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Decision of the Constitutional Court of Ukraine on the Constitutionality of Articles 81, 82 of the Criminal Code of Ukraine in the Practical Use of the European Court of Human Rights

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Abstract

The relevance of the study lies in the assessment and analysis of the decision of the Constitutional Court of Ukraine on the application of the provisions of Articles 81, 82 of the Criminal Code of Ukraine, which are unconstitutional because they violate the personal rights of those sentenced to life imprisonment because they cannot be applied. The decision on unconstitutionality is commensurate with the convention requirements due to the practice of the European Court. The purpose of the study is to examine the specific features of the decision of the Constitutional Court of Ukraine regarding the compliance of articles of criminal legislation with the Constitution of Ukraine, to analyse the functioning of the institution of clemency in international experience, to examine the practice of the European Court of Human Rights regarding the parole of persons sentenced to life imprisonment. The methods used to examine the subject are: comparative, legal recognition, logical and legal, hermeneutical, analysis methods. Among the results of the study are the determination of the fact of violation of the constitutional rights of convicts due to the lack of prospects for release from punishment; characteristics of the court's decision on the admissibility of the provisions of criminal legislation, considering convention requirements; disclosure of human rights violations by comparing life imprisonment with the end of a person's life cycle; analysis of the practice of the European Court regarding the Prohibition of the use of life imprisonment. The paper also suggests ways to solve these problems. It is proved that the decision of the Constitutional Court of Ukraine satisfies the Convention requirements. The provisions disclosed in the study will be useful for analysing court decisions and creating recommendations for overcoming gaps in criminal legislation to harmonise it with the Constitution of Ukraine and comply with its obligations to protect human rights and dignity

Keywords: international experience, parole, institution of clemency, correction of convicts, convention

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Introduction

Recently, the decisions of the Constitutional Court of Ukraine on the unconstitutionality of the norms of criminal legislation have aroused great scientific and practical interest [1], where the court gives conclusions on the compliance of the norms of legislation with the requirements of the European Court of Human Rights (further – ECHR) due to the fact that the Constitution of Ukraine provides for the same rights as the Convention [2]. Ukraine recognised the authority of the European Commission on Human Rights in accepting applications addressed to the Secretary General of the Council of Europe on violations of the provisions of the convention by adopting the Law of Ukraine "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950". This step made the Convention one of the components of national legislation, so its provisions should be applied in the activities of courts, criminal and civil, in particular [3].

Ukrainian regulatory documents clearly indicate the procedure for serving sentences by convicts. Depending on the degree of Correction, the convict moves from one stage of the system to another. According to the provisions of Article 82 of the Criminal Code of Ukraine, if a convicted person changes their behaviour in a positive way, the unserved part of the sentence may be replaced with a more lenient one. In turn, Article 81 of the Criminal Code of Ukraine declares the application of parole from serving a sentence to a convicted person in case of their conscientious behaviour and involvement in work. However, the first parts of both articles were declared unconstitutional due to the impossibility of their application to persons sentenced to life imprisonment. The study analyses the issues of legal regulation of cases of life imprisonment in Ukrainian and international judicial practice.

The system of decisions of the criminal legal aspect is formed by the practice of the European Court on non-mitigation of life imprisonment. The decision in the case of Vinter and others v. the United Kingdom [4] was found to be exemplary in relation to the problem under consideration. The court has repeatedly supported the positions formed in this decision. This is the nature of the decision of the ECHR "Petukhov v. Ukraine" [5] on stating a systemic problem regarding non-mitigated life imprisonment. This decision was, so to speak, an impetus for individuals to appeal to the Constitutional Court of Ukraine through the newly created institution of constitutional complaint that the application of such punishment contradicts constitutional rights. The decision of the Second Senate of the Constitutional Court of September 16, 2021, after a long trial, was the final one in this issue [6].

O. Nastasyak [7] believes that in practice, the application of the provisions of the criminal legislation on parole occurs more often. This is a manifestation of the convicted person's unsuccessful motivation to change the colony to a correctional centre with employment. The essence of parole concerns serving a long-term sentence, where the application of Article 81 of the Criminal Code of Ukraine [1] is possible only when serving part of the sentence imposed by the court. This rule can be applied to convicts who have fully shown their changes and corrections [7].

D.V. Kaznacheyeva [8] identifies the correction of the convicted person in the positive dynamics of their psyche. There are three degrees of positive evaluation of the correction:

- proof of correction by convicted persons;
- the path of correction that convicts have taken;
- the path of correction on which the condemned stand firm.

A negative assessment is given when convicts violated the rules of serving their sentences and did not take the path of correction.

O.P. Horokh [9] highlighted the position of easy access to understanding the provisions of Articles 81 and 82 of the Criminal Code of Ukraine: it is necessary to introduce rules of subordination of the court regarding the application of a penalty, which make it impossible to voluntarily choose the type and measure of a more lenient penalty.

Researchers in the field of law I.S. Yakovets, and K.A. Autukhov [10] have the opinion that prisoners who have served twenty years of a sentence with the possibility of applying the institution of clemency have the right to early release.

The legislation of Ukraine does not contain the function of reviewing a court decision against those sentenced to life imprisonment. Therefore, the way to resolve this issue is the adoption by the Verkhovna Rada of draft laws that allow releasing a convicted person ahead of schedule, in accordance with the practice of the ECHR [11].

In addition, the constitutional procedure in many countries contains provisions for pardons when considering criminal cases. The issue of clemency was also analysed in the framework of papers on the law. For example, A. Novak [12] compared the powers of pardon and commutation procedures in the United Kingdom, the United States, and the Commonwealth of Nations. The researcher's paper raises issues of bureaucratisation of the powers of these procedures, issues of the impact of innovations in the field of legislative activity, judicial review, and executive consultations on the procedure. It contains a discussion on the future vectors of the development of regulation of pardons and commutation of sentences, considering the abolition of the death penalty in the Commonwealth of Nations and the development of the institution of parole in modern legal realities.

Researcher M. Minow [13] investigated the relevance of the presence of alternative justice mechanisms on the scale of global law. The study presents material on the correlation between serious crimes against humanity

and the introduction of procedures for mitigating the serving of sentences by convicts. The researcher considers criminal trials and judicial ones, analyses truth and reconciliation commissions as an alternative institution of punishment. In addition, the existence of corruption and compromise to mitigate the sentence is not ignored. Amnesty is seen as a way of political pressure by sacrificing transparent justice. The study discusses alternatives to judicial proceedings to achieve complementarity and suggests recognition of individual national restorative justice processes.

The collective of Ukrainian authors D. Kryklyvets *et al*. [14] investigated the acquisition of liberality by the judicial system by pardoning those sentenced to life imprisonment. Researchers see the reason for liberality in the establishment and development of democracy in Ukraine, which has formed the need for the introduction of European liberal values. Humane approaches to convicts, according to researchers, is priority a area for the development of criminal law legislation.

The purpose of the study consists in the investigation of the specific features of the decision made by the Constitutional Court of Ukraine regarding the compliance of articles of criminal legislation with the Constitution of Ukraine, investigation of the principles of functioning of the institution of clemency in international experience, investigation of the practice of the ECHR on the issue of parole of persons sentenced to life imprisonment. The scientific originality of the work lies in the consideration of the functioning of unconstitutional articles in the experience of the ECHR. The author identifies a list of tasks that need to be solved as part of the study:

- analysis of the decision of the Constitutional Court of Ukraine concerning paragraphs 81, 82 of the Criminal Code of Ukraine;
- identification of the possibility of applying Articles 81 and 82 of the Criminal Code of Ukraine in the case of those sentenced to life imprisonment;
- analysis of decisions of the European Court and The European Convention on Human Rights [3] in the practice of the institution of clemency;
- research of international experience and practice of the ECHR.

Materials and Methods

During the study, methods of scientific knowledge were used. Using the comparative method, the paper compares the application of parole and the institution of clemency in Ukraine, France, Albania, Monaco, and other countries. The methods of punishment are compared to the example of Norway and Croatia, where there is a complete ban on punishment in the form of life imprisonment [15].

The legal recognition method consisted in using methods and techniques of cognition, ideas to achieve a scientific result. Based on the method, the features of the norms of the criminal law are highlighted in comparison with the correction of a convicted person, serving a certain term, which will allow applying a reduced method of punishment. In Ukraine, the institution of clemency can be applied in the case of serving a twenty-five-year term.

The logical-legal method contributed to the characterisation of the court's conclusion on the unconstitutionality of Articles 81 and 82 of the Criminal Code of Ukraine. This method helped to provide a recommendation to eliminate gaps in criminal legislation [16].

The hermeneutical method helped to interpret the provisions of papers, the Criminal Code of Ukraine [1], the decision of the Constitutional Court [6], The European Convention [2], the provisions of the Council of Europe Ministerial recommendation [17], the ECHR case "Vinter and others v. the United Kingdom" [4] and "Petukhov v. Ukraine" [5].

A rather important role in the study of the material was played by the synthesis method, which consisted in an investigation of the practice of ways to ensure compliance with constitutional human rights and rights provided for by the European Convention on Human Rights [3], which are violated due to the impossibility of applying Articles 81 and 82 of the Criminal Code of Ukraine to life imprisonment [7].

The method of analysis consisted in analysing the material of researchers regarding the unconstitutionality of Articles 81 and 82 of the Criminal Code of Ukraine, the possibility of applying such norms and the decision of the Constitutional Court of Ukraine, which included a violation of the constitutional rights of those sentenced to life imprisonment. The author processed the decision of the ECHR to deprive the purpose of correction due to the impossibility of parole, so the Supreme Chamber of the ECHR recognised such measures as illegal and such that they cannot exist. These measures indicate a violation of the Convention, according to which there must necessarily be ways to mitigate the sentence, release from life imprisonment by replacing it with a more lenient sentence.

The study is divided into three stages. In the first stage, the specific features of the decision of the Constitutional Court of Ukraine regarding the unconstitutionality of Articles 81, 82 of the Criminal Code of Ukraine and the result of the activities of the European Court in the case "Vinter and others v. the United Kingdom" were considered [4]. The second stage was to clarify the specific features of the Convention on life imprisonment and the institution of clemency. The study also describes the attitude of the ECHR toward the legislation that makes parole from life imprisonment impossible. The third stage is determining the grounds for parole from life imprisonment and providing recommendations for making changes to the criminal legislation.

Results and Discussion

The Constitutional Court of Ukraine in its decision recognised the non-compliance of the Constitution of Ukraine with Articles 81 (parole) and 82 (replacement

of the unserved part of the sentence with a more lenient one) of the Criminal Code of Ukraine in terms of the fact that they cannot be applied to imprisoned persons [7]. It is necessary to consider European standards to assess whether such a decision will satisfy the convention requirements for life imprisonment.

The problem of life prisoners' hope for a release in Council of Europe countries has long been the subject of consideration for the Strasbourg Court. For the first time, this problem is raised in the Recommendation of the Committee of Ministers of the Council of Europe [17] on the definition of human rights, according to which a situation where persons who have been sentenced to life imprisonment do not have the hope of being released through certain judicial or administrative measures, pardon, or commutation of punishment cannot co-exist with Article 3 of the European Convention on Human Rights [3]. This conclusion of the Commission became fundamental for the consideration of such cases by the court in the future [8].

An important decision regarding the understanding of the problem of non-mitigated imprisonment is the decision of the Grand Chamber of the ECHR in the case "Vinter and others v. the United Kingdom" [4]. First, the court is guided by the fact that states are obliged under the Convention to take measures to protect the population from violent crimes. When it comes to the most serious crimes against the person (such as murder), the state can apply an indefinite term of imprisonment, thus allowing continuous isolation of the offender. The Court distinguishes a reduced and non-reduced life sentence [9]. Compliance with the requirements of the Convention can occur if the gaps in the Criminal Code of Ukraine regarding life imprisonment are eliminated [3]. The requirements will also be met if a person has been denied the right to parole in accordance with national legislation, for example, because they continue to pose a danger to society. The European punitive policy focuses on the correction of convicts, so it is assumed that any deprivation of liberty should contribute to the correction of convicts and encourage internal changes for the possibility of release from punishment.

As the Court noted, the reasons why a person is chosen for life imprisonment exist at the time of the national court's decision, but after a certain period of time they may disappear, and therefore it makes no sense to keep a person in prison. However, the review of punishment must be justified by changes in the convicted person and a clear vision of the right path. It is necessary to consider the practice of applying a reduced sentence for the court to review the punishment. In addition, persons who have received life imprisonment should be informed about rehabilitation and under what conditions parole is possible. This will encourage the individual to change.

If a prisoner is isolated without any prospect of release and without the possibility of a review of the sentence, there is a risk that they will never be able to redeem themselves for their crime. Even if there is exceptional progress towards correction, their penalty remains fixed and not reviewed. On the contrary, the punishment becomes greater over time: the longer the prisoner lives, the longer their punishment is [9].

Thus, analysing the decisions that were taken by the Commission and the Court, the main requirements of the Convention are the legislation of the state, which provide for measures to replace, mitigate, or end life imprisonment through certain judicial or administrative measures, pardon, or commutation of punishment. As a consequence, there are states in the Council of Europe with different systems for reviewing life imprisonment sentences that have the right to exist. Most council of Europe countries have a special review of the life sentence after serving a certain minimum sentence, as a result of which a person can be released on parole [18].

There are five states, including Ukraine, which have introduced a specific pardon procedure, the purpose of which is to replace the sentence in favour of the convicted person. There are also states where there is no life imprisonment at all, for example, Norway or Croatia [8]. Therefore, the existence of the institution of Presidential clemency does not contradict the Convention and the state can use it, as well as the judicial form. Considering the above and the fact that Ukrainian legislation cannot be considered mitigated, the ECHR identified a violation by Ukraine of the provisions of the European Convention on Human Rights [3] (namely, the prohibition of the use of non-mitigated life imprisonment). The decision in "Petukhov v. Ukraine" No. 2 [5] became a key one, as it identified a systemic problem of the impossibility of applying Article 82 of the Criminal Code of Ukraine [10].

Notably, the court in its decision focuses on reforming the institution of clemency, since reporting on the decision taken to pardon a person is not the responsibility of the President of Ukraine [19]. Filing an application for clemency is possible only in case of mandatory imprisonment for a term of 20 years. It also considers the analysis of all the circumstances of the criminal case, the harm caused to the victim, internal changes of the convicted person, sincere remorse, etc. The pardon process should be open with the disclosure of information about their condition and considering the opinion of the victim party and involving them in the consideration of the procedure. However, the openness of the pardon procedure process is ensured by considering the international practice and experience of the ECHR in this category of cases. Such a procedure contributes to the observance of human rights and will comply with constitutional norms [10].

However, the author notes that the ECHR has always proceeded from the principle of respect for the sovereignty of the state. Therefore, the state itself can choose measures of a general and individual nature to implement the decision. The main measures are to eliminate gaps in legislation and review the practical

use of norms [11]. It is the prerogative of the legislator to implement this provision, but the Constitutional Court can initiate the application of such measures [20]. The Constitutional Court of Ukraine is an independent body that can interpret the constitutional rights of a person. However, given that the Constitution of Ukraine provides for the same content of rights as the European Convention [3], the interpretation of identical rights by the Constitutional Court of Ukraine and the ECHR cannot differ too much [21].

Consequently, the court focused on the institution of clemency and proposed specific solutions to the problem raised. The Constitutional Court, by its decision, factually introduced the institutions of mitigation of punishment. However, to apply a pardon to a convicted person, it is necessary to consider the qualification of the crime committed and the degree of damage caused, consider the opinion of the head of the institution serving the sentence. Pardoning a person will provide for the application of the principle of the rule of law and humane treatment of the person [18]. The difference in the vision of this problem by the two courts, on the one hand, may create a certain barrier to understanding human rights standards, but, on the other hand, it is the introduction of the above-mentioned institutions to the punishment of life imprisonment that can bring Ukraine closer to European human rights standards regarding the problem under study. Given the current state of the legislation on parole [22] and the replacement of the part of the sentence not served with a more lenient one, life imprisonment will become mitigated from the standpoint of the Convention.

However, there are still some questions about how the result was achieved. The recognition by the Constitutional Court of Ukraine of Articles 81 and 82 of the Criminal Code of Ukraine in the part that they do not allow their application to the penalty of life imprisonment raises certain questions [7]. Articles 81 and 82 of the Criminal Code of Ukraine provide for a different procedural form of review of a court verdict, they also apply to fixed-term sentences, after which a person can be released from punishment or replaced with a more lenient one, determined through the part of the sentence that the person has already served, and this depends on the severity of the offence and the period to which a particular representative is convicted. A different logic applies to life imprisonment. As the legislation of states that have a system of parole (Monaco, Albania, France, etc.) shows [23], a tariff period should be applied, that is, the minimum period that a person must serve [24]. Therefore, this term will apply to all cases, regardless of the term assigned to a particular person. That is why to bring the legislation in line with the decision of the Constitutional Court of Ukraine, it is necessary to include in the Criminal Code of Ukraine new articles "Parole from serving life imprisonment" and "Replacement of life imprisonment with imprisonment for a certain term" [25].

Conclusions

The provisions of Articles 81 and 82 of the Criminal Code of Ukraine, due to violations of the constitutional rights of those sentenced to life imprisonment, were declared unconstitutional by the decision of the Constitutional Court of Ukraine. It is necessary to amend specific legislative acts that will provide for a reduction in the sentence of life imprisonment to address the gap in the legislation. The judicial system notes that such norms are not a motivational moment for convicts, that is, they will not contribute to correction. In the future, a person will never be able to atone for a crime without the possibility of reviewing the court verdict, and the greatest punishment will be the length of their life.

The European Convention on Human Rights provides for measures to apply Articles 81 and 82 of the Criminal Code of Ukraine as a mandatory factor in the correctional field. Council of Europe countries have a special legal procedure that allows life imprisonment after serving a certain term to be replaced with parole.

In Ukraine, there is a specific pardon procedure that is applied to convicts to reduce the sentence to 25 years or completely release them from imprisonment. This institution provides an opportunity to bring Ukraine closer to European standards and correct the situation of violation of the rights of convicts provided for in the convention. However, to mitigate the sentence of convicted persons regarding the application of Articles 81 and 82 of the Criminal Code of Ukraine, it is necessary to consider the severity of the crime, the behavioural nature of serving the sentence, and other factors that indicate the correction of the person. Life imprisonment has a different specificity, which is provided for by a certain minimum term of punishment, after which it is possible to review and commute the sentence. Consequently, it is recommended to introduce amendments to the criminal legislation that will provide for the possibility of applying for parole or replacing the sentence in a more favourable way with those sentenced to life imprisonment, without violating constitutional rights and the provisions of the Convention. In the future, the subject raised can be investigated by analysing the provision of the act on the clemency of the Criminal Code of Ukraine on the possibility of reducing the sentence of life imprisonment to at least 25 years in prison.

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Рішення Конституційного Суду України щодо конституційності статей 81, 82 Кримінального кодексу України в практичному використанні Європейського суду з прав людини

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Анотація

Актуальність дослідження полягає в оцінці та аналізі рішення Конституційного Суду України щодо застосування положень статей 81, 82 Кримінального кодексу України, які є неконституційними, оскільки порушують особисті права засуджених на довічне ув'язнення через неможливість їхнього застосування. Ухвалене рішення про неконституційність співмірне з конвенційними вимогами, зумовленими практикою Європейського суду. Мета статті – вивчити особливості рішення Конституційного Суду України щодо відповідності Конституції України статей кримінального законодавства, проаналізувати функціонування інституту помилування в міжнародному досвіді, дослідити практику Європейського суду з прав людини щодо умовно-дострокового звільнення засуджених до довічного позбавлення волі. Методами, за допомогою яких здійснюється дослідження теми, є: порівняльний метод, правопізнавальний метод, логіко-юридичний метод, герменевтичний метод, метод аналізу та інші. Серед результатів статті – визначення факту порушення конституційних прав засуджених через відсутність перспектив звільнення від покарання; характеристика рішення суду щодо допустимості положень кримінального законодавства з огляду на конвенційні вимоги; розкриття порушень прав людини через зіставлення довічного ув'язнення із завершенням життєвого циклу людини; аналіз практики Європейського суду щодо заборони застосування довічного ув'язнення. У роботі також запропоновано шляхи вирішення порушених проблем. Доведено, що рішення Конституційного Суду України задовольняє конвенційні вимоги. Положення, які розкрито в статті, будуть корисними для аналізу судових рішень та створення рекомендацій щодо подолання прогалин кримінального законодавства з метою його узгодження з Конституцією України та дотримання в ньому зобов'язань захищати людські права та гідність

Ключові слова: міжнародний досвід, умовно-дострокове звільнення, інститут помилування, виправлення засуджених, конвенція