

# Judicial Discretion and Issues of Its Implementation at the Application of Punishments Alternative to Confinement

Lyadov E.V.

Academy of Law and Management of Federal Service for the Execution of Sanctions (Academy of FSES of Russia),  
Ryazan, Russia  
Email: leve2000@yandex.ru

## ABSTRACT

Criminal sentencing for the completed offence and the related judicial discretion at the selection of type and amount of penalty to a liable person is not a new practice for criminal legislation, including Russian. On the one part, judicial discretion is a necessary condition for differentiation and individualization of punishment to a perpetrator; on the other part, it has a propensity for corruption. It should be noted that the list of the judicial discretion grounds includes ambiguous rules set forth in the legislation; discrepancies between standards of different sector profile; misregulating of relations that became the judicial matter; legal provisions; evaluative legislative notions and other circumstances, objectively causing judicial discretion. The grounds specified are present both at the application of punishments both in whole, and at the application of punishments alternative to confinement, in particular.

**Keywords:** *imposition of punishment, sentence enforcement, alternative to confinement, criminal sanction, judicial discretion*

## 1. INTRODUCTION

The Constitution of the Russian Federation classified the criminal sanction application to the exclusive competence of court. This constitutional provision was fixed in Art. 8 of the Russian Federation Code of Criminal Procedure, according to which, "no one can be convicted of a crime and subjected to a criminal sanction otherwise than under the court sentence and according to the legal procedure." Moreover, pardon or commutation of sentence are also fulfilled by the court.

It is stipulated by Art. 10 of the Universal Declaration of Human Rights that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" [1].

In cl. 1 of Salvador Declaration on Comprehensive Strategies for Global Challenges: crime prevention systems and criminal justice in the changing world. It is emphasized that "an effective, fair and humane criminal justice system is based on the commitment to uphold the protection of human rights in the administration of justice and the prevention and control of crime" [2].

The need for justice for the state and society is, without doubts, important and necessary. Finding the negative behavior of people that is contrary to interest of protecting priority values and goods requires special conditions and special order, favorable for solving this issue to the fullest extent [3].

## 2. STUDY METHODOLOGY

Theoretical and methodic provisions were presented by works of Russian and foreign scientists in investigating the issue of the judicial discretion in the whole and when applied to punishments alternative to confinement, in particular, conclusions and offers, obtained in the course of applied studies in the area under consideration in the given social and economical and social and political conditions, issues of the current federal legislation efficiency.

Such scientific study methods as theoretical, sociological, and formal and logical method, were used in this study.

Theoretical studies are aimed at comprehensive studying and cognition of objective reality with the purpose to determine relation and generalizations, forming the basis of the theory development, that are common for this subject area. The sociological method allows evaluating the behavior of people connected with issues of imposition and enforcement of punishments alternative to confinement, in particular. The use of formal and logical method allowed to distinguish and evaluate modern directions of development of the legislation of the Russian Federation in the field of legal regulation of the application of punishments alternative to confinement, and features of the judicial discretion, in connection with this.

### 3. STUDY RESULTS

Scientists and legal practitioners use two notions for the court discretion designation: "Judicial discretion" and "legal discretion". Without descending into etymology, we will proceed from the identity of the aforementioned notions, however, we consider the use of the notion "judicial discretion" the most applicable.

Criminal sentencing for the completed offence and the related judicial discretion at the selection of type and amount of penalty to a liable person is not a new practice for criminal legislation, including Russian. Barak A. noted, "where there is right, judicial discretion will be" [4].

According to correct words of A.R. Gambarian, "enforcement of law is a complex process consisting of the line of stages, each of them contains elements of judicial discretion". At this, he distinguishes three stages of legal enforcement with judicial discretion present at their fulfillment. The first stage is related to the determination of "factual circumstances of a legal case; at the second stage of the judicial discretion law enforcement, where judicial discretion is expressed by selecting the legal standard subject to application, at the third stage, at passing judgement under the legal case, when judicial discretion is expressed in the course of determining legal consequences of the specific case" [5].

Speaking of the grounds of the judicial discretion, it should be noted that the list of the judicial discretion grounds includes "ambiguous rules set forth in the legislation; discrepancies between standards of different sector profile; misregulating of relations that became the judicial matter; legal provisions; evaluative legislative notions and other circumstances, objectively causing judicial discretion" [6].

Podmoskovny V.D., speaking of the judicial discretion, notes that it is characterized both by positive and negative points [7]. At this, A.R. Gambarian indicates that "in one case, it is considered as an objective need, providing the flexibility and development of legislation; on the other part, judicial discretion is considered as an ultimately dangerous and undesirable phenomenon for justice and society members because, by applying the discretion, a court can admit abuse and inflict harm to statutory interests" [8]. The result of the negative situation will be a judicial error, not only having a negative effect for a convicted person but also undermining social trust in justice, judicial system in the whole. A.P. Chekhov wrote in connection with this, "...a judicial error, given present-day court procedures, was very possible, and it would be no wonder if it happened. Those who take an official, business-like attitude towards other people's suffering, like judges, policemen, doctors, from force of habit, as time goes by, become callous to such a degree that they would be unable to treat their clients otherwise than formally even if they wanted to; in this respect they are no different from the peasant who slaughters sheep and calves in his backyard without noticing the blood. With this formal, heartless attitude towards the person, a judge needs only one thing to deprive an innocent man of all his property rights and sentence him to hard labor: time. Only the time

to observe certain formalities, for which the judge is paid a salary, and after that—it is all over" [9].

The Russian Constitutional Court also confirms that the court is entitled to make decisions at its own discretion. For example, in its Definition No. 404-O of November 20, 2003, the Russian Constitutional Court expressed its opinion that it cannot be considered as infringement of any constitutional rights and freedoms of the citizen, if a judge makes different decisions under, in general, identical cases because, by applying the legal instruction to merits of a case, a judge makes a decision within the freedom of discretion provided to him/her by law [10].

Along with that, an over-the-topness of the judicial discretion should be noted, which, in particular, can be seen from data obtained by R. Dolotov and E.L. Sidorenko when applied to proportion and intersubstitutability of criminal sanctions, namely, the penalty replacement to confinement in case of evading from its payment. It should be emphasized here that the current legislation contains no standards that would strictly regulate the proportion in such cases, giving full freedom to the judge's discretion.

Thus, according to estimates of R. Dolotov, variance of the "cost" of one month of confinement at the penalty replacement is really large. from 146 RUB to 50,000 RUB. As is known, the higher is the variation coefficient value, the higher is the variance and the lower is the evenness of values testes, relatively. The pool is believed to be quantitatively homogeneous in statistics if the variation coefficient does not exceed 33%. In case of acquisitive offences, this factor exceeds 100%. Thus, the court subjectivism at the penalty replacement in the case of willful evasion from its payment leads to considerable variations at the confinement term determination, which did not allow speaking of any empirically evincible proportion ratios. In our opinion, this is expressed as one of negative points in legal discretion [11].

Using the method of calculating the proportion at penalty replacement with confinement offered by R. Dolotov, E.L. Sidorenko, by including sampling and corruption crimes, obtained the cost variance of 1 month of confinement that twice exceeded the results presented by R. Dolotov. Minimal cost was 135 RUB, and maximal, 130,000 RUB [12]

The issue whether judicial discretion is necessary is beyond doubts. But where are the limits of its expansion? How widely can the provisions be interpreted at their application by judges? It seems to be the most important relating to understanding and interpretation of evaluative notions (categories), the number of which in our current legislation is rather large, which, in its turn, imposes the highest possible liability on judges for decisions made during the judicial proceedings.

The use of exclusively evaluative judgments in the law leads to various evaluation of similar circumstances [13]. "Increasing the number of provisions the structures of which contain evaluative notions", states S.V. Smolin, "normally leads to the excessive widening of the judicial discretion limits" [14]. It should be mentioned here that "removing the hazards of the judicial discretion, and, in the first turn, possible subjectivism and abuse of discretion,

can only be done by putting it into the limits of general restrictions" [15]. In our opinion, evaluating notions should be used in the legislation only if absolutely necessary. It should be additionally specified that, in distinction from clearly formulated notions and categories, evaluative notions and categories in different time intervals can have the strongly varying interpretation which, beyond doubt, will affect the regulatory enforcement and social reaction to punishments imposed by courts. M.I. Kovalyov states in connection with that, "If the law-making body uses evaluative wordings, it thereby leaves open the possibility of varying the content of the respective notion or definition, depending on the situation conditions, but within the limits of freedom provided to the interpreters" [16].

The law-making body should aim to formalize the evaluation signs, if possible. "Formalization of evaluative signs", according to Ye.V. Kobzeva and N.A. Lopashenko, "is its (the law-making body's) exact prerogative. It can be implemented through the introduction of special provisions (an independent article) into the General Part of the CC RF, and through the wider use of notes to chapters of the Special Part of the CC RF, and the introduction of special articles disclosing the meaning of evaluative signs for separate law chapters, into the latter" [17]. Agreeing with the opinion specified, it should be noted that the issue of using evaluative notions in the Correctional Code of the RF should be solved in a similar way. And in case of urgent necessity in the formalization of the certain categories, this can be achieved by forming directives in Decisions of the Plenum of the Russian Supreme Court.

In the whole, the criminal legislation is unable to cover absolutely all the situations formed at the consideration of the certain criminal case, respectively, the law-making body provided to the legal practitioner a possibility to act at its own discretion. However, it is believed that the current criminal legislation, similar to penal legislation, is overloaded with a large number of evaluation categories, excessively expanding the judicial discretion, and requires the certain specialization.

At the same time, attention should be paid to the fact that not always wide judicial discretion is connected with the law-making body's will to this. Today, due to the considerable number of amendments and supplements to the criminal legislation, and this number of amendments and supplements to the CC RF exceeds one thousand, according to the pictorial phrase of Professor A.I. Korobeyev, "from initially integral and systemic act, it turned into a simulacrum of a patchwork quilt, became filled with internal contradictions..." [18], the certain, and sometimes excessive "freedom" of the legal practitioner was a consequence of breaking the legislative techniques and architectonics of the criminal law.

The way out of the existing situation is in strict conformity to the legislative technique rules at the adoption of laws, their thorough elaboration and conformity to the structural construction of the criminal law, including the procedure of its amending and supplementing.

Speaking of evaluation categories (notions) used by the law-making body, it should be noted that no term "evaluation category" is defined in the current legislation. Criminal literature defines as "evaluative" such notions, the content of which is determined not by a law or another regulatory act but by a feeling for law and order of a person who applies the respective legal provision based on the merits of a case (e.g., "severe consequences", "considerable damage", "essential damage", etc.). By using them, the law-making body aims to give the subject of criminal law standard application a possibility to take maximal account of actual circumstances of the certain criminal case, and requirements of the changing conditions of social life [19].

Application of a criminal standard, including evaluative notions, does not exclude but, on the contrary, presumes the preliminary clarification of meaning and will of the law-making body that provides the certain freedom in decision-making to the legal practitioner, thus establishing the certain judgement limits [20]. Determining the judicial discretion limits is of high importance right when using such standards.

The main criterion for the evaluation category distinguishing in jurisprudence is that it goes beyond the law limits formally and obviously, by its content. It is a category, the exact understanding and interpretation of which requires not only the knowledge of laws but also the knowledge of moral standards, the certain life experience, etc. [21]

It should be mentioned that in the particular case, the law-making body discloses the content of the certain evaluation category, and otherwise, does not disclose it, considering this action unreasonable. E.g., in cl. "a", P. 1, Art. 30 of the Correctional Code of the RF it does not particularize what shall be meant by "justifiable reasons", substantiating (justifying) absence of a person convicted to community service from work, entitling an executor of law (penal inspection) to solve this issue with regard of the particular circumstances. Otherwise, namely, in P. 4 Art. 50 of the Correctional Code of the RF, the law-making body specifies the complete list of "exclusive personal circumstances", which is also an evaluation category, at the presence of which a person convicted to custodial restraint can receive the consent of the penal inspection for leaving the place of his/her permanent residence (staying) at the certain part of the day, for visiting the certain places located within the territory of the respective municipal object, or for leaving the limits of the respective municipal object. The situation in P. 5 of the article specified, regulating the obtaining of the penal inspection consent to the place of the convicted person's permanent residence (staying), is similar.

When considering, in particular, such evaluation category as "justifiable reasons", it should be mentioned that it is one of the most widespread and, at the same time, the most disputable ones. This evaluation category is present in the context of the following situations related to the implementation of punishments alternative to confinement: in solving the issue of permitting a person sentenced to community service to work less amount of hours during

the week (Part 2, Art.27 of the Correctional Code of the RF); at admitting the convicted person deliberately eluding the community service performance (Part 1, Art. 30 of the Correctional Code of the RF); in making a decision on attracting the convicted persons to community service, who do not appear on call or for registration (Part 3 Art. 39 of the Correctional Code of the RF); upon the ascertainment of the fact of the violation and gross violation of order and conditions of service in the form of community service by a convicted person and at admitting the convicted person deliberately eluding this community service performance (Art. 46 of the Correctional Code of the RF); at calculating the custodial restraint term (Part 3 Art. 49 of the Correctional Code of the RF); upon the ascertainment of the fact of the violation and gross violation of order and conditions of service in the form of confinement and при признании его злостно уклоняющимся от отбывания наказания in the form of custodial restraint (Art. 58 of the Correctional Code of the RF); upon the ascertainment of the fact of the violation and gross violation of order and conditions of service in the form of community service by a convicted person (Part 1 and 2 Art. 60.15 of the Correctional Code of the RF); in the exercise of the compulsory attendance of a probationer привода условно осужденного by penal inspections and formation military commanders (Part 4 Art. 188 of the Correctional Code of the RF).

We should agree with A.G. Antonian, indicating that one of functions of this evaluation category is saving legal funds. The law-making body, after specifying the complete list of "justifiable reasons", will have to expand this list from time to time by amending the Correctional Code of the RF. In addition, each article of the Correctional Code of the RF using this category, the specific meaning, or aspect of "justifiable or unjustifiable reasons" can be distinguished [22].

In our opinion, with the purpose to specialize justifiable reasons and to exclude the excessively extensive interpretation of them, it is required to fix the need of documentary confirmation of the respective justifiable reason in legislation. This issue was raised in the Correctional Code of the Republic of Kazakhstan [23] in various articles. E.g., according to P. 2 Art. 53 the Correctional Code of the Republic of Kazakhstan when applied to the punishment in the form of community service, "the untimely receipt of the call, and other documented evidences that deprive the convicted person of the possibility to arrive on call in time, should be deemed justifiable reasons of the default of him/her in appearance in the probation service at the time prescribed", a reference to this part of the article is given in Art. 59 in the context of punishment in the form of social work, in Art. 66 – relating to custodial restraint, in Art. 77 – at service of sentence in the form of deprivation of the right to occupy determined posts or to engage in a determined activity.

It should be noted that the interpretation of evaluative notions should be carried out in clear and exact language not permitting ambiguous understanding, if possible, without using other common and evaluative notions, that

will enable their interpretation in one way of meaning and their correct and even use in practice.

#### 4. CONCLUSION

"Judicial discretion is an objectively existing phenomenon inherent to the law system of any state" [24], which offers the certain opinion (conclusion) of a judge in a case considered in the certain moment of time. "Peculiarities of legal discretion as a legal phenomenon depend on the specific legal consciousness concept" [25]. However, the implementation of the provided discretionary powers by judges should not cause the infringement of civil rights and freedoms, but should contribute to the law and order strengthening.

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