

THE TERMS OF DEPRIVATION OF LIBERTY AND THE PROBLEM OF PENALIZATION IN CRIMINAL LAW

Bokovnya Alexandra Yuryevna¹, Sundurov Fedor Romanovich²

¹Kazan Federal University, Faculty of Law,
Criminal law Department, e-mail: at240886@gmail.com <<mailto:at240886@gmail.com>> of ph.
89196919191

²Kazan Federal University, Faculty of Law,
Criminal law Department, e-mail: kafedra.ksu@yandex.ru of ph. 2337103

ABSTRACT

In the offered article insufficiently studied regulation problem of punishment limits in the form of imprisonment which optimality can considerably predetermine successful achievement of the punishment objectives and the solution of the corresponding tasks is investigated in the criminal legislation. It is noted that duration of punishment terms directly defines character and volume of retaliatory impact on the convict. It is emphasized that in the mechanism of criminal legal protection of the personality, societies and states in fact the predominating value has the regulation of limits of punishability for crimes. Penalization, as well as depenalisation, always acted and continue to act as the most important directions of modern criminal and legal policy which are carried out for the benefit of criminal liability and punishment differentiation. Authors recognize that both the general limits of punishability, and the limits of separate types of punishments concretized, in turn, in sanctions of norms of the Special part of the Criminal Code of the Russian Federation are provided in the criminal legislation. In their opinion, the highest limit of punishability under the Criminal Code of the Russian Federation represents lifelong imprisonment which both on duration, and in the order of appointment and to serving conditions actually acts as an exceptional measure of punishment. They are skeptical about increase in duration of punishment terms in the form of imprisonment up to 30 and 35 years according to the Federal law of May 5, 2014 No. 130-FZ as at such approach the time of imprisonment for a certain term and lifelong imprisonment is leveled. A number of offers on differentiation of lifelong imprisonment and optimization of imprisonment terms duration is proved.

Keywords: criminal legislation; crime; responsibility; sanction; punishment; punishment purposes; imprisonment; terms; lifelong imprisonment; parole.

INTRODUCTION

Punishment as expression of the criminal and legal ban, an embodiment of the retaliatory power of the state defines the nature of criminal law and its main function - the prevention of crimes commission by restoration of social justice, correction of convicts and creation of prerequisites for their resocialization.

Social effectiveness of criminal law norms finally is defined by system of those answers which the state addresses guilty of crimes commission, as well as to other persons.

In the mechanism of criminal legal protection of the personality, society and state, in fact, the predominating value has the definition of crimes punishability limits. Penalization, as well as depenalisation, always acted and continue to act as the most important directions of modern criminal and legal policy which are carried out for the benefit of criminal liability and punishment differentiation.

Punishment limits are set as at the legislative level; if the legislator defines them taking into account character and standard degree of public danger of various crimes, standard properties of the guilty

person's identity, then the law enforcement official specifies them taking into account individual essential elements of the offense, circumstances of its commission and the identity of the guilty person, but within the parts of the Criminal Code of the Russian Federation of standard punishments provided in Special and General.

MATERIALS AND METHODS

As materials for work provisions of articles 56, 57, 58 prescribing punishments in the form of imprisonment for a certain term and lifelong imprisonment, article 43 regulating the purposes of punishment, article 79 Criminal Code of the Russian Federation regulating parole from serving sentence, Resolutions and Definition of the Constitutional Court of the Russian Federation concerning non application of the death penalty in Russia, articles 36, 70, 76 CC of Spain, § 38 Criminal codes of Germany, as well as statistical data on appointment of imprisonment in the Russian Federation for the term of over ten years served.

Reliability of the received results is provided on the basis of the analysis of the considerable and necessary legislative rules massif, statistical data and jurisprudence materials, as well as use of modern research methods on legal establishments: historical and legal, logical, system and structural, comparative jurisprudence etc.

RESULTS AND DISCUSSION

From our point of view, it is necessary to distinguish the general limits of punishability and limits of specific types, terms or degree of punishments. In a number of the modern states the strictest punishment is the death penalty. In Russia, as we know, on its application the moratorium is established, at the same time it is not excluded from system of punishments. This artificially created situation demands permission at the legislative level. It is unlikely the solution of a question is found - to apply the death penalty or not - even if assigned to such authoritative body as the Constitutional Court of the Russian Federation.

The highest limit of punishability under the Criminal Code of the Russian Federation represents lifelong imprisonment which both on duration, and under the terms of serving actually acts as an exceptional measure of punishment. Also we will note that unlike other types of punishments lifelong imprisonment is not subject to individualization in process of both its appointment, and execution.

From the absolute nature of punishment in the form of lifelong imprisonment the legislator provided the only exception. According to the p. 5 of Art. 79 of the Criminal Code of the Russian Federation the person serving lifelong imprisonment can be released conditional ahead of schedule if the court recognized that the person does not need further serving of this punishment and actually has served over 25 years already. It is asked on the basis of what data the court can resolve an issue - such convict needs further serving of this punishment or not if in the Criminal and executive code of the Russian Federation lone-cell keeping of convicts, exclusively strict conditions of isolation in corrective colonies of special regime are provided without carrying out educational actions and their involvement in educational process. The only criterion of firm formation of the correction condemned on the way (we will designate thus the parole basis) is specified in the p. 5 of Art. 79 of the Criminal Code of the Russian Federation according to which the conditional early release from further serving of lifelong imprisonment is applied only at absence on behalf of the convict of malicious violations of the serving sentence established order within the previous three years. Lack of malicious violations of an established serving order for lifelong imprisonment can hardly form the basis for the comprehensive, weighed conclusion of court that the convict does not need imprisonment serving from now on.

Limits of lifelong imprisonment at parole from the serving are essentially corrected towards minimization up to 25 years. Here quite naturally there is a question - and why the legislator established the term not

less than 25 years which is subject to obligatory serving at parole? It is only possible to guess what it was guided by: whether the maximum term of imprisonment on set of crimes, whether its expediency from the point of view of such convicts vital prospects, or some other reasons. And we would suggest providing duration of the term which is subject to obligatory serving in 30 or 35 years. How is it possible to prove justice of this offer? If the legislator coordinated 25-year term to the greatest possible term of imprisonment on set of crimes which was provided in initial edition of Art. 56 of the Criminal Code of the Russian Federation, then according to the Federal law of May 5, 2014 No. 130-FZ (in a Federal Law edition of July 6, 2016) which added Art. 56 of the Criminal Code of the Russian Federation with a part fifth, now on set of some crimes it can be appointed over 25, but no more than 30 years, and on set of sentences - no more than 35 years. Let's notice that if imprisonment is appointed to this maximum term to the person aged we will tell, over 40 years, then it actually turns into lifelong imprisonment. More "perspective" from the point of survival view during such long terms of this type of punishment have the persons aged from 20 to 30 years.

It is seems to us that it is not necessary to level sides between imprisonment for a certain term and lifelong imprisonment. The last is an exceptional measure of punishment therefore also approach to its regulation has to be special. First, duration of the lifelong imprisonment term which is subject to obligatory serving at parole has to be, in our opinion, not smaller, than the greatest possible term of imprisonment for a certain term - 35 years (on set of sentences) or, at least, not less than 30 years (on set of crimes).

Besides, it is necessary to pay attention that if the person is sentenced on set of sentences to 35 years of imprisonment, the person can apply for parole in compliance with the item "d" of the p. 3 of Art. 79 of the Criminal Code of the Russian Federation after having served not less than four fifth this term, that is after 28 years while the convicts leaving lifelong imprisonment can be exempted from this punishment after 25 years. At the same time it must be kept in mind that to lifelong imprisonment are usually condemned not for one, but for many crimes, it is frequent as well on set of sentences.

Secondly, follows from the system analysis of the item "v" and "d" of the p. 3 of Art. 79 of the Criminal Code of the Russian Federation that condemned for murder of the juvenile not less than two thirds of the punishment term determined by court, and condemned for a crime against sexual integrity of the minor who did not reach 14-year age after having served not less than four fifth of the term of this punishment can be exempted from serving sentence in the form of imprisonment. From here, taking into consideration similar cases of condemnation with purpose of identical imprisonment term, say, by 15 years, then in the first case (for murder of the teenager) the convict has an opportunity to be released conditional ahead of schedule after having served 10 years, and in the second (for pedophilia) - after having served 12 years. Without wishing to underestimate a little public danger of crimes against sexual integrity of minors and especially those who did not reach 14-year age, we will note as the indisputable fact that murder of the juvenile, especially in the presence and other aggravating circumstances, is especially heavy, most dangerous crime. A conclusion about increase in duration of the imprisonment term appointed for murder under the aggravating circumstances, any person (minor, full age) which is subject to obligatory serving at parole to four fifth of the punishment term defined in a conviction of court arises. Probably, there is no need to prove obvious - murder under the aggravating circumstances, especially juvenile, is the most dangerous (after genocide) crime of all acts forbidden in norms of the Special part of the Criminal Code of the Russian Federation.

Thirdly, specifics of lifelong imprisonment, first of all, are exclusively strict conditions of isolation, the impossibility and inexpediency of holding corrective actions in the standard understanding in the penal correction system; system is reflected also in the punishment purposes; in these conditions it is impossible to provide achievement of convicts' correction goals. As the priority next purposes of punishment physical neutralization of criminal activity of convicts, safety of people and society in general act here. From

punishments regulated in the Criminal Code of the Russian Federation (the p. 2 of Art. 43) paramount are more whole at lifelong imprisonment the purposes of restoration of social justice and the prevention of commission of new crimes.

Fourthly, any differentiation of lifelong imprisonment serving conditions depending on public danger of the convicts identity and crimes committed by them is not provided in the PEC of the Russian Federation. All of them on arrival in CF of a particular treatment are located in strict conditions of serving sentence, a minimum for 10 years, and then depending on behavior can be transferred to the facilitated or strict conditions of serving sentence (Art. 127). However, whether it is necessary to carry out initial differentiation of convicts to lifelong imprisonment on two categories: especially dangerous and rather less dangerous and to provide, for example, concerning the first contents within 15-20 years on strict conditions of serving sentence.

Differentiation of lifelong imprisonment on two types is also expedient: 1) with the right for parole from serving sentence and 2) without the right for such release. Such differentiation is quite logical and expedient as to lifelong imprisonment for persons with various degree of public danger. Granting all lifelong imprisonment convicts the right for parole in a certain measure levels sides between this type of punishment as an exclusive criminal and legal measure and imprisonment for a certain term.

It is thought, such approach to a regulation of lifelong imprisonment is caused by certain distinctions in social and psychological measurement of the identity of convicts to this type of punishment, character and degree of public danger of the committed crimes. It is important, for example, if the person is convicted for the first time or is condemned for a recurrence of crimes, at mature age (35 years and older) or at rather young age when steady antisocial installation is not always fixed in the personality, this sentence for genocide, murder under the aggravating circumstances is imposed, or for the crimes which are not interfaced to murder. And even crimes of the same sort can attract absolutely various consequences, for example, infringement of life of the public figure (we recognize the high value of his life), on one hand, and the Russian President's life, on the other. In the latter case there can come very grave consequences in the form of destabilization of political, social and economic situation and even military conflict in the country. The events in Turkey connected with attempt of a coup d'etat and R. T. Erdogan's murder, which literally "blew up" the Turkish society are the most striking example.

The system of uncertain sentences is practiced in the USA, with additions of punishments on set of crimes without definition of the top limit assignment as punishment for hundred and more years or several lifelong imprisonments [1] is represented unacceptable from the point of view of social justice and in general common sense. As if traditions in the sphere of the criminal legislation were not significant, it is hardly possible to estimate such practice of the punishability accepted for the democratic states. Something can be and is necessary to borrow from USA, but only not this medieval practice.

In regulation as punishment along with lifelong imprisonment and imprisonments for a certain term there is a correlation problem (at least approximately) imprisonment durations for a certain term with lifelong imprisonment. As the general norm in the p. 2 of Art. 56 of the Criminal Code of the Russian Federation the maximum duration of imprisonment for a certain term in 20 years is established.

The possibility of imprisonment purpose on set of crimes up to 25 years, and on set of sentences up to 30 years is provided in the p. 4 of this article. Longer imprisonment terms as it was already noted, are established in the p. 5 of Art. 56 of the Criminal Code of the Russian Federation according to which in case of commission of the crimes provided by Art. 205, 205¹, 205³, 205⁴, 205⁵, the p. 3 and 4 of Art. 206, the p. 4 of Art. 211, Art. 277, 278, 279, 353, 356, 357, 358 and 360 of CC, at partial and full addition of

imprisonment terms at assignment of punishment on set of crimes the maximum term of imprisonment cannot be more than 30 years; and on set of sentences – no more than 35 years. Such increase in duration of imprisonment terms (up to 30 and 35 years) in essence in many cases washes away a border between lifelong imprisonment and imprisonment for a certain term. Let's note that among the crimes given above there are also those for which commission lifelong imprisonment (the p. 3 of Art. 205, by the p. 4 of Art. 205 is provided are specified¹, Art. 205³, Art. 277, Art. 357). Therefore in these situations there is no essential alternative between these types of imprisonment if to consider (as it was shown above) that the convict to lifelong imprisonment at parole needs to serve no less than 25 years, and sentenced to 35 years of imprisonment - not less than 26 - 28 years.

The fact that it is difficult to recognize any distinct criteria for the list of crimes provided in the p. 5 of Art. 56 of the Criminal Code of the Russian Federation attracts attention. For example, in this list infringement of life of the state or public figure (Art. 277 of the Criminal Code of the Russian Federation) is specified and at the same time in it are not included the infringement of life of the person which is carrying out justice or preliminary investigation (Art. 295 of the Criminal Code of the Russian Federation), infringement of life of the law enforcement agency employee (Art. 317 of the Criminal Code of the Russian Federation). It is thought, life and health of specified persons owing to specifics of their activity are subject to bigger danger, than, say, life and health of the deputy of legislative assembly of the certain region. If to proceed from sanctions of Art. 277, 295 and 317 of the Criminal Code of the Russian Federation, then the legislator recognizes the crimes provided in them equivalent on character and degree of public danger.

There are all bases from the point of view of social danger and relative prevalence (in comparison with the same encroachments) to include in this list the murder under the aggravating circumstances which degree of public danger is immeasurably higher than, let's say, a public justification of the armed actions referring to national release of the oppressed people.

The maximum term of imprisonment which was established in initial edition of the p. 2 and 4 of Art. 56 of the Criminal Code of the Russian Federation seems optimum to us. Increase in its duration in 2014 up to 30 and 35 years (respectively, for set of crimes and set of sentences) actually leveled a side between lifelong imprisonment and imprisonment for a certain term. On the other hand, it is not necessary to go into other extremes when imprisonment duration up to 15 years is provided, on one hand, and on the other - lifelong imprisonment. For example, in Art. 38 of the CC of Germany, is provided that "imprisonment - is temporary if the law did not provide lifelong imprisonment" (p.1). The maximum term of imprisonment is established in 15 years, and the minimum term - one month [2]. This 15-year term, from our point of view, cannot be regarded as a real alternative to lifelong imprisonment. And if to consider that convicts to imprisonment are usually released after passing of a certain term of serving sentence ahead of schedule, then the difference between these types of imprisonment becomes more than obvious. To exclude excessively big gap between them, on one hand, and on the other - not to allow their leveling on terms, it would be necessary to establish the maximum term of imprisonment to 25 years. If 15-year term in this regard seems insufficient, then 30 - 35-year term - superfluous, that is actually turns into an analog of lifelong imprisonment for the persons condemned at the age of 40 years and older.

There is also other experience of legislative regulation of imprisonment terms. So, CC of Spain does not imply punishment in the form of lifelong imprisonment. As the general rule at most of imprisonment it is established in twenty years (p.1 to Art. 36) and as an exception to thirty years (Art. 70, 76) [3].

The problem of efficiency of long imprisonment terms has to be considered proceeding from priorities of social installations of punishment; if the legislator his prime purpose recognizes neutralization of criminal activity of the convict and the prevention of new crimes commission, his aspiration to increase

imprisonment term duration (up to 35 years at set of sentences, besides if to consider that in these cases at departure by the convict of some part of punishment on the previous sentence, the term of imprisonment can exceed 40 - 45 years) seems quite logical and if he (legislator) takes into account first of all interests of the convict correction, his resocialization, his timely return amid the law-abiding citizens, in that case practice of a regulation of excessively long imprisonment terms has to be unacceptable.

Absolutely maximum limit of punishment in the Russian criminal legislation represents lifelong imprisonment which is appointed to the persons who committed during serving of lifelong imprisonment new serious crime as they, unlike other convicts, are not subject to parole.

As in more than 80% of sanctions in the Special part of the Criminal Code of the Russian Federation punishment in the form of imprisonment for a certain term (and lifelong imprisonment - only in 9 sanctions), main "loading" in counteraction to crimes, first of all, heavy is prescribed and especially heavy, it is the share of imprisonment for a certain term. And at the same time it is appointed to more than one third of all persons brought to trial. Therefore here, in our opinion, it is important not "to force retaliatory psychosis" in the criminal legislation including by excessive lengthening of this punishment term duration, and to provide, whenever possible, harmonious combination of social justice restoration interests, convicts correction, their resocialization and the prevention of crimes commission by condemned, as well as other persons. Jurisprudence which not always realizes the increased retaliatory claims of the legislator is characteristic in this regard; for example, even before increase in duration of imprisonment terms up to 30 and 35 years, respectively, on set of crimes and set of sentences courts appointed less than 1,0% of convicts to imprisonment for the term over 15 years. The percent of condemned to the punishment over 10 up to 15 years - within 2,5 - 3% - is rather low.

In essence in this case we deal with adjustment by jurisprudence of separate provisions of the law without its formal violation (however, contrary to its spirit and motives of the legislator). We should not hurry with criticism of such situation, in our opinion. If laws are adopted on the basis of conclusions of several hundred people, that is deputies of the State Duma, members of the Federation Council, members of the government, the Russian President and the staff of his administration who as a rule have predictive character, and at times are not deprived of conjuncturally - emotional character (see "lawmaking" in connection with confiscation of property, slander, etc.), then tendencies or trends, as now it is fashionable to speak, in jurisprudence are formed by law-enforcement activity of tens of thousands federal, magistrates, other participants of criminal trial, law enforcement officers, that is, as they say, by the life, so to speak, law-making of masses and social practice in general are defined.

Of course, the legislator can and has to bring in case of need various innovations in the legislation including directed to strengthening of criminal liability for heavy and especially serious crimes. At the same time he has to proceed from this whether the potential of the operating precepts of law is realized completely. It seems to us that at increase in duration of imprisonment terms up to 30 and 35 years on set of some crimes and on set of sentences the legislator ignored the steady tendency in jurisprudence directed to abstention from groundless purpose of long imprisonment terms. It is characteristic that among convicts to imprisonment the majority is made by the persons who committed heavy or especially serious crimes, at the same time, as it is noted above, rather long imprisonment terms are appointed no more than 4 - 5% of convicts.

CONCLUSIONS

Duration of punishment terms in the form of imprisonment directly defines character and volume of retaliatory impact on convicts.

There are provided in the Criminal Code of the Russian Federation: 1) general limits of punishability; 2) limits of separate types of punishments; 3) limits of the sanctions provided for commission of specific types of crimes.

Increase in duration of imprisonment up to 30 and 35 years, respectively, on set of crimes and on set of sentences seems excessive from the point of view of the punishment purposes declared in the law as well as because at such approach the side between imprisonment for a certain term and lifelong imprisonment is leveled. To exclude a big gap between them and at the same time not to allow their leveling on terms, it would be necessary to establish the maximum term of imprisonment to 25 years.

Differentiation in the Criminal Code of the Russian Federation of lifelong imprisonment on two types seems expedient: 1) with the right for parole from serving sentence and 2) without the right for such release depending on character and degree of public danger of a crime, circumstances of its commission and the identity of the guilty person.

SUMMARY

By results of work it is possible to conclude that imprisonment as a type of criminal penalty in system of a penalization holds a specific place as it is accompanied by deprivation of the convict of personal liberty, his isolation in penitential (corrective) establishment, it is provided in the majority of criminal and legal sanctions and it is rather often appointed guilty of crimes commission. At the heart of a penalization and depenalisation as a rule there are problems of duration determination for imprisonment terms, its ratio with other types of punishments, as well as with other measures of criminal and legal character. These main directions of criminal and legal policy assume not immensely increase in duration of imprisonment, but establishment of its differentiated limits depending on crimes severity and the identity of guilty persons, as well as determination of its terms in the context of achievement of the social justice restoration objectives, correction of the convict and the prevention of new crimes commission.

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