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GRANTING CLEMENCY TO CONVICTS IMPRISONED FOR LIFE IN UKRAINE: CERTAIN REMARKS

ПОМИЛУВАННЯ ЗАСУДЖЕНИХ ДО ДОВІЧНОГО ПОЗБАВЛЕННЯ ВОЛІ: ОКРЕМІ ЗАУВАГИ

Kryklyvets D.E., Lecturer at the Department of Criminal Law and Criminology
Ivan Franko National University of Lviv

The article deals with the analysis of legal regulation of life imprisonment under the standing CC of Ukraine, firstly, in the context of the legally defined purpose of punishment. It is stressed that application of exemption from the further serving the punishment to the life convicts is limited. The legal position of the ECHR concerning granting clemency to life convicts in Ukraine is analysed, and as a result the arguments in favour of improving the clemency procedure are proposed. It is substantiated that the factually served term of punishment should be counted in the term of imprisonment, appointed in case of substituting life imprisonment for imprisonment for certain term. As well, the author pays attention to the issue of determining the term of imprisonment in case of substituting the life imprisonment, as far as the legislator fixes only the minimum limit of this term. In this aspect the norms of the criminal law lacks the legal certainty, consequently the legislator should define the maximum imprisonment in such cases. One more issue concerns the subject of granting clemency, as far as under Part 1 Article 50 of the CC of Ukraine a court is the only subject of imposing a punishment. The author grounds that granting the President of Ukraine the right to clemency is substantiated, as far as he acts on behalf of society and in respective cases he, depending on kind of clemency, factually either renew the convict`s right to freedom, or creates the prerequisites for this in case of serving the respective term of imprisonment for which the life imprisonment is substituted under the clemency procedure. Moreover, the issue of the criteria of defining the term of imprisonment in case of substituting the life imprisonment is considered, as far as this requires the special training. It is noted that this issue is partially solved by the fact that the preliminary consideration of clemency motions is provided by the Presidential Commission on Clemency Issues, as a members of which as well the lawyers are appointed.

Key words: life imprisonment, imprisonment for certain term, exemption from the further serving the punishment, clemency, counting the factually served term of punishment.

Статтю присвячено аналізу правового регулювання довічного позбавлення волі за чинним КК України, насамперед у контексті законодавчо визначених цілей покарання. Наголошено на обмеженості застосування звільнення від подальшого відбування покарання до засуджених довічно. Проаналізовано правову позицію ЄСПЛ щодо помилування засуджених до довічного позбавлення волі в України, у контексті чого наведено аргументи на користь необхідності вдосконалення процедури помилування. Обґрунтовано, що фактично відбутий строк покарання повинен ураховуватися у строк позбавлення волі, призначеного у порядку заміни довічного позбавлення волі на позбавлення волі на певний строк. Також проаналізовано проблему визначення строку позбавлення волі у порядку заміни довічного позбавлення волі, оскільки законодавець указав лише на мінімальну межу цього строку. У цьому розумінні нормам кримінального закону бракує правової визначеності, а тому законодавець повинен визначити максимальний строк позбавлення волі у таких випадках. Ще одне питання стосується суб'єкта помилування, адже, згідно з ч. 1 ст. 50 КК України, суб'єктом застосування покарання є лише суд. Обґрунтовано, що надання права на помилування саме Президенту України є виправданим, адже він виступає від імені суспільства та у відповідних випадках залежно від виду помилування фактично або поновлює засудженого у праві на особисту свободу, або створює передумови для цього, що можуть бути реалізовані засудженим у майбутньому, тобто у разі відбуття відповідного строку позбавлення волі, на який у порядку помилування замінене довічне позбавлення волі. Окрім того, порушено питання про критерії визначення строку позбавлення у разі заміни довічного позбавлення волі, оскільки це потребує спеціальної підготовки. Зауважено, що ця проблема частково вирішується тим, що попередній розгляд клопотань про помилування здійснює Комісія при Президентові України у питаннях помилування, до складу якої призначаються також і юристи.

Ключові слова: довічне позбавлення волі, позбавлення волі на певний строк, звільнення від подальшого відбування покарання, помилування, зарахування строку фактично відбутого покарання.

Life imprisonment is the severest kind of punishment under the standing Criminal Code of Ukraine (further – the CC of Ukraine). Among the other factors its severity is determined by the sufficient restrictions of applying the number of kinds of exemption from serving the punishment and exemption from the further serving the punishment, that are: the kinds of exemption from serving the punishment related to probation; parole; exemption from the further serving the punishment by substituting the unserved part of punishment for milder punishment, as well as on the ground of a law on amnesty. Moreover, it is with life imprisonment that legislator associates the sufficient restrictions concerning exemption of person, who has committed the crime, from criminal liability due to the expiration of the prosecution terms, as well as concerning the exemption from serving the punishment due to the expiration of the accusatory sentence execution terms.

If one considers the stipulation of life imprisonment, particularly its indefinite duration, from the point of view of Part 2 Article 50 of the CC of Ukraine, which discloses the purpose of punishment, one can arrive at conclusion that legislator in fact considers the correction of sentenced for life person, as one of the sides of punishment purpose, to be generally impossible. Hence, the legislator shifts the focus to retribution and preventing such a person from committing criminal lawbreaking that can be achieved by the way of its life isolation. At the same time the standing CC of Ukraine foresees the exceptions to the mentioned above, to which one can attribute the following kinds of exemption from the further serving the punishment: due to the illness (Article 84 of the CC of Ukraine) and on the ground of clemency act (Article 87 of the CC of Ukraine). It is worth stressing that legislator has prescribed the clemency procedure only in general, consequently a number of issues, related to this king of exemption, remain unsolved.

One of these problems was raised by the European Court of Human Rights (further – the ECHR) in the case of Petukhov v. Ukraine (No. 2) of March 19, 2019. It goes about that under Part 2 Article 87 of the CC of Ukraine due to the clemency act the life imprisonment can be substituted for deprivation of liberty for the term not less than 25 years; under Paragraph 2 Point 4 of the Regulation on the Procedure of Granting Clemency in case of sentencing person to life imprisonment, the clemency petition can be submitted after serving not less than 20 years of the appointed punishment. In this case the ECHR supported the applicant`s statements that clemency procedure lacks the clarity and predictability, as far as from the content of the legal norms it is unclear whether the 25 years term of imprisonment in case of clemency is to

be calculated from the moment when the sentence execution started or from the date when the clemency is granted. In the first case the general length of serving the punishment amounts to 25 years, and in the second case it is equal to 45 years. As well the applicant states that it is unclear whether the parole is applicable in this case. If this kind of exemption is applied, the calculation of its terms will differ sufficiently depending on which one of the two mentioned above ways of calculating the terms of serving punishment is applied (Points 157, 176 of the judgment) [1].

The mentioned problem of calculating the imprisonment terms in case of granting clemency to the persons, sentenced for life, is quite burning. Considering the contemporary state of legal regulation, the solution to this problem should be sought in the context of the criminal legal norms system analysis, as well as of their system relations with the other branches of law legal norms. Besides, the actuality of this question is raised by the fact that as in April 2019, there were 1541 persons imprisoned for life in Ukraine, and due to this indicator Ukraine holds the first place in Europe [2].

Considering the raised issue, we can put forward the following arguments:

1. The norms of the standing CC of Ukraine regulates the cases when the terms of the factually served punishment or custody (pre-trial detention) shall be taken into account. These cases are the following:

a) counting the partially or fully served punishment under the previous sentence in case of appointment the punishment within the so-called "broken" multiple criminal lawbreakings (Part 4 Article 70 of the CC of Ukraine);

b) appointing the punishment according to the rules of multiple sentences, as far as only the unserved part of punishment under the previous sentence should be attached to the new sentence (Article 71 of the CC of Ukraine);

c) counting the term of custody in the term of punishment (Part 5 Article 72 of the CC of Ukraine);

d) appointing the sentenced person punishment under the new law, that mitigates criminal liability (Part 3 Article 70 of the CC of Ukraine);

e) counting the term of applying the coercive measures of medical character to a person in the term of punishment in case of his recovery and sending him for the further serving the punishment (Part 4 Article 84 of the CC of Ukraine).

The similar norm is contained as well in the Criminal Executive Code of Ukraine (further – the CEC of Ukraine). It goes about the norm concerning counting according to Article 72 of the CC of Ukraine the term of custody and the term of pursuing under guard to corrective center in the term of punishment (Part 2 Article 58 of the CEC of Ukraine).

The norms of the Criminal Procedural Code of Ukraine (further – the CPC of Ukraine) fix the same provisions. They are the following:

a) about counting the term of recovered person`s staying in the medical establishment if he sentenced to arrest, restriction of liberty, holding in disciplinary battalion for the servicemen or imprisonment in the term of punishment (Part 3 Article 515 of the CPC of Ukraine);

b) about counting the term of sentenced person`s staying in the medical establishment while serving the imprisonment punishment in the term of this punishment (Part 1 Article 540 of the CPC of Ukraine);

c) about counting the time of holding the extradited person on the territory of the requested state while solving the issue on extradition to Ukraine, as well as the term of his transferring to the general term of serving the punishment, appointed by Ukrainian court sentence (Part 1 Article 577 of the CPC of Ukraine);

d) about counting the term of staying in custody in Ukraine in case of considering the request concerning foreign state court`s sentence execution to the general term of punishment (Part 6 Article 603 of the CPC of Ukraine).

The stated above confirms that the terms of the factually served punishment, as well as the terms of restricting personal liberty on the other grounds, shall be counted either in term of the factually served part of punishment or while appointing the punishment. It is determined by the very fact that the right to liberty and personal inviolability is one of the inalienable and immutable human rights that are guaranteed and can`t be cancelled (Articles 21, 29, Part 2 Article 22 of the Constitution of Ukraine). This right can be restricted only in the exceptional cases foreseen by a law. The state treats such cases as exceptional in their sense, the validity of these rights restriction is verified by a court and if such restrictions are groundless, the person obtains the right to certain compensations. Consequently, it is justified that such restrictions, even if there are the legal grounds for them, shall be taken into account while appointing the punishment, as far as the critical difference in the mechanism of factual influence of custody and serving the punishment of imprisonment can hardly be found – both are the restrictions of the person`s physical freedom.

2. If one assumes that an adult in the age of 18 years is sentenced to life imprisonment (under Part 2 Article 64 of the CC of Ukraine life imprisonment is not applied to the persons that have committed the crimes before the age of 18), and after that this person has served twenty years of appointed punishment and then the life imprisonment for this person is changed for twenty five years of imprisonment according to clemency procedure, such person will be released from the corrective colony in the age of 63 years. Considering that according to the data of State Statistics Service of Ukraine in 2019, the average expected duration of life at birth[1] comprised 76.98 year for women, and at the same time for 10.06 year lesser for men (66.92 year) [3, p. 56]. Of course, the statistics may change every year due to many factors that are not the subject of this study, and there is a tendency to increase in life expectancy from 1990 to 2016 [4], but the prospect of being released at this age can`t be called the most optimal, and most importantly – timely. This approach contradicts to the declared in Part 1 Article 3 of the Constitution of Ukraine provision, that a human, his life and health, honour and dignity, inviolability and security are recognized in Ukraine as the highest social value. Under such conditions, the interests and aspirations of such a convict actually remain outside the legislator`s attention.

3. The analysed mechanism is closely related to one more question to which the CC of Ukraine doesn`t give an answer: as far as Part 2 Article 87 reads that life imprisonment is substituted for imprisonment for the term not less than twenty five years, consequently what is the maximum limit of imprisonment in that case? According to the general rule imprisonment is appointed for the maximum period of fifteen years and the exception is the possibility to appoint the imprisonment up to twenty five years according to the rules of multiple sentences if at least one of the committed criminal lawbreakings is particularly heavy crime (Part 2 Article 71 of the CC of Ukraine). If one considers this norm from this very point of view, one can arrive at the conclusion that in Part 2 Article 87 of the CC of Ukraine the legislator has formulated one more exception. The great extent of abstraction is considered to be characteristic of this norm, which is being combined with factually unlimited discretion, given by this norm, create the sufficient prerequisites for the life convicts` rights restriction.

4. There is one more discrepancy related to the subject of granting clemency. The fact is that granting the clemency is a constitutional power of the President of Ukraine (Paragraph 27 Part 1 Article 106 of the Constitution of Ukraine),

[1] The average expected duration of life at birth – is the average number of years, the newly born persons will live, if the age rate of mortality is the same, as it was in the year of calculation (the definition is provided according to p. 66 of the Tables of birth, mortality rates and the average expected duration of life in 2019. Statistical bulletin. – author`s note).

but at the same time under Part 1 of Article 50 of the CC of Ukraine the punishment is imposed on behalf of the state by a court sentence. In this context it is worth noting the terminological discrepancy, as far as in Part 1 Article 50 of the CC of Ukraine it goes about application of punishment, in Part 1 Article 65 of the CC of Ukraine – about appointment of punishment, and in Part 2 Article 87 of the CC of Ukraine – about substitution of punishment. Based on the context and the sense of the word "to apply" in Part 1 Article 51, Part 3 Article 52, Part 2 Article 57, Part 1 Article 58, Part 3 Article 60, Part 3 Article 61, Part 2 Article 62, Article 64, Part 4 Article 68 of the CC of Ukraine, we can consider it to be a synonym to notion "to appoint punishment", especially considering that in articles of the General Part of the CC of Ukraine they quite often are used together, namely in Articles 52, 58, 62 of the CC of Ukraine. In return the substitution of punishment is used at the stage of appointing the punishment (Part 1 Article 58, Part 1 Article 62 of the CC of Ukraine), as well as at the stage of its execution and serving – the last takes place actually more often (Part 5 Article 53, Part 3 Article 57, Article 82, Article 83 of the CC of Ukraine). This means that substitution of punishment may take place while its appointment, as well while its very execution and serving. These cases are not the same ones, as far as in every case the substitution of punishment possesses its own separate grounds and is provided within different procedural mechanisms. It is the last of these cases that the mechanism of life imprisonment substitution to imprisonment for certain term belongs to. Under Part 1 Article 537 of the CPC of Ukraine the issue of punishment substituting on the different grounds, foreseen by the CPC of Ukraine, is solved by a court. Such legislator`s decision conforms with the unique approach, fixed in Part 1 Article 50 of the CC of Ukraine, that it is the court that is the subject of punishment application. Although one can state the differences between the notions "the application of punishment" and "the substitution of punishment", yet essentially they are close, as far as at the certain stage it goes about the new, though more lenient, punishment which the sentenced person hasn`t served before and shall serve in future. That is why it is quite logical that it is the court that solves this issue. Concerning the substitution of life imprisonment the legislator has waived the approach stated above that a court is the subject of punishment substitution. This exception can be explained by the fact that under Articles 102 and 103 of the Constitution of Ukraine the President of Ukraine, elected in the legally foreseen order, is the head of the state and represents the state on its behalf, and in particular he is guarantor of the rights and freedoms of a human and citizen. In this context realizing his right to grant clemency the President of Ukraine in fact acts on behalf of society and in cases when there is no need in further application of punishment he, depending on kind of clemency, factually either renew the convict`s right to freedom, or creates the prerequisites for this in case of serving the respective term of imprisonment for which the life imprisonment is substituted under the clemency procedure.

In this case there is one outstanding issue, namely: what are the criteria that shall be used by the President of Ukraine to determine the term of imprisonment in case of substituting life imprisonment? As it seems in this case we shall follow primarily the general grounds of appointing punishment (Article 65 of the CC of Ukraine), as well as the other provisions of the CC of Ukraine General part. However, one is to be specially trained to have the necessary command of these provisions, as well as of the other CC of Ukraine provisions. Moreover, to appoint the lawful punishment one is to know the tendencies of judicial practice of appointing punishment, and generally it is important to know the principles of law. The abovementioned requires the professional qualification that can be obtained by means of legal education and practice, but neither Part 2 Article 103 of the Constitution of Ukraine, nor Part 1 Article 9 of the Law of Ukraine "On the Elections of the President of Ukraine" formalize this requirement for a candidate, as well as fix any requirements for education at all. Domestic practice of state administration testifies that it is not necessarily that lawyers are elected as the Presidents of Ukraine. Of course, this situation is compensated by this very fact that according to Passage 3 Point 8 of the Regulation on the Procedure of Granting Clemency the qualified lawyers as well are appointed as the members of the Presidential Commission on Clemency Issues that provides the preliminary consideration of clemency motions. To some extent this creates the certain guarantee of legitimacy of solving clemency issues, however, the last belongs to the President of Ukraine competence who adopts the final decision, so that the problem don`t lose its actuality.

Conclusions. The procedure of granting clemency to convicts imprisoned for life should be regulated more clearly, so that to exclude the legal uncertainty and extra discretion. Moreover, such regulation should be provided at the level of the CC of Ukraine. There are two important ways of improving the standing criminal legislation in this respect. *The first one* is that the law should restrict the maximum term of imprisonment appointed in case of life imprisonment substitution. *The second one* is that the factually served term of imprisonment should be obligatorily taken into account by the way of counting it into term of imprisonment for which life imprisonment is substituted.

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