grounds for remittance. We now have a situation to exclude life imprisonment when the sentence can be mitigated, and that the article that regulates mitigation excludes this possibility for some crimes for which life imprisonment can be imposed. Mitigation restrictions do not apply when the court can exempt the perpetrator from punishment (Art. 57 para. 2 of the CC with reference to the Art. 57 para. 1 of the CC and Art. 56 of the CC) (Đorđević & Bodrožić, 2020: 77–81; Vuković, 2021: 490–491). This inconsistence will be the subject of approaching amendments to the CC (Pavićević, 2022).

Principle of Humanity

One aspect of this principle concerns the protection of the most important goods of a person, while another seeks to minimize the inhumanity of punishment. After all, the Constitution of the Republic of Serbia (Constitution, 2006/2021) proclaims the dignity and free development of personality (Art. 23), the inviolability of physical and psychological integrity under which no one can be subjected to torture, inhumane or degrading treatment or punishment (Art. 25). In doing so, these rights may be limited to the extent necessary to satisfy the constitutional purpose of the restrictions in a democratic society and without encroaching on the essence of the prescribed right (Art. 20). The prohibition of torture represents a so-called "hard core" of human rights according to the ECtHR (Ilić G., 2019: 129). This concerns the normative boundaries in which one should remain when imposing life imprisonment in any form, but always – exceptionally. These rules should be understood at all times from both the offender's and victim's point of view, because humanity must satisfy both interests as much as possible (Kolarić, 2015b). It seems that life imprisonment without the possibility of parole constitutes an inhumane sanction forasmuch that this exception did not exist in the sentence of imprisonment from 30 to 40 years – it was possible to release a person serving this sentence under regular conditions (art. 46(2) of the CC before the amendments of 2019) (Đokić, 2016).

In literature, one finds a view in which torture, life imprisonment and the death penalty are "put in the same basket" by strictness, and by moral depth. In the absence of answer on how to deal with such offenders, the question is what to do with them (Bedau, 1990). On the one

hand, the state has taken its position by stipulating life imprisonment without parole. On the other hand, from the perspective of achieving social well-being, the question is what satisfies the society, what is fair according to the findings of public opinion (Mill, 2001). We can argue that our public is inclined toward repression and at times possibly unobjectively heartfelt when presenting an opinion on certain sensitive issues (Kolarić, 2015a). Sometimes even the methods of implementation of a particular sentence do not have clear effects – in life imprisonment without parole they are unchangeable and permanent, and the possibility of pardon or amnesty is indeterminate. The process of granting pardon in Serbia is not subjected to a special control (Vuković & Bajović, 2017). Therefore, the time will tell what kind of impact the provision of life imprisonment will have on control by European institutions in case they need to process a request that challenges those provisions.

Principle of Justice and Proportionality

This postulate stands between retribution and utilitarianism as a barrier to absolute retribution and protection of the individual and the society. There are also slightly different perceptions that consider this principle a measurement of retribution for the severity of the offence. This is because when applying a sentence of life imprisonment there is no measurement in the ordinary sense, but it is simply being chosen (Ilić G., 2019).

Novelties from 2019 added "achieving justice and proportionality among the committed offence and the severity of the criminal sanction (sic!)" to the penalty purpose section (Art. 42 para. 1 point 4 of the CC). Although it is a general purpose that is to be achieved, it seems that the proposer of the statute only binds it to the modality of life imprisonment without the right to parole (Ilić V., 2019). In the Reasoning of the Draft of Amendments to the CC (Draft), it is stated that in this way they give guidance to judges to take into account this reason in each particular case when deciding on the sentence. It looks like this explanation of the lawmaker is fairly general because when weighing the sentence in light of the principle of individual subjective responsibility, the court bears in mind the purpose of the punishment in its usual form – both through special and general prevention. This suggests that the legislator came from some more traditional notions of the purpose of punishment that involve retribution, deterrence and incapacitation of the perpetrator (Van Zyl Smit & Appleton, 2019). It is clear that one cannot expect that the sentence does not contain repression, and especially not a sentence of life imprisonment. Without it, punishment would not be a punishment. Nevertheless, the problem that retribution carries is that it does not allow exceptions and sometimes does not allow the review of punishment either (Vuković, 2007) (this applies with respect to the life imprisonment under Art. 44a of the CC for a number of crimes). A "deserved punishment", if it is not in collision with the individualization and subjective responsibility of the perpetrator, should be proportional to the act and not to the criminal tendency of a person. For example, this is the conclusion in the Lynch case (Lynch and Whelan v. Ireland) (Van Zyl Smit & Appleton, 2019).

Moreover, achieving the principle of justice means not only deterrence and retribution for the crimes committed, but also reconciliation, reintegration and communication with the convicted person, but in accordance to the degree of his guilt. It is noted that this is contributed by the institute of release on parole through which the appropriate level of individualization is achieved, but not only on the basis of its existence as such, but through

the prescribed procedure (Bierschbach, 2012). Hope is treated as a measure in the weighing of punishment, and the proportion of punishment to the severity of the offence is not something that can be determined in abstract way when prescribing the law, but according to the circumstances of a particular case (Ristroph, 2010).

In the case of Sawoniuk v. UK the stance was taken that certain personal characteristics such as the age of the offender are not an excuse in case of relevant level of seriousness and gravity of the offence (Van Zyl Smit, 2010). The Court pointed out that an individual's rights are not completely undisputed for an offence that they have done, even if special preventive sentencing aims may be omitted in a given case. Certainly, judges who aspire to achieve justice (in principle) or at least fairness (in particular) are given a tricky task because a fair part is not always an equal part. This is especially the case if we draw parallels with the death penalty that irreversibly takes away one personal right – life, since life imprisonment without proper mechanisms for consideration and release after a certain amount of time makes this punishment irreversible, however through the prism of another right – the freedom of the individual.

LIFE IMPRISONMENT AND OTHER PROVISIONS OF THE CC WITH A BRIEF REVIEW OF INTERNATIONAL LEGAL STANDARDS

Parole

Perhaps one of the most contentious issues of introducing life imprisonment is the exclusion of parole in relation to five crimes (Art. 46 para. 5 of the CC). The initiative submitted to the National Assembly does not list the reasons why parole should be excluded for certain crimes. We believe that in the context of life imprisonment one must provide a legal opportunity for the perpetrator to hold at least the hope that he/she can at some point be released (Appleton & Grøver, 2007). In addition, such a solution is contrary to the views of the ECtHR and could potentially lead to violations of many international instruments, especially with regards to Serbia's EU integration process (e. g. Resolution adopted by the Committee of Ministers in 1976, which requires an individual prediction; Recommendation R (99)22, 1999 – prison overcrowding and prison population inflation, Recommendation Rec (2003)22 – on conditional release (parole); Recommendation Rec (2006)2 – on the European Prison Rules, etc.). At the same course there are planned amendments to the CC which are aimed at revoking the absolute prohibition on parole (Pavićević, 2022).

This is the strictest life imprisonment proposal and quite controversial. The disparity is reflected in the fact that we cannot go to extremes that imply an absolute legal exclusion of offenders from the community. By that logic, we could argue that the streets will be clean if we just remove all those who spit, throw away papers, cigarette butts, etc. (Jochelson et al., 2018). The negative consequences of incarceration can be so devastating that possibility of parole should be allowed for everyone (Ignjatović, 2016).

Beyond these cases, and with the fulfilment of other conditions, a person sentenced to life imprisonment can be released if he/she has served 27 years. This period is different from country to country (e. g. in Ireland it is seven years, in Estonia and Moldova 30) (Griffin, 2018). In practice, according to the ECtHR's case law (Bodein v. France from 2014), it is

25 years, but from the moment of sentencing (excluding calculating detention and other deprivation of liberty). As for the arguments of "once a criminal always a criminal", we will mention a stance that the majority of persons who violated parole did not do so because of the new offence, and that after seven years the risk of the perpetrator being released from life imprisonment is equal to the chance that those who have never committed a crime will do so (Liem, 2017). This finding means far from "nonchalant" treatment of convicts, but that at least some consideration of parole should be taken into account (Van Zyl Smit, 2002).

We will also highlight the European arrest warrant that applies to the EU member states, under which a person serving a life sentence who has been transferred from one member to another has the right to be released after 20 years regardless of the specific rules of the related country (Art. 5) (Council of the European Union, 2002). And according to the Rome Statute of the International Criminal Court, the sentence of life imprisonment is reviewed after 25 years for its potential mitigation, which, given the jurisdiction of this court and the seriousness of the crimes in its jurisdiction, is not without significance. For such offences prior to our CC, there is the possibility of parole (but after 27 years).

Of particular importance is the issue of extradition of perpetrators of crimes for which life imprisonment has serious implications for international co-operation. The laissez-faire doctrine is a facilitated extradition because, ultimately, international treaties are a legitimate instrument that contributes to this co-operation because they are based on the will of the states. What is imposed in these cases is which decision to recognise – the country of condemnation or the country of the reception (Van Zyl Smit, 2015)? It seeks to accept an option that favours human rights, which is life imprisonment with the right to parole. Only if that request is met by the state that issued the conviction does the state allow extradition to the country that asks for it (Van Zyl Smit, 2015: 179) – e.g. Vinter v. England and Trabelsi v. Belgium. Nevertheless, such solutions inevitably lead to an increased degree of discretion and require extreme vigilance in implementation.

The duration of parole under Art. 47(7) of the CC is 15 years from the day a person is paroled, and this is a provision that imposes certainty in legal relations because it is not sustainable to keep a convicted person "sitting on pins and needles" (according to the Draft, this time limit was 10 years, but was amended in the Proposal that entered the final parliamentary procedure).

Statute of Limitations

The latest modification supplemented Art. 108 of the CC by removing the statute of limitations for crimes for which the sentence of life imprisonment is imposed, the prosecution and execution of the sentence. This solution is potentially unconstitutional given Art. 34 para. 6 of the Constitution of the Republic of Serbia, under which the statute does not cover war crimes, genocide and crimes against humanity. Moreover, despite changes of the Constitution that have been made in 2021, this provision has not amended.

In addition, we had had this provision before in our legal system. The Act on Special Measures for Preventing the Commission of Sex Crimes against Minors (Act on Special Measures for Preventing the Commission of Sex Crimes against Minors, 2013) also known as "Marija's Law" that, with vague nature, derogated the provisions of the CC by prohibiting

the mitigation of sentence, parole and statute of limitations, among other crimes where the exclusion of parole in the amendments of the CC drew the most attention. Now, we have a situation in which lex generalis (CC) is harmonized with lex specialis (Act on Special Measures for Preventing the Commission of Sex Crimes against Minors), which calls into question the consistency of the legal system, as it is not common for such a law to regulate the original matter of the main law.

Pardon

In relation to five crimes, the pardon is the only institute that provides hope for a "return" (from) life imprisonment. From the ECtHR aspect, states have been left with some of the sovereign right to set their own procedures for "reducing" life imprisonment. The rationale for the ACC did not mention clemency in any place as an option that maintains compliance with the European rules. This may indicate a slip-up, a one-off enactment of the law or an unfounded approach in yet serious changes.

For the ECtHR, it is not so much the formal criteria as the essential possibilities for revising the decision that sentenced the offender to life in prison. Hence the significance of the Kafkaris case in terms of the factual, real possibility of a convicted person being hypothetically at large where it is unclear what the de jure and de facto chances for release are (Van Zyl Smit, 2010).

The Law on Pardon (Law on Pardon, 1995) does not provide material legal and process legal guarantees in order to be considered to be a real and legal possibility for the convicted person on a life imprisonment to be released at some point (Ilić V., 2019) (the author claims that from 2013 to 2018 no clemency requests have been adopted). A pardon should be understood as it is essentially a prerogative of the President, not some effective right of the convicted person, even though he is on the last line of correcting unfair sanctions. Although the proceedings are "three-stage" and imply the participation of the court, the Ministry of Justice and, finally, the President of the Republic, there is no closer determination that would contribute to the reduction of discretion. It is interesting that Art. 4 of the LP still continues to talk about the death penalty and the initiation of a pardon procedure ex officio in that case. Equally, if the question is to be asked regarding a person serving a life imprisonment (as a substitute for capital sentence), then we would have official treatment (provided this law does not change).

This "act of mercy" is more political than legal, because the function of the President is executive, not judicial. Such a climate sums up a politician's fear of error, fear of injustice, but also opens up the possibility of abuse. After all, the convicted person has no remedy against the President's decision. To avoid this, it is necessary to have firm rules, clear standards, public trust, competent, skilled and economically independent staff, all of which contribute to obtaining legitimacy to decide on a great right such as freedom (Colgate Love, 2010).

Although Serbia has formally fulfilled the obligation to have a mechanism for reviewing life imprisonment, we believe that in fact this is not enough and that given the practice so far, the ECtHR would not look kindly on the existing solution (Ćorović, 2021). In addition, the Law on Amnesty from 2012 (Law on Amnesty, 2012) stipulates that amnesty

is not subject to a legal penalty of 30 to 40 years in prison (Art. 2), which again deserves special attention because it is an act of lawmaker concerning an indefinite circle of persons.

CONCLUSIONS

The provisions on life imprisonment were created on specific social occasions and in the same state of collective consciousness of our people. Serbia has become one of 184 countries in the world that uses the sentence of life imprisonment. What is symptomatic is that we have the harshest form of this sentence for certain crimes – without parole, and as we have seen, without practically a valid mechanism of pardon or amnesty.

Life imprisonment is placed in the sentencing system in a legislatively acceptable way and theoretically represents a cleaner solution than a sentence of 30 to 40 years in prison. We are of the opinion that in practice the courts will impose this sentence solely under the conditions prescribed by the CC, as exceptional sentence. So far, two convictions of life imprisonment have been issued in Serbia, one for the crime of abduction and rape committed in temporal continuity as joinder of offences and the other for the crime of aggravated murder. Despite the uncontested severity of misdeeds directed at sensitive categories of people (children, helpless persons, pregnant women), an additional problem perhaps will be a variant of life imprisonment without parole. It should be noted that the possibility of parole means just that – only the possibility, not the need and the obligation to release the convicted person. Given the types of crimes, the creativity of defence lawyers in front of domestic and international courts can be expected in the process of proving the achievement of the characteristics of actus reus and mens rea and "adapting" legal qualifications of a crimes.

Derogation of a general institute such as parole, and partly the period after which it can be considered, also indicates the expressed punitiveness of the community. It seems that when amending the CC, we have disregarded the fact that on our European path the legal admissibility of any form of punishment depends not only on its recognition in the national legislation, but also on harmonization with relevant international standards. This can be problematic not only in proceedings in the ECtHR, but also in providing international legal assistance in criminal matters (extradition and other forms of co-operation).

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