
THE LAW ENFORCEMENT BY THE BODIES OF CRIMINAL EXECUTIVE SYSTEM

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SYSTEMIC DEFICIENCIES IN LEGISLATION IN THE FIELD OF CRIME FIGHTING AS A PRECONDITION FOR THE FORMATION OF "INTEGRATIVE" CRIMINAL-EXECUTIVE LAW

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Subject. Legal regulation of the implementation of state coercive measures at the "pre-penal", "penal", and "post-penal" stages of the criminal justice system's activities.

The purpose of this article is to analyze systemic deficiencies in the legal regulation of implementing preventive measures, criminal liability, and post-penal (post-punitive) control, which are among the main prerequisites for forming an "integrative" criminal-executive law with expanded regulatory boundaries.

The methodology. Formal-legal, comparative-legal, historical-legal, and systemic methods were used.

The main results and conclusions. The author analyzes systemic shortcomings in the current legislation governing the enforcement of various types of state coercive measures differing in their legal nature at different stages of the criminal justice system's operations. These include gaps, conflicts, and other legislative technical flaws, insufficient legal protection for suspects, defendants, and convicts, inadequate legal foundations for monitoring compliance with their rights, freedoms, and legitimate interests, and insufficient continuity between the stages of criminal justice activities. Many of these issues should be resolved by a new codification of penal law with extended regulatory boundaries. The anticipated benefits of such codification include improved qualitative consistency and effectiveness of legal tools for combating crime, increased number and greater legal force of guarantees for participants in relevant relationships when applying the most severe coercive measures to maintain public order against criminal offenses, enhanced ease of application due to reduced numbers and content of sources of penal law regulations, improved clarity and accessibility of legislation, shorter timeframes to achieve a certain level of evolution in the penal system, and ensuring a balance between societal and governmental interests and needs.

1. Introduction

Although contemporary legal theory and branch-specific legal scholarship over recent decades have demonstrated a tendency toward increasing sectoral differentiation both in Russia and abroad [1–7], the sphere of penal enforcement law and related legal fields reveals sufficient grounds for the integration of the legal regulation governing the execution of criminal liability measures with “pre-penal” and “post-penal” coercive measures. As demonstrated by an analysis of legal scholarship, current legislation, and enforcement practice, one of the principal prerequisites for the formation of penal enforcement law with expanded regulatory boundaries—conventionally referred to as “integrative” penal enforcement law [8]—is the need to substantially improve the systemic coherence of the current legal framework regulating the execution of state coercive measures implemented at different stages of criminal justice administration.

As has been correctly observed in criminal law scholarship, the need to enhance the effectiveness of existing legislation constitutes one of the principal arguments in favor of developing a new legislative model capable of ensuring greater doctrinal coherence and regulatory consistency [9]. However, the present study demonstrates that the systemic coherence of legislation governing the execution of coercive measures at the “pre-penal,” “penal,” and “post-penal” stages is negatively affected by legislative lacunae, normative conflicts, and other defects of legislative drafting; the insufficient regulation of the legal status of suspects, accused persons, and convicted persons; the absence of adequate legal mechanisms for monitoring compliance with their rights, freedoms, and lawful interests; and the insufficient continuity between the

stages of criminal justice administration.

The foregoing necessitates a specialized study of the systemic deficiencies inherent in “integrative” penal enforcement regulation, the elimination of which should contribute to enhancing the effectiveness of the goals and objectives of state criminal policy.

2. Systemic Deficiencies of “Integrative” Penal Enforcement Regulation

Legal scholarship rightly observes that deficiencies in legislative regulation arise not only from lawmaking errors associated with non-compliance with legislative drafting techniques, but also from the objective impossibility of regulating every aspect of social life [10, p. 147]. In the context of the formation of “integrative” penal enforcement law, however, it is necessary to focus not on all deficiencies of current legislation, but specifically on those arising within the sphere of implementation of state coercive measures at different stages of criminal justice administration—from the initiation of criminal proceedings to the expungement of a criminal record—the legal regulation of which falls outside the scope of current penal enforcement legislation, while nevertheless maintaining structural and functional interconnections with it.

This approach is justified by the fact that the mere existence of legislative deficiencies within the current subject matter of penal enforcement regulation does not in itself necessitate the creation of an integrative version of such regulation accompanied by an expansion of its boundaries. In such cases, it would be sufficient either to introduce amendments into existing legislation or, as an exceptional measure, to adopt a new Penal Enforcement Code of the Russian Federation while preserving the existing subject matter of

regulation. For analytical convenience, the identified problems should be examined according to the respective stages of criminal justice administration.

2.1. The Pre-Penal Stage

Among the most significant deficiencies of legal regulation in the sphere of enforcement of criminal procedural coercive measures recognized in legal scholarship are the following: the insufficient regulation and protection of the legal status of suspects, accused persons, and defendants, as well as the mechanisms governing the implementation of the corresponding legal relations; the problems arising from the overlapping legal status of a suspect or accused person and that of a convicted person, ultimately resulting in difficulties in exercising their rights, freedoms, and lawful interests; the ambiguity of the legal nature of certain norms and institutions located within penal enforcement and criminal procedure legislation; difficulties relating to the calculation and crediting of periods of criminal procedural coercive measures toward criminal punishment and other criminal law measures; the absence of sufficient legal foundations for monitoring compliance with the rights of persons subjected to preventive measures alternative to detention, except perhaps at the departmental level; and conflicts in the interpretation of the principal legal categories employed by the relevant branches of legislation.

An analysis of current legislation governing criminal procedural coercive measures demonstrates that, with certain exceptions, the procedure for their execution is regulated primarily through subordinate legislation. Such a tendency, both in Russia and in most foreign jurisdictions, cannot in itself be regarded as negative, provided that such normative acts fully comply with statutory requirements. However, issues concerning the substance and

mechanisms of implementing legal restrictions, as V.A. Utkin correctly observed as early as the late twentieth century, cannot be resolved exclusively at the subordinate regulatory level. Where such acts are adopted, they do not eliminate legislative lacunae—which may only temporarily be supplemented by subordinate regulation under certain conditions—but instead merely confirm their existence [13, pp. 12–13; 14, p. 23].

An illustrative example is the departmental regulation permitting unrestricted inspections of the residence of suspects or accused persons placed under house arrest, established by analogy with imprisonment in Clause 414 of Order No. 110 of the Ministry of Justice of the Russian Federation dated 4 July 2022. As noted by V.A. Utkin, the normative level at which such rules are regulated clearly fails to correspond either to their actual significance or to the constitutional provisions of the Russian Federation [14, p. 23].

It should be emphasized that such deficiencies affect not only the persons subjected to the restrictions in question, but also the authorities responsible for supervising compliance therewith. For example, while imposing upon penal enforcement inspectorates the obligation to monitor the sending and receipt of postal and telegraphic correspondence, as well as the use of communication facilities and the Internet by suspects and accused persons, the legislator has failed to establish legal norms enabling the effective exercise of such powers [15, pp. 324–325; 16, p. 51; 17, p. 149]. As a consequence, law enforcement practice has produced instances in which supervised persons have been held liable under other branches of law, a situation scarcely compatible with the principle of legality.

Another significant systemic deficiency of the current framework of crime-control legislation concerns the overlapping legal status

of suspects or accused persons and convicted persons, which gives rise to substantial practical and doctrinal difficulties in the implementation of their respective legal rights and obligations. In recent years, the consequences of this problem have become the subject of analysis not only in legal scholarship but also in judicial practice, particularly in the jurisprudence of the Constitutional Court of the Russian Federation (for example, Resolution No. 50-P of 28 December 2020). Nevertheless, several important issues remain unresolved.

First, questions persist concerning the legitimacy of imposing additional restrictions upon convicted persons participating in investigative actions or court proceedings as suspects or accused persons pursuant to Article 77.1 of the Penal Enforcement Code of the Russian Federation. Such restrictions currently include the granting of long-term visits only upon written authorization from the authority conducting the criminal proceedings, significant alterations in detention conditions, and the introduction of walking periods compared with ordinary or privileged conditions in correctional colonies. Consequently, the scope and content of legal restrictions applicable to persons held in ordinary or privileged conditions in correctional colonies or educational colonies differ substantially from those applicable to persons detained in pre-trial detention facilities under Article 77.1 of the Penal Enforcement Code and differ only slightly from the conditions applicable to suspects or accused persons held in custody as a preventive measure.

Moreover, in certain respects suspects and accused persons enjoy more favorable conditions than convicted persons held pursuant to Article 77.1, including increased residential space and unrestricted access to films and video materials. At the same time, periods of detention under Article 77.1 are credited toward the sentence on a day-for-day basis, whereas detention as a preventive measure is credited at

the rate of one day to one and one-half days in general regime correctional colonies and educational colonies. Such an approach is difficult to reconcile with the principles of fairness and proportionality.

Second, significant uncertainty exists concerning the execution of imprisonment where a convicted person commits a new offense and is subjected to preventive measures in the form of house arrest or prohibition of certain actions. Current legislation does not clarify whether the execution of the original sentence is suspended under such circumstances. Nor does it adequately regulate the interaction between the convicted person's rights and obligations under penal enforcement legislation and the restrictions imposed by criminal procedural legislation.

Examples include conflicts between the convicted person's right to submit complaints, applications, and petitions and the prohibition on sending or receiving postal correspondence; between the obligation to work in positions designated by correctional institution administrations under Article 103 of the Penal Enforcement Code and prohibitions on visiting certain places or operating vehicles under Article 105.1 of the Criminal Procedure Code; and between the right to communicate orally with correctional administration personnel and restrictions on communicating with specified persons. In such situations, the traditional methods for resolving legal conflicts developed in general legal theory prove insufficient.

Third, unresolved issues persist concerning the execution of non-custodial punishments and other criminal law measures where preventive measures are simultaneously imposed upon convicted persons. Unlike imprisonment, the legislation contains no explicit provisions indicating that the unserved portion of a sentence should be calculated from the moment preventive detention is imposed for a newly committed offense. Consequently, the

imposition and execution of preventive measures—even the most restrictive ones—do not formally suspend the execution of non-custodial punishments or other criminal law measures.

While such an approach generally corresponds to the purposes and principles governing the relevant legal relations, difficulties arise where the simultaneous implementation of different measures renders compliance impossible. This issue is particularly acute in relation to the punishment of restriction of liberty, whose legal restrictions are substantially similar or even identical to those imposed through house arrest or prohibitions on certain actions.

The problems concerning continuity between the stages of criminal justice administration stem not only from defects of legislative drafting but also, in certain instances, from unresolved questions regarding the legal nature and branch affiliation of the relevant legal relations. Such unresolved issues include the institutional affiliation of the legal regulation governing detention during the sentence execution stage, the execution of certain forms of criminal procedural postponement, and the implementation of “other criminal law measures.”

In addition, the effectiveness of legal regulation is undermined by the insufficient scientific substantiation of norms establishing structural and functional interconnections between different stages of criminal justice administration. This deficiency is particularly evident in the rules governing the crediting of preventive measures toward criminal punishment, which have produced paradoxical outcomes in law enforcement practice [21, 22].

Without attempting to analyze all such paradoxes, it may be noted that many of them could be resolved by simplifying the existing system of prison regimes and detention conditions; introducing into the Criminal Code

provisions permitting courts to take into account additional prohibitions imposed upon suspects or accused persons under Clauses 2–6 of Part 6 of Article 105.1 of the Criminal Procedure Code; extending the application of Article 72 of the Criminal Code to situations in which preventive measures are imposed upon convicted persons who are subsequently acquitted of newly charged offenses; and applying the existing crediting coefficients to periods of detention under Article 77.1 of the Penal Enforcement Code [22, p. 127].

2.2. The Penal Stage

Although the execution of criminal punishments and several other criminal law measures connected with the convicted person’s criminal record currently falls within the scope of penal enforcement legislation, a number of criminal law and criminal procedural measures arising at the sentence execution stage remain unregulated by these norms even after more than twenty-five years of legislative development. This situation is primarily attributable to the unresolved issue, both in legal scholarship and in legislative and judicial practice, concerning the definition and legal nature of “other criminal law measures.”

Without seeking to determine which specific criminal law measures constituting forms of criminal liability should be incorporated into the subject matter of “integrative” penal enforcement law, it should nevertheless be emphasized that each of these measures presently requires improvement of its legal regulation. In some instances, targeted amendments to existing legislation would suffice; in others, however, the implementation procedure lacks any normative foundation whatsoever.

A striking example is the absence of legal regulation governing postponement of sentence execution under criminal procedural legislation

on grounds of illness or severe consequences, or the threat thereof, for the convicted person or his or her close relatives, as well as other exceptional circumstances. Although such persons are not subjected to specific obligations or prohibitions, nor to sanctions for non-compliance—as opposed to convicted persons granted postponement under Articles 82 and 82.1 of the Criminal Code—they nevertheless require supervision due to the possibility of evading sentence execution or the disappearance of the legal grounds justifying postponement.

A similar problem has arisen in connection with supervision over persons conditionally released from punishment pursuant to Article 80.2 of the Criminal Code, the procedure for which remains unregulated at the federal legislative level. As correctly observed by K.N. Karpov, although a person's placement in altered military or combat conditions may contribute to eliminating the social danger posed either by the individual or by the committed offense, the mechanism of conditional release from punishment should not entail the absence of supervision concerning compliance with release conditions or the prevention of continued criminal activity, including during military service [23, p. 76]. Consequently, legal scholars have proposed regulating such supervision within the Penal Enforcement Code [24, p. 187]. Nevertheless, unresolved issues remain regarding supervision and its legal foundations from the moment conditional release is granted until the fulfillment or non-fulfillment of the relevant obligations.

Another unresolved issue concerns the level of legal regulation governing the transfer and transportation of persons sentenced to imprisonment, as well as the legal nature of such relations. The legislator attempted to address this problem in Articles 75 and 76 of the Penal Enforcement Code by providing that the procedures for directing and transferring

convicted persons should be determined through subordinate regulations. However, the actual escorting of such persons, together with their rights and obligations during transfer, continues to be governed exclusively by departmental instructions, a situation difficult to reconcile with Part 3 of Article 55 of the Constitution of the Russian Federation [25, p. 139].

2.3. The Post-Penal Stage

At the post-penal stage, it is presently possible to identify the legal regulation of two principal coercive measures: supervision over persons released on parole and supervision over persons subjected to administrative supervision. Each of these measures should be examined separately.

An analysis of current legislation demonstrates that the most serious deficiency in the legal regulation governing supervision over persons released on parole is, in essence, the absence of such regulation. Attempts by the Federal Penitentiary Service of Russia to regulate the activities of penal enforcement inspectorates in this sphere through methodological recommendations undoubtedly merit attention. Nevertheless, such practice contradicts constitutional principles, particularly with respect to the issuance of official warnings and the conduct of residential inspections.

The unresolved nature of this issue, together with the inability of supervisory authorities—unlike in the sphere of other criminal law measures, such as suspended sentences—to petition courts to impose additional obligations upon parolees violating release conditions, ultimately contributes to recidivism.

As regards administrative supervision, its implementation generally presents fewer difficulties than the other coercive measures discussed above. Nevertheless, several issues

warrant attention.

First, the restrictions imposed upon persons under administrative supervision increasingly resemble criminal punishments and other criminal law measures, and in some instances duplicate them entirely. As a result, two separate supervisory authorities may simultaneously monitor compliance with identical obligations and prohibitions, contrary to the principle of rational economy in the application of state coercive measures and the efficient use of institutional resources.

Second, conflicts exist between the general and special provisions of legislation governing administrative supervision, thereby impeding the effective implementation of supervision with respect to certain categories of released persons.

For example, pursuant to Part 2.1 of Article 3 of the Federal Law on Administrative Supervision, administrative supervision is imposed by a court upon a person who, after reaching the age of eighteen, committed an offense against the sexual inviolability of a minor under the age of fourteen and suffers from a sexual preference disorder (pedophilia) that does not exclude criminal responsibility. Unlike other categories of supervised persons, however, the legislation does not require that such a person be released or scheduled for release from a place of imprisonment. On the one hand, this contradicts the concept of administrative supervision established in Article 1 of the Law; on the other hand, it remains consistent with the objectives of such supervision established in Article 2.

Such a situation may theoretically arise where a court imposes a punishment below the statutory minimum under Part 3 of Article 134 of the Criminal Code, for example correctional labor or restriction of liberty as the principal punishment rather than imprisonment. Current legislation, however, does not establish procedures for supervising this category of

persons.

3. Conclusions

The foregoing analysis demonstrates that the need to substantially enhance the effectiveness and systemic coherence of legal regulation in the sphere of crime control constitutes, alongside other relevant factors and conditions, one of the principal prerequisites for the emergence of “integrative” penal enforcement law and for the development of a corresponding codified legislative act serving as its formal legal embodiment.

An analysis of legal scholarship, legislation, and law enforcement practice indicates that such objectives can only be achieved through the elimination of systemic deficiencies. These include legislative gaps, legal conflicts, and other defects of legislative drafting relating to the implementation of “pre-penal,” “penal,” and “post-penal” coercive measures; the insufficient regulation of the legal status of suspects, accused persons, and convicted persons; the absence of adequate legal mechanisms ensuring the protection of their rights, freedoms, and lawful interests; insufficient continuity between the stages of criminal justice administration; and the ambiguity surrounding the legal nature of certain norms and institutions located within criminal, penal enforcement, and criminal procedural legislation.

Most of these problems should be resolved through a new codification of penal enforcement law with expanded regulatory boundaries, thereby ensuring the systemic coherence of legal regulation within the criminal justice system.

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