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OTHER MEASURES OF CRIMINAL-LEGAL NATURE: DEFINITION, LEGAL NATURE, SYSTEM

The article is devoted to the analysis of the concept of the legal nature and the system of other measures of criminal-legal nature, specified in the Criminal legislation of Russian Federation and the problems of application of these measures in the judicial practice. The author pays attention to the fact that these measures are quite common in the judicial practice, especially conditional sentence. The legislator establishes three of other measures of criminal-legal nature in section VI of the RF Criminal Code: compulsory measures of a medical nature, forfeiture of property and judicial penalty. But the author of the article aims to prove that the system of other measures of criminal-legal nature is not exhausted by these three measures. The article substantiates the statement that the measures in question constitute independent institute of criminal law. The author analyzes in details the concept and the legal nature of other measures of criminal-legal nature, their difference from punishment. Since the other measures of criminal-legal character are varied and specific, the author considers that it is difficult to formulate a general definition of such measures. The author distinguishes three approaches in the theory of criminal law on the question about the system of measures under consideration: "wide", "narrow" and "balanced approach." The author adheres to the "balanced approach" and justifies the statement that the organization of other measures of criminal-legal nature can only be based on their legal nature. This leads to the conclusion that conditional sentence, postponement of punishment, postponement of punishment for drug addicts, compulsory measures of educational influence, compulsory measures of medical nature connected with the execution of the sentence should be referred to other measures of criminal law. The author substantiates the view that the legislator's decision about systematization of measures considered in Section VI of the RF Criminal Code is inconsistent and illogical. According to the author, the forfeiture of property should be provided in the criminal legislation not as other measure of criminal law, but as an additional kind of punishment. Judicial fine should be excluded from the Criminal Code. Because of their specificity and diversity it is hardly expedient to allocate all the other measures of criminal-legal nature in one section of the RF Criminal Code.

Keywords: punishment, measures alternative to punishment, other measures of criminal-legal nature, law enforcement, conditional sentence, postponement of punishment, compulsory measures of educational influence, compulsory measures of medical nature, forfeiture of property, judicial penalty.

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Criminal and penal legislation of the Russian Federation is based on fundamental provisions of the Constitution and on generally recognized principles and norms of international law related to the execution of sentences and the treatment of prisoners. The rules of these branches of law implemented the provisions of international and European standards which are specified in the UN Standard Minimum Rules in respect of non-custodial measures (Tokyo Rules) of 1990, in UN Standard Minimum Rules for the administration of Juvenile Justice (the Beijing rules) of 1985 and in Recommendations of the Council of Europe Committee of Ministers "On the European probation rules" of 2010.

These standards are oriented to broader application of punishments not related to imprisonment and measures alternative to punishment. As rightly pointed out by Hans-Jörg Albrecht, the overcrowding of prisons is a serious problem that has existed for decades in the different states [1, p.1]. That is why criminal legislation of most countries of both Roman-Germanic and Anglo-Saxon legal system provides a possibility to apply to persons who have committed a crime, not only punishment but also other measures of criminal law or of security measures. At the same time the measures are quite common in the judicial practice, especially probation. For example, in 2015, the provisional using Art. 73 of the Criminal Code of the Russian Federation have been convicted 25.4% of the total number of prisoners, i.e. every fourth convicted. In Germany, the probation is intermediate between a fine and by imprisonment. Since its legalization, it is gradually replacing imprisonment on the back burner. Currently, nearly 3/4 of the persons condemned to imprisonment with a probation period [2, p.128].

Most scholars believe that the other measures under criminal law form an independent institute of criminal law [3, p.44; 4, p.26; 5, p.171; 6, p.11; 7. p.52; 8]. The consolidation of this institution at the legislative level is associated with the adoption of the Federal Law of 27.07.2006 N 153-FZ, according to which section VI of the Criminal Code "Compulsory medical measures" has been renamed into "Other measures of criminal law" section and to recently included two chapters: 15 "Compulsory medical measures" and 15.1 "Forfeiture of property." But with the adoption of the Federal Law of 03.07.2016 N 323-FZ of Title VI of the Criminal Code was amended by chapter 15.2 "The judicial penalty."

Thus, at the present time, section VI of the Criminal Code "Other measures of criminal law" includes only three varieties of these measures. However, as rightly pointed by T.G. Poniatowskaya, "the name of the section of the General Part of the Criminal Code gives the stipulations therein contained and the value of the General Part of the institute, which must be structurally separate, logically complete and consistent system of legal rules, with one base and the general subject of regulation". [8] But is this statement applicable to the institution of other measures under the criminal law? Three other measures of criminal law, enshrined in the same section of the Criminal Code, are different in their legal nature, grounds and application purposes. On the other hand, most scientists suppose that other measures of criminal law are fixed in other sections of the Criminal Code. At the same time it should be noted that the presence of the other measures under the criminal law in the Criminal Code of the Russian Federation except those which are laid down in section VI of the Criminal Code, allows, inter alia, A.N. Batanova doubt the presence of the Criminal Code independent institute other measures of criminal law [9, p. 152]. We cannot accept the latter position.

First of all, we should focus on the legislator's position, according to which the Criminal Code refers to the possibility of applying for a crime punishment and other measures of criminal law (Part 2 of Art. 2, Part 1 of Art. 6 of the Criminal Code, ch. 2, Art. 7 of the Criminal Code). N.A. Struchkov wrote on the essence of other measures of criminal law: "In the case of criminal liability without the use of punishment it takes the form of a measure different from the actual punishment" [10, p.76].

It combines these measures with criminal penalties that they are possible for the commission of crimes. Any other measure of criminal law as a punishment, is a measure of state coercion. The use of these measures is associated with certain restrictions and the laying on of the convicted additional responsibilities, but they are not as significant as in the case of appointment of the criminal punishment. The difference between other measures of criminal law from criminal punishment is this: these measures are not included in the legislative list of the types of penalties (Article 44 of the Criminal Code.); It is not listed in the sanctions regulations of the Criminal Code

of the Russian Federation; does not involve a significant limitation of the legal status osuzhdennyh.Takim, the other measures under criminal law - is provided in the criminal law measures applied to the persons who committed the crime. The basis of such measures is the recognition of a person guilty of an offense. Criminal punishment is the main form of realization of criminal liability. However, criminal liability is not confined to a punishment, it can be implemented and by others (other) measures under criminal law. As already mentioned, the legislator refers to other measures under criminal law enforcement medical measures for forfeiture of property and a court fine. But in the theory of criminal law, this question is debatable. In our opinion, there are three approaches on the question of the kinds of other measures under criminal law.

Thus, some authors hold "broad approach" and refer to the number of other measures of criminal law a considerable number of measures related thereto types of exemption from criminal responsibility, types of release from punishment, penalties and even some special rules for sentencing (I.E . Zvecharovsky, S.G. Kälin, V.K. Duyunov, L.V.-Inogamova Khegai, R.S. Danielian, V.F. Shiryaev, etc.) [11, p.21.; 12. s.56-57; 13, p.94; 14. s.100-101; 15. p.41; 16, p.28-29]. For example, in the opinion of Zvecharovsky, such measures include: 1) subsystem of types of exemption from criminal liability; 2) subsystem of forms of punishment; 3) subsystem of types of release from punishment; 4) subsystem of types of release from punishment; 5) subsystem of forms replacing the unserved part of the punishment; 6) the repayment or removal of a criminal record; 7) subsystem of types of coercive measures of an educational nature; 8) subsystem forms of compulsory medical measures; 9) the forfeiture of property [11, p.21]. Other scientists support of a "narrow approach" and include into in other measures of criminal law measures only a few, mostly compulsory educational measures, compulsory medical measures, forfeiture of property (M.F. Kostiuk, A.N. Batanov, V.A. Posokhova and T.M. Kalinin, A.A. Pavlov, A.N.Batanov, V.V. Paliy, etc.) [17, p.3.; 6, p.13; 9, p.152; 18, p.13].

Finally, the third group of scientists (M.F. Gareev, F.R. Sundurov et al.) are of a more balanced approach. They describe among the other measures of criminal law such measures as postponement of punishment, reprieve punishment drug addicts, probation, compulsory educational measures, coercive measures of a medical nature connected with the execution of the punishment [19, p.5; 20, p.56].

The system of other measures of criminal law in the Criminal Code can only be based on their legal nature and grounds of enforcement.

The big objection is the assignment of all kinds of exemption from criminal liability and punishment to other measures under criminal law. This is largely due to the fact that the Criminal Code provides for implementation of such forms of criminal responsibility, as release from punishment, deferral of serving a punishment and condemnation of minors using the compulsory educational measures. So assignment of all types of exemption from criminal liability and punishmen to other measures of criminal law t, except those which are forms of realization of criminal liability is impossible.

Scholars using "the narrow approach" to the understanding of the system of measures of criminal law base their opinion on the content of criminal legislation and, moreover, complement the system of these measures by coercive measures of educational influence. The system combines measures of different legal nature and grounds of the application.

Controversial is the question of referral of compulsory medical measures to other measures under criminal law. In accordance with Art. 19 of the Criminal Code, Only a sane natural person who has reached the statutory age envisaged by this Code shall be subject to criminal liability. Therefore, if a socially dangerous act is committed in a state of insanity (Art. 21 of the Criminal Code), a person is not the subject of a crime and can not be held criminally responsible. Despite coercive, compulsory medical measures in relation to a method of treating the insane, and not a form of realization of criminal liability. In this case, persons are not to be punished but should be cured.

However, compulsory medical measures may be applied not only to insane persons, but also to the persons who committed the crime and whose mental disorders do not exclude criminal liability (in accordance with Part. 2, Art. 22 and n. "in" h. 1 Art. 97 of the Criminal Code). On the basis of Art. 99 of the Criminal Code and Art. 18 of the Penal Code compulsory medical measures shall be appointed in such cases along with punishment. Thus, compulsory medical measures are not uniform by the legal nature and the grounds of application.

It is a controversial question whether agree with the legislator's opinion that the forfeiture is also one of the other measures under criminal law. In accordance with Art. 104.1 of the Criminal Code, Confiscation of property means forced gratuitous withdrawal without compensation, and conversion to ownership of the State under a judgment of conviction of the listed property. But this list hardly exhaustive.

The UN Convention for the Suppression of the Financing of Terrorism of 1999, UN Convention against Transnational Organized Crime of 2000, Convention of Council of Europe on the Criminal Law of 1999 and other international instruments provide forfeiture of property as a form of criminal punishment. In our view, the establishment of forfeiture as of an additional form of criminal punishment is more effective. This is largely due to the fact that the forfeiture of the property would have a serious deterrent effect. An important argument is the high proportion of violent crimes in the total crime in our country. And the role of the forfeiture is precisely to strengthen the punitive and educational influence on condemned to imprisonment by the impact of its property interests.

In the period from 1997 to 2003 when the forfeiture was provided by the Criminal Code as an additional penalty, it was administered by the courts are more often than additional penalties. For example, in 2003 the forfeiture was appointed for 16663 convicted (2.2% of the total number of convicted persons), while the deprivation of the right to occupy certain positions or engage in certain activities as an additional punishment was appointed for 4375 convicted (0.6%), the fine as an additional punishment was appointed for convicted in 1115 (0.1%). But after the forfeiture has been applied to as a measure of criminal law, the number of those sentenced to it declined significantly and was between 2008 and 2015. only 0.1 - 0.3% of the total number of convicts annually.

In our opinion, Chapter 15.1, dedicated to the forfeiture should be removed from the Criminal Code. The forfeiture must be re-inserted into the system of penalties as an additional form of punishment, and set it for committing grave and especially grave crimes selfish orientation, along with deprivation svobody.

We can also hardly support and consolidation of a new measure under the criminal law, and namely the judicial fine. The legislator actually offers to apply this for a penalty as a other measure of criminal law. The only difference is the size of the fine. As rightly pointed out by N.E. Krylova, the introduction of a judicial fine as the other measure under criminal law "opens the way for further trampling of the basics of criminal law and criminal procedure to revise the central penal categorieswhich are criminal responsibility and punishment" and, eventually, will lead "to the general trend, related to the further "devaluation" institute criminal penalties "[21, s.97-98].

When considering the concept and the legal nature of the system of measures of criminal law raises the question of the need to position all these measures in a single section or chapter of the Criminal Code, as it is done in many foreign codes. And this question is quite controversial.

Thus, F.R. Sundurov [20, p.179], N.G. Osadchaya and I.A. Sementsova [7, p.103], M.Y. Dvoretskiy [22, p. 55] consider that the necessary separation of the rules governing all alternative measures to punishment under criminal law,should be done in a separate section or chapter of the Criminal Code. But, according to S.G. Kälin, the question of the placement of the legislative material should be decided in accordance with national traditions [12, p. 58]. In our view, the position of S.G. Kelin is more preferred. It is hardly appropriate to allocate all the measures under criminal law in one section or chapter of the Criminal Code.

Thus, all the other measures under criminal law are not uniform. But all they are forms of realization of criminal liability and are alternative to the real punishment.

We suppose that other measures under criminal law should include conditional sentence (Art. 73 of the Criminal Code), deferral of serving a punishment (art. 82 and 82¹ of the Criminal Code), compulsory measures of educational impact (Articles 90, 92 of the Criminal Code), coercive measures of a medical nature connected with the execution of punishment (Art. 2, Art. 99 of the Criminal Code). Section VI of the Criminal Code is necessary to refer to "Compulsory medical measures" rather than "Other measures under criminal law."

References

1. Albrecht H.-J. Prison Overcrowding - Finding Effective Solutions. Strategies and Best Practices Against Overcrowding in Correctional Facilities. URL: https://www.mpicc.de/shared/data/pdf/research_in_brief_43_-_albrecht_prisonvercrowding.pdf. 83 p.

2. Kaiser G., Schöch H. Kriminologie, Jugendstrafrecht, Strafvollzug. Munchen, 2010. 273 p.

3. Akutaev R.M. The concept and system of measures of criminal-legal nature, their difference from punishment. *Rossiyskaya justitsia,* 2014, no. 4, pp. 44 - 48.

4. Bezborodov D.A., Zarubin A.V. Other measures of criminal-legal nature: the concept, features and types: a tutorial. St. Petersburg, St. Petersburg Law Institute (branch) of the RF Academy of General Prosecutor's Office, 2015. 80 p.

5. Stepashin V.M. Other measures of criminal-legal nature. *Vestnik Omskogo Univerisiteta*, 2009, no. 1, pp. 169–171.

6. Pavlova A.A. Other measures of criminal-legal nature as an institution of criminal law. Cand. Diss. Thesis. Moscow, 2011. 28 p.

7. Osadchaya N.G., Sementsova I.A. Problems of legal regulation of other measures of criminal law. *Jurist-pravoved,* 2015, no. 1, pp.52-56.

8. Esakov G.A., Poniatowskaya T.G., Rarog A.I. etc. Rarog A.I. (ed.). Criminal influence. Moscow, Prospekt, 2012. 288 p.

9. Batanov A.N. Other measures of criminal-legal nature - an independent institute of the Russian criminal legislation?. *Obshestvo i pravo,* 2011, no. 5 (37), pp.151-154.

10. Struchkov N.A. Criminal liability and its realization in the fight against crime. Saratov, 1978. 882 p.

11. Zvecharovsky I. The concept of measures of criminal-legal nature. *Zakonnost,* 2007, no. 1, pp.12-21.

12. Kelina S.G. Punishment and other measures of criminal-legal nature. *Gosudarstvo i pravo,* 2007, no. 6, pp.51-58.

13. Duyunov V.K. The impact of criminal law: Theory and Practice. Moscow, 2003. 520 p.

14. Inogamova-Khegai L.V. Differentiation and individualization of criminal responsibility and other measures of criminal-legal nature. *Obshestvo i pravo,* 2016, no. 2, pp.103-108.

15. Danelian R.S. On the question of the system of other measures of criminal-legal nature. *Rossiskiy sudya,* 2013, no. 2, pp. 40 - 42.

16. Shiryaev VF Punishment in the system of criminal law measures: theory and practice. Vologda, 2004. 223 p.

17. Kostyuk M.F., Batanov A.N., Posokhova V.A., Kalinina T.M. Concepts and types of other measures of criminal-legal nature. Moscow, Prospect, 2011. 320 p.

18. Kalinina T.M., Paly V.V. Other measures of criminal-legal nature: the scientific and practical commentary. Moscow, Prospect, 2011. 152 p.

19. Gareev M.F. The objectives of other measures of criminal-legal nature and the means of achieving them at the Russian criminal law. Cand. Diss. Thesis. Kazan, 2005. 198 p.

20. Sundurov F.R. The punishment and alternative measures in criminal law. Kazan, 2005. 298 p.

21. Krylova N.E. Is humanisation of the criminal law underway? The analysis of the draft laws approved at the plenary session of the Supreme Court of the Russian Federation on july 31, 2015. *Zakon*, 2015, no. 8, pp. 90 - 107.

22. Dvoretskiy M.Y. Other measures of criminal-legal nature as a form of criminal responsibility realization. *Vestnik Tambovskogo Univerisiteta*, 2015, no. 3 (15), pp.52-56.

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