

Justice of Punishment as Social Compromise

Voronin V.N.

Moscow State University of Law named after O. E. Kutafin (MSAL), Moscow, Russian Federation
Email: voronin@crimconf.com

ABSTRACT

For finding the way of achieving a just punishment we drew up a special questionnaire containing open question and conducted a survey among 350 federal judges from 20 subjects of the Russian Federation. The survey was conducted in the course of 2017 by forwarding the questionnaires to the courts of all regions; in January 2018, we analyzed and summarized the resulted obtained. We selectively studies sentences passed by judges from the same regions and concluded that there are several possible options: 1. Court gave a correct appraisal of the criteria of justice provided by law, though the public does not consider the punishment to be fair. Therefore, social level of justice is unrealized; it may result from deformation in public consciousness as for certain legal processes, although, while imposing punishment a judge must aspire to realize social public will and minimize social opposition as for the penalty imposed; 2. The court gave incorrect appraisal of legal criteria and punishment may not be considered as fair, nevertheless, due to the deformation in public consciousness, the public may still regard such punishment as fair, though it not being the said. 3. Finally, the most favorable situation – when a sentence is passed in compliance with all legal criteria and successfully undergoes social expertise; in this case, one may say that justice is attained and the punishment is fair.

Keywords: *social justice, purposes of punishment, criteria of justice, measure of punishment, judge*

1. INTRODUCTION

Law theorists, sociologists and political experts show a great enthusiasm for the issue whether criminal policy corresponds to public opinion particularly concerning imposition of punishment [10]. The term ‘justice’ is closely connected with stability in society. The problem of justice has social, economic and psychological aspects [1. P. 22]. Sociological approach to social justice involves public opinion survey in respect of justice in such society in general or justice of any establishment or institution [1. P. 26]. Thus, S.V.Mareeva in her research found out that Russian people do not very much believe in the possibility of creating a just society in Russia [2. P. 117]. In his turn, A.B.Veber singled out the following objective criteria of social justice in the context of economic development: a) equal launch opportunities for individuals; b) social support of those whose opportunity to achieve the desired result is limited by reasons beyond their control [3. P. 4]. In view of psychological aspect of justice one may lay emphasis on the concept of ‘justice of the result’ that is subdivided into distributive and punitive elements. The first one is related to distribution of rewards, and the second – to punishment. [4. P. 14]. Meanwhile, you may not ignore a legal approach to the concept of justice as it is based on all the above mentioned aspects of justice. Thus, in sociology we find an idea that “one may speak of justice (or injustice) of this or that action, view, relation or a particular person” [1. P. 26]. A different approach is employed in law. Thus, O.N.Gorodnova states: “Addressing justice as a mete-wand for the quality of

social values, legal concepts and acts, one should assess legal regulations in their harmony with other legal principles in the context of justice... Nowadays, justice of legal regulation may become a mete-wand for social norms” [5. P. 32].

The term ‘justice’ is often used in legislation: Article 6 of the Criminal Code of the Russian Federation (hereinafter referred as ‘RF CC’) contains “Principle of Justice”; Article 60 part 1 of RF CC provides that a just punishment shall be imposed on a guilty person. In fact, a crime results in violation of law and order and lack of stability, that lead to injustice. How society comes back to stability, how to right a wrong? The answer is: by sentencing for crime. The measure of punishment may be stricter or milder, but for justice to have been met, punishment must fit the crime.

If the measure of punishment is not sufficient, the scales of justice will not balance; if the measure of punishment is excessive there will be no stability and justice will not be restored. So, how much ‘punishment’ is necessary to balance justice with crime committed? If to address the issue from the legal viewpoint, we may paraphrase it as follows: what are the criteria of justice in imposition of punishment? Therewith, there still remains a problem of co-relation of an ordinary understanding of justice with a professional judicial view; therefore it seems appropriate to compare sociological and legal approaches to the issue of justice through the example of the institute of criminal sentencing.

2. RESEARCH METHODOLOGY

We operated on the following methodological principles: objectivity concept, deterministic principle, historical principle, holism, the principle of consistency, structural principle, functional principle, hierarchy principle, comparative principle, and principle of pluralism in the interpretation and understanding of law. In the research we employed private methods: legal analysis, legislative principle of consistent technique, legal comparativistics, expert evaluation method, as well as precise sociological method. For finding the way of achieving just punishment we drew up a special questionnaire containing open question and conducted a survey among 350 federal judges from 20 subjects of the Russian Federation. The survey was conducted in the course of 2017 by forwarding the questionnaires to the courts of all the regions; in January 2018, we analyzed and summarized the results obtained. We selectively studies sentences passed by judges from the regions that expressed a desire to participate in the survey. The data obtained in the course of the sociological research were checked against case materials in every specific region and against the results of related sociological research obtained by other scholars. It should be emphasized that conducting of a survey among judges has its distinction as the questionnaire contained the questions concerning assessment of the criteria of just punishment by judges; it allowed us to appraise how they decided on type, length, and amount of penalty in each criminal case.

3. JUSTICE: SENTENCE AND PUBLIC RESPONSE

As previously stated, justice is closely connected with social interests, social assessment of the imposed penalty, so, while passing a sentence judges should realize social needs. Thus, the sentence passed in August 17, 2012 by Chamovnichesky district court of the city of Moscow to Tolokonnikova N.A., Samutzevich E.S., Alekhina M.V. on a charge of hooliganism caused great public outcry (part 2, art. 213 RF CC). Pursuant to the sentence, the court found the defendants guilty and imposed a custodial sentence for a term of 2 years (Sentence of Chamovnichesky district court of the city of Moscow of August 17, 2012, criminal case № 1-170/12). Leaving aside political background of the case and criminal legal issues, it should be noted that severity of the punishment caused public response. The public had not expected the court to pass a custodial sentence. Was there a social need in such a severe punishment? A number of political and public figures commented on the severity of the sentence, various opinion polls were conducted. In March 22, 2012 Levada-Centre released the polled data "Do you think that imprisonment for a term from 2 to 7 years that "Pussy Riot" participants face for their 'concert' in the Cathedral of Christ the Savior would be adequate or excessive for the action?" 46% of the respondents considered the penalty

adequate, 35% found the term excessive. Data obtained by All-Russian Public Opinion Research Center on how Russian people assess the "punk-prayer" of Pussy Riot and how, in the respondents' view, the girls should be punished are as follows: 86 % of Russian people believe that Pussy Riot are to be punished, but only 10% of the respondents call for penal custody. Public men were also solid concerning the punishment to be imposed on the defendants. Russian author Boris Strugatzky stressed that "the authorities' reaction to the incident was so inadequate, so incompetent, and so bureaucratically dull that instead of antipathy to the hooligans it caused antipathy to itself and to our heroic justice.

The director of Pushkin State Museum of Fine Arts Irina Antonova though not approving the move of the punk-group, stated that to put young girls into prison for such an action is 'abnormal'. Even public authorities from political set spoke out against the severity of the sentence to the defendants in the case. The chairman of the Federation Council of the Federal Assembly Valentina Matvienko called the punk-prayer in the Cathedral of Christ the Savior 'revolting' and 'immoral' but added that the girls might be set free despite the immorality of their act. RF Minister of Justice Alexander Kononov said that the defendants in the case "deserve to be punished, but the penalty should not be in the form of penal custody".

T.V.Klenova gave her arguments on the matter: "typical conflicting public reaction that was a respond to criminal sentences to Kruglova and Shavenkova. In July 19, 2010, Togliatti central district court found Kruglova guilty in committing a crime provided for in part 4, art. 159 RF CC and gave her custodial sentence in a general penal colony for a term of three years, though Kruglova had four kids and was pregnant with the fifth. Mass media communications, first and foremost the Internet, addressed the issue of selectiveness of domestic court system drawing a comparison between the Kruglova case and the Shavenkova case heard by Kirovsky district court in the city of Irkutsk in August 17 of that year. Shavenkova was convicted and sentenced to three years imprisonment under part 3, art. 264, RF CC; but taking into account that she had a two-year-old kid the court set aside the sentence till the kid of the defendant is 14. In public opinion, the sentence to Shavenkova was unfoundedly lenient and this leniency was due to the fact that Shavenkova was the daughter of Irkutsk regional elections commissioner. Samarsky regional court deflected the judgment to Kruglova and set aside the sentence for 12 years [6. P. 36]. For the foregoing reasons, we might conclude that while setting aside a sentence to Kruglova, Samarsky regional court acted in the best interests of the public, and this resulted from the situation of social unrest.

Later cases are better related to criminal law and are politically motivated, though we shall make an attempt to discuss them leaving the political background behind. Therewith, nearly two thirds of Russian people (63%) consider that in the country there are those convicted for their political views and determination to participate in political life. We believe that the sentences that are politically motivated and the penalty imposed for them

may automatically be considered as unfair. Let us consider the case: in September 16, 2019, Tverskoy district court of the city of Moscow passed a sentence to Pavel Ustinov Gennadyevich charged with a crime under part 2, art. 318 RF CC in the following circumstances: in August 3, 2019, in or around 3-30 a.m. near a building located in Tverskaya street 18, in Moscow, a policeman from Special Purposes Mobile Union of Russian GU FSVNG of the city of Moscow initiated measure for taking Ustinov P.G. into custody; while doing it he took Pavel's left elbow with his right hand, and Ustinov being aware of public danger and illegality of his own acts, as well as of the fact that he was dealing with a person in a position of authority performing his job, with guilty intent to use violence dangerous to health, actively reacted against him; by doing so, he violently put his right hand on the left hand of the victim and by force of his body exercised dragging pressure on the wronged person's left hand shoulder joint, by this inflicting bodily harm in the form of dislocation of the left humeral head, so moderately severe hurting him. Pursuant to the sentence, imposing punishment in the form of penal custody for a term of three and a half years in a general penal colony, the court took into consideration personality data of the person brought to trial, certificates of good conduct from his educational institution, from the place of compulsory military service and in private life, as well as personal surety and the fact that Ustinov P.G. was raised in a multi-child-family, that together are considered to be circumstances mitigating punishment; nevertheless the court also had regard to circumstances, character and public danger of the crime

The imposed sentenced made great front page headlines; art community sent an open letter to the President of the Russian Federation in defense of Pavel Ustinov; large-scale flashmob was held in social networks, even the head of Federal National Guard Troops Viktor Zolotov made a statement that it is the court that makes a decision, but as for him, he would have charged with a two-year suspended sentence.

Under public pressure RF Procurator General filed an appeal petition against the sentence precisely on the grounds of unfairness of the sentence. Judicial panel of Moscow city court considered the appeal petition and arrived at a conclusion that it is possible to substitute the grade of the offence for an offence of minor gravity. i.e. from grave crime to a medium-gravity crime, and mitigate the sentence to Pavel Ustinov up to one-year restrain of liberty taking into account the information presented to the appellate court on the invalidity of his father, certificates of good conduct from his place of residence, as well as the saying of the wronged person that the sentence imposed on the defendant was too severe. Having regard to the personality of Ustinov P.G., taking into account the character and level of public danger of the crime committed, as well as the effect of the punishment on the life conditions of his family, the judicial panel drew a conclusion that correctional rehabilitation of Ustinov P.G. is possible without restrain of liberty, and, therefore, imposed a conditional sentence.

The example case might be considered a triumph of justice in a social aspect as an imposed unfair sentence was considerably mitigated under the pressure of public opinion. Such a conduct of the state might be viewed as a drawback, though the compromise was reached in relation to original injustice. Though, there exists an opinion that if society wishes more severe (or more lenient) sentences than a criminal objectively deserves it would be better not to raise (or reduce) a custodial penalty, but enlighten the public so that our citizens could understand which rules of imposition of penalty serve to attain justice [9]. Pursuing the point, it is necessary to form public concept of justice in the way required by the law.

4. JUSTICE OF PUNISHMENT: JUDICIAL VIEWPOINT

In the view of the foregoing we may conclude that just punishment is heard and considered in society, but generally in case of high-profile criminal matters; the state has no scope for carrying out public expertise on every sentence, as it would violate the foundation of justice. So the task of exploring public respond to an imposed sentence falls on the shoulders of a judge and becomes part of his job in the process of imposing a sentence for the purpose of implementation of the principle of justice and restoration of social justice. We fully agree with S.A.Galaktionov that "unjust punishment is more sensitive to the public than unjust honor. Passing an unjust sentence, a judge undermines public confidence in justice, so the principle of justice in criminal law is particularly important [7. P. 78]. Researchers of judicial manpower point out that the most valuable asset of the judiciary is the trine: "legitimacy – defense of rights – justice", where justice lies at the center of it; it is in terms of this concept that society understands 'law' and 'justice' [8. P. 3]. One may contemplate on public level of justice for ages, though criminal law provides for criteria that just punishment should match. Under art 6 of RF CC, punishment and other punitive legal measures applied to a person who committed a crime shall be just, i.e. agree with the character and level of public danger of the crime committed, circumstances of the crime and personality of a guilty person. Therefore, criminal law that actively employs the concept of 'justice' provides for supporting tools while imposing sentences in criminal cases. We suggest a term 'criteria' for supporting tools ensuring justice in the legal system. 'Criteria' is *indicia*, grounds, decision rule for appraisal of something for compliance with due claim. As to etymology of the term 'criterion', the word itself originates from a Greek word *κριτήριον* that means the ability to differentiate, instrument for judgment, measure. The word *κριτήριον* has the following variants of translation: instrument to solve a problem, litigation venue, and is derived from *κριτής*, that is translated from the Greek language as 'a judge'. Among the criteria for justice we might define the following (under art. 6 RF CC): public danger of a crime,

personality of a guilty person, and the circumstances of the offence. In our view, there exists a certain mechanism by which the above named criteria affect the final penal measure. In the first place the court assesses the limits of liability to punishment, defines the extent of penalty that might be imposed on a certain individual subject to the provisions of a penal part of article from the Special Part of RF CC under which the offence is defined. Then the court applies the provisions of the General Part to adjust the extent of punishment; at that, it applies formal rules for imposition of punishment. Then, the court is to decide on several types of punishment in accordance with the principle of justice in course of imposition of penalty, and finally, it must assess the penalty acting with maximum judicial discretion; the criteria take on a role of a guide for a judge, the court establishes the circumstances characterizing every criterion and takes their assessment. Assessment is a means by which the court decides on significance of this or that criterion and its impact on the penal measure imposed for the purpose of mitigating the sentence or making it more severe. Criteria assessment is some kind of a basis for administering punishment.

5. RESULTS

For finding the way of achieving just punishment we drew up a special questionnaire containing open question and conducted a survey among 350 federal judges from 20 subjects of the Russian Federation. First, the respondents were proposed to answer, among other, the following question: "In the course of imposing a sentence, what factors have an impact when the court considers the character of public danger of a crime committed?" The judges surveyed demonstrated no precise understanding of the character of public danger: 22% of the respondents gave no answer at all, 25% pointed out the object of crime, 23% named the category of a crime, 15% - the form of guilt, 8% - the degree of harmful consequences. Along with the presented factors, we got the following answers: aggravating and mitigating circumstances, degree in the commission of crime, minority status of a guilty person, repetition of crime, *modus operandi*, motive of crime, public mind (respond), particular circumstances of crime, conduct of a person affected, peculiar ferocity and cynicism of crime. As it is clear from the survey, many of the judges confused the concept of character of public danger with its degree.

While answering the question: "In your opinion, what factors have an impact when the court considers the degree of public danger of a crime committed?", for the most part the judges pointed out several factors. The majority of the respondents (35%) laid stress on harmful consequences (their degree), nearly as much (34%) mentioned nature and extent of damage (harm), whereas 15% of the respondents pointed out both damage and consequences, that demonstrates the fact that judges take these concepts separately.

The next in popularity is the answer 'modus operandi' – 25%, then goes 'role of a guilty person in committing a

crime' – 18%. 14% of the respondents named purposes and motives of crime, 7% - degree in the commission of crime, and only 3% pointed out degree of execution of criminal intent. Less common were the answers: gravity of offence – 5%, environment – 5%, characteristic factor – 4%, the number of persons affected – 3%, personality of a guilty person – 3%, scene of crime – 3%, character references of person affected – 3%, mitigating and aggravating circumstances – 2%, reluctance to pay damages – 2%. 1% of the respondents underlined the following factors: recidivism, age, affected person's opinion, time, appropriation of corporate opportunities.

The third question in the questionnaire was "What factors and circumstances have priority for you in pre-sentence report and what is its impact in the process of individualization of punishment?" The most typical answers were: 47% - prior conviction, at that only 4% answered that expunged conviction and spent conviction must also be considered, 8% pointed out the fact of prior criminal record, 39% stated that for them family status plays its role, 32% named state of health, 30% - age of a guilty person, 29% - regular job. 24% of the respondents indicated the need to consider various personal characteristics of a guilty person (from a district militia inspector at the domicile, from the job, from educational establishments, from neighbors), 22% mentioned caring responsibilities. Other factors that were offered to the respondents were less popular: confession of guilt, penitence – 12%, attitude to what was done – 11%, permanent residency, registration – 8%, post-criminal conduct – 8%, gender – 7%, motives and aims – 4%, previous administrative liability – 5%, behavior in private life – 5%, behavior at the place of residence – 5%, behavior prior to crime – 5%, social status – 4%, work ethic – 4%, property status – 3%, conduct of a guilty person – 3%, social adaptation – 3%, consequences of crime – 3%.

From 1% to 2% of the respondents pointed out the following factors: confluence of circumstances, form of guilt, mitigating and aggravating circumstances, living conditions of the family, social personal dignity, illnesses of relatives, active service, citizenship, honors, education, role in crime, religious denomination, race, way of life, community involvement, psychophysical characteristics, intelligence, criminal disposition, habitual drunkenness, drug habit, social role factors, moral psychological factors, lack of aggravating circumstances, drunken or sober state at the time of a crime, degree of criminalization. 6% of judges were undecided as for the question.

6. RESULTS AND DISCUSSION

Survey based results, as well as their correlation with opinion poll findings, that were conducted by independent centers concerning justice of sentences on high-profile criminal cases mentioned above became the basis for the following theoretical conclusion: in the process of imposing a sentence to a guilty person justice has two main levels: social and legal. Under social level of justice

we understand whether the measure of punishment is reflected in the public consciousness as just or unjust.

7. CONCLUSION

On the basis of criteria assessment and particular factors characterizing each criterion, court imposes such measure of punishment as is considered to be just. Therewith, to achieve justice of punishment it is imperative that justice be realized both on social and legal levels. It is legal level that we propose to go by, as public appraisal of punishment is made after the court has analyzed all criteria of justice, and on those results final measure of punishment is assessed.

Thus, there are a few options as for realization of justice in the sphere of imposition of penalty: 1. Court took a correct view of criteria of justice provided by law, though the public does not believe the punishment to be just. Consequently, social level of justice remains unrealized. It may result from deformation in public consciousness of certain legal aspects, though while imposing punishment a judge should aspire to realize public social will and minimize public opposition as for the sentence imposed; 2. Court took an incorrect view of legal criteria and punishment might not be considered as just, however, due to deformation in public consciousness society may take this punishment as just, though it not being the said; 3. Ultimately, the most favorable situation – when a sentence is passed in compliance with all legal criteria and successfully undergoes social expertise; in this case justice is finally realized and the punishment becomes just. But the question remains open: how to attain this ideal? As for legal level, it is no problem – court shall examine all circumstances of the case and weigh criteria of justice provided by law. Thus, the problem lies in lack of formalized criteria of public justice. But the essence of ideal lies in the idea that one should endeavor to attain it – it is a vector of sound progressive development.

ACKNOWLEDGMENT

The research is done with financial support from RFBR under agreement № 19-011-00818.

REFERENCES

- [1] U.B. Epikhina, Public justice in Russian social ideas, M.: Ltd “IPC ‘Maska’”, 2014.
- [2] S.V. Mareeva, Justice and inequality in Russian public perception, *Journal of institutional research* 7(2) (2015) 109-119.
- [3] A.B. Veber, Social justice and development, *Free ideas* №5 (2015) 95-108.
- [4] O.A. Gulevich, Social psychology of justice, M.: Pub.House “Institute of psychology RAS”, 2011.
- [5] O.N. Gordonova, Idea of justice as appraisal criterion and improvement of criminal legislation: theoretical and applied aspects: Ph.D thesis in legal sciences: 12.00.08, Cheboksary (2014).
- [6] T.V. Klenova, Problem of equality in criminal law, *Russian Judge* №7 (2011) 36-41.
- [7] S.A. Galaktionov, Principle of justice: criminal legal aspect: Ph.D thesis in legal sciences: 12.00.08, Ryazan (2004).
- [8] V.V. Volkov, A.V. Dmitrieva, M.L. Pozdnyakov, K.D. Titaev, Russian judges as professional group: research, St.Peterburg.: Institute of administration of law of European university in St.Peterburg (2012) 60 p.
- [9] G. Duus-Otterström, Retributivism and Public Opinion: On the Context Sensitivity of Desert. *Criminal Law, Philosophy* №12 (2018) 125–142. DOI: <https://doi.org/10.1007/s11572-017-9415-z>
- [10] R. Jesper, J. Roberts (eds.), *Popular Punishment*, Oxford: Oxford University Press. (2014). URL: <https://books.google.ru/books?id=yndYAwAAQBAJ&pg=PP1&ots=kvr6rv09f-&lr&hl=ru&pg=PR4#v=onepage&q&f=false>