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IMPRISONMENT: PROBLEMS OF APPLICATION AND WAYS
OF REFORMING

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Abstract

The paper considers the problems of imprisonment as the most stringent preventive measure used in foreign countries. The analysis of statistics suggests that the courts too often resort to it, while the unjustified and frequent use of pre-trial imprisonment has too many negative consequences and may lead to the opposite effect. High levels of pre-trial imprisonment are observed in most countries, especially in low-income countries and states emerging from military and social conflicts. With the spread of a new COVID-19 coronavirus infection the load of correctional facilities, including with people waiting for the investigation results, becomes even more urgent. Pre-trial imprisonment also requires considerable economic costs. In some countries, these costs outburst the reform of bails and other alternative measures to reduce the number of imprisoned persons, as well as racial and socio-economic inequalities in the pre-trial system as a whole. Currently, the pre-trial practice shows that the use of alternative preventive measures has great potential, but often in court it is not always possible to fully assess the existing risks. The approach to addressing a large number of pre-trial detainees should be comprehensive and should be part of a state strategy supported by relevant empirical research. The authors study the experience of foreign countries and possible ways to optimize the institution of imprisonment in the field of criminal policy, legislation and law enforcement. The presented experience may also be useful for domestic legislation.

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1. Introduction

One of the trends in the world detention space is the increase in the prison population. According to the Penal Reform International (PRI), more than 11 million people are now kept in correctional facilities around the world. In 102 countries, the load is confirmed at 110% (Global trends in the prison system 2020). For example, in the USA, the level of pre-trial imprisonment in comparison with the total population is significantly higher than in any European or Asian country (Stevenson & Mayson, 2017). It should be noted that, unlike foreign countries, for several years the Russian Federation has been facing a decrease in the total number of persons in penal facilities (482,888 people as of 01.01.2021 and 41,040 people as of 01.01.2020). Moreover, the number of persons held in pre-trial imprisonment centers and premises operating in the regime of pre-trial imprisonment center has increased quite significantly over the past year (104,220 people. (+ 6,439 people as of 01.01.2020).

Overcrowding is life-threatening, given the serious health problems associated with prison conditions in overcrowded correctional facilities. The current coronavirus pandemic (COVID-19) is another reason to think about the importance of finding ways to reduce the number of persons in imprisonment facilities and prisons.

2. Problem Statement

Today in many countries a large number of people are held in imprisonment in anticipation that their guilt/innocence will be proved in court.

In 40 countries, more than half of the prison population is detained. High rates of pre-trial imprisonment are observed in most continents, especially in low-income countries and states emerging from military or social conflicts. Data from the Institute for Crime and Justice Policy (ICPR) show that in some countries the proportion of pre-trial detainees is up to 80–90 % of the total prison population (Libya, Bangladesh) (Highest to Lowest – Pre-trial detainees).

Some of these people may be acquitted; for others, cases could be dismissed before trial and others would be convicted but not deprived of their liberty, since the period of imprisonment (pre-trial imprisonment) exceeded the maximum sentence for the crime or a non-custodial sentence would be imposed. In all three scenarios, time spent in imprisonment usually leads to serious consequences for a person, including loss of work, housing, family and community relations, and sometimes physical and/or mental health disorders.

The terms of imprisonment of such persons may last for months or years. However, in a number of countries, the conditions of imprisonment of such persons are often stricter than for convicts, and relate to restrictions on dates, opportunities to participate in education, professional training or work, etc.

The validity and soundness of the terms of imprisonment of accused people and defendants is an urgent problem for domestic criminal procedure, which is reported by the Commissioner for Human Rights in the Russian Federation Tatyana Moskalkova. Over the past decade, the European Court of Human Rights has issued more than a hundred ordinances against Russia on illegal and unreasonable imprisonment. “In many cases, violations refer to article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that everyone has the right to freedom and security and

no one can be deprived of freedom except in exceptional cases” (RF Commissioner for Human Rights, 2020).

In general, the alternatives to imprisonment represent a solution to global challenges, including the proliferation of COVID-19.

At the pre-trial stage, alternatives include bail, seizure of travel documents, periodic reporting to the police, electronic monitoring and curfews. The Russian criminal procedure also provides for a wide range of alternative procedural measures, the main of which is also the pledge and prohibition of certain actions. However, statistics show that the application of these measures in the Russian Federation is disproportionately lower than the number of applications for preventive imprisonment received and granted.

The main obstacles to the expansion of alternatives are the non-existent or inadequate legal framework, the lack of necessary resources and infrastructure, and the lack of confidence in them by the judiciary and the general public. So, in modern society, there is an opinion that the cash deposit creates a “two-level justice system”, which detains the poor, but allows those who have money to be free, having actually paid off, which undermines the very goal of justice. In some high-profile criminal cases, courts tend to be more inclined to detain in order to prevent possible disorders in the society.

There are also certain groups of persons who have unequal access to these measures, such as foreign nationals, persons without permanent residence, etc.

3. Research Questions

Subject of the study:

- Theoretical and regulatory support of criminal procedural legal relations arising from the application of a preventive measure in the form of imprisonment.
- Organizational support for the implementation of the institution of imprisonment in the Russian Federation and foreign countries.

4. Purpose of the Study

The purpose of the study is to develop, through the study and analysis of the totality of organizational, legal and theoretical bases for the application of imprisonment in foreign countries and the Russian Federation, a set of measures to reform the institute under study in order to reduce the proportion of detainees pending a court decision.

5. Research Methods

The main method of research is the analysis of regulatory sources, the law enforcement practice of preventive measures in the form of imprisonment. The use of the comparison method made it possible to distinguish similarities and differences in the implementation of this legal institution in the Russian Federation and foreign countries in modern conditions, including in the conditions of countering the spread of coronavirus infection in places of imprisonment and correctional facilities in general. The

analogy method made it possible to conclude that the experience of foreign countries in this area may be implemented in the Russian criminal procedure.

6. Findings

In 2020, some governments took urgent steps to reduce the prison population in order to reduce the risk of massive outbreaks of COVID-19. Under current conditions, some governments decided to temporarily release some categories of prisoners on bail or to grant temporary leave to people with health problems (Iran), others took measures related to social distancing with the outside world by restricting visits by relatives or legal representatives of detainees (Italy, Hungary, Kuwait, etc.). (CDN, 2020) It is clear, however, that the problems that the pandemic exposed require more than temporary measures.

The main areas of reform of this institution in order to reduce its use may be distinguished by analyzing the practice of imprisonment implemented by the governments of some countries, including the Russian Federation over the past decade:

1) compliance with international standards in national legislation on pre-trial proceedings and reforming criminal procedure legislation by narrowing the scope of pre-trial imprisonment.

In general, international standards define key principles, such as the presumption of innocence, the necessity and proportionality of deciding on pre-trial imprisonment. However, national legislation should be clear and preclude the possibility of dual interpretation in describing the specific grounds for imprisonment.

There are some alternatives to pre-trial imprisonment as set out in the UN Tokyo Rules and other international standards.

In particular, the UN Tokyo Rules state that pre-trial imprisonment is used in criminal proceedings as a last resort, provided that the interests of the investigation of the alleged offense are duly taken into account and the protection of society and the victim. The alternatives to pre-trial imprisonment are applied as early as possible. Pre-trial imprisonment lasts no longer and is applied humanely and with respect for the inherent dignity of man.

It is known that imprisonment is the most stringent preventive measure, including in foreign countries (Sarre et al., 2006). According to the Russian legislation, persons suspected or accused of committing crimes for which the criminal law provides for a punishment of imprisonment for more than three years if it is impossible to apply a different, milder, preventive measure.

There are many differences between countries in the extent and nature of conduct subject to the criminal law. In many low-income countries, the criminal law dates back to the colonial era and includes crimes such as “fraud and vagrancy” or “idleness and disorder”, which have little justification in the 21st century. Some countries took the initiatives to limit the spread of criminal offences. For example, Italy decriminalized a long list of minor offences making them administrative offences rather than crimes. These include driving without a license, as well as the crime of “abuse of human trustfulness”, etc. (The Japan Times, 2016).

The Russian Federation also decriminalized certain crimes by introducing the so-called “administrative precedence”, where certain crimes were criminalized after administrative punishment.

Imprisonment as the most stringent preventive measure under certain conditions (if it is impossible to apply a different, milder, preventive measure, if it is impossible to establish the identity of the suspect or the accused, as well as if they violated the previously chosen preventive measure or evaded the investigating authorities or the court) may also be applied by the court to persons suspected or accused of crimes of minor or medium gravity.

In 2016, some offences of minor gravity were decriminalized, and a new basis for exemption from criminal liability was introduced in connection with the imposition of a court fine. Taking into account the amendments, persons who committed crimes under Art. 116 part 1 and Art. 157 of the Criminal Code, as well as a number of crimes against property in the absence of qualifying signs and the cost of stolen property less than 2.5 thousand rubles, as well as double the lower limit of significant damage caused to a citizen from 2.5 thousand to 5 thousand rubles (Zhilyaev, 2018).

In 2020, actions were decriminalized under Art. 198 of the Criminal Code (“Evasion of physical person from paying taxes, fees and (or) physical person – payer of insurance premiums from paying insurance premiums”) from the amount of up to 2.7 million rubles, and under Art. 199 and 199.1 of the Criminal Code – from the amount of up to 15 million rubles. However, turning to the previous statistics on the number of detainees in Russian correctional facilities, it cannot be said with complete certainty that these measures reduced the number of such persons. Moreover, it is worth noting that at the end of 2020 the country immediately adopted 4 federal laws tightening liability under Art. 128.1 of the Criminal Code of the Russian Federation (“Slander”), Art. 267 of the Criminal Code of the Russian Federation (“Bringing vehicles or railways into disrepair”), Art. 330-1 of the Criminal Code of the Russian Federation (“Malicious evasion from the performance of obligations provided by the legislation of the Russian Federation in connection with the recognition of a person performing the functions of a foreign agent”).

2) greater use of restorative justice.

Criminal prosecution and the imposition of fair punishment by the perpetrators – one of the main directions of criminal proceedings. The meaning of restorative justice is that the perpetrator understands the consequences of his act and seeks to make amends for the harm caused to the victim, which in turn corresponds to another component of the purpose of criminal proceedings – the protection of the rights and legitimate interests of persons and organizations affected by crimes.

Restorative justice programs are successfully implemented in many countries of Eastern and Western Europe and in the post-Soviet space (including Kazakhstan, Kyrgyzstan, Moldova, and Ukraine). Compensation, mediation or pre-trial redress may often provide a better solution for both the offender and the victim.

The European Convention for the Protection of Human Rights and Fundamental Freedoms also provides for the possibility of applying a settlement agreement, which states that at any stage of the proceedings a court may decide to terminate the proceedings if the circumstances of the case make it possible to conclude that the dispute was settled.

In the Russian Federation, an element of restorative justice is the institution of reconciliation of the parties in cases of crimes of minor and moderate gravity in accordance with Art. 25 of the Code of Criminal Procedure of the Russian Federation. Being one of the ways to resolve the criminal legal

conflict, the reconciliation of the parties is the refusal of the victim, in accordance with the procedure established by the Code of Criminal Procedure of the Russian Federation, to bring the person who committed a crime to criminal responsibility, provided that he has committed actions aimed at restoring the violated rights of the victim.

At the same time, if we address the experience of other countries, we may conclude that restorative justice is not so widespread in the Russian Federation.

For example, in Belgium, restorative justice is possible at any stage of the criminal process and for any crime. Moreover, restorative justice is clearly established by law, accessible throughout the country and funded by both the federal and regional authorities (Raes & Snacken, 2004). In Austria, mediation between the offender and the victim is implemented as a measure of exemption from criminal liability at the pre-trial or judicial stage of the process, provided that the crime is not serious, and a punishment of not more than 5 years in prison is provided (Gombots & Pelikan, 2015). Rehabilitation conferences, conciliation circles, the creation of specialized funds are widely used allowing persons who have committed crimes (usually minors) to pay compensation, etc. (Shilovskaya & Sitdikova, 2018).

3) equal access to legal aid.

Access to legal advice from both public defenders and private lawyers or paralegals improves access to justice. In the Russian Federation, lawyers participate as advocates. In accordance with Art. 49 of the Criminal Code of the Russian Federation, one of the close relatives of the accused or another person whose admission is requested by the accused may be admitted along with a lawyer. In the trial of a justice of the peace, this person is allowed instead of a lawyer.

Some countries are establishing non-governmental organizations with large-scale criminal justice programs. For example, Sierra Leone has a non-governmental organization, Timap for Justice. In cases where prisoners have not previously applied for bail or have been wrongly denied bail, the paralegal explains the bail process and helps the prisoner to file a new bail application. Legal assistants also identify, communicate and inform guarantors of their role and responsibilities.

4) use of innovative technologies in judicial practice.

Videoconferencing technologies used in prisons and other criminal justice institutions show reduced transportation costs, improved security of prisoners, faster consideration of cases and redeployment of personnel resources. However, the integration of remote technologies in criminal proceedings remains limited. As local governments struggle with growing fiscal constraints and increased criminal justice costs, they are increasingly turning to technological solutions and alternatives to reduce criminal justice costs and support efficiency. The use of videoconferencing in the criminal justice system has become a powerful asset for criminal justice stakeholders. For example, the UK adopted the Swift and Sure Justice reform program, which provides for virtual trials, the possibility of registering the accused in a special system for examining the case file and the indictment, and, if he pleads guilty, he may pay a fine if provided for by law, which significantly reduces the burden of courts with crimes of small and medium gravity, reduces the time frame for criminal proceedings against persons awaiting a court decision while in custody.

7. Conclusion

It is clear that modern conditions require changes in the current system of criminal justice in the area of sentencing and imprisonment. The analysis of law enforcement practice showed that similar to foreign countries the Russian Federation is implementing measures aimed at reducing the number of persons in custody. Some of these measures are quite successful; others require further reform of the criminal procedure legislation and the availability of certain resources. Definitely, these measures should be part of long-term public strategies to reform criminal policies thus addressing over-incarceration and overbalance of imprisoned people.

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