ON THE QUESTION OF THE LIMITS OF JUDICIAL DISCRETION IN ADJUSTING THE NON-PENITENTIARY REGIME OF RESTRICTION OF FREEDOM AND SUSPENDED SENTENCE

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ABSTRACT

The purpose of the Art is to take into account the personal characteristics of convicts and individual criminological forecast of their behavior to develop the most optimal regime for the application of restrictions and obligations to supervised persons, in order to reduce the penalty and post-penalty criminological recidivism. The leading research method was a statistical method, which revealed the data on criminological recidivism on the part of prisoners sentenced to the restriction of freedom and suspended sentence. Taking into account the data on criminological recidivism among certain categories of convicts, the paper proposes recommendations to the current explanation of the Plenum of the Supreme Court of the Russian Federation to optimize the activities of the court and criminal executive inspections.

Keywords: judicial discretion, a convict, the restriction of freedom, a suspended sentence.

1.INTRODUCTION

According to the current Criminal Executive Code of the Russian Federation, the court is vested with the function of monitoring the execution of sentences. However, the legislative consolidation of this provision has not stimulated any active discussion in the direction. Thus, some authors are right in claiming that “in numerous scientific works devoted to judicial control in criminal proceedings, the activities of the court to resolve issues related to the execution of the sentence are ignored” (Nikolyuk, 2006). But the importance of these aspects for science and practice is difficult to overestimate. So, P.V.

Teplyashin (2010) reasonably points out that "the constitutional provisions on the recognition of the highest value for the state and society of rights and freedoms of the human and the citizen stipulate the obligation of the courts to ensure the observance and protection of the rights and freedoms of persons serving criminal sentences. It is the judicial component that occupies a special place in the mechanism of ensuring the legal status of convicts" (Teplyashin, 2010). The proposals to improve the legal regulation of the analyzed sphere come as a natural result of their consideration of the problematic issues. Some of them certainly deserve attention and will be appreciated later. Thus, V.V. Nikolyuk points to the need to harmonize the texts of Art.397 of the Criminal Procedure Code and part 1 of Art.20 of the Criminal Code. Other researchers consider it expedient to adopt the law "On control over the activities of institutions and bodies executing punishments" (Teplyashin, 2010; Grishko, 2007; Kolokolov et al., 2008). Addressing the issues of the convicts' legal status, V.A. Utkin (2018) emphasizes the importance of judicial control and proposes to amend part 4 of Art.10 of the Criminal Enforcement Code of the Russian Federation as follows, "The rights and obligations of the convicts are determined by the Code and other legislation of the Russian Federation, are specified by other law-relevant regulatory legal and law enforcement acts in terms of order and conditions of serving the punishment, and of other criminal and legal measures" (Utkin, 2018). Therefore, judicial discretion in the implementation of punishments without isolation from society is an important part of the law enforcement process, and we should consider it in more detail. When judicial discretion is talked about in the legal literature, it is stated to be determined by a set of objective factors, namely, "a) the dynamism of the conditions of existence of society; b) the inability to ensure compliance between the certainty of law and the infinite variety of life phenomena; c) the impossibility of creating a universal legal prescription suitable for resolving all special cases of a legal situation of a certain type, i.e. the firm formulation of all the structural elements of the norm; d) the technical and legal imperfection of many rules, making it impossible to apply them without judicial interpretation" (Rarog, 2003). In this regard, the authors analyze the concept in question, formulating their own definitions and revealing the features. So, according to D.A. Parkhomenko (2015), discretion in the criminal law is "the activities of the competent authority which are based on the norms of the criminal law and evaluate the circumstances of the case in the context of their criminal and law settlement, having as its result a decision within the limits established by law in respect of a person who committed an act containing elements of a specific crime, with its appropriate criminal procedural execution" (Parkhomenko, 2015). The author further notes that "discretion in the criminal law is feasible at all stages of the mechanism of criminal law regulation and protection.... and identifies three stages in its development: 1) from the time of the crime until the entry of the conviction into legal force; 2) from the date of entry of the conviction into legal force until the moment of serving a punishment imposed by a court or release from punishment; 3) from the time of serving a punishment imposed by a court (or release from punishment) until repayment or withdrawal of criminal record" (Parkhomenko, 2015). The discretion in the implementation of the criminal law can be discussed as well in the context of execution of criminal legal measures (Parkhomenko, 2015). While we agree with the author in many respects, it is necessary to focus attention on some shortcomings of this position.

First, the author limits the definition of discretion to the act, its criminal and legal assessment. However, he notes that the discretion also takes place after a sentence is

passed up to the expiration or withdrawal of a criminal record. Secondly, it is not fully possible to agree that during the period of serving a sentence, there should be a question of discretion in the criminal law. T.G. Antonov (2009) rightly notes that in these cases it is necessary to talk about responsibility in the criminal executive law. The Criminal Code of the Russian Federation provides for types of punishments and other measures of a criminal and legal nature for committing crimes, and their implementation is defined in the Criminal Executive Code of the Russian Federation. Thus, in part 2 of Art.1 of the Criminal Code of the Russian Federation, the tasks of the criminal executive legislation include the need to regulate the order and conditions of executing and serving a punishment, determining the means of correction of convicts... This allows us to talk about the discretion in the criminal executive law as regards the execution of punishments and other measures of a criminal legal nature. Moreover, it is emphasized that the implementation of a significant number of rights and legitimate interests of convicts depends on judicial and administrative discretion (Grishko, 2014; Nesterov, 2012; Nesterov, 2015). In this regard, it is logical that there are studies of evaluation categories in the criminal executive law (Antonyan, 2016; Lackeev, 1991; Utkin, 2008).

2.METHODOLOGICAL FRAMEWORK

2.1.Research Methods

The research is based on the following methods: logical, systematic, statistical, dialectical, historical, logical and juridical, sociological.

2.2.Empirical Basis of the Research

The main conclusions and proposals developed during the study are based on the statistics on the courts of the Krasnoyarsk territory, Kemerovo, Tomsk, Novosibirsk and Irkutsk regions for the period 2011-2018; the data from the Federal Penitentiary Service of Russia, the Ministry of Internal Affairs of the Russian Federation, sentences and other decisions of the courts of the Krasnoyarsk territory, Kemerovo, Tomsk, Novosibirsk and Irkutsk regions (a total of 832 decisions), kept in the archives, and placed at the portal "Litigation and Regulatory Acts of the Russian Federation". In addition, the research is based on the results of the study of 438 personal records of convicts under the restriction of freedom, serving or having served a sentence in the Krasnoyarsk territory in the period of 2010-2018, as well as 398 personal records of those under suspended sentence.

2.3.Research Stages

The research of the identified problems was carried out in three stages.

At the first stage, the theoretical positions were analyzed as to the sphere of judicial discretion in criminal and criminal executive law, as well as the execution of penalties not related to isolation from society; the problems, goals and methods of the research were highlighted.

Secondly, we carried out a criminological analysis on the functioning of the non-penitentiary regime of restriction of freedom and a probation period during the suspended sentence; we examined personal characteristics of convicted persons

registered in the criminal executive inspections, distinguished groups of convicts in need of more serious control on the part of the court and the criminal executive inspections. During the third stage, the findings of the research were studied and systematized, recommendations to optimize the application of restrictions and obligations to certain groups of convicts were made to courts.

3.RESULTS

Taking into account the criminological information given in the study it is recommended to provide item 16[1] in the resolution of the Plenum of the Supreme Court of the Russian Federation of December 22, 2015 No. 58 "On practice of sentencing by courts of the Russian Federation", and state it as follows, "in case of violation of the order and conditions of serving the restriction of freedom on the part of the convicts serving the punishment under articles 158, 166, 228 of the Criminal Code, additional restrictions are applied to them, except for the cases when the establishment of these restrictions interferes with the convicts' employment or admission to the studies, normal labor or educational activities, or supervision of relatives and friends." Also, it is necessary to provide item 162 formulating it the following way, "If the convict commits an administrative offence or leaves the place of permanent residence (stay) at night, he is forbidden to leave the dwelling at a certain part of the day, except for the cases specified under item 161." Restriction of freedom can be replaced under part 5 of Art.53 of the Criminal Code for those convicted of crimes related to drug trafficking, theft, car theft, in case they do not work, do not study, abuse alcohol, suffer from alcohol or drug addiction, and do not provide for the family." Moreover, item 17 of this resolution needs to be completed with the following statement, "If those convicted of crimes against property while under suspended sentence violate the order and conditions during the probation period, additional restrictions and duties are applied to them, except for the cases when the establishment of these restrictions interferes with the convicts' employment or admission to the studies, normal labor or educational activities, or supervision of relatives and friends." A suspended sentence can be cancelled in respect of those convicted of crimes against property (thefts, burglaries, robberies) if they maliciously evade serving it, provided they do not work, do not study, abuse alcoholic beverages, suffer from drug or toxic dependence, and are not married."

4.DISCUSSIONS

Since this topic is considered by modern scientists and certain options for optimizing the current legislation in this area are proposed, it seems that it is advisable to turn to the historical experience. As the judicial discretion did take place during the Soviet period of development of our state, it is relevant to pay attention to legislative designs of the previous years. Thus, Art.42 of the Criminal Code of the RSFSR (1926) stipulated that "a fine is a monetary penalty imposed by the court within the limits stated by certain articles of the Code, and applying it as an additional measure is at the discretion of the court." When determining the fine, in case of non-payment the court may decide to replace it with forced labor without imprisonment at the rate of one hundred rubles of the fine per one month of forced labor. Replacement of a fine by imprisonment and imprisonment by a fine is not allowed. Thus, the legislative constructions assuming judicial discretion were present in the Criminal Code of the

RSFSR of 1926. Undoubtedly, they were few, but this is due to the fact that the system of punishment without imprisonment was not so diverse, though the presence of certain discretionary powers of judges is difficult to deny. But, nevertheless, more interesting from this standpoint is the analysis of the Corrective Labour Code of the RSFSR of 1933. It has got Section I, called the Corrective Labour Without Deprivation of Freedom. Art. 9 of the CLC of the RSFSR contains rules that imply a certain discretion of the court in matters relating to the execution of the sentence. So, in Art. 9 of the CLC of the RSFSR it is fixed that the corrective labour appointed for a period of up to six months concerning the persons who are employed on a full-time basis is served by them, as a rule, in their workplace. In exceptional cases the court may decide to send these persons to the work organized by the corrective labour institutions. Corrective labor imposed by the court for a period of more than six months on persons who are employed full-time is served depending on the verdict of the court, either in their workplace, or at work organized by corrective labor bodies. Corrective labor is served by collective farmers sentenced to up to six months in their collective farms; those convicted for a term of six months and more work outside the collective farm at the discretion of corrective labor authorities. The court has the right in some cases to allow deviations from this order. The analysis of this norm allows to state that the court had the right to establish a type of work as well as a place for the convict to labour. The rules which contain discretion were also enshrined in Art.109 of the CLC of the RSFSR, "In case of a malicious evasion from serving corrective labor, a corrective labor institution puts a question before the people's court, according to the place for the enforcement of the verdict, to replace exile with imprisonment." It is also noteworthy that in this document there is Section IV, the content of which assumes that supervisory commissions had a number of powers that nowadays are attributed to the exclusive competence of the court. Specifically, they include: the right to parole, the decision to replace the punishment with a more severe one in the manner prescribed by law (Art.115), etc. Thus, it can be stated that the judicial discretion at that time was extensive, but a number of judicial powers belonged to other subjects as well. The next document that we will analyze is the Criminal Code of the RSFSR of 1960. Art. 21 of this document provides for eleven types of punishments that could be applied to criminals. Moreover, Art. 23 includes the death penalty. More lenient than imprisonment and the death penalty are such punishments as exile, expulsion, corrective labor without deprivation of freedom and others. Since these three measures are more interesting for the present research, they will be analyzed in detail. So, in Art. 28 of the Criminal Code of the RSFSR it is enshrined that "in case of evasion from serving a punishment in the workplace by a person sentenced to corrective labour without imprisonment, the court, on a report of the internal affairs bodies or on a petition of a public organization or labor collective, can direct this person for serving a punishment to other places determined by bodies in charge of application of corrective labour, but in the area of residence of the convict. In case of a malicious evasion from serving a punishment by a person sentenced to corrective labour without imprisonment, the court can replace an unserved term of corrective labour with a punishment in the form of imprisonment for the same term." In contrast to the present Criminal Code of the Russian Federation, reports in case of an evasion from serving the measure could be sent not only by special bodies, but also by representatives of public organizations or the labor collective. There is a significant difference, as currently public supervisory commissions are not endowed with such powers. In addition, attention should be drawn to Art. 44 of the Criminal Code of the RSFSR. At the request of a public organization or

labor collective entrusted with the supervision of a person under suspended sentence, the court may reduce the probation period established by the sentence. The question of reducing the probationary period may be raised after half of this period is served at least. If a person under suspended sentence, being transferred for correction, re-education, and also under supervision of a public organization or a labor collective, does not justify their confidence, breaks the promise to prove the correction through exemplary behavior and honest work, or leaves a labor collective so that to evade a public influence, on the petition of a public organization or labor collective the court can make a ruling to cancel the suspended sentence and direct the convict to serve the sentence imposed by the verdict. The analysis of this norm demonstrates that in the Soviet times the court had more discretionary powers. At present, control, as a rule, for those under a suspended sentence is carried out, except for the military, only by a special subject, which is the criminal executive inspection. According to the cited norm, in the Soviet period, the court could transfer a person under a suspended sentence to public organizations and labor collectives if there are petitions. In addition, there were elements of discretion in other punishments that were applied in the Soviet period. Namely, it is a question of such measures as an exile (CL, 1933), a parole with compulsory employment (Bulletin of the Supreme Court of the USSR, 1964), a suspended sentence with the direction to construction sites of the national economy (Bulletin of the Supreme Soviet of the USSR, 1977) and others. It is also interesting that in foreign countries probation staff prepare a report on the possibility of applying individual punishments without isolation from society, thereby giving the court some guidance in establishing the optimal regime for the application of these measures, in addition, appropriate programs are prepared that allow for more effective correction of offenders (Ashton & Wilson, 2001; Doherty, 2000; Maguire, Morgan & Reiner, 2002). Thus, to sum up the mentioned above, it can be stated that the discretionary powers of judges in the Soviet period in matters of control over the execution of sentences without isolation from society and other measures of a criminal legal nature took place, moreover, in some cases they were wider. This is partly due to the fact that a larger number of subjects have been included in the implementation of criminal law measures. On this basis, the analysis of the implementation of these measures in the criminal executive legislation (corrective labour) makes it possible to talk about the fact that judicial discretion in this area is not a new phenomenon. However, there were no special studies of these questions, only certain aspects of selected issues were analyzed. In this regard, the analysis of issues of judicial discretion in adjusting the requirements of the regime of certain punishments, which are not related to the isolation of convicts from society, and other measures of a criminal legal nature is also appropriate. Let us consider this segment in more detail on the example of a suspended sentence and the restriction of freedom. Item 4 of Art. 50 and item 5 of Art. 53 of the Criminal Code of the Russian Federation contain a phrase “a court may replace” the punishment with a more severe one. In addition, within the execution of restriction of freedomand a suspended sentence, restrictions and responsibilities established by a court sentence may be supplemented or amended (item 3 of Art. 53 of the Criminal Code of the Russian Federation, item 7 of Art. 73 of the Criminal Code). And, therefore, should legal relations over the execution of the sentence appear, it is reasonable to talk at least about the first two. However, it should be noted that judges lack guidelines for the addition and partial abolition of restrictions and duties applied to convicts. But their optimal establishment significantly affects the level of criminological recidivism, that is, it helps to prevent the

commission of new crimes and offences by persons registered in the criminal executive inspections. Therefore, it is now advisable to study and provide options for limiting judicial discretion, taking into account the needs of theory, law enforcement practice, historical experience. S.F. Kuptsova (2017) justifiably points out that "the presence of limits of judicial discretion is an inherent property that determines its existence". "In its etymological meaning, the limit of judicial discretion represents a real boundary, a boundary beyond which a judge should not go in matters of his discretion. Taking into account that in modern Russia the formation of judicial law is just beginning, and control mechanisms are not as developed as in the countries of the common law system, in the language of legal documents the limit of judicial discretion should have clear guidelines, without assuming its broad interpretation" (Kuptsova, 2017). Agreeing with this statement, we will note that the criminological characteristic of the convict's personality, the data on recidivism (penal and post-penal) also have to become a support for judges and other practical workers. It should be noted that in literature there are two terms "limit" and "border", which are related as follows. So, in the explanatory dictionary of V. Dahl (1989), the border is defined as, "A boundary, a border – a frontier, a limit, a hedge, a line, an edge, the end and the beginning, a joint, a dividing line". "The limit is the beginning or the end, a hedge, a line, a section, a region, an edge, a border, the end of one and beginning of another, in the sense of the real and spiritual" (Dahl, 1989). Undoubtedly, the use of these terms as synonyms is quite reasonable and true, but it is necessary to take into account the clarifying opinion of F.R. Borovkova (2007) that "the border is always "between", and "the limit" belongs, firstly, to the second meaning of the word "edge" (the end of the thing), where it defines the extreme degree, the beginning and the end (limit - edge); secondly, it has an independent meaning. Proceeding from this, we consider the use of the term "limit" of judicial discretion to be more correct. The limits should serve as certain guidelines for judges and employees of criminal executive inspections when adjusting the non-penitentiary regime of the measures under consideration. It should be noted that in the regulation of criminal and executive relations moral limits take place. M.I. Kleandrov (2007) states that "an important contribution to the question of limiting judicial discretion is made by the ethical rules that guide (or do not guide) the judge. These rules are formalized to a lesser extent, and sometimes they operate in an unwritten form and are determined by the general moral atmosphere in each particular court" (Kleandrov, 2007). This is significant with regard to relations arising from the replacement of sentences not related to the isolation of convicts from society, since the staff of the criminal executive inspections and judges should not apply additional restrictions and duties in favor of friendly relations among themselves or hostile relations to the perpetrator. Moreover, "the limits of judicial discretion must be consistent with the current legislation and the moral foundations of society. The implementation of the limits of judicial discretion depends on the experience, professionalism, high moral qualities of the judge which are inherent in the political, socio-economic situation prevailing in society. In cases where there are no legal limits of discretion, moral and ethical attitudes, restrictions of judicial discretion based on generally recognized principles and customs start exerting their influence" (Kuptsova, 2017). Determining the combination of factors influencing judicial discretion, N.V. Radutnaya (2002) writes, "Judicial discretion, as a rule, is associated with the interpretation of the legal norm and the choice of a solution from several alternatives. Obviously, this discretion is limited by the requirements of the legal system, which implies the actions of the judge only within this framework. However, if there are

difficulties in making a specific decision, the judge uses own subjective potential, that is personal experience and worldview. The combination of these factors and the interpretation of the foundations of law and legal principles creates conditions for the resolution of even complex legal situations. Moral categories can also be used as a means of solving them" (Radutnaya, 2002). In the literature, the sources of the limits of judicial discretion include legal norms and judicial practice as well (Pogorelova, 2005). In our opinion, when there is a replacement of a punishment with a more severe one, priority is given to the second source. At the same time, the main thing here is to provide criminal executive inspections with the authority to establish optional duties with the possibility of appealing such decisions to the court. And courts while considering these complaints should be guided by convict's personal characteristics taking into account the individual forecast of their behavior. Such categories of convicts were distinguished in the legal literature, for example, by N.V. Olkhovik (2009). He indicats that, among the convicts, the most criminogenic category is the persons who committed crimes against property (67.5 %) (Olkhovik, 2009). In addition, among those sentenced to the restriction of liberty, the risk group includes those convicted under Articles 158, 166, 228 of the Criminal Code (Rakhmatullin, 2019). The majority of them do not work, do not have families and children, abuse alcohol, etc.

5.CONCLUSION

Therefore, the proposed novelties will limit the judicial discretion when considering the submissions of criminal executive inspections. Obviously, certain changes of the established restrictions and duties in a court sentence have to take place, as over time there can be some shift in the convict's behavior, his relationships with relatives and friends, as well as a place and schedule of work, and other circumstances which essentially affect the correction of the person. However, they should be implemented with regards to the social criminological basis of the functioning of the restriction of freedom and probation. Thus, judicial discretion in the criminal executive law during the implementation of punishments not related to the isolation of convicts from society in certain cases plays a key role and can have a positive or negative impact on the level of recidivism among different categories of perpetrators. Definitely, attempts should be made to limit it, taking into account the extent to which certain categories of convicts are prone to recidivism.

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