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Life imprisonment : in the light of standards of protection of human rights

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Life Imprisonment (in the Light of Standards of Protection of Human Rights)¹

Kara dożywotniego pozbawienia wolności (w świetle standardów ochrony praw człowieka)¹

I

The Polish Criminal Code of 1969 enumerates the following penalties (art. 30):

- 1) imprisonment (up to 15 years)
- 2) limitation of liberty
- 3) fine.

They are so-called "ordinary" penalties, as the Code adds also death penalty (the penalty of extraordinary nature, provided for the most serious "felonies") and 25 years of imprisonment (art. 30 par. 2 and 3).

The penalty of 25 years of imprisonment has replaced the life imprisonment, stipulated by the former Polish Criminal Code of 1932 (besides death penalty, imprisonment up to 15 years and fine).

Since April 1988 no death sentence has been executed and actually the penalty of 25 years of imprisonment is the harshest penalty in Poland today.

According to art. 91 of the Criminal Code of 1969 (as emended in 1988, before 1988 the provisions had been less liberal), conditional release is possible after the prisoner has served at least "a half of the sentence, if the prisoner has never served the penalty of imprisonment before, or two-thirds if he has already served the penalty of imprisonment". Persons convicted for unintentional offences, young adults (up to 21 at the moment of sentencing),

¹ Paper to conference on "International Human Rights Standards and Polish Penal Law (Present and Future)" Mądralin by Warsaw, 16-19.06.1993

those caring for a child aged under 15, women aged at least 60 and men aged at least 65 can be released after one-third of the term. On the other hand, a multi-recidivist has to serve at least three-fourths of the penalty.

According to art. 92, irrespective of conditions stated in art. 91, a prisoner may be conditionally released after 15 years of imprisonment.

In the light of art. 91 and art. 92 the prisoner serving 25 years of imprisonment may be conditionally released (of course, provided the material conditions, especially "positive prediction", mentioned in art. 90, had been met), after resp. 8 years and 4 months, or after 12 years and 6 months, or after 15 years (see the decision of the Supreme Court of 31.12.1982 and the decision of the Supreme Court of 9.06.1983).

The practice of conditional release is of the greatest importance. Usually the penitentiary courts decide the conditional release of prisoners serving the penalty of 25 years of imprisonment, however after several refusals.²

There are seven countries which have abolished not only capital punishment but also the life imprisonment: Ecuador, Costa Rica, Brasil, Mexico, Portugal, Spain, Norway. Since 1988 Poland has been approaching this group, obviously without negative results both in the field of general prevention and individual prevention.

II

After 1989 the Commission for the Reform of Criminal Law (appointed by the Minister of Justice) has been working on new criminal codes. The draft of the Criminal Code, issued in 1991, enumerates the following penalties (art. 31):

- 1) fine
- 2) limitation of liberty
- 3) imprisonment (up to 15 years)
- 4) 25 years of imprisonment
- 5) life imprisonment.

As we see, the draft proposes the abolition of death penalty (which *de facto* does not exist) on the one hand, and the introduction of life imprisonment on the other. What is more, the draft proposes the conditional release of those serving 25 years of imprisonment after at least 15 years spent in prison and of those serving life imprisonment after 25 years (art. 76 par. 3).

² J. Korecki, *Kara 25 lat pozbawienia wolności*, Warszawa 1988.

Undoubtedly, proposals mentioned above would make — provided they are accepted by the parliament — the criminal policy in the field of the harshest punishments more severe than the criminal policy of last 5 years.

However, we have to mention that in no case the life imprisonment would be mandatory sanction. The life imprisonment is always accompanied by 25 years of imprisonment and imprisonment of 10 to 15 years.

In the written motivation the Commission for the Reform of Criminal Law gives the following grounds for the introduction of life imprisonment: the gravity of crimes, for which life imprisonment could be meted out (homicide and 6 other serious felonies), the response of public opinion to the abolition of death penalty, the necessity of elimination from society of the most dangerous criminals.³

III

The nature of the penalty of life imprisonment is a strange hybrid. D. van Zyl Smit states: "On the one hand, it is seen in most countries where the sentence of death has been abolished as the harshest sentence which may legally be imposed as punishment for the most serious crimes. On the other hand, the sentence of life imprisonment is used as a form of indefinite preventive detention to protect society against dangerous or incorrigible offenders, whose specific offences may not necessarily require the harshest punishment available".⁴

M. Szewczyk, commenting on the draft of the Criminal Code of 1991, expresses the opinion that imprisonment, especially penalty of 25 years of imprisonment and life imprisonment, is seen as the measure of prevention and incapacitation rather than the measure of repression or resocialization.⁵

Life imprisonment is (in contrast to other ones) the indeterminate criminal sanction. The actual duration of the penalty of life imprisonment is not prescribed by the sentence of court.

As a result of that indetermination, the execution of life imprisonment is characterised by uncertainty. "The lifer, though he may know the average sentence, can never count on release until it is actually granted him. This uncertainty weighs heavily on lifers, for in some senses the whole of their

³ Komisja do spraw Reformy Prawa Karnego, *Projekt Kodeksu Karnego*, Warszawa 1991, s. 30 „Uzasadnienie”.

⁴ D. van Zyl Smit, *Is Life Imprisonment Constitutional? — the German Experience*, manuscript.

⁵ M. Szewczyk, *System środków karnych w projekcie nowego prawa karnego*, [w:] S. Waltoś (red.): *Problemy kodyfikacji prawa karnego*, Kraków 1993, s. 154.

future lives are at risk from moment to moment; they can never know that they have not condemned themselves to a vastly extended term in prison because of one momentary aberration".⁶

IV

D. van Zyl Smit has made a remark that "In most countries life imprisonment has been overshadowed by the sentence of death and it has become controversial only after the abolition of the death penalty. Usually it has taken some years for the problems which are inherent to the sentence of life imprisonment to be recognised."⁷

D. van Zyl Smit means the recognition that life imprisonment raises fundamental constitutional issues, especially those concerning human rights. And it is rather new approach to life imprisonment — traditionally quite other issues were studied (the psychological effects of life sentences, treatment regimes conditional release etc.). Incidentally, prominent Polish journalist, S. Podemski, still fails to notice that life imprisonment has to be studied in the light of standards of protection of human rights — his point of view is fairly traditional.⁸

The opinion prevails that life imprisonment without the possibility of release may violate the basic human rights of prisoners by denying them the opportunity of rehabilitation and constitute cruel, inhumane or degrading punishment.

We should also stress that a sentence of life imprisonment implemented in the way that a prisoner is in fact incarcerated for the rest of his natural life would mean that his human rights, e.g. right to freedom of movement, have been eliminated. Such an action violates the provision which allows fundamental rights to be restricted by legislation but not to be abolished.

It seems that the very nature of the penalty of life imprisonment contravenes human rights. The protection of human rights, with the respect for human dignity in the first place, makes the retention or — in Poland — restoration of life imprisonment highly disputable.

⁶ R.J. Sapsford, *Life sentence prisoners: Psychological changes during sentence*, "British Journal of Criminology", 1978, 18, s. 130.

⁷ D. van Zyl Smit, *Is Life...*

⁸ S. Podemski, *Na całe życie*, „Polityka”, 12.06.1993, s. 3.

V

The United Nations pays attention both to the protection of human rights and to criminal policy. However, the UN-documents have not referred explicitly to life imprisonment for many years. Death penalty has been the matter of interest.

Art. 7 of the International Covenant of Civil and Political Rights prohibits torture or cruel, inhuman or degrading treatment or punishment. Art. 10 of the Covenant guarantees the right of any person deprived of liberty to be treated "with humanity and with respect for the inherent dignity of the human person". Lastly, art. 10 para. 3 of the Covenant guarantees a penitentiary system comprising "treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".

We can ask the question, whether the Covenant, namely art. 7 and art. 10, prohibits life imprisonment implicitly.

S. Errat and K. Neudek express the following opinion: "One of the United Nations guiding principles for prisoners under sentence is that a sentence of imprisonment can only protect society, "... if the period of imprisonment is used to ensure, as far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life" (para. 58 of UN Standard Minimum Rules for the Treatment of Prisoners). Within these guidelines it would appear that a sentence which destroys that ability and neglects the possibility of release is not in conformity with the purposes and objectives of basic human rights and the Standard Minimum Rules for the Treatment of Prisoners. Once a prisoner has been judged as being no longer a danger to society, prolonged detention beyond that which is considered necessary for reasons of justice would not accord with a humane penal policy".⁹

We see that S. Errat and K. Neudek stress the importance of the possibility of release of a life sentence prisoner; if law does not deny the release (conditional release) of lifers, it conforms with the UN standards of protection of human rights.

The question is, whether we can go further and argue that in the light of art. 7 and art. 10 of the Covenant the penalty of life imprisonment as such is inadmissible.

Obviously, there are many arguments against life imprisonment, referring to its inhuman nature.

⁹ S. Errat, K. Neudek, *The Life Sentence Prisoner, Paper to International Comparative Seminar on the Problem of "Dangerous" and Long-Term Prisoners*, Prague, 8-11 April 1992, p. 8.

However, the UN Convention on the Rights of the Child of 1989 affirms life imprisonment (or at least tolerates it). In art. 37 it stipulates that "No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment. Neither capital punishment nor life imprisonment shall be imposed on any person below the age of 18 years, without the possibility of release".

VI

The European Convention on Human Rights and other documents of the Council of Europe establish rather high standards of the protection of human rights.

The European Convention does not mention the life imprisonment explicitly. The required standards should be derived from provisions of general character, especially from art. 3, stating: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." And we have to remember that the Convention has been explained (and applied) in "progressive" way, taking into account social, political and ethical changes.¹⁰

The decisions of the European Commission of Human Rights and European Court of Human Rights referring to art. 3 are numerous. In several cases the Commission has dealt with the matter of life imprisonment and has not found it inadmissible in the light of art. 3.

This affirmation of life imprisonment has been criticized.¹¹ However, in the last years both Commission and Court have had no opportunity to evaluate the life imprisonment and, eventually, to declare it inadmissible.

P. Hofmański is of the opinion that Commission and Court will find that life imprisonment contravenes art. 3 of the European Convention¹²

However, up to now the agencies of the Council of Europe accept the life imprisonment, provided some requirements (conditional release etc.) are met.

European Committee on Crime Problems said: "a crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on

¹⁰ M. Nowicki; *Wokół Konwencji Europejskiej*, Warszawa 1992, p. 19; (see e.g. P. van Dijk, G.J.H. van Hoof: *Theory and Practice of the European Convention on Human Rights*, Deventer-Boston 1990, p. 226-241)

¹¹ H.G. Ganter, *Die Spruchpraxis der Europäischen Kommission für Menschenrechte auf dem Gebiet des Strafvollzuges*, Bonn 1974, P. Hofmański, *Europejska Konwencja Praw Człowieka i jej znaczenie dla prawa karnego*, Białystok 1993 p. 176.

¹² Hofmański; *Europejska...* p. 176, 178.

the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society.”¹³ The Committee obviously affirms the penalty of life imprisonment and only demands the legal opportunity of early release of a lifer “if he is no longer a danger to society.

The life imprisonment is also the matter of the Resolution (76)2 on the Treatment of Long-Term Prisoners, adopted by the Committee of Ministers of the Council of Europe on 17 February 1976.

The Resolution states that long-term sentences are ultimate ratio, imposed only if they are necessary for the protection of society, that execution of long-term imprisonment should be governed by the treatment ideology and that long-term prisoners should be granted conditional release as soon as possible. And, according to para. 11, the member states are recommended to “adapt to life sentences the same principles as are applied to long-term prisoners.” As for conditional release of lifers, para. 12 says that an examination determining whether or not it can be granted “should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals”.

The Resolution accepts the life imprisonment, of course under several conditions (rehabilitation or, better to say, resocialization, conditional release etc.).

It seems that — in the matter of life imprisonment — the opinion of the Council of Europe is the same as the opinion of the United Nations. However, the instruments of the Council of Europe declare the necessity of conditional release for lifers much stronger than the instruments of the United Nations do.

VII

In Federal Republic of Germany, where the death penalty was abolished by the Constitution of 1949, has been long debate as to whether life imprisonment has been compatible with the provisions of constitution, especially with the constitutional principle that the dignity of Man is unimpeachable.

It was argued that life imprisonment is the complete deprivation of personal liberty (up to 1982 the Criminal Code had not allowed for conditional release of lifers), which is guaranteed by constitution and can be only limited, but never totally eliminated. Another argument was that life imprisonment

¹³ *Treatment of Long-Term Prisoners*, Strasbourg 1977.

violates human dignity, as people become only objects of the state and have no longer an available domain of private life. And — because life imprisonment is mandatory for murder, optional for homicide — it was argued that life imprisonment offends against the principle of equality before the law, as the threatened punishments for murder and for homicide are quantitatively different in terms of gravity, whereas the "seriousness of crime" and the "dangerousness of the criminal" often do not correspond to this difference.¹⁴

In 1977 the Federal Constitutional Court decided that life imprisonment was constitutional if some principles were respected, including that there would be legal provisions for conditional release for lifers.

As a result, in 1981 the Criminal Code was emended — according to new para. 57a the court may suspend the remainder of a life sentence on probation if the offender has served fifteen years of his punishment, the gravity of the offender's guilt does not necessitate that he continues to serve his sentence and the general requirements of conditional release (para. 57 — "circumstances justify an attempt to determine whether the offender will lead a law-abiding life outside prison; and the offender agrees") are met.

In recent German debates about life imprisonment there have been made attempts to move beyond a discussion of current legislation to a more general critique of the institution of life imprisonment itself. Prominent in this respect has been the "Projektgruppe Fulda"; in their arguments they have attempted to discredit the concept of resocialization in prison, on which the Federal Constitutional Court based much of its support for the penalty of life imprisonment.¹⁵

VIII

S. Errat and K. Neudek came to the following conclusion: "International conventions and instruments on imprisonment and human rights suggest that the ultimate deprivation of liberty may only be justified if accompanied by review and assessment procedures which operate within commonly accepted judicial standards. Indeterminate life sentencing cannot be allowed to be an open door to arbitrariness. Fair, unprejudiced assessment programmes are possible checks against it." (...) "... all life sentence prisoners should have the possibility of eventual release".¹⁶

The penalty of life imprisonment, in the form suggested by the draft of the Criminal Code (issued in 1991), does not contravene the standards

¹⁴ D. van Zyl Smit, *Is Life...*, Errat, Neudek; *The Life...*, p. 9.

¹⁵ Smit; *Is Life...*

¹⁶ Errat, Neudek, *The Life...* p. 23.

which have been established by the International Covenant on Civil and Political Rights (especially art. 7 and art. 10) and by other UN instruments. Provisions of the draft guarantee the possibility of conditional release, albeit after life sentence prisoner has served at least 25 years. And the penitentiary court decides.

The European Convention on Human Rights and other instruments of the Council of Europe have established higher, than those of the UN, standards of the protection of human rights. However, those concerning life imprisonment are very similar. The differences are small: European rules (especially the Resolution of 1976) are more categorical and accurate while referring to provisions on conditional release of lifers, than the United Nations ones.

Here we have to notice that the minimum of 25 years in prison as premise for conditional release of lifer, as proposed by the draft of Criminal Code, does not observe the Resolution of 1976, which recommends much lower minimum (para. 12 says that a review of the life sentence should take place after eight to fourteen years).

However, the provisions of the draft on life imprisonment are in conformity with the European Convention on Human Rights (especially art. 3), as it has been understood up to now.

Of course, the interpretation of the provisions of the European Convention in respect to life imprisonment may change. It seems probable that in the future the life imprisonment itself will be found as violating art. 3 of the Convention.¹⁷

STRESZCZENIE

Przedmiotem artykułu jest kara dożywotniego pozbawienia wolności. W obowiązującym kodeksie karnym z 1969 roku kara owa nie występuje: najsurowszymi karami są według jego przepisów kara 25 lat pozbawienia wolności oraz — nie wykonywana od 1988 roku — kara śmierci. Projekt nowego kodeksu karnego nie przewiduje kary śmierci, wprowadza natomiast — obok kary 25 lat pozbawienia wolności — karę dożywotniego pozbawienia wolności.

W artykule omawia się karę dożywotniego pozbawienia wolności w świetle aktów prawa międzynarodowego dotyczących ochrony praw człowieka oraz w świetle dyskusji w literaturze przedmiotu. Omawia się także dyskusję na temat konstytucyjności kary dożywotniego pozbawienia wolności w RFN.

¹⁷ P. Hofmański, *Europejska...*, p. 178.