

THE PROBLEM OF MANDATORY REPLACEMENT OF PUNISHMENT TO MORE SEVERE ONE

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The subject. The article deals with the problem of mandatory replacement of punishment, not related to imprisonment, with more stringent measures of state coercion due to malicious evasion from serving the applicable penalties.

The purpose of the article is to identify the criteria for replacement of punishments to more severe one, including multi-stage replacement.

Methodology. The author uses the method of analysis and synthesis, as well as formal legal method and dialectic approach.

Results. The most vivid embodiment of the principle of the economy of repression is the provision of the courts the possibility of using alternative types of punishment that are alternative to deprivation of liberty (from fine to forced labor). Obviously, the economy of repression should be conditional.

The economy of repression always involves a certain risk, which is, first of all, a threat to evade the convict who is serving the least repressive measure of influence.

Consequently, the application of the most lenient repressive measure of state coercion must be compensated by the mechanism for ensuring its implementation.

In the Criminal Code of the Russian Federation, the legislator uses different formulations that exclude a uniform solution to the question of a multi-step replacement of punishments.

It requires a change in the provisions of federal laws that are not related to criminal law, as well as by-laws that transfer the replacement of punishment in the form of a fine and mandatory works with a more severe punishment from imperative to dispositive - contrary to the direct requirements of the criminal law.

Conclusions. The legislative decision on the obligation of replacement should be clear and uniform. The current approach of the legislator is not justified, since the reality of

replacement in determining the malicious evasion of the convicted person from serving the punishment assigned to him should be the same regardless of the type of punishment served and should not become an automatic substitute, otherwise the court is deprived of the opportunity to fully and comprehensively investigate the issue of the expediency of such a replacement in terms of the reasons for committing this violation of the regime and the achievement of the objectives of criminal punishment. Evasion of the convicted person from the sentenced punishment should always lead to negative consequences for him, however, the institution of substitution of punishment for stricter ones does not meet this requirement.

1. Conditions for saving repression.

The most vivid embodiment of the principle of the economy of repression is the provision of the courts the possibility of using alternative types of punishment that are alternative to deprivation of liberty (from fine to forced labor). Obviously, the economy of repression should be *conditional*. On the one hand, the imposition of punishment, the use of other measures of criminal law - always predictive activities. It is impossible to agree with E.L. Sidorenko is that "It is methodologically incorrect to put the process of imposing punishment on the basis of predictions of the future behavior of the perpetrator. This approach is not immune to errors and subjectivism" [1, p. 266]. The court assesses the probability of achieving the goals of criminal responsibility (punishment), guaranteeing the actual implementation of the measure applied. In accordance with the goal of restoring social justice, conditions are created for the maximum possible elimination of the harmful consequences of the deed committed by the perpetrator. On the other hand, the economy of repression *always involves a certain risk*, which is, first of all, the risk of avoiding the least repressive measure of punishment for the convicted person. Consequently, the use of the most lenient repressive measure of state coercion *should be compensated by the mechanism for ensuring its implementation* (up to the establishment of the possibility of replacing the chosen measure with a more strict and (or) criminalizing the most dangerous forms of evasion of the convicted person from serving the appropriate measure of influence).

2. Contradictions of the legislation in the sphere of punishment substitution.

It is during the replacement of punishment that the sanction of the norm of criminal law is applied more rigorously [2, p. 75-76]. In the literature, there is a certain illogicality allowed in the construction of norms for the replacement of punishment by a more serious form [3, p. 13]. Attention is drawn to the inconsistency of the legislator when deciding whether to replace punishment with stricter ones. If in connection with a fine, compulsory and forced labor (part 5, article 46, part 3, article 49, part 6, article 53.1 of the Criminal Code of the Russian Federation (hereinafter CC) the criminal law uses the word "*replaced*", which presupposes the duty of the court to carry out such a toughening of the punitive effect, then in the case of malicious evasion of the convicted person from serving a sentence in the form of correctional labor, the court and restrictions of freedom *can* replace the unserved punishment with stricter ones (Part 4, Article 50, part 5, Article 53 of the Criminal Code). The situation is only aggravated by the presence of non-coincidence formulations in various normative acts.

So, the issues of execution of the fine are currently regulated by three legislative acts: the Criminal Code, the Criminal Executive Code of the Russian Federation and the Federal Law of October 2, 2007 No. 229-FZ "On Enforcement Proceedings". Moreover, the provisions of these laws contradict each other, which leads to the emergence of unsolvable problems in law enforcement activities. The *issue of the obligation to replace a fine with a more severe punishment* is resolved in different ways. In part 5 of Art. 46 of the Criminal Code states that in case of malicious evasion of payment of a fine designated as the main punishment, the penalty *is replaced by another punishment*. Part 2 of Art. 32 requires bailiffs to send to court a proposal to replace the penalty with another type of punishment. However, in paragraph 1 of Article 10 of Art. 103 of the Federal Law "On Enforcement Proceedings" expressly states *that the court may refuse to replace the fine with another type of punishment*.

As mentioned by A.P. Skiba: "The noted conflicts lead to difficulties in law enforcement and in the theory of the considered branches of law, and the absence of a unified position in the Criminal Code, the Russian Federation Criminal Code and the Criminal Procedure Code in the enforcement of a criminal penalty in the form of a fine can lead to situations in which in some regions of Russia practice its performance can be very different" [4].

Moreover, one cannot agree with the opinion that the Federal Law "On Enforcement Proceedings" has a priority "on the conditions and procedure for replacing the fine with another type of punishment" [5]. The norms of the PEC and the Federal Law "On Enforcement Proceedings" do not duplicate and do not develop the provisions of the Criminal Code on the consequences of evasion from serving a fine, but fill in the gaps of the Criminal Code, being in essence criminal legal regulations.

It requires amending paragraph 60 of the Instruction on the organization of execution of punishments and measures of a criminal-legal nature without isolation from the society, according to which, *in the event of the court's refusal to replace compulsory labor with another type of punishment, a new submission to the court is sent after the convict's repeated violation of the order and conditions of serving punishment*. Thus, the bylaw normative act transfers the replacement of punishment in the form of mandatory works with a more severe punishment from imperative to disproportionate - contrary to the requirements of the Criminal Law, in accordance with Part 3 of Art. 49 of which, if the court establishes the signs of malicious evasion of the convicted person from serving *compulsory works*, they *are replaced by forced labor or imprisonment*.

3. Areas of improvement of legislation in the field of punishment substitution.

O.N. Bibik argues that "the criminal law is very imperfect, and the recognition of it as the only source of criminal law does not create sufficient guarantees for the individual from violating his rights and freedoms in the application of criminal law" [6, p. 77]. At the same time, we are in agreement with those authors who critically evaluate the practice of including criminal law orders in acts of another branch of legislation [7, p. 6; 8, p. 101; 9, p. 66] and believe that in the Criminal Code must necessarily include those laws that establish criminal liability, i.e. carry out criminalization and penalization of the act [10, p. 68]. It seems that these provisions should be placed directly in the criminal law, which will resolve both theoretical discussions and law enforcement issues.

The legislative decision on the obligation of replacement should be clear and uniform. The current approach of the legislator is not justified, since the reality of replacement in determining the malicious evasion of the convicted person from serving the punishment assigned to him *should be the same regardless of the type of punishment served* and should not become an automatic substitute, otherwise the court is deprived of the opportunity to fully and comprehensively investigate the issue of the expediency of such a replacement in terms of the reasons for committing this violation of the regime and the achievement of the objectives of criminal punishment. For the inadmissibility of the automatic replacement of punishments and other measures of a criminal-legal nature without isolation from society, it is indicated in Recommendation No. R (92) 16 of the Committee of Ministers of the Council of Europe to member states on the European rules on the application of public sanctions and penalties, Rule No. 10 of which provides, that "the law should

not contain a provision on the automatic replacement of a public sanction and measure related to deprivation of liberty, in the event that the offender does not comply with the conditions and obligations imposed by the general punishment or measure". Proceeding from this, in the opinion of N.V. Olhovik, it is necessary to make changes in Part 5 of Art. 46 and part 3 of Art. 49 of the Criminal Code and provide for the *possibility of* replacing the fine and compulsory work in the event of malicious evasion of the convict from their serving [11, p. 126].

A more balanced approach was advocated by Yu.M. Tkachevsky, rightly remarking that malicious evasion from serving a sentence is a firmly expressed reluctance to serve him. All methods of other influence on the convict have already been exhausted, but they did not help ... But if this is so, then the question of replacing the punishment in question should be mandatory, not optional, that is, "Should" take place, and not "can" take place [12, p. 70 - 71, 119; 13, p. 309; 14, p. 95]. It is hardly possible to explain the legislative establishment of a "special" regime for the execution of correctional labor and the restriction of liberty (as the main form of punishment), in which the decision to replace correctional labor with a more severe punishment due to malicious evasion of their serving is left to the discretion of the court.

4. Multistage replacement of punishment.

Evasion of the convicted person from the sentenced punishment should always lead to negative consequences for him, however, the institution of substitution of punishment for stricter ones does not meet this requirement.

In this regard, special attention deserves the question *of the possibility (and, accordingly, the obligation) of a "multi-stage" replacement of punishment with a more severe one due to malicious evasion of his serving.*

Yu.M. Tkachevsky noted that Art. 28 of the Criminal Code of the RSFSR in 1960 . provided for the replacement of corrective labor with imprisonment in case of malicious evasion from serving a sentence of a person *convicted* to correctional labor without deprivation of liberty, i.e. it follows from the editorial board that the correctional labor assigned to persons maliciously evading the payment of a fine was not provided for in the case of malicious evasion of their execution. A deadlock situation was created. The legislator in the Criminal Code eliminated this injustice [12, p. 122]. With him were solidarity. Milyukov and O.V. Starkov, stating that "as a result of the indicated replacement, the person sentenced to a fine ... may be imprisoned ... as a result of the subsequent replacement of correctional labor by deprivation of liberty" [15, p. 70] . A multi-stage replacement was also allowed by V.I. Radchenko, A.S. Mikhlin, I.V. Shmarov [16, p. 55] and other authors.

B. Karganov, on the contrary, believes that a multi-step replacement of punishments is impossible, since the law, in particular, spoke of replacing punishment for persons *sentenced* to correctional labor. But correctional labor, when they replace a fine, are not served by a verdict, but by a court order [17, p. 33]. The same position is occupied by S.S. Utkin, reasonably noting that "replacement of correctional labor penalty would have a deterrent value only in the case of the further possibility of replacing the hard labor imprisonment" [18, p. 151-152]. V.D. Filimonov believes that the current Criminal Code does not at all give an answer to the question whether, for example, mandatory and corrective works assigned for malicious evasion ... in turn, on the same basis, be replaced by deprivation of liberty [19, p. 272; 20, p. 607].

Indeed, the legislator uses different language in the Criminal Code, excluding a uniform solution to the issue of a multi-step replacement of punishments, since replacement is envisaged in cases of malicious evasion:

- from payment of a fine *appointed* as the main punishment (Part 5, Article 46 of the Criminal Code);
- *evasion of the convicted person from serving* compulsory labor (Part 3, Article 49 of the Criminal Code);
- *evasion of the convicted person from serving* correctional labor (Part 4, Article 50 of the Criminal Code);
- evasion of the convicted person from serving the restriction of freedom, *appointed* as the main form of punishment (Part 5, Article 53 of the Criminal Code);

- *deviation of the convicted person from serving compulsory labor* (Part 6, Article 53.1 of the Criminal Code).

Thus, a *literal* interpretation of the contents of the above norms leads to the conclusion that the fine and restriction of freedom can be replaced by a more severe punishment because of malicious evasion of their serving only if these coercive measures were initially imposed by a court verdict. At the same time, malicious evasion of the convicted person from serving compulsory, corrective and forced labor will entail a tougher punishment, regardless of *what* was the basis for their execution. Consequently, compulsory, corrective and forced labor can be replaced by a more stringent coercive measure and if they are appointed by the court verdict, and in their execution, instead of the fine from which the convicted person has maliciously evaded. With regard to other measures of state coercion, the substitution by a more severe form of punishment may be a one-off, one-off event.

Such a legislative decision is difficult to recognize as successful, because it does not guarantee the implementation of state coercion as a punishment for the crime committed.

The basis for the transition to a more severe form of punishment should be recognized as malicious evasion of the convicted person from the punishment applied to him.

In this regard, it seems necessary in Part 5 of Art. 46 and part 5 of Art. 53 CC replace the word "appointed" with the word "applied".

It is gratifying that both the Plenum of the Armed Forces of the Russian Federation resorted to an extensive interpretation of the norms on the replacement, in particular, of the restriction of liberty by a more severe punishment, due to the malicious evasion of his serving. Thus, in paragraph 7 of the Resolution of the Plenum of 20.12.2011 No. 21, it was recorded: "If the punishment imposed in the form of deprivation of liberty was replaced in the procedure of Article 80 of the Criminal Code of the Russian Federation by restricting freedom, from serving which he maliciously evaded, the court, on the basis of a criminal executive inspection considers the question of replacing this punishment with deprivation of liberty (part 5 of Article 58 of the PEC of the Russian Federation)". Thus, the Plenum permits the possibility of replacing the restriction of liberty with a more severe punishment even if the restriction of liberty was itself applied in the manner of replacing the form of punishment previously imposed by the court.

5. Conclusions.

It is important to note that the *replacement of punishment with a stricter one*, being a form of criminal liability, *is intended to ensure the deterioration of the legal status of the convicted person* who has maliciously evaded serving a prescribed type of punishment, by applying another, more stringent coercive measure.

Therefore, one cannot agree that the meaning of the establishment of appropriate penalties "should not consist in strengthening the responsibility for the crime previously committed .., but in the appointment of such punishment, which in its severity would correspond to the severity of the punishment previously imposed, but unlike the first one really fulfilled " [19, p. 272-274] . With this approach, the fact that the necessity of replacing punishment is not due to the objective impossibility of complying with the state coercion measure established by the court verdict is ignored, but the deliberate actions of the convicted person who purposefully and maliciously avoid the undermining of the criminal legal retaliation determined by the court, taking into account the requirements of the economy of criminal repression and sufficiency of punishment to achieve the goals of criminal punishment. In this regard, the transition to a different punishment is natural, which not simply "unlike the first could be really executed", but would be more severe, repressive in relation to the originally appointed one.

At the same time, the solution of a number of fundamental questions requires optimization:

- 1) ensuring the actual tightening of punishment (deterioration of the legal status of the convict);
- 2) choice of substitute punishment;
- 3) the proportionality of substitution of sentences for others (formalization of replacement).

REFERENCES

1. Lopashenko N.A. (ed.). *Criminal law. A common part. A crime*, Academic course, in 10 volumes. Moscow, Yurlitinform Publ., 2016. Vol. VII. Bk. I. 536 p. (In Russ.).
2. Blagov E.V. *Application of criminal law*. St. Petersburg, Yuridicheskii tsentr Press Publ., 2004. 505 p. (In Russ.).
3. Ivanova S.I. *Evasion from serving a criminal sentence*, Cand. Diss. Thesis. Krasnoyarsk, 2004. 22 p. (In Russ.).
4. Skiba A.P. Some conflicts between the norms of the Criminal Code of the Russian Federation, the Criminal Executive Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation when execut-ing criminal punishment in the form of a fine. *Ispolnitel'noe pravo = Executory Law*, 2008, no. 4. Available at "Con-sultantPlus" System. (In Russ.).
5. Isaenkova O.V. (ed.). *Commentary to the Federal Law No. 229-FZ of October 2, 2007 "On Enforcement Pro-ceedings"*. 2008. Available at "Garant" System. (In Russ.).
6. Bibik O.N. *Sources of criminal law of the Russian Federation*. St. Petersburg, Yuridicheskii tsentr Press Publ., 2006. 243 p. (In Russ.).
7. Ivanchin A.V. *Criminally-legal constructions and their role in the construction of criminal legislation*, Cand. Diss. Thesis. Yekaterinburg, 2003. 24 p. (In Russ.).
8. Radnaeva E.L., Erkhitueva T.I. Some Problems of Using Penalty in the Aspect of Criminal Legislation Reform-ing. *Sibirskii yuridicheskii vestnik = Siberian Law Herald*, 2011, no. 1, pp. 99–102. (In Russ.).
9. Cherenkov E.A. Legal consequences of evasion from payment of a fine designated as a criminal punishment. *Nauka i obrazovanie: khozyaistvo i ekonomika; predprinimatel'stvo; pravo i upravlenie*, 2013, no. 2, pp. 63–66. (In Russ.).
10. Pudovochkin Yu.E. Sources of criminal law of the Russian Federation. *Zhurnal rossiiskogo prava = Journal of Russian Law*, 2003, no. 5, pp. 64–75. (In Russ.).
11. Olkhovik N.V. Efficiency of criminal-legal, criminal-executive and criminal-remedial means of maintain-ingnon-penitentiary regime. *Vestnik Tomskogo gosudarstvennogo universiteta = Tomsk State University Journal*, 2012, no. 356, pp. 125–129. (In Russ.).
12. Tkachevskii Yu.M. *Progressive system of execution of criminal penalties*. Moscow, Zertsalo Publ., 1997. 144 p. (In Russ.).
13. Abdullin E.M. Violation of the principle of systemic character in regulating the replacement of punishment. *Aktual'nye problemy rossiiskogo prava = Actual Problems of Russian Law*, 2007, no. 2, pp. 307–313. (In Russ.).
14. Ryzhov R.S. Legal Regulation of Substitution of One Punishment for a Stricter One. *Vestnik Vladimirskogo yuridicheskogo instituta = Bulletin of Vladimir Law Institute*, 2013, no. 3, pp. 94–96. (In Russ.).
15. Starkov O.V., Milyukov S.F. *Punishment: criminal law and criminopenological analysis*. St. Petersburg, Yuridicheskii tsentr Press Publ., 2001. 461 p. (In Russ.).
16. Radchenko V.I. (ed.). *Commentary on the Criminal Code of the Russian Federation*. Moscow, Verdikt Publ., 1994. 316 p. (In Russ.).
17. Karganova B. Place of the penalty in the penal system under the Criminal Code of the Russian Federation. *Ugolovnoe pravo = Criminal Law*, 2003, no. 4, pp. 33–35. (In Russ.).
18. Utkina S.S. *Criminal punishment in the form of a fine*. Tomsk, Tomsk University Publ., 2004. 166 p. (In Russ.).
19. Filimonov V.D. *Rule of criminal law*. St. Petersburg, Yuridicheskii tsentr Press Publ., 2004. 281 p. (In Russ.).
20. Filimonov V.D. The legal nature of malicious evasion from serving punishment, in: *Sootnoshenie prestuplenii i inykh pravonarushenii: sovremennye problemy*, materials of the IV International scientific and practical conference devoted to the 250 anniversary of formation of

Lomonosov Moscow State University (Law Department of Lomonosov Moscow State University, May 27-28, 2004). Moscow, LeksEst Publ., 2005, pp. 606–609. (In Russ.).

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