

THE ARBITRARINESS OF CRIMINAL PUNISHMENT (THE EXAMPLE OF THE FINE)

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The subject. The paper deals with the problem of arbitrariness of criminal punishment in case of replacement of fine with other types of criminal penalties.

The purpose of the paper is to identify the criteria to replace the fine to more severe kind of punishment.

Methodology. The author uses the methods of analysis and synthesis, as well as dialectic approach. The formal-legal interpretation of the Criminal Codes and of the Russian Federation researches of familiar criminalists is also used. The main results and scope of their application. The arbitrariness of repression as its indicator means the possibility of changing the quality, quantity and (or) intensity of repression depending on the convicted person's compliance with the imposed regime, including the replacement of the assigned measure of state coercion with a more severe one.

The author proposes a new version of pt. 5 of art. 46 of the Criminal Code of the Russian Federation. A new model of the consequences of non-payment of a penalty involves the observance of several conditions: 1) every sanctions, including penalty of a fine, should be submitted to the alternative punishment; 2) every sanction, including a penalty of fine and imprisonment, should be submitted to the "intermediate" punishment; 3) selecting the replacement of punishment should be due to unpaid fines and to provide a factual and not a formal toughening of punishment; 4) should establish the possibility of replacing the fine with imprisonment in proportion to the unpaid amount of the fine.

The results of research may be used as the basis of correction of the Criminal Code of the Russian Federation and judicial practice. The paper may also inspire new researches concerning replacement of criminal punishment. Conclusions. The current system of replacing the fine does not correspond to the idea of saving repression. The new scheme of replacement of criminal punishment proposed in the paper is less arbitrary.

1. The concept of the conventionality of repression and its reflection in criminal law.

Conventionality of repression means the possibility of changing the quality, quantity and (or) intensity of repression depending on the convicts' observance of the regime of serving the relevant measure, including replacing the designated state coercion measure with a stricter one. There is no universal solution to the question of the consequences of evading punishment in current legislation. In addition to the lack of a single algorithm for determining such consequences, the universal concept of malicious evasion from serving punishment and other measures of responsibility, the legislation is replete with gaps or insufficiently effective solutions in terms of determining the maliciousness of evading specific types of punishment and their specific consequences. Optimization of repression, its economy, taking into account the indicator under consideration, is possible in two ways: 1) clarification in the criminal-executive law of the concepts of malicious evasion from relevant types of punishment; 2) clarification of the consequences of evasion in the Criminal Code.

2. Circumstances to be considered in determining the consequences of evasion of penalty.

The criminal law consequences of malicious evasion from serving specific types of punishment should also be fully provided for by the Criminal Code. However, the *legal*

consequences of avoiding a convicted person from paying a fine, appointed as the main punishment, are defined in the current Criminal Code and PEC. They consist in the mandatory replacement of a fine by a more stringent measure of state coercion, but Part 10 of Art. 103 of the Federal Law "On Enforcement Proceedings" provides in such cases the possibility of the enforcement of a fine. A compulsory penalty is also provided if the fine for a crime committed by a minor is not paid by the person charged by the court to pay it in due time for voluntary execution (clause 3 part 10 of article 103 of the Federal Law). Such regulations are absent in the Criminal Code at all. Of course, the possibility of enforcing a fine imposed as the main punishment is expedient and, above all, as an alternative to replacing the fine with a more severe punishment, or a measure preceding such a replacement [1, p. 75] , but such a decision should be contained directly in the criminal law.

When replacing the punishment with a more stringent , *the part of the punishment imposed by the court actually served by the convicted person is taken into account*, but this rule is not unreasonably provided for in respect of a *fine*, to which, in particular, R.S. Ryzhov, who rightly believes that the part of the sentence served by the convicted must be taken into account without fail [2, p. 95] .

In the literature, it is rightly noted that the proportions for which the replacement is made are chosen arbitrarily, and in some cases, despite the desire of the legislator, it is even possible to reduce the punishment instead of toughening it [3, p. 310]. Obviously, such proportions should be optimized, which is the subject of independent research.

The *undue differentiation of the consequences of malicious evasion from serving a fine and restriction of freedom* attracts attention . The legislative decision on the consequences of malicious evasion from the payment of a fine, appointed as an additional punishment, was subjected to deserved criticism, and Yu.M. Tkachevsky called him a “big disadvantage” [4, p. 75]. It seems that it is necessary to return to the original version of Part 5 of Art. 46 of the Criminal Code, establishing the uniform consequences of failure to pay a fine within the prescribed period, regardless of whether this coercive measure was provided as the main or additional punishment. This approach has found support in modern scientific research [5, p. 5-6; 6, s. 7-8, 20]. Moreover, Part 5 of Art. 46 of the Criminal Code provides two options for replacing the fine imposed as the main punishment. Separation of the consequences of non-payment of a fine depending on the method of calculating the fine was subjected to reasonable criticism, since it could not introduce uniformity in judicial practice [7 , p. 64] . Such different consequences of failure to pay a fine in some cases exclude the possibility of adding a fine imposed on the totality of crimes and sentences, creating unjustified difficulties both in determining the final punishment and in its execution.

3. Penalties used as a substitute for a fine when evading payment.

The study showed that the idea of saving repression in the least degree corresponds precisely to the system of replacing the fine with a more severe type of punishment. Sharp objections were also raised by the model of replacing the fine with a more severe punishment within the limits of the sanction. In the literature, attention was paid to the availability of sanctions in the Criminal Code, which only provides for a fine, or another type of punishment is offered as an alternative, which is necessarily imposed with an additional penalty of a fine, or punishment that cannot be applied to a particular convicted person due to a direct legislative prohibition or only imprisonment [8 , p. 272; 9, p. 607; ten; 11, s. 2-4 and others] . Mandatory, corrective, forced labor, restriction of liberty, arrest, and in cases provided for by law, and imprisonment may, in particular, serve as punitive substitute penalties. It should be borne in mind that in relation to *all* these measures of state coercion there are significant limitations in the application. As a result, this in some cases excludes the possibility of replacing the punishment imposed by the court, from serving of which there was malicious evasion, with a more stringent measure of state coercion, since *all* “substitutes” punishments cannot be applied to certain categories of convicts.

According to this model, the fine can be replaced by any type of punishment specified in the relevant sanction, including imprisonment (despite the fact that the existence of alternatives in the form of imprisonment and a fine in one sanction is incompatible in essence, since the privilege is

created to the more affluent citizens [12 , pp. 25-31]). G.K. Buranov draws attention to an obvious paradox: the mildest punishment can be replaced by the most severe [11, p. 3].

The question of the possibility of using deprivation of liberty as a “substitute” punishment was considered by us earlier within the framework of a general characteristic of the institution of substitution. When considering the specifics of repressiveness of certain types of punishment, this issue deserves special attention: how correlated are the least repressive types of punishment (fines, mandatory work) and imprisonment. Is such a substitution acceptable in relation to the most benign types of punishment? It is especially important to take into account the peculiarities of the perception of punishment by convicts, including minors. After all, often convicts themselves express a desire to “serve their due time” [13, p. 43], since for a teenager, in his own environment, serve the deprivation of liberty “more prestigious” in his spare time of socially useful work; in practice, one can face a defrauding adolescent by the fact that he has been in prison [14 , p. 38].

In the legal literature, a point of view was expressed more than once about the inadmissibility of such a replacement, creating the privilege of wealthy citizens [15, p. 25-31; 16, p. 10-13; 17, p. 65-67 et al]. The opposite opinion is also expressed [7, p. 64; 18, p. 33-35]. It is noted that even in pre-revolutionary Russia, it was allowed to replace the fine with other types of punishment, including imprisonment, for the full payment of the fine with compensation for the days served in prison [19, p. 52-55]. Attention is paid to a similar replacement scheme in foreign legislation [20, p. 120-130]. Other scientists allow a similar replacement, but with significant reservations. [8, p. 275; 21, p. 129].

Attention is drawn to the fact that the law does not provide for a clear equivalent of such substitutions depending on the size of the fine; there are no criteria for determining the duration of a new type of punishment appointed in the order of substitution [11 , p. 2-4] . As attention was paid earlier, a de facto fine may be a more severe type of punishment than deprivation of the right to occupy certain positions or engage in certain activities, deprivation of a special, military or honorary title, class rank and state awards, compulsory work, correctional work, and therefore replace a more severe punishment in the case of malicious evasion of its execution is in fact milder, contrary to the very essence of the punishment. V.D. Filimonov considers it unclear how, for example, it is possible to replace the fine in the amount of 1 million rubles [9, p. 608]. In this connection, a rather dubious proposal was also expressed - with no fine for correctional work, do not establish their term and execute the punishment until the amount of deductions reaches the amount of the fine [22 , p. 451].

Since it is not clear what other punishment and in what amount the fine can be replaced, and therefore it is considered expedient to establish the type of substitute punishment and the coefficient (equivalent) of the replacement [23, p. 197; 5, p. 14 et al]. It is correctly noted that the possibility of replacing the fine with any other punishment, in any amount, except for imprisonment, is unacceptable [24, p. 8]. So, M.M. Nurmiyev recommends electing a substitute penalty, depending on the size of the originally imposed fine. [6, p. 7-8, 20]. However, it is difficult to agree that when replacing the punishment one should proceed from the size of the imposed fine, and not the amount that was not paid.

I.N. Lempert proposes to establish the *requirement of proportionality* when replacing a fine with a more severe punishment , and the total term of imprisonment may not exceed five years. [25, p. 8, 22]. Various modifications of the proportions are suggested by A.V. Zhukov [5, p. 5-6], D.S. Dyadkin [26], V.A. Utkin [21, p. 129]. The proposed options for improving the mechanism of replacing the fine with a more stringent type of punishment deserve to be studied, but they seem to be indisputable, because, first of all, they do not solve the problem of the court choosing an appropriate “replacement” type of punishment (the court will be able to replace the earlier punishment as correctional work for a period of two years and imprisonment of five years). Unfortunately, the system of sanctions, as such, is very conditionally reflected in the current legislation, but we believe that the implementation of such a proposal will not eliminate the existing imbalance between the severity of the act and the punishment provided for it (including the application of the rules on the replacement of punishment by more stringent) .

According to S.F. Milyukova and O.V. Starkov, a definite guide in this direction can serve as part 3 of Art. 30 of the formerly established Criminal Code of the RSFSR of 1960, according to which the court had the right to replace the unpaid amount of the fine with correctional labor at the rate of one month of correctional labor for two minimum wages [27, p. 70]. V.A. Zhabsky proposes to replace the unpaid fine or unpaid part of the fine with public works, and not within the limits of the sanction provided for by the corresponding article of the Special Part of the Criminal Code (Art. 46) [29, p. 32]. However, in this case, a significant obstacle to the execution of the substitute punishment will be the restrictions on their use established by criminal law. S. Utkina, trying to solve the problem under study, compares the maximum values of the fine and mandatory work [29, p. 158]. At the same time, firstly, the problem of the election of a substitute punishment by the court, the impossibility of applying separate measures of state warning to a number of categories of convicts, the connection between the proposed proportion and legislative limits for compulsory and corrective work is still not resolved. In addition, the question of possible proportions remains unresolved when a fine is replaced by other, more severe types of punishment (for example, imprisonment).

4. Conclusions.

The current system of replacing the fine does not correspond to the idea of saving repression. In this regard, a new edition of Part 5 of Art. 46 of the Criminal Code:

"In case of malicious evasion from payment of the fine, the unpaid part of the fine is replaced by another punishment, with the exception of imprisonment, within the sanction provided for by the corresponding article of the Special Part of this Code, or imprisonment at the rate of one day of imprisonment for ... Minimum wage. The term of imprisonment may not exceed the limits established by Art. 15 of this Code for the category of the guilty crime. If it is impossible to replace the fine with a more severe type of punishment, as well as in the case of failure to pay the fine in time for voluntary execution by a person charged by the court with the obligation to pay it for a crime committed by a minor, the fine is enforced as provided by the Federal Law "On Enforcement Proceedings".

As noted above, the idea of replacing the fine with a more severe punishment within the limits of the sanction met with significant objections, however the latter were caused not so much by the replacement scheme itself, but by the shortcomings of the sanctions.

The new model of the consequences of non-payment of a fine implies the observance of a number of conditions: 1) in each sanction, including a fine penalty, alternative punishments should be presented; 2) in each sanction, including punishment in the form of a fine and imprisonment, should be presented "intermediate" punishment; 3) the choice of a replacement punishment must be determined by the amount of the unpaid fine and ensure the actual rather than the formal tightening of the punishment; 4) the possibility of replacing the fine with the deprivation of liberty in proportion to the unpaid amount of the fine should be established. The maximum term of imprisonment in this case should be determined by the category of the crime committed by the guilty person regardless of the imprisonment in the sanction (taking into account the requirements of part 6 of article 15 of the Criminal Code). Restrictions on the appointment of deprivation of liberty, under Part 1 of Art. 56 and Part 6 of Art. 88 of the Criminal Code, when replacing the fine with imprisonment do not apply; 5) the impossibility of replacing the fine with a stricter punishment should be compensated by collecting the fine by force, determined by the Federal Law "On Enforcement Proceedings", while the possibility itself as a legal consequence of malicious evasion from paying the fine should be provided for directly in the Criminal Code; 6) the legal consequences of malicious evasion from paying a fine should be unified and not dependent on the status of the fine as the main or additional type of punishment.

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