LIBERALISATION OF SENTENCES AND HUMANISATION OF CUSTODIAL SENTENCES IN GEORGIA

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Abstract. In the current process of EU integration, it has been not only desirable and appropriate but also necessary to regard the conceptual basics of the principles of democracy and to approximate them with international standards. This, in turn, entails the liberalisation of criminal legislation. Since 2004, the influence of authoritarianism and radicalism on the criminal legislation of Georgia had been evident, but it has changed since 2013 when the process of liberalisation of criminal policy was initiated. Although it has been nine years since the initiation of the process, there is still a lot more to be done for the improvement of criminal legislation, all the more so because the weakening of the liberalisation policy can be observed since 2015 due to the increase of certain serious criminality.

Keywords: Liberalisation, Resocialisation, Legimetry

Preface: In scientific discourse, there are extensive and restrictive, maximalist and minimalist theories. If our purpose is a reasonable liberalisation of the liabilities of an offender, it would be preferable to support the maximalist theory, all the more so as the EU seeks the liberalisation of criminal law, so it is preferable to use an extensive definition taking into account the most recent achievements of hermeneutics. Namely, the conduct of the offender should be studied in the wide context of its relation to social norms, not only in relation to moral and legal requirements[1].

In order to achieve the liberalisation of sentences and the humane treatment of

1. *Tsirkvadze T.,* Offences Committed under the Provoked Temporary Insanity as a Victimological Matter, Scientific Journal Criminologist, 2020, No 15, 162.

offenders, which entails equitable and proportionate sentences and the opportunity of resocialisation for the offender, it is necessary to make certain changes to legislation: 1) to extend and improve the area of alternative sentences; 2) to determine a proportionate term of sentence for a crime committed using legimetry methods; 3) to give more importance to the principle of individualisation in court; 4) to differentiate the usage of a conditional sentence and a plea bargain; 5) to enforce progressive attitudes in penitentiary establishments.

Liberalism implies a logical interrelation between politics and law, therefore the liberalisation of sentences includes the imposition of such sanctions where the political and the legal components will be considered proportionally. The proportionate interrelation of the two components is difficult to achieve and often results in philosophical difficulties. Therefore, observing proportionality requires certain operations of legal measurement.

Liberalisation of Punishment

In ancient times, the main purpose of punishment was revenge for the offender. The Talion principle – "an eye for an eye and a tooth for a tooth" – serves as evidence of thi[2]. Not long ago, this purpose still prevailed in the criminal policy of dominant Russia, and of Georgia, which was in general reduced to the categories of crime and punishment. Although, as time passed, society developed and realised that the mere punishment of an offender was not sufficient; that sometimes, because of social interests, it was necessary to think about the motivation of an offender. Professor Mindia Ugrekhelidze refers to this approach as the *method of stick and carrot*[3], meaning that if the offender is focused on motivation from the State, he/she will cooperate with the investigation, will refrain from crime, and try to regain the status of a full-fledged member of society. As for the system oriented on punishment alone, it demotivates the offender to atone, and encourages his/her further criminal behaviour[4]. The criminal policy of Georgia has embarked on the former direction since 1999, and the Code is being methodically refined and improved through its liberalisation.

In the 18th century, the movement of Enlightenment opposed the purpose of punishment as the retribution. One of the leaders of this movement was one of the progenitors of the Classical School, Cesare Beccaria, who considered the ultimate purpose of punishment to be the prevention of the repeated commission of crime, both by the offender and any member

2. *Lex Talionis,* The Torah – A Modern Commentary, New York: Union American Hebrew Congretions, plaut, 1981, 572; Hans Kelsen, Vergeltung und Kausalität, Hague, 1941.
3. In English literature it is referred to as "the method of stick and carrot"; in Russian – "метод кнута и пряника".
4. *Ghlonti G., Kelenjeridze I., Dolidze T., Ghlonti A.,* Comparative Criminal Law, Institute of Law of the European University, 2022, 30.

of society, rather than the punishment of an offender. This requires a punishment that is more influential on the spirit of the offender and less severe on his/her body[5].

To carry out the purposes of punishment, it is necessary to impose an individual penalty on an individual offender, by way of considering the legally significant circumstances relating to a particular case. These circumstances comprise the objective and subjective characteristics relating to an offender, such as his/her surroundings, family, character, the characteristics of the victim, social factors, the post-criminal behaviour of an offender[6], the level of guilt[7] etc. This is precisely what is required in the individualisation of punishment, which gives a judge the freedom to reasonably choose a penalty.

When determining a sentence, a judge might be emotionally predisposed to certain positions so as to prevent a reasonable substantiation of a sentence. Different judges can determine different sentences for a particular crime which is conditioned by their convictions and values. Every person cannot have the same moral views, and notwithstanding the fact that judges are required to have very high moral standards, differences between them will still exist.

For example, according to Andrew Ashworth, when a judge determines a sentence, his/her decision is influenced by the demographic characteristics of the judge, such as his/her age, social status and background, race, gender, religion, political views etc[8].

All the above-said is confirmed by a study conducted by the American attorney Howard Zerr, in which several judges were given identical cases and their decisions were very different[9]. The differences between decisions made by the city courts, courts of appeals and supreme courts serve as an example as well. As further developments take place, this problem can be solved by the techniques of legal measurement, so-called legimetry, which will enable judges to decide the issue of determining the term of a sentence with scientific precision.

In 2007, the Standing Commission was established on the study and generalisation of judicial practice in criminal law and the determination of suggestions for judges of the common courts, which developed suggestions and recommendations regarding problematic issues of judicial practice in criminal law. The Commission gave a detailed outline of the terms of

5. *Beccaria C.,* On Crimes and Punishments, Translated from Italian by *Khutsurauli I.,* 2003, Tbilisi, 101.
6. *Ugrekhelidze M.,* Phenomenology of Post-Criminal Emotional Feelings, International Journal of Law – Law and World, 2017, No 7, 29-39.
7. *Ugrekhelidze M.,* Die Bedeutung des Schuldgehalts der Tat im Strafrecht. Zwietes Deutsch-Sovietishces Kolloquium über Recht und Kriminologie (B2), "Nomos"- Publishing house, Baden-baden, Germany, 1984; *Dolidze T.,* Circumstances Excluding and Mitigating Guilt in Criminal Law, Institute of Law of the European University, 2022, 33-34.
8. *Andrew Ashworth*, Sentencing and Criminal Justice, Fifth edition, Cambridge University Press, New York, 2010, p. 41.
9. *Howard Zerr.,* Restorative Justice; A New Look at Crime and Punishment; Translated from English by M., Centre Judicial-and Legal Reform, 2002, p. 30-31.

sentences to be determined for an offender on account of specific circumstances, which are also listed therein. It also stipulated that if any other significant circumstances existed, the indicated term of a sentence could be reduced or increased[10]. I think this "guideline" serves as an attempt at using legimetry tools, an approach which is positively evaluated by the American attorney Andrew Ashworth, who considers that making extreme decisions in cases with similar circumstances necessitates restricting judges to certain frameworks. In his view, there are many norms about which courts of different instances have different opinions[11]. The system of guidelines, which, if not fresh fruit, is at least old fruit under a new name for Georgia, attracted lots of complaints and criticism about many of its aspects. Evidently, it could not escape criticism in Georgian legal literature and publications (especially from Professor Otar Gamkrelidze). However, as long as our topic is entirely different here, we will avoid it purposefully.

Legimetry represents the scales in the hand of the ancient Greek goddess Themis; therefore, if we see a judge in Themis's role, then for him/her legimetry is a tool which enables a judge to make the most precise decision, to determine a proper sentence, and to avoid relying on his/her inner beliefs and views, which may be entirely different for every judge; as the famous saying goes: "Two lawyers, three opinions".

Proportionality of a sentence

The proportionality of a sentence entails determining a sentence for an offender which is in proportionate relation to the purpose of the crime. In order to determine whether or not the sentence is proportionate, it should be evaluated as against its purposes. In order to determine the type and measure of a proportionate sentence, first it is necessary for a legislator to evaluate the gravity of the crime, on the basis of its criminal liability, and then a sentence shall be differentiated[12]; following that, a judge should evaluate the circumstances of the particular case, especially the personality of the offender, and shall individualise criminal liability and the sentence. All this should be carried out by means of a logical balance of moral and political determinants. The moral criterion is a virtuous category – *just deservs* – centred on the need to achieve justice. As for the political criterion – *expediency* – this determines how beneficial a certain decision could be (in this case, the imposition of a sentence that is the most productive). These two criteria should necessarily be balanced, since if, for example, the moral determinant outweighs the political, the sanction imposed will result in failing to achieve the purposes of a sentence,

10. Suggestions and Recommendations on Problematic Issues of Criminal Law Practice, the Supreme Court of Georgia, 2007, Tbilisi.
11. *Andrew Ashworth,* Sentencing and Criminal Justice, Fifth Edition, Cambridge University Press, New York, 2010, p. 7.
12. *Tsereteli T.,* Legal Terminology, Tbilisi, 1963, 30.

and an ineffective punishment. And if the political component prevails over the moral, the community shall not have a sense of restoring justice and the sense of injustice will triumph, a situation which is anathema to the principles of a constitutional state, and one which promotes the development of a police state[13].

Certain criteria can be determined as legimetry tools for determining a term of a sentence; for example, the number of days or months of restriction should be predetermined where a person has not been previously convicted and has received very good character references from the family and relatives; another example is the post-criminal factor, that is how a person behaves after he/she commits a crime, whether or not he/she cooperates with law enforcement agencies, or tries to compensate for the damage incurred by the victim, and whether or not he/she tried to save or help the victim after committing the crime, etc. All the mitigating or aggravating circumstances should have their own weight, and a judge, after examining and confirming the particular circumstances of the case, should appeal to the scales of Themida in his/her hands to weigh the combination of circumstances; only then should a judge increase or decrease the level of sanctions determined by legislator. These calculations are not to be made by the judge alone. A certain algorithm should be developed which will make calculations electronically and determine a relevant term, although whether this mechanism takes into consideration specific mitigating or aggravating circumstances should be determined by the judge. The judge alone should decide upon the guilt or innocence of a convicted person. Therefore, during the sentencing hearing, the prosecution must substantiate aggravating circumstances, and the defence mitigating; the judge should decide how realistic the circumstances are, and whether or not to include them in the relevant legimetry mechanism.

Some other factors should be considered as well; for example, if a sanction envisaged by a relevant article of legislation prescribes a fine, or community service, or restriction of liberty for a term of 1 to 3 years, to be applied to the convicted person. At first, the initial index entered in the legimetry tool will be 2, since for the particular crime the sanction prescribed is restriction of liberty for a term of 1-3 years, the indication of maximum and minimum terms gives an average of 2 years. This can then be increased or decreased by a number relating to the mitigating or aggravating circumstances. If the number indicated is less than 1 year, a judge will be able to decide between the fine and community service in accordance with the purpose of proportionate sentences, with a view to its efficiency in terms of achieving the purpose of the sentence.

Clearly, the indicators for mitigating and aggravating circumstances shall not be the same for different crimes. They should be accompanied with a percentage, and their numerical value

13. *Ugrekhelidze M.,* From Legimetry to Legal Dimensiology, Journal Caucasus International University herald, Tbilisi, 2011, No 3, 64 – 65; *Ugrekhelidze M.,* Law as the Dimension System, Scientific Journal – Georgian Politics, 2015, No 21.

changed in accordance with the sanctions established by the legislation. For example, if we give 1 per cent to cooperation with law-enforcement agencies, in the case of Article 108 of Georgian Penal Code, its numerical value will be approximately 38 days, but in the case of Article 111 it will be 7 days. Clearly, these numbers are conditional as well.

A similar method was used by the local councils of the Ministry of Corrections and Probation provided for by Article 12 of the version of 28 October 2010 of the Statute of the Council. It envisaged granting coefficients to certain criteria, on the basis of which the question of release on parole was determined[14].

Humane and resocialisation-oriented ways of restricting liberty

In legal literature, many legal academics consider that restriction of liberty increases the level of crime, and thus a convicted person is driven to more crime. One influential factor is that the tag of "former prisoner" makes it difficult for a person to reintegrate into society, to develop normal societal relations, both in terms of family and career, which is the result of stereotypes established in society. This can, however, be corrected by changing both the policy of prisoner treatment in prisons and the views established in society.

In 2014, the first liberty restriction facility was opened in Georgia with financing from the US. It was operational for a certain period and it held convicted persons whose sentence of imprisonment, by a decision of the Local Parole Councils, had been substituted by restriction of liberty. In order to achieve the purposes of a sentence, prisons should be arranged in line with the standards of these liberty restriction facilities.

Such a facility should be equipped with proper infrastructure and services of a high standard, though I will focus attention only on those metrics which I consider to be necessary preconditions for the resocialisation of detained persons, and therefore necessary to implement in prisons too. The liberty restriction facilities in question were equipped with different sports grounds, gyms, rehabilitation centres, libraries, and a training centre where convicted persons could gain qualifications in the trades and professions of electrician, tile master, accountant, computer engineer, and enameller. The duration of a course was 1 month and the participants were issued with relevant certificates. These courses were started according to the requests of convicted persons, and there was an opportunity to start other courses as well where requested. There was an iron and wood factory, a plasterboard factory, a pasta factory, and a bakery where convicted persons were employed and received payment. In

14. Guruli P., Parole – Legimetrical Comprehension, Journal Law and World, 2017, No 6, 53 – 54.

addition, in these facilities there was an opportunity to receive the services of a psychologist both individually and through social courses, such as: the development of public awareness regarding convicted persons, stress management, psychodrama, the essence of violence, and the preparation of convicted persons for release[15].

All this is necessary for the correction of a person and to change of his/her way of life. Every person has a certain interest which they might cling to, and desires to become a full-fledged member of society. For some it might be sports, for others a profession, or a paid job, or reading books in the library, or receiving education and higher education. Together with the help of a psychologist both individually or in the form of support groups, this approach will definitely have desirable results and the criminal interests of a convict will change. All the more so in that he/she will have the opportunity to use the knowledge and experience received, and be employed in some capacity. The change of lifestyle and goals of prisoners will result in the change of attitudes and views towards them in society, and put an end to the stigma of being a former prisoner which exists today.

At various stages of life everyone can make a mistake and become a victim of certain circumstances. However, as long as everything in the world is driven by dialectic process and logics, every person has both good and bad traits. It depends on external factors which of them will be developed. Therefore, if we see positive features in a person and help him/her to develop in that direction, the level of crime in society will decrease and subordination to law increase. And the State should find it worthwhile to allocate funds for this purpose.

Conclusion

- It can be stated that the liberalisation of sentences and the humanisation of custodial sentences indicate a new stage of development which can result in the transition of society towards a progressive path. This will change the awareness of society (people) and decrease the level of criminality.
- This will require the usage of legimetry methods i.e. “legal measurement”, “measurement by the law” and “measurement for legal purposes”. The refinement and improvement of standards and approaches in prisons ultimately require the potential use and utilization of measuring methods.

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