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Complexion of the Constitutionality of Life Imprisonment in the European Union. Particular Reference to the Spanish and German Legislations

Abstract

The 'revisable permanent prison' sentence has been taken in Spanish Organic Law 1/2015 (30 March), amending the Criminal Code (Organic Law 10/1995 (23 November). It has been justified because, amongst other reasons, it follows the penological model of other European countries like Germany. This paper will focus on the study of the legal system for its enforcement and the consequences of this system in each case as regards the possible unconstitutionality of the sentence.

I. Introduction.

Life imprisonment in the area of the European Law has been considered by the European Court of Human Rights (ECtHR) as fitting the European Convention on Human Rights (ECHR)[1] after declaring that when the national law offers the possibility

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1 The European Convention on Human Rights is an international treaty under which the member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. The Convention, which was signed on 4 November 1950 in Rome, entered into force in 1953. The Court's first session took place on 18 September 1959 and adopts its Rules of Court 14 November 1960. The Court delivers its first judgment: *Lawless v. Ireland* 1 November 1998 and entries into force of Protocol No. 11 to the Convention, instituting "the new Court" 18 September 2008. The Court delivers its 10,000th judgment 1 June 2010 and entries into force of the Protocol No. 14, whose aim is to guarantee the long-term efficiency of the Court. Since 2010, four high-level conferences on the future of the Court have been convened to identify the means to guarantee the long-term effectiveness of the Convention system. These conferences have, in particular, led to the adoption of Protocols 15 and 16 to the Convention. Protocol No. 15, adopted in 2013, inserts a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble; it also reduces from 6 to 4 months the

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of reviewing the indeterminate prison sentence with a view to its commutation, remission, end or to a conditional release of the convict, this would be enough to satisfy the article 3 of the Convention[2]. This Court has certainly distinguished between the unavoidable life imprisonment, which contravenes the rights regarded in the Convention, and the discretional life imprisonment, which allows the release of the convict being consistent with the doctrine of the Court[3].

In the Spanish legislation, the Organic Law 1/2015, of 30 March, amending the Organic Law 10/1995, of 23 November, the Spanish Criminal Code has introduced the "revisable permanent prison" in relation to certain offences considered as extremely grave. The Explanatory Memorandum of this law justifies exactly this measure as it follows the pattern of other European countries. Furthermore, defending the total constitutionality of this measure, it alludes to the fact that the penalty will be subjected to a regime of review, so that after the convict has fully served a relevant part of the conviction, and once his reintegration has been assured, he could obtain a conditional release after ensuring the compliance with certain requirements. This would resolve any concern about the possible inhumanity of the penalty since it "guarantees a horizon of freedom for the convict"[4]. Therefore, and according to the Explanatory Memorandum, it would not consist of a "final penalty" by means of which the State would want nothing to do with the convict. Rather, it would consist of making a penal response proportionate to the gravity of the guilt compatible with the re-education, which must be focus of the enforcement of imprisonment sentences. In this way, the Explanatory Memorandum intends to justify the "revisable permanent prison", which, in our opinion, in spite of coming out as a response to a "social demand", still gives rise to doubts, not just about the constitutionality of its own introduction, but also about its adoption by the other legislations of the European countries[5].

time within which an application must be lodged with the Court after a final national decision. 2013 has also seen the adoption of Protocol No. 16, which will allow the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 is optional. Finally, 27 March 2015 has taken place High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility"(Brussels Declaration). The Convention prohibits in particular: torture and inhuman or degrading treatment or punishment, slavery and forced labour, and death penalti.

2 European Court of Human Rights judgments 12 February 2008, *Kafkaris v. Cyprus*; 3 November 2009, *Meixner v. Germany*; 13 November 2014, *Bodein v. France*; and 3 February 2015, *Hutchinson v. the United Kingdom*.

3 European Court of Human Rights judgments 25 October 1990, *Thynne, Wilson and Gunnell v. United Kingdom*; 18 July 1994, *Wyrine v. United Kingdom*; and 16 October 2001, *Einhorn v. France*.

4 Explanatory Memorandum II.

5 The Spanish doctrine has held a variety of stances in relation to the opportunity, and even the constitutionality of the introduction of this penalty. In particular, some have denfended it, like M. JAÉN VALLEJO: "Prisión permanente revisable (Una nueva pena basada en el Derecho Europeo)", *Diario del Derecho, Iustel*, 06/11/2012, p. 2 (Internet edition). Nevertheless, most of the authors have spoken against it and noteworthy among these is ACALE SÁNCHEZ,

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This paper will refer to, particularly, two regimes of life imprisonment, both the Spanish and the German one; this will allow us to take a close look at the issues related to the constitutionality of this penalty in the European legislations. And I retain the opposite opinion to the new Spanish legal regime.

The paper will analyse, in particular, the need to respect, at the first level of constitutionality, article 3 of the ECHR, paying attention to the interpretation that the ECtHR has made about this precept. This will allow us to examine the effective respect from the national legislator afterwards, taking into account the legislative development, through this concrete regulation, the respect for this article. But, in a second level, it is necessary to verify the constitutionality, not only through the requirements previously analysed, but also paying attention to other principles constitutionalised in several countries. These might be the principle of legality or that of the necessary orientation of the penalty to the purposes of re-education and social reintegration.

II. Stance of the European Court of Human Rights toward the revisable permanent prison.

The doctrine of the European Court of Human Rights has been categorical in its prohibition of subjecting the prisoners to penalties that involve inhuman and degrading treatment. It demands, as a requirement to maintain the viability of this measure, that the State offers to the prisoner a possible release after having reviewed his penalty. Just as this Court stated, for instance in the judgments of 7 July 1989[6], 16 November 1999[7], 12 February 2008[8], or 3 November 2009[9], so that the specified penalty is not declared as contrary to the article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, it must provide for the possibility of reviewing the conviction and leave at least one way open for the imprisoned person to get back his freedom and become reintegrated into society. Nevertheless, it has been argued that this would not be justified since it would trigger anxiety and reactions similar to those over persons

M.: "Prisión permanente revisable: Arts. 36 (3 y 4), 70.4, 76.1, 78 bis, 92, 136 y concordantes en la Parte Especial". In *Estudio crítico sobre el Anteproyecto de reforma penal de 2012*. Dir. Álvarez García, coord. Dopico Gómez Aller. Valencia, 2013, and MORILLAS CUEVA, L.: "Pena de prisión versus alternativas: una difícil convergencia", *Libertas, Revista de la Fundación Internacional de Ciencias Penales*, No 1, 2013, p. 459 et seq. See also, regarding the complexion of the enforcement of this penalty, CANCIO MELIÁ, M.: "*La pena de cadena perpetua en el Proyecto de reforma del Código penal*", *La Ley*, No. 8175, 2013, and more recently, CARBONELL MATEU, J.C.: "Prisión permanente revisable I (arts. 33 y 35)". In *Comentarios a la reforma del Código Penal de 2015.* González Cussac, J.L. (dir), Tirant lo Blanch, Valencia, 2015.

6 *Soering v. United Kingdom* (1989) 11 EHRR 4399, Judgment, 7 July 1989.

7 *T. and V. v. United Kingdom* (1999) 170 EHRR 2472, Judgment, 16 November 1999.

8 *Kafkaris v. Cyprus* (2008) 49 EHRR 35, Judgment,12 February 2008.

9 *Meixner v. Germany* (2009) 49 EHRR 183, Judgment, 3 November 2009.

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on the death row in the United States. The sentence of life imprisonment was rejected by the Strasbourg Court in 1989[10].

The compatibility with the European Convention on Human Rights would be possible, in principle, with the mere provision for measures to review the conviction, without violating article 3 of the ECHR, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Consequently, the ECtHR demands that the prisoner can have the continuation of his imprisonment periodically reviewed and through an appropriate procedure[11]. The ECtHR considers as penalties that do not violate the aforementioned article 3 of the ECHR include those that can be suspended by act of the executive power either because of the unconditional pardon of the conviction or the substitution of the sentence.

Since 2006, the ECtHR has judged the life imprisonment from the basis of the inhumanity or humanity of the conviction without analysing just the regularity of the deprivation of liberty as it did previous to 2006. This means that it does not value how the conviction shall be imposed, but if it must be imposed, if it is inhuman, it is contrary to the principle of legality.

In the case *Kafkaris v. Cyprus*[12], the foundations of the constitutionality of the revisable permanent prison were laid. In 1976 the Council of Europe had already made a recommendation entrusting governments of the Member States to review periodically if the prisoners had a favourable prediction, since keeping someone behind bars for life just on considerations of general prevention was inhuman. Keeping someone locked up when he is no longer a danger to society would not be compatible with the idea of reintegrating the offenders into society. Later, the Council of Europe itself declared that the conditional release is one of the most effective measures to contribute to reintegration. In this respect, the ECtHR has always considered a conviction as inhuman when the offender has no chance to achieve his freedom. Therefore, and in principle, wherever the legislation provides for the review of the sentence, its suspension or a conditional release, the requirements of the article 3 of the ECHR are met. In the case of judicial decrees, Europe's highest court agrees on the constitutionality of the decision, since the Cypriot law provides for the offender to obtain a reduction of the conviction regardless of the time he has been in prison.

In the case *Vinter v. United Kingdom*[13], and in a contrary sense, we find a dictum on the unconstitutionality of the convictions similar to the revisable permanent prison. The Grand Chamber of the ECtHR handed down an opinion -*Vinter case*- directly related to the control of life imprisonment penalties and which we can consider as a

10 In this sense see CUERDA RIEZU A.: *La cadena perpetua y las penas muy largas de prisión*, Atelier, Barcelona, 2011, p. 25. About a study on the sentence of imprisonment for life and its rejection in the light of the jurisprudence of the European Court of Human Rights, see, for all, *SNACKEN, S. / VAN ZYL SMIT, D.: Principles of European prison law and policy: penology and human rights,* OUP Oxford, 2009, in particular the pages 1-37.

11 *Bülow v. United Kingdom* (2003), 37 EHRR 28, Judgment,7 October 2003.

12 *Kafkaris v. Cyprus* (2008) 49 EHRR 35, Judgment,12 February 2008.

13 *Vinter v. United Kingdom* (2013) 55EHRR 34, Judgment, 9 July 2013.

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paramount reflection of the doctrine that keeps being progressively defined by the Strasbourg Court on this matter[14]. The case collectively reviews three appeals lodged by three British citizens –Vinter, Bamber and Moore- whose demands were simultaneously considered and rejected as compliant under the article 4 of the ECtHR. Nevertheless, the Grand Chamber, on appeal, issued a final and definitive statement which, correcting the chamber, put the violation under article 3 of the ECHR because of the way one of the types of life imprisonment – the one called "whole life tariff" – was applied according to the current English legislation[15]. In the three cases a whole life tariff was imposed after basically assessing that the gravity of the facts made such punishment appropriate, which was neither automatic nor *ex lege* foreseen in a perceptive way. However, we emphasize that in this case, and from the perspective of the ECtHR, the imposition of the penalty is not discussed because of its possible disproportion[16].

It must be noted that, above all, the Court considers that each State can decide on the particularities of its own criminal justice system and, in particular, on the review of the convictions and the penitentiary benefits, being the national authorities of the States Parties responsible for the decision on the appropriate duration of the penalty of deprivation of liberty. As such, it confirms the structural subsidiarity of the regional human rights systems[17]; so, in principle, the sentences of imprisonment for life would not be *per se* incompatible with the ECHR[18].

Notwithstanding the foregoing, the ECtHR will be responsible for determining if there has been a violation of the international obligations to the Treaty, establishing limits on this matter, and more concretely, a possible violation of the article 3 of the ECHR[19]. This way, and on the one hand, the imposition of a clearly disproportionate penalty will be considered as a violation of this article. But, above all, and in regard to the subject under discussion, the judgment in the *Vinter case* will clearly provide that the conditions of the "legitimacy" of the penalty of imprisonment for life would be

14 *Vinter and others v. United Kingdom* (2013) 55EHRR 34, Judgment, 9 July 2013. See the magnificent comment that VAN ZYL SMIT, D. / WEATHERBY, P. /CREIGHTON, S. make in their work "Whole life Sentences and the tide of European Human Rights Jurisprudence: What is to be done?", *Human Rights Law Review*, vol. 14, No. 1, March 2014, pp. 59-84.

15 See, about the consequences derived from this Judgment, and among others, LANDA GOROSTIZA, J.M.: "Prisión perpetua y de muy larga duración tras la LO 1/2015: ¿Derecho a la esperanza?", *Revista electrónica de Ciencia Penal y Criminología*, 17-20 (2015), online resource, and CONTRERAS V., P.: "Presidio perpetuo irreductible como pena inhumana y degradante: análisis del caso *Vinter* y otros v. Reino Unido (Tribunal Europeo de Derechos Humanos)", *Revista de Ciencias Sociales*, No. 63, 2013, pp. 169-181.

16 LANDA GOROSTIZA, J.M.: "Prisión perpetua y de muy larga duración tras la LO 1/2015: ¿Derecho a la esperanza?", op. cit.

17 See CAROZZA, P.: "Subsidiarity as a Structural Principle of International Human Rights Law", *The American Journal of International Law*, vol. 97, 2003.

18 TEDH, *Vinter and others v. the United Kingdom*, APP. nos. 66069/09, 130/10 and 3896/10, July 9, 2013, p. 106.

19 CONTRERAS V., P.: "Presidio perpetuo irreductible como pena inhumana y degradante: análisis del caso Vinter y otros v. Reino Unido (Tribunal Europeo de Derechos Humanos)", op. cit., pp. 176 et seq.

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based on two main thematic areas: firstly, the need for an expectation of being released and, secondly, also the possibility of reviewing the penalty. The European Court establishes these requirements or essential principles as constituent of the essential content of the article 3 of the ECHR. Therefore, and as the case may be, the penalty of imprisonment for life should be formulated so that there is a sort of right of hope –an expectation of liberation- (*de iure*), together with effective review mechanisms (*de facto*) that allow actualisation of this expectation. All the people convicted to prison have right to a prospect of liberation and review of their conviction. Those are two principles considered as implied: an opportunity to their own rehabilitation; and the right to an effective review of the proceedings. In essence, it would mean making effective the right to reintegration, so that it would be vital to build a norm of review of the enforcement of the penalty in order to establish if this review is compatible with the right mentioned[20].

This way, the standard of control would be based on these four points: the penalty of imprisonment for life must be "reducible" *de iure*, but also *de facto*, from which is derived the procedural obligation that there is a review mechanism which is assured though in a more imprecise way. Firstly, it must be subjected to some kind of period for its activation and, secondly, and also in a relatively imprecise way, are established certain material criteria of such review, making the justified continued stay in prison depend on the fact that there is any "legitimate grounds for criminalisation". Therefore, the standard of control that is built is not merely formalistic, and neither is it entirely closed.

The dignity of the convict requires that the State organises the enforcement of the penalties in the belief that any convict can change and, consequentially, must provide for a feasible opportunity of reintegration. Therefore, there must be the legal possibility of liberation and in a universal way for all those who must serve a penalty of imprisonment for life, whatever the facts for their conviction, just as the requirements and assumptions must be known from the beginning, on the basis of which the evolution of the prisoner will be verified regarding if the review is positive or negative.

If there was no legal horizon, or there was a vague or indeterminate one, there would not be appropriate planning for the rehabilitation programme, so that the prisoner could work to reach such aim. It would be missing the minimum incentive that would allow the prisoner to act like a human being that needs, as indispensable basis for existence, a reasonable and effective hope to be able to organise a stay in prison that makes possible going back into society as a responsible and law-abiding subject. The right to hope of liberation must be, in the end, incorporated within the legal system, so that any uncertainty about its existence is addressed from the outset that this person is not convicted to a penalty of imprisonment for life. Thus, the lack of *de iure* reducibility could lead to a conviction from the ECtHR from the moment of the imposition of the penalty and without having to wait for it to have been enforced for several years.

20 LANDA GOROSTIZA, J.M.: "Prisión perpetua y de muy larga duración tras la LO 1/2015: ¿Derecho a la esperanza?, op. cit.

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Therefore, the *Vinter Judgment* prohibits an irreducible penalty of imprisonment for life; release or liberation may be due to many reasons such as the commutation of the penalty, its anticipated termination or a provisional release, among other possible penitentiary benefits. But according to the ECtHR, what essential is that, although a certain possibility is not required, at least such possibility exists[21]. For that reason, any State that does not establish any kind of possibility of review of the criminal basis of the imprisonment for life would not satisfy the standard of the article 3 of the ECHR, or an irreducible penalty of imprisonment for life would be considered as a cruel and inhuman penalty.

But, on the other hand, it will also be required, as we have pointed out, a *de facto* obligation, which assures the possibility or procedural mechanism of the review. This way, a mere legal recognition of the expectation of liberation would not be enough, but it is also required an effective channel that can carry it out –the existence of a review mechanism. And in this sense, the Court only does a series of relatively imprecise and interpretable indications or suggestions based on the fact that, above all, room for manoeuvre must be provided to the States when it comes to planning the concrete configuration of such mechanism. Then the possibility is maintained that the Sates establish, in an individual way, the substantive and procedural rules of the review to determine the possibility of a release or liberation, maintaining a sphere of important discretion, which can always be reviewed by the Court[22].

However, this mechanism could not be absolutely undetermined in the review period. After a thorough analysis of the international and regional standards of the human rights as wells as of the comparative law, it would be suggested that the effective review period should not last longer than 25 years after the imposition of the penalty of imprisonment for life with, moreover, the obligation that after that date there are periodic reviews[23]. Then a range of possibilities would open up, in which, on the one hand, the indeterminacy of the review duration must be excluded as contrary to the article 3 of the ECHR. On the other hand, it should not go beyond a minimum serving which is not adamant and neither should it be rigorously interpreted, around 25 years as a maximum. And apart from this minimum period of serving, before which the review mechanism should not operate, the consideration of the material criteria of review acquires great relevance. Here, it has been maintained, and that is a view I share, that beyond what the Court literally and expressly states, there would be an underlying logic of giving more importance to the criterion of rehabilitation, to the detriment of purely retributive or general-preventive reasons as the keystone to decide if giving a conditional release to the subject. This would be more in the line with a model of criminal

21 CONTRERAS V., P.: "Presidio perpetuo irreductible como pena inhumana y degradante: análisis del caso *Vinter y otros v. Reino Unido* (Tribunal Europeo de Derechos Humanos)", op. cit., p. 177.

22 TEDH, *Vinter and others v. the United Kingdom*, APP. nos. 66069/09, 130/10 and 3896/10, July 9, 2013, p. 121.

23 LANDA GOROSTIZA, J.M.: "Prisión perpetua y de muy larga duración tras la LO 1/2015: ¿Derecho a la esperanza?, op. cit.

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enforcement according to the standards of the human rights, and respecting at the same time the principles of legality and proportionality[24].

But, going back to the concrete case –*Vinter*–, about which we have been writing this comment, we must emphasise that the British legislation had eliminated since 2003 the twenty-five year review of the sentences of imprisonment for life, allowing each judge to individually determine when the conviction could be reviewed. This regulation obliged that the conviction to imprisonment for life were effectively of imprisonment for life, unless the Secretary of Justice decided on a release for humanitarian reasons; in other words, if the prisoner was about to die. We must point out that the *Vinter Judgment* only relates to England and Wales, because in Scotland there is no life imprisonment and in Northern Ireland there is a review of convictions of imprisonment for life[25].

The Court, overturning another decision made in January 2012, declared this modification contrary to the article 3 of the ECHR because the convicts are denied the right to a real and effective review of their conviction. The ECtHR considers that if this periodically established review is suppressed the prisoners have no prospect of freedom; so they would never regret their crime and, no matter if they have achieved rehabilitation, their punishment may never be reviewed. The British government, for its part, alleges that any convict can be released, which is the same as stating that it involves reviewing the sentence. In view of this, the ECtHR states that this regulation applies only to ill people who present a minimal risk of recidivism and in situations in which there is a need for medical care outside the correctional facility. And it finally considers that in the British legislation, there is an absence of a review mechanism for sentences of imprisonment for life since it does not ensure the review in concrete cases; therefore, it loses sight of the aim of rehabilitating the criminal. The underlying problem, states the judgment, is that a system as the one in England and Wales loses sight of the aim that the modern criminal justice policies are supposed to have: rehabilitate the criminal. Nevertheless, in practice, this judgment will hardly effect the release of these prisoners because the Court does not deny, as we have already indicated, the right by the States to impose a sentence of imprisonment for life and the right to maintain the people convicted in prison their whole life if it is considered that they are still dangerous

24 This is the view held by LANDA GOROSTIZA, J.M.: "Prisión perpetua y de muy larga duración tras la LO 1/2015: ¿Derecho a la esperanza?, op. cit.

25 According to Professors van ZYL SMIT, WEATHERBY and CREIGHTON the current law does not offer a realistic hope of release and a meaningful review of the lawfulness of continued detention after a certain period of time, and therefore infringes upon the right of lifers to be free from inhuman or degrading treatment or punishment. The existing review mechanism of compassionate release at the discretion of the Secretary of the State at best offers 'faint hope' for lifers, as it only promises release for those who were terminally ill or physically incapacitated. This limited ministerial review could lead to the continued incarceration of a prisoner even if his or her imprisonment could no longer be justified on legitimate penological grounds. Cfr. VAN ZYL SMIT, D. / WEATHERBY, P. /CREIGHTON, S.: "Whole life Sentences and the tide of European Human Rights Jurisprudence: What is to be done?", op. cit.

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to the society –which requires the possibility that they have the right to be released from prison if the State considers that they are rehabilitated. In short, the *Vinter* decision concludes that in cases where a whole life order is imposed, the prisoners should be assured of the prospect of a comprehensive review of factors ranging from the gravity and nature of the original offence to the progress of rehabilitation in prison. And the broad parameter of the *Vinter* review makes it distinguishable from the *post-tariff* review, which is limited to a consideration of the potential dangerousness the offender could pose to society[26].

We must finally refer to the Judgment of the ECtHR of the 3 February 2015, the case of *Hutchinson v. the United Kingdom*[27].

The contradiction mentioned is just apparent since the Court will consider as resolved the doubts it had in the past about the British legislation, and in aftermath of a recent judgment of its Court of Appeal, which establishes that the Secretary of Justice is obliged to release lifers if there are "exceptional circumstances" and that decision can be reviewed by the courts.

The Court concludes in this judgment that the conviction to imprisonment for life is subject to a review in the British national law, and therefore the Court upholds it. Arthur Hutchinson was convicted in 1984 to a penalty of imprisonment for life with a minimum serving of 18 years. In 1994, the minister reported to him that he had been imposed with imprisonment for life, and in May 2008 the courts upheld its decision due to the gravity of the offences of the prisoner. The British Court of Appeal also supported this measure; the prisoner then turned to Strasbourg, on the 10 November 2008, stating that his case was similar to the *Vinter* case. The European Court issued a judgment in 2003 which expressed doubts about the faculty of the minister of Justice when it came to reviewing penalties of the lifers. Strasbourg, as noted earlier, questioned the system because the British Criminal Justice Law of 2003 overturned the previous model which allowed the Secretary of Justice to automatically review the

26 The Strasbourg decision suggests that there should be no criminal cases -regardless of the gravity of the original criminal conduct of the offender- where the purposes of retribution and deterrence could only be satisfied by whole life orders without the possibility of future release until close to death or seriously ill. Indeed, even 'the worst of the worst' criminals who are sentenced to whole life orders are entitled to know, at the outset of their sentence, the specific date when they could be considered for release under a meaningful review. They should not have to wait to know whether, when and under what conditions this review will take place after serving an indeterminate number of years. The *Vinter* case, therefore, indicates a growing importance of rehabilitative goal of imprisonment during the review that takes place at the later stage of the incarceration. 'A right to rehabilitation' should be recognised in Britain's prison legislation and 'comprehensive and manifestly fair procedures' need to be set up to evaluate progress toward release for lifers subject to whole life orders. VAN ZYL SMIT, D. / WEATHERBY, P. /CREIGHTON, S.: "Whole life Sentences and the tide of European Human Rights Jurisprudence: What is to be done?", op. cit.

27 In this case the Court rejects the appeal lodged by a British prisoner who reported that his conviction to imprisonment for life constituted "inhuman and degrading treatment", when it concludes, apparently against the *Vinter* Judgment, that the legislation of the country has mechanisms to review the penalties and, therefore, it is "compatible with the article 3" of the European Convention on Human Rights.

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penalties of imprisonment for life after serving 25 years without creating alternative review mechanisms.

Notwithstanding the foregoing, and despite of the clarity expressed in the *Vinter* Judgment, the British government stated, rejecting the protection in relation to the Hutchinson case, that on the 18 February 2014 the Court of Appeal issued another judgment –*R v. Newell; R v. McLoughlin*- in which it made clear that the convictions to imprisonment for life are subject to a review in the British law. In this case, the British Court emphasised that if a lifer can prove that after the imposition of the penalty "exceptional circumstances" have arisen, the Secretary of Justice must analyse, compatibly with the article 3 of the ECHR, if these circumstances justify his release from prison. The decision of the Secretary of Justice must be reasoned according to those "exceptional circumstances" and not just for humanitarian reasons, and be subject to judicial review. This way, in aftermath of this British judgment, the ECtHR will consider its doubts as resolved, considering that the British law "gives to the lifers hope and the possibility of being released if circumstances arise, in which the punishment is no longer justified"[28]. Moreover, it will remind that domestic courts are responsible for resolving the problems of interpretation of the national laws. So, since a British Court has established a position on the matter that worried the European Court, the last sentence considers that the powers of the Secretary of Justice to release a prisoner "are enough to comply with the article 3" of the ECHR.

Thus, the whole respect towards article 3 of the ECHR or, in other words, the whole constitutionality of the penalty of life imprisonment established by the States obliged by the Convention, will be conditioned by a real possibility of release, planned from the principle of the imposition of the penalty, and regardless of the fact that, at a later point, this release might or not be carried out, on the assumption that there has been no rehabilitation. At a strictly national level, the constitutionality of the penalty will essentially derive from the fact that the legislation regulates the appropriate mechanisms to make the release possible and, above all, that the judges and courts or, as the case may be, the competent authority, have the necessary discretion to make the release effective. And that, also at a national level, without prejudice to respect towards other principles established in the constitutional texts.

In relation to the introduction of the revisable permanent prison in the Spanish legislation, we have to highlight that the opinion drawn up by the Spanish Council of State in this regard, on the basis of the ratification by Spain of the Statute of the International Criminal Court, states the admissibility in this Statute of the sentences of imprisonment for life as long as they are justified due to the gravity of the facts and the circumstances of the offender. And indeed, the instrument of ratification by Spain of the Rome Statute of the International Criminal Court[29]contains the following clause: "Spain declares that, at the right moment, it will be willing to receive persons con-

28 *Hutchinson v. the United Kingdom* (2015) 24 EHRR 505, Judgment, 3 February 2015.

29 Spain ratification of the International Criminal Court Rome Statute, approved on 17 July 1998, had place on 26 October 2000.

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demned by the International Criminal Court, on the condition that the imposed penalty does not exceed the maximum length established for any crime in compliance with the Spanish legislation". Although this precaution cannot be invoked to flatly refute the agreement of the revisable permanent prison with the Spanish legal system, at least it highlights the obvious opposition by the legislator toward the fact that the sentences of imprisonment for life could eventually be executed within the Spanish territory.

In any case, and notwithstanding the foregoing, once the doctrine of the ECtHR has been established, we must refer, in a more concrete way, to the enforcement of the penalty in the Spanish and German legal systems in order to distinguish possible nuances in relation to the constitutionality or unconstitutionality of life imprisonment.

III. The enforcement of life imprisonment.

1. Periods of security[30] and achieving the early release. Predictions of social reintegration.

In the Spanish legislation, and according to the articles 36.1 and 92 of the Criminal Code, the possible review of the permanent prison would be carried out after having fully served a relevant part of the conviction, in particular, 25 years as a general rule; 28 for terrorism offences and terrorist organisations; 30 years for the alleged commission of two or more crimes for which this penalty is imposed; an 35 if, in this last case, the offences are related to terrorism or terrorist organisations. Such review will require a guarantee of their reintegration as reflected in the fact of having achieved the early release and the favourable prediction of social reintegration or the clear indication of having abandoned the purposes and means of their terrorist activity.

The classification of the convict achieving the early release must be authorised by the court after presenting a favourable prediction of social reintegration and consulting with the Public Prosecutor and the General Secretary of Penitentiary Institutions, and will not be carried out until having served twenty years of actual imprisonment, in case the convict had been convicted for a terrorism offence, or until having served fifteen years of actual imprisonment in the other cases. In these cases, the convict will not be granted a release on temporary licence until having served a minimum of twelve years in prison, in the first case, and eight years in prison in the second case. Consequently, a minimum period of security to achieve the early release is understood as a period of fifteen years for the lifers for committing qualified murder[31], killing the king or the crown prince[32], killing the head of a foreign state or any other person who is in Spain

30 By period of security we understand the time required to serve the penalty, according to the circumstances legally contemplated, in order to get an early release, regardless of the evolution of the prisoner.

31 Article 140.1 of the Spanish Criminal Code.

32 Article 485.1 of the Spanish Criminal Code.

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and is internationally protected by a treaty[33], crimes of genocide[34] and crimes against humanity.[35] In the case of the people convicted for a terrorism offence, to achieve the early release, it will be required that they serve twenty years of actual imprisonment[36]. And all this, without providing for the special limit when serving actual imprisonment, in order to achieve the early release, when the convict has been convicted for two or more offences and, at least one of them carries a revisable permanent prison penalty[37].

The prediction of social reintegration will be decided by the court "in view of the personality of the offender, his criminal record, the relevance of the legal goods that could be affected in case of recidivism, his conduct while serving his sentence, his family and social circumstances, and the effects expected from the suspension of the enforcement and compliance with the imposed measures"[38]. These are the circumstances upon which the decision will be based after having considered the progress reports provided by the correctional facility and by specialists designated by the court itself. In case the offender had been convicted for several offences, the examination of these requirements will be carried out considering all the offences committed. If the offences are related to terrorist organisations or groups, it will be necessary for the offender to show a clear indication of having abandoned the purposes and means of his terrorist activity, to have actively collaborated with the authorities, in addition to technical reports that guarantee that the prisoner is actually disengaged from the terrorist organisation and from the environment of illegal associations and groups around it and ensure his collaboration with the authorities.

Open prison will last between five to ten years, taking into account that the period of suspension and conditional release begins on the date of the release of the convict. Once he has served 25 years of the sentence, the court must verify, at least every two years, the compliance with the requirements of the conditional release. Likewise, the court will consider the requests of the convict to be granted a conditional release and he can, however, establish a period of up to one year, within which, after a request has been rejected, it will not be dealt with anymore.

In respect of open prison or "review" of life imprisonment penalty in the German criminal law[39], it provides that the court shall grant conditional early release from a sentence of imprisonment for life if 15 years of the sentence have been served, the particular gravity of the guilt of the convict does not require its continued enforcement;

33 Article 605.1 of the Spanish Criminal Code.
34 Article 607 of the Spanish Criminal Code.
35 Article 607 bis 2 1º of the Spanish Criminal Code.
36 Nevertheless, it is necessary to consider that, according to article 36.3 of the Spanish Constitution "in any case, the court or judge responsible for enforcement of sentences may order, after a report from the Public Prosecutor, the General Secretary of Penitentiary Institutions and the other parts, the progression to the third degree for humanitarian reasons and reasons of personal dignity of seriously ill convicts with incurable diseases and of convicts in their seventies, evaluating above all that they barely pose a danger".
37 Article 78 of the Spanish Criminal Code.
38 Article 92.1.c) of the Spanish Criminal Code.
39 Contemplated in in the section 57a StGB, introduced in 1981.

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and the requirements of the § 57(1) sentence 1 Nos 2 and 3 are met[40]. For the prediction, it is decisive that it can be justified that the convict will not commit any other offence out of the sentence imposed. In this case, it must particularly be taken into consideration the personality of the offender, his previous history, the circumstances of the offence committed, his conduct while serving his sentence, his living conditions and the circumstances required for its substitution (§ 57a(1) sentence 1 No 3 and (2) in relation to § 57a(1) sentence 1 No 2 sentence 2)[41]. Moreover, the consent of the convict is required (§ 57a(1) sentence 1 No 3 and (2) in relation to § 57a(1) sentence 1 No 3).

The German procedural law includes some additional precautions –the enforcement of the rest of a sentence of imprisonment for life can only be applied when the court has requested in anticipation an opinion of a specialist about the convicted person, mainly about if there is no longer the possibility that he is a danger due to recidivism (§ 454 sentence 2 StPO –criminal procedure code–)[42]. During this procedure and against the appeal lodged by the offender, the Court can also ask for a psychiatrist to draw up an opinion about him; if he was physically healthy while committing the offence and if he had not shown any particular psychic anomaly.

It is clear that there is the possibility of imposing open prison with regard to life imprisonment once 15 years have been served, attending to the other two circumstances – the fact that the particular gravity of the guilt of committing an offence does not require its continuous enforcement; and the requirements of § 57(1) sentence 1 Nos 2 and 3 are met, in particular his justification when considering the interest of the safety of the community and that the individual concerned gives his consent–.

It has been estimated by the doctrine[43] that the period of 15 years would be the maximum that a penalty of deprivation of liberty should last if we appreciate that the main function of the penalty shall meet the targets of social rehabilitation and reintegration. And once the other requirements are met, which as a whole imply a favourable prediction, as well as the consent of the convict, he would be conditionally released at the time. The § 56b StGB provides for the possibility that the court imposes on the convicted person the obligation of repairing the damage caused or, when appropriate, paying to a non-profit public institution an amount of money, commensurate with the offence committed.

40 It is necessary to add that, as served penalty in the sense of the (1) sentence 2 No. 1, is valid any deprivation of liberty that the convict has suffered in the context of his criminal conduct. The duration of the period of conditional release is of five years. Moreover, the court might establish maximum periods of two years and before they expire it is unacceptable that the convict submits a request in relation to the suspension of the rest of the penalty.

41 About the requirements for the ruling on the prediction, see BVerfGE –Rulings of the Constitutional Criminal Court- 58 208, 222 et seq.; 70 97, 308 et seq; and BVerfG 25.

42 About this in detail, see *Meyer-Goßner* Kommentar, § 454 section 37 et seq. and *Fischer* Karlruher Kommentar § 454 section 29.

43 See, among others, JAÉN VALLEJO, M.: "Prisión permanente revisable", *El Cronista*, No. 35, 2013 and CANCIO MELIÁ, M: "La pena de cadena perpetua en el Proyecto de reforma del Código penal", op.cit.

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We must consider that this regulation, when put into practice, will imply that lifers serving more than 25 years[44] will be few when it comes to the application of the German legal regime on open prison. And there is no doubt that the possible review of the penalty after having served 15 years means overcoming the unconstitutionality of the measure included in the German criminal law and constitutes a relevant difference with respect to the Spanish regime of open prison.

The regulation of the preventive detention in the German legislation requires, according to § 66 (2), the conviction to "a sentence of temporary deprivation of liberty". In view of this unequivocal literal sense of the law, the order of preventive detention together with the imposition of a sentence of imprisonment for life, are excluded when the penalty of deprivation of liberty is imposed as an individual penalty or is considered as an overall penalty, as a result of several sentences of imprisonment for life[45]. This, in principle, might be surprising, although the Federal Court (BGH) has also clearly defended, from the opposite point of view, its enforcement and has described with difficulty the restriction of the § 66 as objective[46].

Nonetheless, since the introduction of the possibility of substituting the enforcement of the rest of the sentence of imprisonment for life for parole, there are some particularities: before the lifer is given parole, according to § 57, a ruling must be made in which the safety requirement relevant to the community is to be taken into consideration. Within the framework of this analysis, all the circumstances to be evaluated can be contemplated, according to § 67c (1)[47] and, in particular, all the aspects of prevention.

The enforcement of the sentence to imprisonment for life is subjected to the Law on Penal Executions[48], which only contains a unique special provision on the sentence of imprisonment for life[49]. According to the § 13(3) of this law, a person convicted to a sentence of deprivation of liberty can be granted pardon if he has served 10 years or has been granted an open regime. And the Law on Penal Executions –in particular the rules on the purpose of the enforcement of the § 2 (1) (reintegration into society as "aim of the enforcement") and of the § 3 (configuration of the penalty enforcement as reintegration into society)– can also be applied to the lifers[50].

44 See, in this sense, MUÑOZ CONDE, Fco.: "Un Derecho Penal comprometido". In AAVV, *Libro homenaje al Prof. Dr. D. Gerardo Landrove Díaz*, Tirant lo Blanch, 2011, p. 874. See also, CARBONELL MATEU, J.C.: "Prisión permanente revisable I (arts. 33 y 35)", op. cit.

45 Consequently, Horskotte LK § 67c section 18 (before the 23 of the Law on amendments to the Criminal Code) estimates that the possibility of ordering preventive custody together with a sentence of imprisonment for life. BGHSt-Judicial Criminal Decisions Federal Court- 33, 398, 399.

46 BGHSt -Judicial Criminal Decisions Federal Court- 37, 160-.

47 BHHSt -Judicial Criminal Decisions Federal Court- 233, 398, 401.

48 Ibidem, op. cit., sections 51 et seq.

49 This shall be valued taking into account that the Law on Penal Executions of 16 March 1976 was approved one year before the Sentence of the Constitutional Court of 21 June 1977 (BVerfGeE 45, 87).

50 See, in this sense, the ruling (76) 2 of the European Council, of 17 February 1976.

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Although the sense of a sentence that imposes imprisonment for life does not seem to give hope to the convict, the enforcement of the sentence of imprisonment for life shall, at all times, be oriented to the purpose of liberating the prisoner from the enforcement of the sentence[51]. Of special significance is the provision of the § 3(2) of the Law on Penal Executions, to which the harmful effects of the deprivation of liberty have to be counteracted.

In any case, in the application and interpretation of the provisions of the Law on Penal Executions, it shall be taken into consideration the particularities that originate from the fact that the sentence of imprisonment to be executed is for life. This leads to a collision between the aim of the reintegration and the criteria of the §§ 57a, 57 b, in particular of the clause on the gravity of the guilt[52]. Here is where the different purposes of the penalty encounter[53].

The ruling on the particular gravity of the guilt is appealable and considered independent from the review[54]. The ruling on the continuation of the enforcement is the responsibility of the executive judge; he shall prove –altogether with the particular requirements- if the particular gravity of the convicted person "requires" the continuation of the enforcement. If the judge on duty, who only considers questions of fact, accepts the particular gravity of the guilt, it will not be necessary a pronouncing about if the penalty becomes later effective for more than 15 years –in case the executive judge finds appropriate a longer enforcement–, or about how long the continuation of the enforcement will last. The task of the judge on duty is restricted to making possible for the executive judge the provision of a longer enforcement due to the particular gravity of the guilt, grounds that the executive judge needs to determine the possible continuation of the enforcement under this approach (Penalty Chamber of the German Federal High Court BGHSt. 40 360; see BVerfGE 86 288, 331).

The ruling BVerfGE 86 288 –Penalty Chamber of the German Federal High Court- had to take a decision on if, in order to determinate a particularly grave guilt, it was enough that, for a sentence of life imprisonment for homicide, the minimum of guilt required has been clearly exceeded[55] or if the guilt of the author of the offence is only estimated as particularly grave when the offence as a whole, including the personality of the offender, differs so much from the usual and common cases of homicide, according to the experience acquired, that a substitution of the sentence of imprisonment for

51 See also the article 10(3) sentence 1 of the International Covenant on Civil and Political Rights (BGB –Federal Civil Code–, II, 1973, p. 1534). It states: "penitentiary system shall comprise treatment of
prisoners the essential aim of which shall be their reformation and social rehabilitation".

52 See HÄGER J., op. ult. cit.

53 See, as example, BverfGe 64, 261 in a case that involves all the extremes: request of release of a 78-year-old prisoner, seriously ill, who was convicted to life imprisonment and to a cumulative sentence of 15 years in prison for murder in 475 cases committed in the Auschwitz concentration camp, out of a total of 2.100 men.

54 BGHSt -Judicial Criminal Decisions Federal Court- 39, 208.

55 BGH 1. Strafsenat (First Criminal Senate) NStZ 1994 540 Vorlegungsbeschluβ (ruling on the presentation); as well as *Foth* NStZ 1993, 368.

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life, after 15 years in the case of a favourable prediction, could be considered as inappropriate[56].

With regard to this issue, the Penalty Chamber of the Federal High Court (BGHSt. 40 360) decreed that it was impossible to investigate the "average of frequent cases according to the experience acquired". Rather, the judge on duty must investigate and consider, without a connection with any conceptual rule, the circumstances relevant to the guilt. In this case, the determination of the particular gravity of the guilt only comes into consideration when there are significant circumstances. This kind of circumstances could be, for instance, the reprehensible nature of the execution of the offence or the motives, the various numbers of victims of the offence or the commitment of several homicide offences or other grave offences –committed with or without a connection to homicide. In that regard, it shall always be considered that this kind of circumstances could not immediately, but within the framework of a global evaluation, lead to acceptance of the particular gravity of the guilt. The court in charge of the review is denied, when verifying the ruling, a detailed monitoring of the accuracy. The Court would have to prove if the judge on duty has covered all the decisive circumstances and evaluated them without making mistakes, although he could not put his own evaluation in the place of the one of the judges on duty. This ruling has solved the variety of points of view behind it with an intermediate solution.

We must highlight that with the introduction in the Law of the § 57a, the legislator has fulfilled the provision made by the Federal Constitutional Court[57], giving to the lifer a concrete chance and also essentially making it feasible to get back his freedom on a later date. The fulfilment of this provision has been explicitly confirmed by the Federal Constitutional Court (Federal (BVerfGE 72 105, 113; BVerfG StV 1992 25) and, for the provisional time, in view of the difficulty and the controversy, it denied that there had been an inappropriate delay of the new regime required by the legislator (BVerfG NJW 1978 2591; BVerfG StV 1981 618). This court has never established a period different from those indicated in the ruling on the need for a Law on Penal Executions (BVerfGE 33 1, 13 y 40 276, 283).

In the meantime, between the Sentence of the Federal Constitutional Court of 21 June 1977 and the entry into force of the § 57, the courts could not get ahead of the provision of the legislator that he himself was asking for. In particular, the right of a lifer to conduct an *ex-officio* trial for the grant of pardon and for a release with the corresponding proceedings, was not possible in the mentioned timeframe (BVerfG NJW 1978 2591). The procedure to be granted pardon remains, in all cases, intact[58]. On the

56 BGH 4. Strafsenat (Fourth Criminal Senate) NStZ 1993 235 and StV 1993 4. Nachweis der ähnlichen Rspr. des 2., 3. (register of the jurisprudency similar to the 2, 3) and 5. Strafsenat im Beschluβ des Großer Senat für Strafsachen (Fifth Criminal Sentence in the ruling of the Great Criminal Senate); as well as *Salger* DRiZ 1993, 391.

57 In particular, the mandate issued by the Federal Constitutional Court of BVerfGE 45 187, 242, 252, see sections 14, 17.

58 About the relation between the suspension of a penalty and the pardon in the case of a sentence of imprisonment for life, see *Joachim Meier*, cit., p. 112 et seq.

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one hand, this means that a sentence to imprisonment for life in the procedure to be granted pardon cannot be commuted to a sentence of temporary deprivation of liberty. On the other hand, in the procedure to be granted pardon, until the introduction of the § 57a, there is the unique possibility to substitute the rest of the sentence of imprisonment for life[59], in addition to the regime of the §§ 57a, 57b, and following[60].

2. Release on temporary licence and conditional release

It would be appropriate to briefly mention, and separately, the legal regime of the release on temporary licence, previous to the early release, in order to highlight, in this case, possible nuances regarding life imprisonment, and always from the perspective of the rehabilitative function of the penalty.

The release on temporary licence that intends to stimulate good conduct in the convict and obtain his social re-education and reintegration, as preparation for his life in liberty, is also object to a special treatment when life imprisonment has been imposed[61]. In this way, under the Spanish Law[62], the convict will not be able to obtain any release on temporary licence until he has served a minimum of twelve years in prison when convicted for terrorism offences, and eight years in prison in any other case, on the understanding that these periods would theoretically correspond to a quarter of the conviction. Besides considering that, for this purpose, the offences committed within criminal organisations are not included in the group of offences related to terrorism, considering these convicts equal to those convicted for other offences[63]. And special treatment will not be given according to the number of offences committed[64].

59 About the comparison between the proceedings for achieving pardon and the legal regulation evaluated before the judgment, BVerfGE 45 187.

60 See *Kunert* NStZ, cit. 1982 89, 95; about the decision of pardon, about the rest of a penalty in the case of a measure of deprivation of liberty yet uncompleted; see *Horstkotte* LK[10] 67c section 20; and about the practice of pardon, *Eisenberg* Kriminologie § 36 section 172 et seq.

61 About the release on temporary licence and the conditional release in relation to the revisable permanent prison penalty in the Spanish legislation, see the excellent study carried out by CERVELLÓ DONDERIS, V: *Prisión perpetua y de larga duración. Régimen jurídico de la prisión permanente revisable*, Tirant lo Blanch, Valencia, 2015, pp. 195 et seq.

62 Article 36.1, last paragraph of the Spanish Criminal Code.

63 The releases on temporary licence are generally regulated in the articles 47 and 48 of the Organic Law 1/1979, of 26 September, General Prison Act, and have a duration of up to seven consecutive days, with a total of thirty six days a year in the case of people convicted in the second degree, and of forty eight days a year in the case of people convicted in the third degree.

64 See, among others, DEL CARPIO DELGADO, V.: "La pena de prisión permanente en el Anteproyecto de 2012 de reforma del Código Penal", op. cit., p. 13.

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So, the "revisable permanent prison penalty" means reinforced limitations to obtain a release on temporary licence, which requires a minimum of eight years in prison as a general rule and twelve if the conviction is due to a terrorism offence[65].

Furthermore, the conditional release will mean a case of open prison of a "revisable permanent prison penalty", which will not be considered as time in prison for the enforcement of the conviction, but will only mean open prison for the rest of the penalty for a concrete period of time[66]. If the convict does not commit an offence and complies with the imposed conditions during the conditional release, the penalty remaining will be declared as extinguished. If, otherwise, he breaks these conditions, the penalty will be revoked and his reimprisonment will be ordered.

The judge or court will grant a conditional release for the convict if he meets the necessary conditions; which will not be a discretional decision, although he has some power over the requirement of a favourable prediction for social reintegration. The requirements or assumptions for it to be granted refer, as we saw, to the release on temporary licence, the classification in the third degree imprisonment and the favourable prediction for social reintegration.

In the reference to the last of the requirements, the article 92.1.c states that "the court, in view of the personality of the offender, his criminal record, the relevance of the legal goods that could be affected in case of reoffending, his conduct while serving his sentence, his family and social circumstances, and the effects expected from the suspension of the enforcement and compliance with the imposed measures, can confirm, after having evaluated the progress reports provided by the correctional facility and by those specialists designated by the court itself, that there is a favourable prediction for social reintegration". And in the cases of accumulation of offences, the prediction must be carried out in relation to the offences as a whole.

A conditional release is conditioned by compliance with prohibitions and duties, so that the judge or court will be able to make the suspension conditional to the compliance with them when it is necessary to avoid the danger of committing new offences, without the possibility of imposing duties and obligations that are excessive or disproportionate, as well as other ones that are considered proper, as long as they are not offensive to the dignity of the convict[67]. Moreover, the judge will also be able to make open prison for the penalty conditional to the compliance with one or more services or measures, which have been established in it and refer to the compliance with the agreement reached by the parties under mediation; paying a fine, which amount shall be es-

65 See DOMINGUEZ IZQUIERDO, E. Mª: "El nuevo sistema de penas a la luz de las reformas". In *Estudios…*, cit. Dir. Morillas Cueva, L. (Dir.), p. 150 and 151 and JUANATEY DORADO, C.*:* "Una "moderna" barbarie: la prisión permanente revisable"*, Revista General de Derecho Penal*, No. 20, 2013.

66 The period of suspension of the enforcement of the sentence of imprisonment for life, as we have already indicated, is of five to ten years, and the Court will establish it within this range.

67 Article 83 of the Spanish Criminal Code.

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tablished by the judge or tribunal according to the circumstances of the case; and carrying out community service[68].

The judge or court is allowed, during the period of open prison, and in the view of the possible modification of the circumstances evaluated, to modify the decision that he or it had previously made and to reach an agreement on the establishment of all or some of the prohibitions, duties or services that had been established, their modification or the substitution for other that are less burdensome[69]. If the non-compliance with the prohibitions, duties or conditions had not had a grave or repeated nature, the judge or court could impose on the convict new prohibitions, duties or conditions, or modify the ones that had already been imposed or extend the period of suspension, without exceeding half the duration of the period initially established[70]. And in the gravest cases, the judge will be able to revoke the conditional release and order that the convict is placed in detention, as specified in the article 86.1 of the Criminal Code[71].

Finally, according to the article 87.1 of the Criminal Code, "after the expiry of the established period, if the offender has not committed an offence that shows that the expectation on which the decision of open prison was based cannot be supported anymore, and once the conduct rules established by the judge or court have been sufficiently met, he or it will reach an agreement on the remission of the sentence". And, of course, this case also applies in relation to the "revisable permanent prison penalty"[72].

The German Criminal Code does not include substantial differences in regard to the Spanish regime when it comes to a release on temporary licence or a conditional release.

After it had been settled in the § 56a, the period for a conditional release, which cannot be longer than five years or shorter than two years, the § 56b establishes the duties that can be imposed on the convict and also can be imposed other warranties or the compliance with certain orders. The German legislation highlights the regulation for the assistance during the conditional release, so that the convict does not reoffend, and the court, as well as in the Spanish regime, can subsequently adopt, change or remove decisions, according to the §§ 56b and 56c.

Moreover, according to the § 56f, the revocation of the suspension of the penalty will also be possible. Its remission will be granted, according to § 56g, after the period of conditional release, if the court has not revoked the suspension. The Court can re-

68 Article 83 of the Spanish Criminal Code.

69 Article 85 of the Spanish Criminal Code.

70 Article 86.2 of the Spanish Criminal Code.

71 About the revocation of the suspension of the penalty, see, among others, SÁNCHEZ ROBERT, M.J.: "La revocación de la suspensión como efecto del incumplimiento de las condiciones", *Cuadernos de Política Criminal*, No. 115, I, Period II, May, 2015, p. 231 et seq. See also JUANATEY DORADO, C.: "Una "moderna" barbarie: la prisión permanente revisable", *Revista General de Derecho Penal*, No. 20, 2013.

72 About the posible revisión of the permanent prison penalty in the Spanish law, and more particularly, about the questions that arise on it being enforced or, as the case may be, lifted, see, for all, CERVELLÓ DONDERIS, V: *Prisión perpetua y de larga duración. Régimen jurídico de la prisión permanente revisable,* op. cit., pp. 291 et seq.

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voke the remission when, within the scope of this law, the offender has been convicted, within the period of conditional release, for a fraudulent offence punishable by a sentence of imprisonment of at least six months. The remission will only be granted within the year following the expiration of the period of conditional release and within six months following the confirmation of the conviction.

In short, once we have observed in the legal system the great similarity between open prison and review, as well as the conditional release, in the Spanish and German legislations in both, a general level and in relation to the revisable permanent prison penalty, we must insist on the fact that the main differences, which are few but essential, lie in the periods of the possible review of this penalty, as well as the actual possibilities or the actual will of the legislator to carry out this review. And here is where lies the difference that allows considering the constitutionality or unconstitutionality of life imprisonment.

IV. Problems of constitutionality from the perspective of the European Convention on Human Rights. A practical view of the realities of Spain and Germany.

The problems of the "revisable permanent prison penalty" in the Spanish legislation, regarding the possible violation of the constitutional provisions, address the basic principles of the criminal laws and, in particular, the prohibition on penalties or inhuman and degrading treatment[73], principle of legality[74], and above all, the need for the enforcement of the penalties and the security measures to be oriented to social re-education and reintegration[75].

Indeed, it has been maintained by the Spanish doctrine the unconstitutionality of life imprisonment and also of revisable permanent prison[76], and even any other very long-term penalty, because of violating the constitutional mandate of social re-education and reintegration of the penalties of deprivation of liberty, the mandate of determination or certainty derived from the principle of legality -since the penalties are indeterminate in relation to the expiration date of the enforcement. And as a consequence of this uncertainty, the principle of equality and non-discrimination would also be violated- and so would the prohibition on penalties or inhuman and degrading treatment, in spite of the possible review of the conviction. The uncertainty of the revisable permanent prison respects neither the principle of proportionality nor the essential contents of the fundamental rights.

73 Article 15 of the Spanish Constitution.
74 Article 25.1 of the Spanish Constitution.
75 Article 25.2 of the Spanish Constitution.
76 See, among others, CUERDA RIEZU, A.: *La cadena perpetua y las penas muy largas de prisión: por qué son inconstitucionales en España*, Barcelona, 2011, p. 109. Of course, there are also defenders of this penalty, among which we could mention MANZANARES SAMANIEGO, J.L.: "La libertad vigilada", *Diario La Ley*, No. 7386, Section Doctrina, year XXXI, ref. D-130, 22 April 2010, p. 2 et seq.

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After the entry into force of the Organic Law 1/2015[77], which implements the revisable permanent prison for the gravest offences[78], and despite the favourable reports of the General Council of the Judiciary, Attorney General and of the Council of State, the Constitutional Court of Spain has accepted for processing the appeal of the opposition groups in the Congress of Deputies against the articles that regulate the new revisable permanent prison[79]. In particular, the appellants suggest that the new measure is a "covered life imprisonment", alleging that the revisable permanent prison violates four articles of the Spanish Constitution, in particular article 15.1, which prohibits inhuman penalties; 17, which regulates the principle of proportionality; 25.1, since it is not a determined penalty but it is prolonged in time even until the prisoner's death, and 25.2, since it restricts the possibility of reintegration. Even the State Attorney considered that the revisable permanent prison borders on the unconstitutionality because it is against the "reintegration function that orders" the Magna Carta. It has been understood that, in practice, this penalty is an "inhuman" penalty, "populist" and characterised by its "legal insecurity". Therefore, there would be "more than reasons" to question a dozen articles related to this "life imprisonment" that clashes head on several provisions of the Constitution: the prohibition of inhuman or degrading penalties (article 15), the principles of legal security, freedom and legality (9, 17 and 25.1) and the social reintegration towards which must be oriented the penalties.

From a criminological point of view, it has been understood by the appellants that, with the legal regime established in relation to this penalty; an offender will know when he goes to prison but not when he gets out, which means that he may be in prison until the moment of his death. We would be dealing here with a "covered life imprisonment", which would cause an impairment of physical or mental health; so in the appeal is exposed the "inhuman, cruel and degrading nature of life imprisonment" because it causes "grave psychological damage" to the convict, influences negatively his personality and undermines his cognitive and social abilities. Regardless of these considerations, which largely separate from a strictly legal argument, it is important to consider the concrete accusations of unconstitutionality that both the doctrine and the appellants have built to cope with the Spanish regulation of the revisable permanent prison penalty.

Sticking to the four essential legal arguments, firstly, and regarding the possible violation of the article 10 of the Spanish Constitution – and consequently article 3 ECHR, in relation to the dignity of the person, we must consider that the revisable permanent prison implies that the convict might never go out in the streets. The decision of suspending or not the rest of the penalty of any lifer is in the hands of a court that can be

77 Law of 30 March, amending the Organic Law 10/1995, of 23 November, of the Spanish Criminal Code.

78 Arts. 33, 35, 36, 76, 78 bis and 92 of the Spanish Criminal Code.

79 About the most important legal arguments for the appeal to the Constitutional Court, see ARROYO ZAPATERO, L., LASCURAÍN SÁNCHEZ, J.A. and PÉREZ MANZANO, M. (Dir.), RODRÍGUEZ YAGÜE, C. (Coord.): *Contra la cadena perpetua*, Ed. Castilla la Mancha University, Cuenca, 2016, p.17 et seq.

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wrong about the judgment on how dangerous the convict is. Moreover, the person who gets in prison "becomes institutionalised" and has therefore few possibilities to "pass" the exam of the court when it comes to being suitable to go back into society. Considering the certain period that he has to serve before getting out of prison, with few or none possibilities of rebuilding his life outside of prison, the revisable permanent prison would hardly be compatible with the right of dignity and free development of personality[80].

Secondly, and in line with the above, it could violate article 15 of the Spanish Constitution, related to the prohibition on penalties or inhuman and degrading treatment, since a prison penalty can become inhuman or degrading if the prisoner is not given an expectation of eventually being able to get out of prison. This inhumanity could also derive from the treatment that this prisoner receives in prison and the life conditions in the correctional facility. And this is because the duration of the life imprisonment is undetermined at the time of its imposition, without a certain guarantee that the convict would get out of prison, which will create a sense of despair[81]. And actually, if life in prison produces intense human suffering, which could become unbearable because of lacking an expectation of safety when reaching one's freedom, the sentence of imprisonment for life could ultimately be, for violating article 15 of the Spanish Constitution, unconstitutional[82].

Thirdly, the principle of legality or the mandate of determination of the penalties, established in article 25.1 of the Spanish Constitution[83], requires its classification, which must provide for a minimum and maximum period to serve, and therefore re-

80 As RÍOS MARTÍN has stated, "dignity implies having actual and certain possibilities of being incorporated into society to develop, even at least, a vital project in levels like society, family and work; which is not respected by the permanent prison, even if it is pretended that it is revisable". See RÍOS MARTÍN, J.: *La prisión perpetua en España. Razones de su ilegitimidad ética y de su inconstitucionalidad*, Tercera Prensa S.L., 2013, p. 109. We cannot forget that prisons are still, basically and from a structural point of view, places dedicated to custody and punishment. See, in this line, *SNACKEN, S. / VAN ZYL SMIT, D.: Principles of European prison law and policy: penology and human rights,* OUP Oxford, 2009, op. cit. pp. 84 et seq.

81 The High Court, in the judgment of 4 November 1994 (RJ 1994/8565), referred to the possible inhumanity of a long-term penalty when he stated that: "Deliberately missing the point of the constitutional inspiration of rehabilitation and social reintegration would lead to an "inhuman treatment" for those who (...) feel themselves compelled to a situation of deprivation of liberty much longer than thirty years. Such intensity would mean a deprivation of an opportunity of reintegration for the individual, a humiliation or sensation of debasement superior to the one implied by the mere imposition of the conviction, inhuman or degrading treatment outlawed by the article 15 of the Constitution".

82 Precisely, the General Council of Spanish Lawyers considered as unconstitutional the revisable permanent prison because a limit is not established when serving a prison penalty, which would violate the articles 10, 15 and 15 of the Spanish Constitution.

83 This provision stipulates the following: "No one can be convicted or sanctioned for actions or omissions that at the moment of their commitment do not constitute an offence, misdemeanour or administrative infraction, according to the legislation current at the time".

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quires the determination of the amount and extension of the punishment[84]. The revisable permanent prison penalty would go against this principle since it is unknown when its enforcement has come to its end. And it is clear that, in the end, the duration will depend on some discretional criteria, connected to some elements of evaluation that are not related to the moment when the offence was committed, but would take place afterwards. When the penalty is imposed, its duration is undetermined; consequently it initially becomes an imprisonment for life[85]. Therefore, the uncertainty about the end of the penalty would violate the mandate of certainty included in the principle of criminal legality in article 25.1, which is based on the fact the citizen must know where he stands and know in advance the possible consequences of his actions.

The Spanish Constitutional Court, on the subject of the duration of the penalty of imprisonment for life, has given its view that "the principle of certainty is violated when the *quantum maximum* of the penalty is absolutely undetermined in the time"[86]. In this regard, in its Judgment of 7 April 1987, it established that "the fundamental right so announced incorporates the rule *nullum crimen nulla poena sine lege*, which means "no crime no punishment without a law", extending it even to the administrative sanctions law and containing a double guarantee. The first one, is material and has an absolute importance, referred to both the strictly criminal area and that of the administrative sanctions, and reflects the particular transcendence of the principle of security in the mentioned areas that restrict the individual freedom and this translates into the imperious requirement of normative predetermination of the illicit practices and of the corresponding sanctions..."[87]. This way, in the application of this doctrine, the General Council of the Judiciary, in its report for the draft bill to reform the Criminal Code, considered as "appropriate to adapt the regulation of the revisable permanent prison to the principle of legality established in the article 25.1 of the Constitution"[88].

Notwithstanding the foregoing and lastly, the main doubt about the possible unconstitutionality of the revisable permanent prison in Spain is related to the possible violation of the article 25.2 of the Spanish Constitution[89].This article is conclusive when it establishes that the penalties of deprivation of liberty must be oriented to the social re-education and reintegration of the prisoners. Therefore, any penalty that does not

84 See, among others, the Constitutional Court judgments 136/1989, of 19 July; 207/1990, of 17 December; 36/1991, of 14 February; and 45/1994, of 15 February.

85 CUERDA RIEZU, A, "Inconstitucionalidad de la prisión permanente revisable y de las penas muy largas de prisión", *Revista Jurídica Otrosí*, n. 12, 2012, p. 2.

86 Judgment 129/2006, of 24 April.

87 Judgment 42/1987, of 7 April.

88 For its part, the report approved by the General Council of the Judiciary also questions the constitutionality of the penalty I relation to the article 25.1 of the Criminal Code. Furthermore, the particular vote extends that negative aspect from a constitutional point of view to the article 25.2. Only two members, Mr. Dorado Picón and Mrs. Espejel Jorquer, did not point out problems of constitutionality.

89 The article 25.2 of the Spanish Constitution, directed to both the legislator and the prison administration, is referred to the principle of re-education and social reintegration, establishing that the "penalties of deprivation of liberty and the measures of security shall be orientated to re-education and social reintegration and shall not consist in forced labour...".

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comply with this requirement would contravene article 15 of the Criminal Code (which rejects any inhuman or degrading treatment) and would also be contrary to the dignity of the person, to the inviolable rights inherently associated to him and to the free development of the personality, enshrined in the article 10.

Leaving aside the considerations in relation to the fact that Spain ratified the Statute of the International Criminal Court and that the ECtHR has declared that life imprisonment is not contrary to the article 3 of the ECHR, as long as its regulation provides for the possibility of reviewing the conviction in order to grant a conditional release, commutation, remission or end of the penalty, the Explanatory Memorandum of the Spanish Law will justify the constitutionality of this measure when stating that "the revisable permanent prison (…) renounces by no means to the reintegration of the convict: once he has served a minimum part of the conviction, the Collegiate Court shall evaluate again the circumstances of the convict and of the offence committed and will be able to review his personal situation. The ruling of this legal periodic review, ideal for verifying in each case the necessary favourable prediction of social reintegration, removes any doubt of this penalty being inhuman since it guarantees a horizon of freedom for the convict".

The revisable permanent prison leaves the re-education and reintegration of the prisoner out of the game -since both are subject to the fact that he is "judged" again in order to be given or not the right to liberty-, after serving a part of his conviction. The Constitution bans the legislator from establishing penalties radically contrary to the social reintegration, as is the revisable permanent prison incorporated in the Spanish legislation. It can hardly be stated that the penalty to imprisonment will be oriented, while its enforcement, to the social reintegration, if a penalty to imprisonment for life that is considered desocializing -and could be avoided- has been imposed. Obviously, it is perfectly possible that -even when the conviction has been served and the social reintegration has not been achieved- the mentioned constitutional mandate would not be violated. However, a provision that openly impeded the social reintegration would violate it, as would be the legal regulation of the conviction to imprisonment for life or the revisable permanent prison, inasmuch as it does not offer to the convict solid expectations of liberty in the near future.

The observations above are therefore particularly relevant in the case of the long-term penalties since, by virtue of the limits established for the alleged commission of several crimes in article 76 of the Spanish Criminal Code, a maximum limit of serving forty years could be reached, something clearly excessive and in contradiction with the principle of reintegration. The Spanish High Court has been indicating this in several judgments[90], Here we must highlight how in some European countries like Italy or Germany the existence of the imprisonment for life is compatible with compulsory re-

90 See the following judgments:
- Judgment 7 March 1993 "…it cannot be achieved or it is very difficult the achievement of the constitutional mandate of resocialization when, depending on the circumstances, an excessive exasperation of the penalties is produced. The constitutional legality must take precedence over the ordinary one; a deprivation of liberty very superior to thirty years would be

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views of the conviction that allow an early release, which gives rise to the fact that the criticisms received are not about the possible violation of the principle of resocialization or of humanity, but rather for the confrontation with the principle of certainty or effectiveness of the penalty or with that of equality, since the effects vary depending on the prisoner's age.

The concrete examination of the legal regime of the "revisable permanent prison penalty" incorporated in the Spanish criminal legislation leads us, and in the line pointed out by the High Court, to make considerations that differ to a large extent from the justifications provided in the Explanatory Memorandum and, therefore, from the essential sense of what was declared by the ECtHR in the aforementioned jurisprudence.

We must express above all, and regarding the "re-education" in Spain, that not only have many sociological studies and others in relation to penal matters shown the objective circumstances and means -lack of officers and technical staff- that restrict it[91], in particular in cases of long-term prison sentences, but also the Council of Europe itself has shown this difficulty. It has even manifested its concern in many European countries, for the number and duration of long-term prison sentences which contribute to overcrowding in prisons and therefore affect adversely the effective and human management of the prisoners[92]. These considerations lead to the assertion that the re-education of a lifer, although it might be "reviewable", is really difficult, if not impossible, and jeopardises the constitutional precept. With this new Spanish penalty, the overcrowding in prisons, with the unavoidable consequence of a more complex re-education of the prisoners, could not be more obvious.

an inhuman treatment because of depriving of the opportunity of reintegration". In the same line, the judgment 30 January 1998, "everything that contravenes and fogs the resocialization will mean a negative aspect from the constitutional point of view".
-Judgment 24 July 200 "...the article 76 of the Criminal Code must be interpreted in relation to the article 15 and the article 25.2 of the Constitution".
-Judgment 23 January 2000 "...forty-eight years in prison is excessive; therefore it must be adjusted to the criminal humanitarianism and to the prohibition of inhuman and degrading treatment..."
-Judgment 7 March 2001 "...penalties that long (48 years in prison) are neither oriented to general prevention, nor to special prevention, therefore it must be turned to the penitentiary mechanisms in order to avoid a penalty similar to the imprisonment for life..., in particular turned to article 206 of the Prison Regulations, which allows the Assessment Board to ask the judge responsible for enforcement of sentences to process a particular pardon for the positive evolution and the change in the behaviour of the prisoner".

91 See, among others, RÍOS MARTÍN, J.: "La prisión perpetua en España. Razones de su ilegitimidad ética y de su inconstitucionalidad", op. cit., p. 150 et seq., and GONZÁLEZ SÁNCHEZ, I.: "La cárcel en España: mediciones y condiciones del encarcelamiento en el siglo XXI", *Revista de Derecho Penal y Criminología*, 3rd Period, No. 8, 2012, p. 351 et seq.

92 In particular, see the Recommendation Rec. (2003)23, concerning the management by the prison administrations of life sentence and other long-term prisoners, adopted on 9 October 2003, though, previously, the Recommendation Rec. (1999)22, concerning prison overcrowding and prison population inflation, adopted on 30 September 1999, in the section 14 states that "efforts should be made to reduce recourse to sentences involving long imprisonment, which place a heavy burden on the prison system.".

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Nevertheless, and this is even more relevant, the "socializing way" open to the convict, once he has served a "minimum" part of the sentence, is jeopardised, since neither has objective criteria been applied enough to guarantee open prison, nor does the period before it is carried out actually allow to leave a way open to resocialization. The objective circumstances referred to the suspension, achieving of the third degree, release on temporary licence and conditional release, in relation to this penalty, do not sufficiently guarantee the respect toward the constitutional principles in criminal law. There is no need to contradict this statement just because of the fact that the enforcement of other penalties in force in the Spanish legislation could sometimes be even rougher than the "revisable permanent prison penalty".

The Spanish Constitutional Court has made clear the need for the penalties of deprivation of liberty and the security measures, according to article 25.1 of the Spanish Constitution, to be oriented to the social reintegration and re-education of the convict, or more clearly, the "reintegration of the convict into society"[93], so that the social re-education that began in the prison will have the aim to "prepare the prisoner for life in liberty"[94].

The penalty of deprivation of liberty, in general, would itself hinder these aims, or at least restrict them, which would make more complex the particular preventive function that, in my view, should imply any penalty[95]. And even more, in the "revisable perma-

93 See the Constitutional Court judgment 2/2001, of 15 January. Certainly, the possibility that, after the imposition of the revisable permanent prison, the prisoner might never get out of prison, would without any doubt mean a violation of the principle set out in the article 25.2 of the Spanish Constitution –*a priori* it cannot be established a certain day in which it is considered possible this reintegration into society–. And in this sense, the European Council has acknowledged that "the execution of long-term penalties can have detrimental effects on the prisoner and his environment", requiring that the convictions are to be reviewed at the latest between 8 and 14 years of prison, in order to decide, in this case, on the conditional release, and ordering such reviews to be periodically carried out. After the examination of the legal regime established in the Spanish Criminal Code on the revisable permanent prison penalty, it is obvious that, in some way, it has followed the Recommendations of the European Council in a so transcendental topic, so that this regime will hardly be able to contribute to the social reintegration of the convicts.

94 See, among others, the Constitutional Court judgments 137/2000, of 29 May and 23/2006, of 30 January.

95 Certainly, and in the sense expressed by the professor Morillas Cueva, in the stage of enforcement of the penalties, the preventive purposes are fundamentally focused on the special prevention, although without cancelling the general-preventive effects which, as deduced from its expository, would be shown in the enforcement of actual imprisonment, which will insist on the seriousness of the legal warning for the rest of the population. See MORILLAS CUEVA, L.: *Derecho Penal. Parte General. Fundamentos conceptuales y metodológicos del Derecho Penal. Ley Penal*, Dykinson, Madrid, 2004, p. 103-104. See, as well, the formulation of the theory of unifying penalties developed by the professor C. ROXIN, in his op. *Strafrecht, Allgemeiner Teil, Band I: Grundlagen. Der Aufbau der Verbrechenslehre*. 4th edition. Verlag C. H. Beck, Munich, 2006, p. 85-95. In this sense, and as has shown the Spanish Constitutional Court, the special prevention is not the only purpose of the penalty, but it does not exclude other purposes like general prevention. See, among others, the Constitutional Court judgments 150/1991, of 4 July, 175/1997, of 27 October, and 200/1997, of 24 November.

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nent prison penalty", which actually disguises life imprisonment, although it looks constitutional, which in the end is a label fraud[96], the outcome of a political debate of the voters favoured by the request for a punitive increase towards the sense of impunity that has falsely been created using clearly defensive arguments in the preamble of the Law 1/2015[97]. The principle of resocialization leads to the enforcement of the penalty and is therefore incompatible with the sentence of imprisonment for life[98] and the right to dignity in article 10 of the Spanish Constitution and the article 3 of the ECtHR.

On the other hand, regarding the constitutionality of this measure in the German Criminal Law and in light of the fact that in this legislation there is no similar provision to the one in article 25.2 of the Spanish Constitution, it is to highlight the dictamen of the Court on life imprisonment in a murder case (§ 211, sentence 1 StGB). The content of the dictamen on this case[99] can be summarized as follows:

1. The sentence of imprisonment for life in a murder case is compatible with the Basic Law, in accordance with the following criteria.
2. According to the current state of knowledge, it cannot be established that the enforcement of a sentence of imprisonment for life –in accordance with the provisions of the Law of Criminal Execution, and taking into consideration the current practice of pardon- necessarily leads to irreparable physical or mental injuries that damage the human dignity (article1, sentence 1 of the Basic Law).
3. Among the provisions for the enforcement of a penalty within the framework of the human dignity belongs the fact that the lifers have at least one chance to be in

96 DOMINGUEZ IZQUIERDO, E. Mª. : "El nuevo sistemas de penas a la luz de las reformas". In *Estudios sobre el Código penal reformado (Leyes Orgánicas 1/2015 y 2/2015)*, MORILLAS CUEVA, L. (Dir.), Dykinson, Madrid, 2015, p. 143 et seq. See also the comments made by TAMARIT SUMALLA, J.M.: "La prisión permanente revisable". In *Comentarios a la Reforma Penal de 2015*. Quintero Olivares, G. (dir), Aranzadi, Navarra, 2015 and VIVES ANTÓN, T.S.: "La reforma penal de 2015: una valoración genérica". In *Comentarios a la reforma del Código Penal de 2015.* González Cussac, J.L. (dir), Tirant lo Blanch, Valencia, 2015.

97 About the reasons of criminal policy put forward, see MAPELLI CAFARENA, B.: "La cadena perpetua", *El Cronista del Estado Social y Democrático de Derecho*, April, 2010, p. 28 et seq.

98 As indicated by the Constitutional Court judgment of 18 May, the principle of humanity must lead the legislator to adopt penalties that take into account the dignity of the convict, avoiding cruelty and both physical and mental damage. The Constitutional Court judgment of 14 November 2008, explicitly acknowledges the incompatibility of the sentence of imprisonment for life with what is laid out in the article 15 of the Magna Carta.

99 See the judgment BVerfGE 45, 187. In this judgment, the German Federal Court clearly set out: "The history of the criminal justice clearly shows that, instead of the cruelest penalties, milder penalties have come into play. It has continued the progress from the most brutal ways of punishment to the most human ones, from the simplest ones to the most distinctive ones, in which it is recognised that there is still a long way to go", v. 45, p. 229. VAN ZYL SMIT, WEATHERBY/CREIGHTON*:* "Whole Sentences and the tide of European Human Rights Jurisprudence: What is to be done", op.cit.

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liberty again. The possibility of pardon itself is not enough; rather, the principle of the rule of law offers the provisions under which the enforcement of a sentence of imprisonment for life may be suspended, as well as in order to regulate the procedure applicable to that effect.

On the other hand, we can also find some arguments on the respect for principles of legality and the principle of respect for human dignity, in the sentence of the First Chamber, of 12 June 1977[100]. In regard to the principle of legality, we consider from the very beginning that in the field of the fight against crime, where the highest requirements of justice are ensured, article 1 (sentence 1) of the Basic Law establishes the conceptualization of the essence of the penalty and of the relationship between guilt and expiation. The principle *nulla poena sine culpa*, which means "no punishment without guilt", has the status of a constitutional principle (BVerfGE 20, 323 [331]). Every penalty must appropriately be in proportion to the gravity of the punishable offence and the guilt of the offender (BVerfGE 6, 389 [489]; 9, 167 [169]; 20, 323 [331]; 25, 269 [285 et seq.]

Regarding the mandate of respecting human dignity, this particularly means that cruel, inhuman and degrading penalties are prohibited (BVerfGE 1, 332 [348]; 6, 389[439]). The offender cannot become the mere object of a fight against crime with the violation of his rights to respect and to the constitutional protection of his social values (BVerfGE 28, 389 [391]). The basic premises of the individual and social existence of the human being are to be kept. In the article 1 (sentence 1) of the Basic Law, in relation to the social State, it is implicit the obligation of the State –and this applies in particular to the enforcement of the penalties- to guarantee a minimum of existence that ensures above all a life in conformity with human dignity. Therefore, it would be incompatible with this concept of human dignity that the State would appropriate for itself the authority to deprive people of their freedom without giving them, at least, the possibility of getting it back, since the essence of the human dignity is violated if the convict is forced to abandon any hope of getting back his liberty, regardless of the development of his personality.

However, if we thoroughly examine the complexion presented by the German legislation, the dictamen of the Federal Constitutional Court maintained, as seen above, the constitutionality in the sentence of 21 June 1997 (BVerfGE 45,187)[101] and repeatedly confirmed it afterwards (BVerfGE 72 105; BVerfG StV 1992 25; BVerfGE 86 288). If

100 See 1BvL 14/76. This sentence is declared in favour of maintaining this penalty since it considers that it is necessary to ensure the juridical conscience and the feeling of juridical security.

101 This judgment was issued after it had been filled the appeal of the Regional Court Verden 1976 980. Before that, the Federal Constitutional Court had refused to admit an appeal of unconstitutionality against the sentence of imprisonment for life according to the § 93a(3) BVerfGG. Appeal of 30 November 1976 –1 BvR 511/67–. The Federal High Court had explicitly declared constitutional the sentence of imprisonment for life in case of murder, BGH NJW 1976, 1755; see also BverfGE 45 187, 201 et seq., opinions emitted by the Federal Criminal Cassation Chamber of the Federal High Court.

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the ruling was restricted to the warning of the sentence of imprisonment for life for murder, the Federal Constitutional Court extended henceforth the principles corresponding to the warning of the sentence of imprisonment for life in other clauses[102]. The central declaration of the ruling is that the principle of the rule of law requires a "judicialization of the indulgence practised so far" for the sentence of imprisonment for life. The enforcement of a penalty worthy of the human being assumes that the convict has a concrete opportunity, and basically also feasible, to get back his liberty. The legislator must, therefore, regulate the suspension of the sentence of imprisonment for life, hence its reaction when it incorporated the § 57a and § 57b[103], which made that the sentence of imprisonment for life obtain a new qualification[104].

The German doctrine has considered that the task of the Federal Constitutional Court in relation to the legislator has been explicitly accomplished[105], on the basis of the constitutionality of the sentence of imprisonment for life in its new form[106]. *Schmidhäuser*[107] interprets the sentence of the Federal Constitutional Court and explains that the warning and imposition of the sentence of imprisonment for life is constitutional and that, however, its enforcement is in the end unconstitutional, and so moved the discussion on to other areas, mainly the system of homicide offences[108] and the clause of the gravity of the guilt, which are referred to in the 57a(1) sentence 2 No 2 and the § 57b[109].

Considering the theories about the purpose of the penalty, the rulings of the Federal Constitutional Court 45, 187, 253 provided a solid contribution, so that it declared as constitutional the "unifying theory" or "mixed" dominant and the appliance, in the individual enforcements, of all the aims integrated in the penalty[110]. It is apparent the inclination of the Federal Constitutional Court is much more in favour of the aims of prevention –and, in particular, in favour of the positive special prevention (resocialization) and the positive general prevention (reinforcement of the awareness about the law) –, as well as the approach on the understanding of the guilt (expiation), than the ones that the jurisprudence of the Federal High Court applies in the adjustment of the penalty[111]. Therefore, the Federal Constitutional Court took into account two cases in which the aggravating circumstances reveal reasons to dispense with the adjustment of

102 See HÄGER J., ult. cit. (section 17).
103 See HÄGER J., in AA.VV.: Strafgesetzbuch Leipziger Kommentar, op.cit., Berlin, p. 126 et seq. sections 18 to 26.
104 Ibidem, section 28.
105 See *Jescheck/Welgend* § 72 I 2 and 3; *Maurach/Gössel/Zipf* § 59 section 16; *Sch/Schröder/Stree* § 38 section 3.
106 See *Blel* I § 104 II; *Tröndle/Fischer* § 38 section 2a; *Lackner/Kühl* § 38 section 2.
107 JR 1978 265, 271 and Studienbuch 15/6.
108 See HÄGER J., op.cit., sections 30 to 34.
109 Ibidem, sections 18 to 25.
110 See. BVerfGE 28 264, 278 and 32 98, 109.
111 Furthermore, the Federal Constitutional Court expanded the following provisions in the area of the application of the principles of the BVerfGE 45, 187: if the sentence at hand war particularly related to the constitutionality of the penalty of imprisonment for life, the Federal Constitutional Court would immediately afterwards ratify the constitutionality of the

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the penalty, according to § 21: on the one hand, the particular reprehensible nature of the offence, in particular in its execution; on the other hand, an adjustment of the penalty is no more indispensable when the author of the offence has provoked, by his own fault, the situation of reduced guilt. There is here a connection between the Federal Constitutional Court and the Federal High Court[112].

In short, the German jurisprudence, considering in the first place that the idea of thinking over the pardon is not enough to guarantee the constitutionality of the measure, insists on the need of a regime of open prison that allows the resocialization or reintegration of the offender, given some terms that will make the measure compatible with the constitutional principles, a regime that should necessarily be regulated by law.

In any case, and we share the opinion of Morillas Cueva[113], we do not consider at all as necessary the introduction in the Spanish legislation of the "revisable permanent prison penalty", attending to political-criminal parameters, giving rise to an unjustifiable tightening of the penalties, within the framework of a negative and irrational expansionism of the criminal law. In the rest of Europe, and in particular in Germany, such tendency to tighten the penalties has currently not been found.

V. Conclusion

Regarding the article 3 of the European Convention on Human Rights, no one can be subjected to torture or inhuman or degrading penalties. Therefore, we consider that the regime of the revisable permanent prison penalty or "imprisonment for life" could, in the end and as shown in this paper, violate this article, as being out of place in the current society.

None of the provisions of the ECHR can be interpreted as restricting or damaging those fundamental human rights and freedoms that could be contemplated in the Convention, according to its article 53. Considering in the first place that, in principle, every person has the right to freedom, no one can be deprived of it, except for concrete cases established in the article 5 of the ECHR.

Just as the first article of the Protocol No. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, I consider that the revisable permanent prison penalty should also be abol-

penalty of imprisonment for life also for its warning for homicide in particularly grave cases, and for treason to the country in particularly grave cases (BVerfGE 45, 363, 370). This way, the Federal Constitutional Court laid down that the imposition of a sentence of imprisonment for life would contravene the Constitution if it were a murderer with reduced guilt, in cases particularly simple, and not when the penalty is proportional due to the considerably aggravating circumstances of the offence (BVerfGE 50 5).

112 See BGH in Dallinger Monatshirft für Deutches Recht, 1972 16 and 570; BGH, MDR 1960 938; and in relation to the development of the jurisprudence: BGH NStZ 1986 114, 115.

113 See MORILLAS CUEVA, L.: "Pena de prisión versus alternativas: una difícil convergencia", op. cit., p. 463. See also, and with similar reviews, the comments of TAMARIT SUMALLA, J.M.: "La prisión permanente revisable", op. cit. and VIVES ANTÓN, T.S.: "La reforma penal de 2015: una valoración genérica", op. cit.

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ished because it is equally degrading for the person and comparable to this one or, if anything, worse. When an individual dies he stops suffering; however, with the revisable permanent prison penalty, the suffering continues for life, which is inhuman and degrading for the convict[114].

The incorporation of the "revisable permanent prison penalty" has meant in the Spanish legislation, without any doubt, an approach to a certain retributive justice, contrary to the most modern penal tendencies in Europe, which are increasingly inclined towards the *garantismo (guaranteeism)*, based on the special prevention and the safeguarding of civil rights and liberties.

Despite the arguments put forward in favour of the introduction of the "revisable permanent prison penalty" –the particular gravity of the offences for which is provided, as well as making compatible the penal response adjusted to the gravity of the guilt, with the purpose of re-education to which shall be oriented the enforcement of the penalty of imprisonment, not constituting a "definitive" penalty- as well as despite of the fact that it shows itself as a model widespread in the European law, having considered the ECtHR, which adjusts to the ECHR, with the paramount nuances marked on the cases Vinter and Hutchinson, to which we widely refer, and the dictamen, in a similar sense and in an indirect way, of the Spanish Council of State, it does not mean that we are not faced with very debatable arguments. And in any case, it is clear the general retributive-preventive line that we are observing in the last reforms in Spain.

The possibility of applying a penalty of up to forty years and serving the full sentence in the gravest cases, provided in the article 78 of the Spanish Criminal Code, shows the lack of necessity of the revisable permanent prison, as well as the doubtful parameters of resocialization and re-education of the offender that it intends to achieve with the introduction of this penalty. In addition to not being necessary, it is unlikely to adapt itself to the parameters required by the article 25.2 of the Constitution[115].

On the contrary, and in the line followed by the other European legislations, like the French one, the German legislation, as examined in this paper, makes possible the suspension of the enforcement of the rest of the sentence of imprisonment for life, in order to grant a conditional release in a much shorter period, in particular when fifteen years of the sentence have been served and, moreover, requiring that the special gravity of the guilt of the convict does not impose the following enforcement; and, where appropriate, considering the requirements of the § 57(1) sentence 1, Nos 2 and 3. And this regulation, compared to the Spanish one, seems much more successful in order to the resocialization of the convicts. Furthermore, in the German Constitution there is

114 Along those lines, the European Committee was created, regulated in the article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Through visits, this committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.

115 See, in this sense, MORILLAS CUEVA, L.: "Pena de prisión versus alternativas: una difícil convergencia", op. cit., p. 462.

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no requirement that, in a similar way as in the article 25.2 of the Spanish Constitution, explicitly enshrines the purpose of resocialization and re-education of the penalty.

The legal regime of the revisable permanent prison penalty incorporated in the Spanish Code provides for the possible review after twenty five years, but considering the requirements for this review, it could actually turn this penalty into life imprisonment –the convict can be considered as "not suitable" for reintegration. And it is evident that, if this is so, it would openly mean an attack against the Constitution, and in particular a violation of the article 15 of the Spanish Constitution and article 3 of the ECHR; –the penalty would, in the end be, inhuman or degrading, since there does not exist a clear perspective in relation to the possibility of abandoning the prison- and above all, of the article 25.2 of the Spanish Constitution, since this penalty would be absolutely incompatible with the principle of re-education and reintegration of the people convicted to penalties of deprivation of liberty.

The introduction of this penalty turns the Spanish Criminal Code into one of the most stringent in comparison with the other European countries, among which we have referred, in particular, to Germany, despite of the fact that it might be provided just for certain "exceptional" cases. And without any doubt, the "minimum" part of imprisonment –period of safety- to be able to obtain the freedom, together with the other examined conditions or requirements –third degree and prediction of favourable reintegration–, make this penalty much more burdensome than the German "life imprisonment", which, on our understanding, can be considered as actually reviewable and in complete accordance with the principles of the preventive function of the penalty. It is more than doubtful, in a general level, the possible reintegration in Spain of the person convicted to this penalty, and always after a "minimum" period, which is indeed really long in many cases. Without any doubt, the incorporation of this penalty should have provided for enough procedural guarantees to ensure that the offenders are protected against arbitrary decisions. The current regime could lead to the statement of its unconstitutionality, in addition to meaning the violation of the article 3 of the ECHR, according to the recent doctrine of the ECtHR.

The introduction of the revisable permanent prison penalty has constituted the essential centre of the tightening of the penalties that enshrine the last reform of the Spanish Criminal Code, which, in our opinion, will neither solve any problem of the penalty regime in force until now, nor guarantee a higher level of security, required by an alleged "social alarm". The progressive evolution of the Spanish legislation toward a humanisation of the penalties, considering in the first place the article 25.2 of the Spanish Constitution, was shown in a special way in the Criminal Code of 1995, in which the essential grounds were the principles of legality, guilt and of minimal intervention[116]. From that point on, already in the reform of 2003, it started to substantially modify the political-criminal orientation, highlighting the retributive nature of the

116 See CEREZO MIR, J.: *Curso en Derecho Penal Español. Parte General I*, sixth edition, incorporated in the reforms introduced in our Criminal Code in the year 2003, Tecnos, 2004, p. 154.

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penalties, in order to, after the reform of 2010, finally introduce the "revisable permanent prison penalty" in the reform of 2015.

And we can mention here the words of the Professor Roxin, in his accurate criticism of the retributive theses, which involve an enforcement of the penalty far removed from the requirements of resocialization, when he states that: "an enforcement of the penalty that is based on the principle of the imposition of a harm cannot repair the damage in the socialization, which often constitute the cause of the commission of offences, and is not therefore an appropriate means to fight against crime"[117]. As we see it, this is what happens with the legal regime of the "revisable permanent prison penalty" introduced in the Spanish Criminal Code.

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117 See ROXIN, C.: *Derecho Penal. Parte General, Tomo I. Fundamentos. La estructura de la teoría del delito*, op. cit., p. 84, adding that "if the purpose of the Criminal Law consists in the subsidiary protection of legal goods, then, for the compliance with this purpose, it is not allowed to make use of a penalty that explicitly disregard any social purpose".

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