

JUDICIAL FINE : PROBLEMS OF SUBSTANTIVE BASIS AND LAW ENFORCEMENT PRACTICE

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The subject of the article is the grounds for exemption from criminal liability with the appointment of a judicial fine are being considered.

The purpose of the article is to reveal the systemic links between Article 76.2 and 75-76 of the RF Criminal Code as well as prospects of judicial fine in criminal law.

The methodology of research includes methods of complex analysis, synthesis, as well as formal-logical, comparative legal and formal-legal methods.

Results, scope of application. The author analyzes the practice of applying Art. 76.2 of the RF Criminal Code on criminal cases concerning crimes with a formal composition, when the defendants did not make any compensation for damage or other reparation for damage caused by the criminal act.

The author notes that the institution of release from criminal liability with the appointment of a judicial fine is controversial. On the one hand, it has positive aspects, as it directly and unambiguously aims at compensation for damage or other smoothing of the harm caused by the crime. Criminal legislation of the Russian Federation should more actively provide for the interests of the victim.

However, fine also has a number of shortcomings related to the contradictory nature of his normative definition. The institution in question does not have its own substantive legal basis, it is applied to the same range of cases as the grounds for exemption from criminal liability provided for in Art. 75, 76 and partially art. 76.1 of the Criminal Code. Consequently, its appearance can make a system of measures that stimulate positive postcriminal behavior only more contradictory.

The introduction of this institution can contribute to an increase in manifestations of corruption. Judicial fine is appointed only by the court, but the court to exercise its functions in this case does not have the ability to verify the truthfulness of the information on the participation of the accused in the committed crime. So, there is a risk of applying this institution to persons who should be brought to criminal responsibility.

This institution is available primarily for wealthy suspects (accused persons) who are capable to reimburse the damage caused by crime immediately and, in addition, within the time limits established by the court to pay a judicial fine.

Conclusions. The author comes to the conclusion that the exemption from criminal liability with the appointment of a judicial fine is a truncated form of active repentance.

Keywords: *judicial fine, exemption from criminal liability with the appointment of a judicial fine, active repentance, reconciliation with the victim, other criminal law measures, punishment, postcriminal behavior, compensation for damage or other reparation for damage caused by the crime.*

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1. Introduction to the subject of research

An obvious tendency of the development of domestic criminal law is an increase in the number of norms that stimulate the positive postcriminal behavior of the person who committed the crime, first of all, in the form of redressing the harm caused to them. The correspondence line for the development of the criminal process is the emergence of special procedures that mediate the use of incentive norms.

The novel of the year 2016 is Article 76.2 of the Criminal Code, which provides new grounds of exemption from criminal liability with the appointment of a judicial penalty. Judicial fine, being similar to a criminal penalty of a fine, is nevertheless not such. In this case, as correctly pointed out by Zvecharovsky, the specificity of the judicial penalty is only in the absence of conviction and the maximum limits that are established for him [1, p. 100]. Judicial fine, as O.V. Borisova pointed out, does not fulfill punitive function [2, p. 86]. With this statement it is difficult to agree, however, the analyzed novel definitely creates an additional alternative to criminal prosecution. Let us also note that in the literature very different, often contradictory estimates of the judicial penalty are given. Some authors, like S.A. Vetoshkin, E.A. Khlebnitsyn, welcome the appearance of this institute [3, p. 156; 4, p. 34], others see it as an unacceptable use of criminal repression outside of criminal liability [1, p. 100; 5, p. 126-127], the third - as a para-punishment, the very existence of which entails the violation of a number of fundamental, including constitutional principles of law [6, p. 34].

One should also pay attention to the fact that the new basis for the exemption from criminal liability with the appointment of a judicial fine since its inception immediately confirmed the thesis that the system of measures characteristic for the Russian Federation that stimulate the positive postcriminal behavior of the perpetrators of the crime is absolutely unsystematic and is characterized by internal competition. This system is interdisciplinary in nature and covers a number of institutions both substantive and procedural criminal law.

So, in the criminal procedure sphere Art. 76.2 of the Criminal Code and the corresponding chapter 51.1 of the Code compete with reduced inquiry and a special order of the court decision regarding the base material in the form of regulations providing for criminal liability for a crime of minor or moderate injury.

Appearance of Ch. 51.1 of the Code of Criminal Procedure demonstrates sufficiently significant changes. Since the adoption of the Criminal Procedure Code of the Russian Federation, and until 2016, the differentiation procedure of exemption from criminal responsibility was fairly conventional, or, as pointed out in this regard, Prof. L.V. Golovko [7, p. 294], which is purely terminological in nature, due to the fact that the termination of a criminal case or prosecution of a particular person was allocated.

The appearance of Ch. 51.1 of the Code of Criminal Procedure of the Russian Federation means that a special criminal procedural form was created for one of the grounds for exemption from criminal liability. It is not clear, however, why it is oriented precisely on Art. 76.2 of the Criminal Code of the Russian Federation, and not at Art. 76.1 of the Criminal Code of the Russian Federation, which is also characterized by a certain procedural specifics. After all, it is difficult to say that, by its legal nature, a judicial fine is seriously different from the monetary compensation provided for in Art. 76.1 of the Criminal Code. In both cases, we are talking about restorative methods for resolving a criminal-legal conflict or for restorative justice [7, p. 211]. It is also unclear for what reason only the court can decide to impose a judicial penalty, if such a restriction is not provided for Art. 76.1 of the Criminal Code. Note also that in the explanatory note to the bill these powers were supposed to be given to the head of the body of inquiry [8].

Secondly, referring to the competitors of the judicial penalty in the criminal-material sphere, we note that these include Articles 75, 76 and 7 of the Criminal Code of the Russian

Federation. At the same time, one of the problems: with Article 75 or Article 76 of the Criminal Code should be a general rule in relation to Art. 76.2 of the Criminal Code.

2. Systemic ties of release from criminal liability with the appointment of a judicial fine (Article 76.2 of the Criminal Code of the Russian Federation) with grounds for exemption from criminal responsibility in connection with active repentance (Article 75 of the Criminal Code) or reconciliation with the victim (Article 76 of the Criminal Code)

How is one of the above standards common to the grounds for exemption from criminal liability in connection with the appointment of a judicial fine and what is the specific basis of the latter?

The literature suggests the following criterion for delineating the grounds for exemption from criminal liability in connection with reconciliation with the victim from exemption from criminal liability with the appointment of a judicial fine : if the parties are reconciled, the criminal case is terminated on the grounds provided for in Art. 76 of the Criminal Code and art. 25 of the Code of Criminal Procedure. If the accused is compensated for the harm caused to the victim, but for any reason, reconciliation is not achieved, there may be a termination on the grounds provided for in Art. 76.2 of the Criminal Code of the Russian Federation [9 , p. 3; 10, p. 116].

This conclusion is close to the truth and allows me to conclude that Art. 76.2 of the Criminal Code creates a new, truncated form of active repentance. Why, in this case, is Article 25.1 placed immediately after the norm regulating in the Code of Criminal Procedure of the Russian Federation the termination of the criminal case in connection with reconciliation with the victim, and not after Article 28.1 of the Code of Criminal Procedure, which provides for the termination of criminal proceedings in connection with active repentance?

This question remains unanswered. Continuing his argument, we note that, in the counter weight of the above, E.L. Sidorenko considers exemption from criminal liability with the appointment of a judicial fine as the institution most closely connected with the exemption from criminal responsibility in connection with reconciliation with the victim. The author points out that " within the framework of Art. 76 of the Criminal Code of the Russian Federation, the release of the culprit from criminal liability is possible provided that the person is reconciled with the victim and the damage is remedied, Art. 76.2 of the Criminal Code of the Russian Federation this list is supplemented by a new requirement - the requirement of payment of a judicial fine. In this connection, the question naturally arises as to the extent to which this rule will be in demand, if a more humane institution of reconciliation has long existed in the Criminal Code of the Russian Federation and has been successfully applied" [11, p. 21].

Note that neither the legislator nor the Plenum of the Supreme Court in its latest regulations specified communication system of exemption from criminal liability with the appointment of a judicial fine with active repentance and reconciliation with the victims. Moreover, they are not explained even by the authors of the bill itself, which we owe this institute. In the explanatory note of the historical forerunner of the judicial penalty, the institution of exemption from criminal liability, typical of the Criminal Code of the RSFSR of 1960, with administrative liability, stipulated in Art. 50.1 of the Criminal Code of the RSFSR [8]. It extended to cases of crimes for which the law provides for punishment in the form of deprivation of liberty for a term not exceeding one year or another milder punishment.

Immediately evident that the range of cases in which the applicable Art. 76.2 of the Criminal Code is much broader, and it is not about administrative punishment in the form of a fine, but about the application of another measure of a criminal-legal nature.

The Plenum of the Supreme Court also explicitly does not say anything on the question that interests us. Paragraph 7.1. Resolution of the Plenum of the Supreme Court of 12.22.2015, № 58 indicates only that the court fine "is not a criminal penalty, and refers to other measures of criminal law laid down by Section VI of the Criminal Code "Other measures of a criminal-legal

character", therefore, the rules of Article 46 of the Criminal Code of the Russian Federation do not apply to the appointment and execution of a judicial fine.

However, by indirect evidence it can be confirmed that the exemption from criminal liability with the appointment of a judicial fine is still a truncated form of active repentance.

So, on the one hand, neither the Criminal Code nor the Criminal Procedure Code of the Russian Federation provides for a form of expressing an opinion to the victims regarding the application of Ch. 51.1 of the Code of Criminal Procedure. After all, if Art. 76.2 The CCP of the RF is recognized as a special form of reconciliation with the victim, it must be decisive. The above thesis is confirmed by the jurisprudence we studied. For example, the defendant, accused of committing a crime under Part 1 of Art. 238 of the Criminal Code of the Russian Federation, was released from criminal liability with the appointment of a judicial fine in the following situation: the defendant for the first time committed a crime of small gravity, has not previously been convicted, repents of the deed, took measures to recover the damage of the victim, from which she refused, the head of the organization where the defendant works, in his own name and on behalf of the defendant, apologized to the victim. That is, even the direct refusal of the injured party to compensate for the damage did not become an obstacle for the court to apply art. 76.2 of the Criminal Code.

In addition, § 2.1. of Decision of the Plenum of the Supreme Court of the Russian Federation No. 19 of 27.06.2013 "On the application by courts of legislation regulating the grounds and procedure for the release of criminal responsibility" provides a general definition for damage to part 1 of Article 75 and Article 76.2 of the Criminal Code of the Russian Federation.

Regarding the ratio of Art. 76.1 and Art. 76.2 of the Criminal Code of the Russian Federation provides for clarification that, in cases where not all or not all of the actions specified in Article 76.1 of the Criminal Code of the Russian Federation are committed by a person who commits a crime of small or medium gravity in the sphere of entrepreneurial and other economic activities, his petition for the termination of criminal prosecution on the grounds, provided for in Articles 75, 76 or 76.2 of the Criminal Code of the Russian Federation, can be satisfied by the court subject to the fulfillment of the requirements contained in these standards.

In addition, this ground for exemption from criminal liability is formulated as imperative, and not discretionary, in contrast to the stipulated Art. 76.2 of the Criminal Code of the Russian Federation, which makes it more reliable for the suspect (accused), although more costly.

3. The problem of the substantive basis of law exemption from criminal liability with the appointment of a judicial fine

Having come to the conclusion that the basis for exemption from criminal liability, art. 76.2 of the Criminal Code of the Russian Federation, is form of active repentance, it is necessary to determine with a clear understanding of the nature of the latter.

There are two positions on this issue. The first proceeds from the premise that active repentance from the subjective side should always presuppose the repentance of the person who committed the crime. For example, it is presented in the work of S.P. Shcherba and A.V. Savkin [12, p. 5-14], H. Alikperov H. [13], P.V. Alushkin [14, p. 12], L.V. Lobanova, S.M. Mkrtchyan [15, p. 116], I.V. Smolkov [16, p. 363].

But there is an opposite point of view. So, in the opinion of Professor L.V. Golovko, active repentance requires not so much repentance, as many active actions to promote the disclosure and investigation of the crime and compensation for the harm caused to them. As L.V. Golovko, "the application of a single concept of "active repentance "not only to one of the general grounds for exemption from criminal responsibility (Part 1, Article 75 of the Criminal Code), but also to a number of special (through Part 2, Article 75 of the Criminal Code), differing, sometimes significantly, from each other in its legal nature, forces us not to exaggerate

the meaning of the term itself. The words "active repentance" should not, apparently, look for a deep meaning, or at least literally interpret them" [7, p. 405].

We believe that this is the most justified position. It can be said that the lawmaker himself confirms it, creating all the new, modified forms of the institute of active repentance, all the less connected with the regret of the deed and increasingly active and useful actions from the perpetrators of the crime. The stated statement of L.V. Golovko can be extended to relatively new institutes of judicial fines and special grounds for exemption from criminal liability in cases of crimes in the sphere of economic activity.

Thus, at the present time, the active positive behavior of a person who has committed a crime aimed at restoring public relations disturbed by him in the forms provided for by criminal and / or criminal procedural legislation can be called the essence of the institute of active repentance. The definition of this institution becomes as amorphous as possible. If you rely on this point of view, you can not only the institutions presented in Art. 76.1, 76.2, but also a pre-trial cooperation agreement interpreted as forms of active repentance [17].

I presented the outcome of the position, we can conclude that only the specific variations of active repentance as a pre-trial agreement on cooperation and exemption from criminal liability with the appointment of court fine, and got their own procedural and procedural forms.

At the same time, when approaching the practical side of the issue, we note that the scale and amorphism of the institution of active repentance gave rise to uncertainty about the scope of application of the institute analyzed by us. For this reason, in this article we are talking about the material and legal basis of a judicial penalty, which should be understood as the range of criminal law norms in criminal cases in respect of which it is possible to take a decision to release a person from criminal liability with the appointment of a judicial fine in the manner provided for. 51.1 of the Code of Criminal Procedure.

As S.V. Anoshchenkov explains, "The theory of liberation from criminal responsibility says that the basis of liberation lies in the corresponding set of legal facts, ie, the actual composition of the release Following the above position, the basis for exemption from criminal liability under Art. 76.2 of the Criminal Code of the Russian Federation can be called material (behavioral) forms of positive postcriminal behavior of a person: compensation for damage or otherwise mitigating harm. The conditions are the following: the commission of a crime by a person (crimes) for the first time; attribution of the crime (crimes) to the category of small and (or) medium gravity "[18, p. 118].

Art. 76.2 of the Criminal Code appear to be quite simple. However, even an insignificant time for the application of the grounds for exemption from criminal responsibility and the imposition of a judicial fine allowed to put a whole series of issues actively discussed in the scientific literature:

- Who should act as a victim in a criminal case when implementing the investigated grounds for exemption from criminal liability? Only individuals?
- Is it possible to impose a judicial penalty if the crime is of a formal nature and does not provide for a sign of socially dangerous consequences?

This problem is ambiguously revealed in judicial practice. There are cases of applying a judicial penalty to persons who are charged with the commission of a crime with a formal composition. There are also cases of using Art. 76.2 of the Criminal Code in situations where there is no specific victim in the criminal case: an individual or a legal entity. How does this assessment find this situation in the criminal legal literature?

S.V. Anoshchenkova expresses the position that for ships pr and the appointment of a judicial fine, "neither the infliction of intangible harm nor the absence of a patient is an obstacle. ... the design of an objective party in the formal composition of crimes cannot serve as a factor limiting the possibility of exemption from criminal liability with the appointment of a judicial penalty "[18, p. 122]. Although the judicial practice on this issue, as already noted, is not homogeneous. Thus, I.B. Stepanova and O.V. Sokolov in his work examines cases when judges "do not support the defense's arguments about the possibility of applying Art. 76.2 Of the

Criminal Code of the Russian Federation in the case of accusation of those guilty of committing formal offenses (Part 1, Article 228 of the Criminal Code, Article 291.2 of the Criminal Code, Article 307 of the Criminal Code of the Russian Federation, etc.)" [19, p. 78].

On the contrary, Vorozhtsov S.A., adhering to the position that the institution in question can be used only in criminal cases on crimes whose composition provides for the possibility of causing harm to specific individuals or legal entities , even proposes an approximate list of articles of the Special Part of the Criminal Code of the Russian Federation, which constitute the material and legal basis of Art. 76 .2 of the Criminal Code: " Art. Art. 112, 113, 114, 116, 116.1, 117, 118, 119, 121, parts 1 and 2 of Art. 122, part 1 and 2 tbsp. 127, art. 157, Part 1 and 2 of Art. 158, art. 158.1, Part 1, 2 and 5 of Art. 159, part 1 of Art. 161, art. Art. 165, 167, 168, 214, 217, part 1 of Art. 230.1, part 1 and 2 of Art. 236, part 1 of Art. 239, Art. 244, 250, 251, 266, parts 1 and 1.1 of Art. 293, Art. 297, 303 and on some other, where criminal actions necessarily cause harm" [20, p. 20].

Similarly N.Yu. Skripchenko points out that "the exemption from criminal responsibility in connection with the appointment of a judicial fine is permissible only for those formal compositions for which the guilty person can take measures to smooth out the harm caused, for example , to apologize, to compensate for moral harm in violation of the inviolability of private life (Art. 137 of the Criminal Code) or housing (Article 139 of the Criminal Code). By the same composition, where the perpetrator cannot objectively restore the rights of the victim violated as a result of the crime, the legitimate interests of the individual, society and the state, the decision to appoint a judicial fine cannot be made, since there is no strictly formal condition - compensation of damage or smoothing out the harm caused in another way " [21].

A.V. Kudryavtsev and K.I. Sutyagin expressed that prevailing in practice, the situation of courts of grounds for exemption from criminal liability with the appointment of a court fine in the absence of damages or other reparation, caused by a crime, is wrong. In this connection, it is proposed to supplement the norms of the institution under consideration "d Other variants of postcriminal behavior that testifies to the possibility of correction of a person without the imposition of punishment with the use of a judicial penalty (for example, appearance with confession, facilitating the disclosure and investigation of a crime, exposing and prosecuting other accomplices in a crime) [22, p. 105].

Proceeding from our own analysis of the existing judicial practice, we can say that cases of releasing a person from criminal liability with the appointment of a judicial fine are not uncommon in the case of indictment under art . 327 of the Criminal Code [5].

Exemption from criminal liability was applied against the defendant accused of committing a crime under Part 1 of Art. 292 of the Criminal Code.

The institution under examination was used, and when the defendant commits a criminal act, enshrined in Art. 328 of the Criminal Code . The court found that the defendant voluntarily wrote a turn-out with the guilt that he had illegally evaded military service, is on the military register, he wants to go to the nearest "autumn" call. These circumstances were regarded as another way of smoothing the damage caused as a result of the crime, thanks to which the violated legitimate interests of society and the state were restored [7].

A case has been revealed where the criminal case was terminated on the grounds in question against a person accused of committing a crime under Art. 138.1 of the Criminal Code of the RF Criminal Code. The court reasoned the decision made by the fact that the defendant repented, pleaded guilty in the incriminated act, no material damage, he could pay a fine [8].

Thus, there are cases of termination of the criminal case, when the guilty party committed a crime with a formal composition for which the sign of socially dangerous consequences is not characteristic, the harm to any particular private persons or harm was not caused at all, and therefore, its appearance or other smoothing It did not occur or was very conditional.

In some cases, the situation falls within the definition of other measures aimed at restoring the violated rights of a crime victim, the legitimate interests of individuals, society and the State, as referred to in 2.1 Resolution of the Plenum of the Supreme Court of the Russian

Federation of 27.06.2013, № 19 "On the application by the courts legislation, regulating the grounds and order of release from criminal liability".

However, the application of a judicial fine in a situation where the harm is not caused is completely out of the context of Art. 76.2 of the Criminal Code of the Russian Federation and speaks of an extensive interpretation of the provisions of Art. 76.2 of the Criminal Code. As can be seen, in cases where the defendant is characterized positively, repent of their deeds, but no active operations aimed at restoring the violation of the public's relationship with the commits. It turns out that the application of the grounds for exemption from criminal liability with the appointment of a judicial fine occurs only for the reason that the court did not consider the person to be brought to criminal responsibility as inexpedient.

We note that there are two options:

- in cases where the subject was an error in the application of the criminal law;
- either the court practice revealed the need to create and apply a new version of the exemption from criminal liability, which is an alternative to criminal prosecution, which does not require the defendant to have an active positive postcriminal behavior, and based only on a general assessment of the individual's identity as not representing a public danger.

We agree with E.A. Khlebnitsyna, who points out that " the type of exemption from criminal liability that is being considered helps to prevent the commission of crimes, since in addition to the traumatic moral and psychological impact on the perpetrator, the material costs necessary to pay a judicial fine" [4 , p. 35].

4. Conclusions

Summarizing the above, we should note that the new institution of liberation from criminal liability with the appointment of a judicial fine has its positive and negative sides. Among the positive, one can relate that it is directly and unambiguously aimed at smoothing out the harm caused by crime. Undoubtedly, domestic criminal and criminal procedural legislation should more actively protect the interests of the victim. In this case, it is appropriate to refer to the example of foreign countries. As indicates E.A. Sarkisov, in the Republic of Belarus "the legislator to some extent tried to tie certain types of exemption from criminal responsibility or punishment, to the satisfaction of the interests of the victim, and the imposition of punishment. In particular, compensation for damage caused by a crime or otherwise mitigating the harm inflicted is one of the mandatory conditions for exemption from criminal liability: 1) with the involvement of a person to administrative responsibility (Article 86 of the Criminal Code); 2) in connection with active repentance (Articles 88 and 88-1 of the Criminal Code). One of the conditions for the person's release from punishment under the amnesty is also full compensation for the damage (damage) caused by the crimes, which is subject to recovery upon the verdict that came into legal force or other decision of the court [23].

An analogue of a judicial fine, as well as compensation provided for in Part 2 of Art. 76.1 of the Criminal Code of the Russian Federation in literature refers to a transaction that is characteristic of the criminal law of a number of countries , such as Belgium, the Netherlands [24, 25] and a prototype of which researchers find even in prerevolutionary domestic legislation [26].

However, the institution of exemption from criminal liability with the appointment of a judicial fine has a number of shortcomings:

1. It does not have its own material and legal basis, it is used for the same range of cases, as well as the grounds for exemption from criminal liability, stipulated in Art. 75, 76 and partially Art. 76.1 of the Criminal Code. Consequently, its appearance is able to make a system of measures, stimulating those who have positive postcriminal behavior is even more unsystematic.

2. Because of the contradictions in the legal structure, the practice of applying this institution is not uniform. In fact, Art. 76.2 of the Criminal Code applies in cases where the damage caused by the crime has not been compensated or otherwise cleared.

3. The introduction of this institution can contribute to an increase in manifestations of corruption. Since, although a judicial fine is imposed only by a court, the court, in order to perform its functions in this case, does not have the ability to verify the compliance of information on the participation of the suspect (accused) in the committed crime to the actual circumstances of the case. So, there is a risk of applying this information about the institution to persons who should be brought to criminal responsibility.

4. The test institute is available primarily for wealthy suspects are able to quickly repair the damage caused offense and, moreover, within the period set by the court to pay a court fine. The question of the possibility of applying this rule, if the victim agrees to a long-term phase-out compensation for harm is resolved negatively.

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