

LIFE IMPRISONMENT IN HUNGARIAN PENAL LAW

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I. Regulatory antecedents

The introduction of life imprisonment has already been appealed in the proposal of 1843.¹ Two forms of imprisonment were distinguished: imprisonment for life (until death) or for a specified term, and detention. The Act V, 1878 – under the well known professional name as Csemegi Code² – was the first codified penal code regulating life imprisonment. The legislators introduced this sanction, because life imprisonment is the only penalty which can be applied – by keeping up a slight graduality – instead of capital punishment – as Professor Ferenc Nagy stated, referring to the arguments of Csemegi Code.³ In the centre of its penalty system the sanction of imprisonment⁴ can be found, controlling five types: penitentiary detention,⁵ the minimum security state prison, prison, correctional institute and in case of misdemeanour – the custody.

The Act II, 1950 was special in a way as contained only general part regulations, and maintained the form of lifelong imprisonment (besides capital punishment).⁶

¹ FAYER LÁSZLÓ (szerk.): *Az 1843-iki Büntetőjogi Javaslatok Anyaggyűjteménye. I.* Magyar Tudományos Akadémia: Budapest, 1896. 35.

² The proposition of Penal Code was proposed and codified by Károly Csemegi Minister of Justice, the name originates from this time.

³ NAGY FERENC: Az életfogytig tartó szabadságvesztés-büntetésről. (Európai kitekintés alapján.) In *Emlékkönyv Cséka Ervin egyetemi tanár születésének és oktatói munkásságának 25. évfordulójára*. Szeged, 1992. 377.

⁴ NAGY FERENC: *A magyar büntetőjog általános része*. (átdolgozott, bővített kiadás) Budapest: Korona Kiadó, 2004. 367.

⁵ *Corpus Juris Hungarici* (DVD), Csemegi Code 22. § „Penitentiary detention lasts for life or it has a specified term. The longest term of penitentiary detention with specified term is 15 years, and the shortest one is two years.”

⁶ Sec (1) 32. § Act II 1950. „The prison lasts for life or for a specified term. A börtön életfogytig vagy határozott ideig tart. (2) The longest term of penitentiary detention with specified term is 15 years, and the shortest is 30 days.”

The Penal Code, 1961 originally disregarded the sanction of life imprisonment⁷ but the Law Decree 28, 1971 on the Modification of Penal Code reintroduced⁸ life imprisonment in the Hungarian Penal Law.⁹ According to Professor József Földvári legislators intended to surmount the distance between capital punishment and the longest period of imprisonment for specified term.¹⁰

The Decision of Constitutional Court 23/1990 stated non-compliance with constitution in case of this sanction. As Professor András Szabó stated in his parallel arguments, the grounds of capital punishment within the system of penal law could be found in the sanctioning aims and the expediency of sanctions, so they must be considered as non-compliant with the Constitution as well. The penal force of a state has no right to take away someone's life. A Constitutional State must not have anybody hung on! However it has the right to employ a punishment within legal completeness and to apply repressive and proportional sanctions. However, proportional sanction can be imposed without employing capital punishment. As mankind has already refused penalty by maiming human bodies, capital punishment should also be given up. The principle of proportional punishment would not suffer a slur on its reputation if you place the gallows and the guillotine next to the whipping bench in the criminal museums.¹¹

The modification of Penal Code, 1993 had a significant element – namely that it precluded the release on probation of a person sentenced to imprisonment, though only in one case. The effect of life imprisonment to be able to replace capital punishment was then fed by one condition to some extent. In spite of the unchanging number of more grievous manslaughter cases, the courts have approached to the highest limit of excluding the release on probation in almost at the same proportion, as it was earlier concerning capital punishment.

According to Professor Mihály Tóth this belief gradually weakened as grievance and structure of crimes changed and the demand to extend the application of lifelong imprisonment emerged.

Since the middle of 1990's different legislative opinions concerning sanctions against organised crime have forecasted the possibility of stricter penal sanctions in case of crimes with extreme objective real grievance.

Since 1999 the circle of crimes connected to organised crime have increased, at the most grievous cases of which life imprisonment can also be imposed.¹²

⁷ Act IV 35. § 1961. Imprisonment is to be imposed for a specified term. The longest term of it is 15 years, in case of culminated or concurrent penalty 20 years.

⁸ HOFFER FERENC: Nagy ügy – kis (?) csapdával. *Ügyészek Lapja*, 1997/5, 59.

⁹ Act 28. 1971. Order with Act Force on the modification and amendment of Penal Code 37. § „Imprisonment lasts for life or for a specified term. The shortest term of imprisonment with specified term is 30 days, the longest is 15 years, in case of culminated or concurrent penalty 20 years.”

¹⁰ FÖLDVÁRI JÓZSEF: *Magyar büntetőjog – Általános rész.* (7., átdolgozott kiadás, Budapest: Osiris Kiadó, 2003. 256.

¹¹ Parallel opinion of Professor András Szabó Constitutional Judge

¹² TÓTH MIHÁLY: A büntetőjogi jogkövetkezmények tana. In BÉKÉS IMRE (szerk.): *Büntetőjog. Általános rész.* Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2002. 250–251.

II. Life imprisonment de lege lata

By the Argumentation of 1978 on the effective Hungarian Penal Code life imprisonment has undetermined term, but several authors represent different opinions. The life imprisonment includes a sense of undefiniteness – as the sanction lasts until the death of the convicted, the turn of which is indefinite – still it cannot be considered as indefinite sanction in the letter by letter comprehension of the word. In this last case – as Ágnes Balogh stated – the release depends on the executing organs. When the term established in the act has exceeded, the convicted on life imprisonment can be released on probation if the court had not excluded the possibility of release on probation earlier. In terms of this, life imprisonment is definite in the sense that it states the term during which the convicted can not be released.¹³

The imprisonment for unspecified term means that the court in its sentence does not establish clear imprisonment, but it will depend on further decisions brought by executing the final term of the sanction, depending on its successfulness.

Distincting the life imprisonment from the imprisonment on specified term is also significant from the point of view of that some regulations of the act concern only sentencing on definite term, so they cannot be applied for the life imprisonment as being an imprisonment for not specified term.

Such measures are as follows:

- separate regulations are applied to release on probation
- no fine may be imposed besides life imprisonment
- sentence on life imprisonment cannot be included in concurrent sentence
- the convicted may not enjoy judicial dispensation, he can only be given release from the aggravating legal consequences upon prior conviction through gaining clemency.

According to current law lifelong imprisonment can be the sanction of different crimes, but always as an alternative sanction besides imprisonment from 10 to 15, from 5 to 15 years. After banning capital punishment [23/1990 (X. 31.) Decision of CC] lifelong imprisonment is the strictest punishment in our sanctioning system. By prevailing view lifelong imprisonment did not become an exceptional penalty, this concept referred only to capital punishment. Different opinions can also be found. As Professor Imre A. Wiener and Katalin Ligeti stated, life imprisonment is an alternative sanction, and as such it is exceptional. Its exceptional nature is strengthened by the fact that it can be imposed only for anybody over 20.¹⁴

Life imprisonment, as threat of grievest sanction can be imposed in case of 30 crimes (against state: 4, against peace: 2, belligerent: 5, common criminal: 9, military: 10) as established in PC, but agreeing with Professor Ferenc Nagy, only one of these

¹³ BALOGH ÁGNES – KÓHALMI LÁSZLÓ: *Büntetőjog I. – Általános rész*. Budapest–Pécs: Dialóg Campus Kiadó, 2003. 156.

¹⁴ WIENER A. IMRE – LIGETI KATALIN: *Büntetéstan*. In WIENER A. IMRE (szerk.): *Büntetőjog – Általános rész*. Budapest: KJK-Kerszöv Jogi és Üzleti Kiadó Kft., 2002. 165.

has practical significance – qualified cases of wilful homicide –, because lifelong imprisonment is imposed in the Hungarian courts only in these cases.¹⁵

Imprisonment is usually imposed with a definite term by the court. Sec (2) Art 40 PC states the general minimum and maximum of this sanction, such as the extent lower or higher of which cannot be included in the provisions of Special Part, and which cannot be exceeded by the courts when applying Special Part. The act establishes two months as the shortest term of imprisonment, the longest period as 15 years, or 20 years in case of accumulated and concurrent sentence, or when committing crime in organised form.

Imprisonment is a unified form of penalty, but it can differ not only in its term but in the degree of execution also, serving its individualisation. By the Sec (1) Art 41, PC the imprisonment is to be executed in a penal institution, such as penitentiary institution, prison or minimum security prison.

In accordance with Sec (1) Art 47/A the court can decide on the release of the convicted either by establishing the earliest date of release, or by excluding the possibility of it.

If probation is not excluded, than the minimal term without release must be determined. By the provisions of the act it can be 20 years, in case of not lapsing crimes it can happen after 30 years imprisonment. Since the court applies life imprisonment only in case of the gravest crimes against life, as a main rule the release on probation is possible after 30 years. The latest date of release on probation is not established in the act, it should be decided by the court. This way more than 30 years can also be determined. If the established term – in proportion with the age of the convicted – is equal to the average human life span, – it results in the exclusion from release on probation, states Ágnes Balogh.¹⁶

The court may decide to exclude the convicted from the possibility of being released on probation. In this case the convicted can only be released from the life imprisonment through executorial clemency.

Art 47./B includes the rules for a case when life imprisonment and imprisonment for specified term coincide. Its based on the provision of Art 69, PC, in accordance with which imprisonment for a specified term cannot be imposed in case of life imprisonment.

The cases regulated in Art 47/B are differentiated according to when the crime the crime was committed – whether the crime because of which convicted is sentenced on imprisonment for specified term had been committed before the sentence of life imprisonment came into force, or in which section of spending life imprisonment had committed it.

Sections (1)–(2) of Article 47/B regulate those cases when the convicted is sentenced for imprisonment for specified term for a crime before the lifelong imprisonment came to force. In these cases the convicted has to fulfil the final decision on the punishment of imprisonment.

¹⁵ NAGY (2004) i. m. 370.

¹⁶ BALOGH – KÓHALMI i. m. 168.

Conviction can be accomplished at two times: during the actual execution of life imprisonment, or during the probational time.

The court proceeding in these cases has no possibility to decide: its duty is restricted to calculate the new possible and earliest date of release. Neither the possibility of probational release from the imprisonment for a specified term nor the time spent in preliminary arrest can be taken into account.

The regulations stated in the Sections (3)-(4), Art 47/B concern the cases when the convicted is sentenced on imprisonment in a final decision because of committing a crime during the execution of life imprisonment. Sentencing can happen at the two times mentioned above. In these cases then the court decides on the possible earliest time of release. During this – within certain limits – the court can consider the new possible earliest time for which the release can be delayed. The delay has to be at least 5 years even if the term of sentence was shorter than that. The court, when deciding on the term of delay (between 5 and 20 years), considers not only the term of imprisonment for specified term, but the category of the crime under sentencing in the new case, the motivations of committing it, the further circumstances and the behaviour of the convicted during executing the imprisonment.

Sec (5) Art 47/B refers to the cases when the convicted person sentenced on life imprisonment is sentenced on imprisonment for a specified term, because of committing a crime during being released on probation. In this case it does not matter whether the sentencing takes place during being on probation or after its exceeding. The release on probation is dismissed in both cases, and the earlier date of it is delayed for the term of imprisonment on specified term, but for minimum 5 and maximum 20 years.

Art 47/C. includes the general conditions of releasing on probation, which is equal – regarding its essence – to the rules of imprisonment for specified term. The differences – in the opinion of Ágnes Balogh – are only in that in case of life imprisonment it is the court who may decide on the earliest date of releasing on probation, while in case of imprisonment for specified term it is regulated by the law.¹⁷

The PC makes the exclusion of release on probation for the court possible. The provision on this does not give any rules on the limit of judicial consideration. This solution of real life imprisonment – in the opinion of Professor Ferenc Nagy – can be considered as disquieting and reprehensible from the view of constitution, legal comparison and imposition, but even from practical-execution. By the Art 47/A of PC it cannot be compared to more guarantial penal principles like e.g. to the principle of a *nulla poena sine lege certa*, or to the one on human dignity, to the prohibition of inhuman and cruel punishment, or to the thought of promoting resocialisation etc.¹⁸

The court cannot release the person convicted for life imprisonment on probation if the convicted in question was sentenced for life imprisonment again. In this case the court resolves in a sentence about the fact that the convicted cannot be released on probation from an earlier life imprisonment.

¹⁷ BALOGH – KÓHALMI i. m. 169.

¹⁸ NAGY (2004) i. m. 370.

Release on probation from life imprisonment¹⁹

1. In the sentence of the court

A) determines the possible earliest date

– at least 20 years

– in case of non-lapsing crimes minimum 30 years

B) excludes the possibility of release on probation

2. If the perpetrator is sentenced for imprisonment for specified term because of committing a new crime, the release on probation is formed as follows: [Art 47/B.PC]:

Time of committing another crime	Time of adjudging the further crime	Its legal consequence.
Before being sentenced on life imprisonment	During the execution of life imprisonment	The earliest date of release on probation is delayed for the term of the imprisonment for specified term.
Before being sentenced on life imprisonment	Releasing on probation from life imprisonment	Terminates release on probation and delays for term of imprisonment for specified term.
During the execution of life imprisonment	During the execution of life imprisonment	The earliest date of release on probation is delayed for the term of the imprisonment for specified term, but at least 5 and maximum 20 years.
During the execution of life imprisonment	During being released on probation from life imprisonment	The earliest date of release on probation is delayed for the term of the imprisonment for specified term, but at least 5 and maximum 20 years.
During the execution of probation from life imprisonment	During being released on probation from life imprisonment	The earliest date of release on probation is delayed for the of term of the imprisonment for specified term, but at least 5 and maximum 20 years.

III. De lege ferenda

The sanction of life imprisonment is generally criticized in the Hungarian special literature on law.

Before accepting the PC, Kálmán Györgyi stated that the possibility of release on probation after 20 years in prison in case of life imprisonment is too high.²⁰

In the opinion of Zoltán Juhász in a constitutional state the state does not have unlimited penal force: the public forces can interfere in the rights and freedom of the

¹⁹ BALOGH – KÓHALMI i. m. 170. The table was accomplished by Ágnes Balogh.

²⁰ GYÖRGYI KÁLMÁN: *Büntetések és intézkedések*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1984. 22.

individuals only with the necessary authorisation and reason. The requirements – determined in Art 8 of the Hungarian Constitution – are directives on penal sanctions, such as basic rights can be limited only in accordance with the law, and in the interest of defence of an other basic or constitutional right, and only in avoidable cases, to the necessary extent and in proportional method. The legal regulation giving the possibility to impose life imprisonment seems to contradict to this.²¹

Ágnes Kelemen draws attention to the fact that life imprisonment is the infringement of constitutional rights, as the convicted lives in uncertainty for a long not knowing when or whether probation becomes possible. The convicted also does not know the exact consequences of his behaviour in the prison on the chances of being released on probation. That can cause further problems for the executing authorities and the officers of the prisons as well.²²

According to Ferenc Nagy the real life imprisonment *de lege ferenda* is not an elimination of an inhuman penal sanction and constitutional conformity. In his opinion the exclusion of releasing on probation in the sentence should be eliminated. Furthermore, in accordance with the European trends the present minimum penal term to be spent actually – which is extremely high and not acceptable by the determinational requirements –, and the term of being on probation should be decreased in the future. There is another argument for the elimination of life imprisonment: even a convicted person has to be given the hope of planning his future, returning to society.

Mihály Tóth stated that life imprisonment cannot be conformed with the whole modern legal system, and what is more, this sanction is inhuman and unjustifiable. It all shows that we are still far from the accomplishment of an effective, expedient and just penal system.²³

The ongoing privatisation processes in penal execution concerning life imprisonment emerge significant questions.²⁴ How much the human rights can be guaranteed in a privatised prison, in such a place, where the state control can operate only to a minimal extent? How can the resocialisation and the profit maximum be brought to a common denominator? So it can be stated about the privatisation processes in penal execution that they emerge many unreplied questions.

Some opinions claim that the question here is not about privatisation but about reprivatisation.²⁵ According to Professor György Vókó this name sounds tempting – however historically it means a certain return –, it is only the surface, because the

²¹ JUHÁSZ, ZOLTÁN: Jog a reményhez. *Fundamentum*, 2005/2, 88.

²² KELEMEN ÁGNES: A halálbüntetés eltörlése és az életfogytiglani szabadságvesztés gyakorlata Angliában. *Magyar Jog*, 1991/1, 48.

²³ TÓTH i. m. 252.

²⁴ KŐHALMI LÁSZLÓ: Jogállam és büntetőeljárás – avagy kételyeim az ezredforduló krimináljoga felől. In KARSAI KRISZTINA (szerk.): *Keresztmetszet-tanulmányok fiatal büntetőjogászok tollából*. (Pólay Elemér Alapítvány Könyvtára 7.) Szegedi Tudományegyetem Állam-és Jogtudományi Kar Büntetőjogi és Büntető Eljárásjogi tanszéke, Szeged: Pólay Elemér Alapítvány, 2005. 136.

²⁵ See ALBIN ESER: Funktionswandel strafrechtlicher Prozessmaximem: Auf dem Weg zur „Reprivatisierung“ des Strafverfahrens? *Zeitschrift für die gesamte Strafrechtswissenschaft* 104/2. (1992), 376–381. Eser is warning on the dangers of a hasty privatisation

reason of past actions is never the same as of those happening at present, and the words for them also rarely mean the same.²⁶

Even if we do not share Nils Christie' opinion – who says that in western type democracies a 'penal industry' has been formed bearing the classical features of industry and these prisons work like western type gulags –,²⁷ we still have to admit that penal jurisdiction is in a special state as it is not threatened by lack of sources since the supply seems to be inexhaustible. It is a branch of industry which can be compared to the Australian rabbits or the wild martens in Norway, almost not having natural enemies.²⁸

Nowadays, when the criminal political model of 'law and order' and its different mutants, announcing the slogans like more effective attempts against terrorism and organised crime, have accepted irrational criminal solutions and thrown away classical, guarantial criminal principles, and when postmodern gladiator training institutions²⁹ (boot camps) are mushrooming we have to stop for a minute and consider whether this legislating direction is right. Can life imprisonment be collated with the idea of state of law?

Professor András Szabó claimed that in a constitutional state the state cannot have unlimited penal power, as the public power itself is limited. In a state of rule of law penal law is not only a sanctioning tool, but it has legal-moral values itself, as a result of the developing penal culture and the guarantial, constitutional rules, and as such it is value-preserver also. Penal law is the legal basis of practising penal power and at the same time a discharging resolution for the defence of human rights.³⁰

Although András Szabó established his thoughts concerning the elimination of capital punishment in Hungary, these ideas should be considered in connection with imprisonment as well.

Those arguing for the actual life imprisonment often say that this sanction is necessary in case of terrorists.³¹

Professor László Korinek draws the attention to the fact that the so called second line of antiterrorist acts offers a way-out, a return for the terrorists who have changed their mind and show repentance, if their ideology has also been changed. In this case they may count on a much commuted penalty when being sentenced.³²

²⁶ VÓKÓ GYÖRGY: Elmélkedés a büntető felelősségre vonás privatizációjáról Nyugat-Európában. *Jogtudományi Közlöny*, 2004/12, 418–419.

²⁷ NILS CHRISTIE: *Büntetésipar*. Budapest: Osiris Kiadó, 2004. 15.

²⁸ Uo. 13–14.

²⁹ LŐRINCZ, JÓZSEF: Büntetőpolitika és a büntetés-végrehajtás konzekvenciái az ezredfordulóm [Sanctioning Policy and the Consequences of Penal Execution at the turn of the Millennium], In: *Györgyi Kálmán ünnepi kötet*, ELTE ÁJK Libri Amicorum 11., Budapest: KJK-Kerszöv Jogi és Üzleti Kiadó Kft., 2004. 394.

³⁰ SZABÓ ANDRÁS: Jogállami forradalom és a büntetőjog alkotmányos legitimitása. *Belügyi Szemle*, 1999/10, 8.

³¹ SZÉKELY JÁNOS: Szabadságvesztés-büntetés és jogpolitika. *Magyar Jog*, 1974/ 9, 513. In the opinion of János Székely considering the latest developments of terrorism a state would disarm itself by renouncing of capital punishment, as the only effective criminal sanction against its enemies.

³² KORINEK LÁSZLÓ: Az antiterrorista harc eszközei, különös tekintettel a büntetőjogra. In GAL ISTVÁN LÁSZLÓ – KÓHALMI LÁSZLÓ (szerk.): *Emlékkönyv Losonczy István professzor halálának 25. évfordulójára*. (Studia Iuridica Auctoritate Universitatis Pécs Publicata 138.) Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar, 2005. 196.

Summing up our ideas we can draw the conclusion that the regulating system of actual life imprisonment is to be reconsidered by the Hungarian legislators and they have to make efforts to create legal regulation in compliance with the requirements of a constitutional state of law.

