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UNIVERSIDAD SANTO TOMÁS, SECCIONAL TUNJA FACULTAD DE DERECHO

UNA VISIÓN GENERAL DE LA PRISIÓN INDEFINIDA EN EUROPA

A GENERAL OVERVIEW OVER THE INDEFINITE PRISON IN EUROPE[1*]

UN APERÇU GÉNÉRAL DE LA PRISON INDÉPENDANTE EN EUROPE

UMA VISÃO GERAL DA PRISÃO INDEFINIDA NA EUROPA

Fecha de recepción: 29 de octubre de 2017
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Resumen

La Ley Orgánica 1/2015 de 30 de marzo, introdujo en el Código Penal español la prisión permanente revisable, con un período mínimo de cumplimiento de 25 años, aunque en delitos graves como el terrorismo y la asociación delictiva pueden llegar a los 35 años. En estas actividades ilícitas, además, se endurecen las condiciones para otorgar la suspensión, el acceso al tercer grado y los permisos de salida. El legislador argumenta que la cadena perpetua ha sido respaldada por el Tribunal Europeo de Derechos Humanos y que existe en la legislación comparada. Sin embargo, el Tribunal Europeo ha establecido requisitos estrictos, específicamente que deben ser revisables y el delincuente debe tener una "posibilidad legal y práctica de liberación". Por otro lado, en la legislación alemana, que nuestra legislatura ha tomado como modelo, la revisión siempre se hace a los 15 años. Las dudas que plantea la nueva regulación han llevado a un recurso de inconstitucionalidad.

Palabras clave: cadena perpetua, prisión permanente revisable, prisión por tiempo indefinido, penas privativas de libertad.

Abstract

The Organic Law 1/2015 of 30 March, introduced in the Spanish penal code the permanent reviewable prison, with a minimum compliance period of 25 years, although in serious crimes as terrorism and criminal association can reach 35 years. In these illicit activities, in addition, the conditions for granting the suspension, access to the third degree and exit permits are hardened. The legislator argues that life imprisonment has been endorsed by the European Court of Human Rights and that it exists in comparative legislation. However, the European Court has established strict requirements, specifically that must be reviewable and the offender should have a "*legal and practical possibility of release*". On the other hand, in German law, which our legislature has taken as a model, the revision is always made at 15 years. The doubts that the new regulation raises have led to an appeal of constitutionality.

Keywords: Life imprisonment, permanent reviewable prison, indefinite prison, custodial sentences

Résumé

La loi organique 1/2015 du 30 mars, introduit dans le code pénal espagnol la prison permanente révisable, avec une période de conformité minimale de 25 ans, bien que dans les crimes graves comme le terrorisme et l'association criminelle peut atteindre 35 ans. Dans ces activités illicites, en outre, les conditions d'octroi de la suspension, l'accès au troisième degré et les autorisations de sortie sont renforcées. Le législateur soutient que l'emprisonnement à vie a été approuvé par la Cour européenne des droits de l'homme et qu'il existe dans une législation comparée. Cependant, la Cour européenne a établi des exigences strictes, en particulier celles qui doivent être révisables et le délinquant doit avoir une «possibilité légale et pratique de libération» .De l'autre

côté, en droit allemand, que notre législature a pris comme modèle, la révision Les doutes que le nouveau règlement soulève ont conduit à un appel de constitutionnalité.

Mots-clés: Emprisonnement à vie, prison permanente réformable, prison à durée indéterminée, peines privatives de liberté

Resumo

A Lei Orgânica 1/2015 de 30 de março, introduziu no código penal espanhol a prisão permanente passível de revisão, com um período mínimo de cumprimento de 25 anos, embora em crimes graves como terrorismo e associação criminosa possa chegar a 35 anos. Nessas atividades ilícitas, além disso, as condições para a concessão da suspensão, o acesso às licenças de terceiro grau e de saída são endurecidas. O legislador argumenta que a prisão perpétua foi endossada pelo Tribunal Europeu dos Direitos Humanos e que existe na legislação comparada. No entanto, o Tribunal Europeu estabeleceu requisitos estritos, especificamente que devem ser passíveis de revisão e o infrator deve ter uma "possibilidade legal e prática de liberação". Por outro lado, na lei alemã, que nossa legislatura tomou como modelo, a revisão é sempre feita aos 15 anos e as dúvidas que o novo regulamento levanta levam a um apelo de constitucionalidade.

Palavras-chave: prisão perpétua, prisão permanente, prisão indefinida, penas privativas de liberdade

Introduction

The Organic Law 1/2015 of 30th March[3], introduced in the Spanish penal code the life imprisonment, called in our legislation "permanent reviewable prison". This penalty was suppressed in the Criminal Code of 1870 and had not been foreseen until now.

The first thing that attracts attention in the new sanction is the name (see about it Abel Souto, 2015; Cuerda Riezu, 2011; Fernández García, 2014; Mir Puig, 2015; Muñoz Conde, 2012; Ramírez Ortiz and Rodríguez Sáez, 2013; Sáez Rodríguez, 2013; Sanz Mulas, 2016).

Normally, in European countries are used expressions like life imprisonment, or indefinite imprisonment, although it is also reviewed and normally before that in Spain. However, our legislator wanted to save the possible censures of unconstitutionality, highlighting that reviewable character.

3 Organic Law 1/2015 of 30th March, that modifies Organic Law 10/1995, of 23th November, introducing Criminal Code (BOE 31th March, 2015).

Anyway, an appeal has been presented for unconstitutionality against the regulation of this penalty, due to a violation of our fundamental norm, Spanish Constitution, mainly Article 25.2 (about that Ortíz de Urbina, 2012). This provision states that "*custodial sentences ... shall be directed towards re-education and social reintegration*". Generally, in European ordinances where life imprisonment is regulated, a similar provision is not recorded, with the exception of Italy, where Article 27 of the Constitution also provides that penalties must be directed to the re-education of the convicted person.

However, revision of the permanent prison reviewable will not be done in some cases up to 35 years of effective compliance. So with such a long internment it is difficult to maintain that it is oriented toward social reintegration.

It should be said that it is surprising the incorporation of a so hard penalty in these moments, because in the last years there has been a general decrease of the delinquency[4]. In fact, the crime rate is among the lowest in the European Union[5]. Nonetheless, the percentage of murders, which is the main offence punishable by permanent reviewable prison, is one of the smallest of Europe (Díez Ripollés, 2006, 2015; García España, Díez Ripollés, Pérez Jiménez, Benítez Jiménez, Cerezo Domínguez, 2010)[6].

Another point to note is the maximum limit of stay in prison, 40 years, when in Germany, for example, it is 15 years.

Well, finally, in addition to such an extensive limit, the permanent prison review has been introduced without a general review of the penal system, as would have been desirable (criticized by Cuello Contreras and Mapelli Caffarena, 2015; Juanatey Dorado, 2013; Jaén Vallejo y Perrino Pérez, 2015; Tamarit Sumalla, 2015).

In so far as there are no pre-emptive grounds for this, other arguments are put forward in the reform law, namely that it exists in many European legislations and has been endorsed by the European Court of Human Rights - henceforth, ECtHR-.

Therefore, I will now comment the regulation of life imprisonment in Germany, since our legislator has taken it as a model for the permanent prison reviewable. However, in that order the review period is much shorter, since it is always fixed at 15 years, while in Spain the minimum compliance period can reach 35 years. Then I will refer to the position of the ECtHR, which, as will be seen, has set strict conditions for life

4 In 2011, when the preliminary draft was processed, they were reduced 0´5% regarding past year, in 2012 0´7 %, in 2013 4´3%, in 2014 3´6 %, in 2015 1´9 and in 2016 1´4. (http://www.interior.gob.es/prensa/balances-e-informes/2016).

5 (http://www.interior.Gob.Es/prensa/noticias/-/asset_publisher/ GHU8Ap6ztgsg/content/id/3283275).

6 According to the Minister of the Interior, the average rate in the European Union is 1.00 murders or completed homicides per 100,000 inhabitants, while in Spain it is 0.64. (http://www.icndiario.com/2014/01/29/balance-de-la-criminalidad-en-espana-infracciones-penales-descienden-un-43).

imprisonment to conform to the European Convention on Human Rights (hereinafter ECHR), mainly the need for revision to allow release if it is understood that the subject is re-socialized, and to offer the prisoner a "*legal and practical expectation of release*." Finally I will briefly comment on the new sanction of permanent prison reviewable.

1. Life imprisonment in German law

1.1 Legal regulation

Article 38 German Criminal Law (Strafgesetzbuch -StGB-) provides *"The penalty of deprivation of liberty is temporary, unless the law imposes life imprisonment"*.

Therefore, life imprisonment (*lebenslange Freiheitsstrafe*) is regulated as an exception to temporary deprivation of liberty, so that the criminal code only marks it in extraordinary cases (about it, Fischer, 2006, 2012, 2015; Kühl, 2011; Stree y Kinzig, 2006; Tröndle y Fischer, 2006).

In addition, it is not always provided for as a mandatory sanction, but in some cases the Court may decide between temporary imprisonment or life imprisonment. Specifically, it is mandatory in the murder[7] and genocide with deaths[8]. Instead, it is optional in crimes such as serious homicide[9], high treason[10], sexual abuse against children[11], rape[12], and robbery[13], when these behaviors are accompanied by death caused at least by imprudence. In such cases, may be imposed a sentence of imprisonment with a minimum of 10 years.

Article 57 a StGB defines conditions of parole in life imprisonment. According to this norm, the sentence is always reviewed at 15 years, without contemplating longer periods.

7 Article 211 StGB (Murder):

"1. The murderer will be punished with life imprisonment.

2. Murderer is the one who, for the pleasure to kill, for satisfying the sexual instinct, for greed, or otherwise for low motives, treacherously, or cruelly, or with means that constitute a public danger, or to facilitate another fact or to cover it up, kills a human being".

8 Article 220 a StGB (Genocide).

9 Article 212 StGB (Homicide):

"1. Who kills a person without being a murderer will be punished with a minimum custodial sentence of 5 years

2. In particularly serious cases life imprisonment is allowed".

10 Article 81 StGB (High treason).

11 Article 176 b StGB (Sexual abuse against children with death).

12 Article 178 StGB (Rape with death).

13 Article 251 StGB (Robbery with death).

To decide whether to suspend execution, the "*seriousness of guilt*" is taken into account, and is valued in view of the offence committed and the personality of the perpetrator. According to the German Supreme Court, guilty is serious (*Schuldschwere*) when a criminal kills several people or acts with brutality or cruelty to the victim.

In addition, it is a legal condition for the parole that "*can be justified taking into account the interests of the safety of the general public*", that is, it attends to the danger of the subject.

Finally, the last requirement is astonishing, since it is necessary that "*the convicted consents to get out on parole."*

In fact, there are prisoners who choose to remain in prison, which reveals that detention can have such a dehumanizing effect that the prisoner does not feel capable of being released and of adapting to social life (data about prison effects in Serrano Gómez and Serrano Maíllo, 2016).

If these requirements are given, the Court agrees to the parole and imposes the convicted several conditions for a period of 5 years. If parole is denied, the convicted will be able to ask for release again, but Court can fix a waiting period, maximum of 2 years.

Well, the effective enforcement in prison of convicted to life sentence in Germany is, like average term, 19 years and in extremely serious cases up to 24 years, still below the minimum of 25 years that is foreseen in Spanish Law. And that difference is increased to 20 years when serious crimes related to terrorism, where the review will not be done before 28 or 35 years.

1.2. Doctrine of the German Constitutional Court

The German Constitutional Court (*Bundesverfassungsgericht*) studied the life imprisonment in the sentence of 21 June 1977[14]. In this case it was questioned the one foreseen for the crime of murder, since the judicial body is obliged to impose it and can not assess in each case if it considers it necessary

The Court declared it according to the German Fundamental Law, but fixed important requirements to respect the human dignity, inviolable value according to article 1 of that law. In the first place, it highlights the need to recognize the prisoner as a "concrete and achievable opportunity" to recover his freedom, adding that for these purposes the path of pardon is not enough[15]. In addition, it determines that to the extent that the

14 (BVerfGE 45, 187, 253).

15 *"The offender cannot be considered a mere object of the fight against crime as a pretext to violate his rights and social values constitutionally protected. The basic presuppositions of the individual and social existence of man must be preserved. From Article 1 of the Basic Law in relation to the principle of the social state is derived - and this is particularly true for prison - the obligation of the state to get everyone to have an existence in accordance with human dignity. It would be incompatible with human dignity so understood that the state*

convicted person must be able to achieve his freedom again, he must be recognized the right to re-socialization[16].

On the other hand, the Court analyzes life imprisonment in light of the purpose of the sentence. In principle, it rejects its application for reasons of special prevention, given the fragility of forecasts of danger, coupled with the low rates of recidivism in the murder[17]. Besides, the Court points out that the purpose of social reintegration is not violated, since the sentence is always reviewed at age 15, so that the stay in prison depends on the danger but is not inherent in life imprisonment[18]. It concludes that for the legislator the penalty serves a expiatory purpose that justifies the application of life imprisonment in serious crimes such as murder. That is, it responds to the claim of justice of society[19].

In brief, that type of sentences will be in accordance with Article 1 of the German Basic Law that proclaims dignity, if the right of the prisoner to re-socialization is maintained and he is guaranteed an expectation of leaving prison, or as the Constitutional Court says, "*a concrete and achievable opportunity to be able to recover later*".

2. Position of the European Court of Human Rights

2.1 Sentence of ECtHR –Grand Chamber- of 9 July 2013

ECtHR studied life imprisonment in Sentence –Grand Chamber- adopted on 9th July 2013, case "*Vinter vs. United Kingdom"* (Roig Torres, 2013). However, in another

would claim for itself a man, deprived of his freedom, without giving him at least the opportunity to be able to obtain freedom again" (paragraph 145).

16 Paragraph 177.

17 *"The end of the penalty of "special negative prevention" can be achieved through the security that entails interning the perpetrator throughout his life. But knowing whether to commit your life to the offender for security reasons is something that will depend on the risk of recidivism. This danger is scarce, as can be seen from the statistics made in the country (about 5%), while the rate of recidivism in habitual crimes is 50-80%. This fact suggests to the members of the regional court that a goal that seeks security is not sufficient justification in itself to impose life imprisonment on the perpetrators of a murder"* (paragraph 220).

18 *"The imposition of life imprisonment, insofar as it legally provides for the suspension of sentence, does not contradict the idea of resocialization that underlies the Constitution ("positive special prevention"). The murderer sentenced to life imprisonment has basically the opportunity to obtain freedom again after serving a certain period of imprisonment... In any case, the objective of rehabilitating the criminal justice system can never be achieved in relation to a group of criminals, those who remain dangerous to society. But this danger does not follow from the life sentence, but from the particular circumstances of the person found guilty"* (paragraph 222).

19 "*Finally, our system of penal sanctions allows for an adequate response to guilt as well as an expiation, and given that the murder is punishable by its extreme injustice and high guilt, the punishment must be exceptionally high. This penalty also responds to the general expectation that justice will be done. Consequently, the legislator threatens who has the life of another, committing a murder, with the highest penalty that fits*" (paragraph 223).

subsequent resolution, the Court would arrive at a solution opposed to that contained in this resolution.

The appellants were British citizens who had been sentenced to life imprisonment for murder with a lifetime compliance order (*whole life order) and* alleged that this punishment was contrary to Article 3 ECHR –it prohibits inhuman or degrading punishment-.

As a consequence of that request, the ECtHR examined the legislation of England and Wales. It contains three types of indefinite imprisonment: a) a life prison for the commission of a second offence -*Life sentence for second listed offender*-, b) a life prison for serious offences -*Imprisonment for public protection for serious offences*-, and c) a life prison for murder -*Mandatory life sentence*-.

Only in the third case is mandatory to the Court this penalty.

Besides, if life imprisonment is imposed, the Court must fix a "minimum compliance period" (*tariff)*. It is the time that the subject must remain in prison before his conviction is reviewed to assess his release under supervision, since in that legislation if the convicted person is released he is subjected to control throughout his life[20].

By the way, in the last modality of life imprisonment (mandatory life sentence for murder), it was also foreseen the obligation to review the sentence at 25 years. However, following certain legislative changes this standard was omitted[21]. Therefore, in some cases, the Judge must establish a minimum period of compliance (between 12 and 30 years), but in others it orders the confinement for life and in this case no longer this duty of revision is contemplated. This was what led the ECtHR to declare that this sentence was contrary to Article 3 ECHR.

The Court notes that life imprisonment is not in itself an inhuman or degrading punishment. But, in order to respect the ECHR, it must be reviewable, "*so that possible changes in the life of the prisoner and his progress towards re-socialization can be assessed, because it is possible that the prison may no longer be justified on these grounds*".

It also states that "*the Court also notes that in comparative and international law there is clear support for a specific mechanism to ensure a review no later than 25 years after the imposition of a life sentence, with periodic reviews thereafter*".

20 Article 31 *Powers of Criminal Courts (Sentencing) Act* 2000.

21 A Home Office Order of 10 November 1997 stated that the minimum period of compliance could be reduced in exceptional circumstances, such as when there was extraordinary progress on the part of the prisoner. This possibility should be taken into account by the Secretary of State after 25 years in cases of prisoners with a lifelong custody order. However, *The Criminal Justice Act* 2003 did not address this review.

And it continues: *"A prisoner who has been sentenced to life has the right to know at the beginning of his sentence what he must do to be considered fit for release and under what conditions to claim it, which includes knowing when he can request a review of his sentence."*.

Accordingly, it states "*that a custodial sentence to life imprisonment is compatible with article 3 only if it offers the prisoner both a prospect of release and a possibility of reviewing his sentence*".

In the light of these arguments, the ECtHR concluded that mandatory life imprisonment for murder, envisaged in England and Wales, was an inhuman or degrading punishment prohibited by Article 3 ECHR, inasmuch as there was no provision for revision when was arranged for life.

2.2 Sentence of ECtHR -4th section- of 3 February 2015

In this resolution, case "*Hutchinson vs. United Kingdom*", mandatory life imprisonment for murder is examined again. However, now the Court denies that it breaks Article 3 ECHR, in contradiction to the previous decision (Roig Torres, 2016).

First of all, the European Court reproduces what was said in the Vinter case. It points out that it breaks human dignity to deprive a person of his freedom without pursuing his rehabilitation and without giving him the opportunity to regain his freedom. The conviction must be legally and effectively reviewable.

However, after the Vinter case, the Court of Appeal in England and Wales had specifically ruled on that form of life imprisonment in the sentence of 18 February 2014 (*R. v. Ian McLoughlin; R. v. Lee William Newell*). In my opinion, this meant that the Court should give a counter-answer to the previous one, in seeking to respect the sovereignty of the national judicial body.

In the two sentences, both in 2013 and in 2015, the ECtHR had to decide whether Article 30 of the (Sentences) Act 1997 was enough to consider that mandatory life imprisonment for murder with a warrant for life is reviewable.

That rule provides that the Secretary of State may release any prisoner for humanitarian reasons. But a 2010 Prison Service Order supplements this provision and states that humanitarian reasons concur when the prisoner suffers a terminal illness, or if he is incapacitated or paraplegic[22].

22 Prison Service Order nº 4700/2010, titled "*The Indeterminate Sentence Manual*". Chapter 12th contains guidelines for release on compassionate grounds:

"That the prisoner suffers a terminal illness and that death is likely to occur very soon (although there are no established time limits, three months may be considered an adequate margin), or the prisoner is prostrate or incapacitated, for example, paraplegic or with stroke grave, and that the risk of recidivism (in particular sexual or violent) is minimal; and that prolonging the prison would reduce the prisoner's life expectancy; and that adequate means exist for the care of the prisoner and treatment outside the prison; and that early release

In the Vinter case, this provision was not consider enough to ensure the review of life imprisonment and the expectation of release. However, the English Court of Appeal interpreted it broadly. It pointed out that the power of the Secretary of State to release inmates is not limited to the cases indicated in the penitentiary rule, but should release the condemned whenever the continuation of internment turns the sentence in inhuman or degrading. In fact, the same thing had already been said by the British court before the Vinter case[23], but in spite of this the ECtHR understood that this rule did not guarantee enough the review.

In another way, as there was an express pronouncement by the national court after 2013, stating that the English legislation must be interpreted in accordance with Article 3 ECHR, in the Hutchinson case the European Court declares that life imprisonment does not violate that norm.

In short, the ECtHR considers life imprisonment to be valid, despite the fact that in England and Wales there is still no concrete deadline for reviewing the sentence for life.

3. Doctrine of the Spanish Constitutional Court

In Spain, the Constitutional Court has faced the life imprisonment only at dealing over extradition, when Spanish authorities are requested by a foreign country to transfer an inmate, who will face in his country the compliance of this penalty, -if trial took place- or will be tried on life imprisonment charge (Roig Torres, 2016).

In sentence nº 181/2004, of 2 November, noted out that "*the imposition of a life sentence may violate the prohibition of inhuman or degrading punishment under Article 15 Spanish Constitution*".

But, the Court itself has considered enough guarantee to grant extradition, in accordance with the ECtHR doctrine, that in the event of such sentence, its execution is not necessarily "lifelong", that is, it must be reviewed (Sentence Constitutional Court nº 148/2004 of 13 September 2004, paragraph 9).

Therefore, the extradited person must be recognized "*the possibility of having recourse to measures of review of punishment or the application of leniency measures with a view to non-execution of sentence*" (Sentence Constitutional Court nº 351/2006, of 11 December, paragraph 7).

Consequently, for the purposes of granting extradition, it is enough that the sentence is reviewable. In addition, this condition raises it in a broad sense, when it refers to measures of "clemency", which could have room for pardon.

Anyway, in that judgment the Constitutional Court simply assessed the adequacy of indefinite detention to Article 3 ECHR and Article 15 of the Spanish Constitution, which prohibits

entails some significant benefit to the prisoner or his family".

23 *David Francis Bieber,* 25 June 2008, and *R. vs. Oakes and others,* 21 November 2012.

inhuman or degrading punishment. He did not come to judge its compatibility with other constitutional principles, such as re-socialization.

4. Permanent reviewable prison in Spain

4.1 Social demand as the basis of the new penalty

In fact, the catalog of offences for which the permanent reviewable prison was foreseen has been extended since the initial draft[24], reflecting that there were no clear actions for which it was considered necessary. The original text only assigned it to terrorist killings. But then it was applied to other crimes: murder, when the victim is under 16 years of age, or a particularly vulnerable person, when the murder follows an offence against sexual freedom, or if it is committed within a criminal organization; repeated or serial killings, murder of the head of a foreign State, or another person protected in a treaty in Spain, genocide and crimes against humanity.

In this enlargement had big influence several cases of girls raped and murdered, causing social alarm (Acale Sánchez, 2016; Alonso de Escamilla, 2016; Cámara Arroyo and Fernández Bermejo, 2016; Muñoz Conde and García Arán, 2015; Serrano Tárraga, 2012). In one of them the father collected signatures asking for life imprisonment, in another the President of the Government promised to change the legislation. And at the time the draft was made, some well-known offenders were released, after receiving long sentences, in spite of being considered by society as non-socializable people. So, inmates convicted of crimes of rape to penalties older than a hundred years were released after fulfilling only 20 years (maximum effective compliance limit according to Article 76 Spanish Criminal Code, later extended to 40 years).

Consequently, the legislator justified this innovation in a social demand. In a introduction to the modification law, is stated that such a reform is necessary to strengthen the confidence of citizens in the Administration of Justice, in this way: "*permanent prison reviewable is introduced for those crimes of extreme gravity, in which the citizens demanded a penalty proportionate to the fact committed*" (over people percentage who support this penalty, Martín Pallín, 2012).

Therefore, the social alarm and the citizen petition of being heavy-handed in dealing with certain delinquents is what leads to its incorporation (Abel Souto, 2015; Cervelló Donderis, 2015 b; Juanatey Dorado, 2012, 2016; Lascuraín Sánchez, 2015).

In fact, criminal data are not taken into consideration, nor preventive needs, in spite of being significant points in Criminal law, according to proportionality principle.

24 Organic Law Draft, to modify Spanish Criminal Code, of 16 July 2012.

Consequently, permanent prison reviewable is, indeed, a display of the alleged "Security Criminal Law", which primarily aims to calm down citizens, sacrificing the minimum intervention principle.

4.2 Regulation

In Spanish Criminal Law (Código penal -CP-), there are not a specific legislation that develops all, its legal regime. Criminal law only contains, as in Germany, the regime of the "suspended prison", an institution that permits the freedom of the inmate, after a minimum compliance period and under certain requirements. After 25 years of conviction, and in some cases 28, 30 or 35, the situation is reviewed, so that, if the convicted is not dangerous, will be released, on probation. In addition, some norms on access to third penitentiary degree, exit permits and determination of the penalty are foreseen.

4.2.1 Legal requirements to suspend the prison execution

They are listed in Article 92 CP (a criticism in Landa Gorostiza; Serrano Gómez, 2013, 2014):

- To have served 25 years of prison -excluding cases of Article 78 CP-

- To be classified in third grade, and

- To get a favorable prognosis of social reintegration (Roig Torres, 2014).

> To give a prognosis, the criminal Court must assess certain factors: the personality of the convicted person, his or her background, the circumstances of the crime committed, the relevance of legal assets that could be affected by a criminal reiteration, conduct during the prison compliance, family and social circumstances, and the effects that can be expected of the own suspension of the execution and of the fulfillment of the measures that were imposed.

In addition, in cases of terrorism, the convicted person must have left the organization and collaborated with the authorities (extend on the subject, Álvarez García, 2014; Sanz Mulas, 2012).

4.2.2 Third grade and prison release permits

Requirements fixed in Article 36 CP.

- Third grade classification: granted by criminal Court, if prognosis is positive and after a minimum period of real compliance, -15 years normally and 20 years in terrorism crimes-.

- Prison release permits: granted by criminal Court, if prognosis is positive and after a minimum period of real compliance, -8 years normally and 12 years in terrorism crimes-.

4.2.3 Special rules of Article 78 bis CP

Article 78 bis CP establishes special rules for cases in which the subject is convicted of several crimes, and at least one of them is punishable by permanent reviewable prison and the remainder add more than 5 years.

- Minimum period of real compliance: from 25 to 30 years in normal crimes, but from 28 to 35 years in terrorism and crimes committed within a criminal organization.

- Access to third grade: minimum period of real compliance from 18 to 22 years and from 24 to 32 in those serious crimes.

4.2.4 Suspended prison

General requirements to suspend the prison execution are in Article 92 CP:

- If execution is suspended, the criminal Court fixes a period, from 5 to 10 years, and condemned person is subject to conditions and control measures.

- If the suspension request is denied, the Court must review the sentence again, at least every 2 years.

Anyway, if the Court has considered that the convicted is not prepared to be released after turning 25 or even 35 years, it seems difficult to find a new judicial decision two years later. I think that with these periodic reviews the legislator really tries to guarantee the constitutionality of the regulation.

4.3 Personal assessment

In view of the previous regulation, the new sanction raises doubts as to its conciliation with different constitutional principles.

4.3.1 Principle of social reintegration

First, it is doubtful whether the principle of re-education and social reintegration enshrined in Article 25.2 Spanish Constitution are fulfilled (in this sense: Acale Sánchez, 2013; Bonet Esteva, 2015; Cancio Meli á, 2013; Carbonell Mateu, 2015; Cervelló Donderis, 2015 a, 2015 b; Cuerda Riezu, 2012; Daunis Rodríguez, 2013; De la Cuesta Arzamendi, 2009; Díaz-Maroto y Villarejo, 2012; Fernández Bermejo, 2014; Fuentes Osorio, 2014; García Rivas, 2014; Grupo de Estudios de Política Criminal, 2015; Hidalgo Blanco, 2013; Juanatey Dorado, 2013; Marín de Espinosa y Ceballos and González Tascón, 2013; Orts Berenguer and González Cussac, 2016; Ríos Martín, 2013, 2014; Rubio Lara, 2016; Serrano Gómez, 2013; Terradillos Basoco, 2012; Urruela Mora, 2012. Nevertheless, some authors consider it constitutional, as Jaén Vallejo, who proposed shorter periods of revision; Martín Pallín, 2012 or Nistal Burón, 2010).

According to the rules mentioned, a person can take 35 years until the first revision is made. That is to say, if he was sent to prison with 18 years, -difficult thing by the slowness of justice-, will not be able to leave before being 53 years.

It seems to me doubtful whether the requirement laid down by the ECtHR is to be fulfilled with such a distant horizon, to guarantee the inmate an "*expectation of liberation*", or as the German Constitutional Court says, to be given "*a concrete and achievable opportunity to recover its freedom in the future* ".

In addition, it is difficult for such a long penalty to be directed towards re-socialization. It is necessary to think that the subject is aware of the high number of years of imprisonment that he has to fulfill effectively and it is very possible that his predisposition to collaborate in the face of his social reinsertion diminishes.

Personally, I think that when someone receives a minimum prison term of 25 or 35 years, it is presumed to be a not re-socializable person. Legislator tends to isolate him as long as possible, to avoid his criminal reiteration.

4.3.2 Principle of legal certainty

Secondly, is doubtful the adequacy of this penalty to the principle of legal certainty (Asencio Mellado, 2010; Boldó, 2013; Cervelló Donderis, 2015; Redondo Hermida, 2009).

The permanent prison reviewable, as I said, does not have a specific regulation. It only has scattered regulations regarding the minimum period of compliance, access to the third degree, prison release permits and some particular rules on determining the penalty. There is also a great deal of confusion about the competent bodies to adopt the various decisions, often as a result of an inadequate transposition of German law (Roig Torres, 2016).

4.3.3 Principle of proportionality

The adoption of such a severe penalty, with a review period much longer than most European countries, requires a solid foundation on the principles of minimum intervention and proportionality.

And, unlike other legal systems, it is established as a mandatory penalty for certain crimes, so that the judicial body can not assess the suitability of imposing it (Del Carpio Delgado, 2013).

In addition, if one attends to the list of crimes that carry it, it is verified that it applies to assumptions of disparate entity. For example, it is foreseen if the murder was subsequent to an offence against sexual freedom and it is clear that rape is much more serious than sexual abuse or harassment[25].

And we must remember that the introduction of the reform law justifies this hard innovation in the need to increase the confidence of citizens in the administration of justice. But public opinion is influenced by the media and is not suited to the actual figures of delinquency. So it ends up fixing a sentence with a minimum limit of up to 35 years, to satisfy a social group that asks it thinking that crime is very high, in view of the events that are issued in the news. To the extent, therefore, that this new sanction is not adopted because it is deemed necessary to safeguard essential legal rights, it may result in breach of the principle of minimum intervention.

Indeed, the ECtHR, in the Stafford v. United Kingdom case, sentence of 28 May 2002, rejected the Government's argument of keeping the prisoner in custody as a way to calm down public opinion. The European Court stated that social trust in the criminal justice system can not legitimize the continued imprisonment of a prisoner who has served the time of punishment if it is no longer dangerous to the community.

In conclusion, I believe that the creation of this indefinite confinement means a "innocuation", that is, the isolation of the subject simply to avoid he keeps committing crimes. It seems to imply also a pure retribution, although in our system it is denied as a valid base of the penalty since the Constitution establishes in its article 1 freedom as a superior value of our legal system. From this perspective it is argued that applying the penalty simply to punish, without a preventive basis is contrary to that provision. But I understand that behind the new sanction also underlies this idea of punishment.

25 It happens the same with murder after any crime against sexual freedom (art. 140.1.2ª CP) or genocide with murder, sexual aggression or injuries (art. 607 CP).

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