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CERTAIN ASPECTS OF CONDITIONAL EARLY RELEASE OF PERSONS SENTENCED TO LIFE IMPRISONMENT

The article addresses to the study of serving some criminal sentence peculiarities in the form of life imprisonment. The authors indicate their own point of view on the issue of conditional early release for the category of convicts. Based on the conducted research, the authors offer their approach to the terms of conditional early release and pardon, as well as the conditions under which it can be applied.

Key words: *punishment, convict, life imprisonment, imprisonment, legal status, conditional early release, pardon, replacement of the unserved part of the sentence with a lighter one, probation.*

Target setting. The Second Senate of the Constitutional Court of Ukraine on September 16, 2021, considering the case “On Constitutional complaint of Dmytro Volodymyrovych Krupka on compliance with the Constitution of Ukraine (constitutionality) of the Part 1 of Article 81, the Part 1 of Article 82 of the Criminal Code of Ukraine, of Volodymyr Volodymyrovych Kostin, Oleksandr Stepanovych Melnychenko on compliance with the Constitution of Ukraine (constitutionality) of the Part 1 of Article 82 of the Criminal Code of Ukraine and on the constitutional complaint

of Viktor Ivanovych Hohin on the constitutional complaint of the Constitution of Ukraine (constitutionality) with the Part 1 of Article 81 of the Criminal Code of Ukraine (the case of sentence revising of a person sentenced to life imprisonment)” decided: to recognize as such, which do not correspond to the Constitution of Ukraine (are unconstitutional), the Part 1 of Article 81, the Part 1 of Article 82 of the Criminal Code of Ukraine in that they make it impossible to apply them to persons sentenced to life imprisonment [1].

In order to regulate the issues regarding the possible release of those sentenced to life imprisonment, a draft law “On Amendments to Certain Legislative Acts of Ukraine to Standardize the Procedure for Replacing Life Imprisonment with a Soft Punishment or Conditional early release” was developed and is being actively drafted discussion by scientists and practitioners. That is why improvements in this direction are timely and relevant.

Actual scientific researches and issues analyses. The scientific analysis of the process of reforming criminal punishments, the order and conditions of their execution and serving, replacing the unserved part of the punishment with a soft one was the subject of research by many domestic scientists, in particular K. A. Avtukhova, O. M. Bandurko, I. V. Bodnar, A. O. Halai, T. A. Denysova, O. M. Dzhuzha, I. V. Ivankov, O. H. Kolb, I. M. Kopotun, O. M. Litvinova, V. F. Puzyrnyi, M. S. Puzyrov, A. H. Stepaniuk, M. I. Havroniuk, S. V. Tsariuk, I. S. Iakovets et al. On the other hand, the issue related to the application of conditional early release and replacement of the unserved part to those sentenced to life imprisonment remains open.

The purpose of the article is the study of certain aspects of conditional early release of persons sentenced to life imprisonment.

The statement of basic materials. When a comparative analysis was carried out according to the content of the draft law “On Amendments to Certain Legislative Acts of Ukraine to Standardize the Procedure for Replacing Life Imprisonment with Soft Punishment or Conditional early release” and the current national legislation in this area, we consider it appropriate to note the following.

In our opinion, the proposed changes to the legislation are mainly focused on protecting the rights of persons sentenced to life imprisonment, however:

a) they must take into account the measures “to resocialize convicts, reduce recidivism, ensure public safety” (paragraphs 24–26 of the Recommendation of the Council of Europe R (99) 22 on prison overcrowding and sharp population growth, adopted by the Committee of Ministers on September 30, 1999 at the 681st meeting of deputy ministers “Conditional early release should be considered as one of the most effective and constructive measures, which not only shortens the length of imprisonment, but also significantly contributes to the planned return of the offender to society. In order to promote and expand the use of conditional early release, it is necessary to create the best conditions for offender support, assistance and supervision in the community, not least in order to encourage the competent judicial or administrative authorities to consider this measure as a valuable and responsible option. Effective in-custody treatment and post-release supervision and treatment programs should be developed and implemented to facilitate the resettlement of offenders, reduce recidivism, ensure public safety and protection, and give judges and prosecutors confidence that interventions are aimed at reductions in the actual term of punishment and public sanctions and measures are constructive and responsible options” [2];

б) The European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment (hereinafter – ECPT), which was established by the European Convention for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment, also expressed its position on the conditional early release of persons sentenced to life imprisonment in his report based on the results of a visit to Hungary in 2007, where paragraph 33 states: “First of all, no one can reasonably prove that all those sentenced to life imprisonment will always remain dangerous to society. Secondly, life imprisonment of persons who have no hope of release poses a significant threat to encouraging cooperation and solving the problem of inappropriate behavior, implementing personal development programs and organizing individual plans and security”. As a result, the ECPT called on the Hungarian authorities to create a mechanism for regular review of the threat to society that a “real convict” represents, based on an individual risk

assessment, in order to establish whether they can serve the rest of their sentence in the community, under what conditions and supervision measures” [3];

c) The ECPT Memorandum on De facto/Real Life Imprisonment (CPT (2007) 55) states: “Since real life imprisonment has a negative impact on individual convicts, it can be detrimental to a humane prison regime. Life imprisonment without hope of release leaves almost no room for “dynamic security” [4].

We believe that the project of amendments proposes a very limited number of persons who are responsible for the conclusion on the safety of the convict to life imprisonment after his/her release (the conclusion of the administration of the of execution of punishments institution on the degree of correction of the convict, which is drawn up in accordance with the Methodology for determining the degree of correction of the convict” (Methodology for determining the degree of correction of the convicted person: Order of the Ministry of Justice of Ukraine dated January 19, 2023 No. 294/5) which is explicitly stated in “Recommendation N Rec (2003) 23 of the Committee of Ministers of the Council of Europe to member states “On the implementation of punishment in the form of life imprisonment and other of long terms of imprisonment by the administrations of places of deprivation of liberty” dated October 9, 2003. “P 13. Certain needs must be established based on personal needs and characteristics related to the committed crime and bad behavior (criminogenic needs). To a large extent, criminogenic needs should be aimed at reducing crime and preventing bad behavior of prisoners both during the execution of the sentence and after release. P. 14. Determination of the initial risk and needs should be carried out by appropriately trained personnel and carried out mainly in a special center. P. 15. a) The application should make the assessment of new risk and needs tools for decision-making on the execution of sentences in the form of life imprisonment and long-term imprisonment” [5].

Since risk and needs assessment tools invariably have a certain margin of error, they should not be the only method used for decision-making and should be supplemented by other forms of determination” [6].

In our opinion, Subparagraph 6 of Paragraph 4 of Section II of the specified Methodology “Attitude towards the use of narcotic

substances/alcohol”, which characterizes the attitude of the convicted person to the use of narcotic substances and/or alcohol, awareness of the impact of use on his life and health, as well as on the likelihood of committing illegal actions under the influence of narcotic substances, alcohol or in order to obtain funds for narcotic substances and alcohol, must be signed by a narcologist of the relevant medical institution after a thorough examination, provided that adequate security measures are taken, and Chapter VI of the indicated Methodology “Psychological characteristics of the convict” – to be compiled by the psychologist of the institution, to contain fifteen psychological criteria, to characterize the identification of individual psychological features of the convict and to be carried out using the method of determining neuropsychological stability “Prognosis”, multifactor personal questionnaire R.B. Cattell (form C) and Rogers-Diamond diagnostic methods of socio-psychological adaptation”, and, therefore, must be signed by an independent psychologist with appropriate qualifications.

We propose to determine the term of conditional early release from serving a sentence of life imprisonment “after a person has actually served at least fifteen years of imprisonment” as the one that most fully corresponds to the content of Article 82-1 of the “Project of Amendments to the Criminal Code of Ukraine”, according to which “a sentence of life imprisonment may be replaced by a sentence of imprisonment for a term of ten to fifteen years, if the convicted person has served at least fifteen years of the sentence imposed by the court”.

First, if a person sentenced to life imprisonment, who has served at least fifteen years of the sentence imposed by the court, it will be replaced by a punishment in the form of imprisonment for a term of ten to fifteen years, then according to clause 3 part 3 Art. 81 of the Criminal Code of Ukraine, conditional early release from serving a sentence to such a convict may be applied after the convict has actually served: “not less than three quarters of the term of the sentence imposed by the court for an intentional, particularly serious crime, in the case of replacing a sentence of life imprisonment with a sentence of by deprivation of liberty for a certain period, as well as the punishment imposed on a person who was previously conditional early released and again committed an intentional criminal offense during the unserved

part of the sentence”. Thus, the convict has the minimum possible term of imprisonment – that is 15 years + 7.5 years (three quarters of 10 years), which is equal to 22 years and 6 months.

Secondly, the convicted person, who in accordance with the proposed Art. 81-1 conditional early release from serving a sentence in the form of life imprisonment may be applied after a person has actually served at least twenty-five years of imprisonment, namely the submission to the court of materials regarding conditional early release from serving the sentence (clause 1 p 3 of Section I of the Instruction on the work of departments (groups, sectors, senior inspectors) for monitoring the execution of court decisions of penitentiary institutions and detention centers, approved by order of the Ministry of Justice of Ukraine dated June 8, 2012 № 847/5, registered with the Ministry of Justice of Ukraine on June 14 of 2012 № 957/21269 (available via the link <https://zakon.rada.gov.ua/laws/show/z0957-12#Text>) is possible only after 25 years, which is less than the possible term of conditional early release, provided for in the application of the Project of Art. 82-1 of the Criminal Code of Ukraine.

Based on the mentioned, we offer the following.

Amendments should be made to Article 81 of the Criminal Code of Ukraine in order to specify the role of the Ministry of Justice of Ukraine in the process of releasing a person sentenced to life imprisonment, part 2 of the specified article should be amended as follows: “Conditional early release from serving a sentence may be applied if the convicted person has proven his reformation, which is confirmed by the conclusion of the commission, the composition of which is determined by the Instruction of the Ministry of Justice of Ukraine, on establishing the appropriate degree of correction of the convicted person, which will contribute to the return of the convicted person to society under conditions that guarantee the safety of this society”.

Article 81-1 “Conditional early release from serving a sentence of life imprisonment” of the Criminal Code of Ukraine provides for the possibility of release upon serving at least 15 years of a sentence of life imprisonment, while the authorized probation authority must determine (make a conclusion) “if it is possible for convicts to serve the rest of their sentence in society, under what conditions and supervision measures”, this information must also be provided by

the authorized body on probation and when considering the possibility of applying to this category of convicts and replacing the unserved part of the sentence with a soft one.

Thus, the main purpose of submitting an opinion on the degree of correction of a person sentenced to life imprisonment is to provide the court with information necessary to determine the degree of severity of the crime committed, the term of the sentence served, the identity of the convicted person, his behavior while serving the sentence, sincere remorse, the state of compensation for the inflicted damage or elimination of the damage caused, family and other circumstances, as well as the possibility of serving the rest of the sentence in society, under what conditions and supervision measures.

The Criminal Code should establish a norm according to which the convicted must take an active part in drawing up a plan for the execution of the punishment, which is taken into account by the court when deciding on the issue of replacing the punishment with a soft one, the very form of the plan for the execution of the punishment is determined by the Ministry of Justice of Ukraine, taking into account the recommendations of the Council of Europe.

It should also be legislated that a convicted person who is sentenced to imprisonment for a certain period in the order of replacement with a soft punishment and who has the right to use parole must additionally submit to the court a report on the execution according to the execution plan of punishment while serving a soft sentence, including an analysis of the reasons for the success or failure of the implementation of the measures provided for in the specified plan, which include, in particular:

- positive development with the help of the penitentiary system to reduce restrictive conditions and, ideally, the end of the sentence;
- participation in work, education, training and other activities, which ensures purposeful use of the time spent in prison and increases the possibilities of successful adaptation after release;
- participation in programs designed to address risks and needs to reduce the destructive effects of life in prisons and the possibility of reoffending after release;

– participation in the organization of leisure and other activities that prevent or neutralize the negative effect of long terms of imprisonment;

– fulfillment of conditions and control measures that contribute to a law-abiding life and adaptation to life in society after conditional release.

Our point of view is based on the analysis of the content of international standards in the field of the protection of the convicts rights, namely the annex “Determination of punishment in the form of life imprisonment and long imprisonment” to Recommendation N Rec (2003) 23 of the Committee of Ministers of the Council of Europe to member states “On the implementation of punishment in the form of life imprisonment and other long terms of imprisonment by the administrations of places of deprivation of liberty”, paragraph 10 of which stipulates that “plans for the execution of punishment” must take into account the risk and necessity (needs) determined for each convict, and provide a systematic approach to: initial placement of the convict, positive development with the help of the penitentiary system to reduce restrictive conditions, and, ideally, the end of the sentence; participation in work, education, training and other activities, which ensures purposeful use of the time spent in prison and increases the possibilities of successful adaptation after release; intervention and participation in programs designed to address risks and needs to reduce the disruptive effects of life in prison and the possibility of reoffending after release; participation in the organization of leisure and other activities that prevent or neutralize the negative effect of long terms of imprisonment; conditions and measures of control that contribute to a law-abiding life and adaptation to life in society after conditional release.

We also consider it expedient to present Article 87 of the Criminal Code of Ukraine in the following version: “1. A pardon is carried out by the President of Ukraine in relation to an individually determined person, taking into account the degree of correction of the convict in order to determine whether a person can serve the rest of his/her sentence in society, under what conditions and supervision measures. 2. A person sentenced to life imprisonment may submit a petition for pardon after serving at least twenty years of the sentence”.

Conclusions. The replacement of the death penalty with life imprisonment punishment was due to humane treatment of persons whose public danger required their unconditional isolation from society in order to ensure the safety of the civilian population. Criminal punishment in the form of life imprisonment, since the adoption of the Criminal Executive Code of Ukraine, did not provide for the possibility of conditional early release, which was recognized as not in accordance with the Constitution of Ukraine. This approach to the specified category of convicts not only does not comply with international norms in the field of the protection of the convicts' rights, but also does not create their desire for law-abiding behavior.

However, the unreasoned application of conditional conditional early release to this category of convicts can cause destabilization of the criminogenic situation associated with the commission of particularly dangerous crimes, as well as a negative reaction of public opinion.

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ОКРЕМІ АСПЕКТИ ДОСТРОКОВОГО ЗВІЛЬНЕННЯ ЗАСУДЖЕНИХ ДО ДОВІЧНОГО ПОЗБАВЛЕННЯ ВОЛІ

Стаття присвячена дослідженню особливостей відбування кримінального покарання у виді довічного позбавлення волі. Автори пропонують:

– визначити строк умовно-дострокового звільнення від відбування покарання у виді довічного позбавлення волі від десяти до п'ятнадцяти років, якщо засуджений відбув не менше п'ятнадцяти років призначеного судом покарання;

– до статті 81 Кримінального кодексу України внести зміни з метою конкретизації ролі Міністерства юстиції України у процесі звільнення засудженого до довічного позбавлення волі, ч. 2 вказаної статті викласти в такій редакції: «Умовно-дострокове звільнення від відбування покарання може бути застосоване, якщо засуджений довів своє виправлення, що підтверджено висновком комісії, склад якої визначений Інструкцією Міністерства юстиції України, про встановлення відповідного ступеня виправлення засудженого, що буде сприяти поверненню засудженого в суспільство на умовах, які гарантують безпеку цього суспільства»;

– передбачити у статті 81-1 «Умовно-дострокове звільнення від відбування покарання у виді довічного позбавлення волі» Кримінального кодексу України можливість звільнення при відбутті не менше 15 років покарання у виді довічного позбавлення волі, при цьому уповноважений орган з питань пробації повинен визначити (зробити висновок), «чи можуть засуджені відбувати решту покарання в суспільстві, за яких умов і наглядових заходів»;

– у Кримінальному кодексі України слід встановити норму, відповідно до якої засуджений повинен взяти активну участь у складанні плану виконання покарання, який береться до уваги судом під час вирішення питання про заміну покарання більш м'яким, сама форма плану виконання покарання визначається Міністерством юстиції України з урахуванням рекомендацій Ради Європи;

– законодавчо повинно бути закріплено, що засуджена особа, якій покарання у виді позбавлення волі на певний строк призначено в порядку заміни більш м'яким покаранням та в якій настало право на застосування умовно-дострокового звільнення, додатково повинна подати до суду звіт про виконання плану виконання покарання під час відбування більш м'якого покарання.

Ключові слова: покарання, засуджений, довічне позбавлення волі, позбавлення волі, правовий статус, умовно-дострокове звільнення, помилування, заміна невідбутої частини покарання більш м'яким, пробація.