ПРАВО

Controversial aspects of imprisonment in different penal systems

Abrahamyan Roza A.
Lecturer at the Chair of Criminal Law of YSU (Yerevan, RA)
https://orcid.org/0000-0002-1218-5298
rozaabrahamyan@gmail.com

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Պատժի տարբեր համակարգերում ազատազրկում պատժատեսակի հակասական կողմերը

Աբրահամյան Ռոզա Ա.
ԵՊՀ քրեական իրավունքի ամբիոնի դասախոս (Երևան, ՀՀ)

Ամփոփագիր. Հոդվածը նվիրված է ազատազրկման ձևով նշանակված պատժի կատարման նոր մոտեցումներին, որոնք տեղ են գտել առաջադեմ իրավական համակարգեր ունեցող երկրներում: Իսկ արված հետևությունները կարող են ելակետ և կողմնորոշիչ ծառայել քրեական պատիժների կատարման տարբերակման և անհատականացման սկզբունքի իրականացման խնդիրների վերաբերյալ հետագա ուսումնասիրությունների համար:
Հանգուցաբառեր և բառակապակցություններ՝ պատիժ, անհատականացում, ազատազրկում, դատավճիռ, պատժի կատարում

Спорные аспекты лишения свободы в различных пенитенциарных системах

Абраамян Роза А.
Преподаватель кафедры уголовного права
Ереванский государственный университет (Ереван, РА)

Аннотация: Статья посвящена новым подходам к исполнению наказаний в виде лишения свободы, которые имели место в странах с развитыми правовыми системами. Сделанные выводы могут служить отправной точкой и ориентиром для дальнейших исследований по вопросам дифференциации и реализации принципа индивидуализации при исполнении уголовных наказаний.
Ключевые слова и словосочетания: наказание, персонализация, лишение свободы, приговор, исполнение приговора

Introduction. There are numerous problems with which those who defend the notion of right forfeiture in the penal context must contend. First, they have to explain whether all convicted offenders forfeit their basic rights, or if only some do perhaps those convicted of serious crimes, however those are defined. It will not be easy to draw this line. If failing to shoulder the responsibilities correlated with rights is the ground for right forfeiture, then minor offenders do this as well as those who commit more serious offenses. Second, forfeiture accounts must address the questions of whether convicted offenders lose all of their basic rights, or only some of them, and which ones. Most forfeiture theorists lean toward the latter kind of account, with some suggesting that offenders forfeit all and only the basic rights that they, through their crimes, violated [**1**].

One further point should be made. Even if we had the empirical information regarding how various possible sentence types and ranges would impact crime reduction in its different modes, including the costs and negative consequences of those types and ranges, the task of processing all of that information so as to yield an optimal sentence range for a single crime type, let alone for all of them, would be formidable, to say the least. The crime reduction approach to legal punishment is typically conceived in rather ambitious terms. Accordingly, it is not enough to locate sentence ranges for the various crime types that will produce some net reduction in crime, taking into account the worrisome fact that the effect of some penal sanctions appears to be to increase it. Preventionism is standardly cast as a maximizing or optimizing project, according to which we should strive to identify sentence ranges for crime types that produce the highest levels of good consequences

while minimizing bad ones, taking into account all of the available sentencing options. Arguably, such a project is beyond our ken. We might hope that forms of artificial intelligence will be devised to help us weigh and process all of the information that would be needed to accomplish this task, but it seems safe to say that it will be some time before we can reasonably expect to have anything approaching a systematic and well-grounded sentencing scheme designed to optimally reduce crime [**2**].

Research. The term "system of executing the penalty of imprisonment" in a broader sense is synonymous with the concept of "penitentiary system" and means the entirety of regulations, institutions, measures and principles of their application, which serve to implement the tasks assigned to the penalty of imprisonment. By providing for three separate systems of executing the penalty of imprisonment within the penitentiary system. The individualization of the execution of the sentence of imprisonment, which includes, among other things, the transfer of convicts to different penal institutions, was considered one of the basic principles of the European penitentiary system both in the interwar period [**3**] and during the work on the 1969 Penal Code, [**4**] although over time the types of penal institutions and the criteria for the classification of convicts changed.

Under the conditions of the independence of the Republic of Armenia, under the influence of the democratization of public life and the adoption of a full-fledged legal concept of human rights, one of the directions of deep legal reforms taking place was the revision of penal policy and legislative reforms. In this context, on December 24, 2004, the Penal Code of the Republic of Armenia was adopted, which, from the point of view of the subject of this research, was an obvious achievement: for the first time, the principles of penal legislation were fixed at the normative-legislative level, which until then were only a research material for the science of penal law, but not the subject of legislative regulation.

The analysis of the legal technique of legislative fixation of the principles of penal legislation gives grounds to conclude that the Penal Code of the Republic of Armenia had certain legal-technical and substantive advantages over the eponymous 1996 law of the Russian Federation. compared to the adopted Code. If the Penal Code of the Russian Federation only listed the principles of penal legislation in Article 8, then the 2004 Penal Code of the Republic of Armenia, listing these principles in Article 5 (humanity, legality, equality of convicts before the law, differentiation and individualization of the execution of sentences, combination of sentences and correctional measures), at the same time enshrined the legal content or normative requirements of these principles in the following Articles 6-10 of the Code.

The new Penal Code of the Republic of Armenia, adopted on June 15, 2022, improved the legal technique of enshrining the principles of penal law and legal regulation in penal legislation, first of all, by dedicating a separate Chapter 2 to the regulation of these relations, Articles 5-8 of which enshrine, respectively, the legal content of the following legal principles: humanity, equality of convicts before the law and prohibition of discrimination, differentiation and individualization of the application of punishments and other means of criminal legal influence, proportionality and suitability of the application of the main means of resocialization of the convict and formation of law-abiding behavior.

Thus, we can conclude that the tendencies of formation and legislative enshrining of the principles of differentiation and individualization of punishments as a form of penal activity give grounds to conclude that in the process of defining and applying deprivation of liberty as a type of punishment in the Ancient and Middle Ages, episodic manifestations of differentiation and individualization, unique facts are observed. However, they are turning into the principles characteristic of penitentiary policy in the modern era.

From the point of view of the issue at hand, a comparative analysis of the two codes shows that their difference is not limited to the difference in the technique of legislative fixation of the principles of penitentiary legislation, but there are also substantive differences, in particular, in the scope of the principles, literal names (transliterations), as well as legal content. In particular, if in 2004. The Penitentiary Code called the principle of interest to us “differentiation and individualization of the execution of punishment” (Article 9), then in 2022. The Penitentiary Code renamed it “Differentiation and individualization of the execution of punishments and the application of other means of criminal law influence”. Moreover, not only the transliteration of the principle (Article 7) has changed, but also the content itself.

The 1969 Penal Code, which was the first codification of the penal code in Poland, apart from the division of penal institutions, provided for various rigors of execution of the sentence of imprisonment. Based on Article 40 of this Code, the sentence of imprisonment was executed according to the basic, mitigated or increased rigor. The rigor of execution of the sentence determined the scope of duties imposed on the convict and the rights granted

to him in relation to the freedom of movement within the premises of the penal institution, the amount of his share of the payment for work, communication with persons from outside, purchase of common use items or the application of specific disciplinary penalties.

The differentiation of the rigors of the execution of the prison sentence resulted in the gradation of its severity. According to S. Pawela, the tightening or mitigation of the severity of the prison sentence in relation to certain categories of convicts served to rationally individualise the punishment and aimed to create the best possible conditions for penitentiary action. The concept of gradation of the severity of the executed prison sentence by maintaining different rigours for different groups of convicts gained popularity in the 1960s in the context of combating recidivism. As J. Górski explains, the high percentage of recidivists in the prison population prompted the authorities at that time to seek more effective ways of limiting recidivism. At that time, the possibility of limiting recidivism was seen in increasing the severity of the prison sentence executed against perpetrators who repeatedly returned to crime. Increasing the severity of the executed sentence was also to apply to perpetrators of economic crimes and criminal offences considered dangerous to society.

This approach to reducing recidivism and combating crime considered particularly serious was reflected in the 1966 regulations on the execution of imprisonment, which was "a fulfillment of the expectations of those who saw repression as a fundamental measure that could deter dangerous and incorrigible criminals from criminal activity." The varied rigors of executing imprisonment provided for in the 1969 Code of Execution of Penalties were a continuation of this concept of combating and reducing crime [**5**]. During the period in which this Code was in force, the importance of the principle of unity of substantive and executive criminal law was emphasized, which was sought as a justification for imposing severe penalties on certain categories of criminals to be accompanied by strict conditions for their execution. Since its entry into force, the 1997 Executive Penal Code has been amended several times. However, when it comes to the provisions regulating the execution of imprisonment in three different systems, the changes introduced were limited in nature and did not violate the fundamental concept developed during the work on this code. A detailed analysis of the principles of execution of imprisonment in three different systems within the framework of this article is not possible, but it is also not necessary to indicate several of the most controversial aspects of the adopted solutions.

The therapeutic system of execution of imprisonment, similarly to the one provided for in the 1997 Executive Penal Code in its original wording, is still intended for convicts who, due to physical disability, non-psychotic mental disorders26, mental retardation, addiction to alcohol or other narcotic or psychotropic substances, require specialist treatment, especially psychological, medical or rehabilitation care (Article 96 § 1 of the Executive Penal Code). Referring a convict to a therapeutic system of execution of punishment does not require his consent. Treatment and rehabilitation of a convict generally require their consent, but Article 117 of the Executive Penal Code provides for exceptions to this rule. They apply to convicts diagnosed with addiction to alcohol, narcotics or psychotropic substances, as well as those convicted of sexual offences listed in this provision committed in connection with sexual preference disorders. In the case of these convicts, in the absence of their consent, the penitentiary court rules on the application of treatment or rehabilitation. In the Executive Penal Code of 1997, the legislator abandoned the idea of separating prisons for convicts requiring specialist treatment, in particular psychological, medical or rehabilitation care. In the original wording of this code, it also did not specify whether the execution of a sentence of imprisonment in the therapeutic system should be carried out on the premises of each prison or only in separate departments established specifically for this purpose.

Convicts serving a sentence of imprisonment in the ordinary system may take advantage of the employment, education, cultural, educational and sports activities available in the prison (Article 98 of the Penal Code). Similarly to convicts serving a sentence in the programmed impact system, those serving a sentence in the ordinary system are also obliged to work (Article 116 § 1 item 4 of the Penal Code) and priority in providing them with work if they are obliged to pay maintenance or have a particularly difficult financial, personal or family situation (Article 122 § 2 of the Penal Code). Undertaking education in a prison is the obligation of a convict who has not reached the age of 18. Convicts who have not reached the age of 18 belong to the group of juveniles who, with few exceptions, serve a sentence of imprisonment in the programmed impact system. As for adult convicts, they are not required to study, but both those serving sentences in the programmed impact system and those serving sentences in the regular system can benefit from the education available in prison. According to Article 130 § 3 of the Criminal Code, priority in obtaining the opportunity to receive education in a post-primary school (secondary

school) and in vocational courses is given not only to convicts who have not reached the age of 21, but also to those who have not learned a profession or will not be able to practice it after serving their sentence. Serving a sentence of imprisonment in the regular system not only does not exclude participation in education conducted in prison, but also does not eliminate priority in classifying convicts for education if they meet the appropriate conditions. It should be added that maintaining ties with family and other close persons, education, self-education and pursuing one's own creative work as well as using cultural, educational and sports facilities and activities are among the rights of convicted persons, which they are entitled to regardless of the system of execution of the prison sentence (Article 102 of the Executive Penal Code).

The abandonment of the differentiated rigors of executing the sentence of imprisonment, which was treated as an instrument of increasing the severity of the punishment executed against perpetrators considered in a specific political context as incorrigible and dangerous, was justified due to the ineffectiveness of such solutions in reducing recidivism and their contradiction with international standards of executing the sentence of imprisonment. In contemporary penology, the unquestionable principle of the treatment of persons deprived of liberty is the principle of necessity and proportionality of restrictions imposed on prisoners. It is expressed, among others, in the European Prison Rules45, which provide that restrictions imposed on persons deprived of liberty are limited to the necessary minimum and proportionate to the legitimate aim for which they were imposed (rule 3). In the light of this document, life in prison is as close as possible to the positive aspects of life in society (rule 5). The legitimate purpose of imposing necessary restrictions on prisoners may be to implement such prison staff tasks as ensuring the execution of the imposed sentence of imprisonment and the imposed pre-trial detention, facilitating the social integration of prisoners after leaving prison, protecting society from perpetrators deprived of liberty by preventing their escape from prison or ensuring safety and orderly life inside prison.46 However, restrictions cannot be legitimised by the pursuit of the justice objective of the sentence of imprisonment, taken into account at the stage of its imposition, because during the execution of the imposed sentence it is achieved by the deprivation of liberty itself. Tightening the prison regime beyond what is necessary and proportionate to the legitimate objective in order to increase the subjectively felt hardship of the sentence served by certain categories of prisoners cannot be reconciled with contemporary standards of treatment of prisoners.47 Although the need to eliminate the rigours of the execution of the sentence of imprisonment provided for in the previous Code of Execution of Criminal Sentences of 1969 is beyond doubt, it does not mean that it was necessary to introduce different systems of executing this sentence in their place. One of the reasons for introducing different systems of executing sentences of imprisonment was the desire to reject the requirement of resocialisation, motivated by respect for the rights of convicts and their subjectivity. However, the principle of respect for the rights of convicts and their subjectivity does not exclude the preparation of a plan for the execution of a sentence of imprisonment for a convict who is not interested in participating in its construction. This results, for example, from the European Prison Rules, which it is difficult to deny that they attach due importance to the protection of the rights of convicts and their subjectivity. According to rule 103.3, convicts are encouraged to participate in the preparation of an individual plan for the execution of a sentence, but such a plan is prepared for a convict who is starting to serve a sentence even if he does not want to participate in it. The only limitation in this respect is the length of the sentence being served; there is no need to plan the execution of the sentence for convicts serving very short sentences. With the exception of those serving very short sentences, an individual plan for the execution of a sentence of imprisonment based on a comprehensive diagnosis of the convict allows for the best possible use of influence measures and programmes, such as employment, education, other types of activities, medical and psychological interventions and furloughs. Convicts who refused to participate in the preparation of such a plan should be motivated to implement it after being presented with a plan developed by the prison administration [**6**].

In Polish prisons, a large percentage of convicts serve sentences of up to one year of imprisonment. In the case of such convicts, preparing a plan for the execution of the prison sentence does not seem advisable due to the fact that the length of their stay in prison does not allow for the development and implementation of a plan covering participation in structured programmes. It would be more advisable to develop a plan for preparing them for release soon after they begin serving their prison sentence. An element of such a plan based on diagnosing the convict should be to make him aware of the problem areas that contribute to recidivism, to motivate him to change in this area and to indicate the possibilities of obtaining help and support in efforts aimed at change also after release from prison. Preparing the convict for release should take into account planning the obligations imposed on him

during the probation period during the conditional early release period, but this requires changing the nature of this institution. Discretionary and therefore unpredictable conditional early release makes it difficult to prepare the convict for release and to plan the impact on the probation period. In the work on the reform of the executive criminal law, the postulate of preparing a plan for the execution of the prison sentence - with or without the participation of the convict - for each perpetrator serving a prison sentence of more than one year should be considered. The sentence execution plan should include measures that are important for maintaining and developing the resources of the convict (employment, improving professional qualifications, furloughs) and corrective interventions aimed at eliminating and limiting the problem areas diagnosed in them, such as addictions, lack of social skills, impulsiveness, aggressiveness, criminal thinking styles or pro-criminal attitudes. Motivating convicts to participate in activities implemented in an appropriate sequence should also take place by indicating to them the real impact that their decisions in this area will have on the scope of their rights and obligations during the sentence and the prospect of obtaining conditional early release on specific conditions. The plan for the execution of the prison sentence should also include placing the convict in a therapeutic ward due to the need to protect his health or enabling participation in structured, professional therapeutic programs adequate to the diagnosed problem areas.

Conclusion. According to desert retributivism, the primary reason why we should set up and operate institutions of legal punishment in society is to see to that those who are convicted of violating defensible criminal prohibitions receive the punishment that they deserve. As Mitchell Berman has shown, it is possible to water down the retributive element so that it plays only a modest justificatory role [**7**].

On such an account, the negative deserts of individuals convicted of crimes give us reason to inflict sanctions on them if no other purposes are served by doing so. However, my sense is that most penal theorists who defend desert retributivism have something more robust in mind—namely, that giving those convicted of crimes the punishment they deserve is a reason, and usually a strong reason, for setting up and administering institutions of legal punishment, not simply a residual reason for punishing the deserving in particular cases. Indeed, Michael Moore has suggested that the strength of the reasons negative desert provides is such that we have a duty to do see to it that the deserving are punished [**8**].

Yet, even if we do not go this far, it is fair to say that most desert retributivists are “immodest,” in that they interpret negative deserts as supplying necessary and sufficient reasons for having and operating institutions of legal punishment. Pursuant to this, societies should make concerted efforts both to avoid punishment of the nondeserving and to see to it that the deserving are visited with sanctions proportional with the seriousness of their crimes. Crime seriousness is standardly understood in terms of the harms done, risked, or threatened by the various types of offenses and the culpability with which those who inflict, risk, or threaten such harms acted [**9**].

Observation of penitentiary practice suggests that, at least to some extent, increasing the percentage of convicts serving sentences in therapeutic and programmed impact systems has become a goal in itself. The increase in the percentage of convicts serving sentences in these systems is sometimes treated as an indicator of the success of the prison system, while the issues of the quality of the impacts and their effectiveness in reducing recurrent crime are omitted. In discussions on the reform of penitentiary policy, one of the initial issues should be a scientific assessment of whether, and to what extent, the functioning of three different systems of executing the sentence of imprisonment affects the implementation of the individual preventive goal of executing this sentence.

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