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MULTIPLE OFFENSES IN CRIMINAL LAW OF LITHUANIA

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Tomas Girdenis

MULTIPLE OFFENSES IN CRIMINAL LAW OF LITHUANIA

Summary

Research problem. In the present doctoral dissertation, the problematic issues of the institute of multiple offences are analysed. Multiple offences as an institute of criminal law is characterised as involving the problems of both the qualification of criminal offences and the individualisation of criminal liability. The problems of the qualification of criminal offences are relevant, when questions of the separation of single criminal acts from multiple offences are dealt with. When the existence of multiple offences is established, it is necessary to move on to the consideration of another problem—the individualisation of criminal liability. The individualisation of criminal liability depends on the form of multiple offences. Therefore, for the formation of a uniform case-law, homogeneous and clear criteria for the differentiation of the forms of multiple offences and their separation form each other are essential. When the forms of multiple offences are defined, it is necessary to evaluate their impact on the criminal liability of the person who committed the criminal act. Of course, the key influence on criminal liability manifests through the rules of the combination of sentences; however, one should not forget other topical issues (such as sentence suspension, release from a custodial sentence on parole and the replacement of the term not served of the custodial sentence with a more lenient penalty, statute of limitations of a judgement of conviction, etc.) the solution of which in one way or another depends on the existence of multiple offences. Moreover, sometimes it is necessary to deal with the problems of the separation of multiple offences from other similar institutes of criminal law (repeat offence, competition between the norms of criminal law). Therefore, a number of such issues constitute the problem of the present research. The implementation of the principle of legal justice depends on appropriate and unvaried solution of these issues.

Topicality, originality and significance of the research. Multiple offences is a rather frequent phenomenon in the Lithuanian case-law; often persons are judged for several rather than single criminal acts. However, the criminal law jurisprudence still lacks a uniform attitude towards the issues regarding multiple offences. First, there exist different definitions of the notion of multiple offences itself, different forms of multiple offences are distinguished and their interpretations change, the criteria for the separation of single criminal acts from multiple offences vary (they often depend on the type of the criminal act committed). Special attention should be paid to the process of the individualisation of criminal liability in cases of multiple offences. In the case-law, the fact that prosecutors more and more often lodge appeals against the decisions of lower

instances about improper combination of sentences is observed. In the case-law, the process of the combination of sentences has become 'forgotten', as often sentences are combined only formally (by adding 3–6 months of imprisonment) without any motivations regarding the choice of the additional sentence imposed. Moreover, after the entering into force of the new Criminal Code on 1 May 2003, due to the changes in case-law and the entrenchment of new ideas in the criminal law jurisprudence, it became crucial to revise the old and well-established provisions regarding multiple offences. Thus, even if the issues of multiple offences have been analysed for a rather long time, in the present dissertation, a new approach of the author as well as of other researchers to the institute of multiple offences is presented together with general considerations (and critical evaluations) on the newly developing case-law. Furthermore, with reference to the fact that the majority of the issues regarding multiple offences (except for the imposition of sentences) are not regulated by the Criminal Code and the decision-making is left for the case-law and the criminal law jurisprudence, the present paper may have great practical significance for the constantly changing and developing Lithuanian case-law in terms of the peculiarities of multiple offences.

The aim and the tasks of the research. The aim of the present doctoral dissertation is to develop a uniform attitude (corresponding to the needs of the theory of criminal law and the relevant case-law) towards the institute of multiple offences and the solution of problems related to it by generalising the experience and achievements of science and case-law.

The tasks of the doctoral dissertation:

1) to define the notion of the institute of multiple offences and its elements by separating it from other similar institutes of criminal law (repeat offence, competition between the norms of criminal law);
2) to develop uniform (by generalising and concretising the existing ones or by suggesting new ones) criteria for the separation of single criminal acts from multiple offences;
3) to review the existing variety of the forms of multiple offences found in the criminal law jurisprudence and distinguish the ones which would correspond to the needs of the Lithuanian case-law as well as define them by distinguishing and describing their characteristics and developing clear and uniform criteria for their separation form each other;
4) to identify the key problems related to the influence of multiple offences on the individualisation of criminal liability as well as to suggest the most appropriate ways of solving these problems;
5) to provide suggestions for the legislator and the courts regarding the development of the institute of multiple offences and the ways of solving the problems related to it.

Propositions to be defended. Multiple offences must be related not to the fact of committing several criminal acts but to the legal evaluation of this fact—prosecution for committing several criminal acts.

1) Repeat offence should not be considered as an independent form of multiple offences and should be evaluated from the perspective of the perpetrator's personality.

2) In case-law, the separation of single criminal acts from multiple offences is often casuistic (depends on a particular category of cases), having no clear and well-established criteria and thus violating the principle of legal justice.

3) The key attributes of single criminal acts are a violation of a direct value or the whole of values protected under a specific norm of the Criminal Code as well as a united content of guilt.

4) The case-law of the recent years, which broadens the perception of the ideal coincidence of criminal acts, forms an incoherent and exceptions-based case-law.

5) In the cases of multiple offences, the rules for sentence imposition restrict the freedom of courts and disturb the appropriate individualisation of sentences; therefore, it is crucial to improve the laws.

6) In case-law, the process of the combination of sentences is 'forgotten' and often does not properly reflect the gravity of all the criminal acts committed; therefore, changes in laws orienting courts towards the case-law appropriate from the perspective of criminal policy are a must.

Research methodology. For the present doctoral dissertation, various methods of scientific research were applied: logical, comparative, historical, linguistic, systemic, method of criticism, document analysis, etc.

Firstly, the logical method and the method of criticism were rather widely applied in the present dissertation. The logical method was applied for making generalisations and conclusions aiming at the development of the institute of multiple offences. The method of criticism was also applied: the author criticised case-law, opinions of scholars, the lack of argumentation for such opinions, etc. The logical method and the method of criticism allowed making the final conclusions and forming suggestions regarding the changes of law and the development of case-law.

A lot of attention was paid to the method of comparative analysis. It was applied for the comparison of scientific conceptions and different opinions of scholars. In order to gain experience, the laws and case-law of different foreign countries were analysed and compared. The application of the historical method allowed revealing the drawbacks of the former laws and case-law (under the Criminal Code of 1961) as well as reviewing the origin of the institute of multiple offences and the history of certain terms.

The linguistic method was applied for the analysis of the denominations of the forms of multiple offences (ideal and real coincidence of criminal acts) and the consideration of their ability to convey the actual meaning. A different variant of these terms, which linguistically better corresponds to the meaning of the forms of multiple offences, was suggested.

For the present research, the systemic method was applied as well. It allowed revealing the structure of the institute of multiple offences, its elements, their interrelation and the place in the system of the bases for criminal liability. By applying this method, the drawbacks of certain notions as well as the use of excessive elements were identified.

The main method applied for the research was the method of document analysis. As even the case-law of the Supreme Court of Lithuania contains rather numerous incongruities and contradictions, namely the rulings, decisions and summary reviews of the case-law of this court passed during the term of the Criminal Codes of 1961 as well as of 2003 being in force were chosen as the key source. However, the scope of analysis was not limited to the case-law of the Supreme Court of Lithuania. The case-law of the European Court of Human Rights, the Court of Appeal of Lithuania, the Vilnius and Panevežys Regional Courts as well as the District Court of Šiauliai Region was analysed.

Structure and review of the doctoral dissertation, main conclusions. The dissertation is comprised of four sections, conclusions and proposals. At the end of the paper, a list of references and author's publications is presented.

Section 1 'The Notion of Multiple Offences' deals with an analysis of the attitude of Lithuanian and foreign scholars towards the issues of multiple offences. The notion of multiple offences is usually understood in two different senses. The proponents of the first conception relate multiple offences with the commitment of two or more criminal acts irrespective of whether a person has previously been convicted for earlier criminal activity or not. Such an opinion is prevalent in the criminal law jurisprudence of post-Soviet states including Lithuania during the times when the Criminal Code of 1961 was in effect. The representatives of the second position relate multiple offences with a situation, when a question regarding the prosecution of a person for several criminal acts committed prior to the passing of the judgement of conviction for these acts is dealt with. As the institute of multiple offences should serve for the solution of the problems of the qualification of criminal acts (separation of single criminal acts from multiple criminal acts) and the individualisation of criminal liability (by indicating the type of multiple offences and its impact on criminal liability), while defining the notion of multiple offences one should accept the opinion of the proponents of the second position. Therefore, repeat offence should not be considered as a form of multiple offences and should be treated as a specific personal feature of the perpetrator.

In defining multiple offences, one may distinguish the following elements of this institute: 1) a person is prosecuted for several criminal acts; 2) these criminal acts are committed prior to the passing of the judgement of conviction for these acts. Noteworthy is the fact that in the definition of multiple offences, the feature of 'the absence of juridical obstacles for the prosecution', established in the criminal law doctrine, is abandoned as excessive and irrelevant to the essence of the phenomenon. During the analysis of the case-law of Lithuanian courts it was also noticed that the evaluation of the relation between multiple offences and repeat offence differed. The author agrees with such a position, with reference to

which cases when after the passing of the judgement of conviction but prior to its entering into force a new criminal act is committed are treated as repeat offences (sentences are combined under Article 64 but not under Article 63 of the Criminal Code).

Under the present provisions of the Criminal Code, multiple offences may be manifested in several ways: 1) when several criminal acts are committed and the person is prosecuted for them by passing a single judgement of conviction; 2) when several criminal acts are committed prior to the passing of the judgement of conviction for at least one of them, but when while making the decision regarding the prosecution for all criminal acts a judgement of conviction has been passed for at least one of the criminal acts; 3) when the person who has been conditionally released form criminal liability commits a new criminal act and the decision regarding the release from criminal liability is revoked.

After summing-up the case-law of Lithuanian courts and different opinions existing in the criminal law jurisprudence, the author suggests understanding multiple offences as such a legal situation when a person is prosecuted for several criminal acts committed prior to the passing of the judgement of conviction for at least one of them.

The institute of multiple offences is similar to the institute of the competition of the norms of criminal law. They may be separated on the basis of the fact that in the case of the competition of the norms of criminal law, the question of the selection of one of several norms of criminal law is considered, while in the case of multiple offences, the issue regarding the quantity of the norms of criminal law (one or several), which is crucial in order to properly evaluate all acts of the perpetrator, is under consideration. With reference to that, the author suggests not considering the competition between the whole and a part as the competition of the norms of criminal law, because it, in its essence, is a problem of the separation of a complex criminal act from the ideal coincidence of criminal acts (i.e. the problem of multiple offences).

In Section 2 'The Notion and Types of Single Criminal Acts', the questions of qualification related to the separation of single criminal acts from multiple offences are analysed. Single criminal acts are criminal acts qualified under a single norm of the Criminal Code to which typical is a violation of a direct value or the whole of values protected under one particular norm of the Criminal Code characterised by the united content of guilt. With reference to the case-law of Lithuanian courts, several forms of single criminal acts may be distinguished: ongoing criminal act, continuous criminal act, criminal acts with alternative elements of dangerous acts and complex criminal act.

Ongoing criminal act is a criminal act when after the performance or non-performance of a certain action (in case of inaction) a person is in a condition under which the objective element of dangerous act is constantly realised until the perpetrator himself/herself ends the commitment of the criminal act, certain circumstances preventing the continuation of the commitment the criminal act

emerge, the obligation to act disappears or a judgement of conviction for the criminal act is passed.

The separation of single criminal acts from multiple offences causes various problems is the case-law. Generally, it is acknowledged that one of the characteristics of a continuous criminal act is the fact that it consists of several single acts (actions and inactions) which, considered separately, are criminal (or constitute a violation of law) and correspond to the objective elements (of an act) of a crime or criminal offence provided for in the same article of the Special Part of the Criminal Code. However, it should be noted that a continuous criminal act is also possible in cases when the same act can be evaluated as constituting or not constituting a violation of law on the basis of different articles of the General Part of the Criminal Code (i.e. not the same article of the Special Part of the Criminal Code). Therefore, in the opinion of the author, it would be appropriate to relate a continuous criminal act with the fact that several acts, considered separately, may be treated as an independent complete criminal act or, with regard to intentionality, as an attempt to commit a criminal act with reference to the same article of the Criminal Code.

In the case-law of Lithuanian courts, the existence of unanimous intent, joining separate moves of a body, is acknowledged as an element of a continuous criminal act. However, such an understanding is too narrow; therefore, it should be agreed with the scholars who claim that a continuous criminal act may be committed through negligence. Instead of 'unanimous intent', the element of the 'united content of guilt' is suggested to be used. While analysing the content of 'unanimous intent', inconsistencies in the case-law were noticed: sometimes cases when a person acts with general intent to continue the criminal act as long as possible are recognised as 'unanimous intent', while in other cases, the courts require certain specificity otherwise establishing the existence of multiple offences. In the opinion of the author, an intent 'to do as much as possible' should not be considered as an element of a continuous criminal act. Unanimous intent may be considered as an element of a continuous criminal act only if it is specific anticipating the final result of the act. This requirement should not be followed, if the norm of the Criminal Code itself is designed as to forbid not a concrete act, but a criminal act continuing for a certain period of time (e.g. Article 202 of the Criminal Code 'Unauthorised Engagement in Economic, Commercial, Financial or Professional Activities').

In the case-law as well as in the criminal law jurisprudence, a number of problems regarding the following element of criminal acts are encountered: the case-law of the Supreme Court of Lithuania is contradictory, as in some cases 'one source' ('one victim') is acknowledged as an element of a continuous criminal act, while in other cases not. However, the analysis of the cases showed a tendency for this element to gradually 'establish' in the case-law and be more and more often applied. The author of the dissertation agrees with such case-law and even suggests specifying this element in greater detail not relating it to 'one source' or 'one victim' only. It is suggested to acknowledge the fact that all dangerous acts

comprising the content of a continuous criminal act must violate the same direct value protected under criminal law as an element of a continuous criminal act.

Besides the abovementioned elements of a continuous criminal act, in the criminal law jurisprudence and the case-law of Lithuanian courts, the following are also discussed: unanimous criminal consequences, identical way of action, analogous circumstances, short period of time between separate actions. However, the author of the dissertation refutes the expedience of distinguishing these elements and suggests abandoning them.

After generalising all elements, it is suggested to define a continuous criminal act as an act which is comprised of several dangerous acts, all of which, considered separately, may be treated as individual complete criminal acts or, with regard to intent, as attempts to commit a criminal act according to the same article of the Criminal Code and which are characterised by the united content of guilt and violate the same direct value protected under criminal law.

In the Lithuanian case-law as well as in the criminal law jurisprudence, a third type of single criminal acts is usually distinguished: a criminal act with alternative elements of a dangerous act. However, considering the fact that it, in its essence, possesses all the elements of a continuous criminal act, it is stated that the definition of a criminal act with alternative elements of a dangerous act as an individual type of single criminal acts loses its meaning. In this case, for criminal acts with alternative elements of dangerous acts, the rules of a continuous criminal act must be applied (it is one of the forms of the manifestation of a continuous criminal act).

The last type of single criminal acts existing in the Lithuanian case-law is a complex criminal act. While analysing this type of single criminal acts it was noticed that neither in the criminal law jurisprudence nor in the case-law problems regarding what should be treated as a complex criminal act exist. However, it was also observed that the case-law lacks clear criteria on the basis of which a complex criminal act could be separated from multiple offences. In order to unify the case-law in this respect, the author suggests the following definition of a complex criminal act: a complex criminal act is a criminal act which violates two or more values protected under criminal law where the additional value is equally or less protected than the principal value and at least one of the objective elements may be considered as a separate criminal act which is always only one of the ways to realise this element and is not ongoing.

Section 3 'Forms of Multiple Offences' analyses the forms of multiple offences occurring in the Lithuanian case-law. Multiple offences can have only two legally significant forms—ideal coincidence of criminal acts (coincidence of criminal acts) and real coincidence of criminal acts (repetition of criminal acts).

Ideal coincidence of criminal acts may be interpreted in different ways. Attitude towards ideal coincidence of criminal acts varies depending on the author's position, the state doctrine that he follows or the period of time. Two groups of approaches to the concept of ideal coincidence of criminal acts may be distinguished: 1) ideal coincidence is realised as a single criminal act; 2) ideal

coincidence is realised as several criminal acts (multiple offences). The first approach to the concept of ideal coincidence of criminal acts was prevalent in the works of Russian scholars in the end of the nineteenth century and the beginning of the twentieth century, and in the Interwar Lithuania. Today it may be found in the criminal law of Germany, Poland, Spain and in the works of some Russian scholars. Yet the main focus is on the analysis of the second approach to the concept of ideal coincidence of criminal acts, as this approach prevails in Lithuania.

Two constituents of ideal coincidence of criminal acts found mostly in the criminal law jurisprudence and case-law may be distinguished: 1) several criminal acts are committed during a single criminal act; 2) several bodies of a single criminal act committed fall under different articles of the Special Part of the Criminal Code.

When analysing the first constituent, it must be noticed that 'a single criminal act' has two meanings—the traditional and the new one. According to the traditional approach, ideal coincidence of criminal acts may occur in several ways: 1) when a single action or inaction coincides with the elements of a dangerous act of several compounds of a criminal act; 2) when a criminal act is committed in a way that coincides with the element of a dangerous act of another criminal act's body; 3) when a complex of actions (an act with alternative actions or a continuous criminal act) coincides with the element of a dangerous act of several bodies of a criminal act. Therefore, the ideal coincidence of criminal acts is possible when while realising the objective elements of one body of a criminal act another body of a criminal act is fully realized by the same actions or inactions.

However, there is a new approach to the term 'a single act' developing in the Lithuanian case-law. According to the case-law, the ideal coincidence of criminal acts is also possible when several bodies of criminal acts are realised by several acts. Although in such cases it is necessary to determine that 1) actions follow one another (one of the criminal acts is just a stop on the way to the achievement of a goal), 2) actions are committed in a short period of time, 3) given that it was a joint idea.

Having summarised the present Lithuanian case-law, it is advisable to revise the definition of the ideal coincidence of criminal acts. Ideal coincidence of criminal acts (coincidence of criminal acts) is a situation when a person in one action commits several criminal acts provided for in different articles of the Special Part of the Criminal Code. Certainly, two cases fall under the concept of an 'action': 1) when several bodies of criminal acts are realised in a single act; 2) when several bodies of criminal acts are realised in several acts, however a) actions follow one another (one of the criminal acts is just a stop on the way to the achievement of a goal), b) actions are committed in a short period of time, c) given that it was a joint idea.

Yet according to the author, the courts' new attitude towards the interpretation of the circumstance of 'a single act' results in inconsistent and exception-based case law; therefore, it is advisable to go back to the traditional concept of ideal

coincidence of criminal acts, with some amendments to it. Ideal coincidence of criminal acts (coincidence of criminal acts) should be interpreted as a situation when while realising the objective elements of one body of a criminal act, the same actions or inactions fully realise another body of a criminal act, provided for in a different article of the Special Part of the Criminal Code.

Section 3 also discusses the issues of the separation of ideal coincidence of criminal acts from single criminal acts. One of the most common cases is the separation of multiple offences from the ideal coincidence of criminal acts. An explicit interpretation of this matter is presented in Section 2, where the issues of multiple offences are analysed.

Quite a few problems in the case-law arise from situations when the commitment of one criminal act triggers intermediate consequences which, taken separately, may be qualified as a separate criminal act. Criminal liability, having caused intermediate consequences, depends on the guilt with regard to intermediate and ultimate consequences. The following legally significant cases of causing intermediate consequences are possible: 1) intentionally aiming at causing more severe consequences but succeeding at causing only intermediary ones; 2) more severe consequences are caused intentionally, at the same time intermediary consequences are caused; 3) intermediary consequences are caused intentionally, at the same time more severe consequences are caused through negligence. Given the first and the second situations, no serious disagreements arise in the case-law, i.e. criminal acts are usually qualified according to the ultimate consequences (as an attempt to commit a criminal act or a complete criminal act), intermediate consequences are not qualified separately. There is an exception to this rule in the case-law in such cases, where an attempt to murder two people results in killing only one of them.

More disagreements arise in the case-law on the third case, i.e. intermediary consequences are caused intentionally, at the same time more severe consequences are caused through negligence. In accordance with the practice created in the Supreme Court of Lithuania plenary ruling No. 2K-P-247/2009 of 20 October 2009, in such cases the act may be qualified according only to intermediary or only to ultimate consequences. Incrimination of both consequences is impossible. Such case-law deserves criticism as it is contradictory and inconsistent. According to the author, a different rule should be applied in the cases analysed; under this rule, if there is a relation between intermediary consequences, the creation of which may be qualified as a criminal act, and intentional guilt, also the relation between the ultimate consequences and negligent guilt, intentional and negligent consequences must be assessed separately and qualified as committed under the ideal coincidence of criminal acts.

Another form of multiple offences occurring in the Lithuanian case-law is real coincidence of criminal acts (repetition of criminal acts). When defining the concept of real coincidence of criminal acts generally, the following features may be distinguished: 1) several separate acts are committed; 2) there is time difference between these acts; 3) several criminal acts are committed by committing these

acts; 4) several criminal acts committed are identical, homogeneous or heterogeneous (provided for both in the same or different articles or paragraphs of the Special Part of the Criminal Code). It is not necessary to single out all these constituents, some of them do not agree with the present case-law. First of all, conforming to the present case-law, when separating ideal coincidence of criminal acts from real coincidence of criminal acts, a constituent of 'several separate actions' rather than a constituent of 'several separate acts' should be used. Considering the fact that 'time difference between separate acts' is not a constituent that in all cases determines the real coincidence of criminal acts, it should not be used. The fourth constituent is also redundant as its content is 'empty'.

So, taking into account the present case-law, the real coincidence of criminal acts (repetition of criminal acts) must be interpreted as a situation when a person commits several criminal acts in several actions. Having refused the new concept of the ideal coincidence of criminal acts, the real coincidence of criminal acts (repetitive criminal acts) should be interpreted as a situation, when a person commits several criminal acts in several acts.

When analysing the forms of multiple offences, the validity of the use of the terms 'ideal coincidence of criminal acts' and 'real coincidence of criminal acts' becomes questionable. In the doctoral dissertation, it is concluded that the linguistic interpretation of these terms does not match the cases, which these terms describe. With a view to make the used terms correspond with each other more precisely in the issue discussed, it is advisable to use the term 'coincidence of criminal acts' instead of the term 'ideal coincidence of criminal acts' and 'repetitive criminal acts' instead of 'real coincidence of criminal acts'.

The last section **'Influence of Multiple Offences on the Criminal Liability'** deals with the individualisation of criminal liability given there have been a multiple offence committed. In this section, the main focus is on the process of the imposition of a penalty, when the punishment is imposed for several criminal acts forming multiple offences.

The first stage of the imposition of penalties under Article 63 of the Criminal Code is the imposition of penalties for the commission of separate criminal acts. Scholars and case-law do not agree on the issue of the imposition of penalties for the commission of separate criminal acts that form a multiple offence; however, they agree with the practice of the imposition of penalties for separate criminal acts irrespective of the very fact of multiple offences (penalties should be imposed for each criminal act separately). Otherwise, the *non bis in idem* principle is violated and the implementation of justice in the process of appeal and cassation is impeded.

The second stage of the imposition of penalties for the commission of several criminal acts is the combination of penalties imposed for the acts that form multiple offences. In this stage, the methods for the combination of penalties depend on the form of multiple offences. The present rule provided for in Article 63(5) subparagraph 1, under which where there is the ideal coincidence of criminal

acts only a consolidated sentence is imposed, interferes with proper individualisation of a penalty. Therefore, it is advisable to make amendments to this rule of the imposition of penalties, making imperative application of the consolidation of sentences recommendatory and enabling the courts to accumulate sentences as a means of combining them. The court should naturally give reasons for the application of the method of accumulating the sentences.

Where there is a real coincidence of criminal acts, penalties may be combined by applying both the method of consolidation and partial or full accumulation. According to the author, applying the method of consolidation of the penalties under Article 63(5) subparagraph 2, especially when a number of criminal acts have been committed, impedes courts' ability to individualise the penalty properly, so this imperative provision should be refused.

According to the case law, the method of the partial accumulation of penalties should meet four requirements under the law: 1) other penalties and the most severe penalty imposed for one of the criminal acts committed should be accumulated; 2) more lenient penalties should be partially added from all penalties imposed; 3) when combining penalties imposed for several criminal acts, one final penalty should be imposed or, under Article 42(4) of the Criminal Code, two penalties; 4) the final combined sentence should be more severe than the most severe penalty imposed for separate criminal acts. However, it should be pointed out that neither the legislation nor the case-law determine the minimum measure of more lenient penalties added to the most severe penalty, which should be followed when applying partial accumulation of penalties. It results in a criminal policy that is not strict enough; therefore, it is necessary to determine by law the recommended minimum measures of the penalties added, leaving the courts a right not to observe them and obliging them to give reasons for not observing these measures.

It should be pointed out that prohibition in the process of the combination of penalties to impose a more severe combined sentence of a type which has been imposed for separate criminal acts, also impedes proper individualisation of the penalty. This problem becomes especially important after stating that penalties for separate criminal acts should be imposed irrespective of the fact of multiple offences. Adequate amendments to the law must be made to solve this problem.

An assertion can be made that the process of combining sentences in the case law is 'forgotten' and very often is only formal. In the author's view, the process of combing sentences should be treated more carefully, i.e. when partially accumulating penalties, courts should indicate which part of which penalty was added; this would facilitate the work of courts of higher instance and ensure the clarity of the sentence. The courts should also give reasons for the choice of the measure of the penalty added, with regard to the total danger of the acts (the total damage incurred to the valuables protected by the criminal law, the number and gravity of criminal acts committed) and the personality of the perpetrator as far as it is concerned with his disposition to repeat criminal acts (this disposition is defined by interrelation between the criminal acts committed, the period of their

commitment, the impact of law enforcement institutions' reaction to commitment of new criminal acts (e.g. a new offence is committed when the offender is charged under suspicion of committing previous acts or when the case has already reached the court), etc.). All this would contribute to individualising the penalty of the defendant properly and would oblige the courts to treat the combination of penalties with the same responsibility as imposition of penalties for a single criminal act is treated.

While performing a research for the doctoral dissertation, it was noticed that the case-law is contradictory when penalties are being combined in the situation provided for in Article 63(9) of the Criminal Code. The doctoral dissertation approves of the practice, according to which in the event of multiple offences sentences imposed for separate criminal acts should be combined, not the sentences already combined.

Besides the imposition of sentence, the fact of multiple offences has influence on other aspects of criminal liability. It may be difficult to implement provisions under Articles 77 and 94 of the Criminal Code (release from a custodial sentence on parole and replacement of the term not served of the custodial sentence with a more lenient penalty) as they are worded so that it seems they apply to a person who has committed only a single offence. Therefore, it is necessary to make amendments to the law and through them not a single act but all the criminal acts committed by the person would be considered when issues regulated under Articles 77 and 94 of the Criminal Code are dealt with. This section also discusses some problems of multiple offences that arise when applying suspension of a sentence under Article 75 of the Criminal Code or when a person is found to have committed a criminal act for the first time. Laws related to influence of multiple offences on the calculation of the statute of limitations of judgement of conviction should also be amended.

Proposals

With a view to eliminate flaws in the criminal law and the case-law that have been identified during the doctoral dissertation research, it is advisable to amend and append accordingly the following articles of the Criminal Code:

It is proposed to amend the provisions of Article 63 of the Criminal Code substantially, amending Articles 51 and 65 of the Criminal Code respectively[1]:

Article 63. Imposition of a Penalty for the Commission of Several Criminal Acts

1. Where several criminal acts have been committed, a court shall impose a penalty for each criminal act separately and subsequently impose a final combined

[1]Adequate amendments are certainly to be made also to Article 64 of the CC. However, amendments to this article require a separate research that is not a subject to the present dissertation, therefore this issue is not analysed in details.

sentence. When imposing a final combined sentence, the court may impose either a consolidated sentence or a fully or partially cumulative sentence.

2. Where a consolidated sentence is imposed, a more severe penalty shall cover a more lenient penalty and the final combined sentence shall be equal to the most severe penalty imposed for all the separate criminal acts.

3. Where a fully cumulative sentence is imposed, all more lenient sentences, which have been imposed, shall be added to the most severe penalty imposed for one of the committed criminal acts.

4. Where a partially cumulative sentence is imposed, more lenient penalties shall be added in part to the most severe penalty imposed for one of the committed criminal acts. Usually to the most severe penalty imposed:

1) at least 1/5 of the imposed sentence is added for every minor crime or a less serious crime;

2) at least 2/5 of the imposed sentence is added for every major crime or grave crime.

5. A court shall impose a consolidated sentence where:

1) there is an ideal coincidence of criminal acts;

2) life imprisonment has been imposed.

6. Where imposing a final sentence a part of the imposed sentences may be consolidated, whereas others may only be fully or partially accumulated, a court shall combine sentences by way of consolidation and accumulation of sentences. A court shall make a choice of the procedure for combining sentences upon assessing the nature and dangerousness of the committed criminal acts.

7. When a penalty is imposed on the grounds provided for in paragraph 1 of this Article, a final combined sentence may not exceed the maximum penalty established for this kind of penalty in this Code.

8. Where a final combined penalty imposed exceeds the maximum penalty established for this kind of penalty in this Code, a court, giving reasons for doing so and under provisions of Article 65 of the Criminal Code, may impose a kind of a combined sentence more severe than the sentences imposed for committing individual criminal acts.

9. A penalty shall be imposed according to the rules stipulated in this Article also in the cases when following the passing of a judgement it is established that a person had committed one more crime or misdemeanour prior to the passing of the judgement in the first case. In this case, the fully or partially served sentence imposed by the previous judgement shall be included in the term of the sentence.

10. A person shall not be considered to have committed several criminal acts where he has committed a continuous criminal act.

11. A court may also not comply with the requirements stipulated in subparagraphs 1 and 2 of paragraph 4 and subparagraph 1 of paragraph 5 of this Article, giving reasons for doing so.

It is also necessary:

to append Article 51(1) of the Criminal Code and set it out as follows:

1. The penalty of life imprisonment shall be imposed by a court in the cases provided for in the Special Part of this Code and in Article 65(2) of this Code.

to insert paragraph 2[2] in Article 65 of the Criminal Code:

2. Fixed-term imprisonment penalties may be replaced by life imprisonment penalties where a final combined penalty imposed for grave crimes exceeds maximum measures for the fixed-term imprisonment provided for in Article 50(2) of the Criminal Code.

It is also proposed to insert the following point in Article 77(1) subparagraph 1 of the Criminal Code: e) at least the part of the combined sentence provided for in this Article for the commitment of the most serious of the criminal acts, if the person was convicted not for committing a single criminal act.

The following point should also accordingly be inserted in Article 94(1) subparagraph 1 of the Criminal Code:

c) at least the part of the combined sentence provided for in this Article for the commitment of the most serious of the criminal acts, if the person was convicted not for committing a single criminal act.

Paragraph 3[3] should be inserted in Article 95 of the Criminal Code:

3. Where several criminal acts are committed, the statute of limitations for all criminal acts is general and equal to the statute of limitations provided for the committing of the most serious of the criminal acts.

It is also proposed to insert paragraph 1 to Article 33 of the Code of Administrative Violation of Law:

In the event of ideal coincidence of a criminal act and an administrative violation of law, the person is not subject to administrative liability for committing this violation.

[2] Article 65(2) of the CC to be treated as Article 65(3) of the CC respectively.

[3] Paragraphs 3, 4, 5, 6, 7, 8, 9 of Article 95 of the CC to be treated as paragraphs 4, 5, 6, 7, 8, 9, and 10 respectively.

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Curriculum Vitae

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Tomas Girdenis

NUSIKALSTAMŲ VEIKŲ DAUGETAS LIETUVOS BAUDŽIAMOJOJE TEISĖJE

Santrauka

Tiriamoji problema. Šiame darbe yra tiriama nusikalstamų veikų daugeto instituto problematika. Nusikalstamų veikų daugetas kaip baudžiamosios teisės institutas pasižymi tuo, kad savyje apjungia tiek nusikalstamų veikų kvalifikavimo, tiek ir baudžiamosios atsakomybės individualizavimo problemas. Su nusikalstamų veikų kvalifikavimo problemomis yra susiduriama tada, kai yra sprendžiami pavienės nusikalstamos veikos atribojimo nuo nusikalstamų veikų daugeto klausimai. Konstatavus nusikalstamų veikų daugeto egzistavimą, yra būtina pereiti prie kitos problemos sprendimo – baudžiamosios atsakomybės individualizavimo. Baudžiamosios atsakomybės individualizavimas priklauso nuo nusikalstamų veikų daugeto formos. Taigi vieningai teismų praktikai formuoti yra būtini vienodi ir aiškūs nusikalstamų veikų daugeto formų išskyrimo bei tarpusavio atribojimo kriterijai. Apibrėžus nusikalstamų veikų daugeto formas, yra būtina nustatyti ir jų įtaką asmens, padariusio nusikalstamas veikas, baudžiamajai atsakomybei. Žinoma, pagrindinė įtaka baudžiamajai atsakomybei pasireiškia per bausmių bendrinimo taisykles, tačiau reikia nepamiršti ir kitų aktualių klausimų (tokių kaip bausmės vykdymo atidėjimas, lygtinis atleidimas nuo laisvės atėmimo bausmės prieš terminą ir neatliktos laisvės atėmimo bausmės dalies pakeitimas švelnesne bausme, apkaltinamojo nuosprendžio priėmimo senatis ir t.t.), kurių sprendimas vienaip ar kitaip priklauso nuo nusikalstamų veikų daugeto buvimo. Ne gana to, kartais tenka išspręsti ir nusikalstamų veikų daugeto atribojimo nuo kitų panašių baudžiamosios teisės institutų (nusikalstamų veikų recidyvo, baudžiamosios teisės normų konkurencijos) problemas. Taigi visa eilė šių klausimų ir sudaro pagrindinę šio darbo tyrimo problemą. Nuo tinkamo bei vienodo jų išsprendimo priklauso ir teisingumo principo įgyvendinimas.

Darbo aktualumas, naujumas ir reikšmė. Nusikalstamų veikų daugetas yra gana dažnas reiškinys Lietuvos teismų praktikoje, neretai asmenys yra teisiami ne už vieną, o už kelias nusikalstamas veikas. Tačiau baudžiamosios teisės moksle vis dar nėra prieita prie vieningo požiūrio į nusikalstamų veikų daugeto problematiką. Visų pirma nevienodai yra suvokiama nusikalstamų veikų daugeto samprata, išskiriamos skirtingos nusikalstamų veikų daugeto formos, keičiasi jų interpretacija, nesutampa pavienės nusikalstamos veikos atribojimo nuo nusikalstamų veikų daugeto kriterijai (gana dažnai jie priklauso nuo padarytos nusikalstamos veikos rūšies). Atskiro dėmesio nusipelno ir baudžiamosios atsakomybės individualizavimo procesas, esant nusikalstamų veikų daugetui. Teismų praktikoje pastebima, kad prokurorai vis dažniau skundžia žemesnių instancijų teismų sprendimus dėl netinkamo bausmių bendrinimo. Bausmių bendrinimo procesas teismų praktikoje tapo „užmirštas“,

neretai bausmes bendrinat tik formaliai (prie griežčiausios bausmės pridedant 3 – 6 mėn. laisvės atėmimo), visiškai nemotyvuojant pridedamų bausmių dydžio parinkimo. Be to 2003 m. gegužės 1 d. įsigaliojus naujajam baudžiamajam kodeksui, keičiantis teismų praktikai bei baudžiamosios teisės moksle įsitvirtinant naujoms idėjoms, tapo būtina peržiūrėti senas nusistovėjusias nusikalstamų veikų daugeto nuostatas. Taigi nors nusikalstamų veikų daugeto problematika yra nagrinėjama jau gana seniai, šiame disertaciniame tyrime bus pateiktas gana naujas, tiek autoriaus, tiek ir kitų mokslininkų požiūris į nusikalstamų veikų daugeto institutą, kartu apibendrinant (kartais įvertinant ją kritiškai) ir naujai besiformuojančią teismų praktiką. Be to, atsižvelgiant į tai, kad dauguma nusikalstamų veikų daugeto klausimų (išskyrus bausmių skyrimą) nėra sureguliuoti baudžiamajame kodekse, jų sprendimą paliekant teismų praktikai ir mokslui, šis darbas gali turėti ir nemažos praktinės reikšmės vis kintančiai ir vis dar besiformuojančiai Lietuvos teismų praktikai, tiek kiek tai susiję su nusikalstamų veikų daugeto problematika.

Darbo tikslas ir uždaviniai. Disertacinio darbo tikslas – apibendrinat mokslo ir teismų praktikos pasiekimus bei patirtį, suformuoti vieningą (baudžiamosios teisės teorijos ir teismų praktikos poreikius atitinkantį) požiūrį į nusikalstamų veikų daugeto institutą ir su juo susijusių problemų sprendimą.

Disertacinio darbo uždaviniai:

1) Apibrėžti nusikalstamų veikų daugeto instituto sampratą bei požymius, atribojant jį nuo kitų panašių baudžiamosios teisės institutų (nusikalstamų veikų recidyvo, baudžiamųjų teisė normų konkurencijos);
2) Suformuoti vieningus (apibendrinant ir su konkretinant jau esančius, ar pasiūlant naujus) pavienės nusikalstamos veikos rūšių atribojimo nuo nusikalstamų veikų daugeto kriterijus;
3) Apžvelgus nusikalstamų veikų daugeto formų įvairovę, sutinkamą baudžiamosios teisės moksle, išskirti Lietuvos teismų praktikos poreikius atitinkančias nusikalstamų veikų daugeto formas, apibrėžti jas, išskiriant ir apibūdinant jų požymius bei suformuojant vieningus ir aiškius tarpusavio atribojimo kriterijus;
4) Identifikuoti pagrindines problemas, susijusias su nusikalstamų veikų daugeto įtaka baudžiamosios atsakomybės individualizavimui, bei pasiūlyti tinkamiausius šių problemų sprendimo būdus.
5) Suformuoti pasiūlymus įstatymų leidėjui bei teismams dėl nusikalstamų veikų daugeto instituto tobulinimo bei su juo susijusių problemų sprendimo.

Ginamieji disertacijos teiginiai:

1) Nusikalstamų veikų daugetas turi būti sietinas ne su kelių nusikalstamų veikų padarymo faktu, o su šio fakto teisiniu vertinimu – traukimu baudžiamojon atsakomybėn už kelių nusikalstamų veikų padarymą.

2) Recidyvas nelaikytinas savarankiška nusikalstamų veikų daugeto forma ir turi būti vertinamas iš kaltininko asmenybės pozicijų.

3) Pavienės nusikalstamos veikos ir nusikalstamų veikų daugeto atribojimas teismų praktikoje neretai yra kazuistinio pobūdžio (priklauso nuo konkrečios bylų kategorijos), neturintis aiškių, teismų praktikoje nusistovėjusių, kriterijų bei tokiu būdu pažeidžiantis teisingumo principą.

4) Pagrindiniai pavienės nusikalstamos veikos bruožai yra vienos konkrečios baudžiamojo kodekso normos saugomos tiesioginės vertybės ar vertybių visumos pažeidimas bei vieningas kaltės turinys.

5) Pastarųjų metų teismų praktika, praplečianti idealiosios nusikalstamų veikų sutapties suvokimą, formuoja nenuoseklią, išimtimis pagrįstą teismų praktiką.

6) Bausmių skyrimo taisyklės, esant nusikalstamų veikų daugetui, varžo teismų laisvę bei trukdo tinkamai individualizuoti bausmę, todėl yra būtinas įstatymų tobulinimas.

7) Bausmių bendrinimo procesas teismų praktikoje yra „užmirštas“ ir dažnai neatspindi viso padarytų nusikalstamų veikų pavojingumo, todėl būtini įstatymų pakeitimai, orientuojantys teismus į baudžiamosios politikos požiūriu tinkamą teismų praktiką.

Tyrimo metodologija. Disertacinio tyrimo metu buvo panaudoti įvairūs mokslinio tyrimo metodai: loginis, kritikos, lyginamasis, istorinis, lingvistinis, sisteminis, dokumentų analizės ir kiti.

Visų pirma, šiame darbe gana plačiai buvo taikomi loginis ir kritikos metodai. Taikant loginį metodą buvo daromi atitinkami apibendrinimai, išvados, kurių pagrindu buvo siekiama tobulinti nusikalstamų veikų daugeto institutą. Nevengiama ir kritikos metodo – kritikuojama teismų praktika, mokslininkų nuomonės, šių nuomonių argumentacijos trūkumas ir t.t. Kritikos ir loginio metodų pagalba buvo prieita prie galutinių disertacinio tyrimo išvadų, suformuluoti pasiūlymai dėl įstatymų pakeitimo, teismų praktikos tobulinimo.

Taip pat itin daug dėmesio buvo skiriama ir lyginamajam metodui. Remiantis šiuo metodu buvo lyginamos mokslinės koncepcijos, atskirų mokslininkų nuomonės. Siekiant pasisemti patirties, buvo analizuojami bei lyginami užsienio valstybių įstatymai, užsienio teismų praktika. Istorinio metodo pagalba buvo atskleisti ankstesnės (galiojant 1961 m. BK) teismų praktikos ir ankstesnių įstatymų trūkumai, apžvelgtos nusikalstamų veikų daugeto instituto ištakos, kai kurių terminų atsiradimo istorija.

Remiantis lingvistiniu metodu analizuojama nusikalstamų veikų daugeto formų (idealioji ir realioji nusikalstamų veikų sutaptys) pavadinimai, jų atitikimas tikrajai prasmei. Pasiūlytas atitinkamų šių terminų pakeitimo variantas, kuris lingvistiškai labiau atitinka nusikalstamų veikų daugeto formų prasmę.

Darbe taip pat naudojamas ir sisteminis metodas, kurio pagalba buvo atskleista nusikalstamų veikų daugeto instituto struktūra, jo elementai, jų

tarpusavio santykis bei vieta baudžiamosios atsakomybės pagrindų sistemoje. Sisteminio metodo pagalba taip pat buvo identifikuoti tam tikrų sąvokų trūkumai, perteklinių požymių vartojimas.

Pagrindinis tyrime taikytas empirinis metodas yra dokumentų analizė. Kadangi net Lietuvos Aukščiausiojo Teismo praktikoje yra gana daug neatitikimų bei tarpusavio prieštaravimų, tai pagrindiniu šaltiniu buvo pasirinktos būtent šio teismo nutartys, nutarimai ir apibendrinimai, priimti tiek galiojant 1961 m., tiek ir 2000 m. baudžiamiesiems kodeksams. Tačiau tyrime neapsiribota tik Lietuvos Aukščiausiojo Teismo praktika. Analizuojama ir Europos Žmogaus Teisių, Lietuvos Apeliacinio, Vilniaus bei Panevėžio apygardos, Šiaulių miesto apylinkės teismų praktika.

Išvados

1. Nusikalstamų veikų recidyvas nelaikytinas nusikalstamų veikų daugeto forma ir turėtų būti vertinamas kaip specifinis kaltininko asmenybės bruožas.
2. Nusikalstamų veikų daugetas – tai tokia teisinė situacija, kai asmuo yra traukiamas baudžiamojon atsakomybėn už kelias nusikalstamas veikas, padarytas iki apkaltinamojo nuosprendžio už bent vieną iš jų priėmimo.
3. Visumos ir dalies konkurencijos reikėtų nelaikyti baudžiamosios teisės normų konkurencijos rūšimi, nes tai savo esme yra sudėtinės nusikalstamos veikos atribojimo nuo idealiosios nusikalstamų veikų sutapties problema (t. y. nusikalstamų veikų daugeto problema).
4. Pavienė nusikalstama veika – tai tokia pagal vieną Baudžiamojo kodekso normą kvalifikuojama nusikalstama veika, kuriai būdingas vienos konkrečios baudžiamojo kodekso normos saugomos tiesioginės vertybės ar vertybių visumos pažeidimas, sujungtas vieningu kaltės turiniu.
5. Trunkamoji nusikalstama veika – tai tokia nusikalstama veika, kai atlikus tam tikrą veiksmą ar jo neatlikus (neveikimo atveju), asmuo papuola į nusikalstamą būseną, kuriai esant nuolatos įgyvendinamas objektyvusis pavojingos veikos požymis tol, kol kaltininkas pats nutraukia nusikalstamos veikos darymą, atsiranda aplinkybės, trukdančios toliau tęsti nusikalstamos veikos darymą, dingsta pareiga veikti ar dėl jos priimamas apkaltinamasis nuosprendis.
6. Kaip tęstinė nusikalstama veika turėtų būti suprantama tokia veika, kuri susideda iš kelių pavojingų veikų, kiekvieną iš kurių atskirai paėmus gali būti vertinama kaip savarankiška baigta nusikalstama veika ar, atsižvelgiant į tyčią, kaip pasikėsinimas padaryti nusikalstamą veiką pagal tą patį BK straipsnį sujungtų vieningu kaltės turiniu ir pažeidžiančių tą pačią vieną tiesioginę baudžiamojo įstatymo saugomą vertybę.

7. Nusikalstama veika su alternatyviais veikos požymiais nelaikytina atskira pavienės nusikalstamos veikos rūšimi, nes visiškai atitinka tęstinės nusikalstamos veikos požymius.

8. Sudėtine nusikalstama veika reikėtų laikyti tokias nusikalstamas veikas, kurios saugo dvi ar daugiau baudžiamojo įstatymo saugomų vertybių, iš kurių papildoma yra lygiai ar mažiau saugoma nei pagrindinė, o bent vienas iš objektyviųjų požymių gali būti vertinamas kaip atskira nusikalstama veika, kuri visada yra tik vienas iš šio požymio įgyvendinimo variantų ir nėra trunkamoji.

9. Nusikalstamų veikų daugetas gali įgyti tik dvi teisiškai reikšmingas formas – idealioji nusikalstamų veikų sutaptis (nusikalstamų veikų sutaptis) ir realioji nusikalstamų veikų sutaptis (nusikalstamų veikų pakartotinumas).

10. Remiantis teismų praktika, tarpiniai padariniai paprastai atskirai nekvalifikuotini, tačiau, autoriaus nuomone, jei su tarpiniais padariniais, kurių sukėlimas gali būti vertintinas kaip savarankiška nusikalstama veika, yra tyčinis kaltės santykis, o su galutiniais – neatsargus, tai tokiu atveju tyčia ir neatsargiai sukelti padariniai turi būti vertinami atskirai ir kvalifikuojami kaip padaryti esant idealiajai nusikalstamų veikų sutapčiai.

11. Teismų praktikoje susiformavo nauji idealiosios nusikalstamų veikų sutapties požymiai, papildantys tradicinę sampratą – 1) veiksmai vyksta vienas paskui kitą ir viena iš nusikalstamų veikų yra tik etapas tikslui pasiekti 2) padaromi per labai trumpą laiko tarpą, 3) esant bendram sumanymui.

12. Apibendrinant dabartinę Lietuvos teismų praktiką galima suformuluoti tokį idealiosios nusikalstamų veikų sutapties (ar tiesiog – nusikalstamų veikų sutapties) apibrėžimą: idealioji nusikalstamų veikų sutaptis (nusikalstamų veikų sutaptis) – tai situacija, kai asmuo vienu poelgiu padaro kelias nusikalstamas veikas, numatytas skirtinguose BK specialiosios dalies straipsniuose.

13. Nauja „vienos veikos“ kaip idealiosios nusikalstamų veikų sutapties požymio interpretacija, atsirandanti Lietuvos teismų praktikoje formuoja nenuoseklią, išimtimis pagrįstą teismų praktiką, todėl siūlytina grįžti prie klasikinės idealiosios nusikalstamų veikų sutapties sampratos: idealiąją nusikalstamų veikų sutaptį suprantant kaip situaciją, kai įgyvendinant vienos nusikalstamos veikos sudėties objektyviuosius požymius, tais pačiais veiksmais ar neveikimu visiškai įgyvendinama ir kita nusikalstamos veikos sudėtis, numatyta kitame BK specialiosios dalies straipsnyje.

14. Atsižvelgiant į dabartinę teismų praktiką, realioji nusikalstamų veikų sutaptis (nusikalstamų veikų pakartotinumas) turi būti suvokiama kaip situacija, kai asmuo keliais poelgiais padaro kelias nusikalstamas veikas. Tačiau atsisakius naujosios idealiosios nusikalstamų veikų sampratos, realioji nusikalstamų veikų sutaptis (nusikalstamų veikų pakartotinumas) turėtų būti suprantama kaip situacija, kai asmuo keliomis veikomis padaro kelias nusikalstamas veikas.

15. Siekiant tikslesnės vartotinų terminų atitikties analizuojamam reiškiniui, siūlytina vietoj „idealiosios nusikalstamų veikų sutapties“ vartoti „nusikalstamų veikų sutapties“ terminą, o vietoj „realiosios nusikalstamų veikų sutapties“, vartoti „nusikalstamų veikų pakartotinumo“ terminą.

16. Skiriant bausmes už atskiras nusikalstamas veikas, sudarančias nusikalstamų veikų daugetą, teismų praktikos pozicijos išsiskiria, tačiau pritartina tokiai praktikai, kai bausmės už atskiras nusikalstamas veikas yra skiriamos, neatsižvelgiant į patį nusikalstamų veikų daugeto faktą (bausmės turi būti skiriamos izoliuotai viena nuo kitos).

17. Dabartinės bausmių skyrimo taisyklės, numatytos BK 63 str. 5 d. 1 ir 2 p. bei 63 str. 7 ir 8 d., varžo teismų laisvę, skiriant bausmes, ir trukdo bausmes tinkamai individualizuoti.

18. Nenustačius prie griežčiausios bausmės pridedamų švelnesnių bausmių minimalaus dydžio, taikant dalinį bausmių sudėjimą, skatinama pernelyg švelni baudžiamoji politika, todėl įstatyme būtina įtvirtinti rekomenduotinus minimalius pridedamų bausmių dydžius.

19. Bausmių bendrinimo procesas teismų praktikoje yra „užmirštas“, dažnai būna tik formalus, tad Lietuvos Aukščiausiasis Teismas turėtų formuoti tokią praktiką, kuria remiantis, teismai, iš dalies sudėdami bausmes, turėtų motyvuoti pridedamos bausmės dydžio parinkimą, atsižvelgdami į bendrą veikų pavojingumą bei kaltininko asmenybę, kiek tai susiję su jo polinkiu kartoti nusikalstamas veikas, ir nurodyti, kokia dalis nuo kurios bausmės buvo pridėta.

20. Bendrinant bausmes, kai yra BK 63 str. 9 d. numatyta situacija, teismų praktika – prieštaringa. Pritartina tokiai praktikai, kuria remiantis, kai yra nusikalstamų veikų daugetas, turi būti bendrinamos už atskiras nusikalstamas veikas paskirtos bausmės, o ne jau subendrintos bausmės.

21. BK 77 str. ir 94 str. yra pritaikytos vienam nusikaltimui įvertinti, nereglamentuojant lygtinio atleidimo nuo laisvės atėmimo bausmės prieš terminą ir neatliktos laisvės atėmimo bausmės dalies pakeitimo švelnesne bausme nusikalstamų veikų daugeto atvejais, todėl nepagrįstai švelninama daug nusikalstamų veikų padariusių asmenų teisinė padėtis.

22. Senaties terminų skaičiavimas už kiekvieną nusikalstamą veiką, sudarančią nusikalstamų veikų daugetą, atskirai prieštarauja senaties instituto prasmei.

Pasiūlymai

Siekiant pašalinti disertacinio tyrimo metu nustatytus baudžiamojo įstatymo bei tam tikrus teismų praktikos trūkumus, siūlytina atitinkamai pakeisti ar papildyti sekančius BK straipsnius:

Siūloma iš esmės keisti BK 63 str. nuostatas, atitinkamai pakeičiant ir BK 51 bei 65 straipsnius[4]:

63 straipsnis. Bausmės skyrimas už kelias nusikalstamas veikas

1. Jeigu padarytos kelios nusikalstamos veikos, teismas paskiria bausmę už kiekvieną nusikalstamą veiką atskirai, po to paskiria galutinę subendrintą bausmę. Skirdamas galutinę subendrintą bausmę, teismas gali bausmes apimti arba visiškai ar iš dalies jas sudėti.

2. Kai bausmės apimamos, griežtesnė bausmė apima švelnesnes ir galutinė subendrinta bausmė prilygsta griežčiausiai iš paskirtų už atskiras nusikalstamas veikas bausmei.

3. Kai bausmės visiškai sudedamos, prie griežčiausios bausmės, paskirtos už vieną iš padarytų nusikalstamų veikų, pridedamos visos paskirtos švelnesnės bausmės.

4. Kai bausmės iš dalies sudedamos, prie griežčiausios bausmės, paskirtos už vieną iš padarytų nusikalstamų veikų, iš dalies pridedamos švelnesnės bausmės. Paprastai prie griežčiausios iš paskirtų bausmių:

1) už kiekvieną nesunkų ar apysunkį nusikaltimą pridedama ne mažiau kaip 1/5 už jį paskirtos bausmės;

2) už kiekvieną sunkų ar labai sunkų nusikaltimą pridedama ne mažiau kaip 2/5 už jį paskirtos bausmės.

5. Bausmių apėmimą teismas taiko, kai:

1) yra ideali nusikalstamų veikų sutaptis;

2) yra paskiriamas laisvės atėmimas iki gyvos galvos.

6. Jeigu skiriant galutinę bausmę dalis paskirtų bausmių gali būti apimamos, o kitos – tik visiškai ar iš dalies sudedamos, teismas bausmes bendrina bausmių apėmimo ir sudėjimo būdu. Bausmių bendrinimo tvarką teismas pasirenka įvertinęs padarytų nusikalstamų veikų pobūdį ir pavojingumą.

7. Kai bausmė skiriama vadovaujantis šio straipsnio 1 dalimi, galutinė subendrinta bausmė negali viršyti šio kodekso nustatyto tos rūšies bausmės maksimalaus dydžio.

8. Jei paskirtų bausmių suma viršija šiame kodekse nustatytą tos bausmės rūšies maksimalų dydį, tai teismas, motyvuodamas savo sprendimą bei

[4] Žinoma, atitinkami pakeitimai turėtų būti padaromi ir BK 64 straipsnyje. Tačiau šio straipsnio pakeitimai reikalauja atskiro tyrimo, kuris nėra šios disertacijos dalykas, tad detaliau šis klausimas neanalizuojamas.

vadovaudamasis BK 65 str. nuostatomis, gali paskirti griežtesnę, nei už atskiras nusikalstamas veikas paskirtas, subendrintos bausmės rūšį.

9. Pagal šio straipsnio taisykles skiriama bausmė ir tais atvejais, kai po nuosprendžio priėmimo nustatoma, kad asmuo iki nuosprendžio pirmojoje byloje priėmimo dar padarė kitą nusikaltimą ar baudžiamąjį nusižengimą. Šiuo atveju į bausmės laiką įskaitoma bausmė, visiškai ar iš dalies atlikta pagal ankstesnį nuosprendį.

10. Nelaikoma, kad asmuo padarė kelias nusikalstamas veikas, jeigu jis padarė tęstinę nusikalstamą veiką.

11. Teismas, motyvuodamas savo sprendimą, gali ir nesilaikyti šio straipsnio 4 dalies 1 ir 2 punktų bei 5 dalies 1 punkto reikalavimų.

Taip pat būtina:

papildyti BK 51 str. 1 d. išdėstant ją sekančiai:

1. Laisvės atėmimo iki gyvos galvos bausmę teismas skiria šio kodekso specialiojoje dalyje bei BK 65 str. 2 d. numatytais atvejais.

papildyti BK 65 straipsnį 2 dalimi[5]:

2. Terminuoto laisvės atėmimo bausmės gali būti keičiamos į laisvės atėmimo iki gyvos galvos bausmę, jei už labai sunkius nusikaltimus paskirtų bausmių suma viršija BK 50 str. 2 d. numatytus terminuotos laisvės atėmimo bausmės maksimalius dydžius.

Be to, siūlytina BK 77 str. 1 d. 1 p. papildyti sekančiu papunkčiu:

e) ne mažesnę dalį subendrintos bausmės, nei numatyta šiame straipsnyje už sunkiausią iš padarytų nusikaltimų, jei asmuo buvo nuteistas ne už vieną nusikalstamą veiką.

Taip pat atitinkamai reikia papildyti ir BK 94 str. 1 d. 1 p. sekančiu papunkčiu:

c) ne mažesnę dalį subendrintos bausmės, nei numatyta šiame straipsnyje už sunkiausią iš padarytų nusikaltimų, jei asmuo buvo nuteistas ne už vieną nusikalstamą veiką.

BK 95 straipsnis turi būti papildomas 3 dalimi[6]:

3. Jei padaromos kelios nusikalstamos veikos, tai senaties terminas visoms nusikalstamoms veikoms yra bendras ir lygus senaties terminui, numatytam už sunkiausią iš padarytų nusikalstamų veikų.

[5] BK 65 str. 2 d. atitinkamai laikant BK 65 str. 3 d.

[6] BK 95 straipsnio 3, 4, 5, 6, 7, 8, 9 dalis atitinkamai laikant 4, 5, 6, 7, 8, 9 ir 10 dalimis.

Taip pat siūlytina ATPK papildyti 33(1) straipsniu:

Esant nusikalstamos veikos ir administracinio teisės pažeidimo idealiajai sutapčiai asmuo yra netraukiamas administracinėn atsakomybėn už šio pažeidimo padarymą.

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