



Viewpoint

Life imprisonment in Spain: An inhuman and unlawful punishment

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1. By way of introduction

Life imprisonment is about the denial of freedom, in principle, up until the border with death. Although it may be reviewed in very exceptional circumstances, the starting point for judging its rationality must be to state what is a cliché among specialists in the penal field: the crisis of punishment that denies freedom, because not only does it deny people's freedom, it also disconnects them from human sociability, which is indispensable.

When they find out about the very serious crimes for which life imprisonment that is subject to review may be applied, any citizen may consider it fair, or even lenient. Incorporating life imprisonment in the penal code is not something that can go unnoticed in society without a minimum of reflection that moves beyond the emotional-vindictive level. On one hand, because it intensely affects the fundamental rights of actual people and no citizen is exempted from the possibility of it being imposed upon them, either because in extreme and unpredictable circumstances in a specific moment one may be compelled to commit such a serious crime or even because, without committing an offence, there may be a miscarriage of justice, something that unfortunately does happen. On the other hand, because it transcends what is individual. When the State incorporates a sentence that has these characteristics into criminal law, it questions our conception of the social and democratic State governed by the rule of law, which is based upon an unquestionable premise that is derived from the political form that the State has adopted in our Constitution. It requires that any sacrifice of freedom must be limited to what is strictly necessary to attain a goal that constitutionally justifies it and, in any case, it must always respect human rights. Yet, the State cannot stay bound to the opinion that a large section of citizens has about the phenomenon of criminality, which spreads and is consolidated through the media. Of course, the victims of any crime must be heard in the process of drawing up criminal laws, but this

does not mean that the legislator must grant them absolute legitimacy to exclusively dictate the criminal policy that must be pursued, especially when the public-media debate lacks a serene reflection that includes all the legal and sociological elements of the criminal phenomenon.

It is beyond question that the act of incorporating the sentence of reviewable life imprisonment in the penal code needs to pass a judgement on its compatibility with constitutional norms. The legislator would have to justify the need for it in relation to the purposes that both the doctrine and jurisprudence grant to penal law, using technical and scientific arguments. Furthermore, they would have to explain and justify, in formal and material terms alike, the legal insecurity that such a sentence entails (art. 9.3 of the Spanish Constitution, SC), that it does not undermine people's dignity (a right detailed in art. 10 of the SC), that it should not become an inhuman sentence or degrading treatment (art. 15 SC) and that it is compatible with the constitutional mandate that sentences must be for the purpose of the re-education and social reintegration of convicts (art. 25.2 SC).

2. Legal possibilities for review

In principle the permanent prison sentence - for life - tends towards lasting for the convict's entire life, until their death. This is the outcome that can be predicted for almost all the envisaged sentences and, hence, it is on this basis that one should reflect about whether it complies with constitutional norms.

The legal text sets various possibilities for a review by the courts in order for the convicted person not to die in prison. If the sentence could be reviewed in real and material terms and, in cases where the person were in conditions that enable their reintegration, it could materialise concretely through a sentence that has a set length or its suspension, it could comply with the Constitution. This possibility would formally safeguard provisions under art. 3 of the European Convention on Human Rights. However, this is not the case. Sadly, with the existing legal possibilities for review that are merely formal and lack any practical potential, the justice ministry does not mean to guarantee the right to re-education and social reintegration of people sentenced to lengthy prison terms. Rather, it only seeks to grant life imprisonment an appearance of legitimacy by highlighting that it may be reviewed and thus overcome the legal obstacle of its more than likely unconstitutionality.

The norms do not allow for there to only be a prospect of release when death is approaching. For humanitarian reasons, when certain requirements are met, convicts may be granted parole. Thus, people serving life sentences will remain prisoners when they are near to death, but in an open regime. They may be held in a Social Integration Centre or in a penitentiary complex of the kind that exist in some public hospitals, with a regime whose strictness is similar to that which exists in prisons. In this way, people convicted to serve reviewable life sentences will die in prison. This circumstance contravenes articles 3 and 5 of the Rome Convention (ECHR).

Although the law envisages that those subject to a permanent prison sentence may be granted permission for temporary leave, in reality this will be practically unfeasible. Not only will they be required to have served more than a quarter of their sentence, which in this case

is indefinite and for life; convicts will also need their good behaviour to be certified, and prison officials will have to produce a positive evaluation in terms of the criteria that are routinely used to deny permits. These include “seriousness of the crime”, “social alarm”, “family and social support”, “prison socialisation”, “need for social reproval” and “distance from having served three-quarters of the sentence”. Considering all these variables, the real possibility of a permit being granted are non-existent.

Even if it were established that people sentenced to reviewable life sentences may have access to parole or a work release regime, the requirements that must be fulfilled in practice make it impossible to apply: evaluation of the seriousness of offences, the length of the sentence that is left to serve, the release permits that have been received, behaviour in the prison, having a job offer, enjoying social and/or family support, not having any psychological variables that prevent an assessment deeming that they will not reoffend, and all of this must be accompanied by a strict control to avoid dysfunctional repercussions in the media.

Although the normative framework envisages that this sentence may be suspended, the requirements provided make this impossible to apply. It suffices to recall how difficult it is to have access to permits and parole due to requirements, as well as the impossibility of a positive evaluation through the criteria that are established. How can someone be socially prepared to live in freedom after spending 25 uninterrupted years in a prison? What family and social relationships will someone who, for example, entered prison when they were 25 years old and applies for their sentence to be suspended when they are 50 have?... What relatives will they have left? What friends do they know? What job have they learned? What psychological effects do they suffer? How can these be tackled? What professional will dare to provide a positive diagnosis for them?

3. An unjustified sentence

The explanatory memorandum of the Bill to reform the Penal Code does not offer reasons that carry sufficient scientific weight to justify the introduction of this sentence. This is what the report by the *Consejo de Estado* (State Council, Spain’s highest consultative body) states.

Considering the argument that it is not a life sentence because legal possibilities for its review and suspension exist, we have already explained why this is impossible.

Considering the argument that similar normative frameworks on life imprisonment exist in other countries on the European scene, we must say that it is true that this sentence is incorporated, with different nuances, in the penal legislation of certain European countries: Italy, Germany, France, the United Kingdom, Greece, Denmark and Ireland. Nonetheless, in the case of *Vinter and Others vs. The United Kingdom*, the European Court of Human Rights declared that this legislation contravenes art. 3 of the ECHR in a ruling on 9 July 2013, because this system denies convicts the right to a real and effective review of their sentence. Moreover, there is no other European country that has an article of its constitution that can be deemed entirely equivalent to article 25.2 of the Spanish Constitution, whereby “custodial sentences and security measures will be directed towards re-education and social reintegration”.

Considering the argument that this sentence is necessary to “bolster trust in the administration of justice”, several issues need to be evaluated:

- is it true that trust in the administration of justice can be obtained by applying life imprisonment, whose establishment may breach the limits that are set by the constitution for the State’s punitive powers?
- up to what point are citizens ready to give in in the public security/freedom and fundamental rights dichotomy?
- might the loss of trust by citizens in the administration of justice not be a result of other factors than the absence of life imprisonment and other matters concerning the application of sentences?
- might the reason for this lack of trust not lie in the absence of material and staffing means to carry out instruction, prosecution and execution procedures that are managed with a minimum of efficiency?
- might it not be because neither the politicians nor the bankers who caused the State’s “economic ruin” assume - other than in a few exceptions - any sort of responsibility, be it political or penal?
- might it not have something to do with the obstacles that political power places in the way of penal proceedings about “white collar” crime, or corruption, and which dilate through time due to the manoeuvres of famous lawyers who come from the university, the prosecution services and the judiciary concocting strategies to turn almost all the trials into infinite proceedings in the courts in order for them never to end with an effective sentence?
- might it not be because further taxes are imposed with the excuse of making the justice system less of a burden when access to the administration of justice, effective judicial protection, is being impeded?
- might it not be due to the misinformation that exists among citizens about the penal system, its scope and effectiveness?

The answers to these questions point to the reasons that may give rise to a sense of mistrust towards the administration of justice among citizens. Hence, if they want to fight it, the political power will have to make an effort of honesty and aim its criminal policy in this direction, rather than towards an almost boundless expansion of punitive repression. In this task, the media have a great responsibility. Rather than serving as a pedagogical instrument at an informative and preventive level, they are turning into mere tools to obtain an increase in their audience shares through a tendentious and morbid treatment of crime. The search for economic proceeds, on one hand, and subjection to the interests of financial entities - the security, military and fear industry^j - and political groups on which they depend, on the other, turn the media into an obstacle for the penal law’s preventive task.

Considering the argument that the permanent prison sentence is necessary because “for cases that are exceptionally serious an extraordinary response is justified”, it becomes necessary to evaluate two possible interpretations. Firstly, one has to refer to a decision about the proportionality between the seriousness of the act and the punishment that is

provided. Secondly, the idea that the victim must receive reparation for the disproportionate damage that they have suffered through an exceptional repressive response by the State underlies this proposition. Concerning the first issue, it is worth noting that the preventive purposes of penal law may be attained through other sentences and other criminal law policies in which the sacrifice of fundamental rights is not so intense and irreparable. In a State governed by the rule of law based on respect for human rights, the strictness of the penal response must be limited precisely by the rights that are constitutionally recognised for everyone: dignity, the prohibition of inhuman, cruel or degrading treatment, and that the sentences' purpose should be re-education and social reintegration.

Concerning the second issue, it should be noted that private revenge is excluded from the legal framework as a purpose of the penal system. Nor can the institutional violence of the administration of justice be used in order to enact it. Penal law is meant to accomplish some preventive and retributive functions, up to the limit of the verification of guilt, proportionality and fundamental rights. However, alongside these legitimate limits, which I consider unbreachable, within the context of deeply human needs, could life imprisonment provide reparation to the victim? In my view, the answer is clearly negative.

Considering the argument that it is a sentence that is "necessary for the purpose of the prevention of criminal offences", the following points should be addressed:

-Penal law must simultaneously serve to prevent and to fight crime, but also to limit the state's intervention in its activity. On the one hand, it must protect society from certain persons' violent acts, but on the other it must ensure that the latter are not subjected to unlimited repression by the State.

-The condition of special prevention [of crime] is clearly not complied with. It denies real possibilities for convicted people to benefit from the constitutional mandate that assigns reformatory and social reintegration purposes to sentences.

-The general negative prevention condition that uses the intimidation provided by the life imprisonment sentence and is aimed at ensuring that citizens abstain from committing certain criminal offences is not complied with either, because the intimidation that life imprisonment gives rise to will not increase the public's security, as it is not at risk. This is also because a greater sense of public security is not attained mainly or exclusively through the penal system. Finally, this is because existing sentences are sufficiently hard and hence dissuasive.

Considering the argument that is included in the explanatory memorandum, which consists in stating that some European Court of Human Rights (ECtHR) jurisprudence supports this sentence, one has to state that some information is being concealed. The explanatory memorandum refers to two ECtHR sentences to justify the view that this sentence complies with the Rome Convention (the ECHR). In concrete terms, it refers to the ECtHR sentences in the *Kafkaris vs. Cyprus* and *M. vs. Germany* cases. It only considers these two sentences which admit its compatibility with art. 3 of the ECHR, in my view in a very lax and formalist way, but it avoids mentioning those which declare that it violates art. 5 of the ECHR concerning the violation of the social reintegration purpose of life imprisonment on the basis

of the criteria for review and the material means for it to be effective (art. 5, ECHR). And this precisely what the explanatory memorandum of the bill is silent about.

A few months after the penal code reform bill was first drafted, on 18 September 2012, as mentioned in the above paragraph, the ECtHR unanimously ruled on the matter in a lengthy and well-founded sentence. It is the aforementioned one whereby the British government was found guilty of violating art. 5.1 of the European Convention on Human Rights regarding the execution of “IPP sentences”, that is, [indefinite] “imprisonment for public protection”. The ECtHR accepted the applicants’ thesis that one of the purposes of the indefinite denial of freedom is rehabilitation, for which the UK government did not make the necessary means available, thus contravening its obligations deriving from international law and impeding compliance with one of the purposes of the 2003 Criminal Justice Act, that of rehabilitation. Furthermore, the *Vintner and Others vs. The United Kingdom* (9.7.2013) case established that the British legislation contravened art. 3 of the ECHR. The legislation that is in force suspended the sentencing review after 25 years in order to make independent judges responsible for deciding when the review should take place in each concrete case. However, this does not guarantee that the review will actually take place.

4. Arguments that make it a sentence whose constitutionality is questionable

The reviewable life sentence is unconstitutional because it undermines:

the dignity of human beings - art. 10 of the Spanish Constitution -;

the prohibition of inhumane sentences and inhuman and degrading treatment - art. 15 of the Constitution -;

the obligation for sentences to be directed at the re-education and social reintegration of convicts - art. 25 of the Constitution -.

Moreover, its indefinite nature is in open contrast with the basic principle of legal certainty.

The reviewable life sentence undermines the dignity of human beings. Human dignity consists in treating people like us, human beings, as goals, and neither as means nor as objects. In my view, it is evident that:

a) A delinquent, like anyone, has a dignity that must not be breached (in substantial and ontological terms alike) that they do not and cannot lose regardless of what atrocities they may commit;

b) The rest of us have a moral duty to safeguard this dignity and the effectiveness of human rights because dignity is an axiological foundation that cannot be breached and because, by preserving other people’s dignity, we are safekeeping ours;

c) Dehumanising someone to protect a majority is a thesis that cannot be sustained from the viewpoint of human rights because it undermines the universal worth of a person and respect for human dignity;

d) Dignity implies having real and certain possibilities of being incorporated into society to develop, even if they only have a minimal will to do so, a life project at a social, family, work and spiritual level; this is contravened by life imprisonment, even if we choose to disguise it as being subject to review. Thus, life imprisonment denies those sentenced the option of outlining a plan for their lives, that is, their “moral autonomy”.

Life imprisonment that is subject to review undermines the right to a prohibition of inhuman punishment and cruel and degrading treatment. Based on the human being’s right to dignity and to moral integrity, the Constitution forbids, in any case, inhuman or degrading punishment - art. 15 of the Constitution -. In order for these concepts to have an adequate substance, they must necessarily be considered in relation to the conditions in which a sentence that deprives people of their freedom are served while bearing in mind that, in any case, almost anyone who is sentenced to life imprisonment will not be able to leave prison until they die. In fact, as I have explained above, legal provisions to be released previously are not viable in practice.

The inhumanity of a prison sentence throughout its duration is rooted in the absence of expectations of freedom for the convict. Preventing such hopelessness will depend on sentences whose length is excessive not being envisaged and on the existence and use of real and viable mechanisms for release when convicts reach a certain age, not merely formal ones that are impossible to apply.

When we talk of humanity, we necessarily have to refer to the basic conditions that any person requires to have a minimal chance of developing their condition as a human being - the right to the free development of their personality - . This implies that any person who is convicted must have the possibility to communicate with their relatives and friends with adequate frequency and in private, thus reinforcing their ability for social and affective relations; they must have a physical space in which to develop their sense of control, self-respect, autonomy and privacy; they cannot be in a setting in which they are constantly subjected to violence or used instrumentally; they must be able to maintain an acceptable level of physical and mental health; and they must know with certainty that they will be able to become someone who relates to others again in the future, once they are released. With regards to every human being’s need for a minimal space in which to develop and deploy all their “human” capabilities, prison makes this impossible. With regards to the need for their affective and social relations not to be annulled, prison destroys sociability. With regards to the need for a context within which the balance of their physical and mental health must be ensured, prison worsens them intensely. With regards to the need for a space that guarantees their privacy, prison does not allow it. With regards to every human being’s need for an environment in which violence is not the continuous form of relation, prison does not provide it.

Obviously, serving a prison sentence entails a limit to these faculties, otherwise this sentence would have no reason to exist, but having to stay there for life or for longer than 25 years, between walls, barbed wire and bars means bringing the conditions of detention in a penitentiary establishment to the limits of what is humanly bearable. Imprisonment undoubtedly causes intense human suffering and, if it moves beyond one’s ability to bear it, the sentence becomes inhuman and hence, from a legal viewpoint, unlawful. Nobody is

exempted from the possibility of imprisonment, and there are increasingly less people who can be certain of this.

Life imprisonment denies the constitutional mandate of the right to social re-education - art. 25.2 of the Constitution -. It requires that the means of execution of a prison sentence must not give rise to consequences for a convict's mind that impede their reintegration into society to develop their life plan - the right to the free development of their personality in relation to social reintegration - . These goals are impossible to attain after 20 years' continuous detention in a penitentiary establishment, as the human mind is "seriously incapacitated" to face the requirements needed for life in freedom in terms of personal relations and responsibility. As a consequence and following this line of reasoning, a prison sentence that lasts a lifetime undermines this right.

Prison gives rise to a sense of permanent danger in people. The extreme tension in its atmosphere frequently causes a person to tend to protect their own "self" as an intimate mechanism to defend their mental health and it leads to an exaggerated self-centredness in this context. Life in prison increases isolation, suspicion and mistrust towards others, building up a new prison within the prison. Persons tend to isolate themselves in introspection. This has serious consequences for the way in which people tackle relations when someone is released from prison and needs to re-establish social relations. We all know that there is no chance of relationships without trust. This is one of the reasons why former prisoners end up alone when they leave prison. And loneliness leads to exclusion, marginalisation and social death. Furthermore, the feeling of vulnerability is not just caused by the institutional and personal violence in which prisoners are plunged, but also by the lack of legal guarantees to protect their own identity that many prisoners experience or believe they experience. The few stimuli received in a prison are very repetitive and violent. The violation of privacy is constant. Apart from being continuously observed (in many cases, for example, through permanent cameras throughout the day), prisoners do not have a minimum of space nor time that is truly their own and organised by themselves available to them. The prison transfers that are now so common, or changes of cell or intrusions into it at any time of the day by officers to conduct searches, with an obligation to undress, are ceremonies of degradation that cause huge vulnerability. This vulnerability basically results from not knowing what to abide by, from not even being able to ensure that they will sleep through the night without someone waking them up, from not knowing how to respond to all of this, and from feeling that regardless of what they do, it will not make much difference, as the answers they will probably receive are not necessarily connected to the consequences which could be logically expected. This all contributes to exacerbate the feeling of vital insecurity. Abandoning the will to live leads many prisoners to adopt a fatalistic and listless attitude that is just another way of expressing the deep depression that prison causes. Depression is the most widespread syndrome, practically nobody avoids it in one way or another, and an extremely high proportion of inmates has to undergo treatment using anti-depressants; Prozac and similar medicines are customary companions of prison life. However, some people often refuse treatment when they perceive the inkling of an even greater loss of control over their own lives behind it, the loss of the last bastion of autonomy and control over themselves.

The indefinite nature of reviewable life imprisonment undermines the principle of legality that is established in art. 25.1 of the Constitution. It requires that sentences be perfectly determined in the penal code in terms of both the ways in which they must be served and their length. Thus, the very definition of this sentence in the explanatory memorandum as a sentence of "imprisonment for an indefinite length of time" openly contravenes the mentioned principle of legality, laid out in art. 25.1 of the Constitution. The unpredictability of the length of time that the sentence which does not envisage freedom, produced by uncertainty about possible releases - leave permits, work release, suspended sentences - that are entrusted to the discretion of prison authorities, lend this penal sanction an arbitrary and iniquitous character which, *per se*, is in contrast with human dignity. These reasons suffice to delegitimise it. Citizens do not just have to know the scope of what is forbidden in advance, but also its consequences.

5. Miscarriages of justice

The possibility of a miscarriage of justice that would be irreparable exists. In an extreme, but possible case ... and what if it turns out that the convict was convicted due to a miscarriage of justice? Miscarriages of justice in cases involving sentences like these are irreversible and irreparable. History has repeatedly confirmed that policies that are exclusively directed at preventing crime and seeking citizens' security can generate more violence than that which they seek to prevent, because security and freedom are not only threatened by crime, but also by excessive, despotic sentences, by arbitrary arrests by the police, in short, by the exercise of the punitive dimension of the State's own prerogatives.

6. Other unwanted consequences

The permanent prison sentence entails other unwanted consequences. Apart from the reasons of a legal kind outlined above, the permanent prison sentence causes serious dysfunctions that must be taken into account, and it is worth considering. Namely:

- The security conditions in which professionals from the prison service are left when dealing with people who have nothing to lose anymore, as they are denied the expectation of freedom.
- Conditions in penitentiary establishments, when those who are serving long sentences find themselves without any specific activities to carry out, and they see time passing like an endless abyss.
- The economic means - in terms of both personnel and resources - available to the prison service to deal with this measure. Recall that keeping people in a prison costs around 36,000 euros per person per year.
- Influence on the prison overcrowding that is already occurring.
- Prisons will end up turning into geriatric wards ... In Spain, there are 351 prisoners who are over 70 years old. The figure rose from 0.9% in 1985 to 3% in 2012. It is likely that this is not

because they commit more crimes, but because sentences are increasingly long. The USA is the country with the most prisoners: 2.3 million. From 1980 to 2012, their number grew 11 times more than that of the general population. According to official figures, over 55-year-olds in prison cost the USA taxpayers 1,600 million dollars.

7. Existence of eternal prison sentences

In Spain, there are eternal prison sentences. They are the ones that are longer than the maximum limits set by the penal code that is in force. These sentences should be the legislator's target to resolve this unfair and disproportionate situation experienced by dozens of prisoners. At present, there are over 200 people in the Spanish state who have been convicted for several crimes whose outstanding prison terms are longer, if we add them up, than the limit set by the penal code for prison sentences. We should recall that according to the penal code, the ordinary limit is 20 years - art. 36 of the penal code -, to which four extraordinary limits must be added: three times as long as the longest sentence, 25, 30 and 40 years - art. 76 of the penal code -.

Sentences that exceed a human life's chronology contravene the constitutional principles of re-education and social reintegration - art. 25.2 of the Constitution -, dignity - art. 10 of the Constitution - the promotion of real and effective equality - art. 9.2 -, and the prohibition of inhuman and degrading treatment - art.15 of the Constitution. Any human being who is denied their freedom must have the hope of being released one day. If this penal prospect is closed by sentences because their sum turns them, *de facto*, into life imprisonment, the consequences resulting from this situation are serious from the perspectives of the Constitution, crime prevention and the maintenance of order within penitentiary establishments.

Translation by Statewatch

ⁱ A hypothesis: the economic/political interests of businesses that support the media and security companies can operate as pressure groups pushing for an increase in punitive measures: a greater public perception of insecurity is correlated with the expansion in the business turnover of these private sectors that are involved in public security tasks. In the USA, this link between an increase in punitive measures and the pressure exerted by security companies to increase their business is studied extensively. In Spain, I do not think this would be far off the mark.

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