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### **PROBLEM OF CRIMINAL REPRESSION, APPLIED OUTSIDE OF CRIMINAL LIABILITY**

A new institute of repressive measures applied outside the criminal liability in criminal law (including as a condition for exemption from criminal liability) is forming now in Russian legislation. The author concludes that the provisions of the criminal law on monetary compensation and a court fine should be deleted because of the following reasons. 1) By their nature, and monetary compensation and a court fine, not being a formal punishment (and, therefore, a form of realization of criminal responsibility) is a monetary penalty, ie, penalty-punishment. Moreover, the rules of court fine destination identical rules of criminal sentencing. 2) Quantitatively court fine may exceed the minimum limits of criminal punishment in the form of fines. The dimensions of monetary compensation in the order of hours. 2, Art. 76.1 of the Criminal Code and at all close to the maximum values of fine-punishment. 3) Exemption from criminal liability requires states to refrain from prosecuting the person alleged to have committed a crime, which means that the non-use of criminal repression. Regulatory standards analyzed, on the other hand, require mandatory use of repression, ie, virtually no exemption from criminal liability does not occur at all. 4) The use of a quasi-penalty in the form of monetary compensation and court fines are not an exemption from criminal responsibility, but on the contrary, the use of criminal repression (of responsibility), and in a simplified manner. 5) Contrary to the requirements of the Constitution and the Criminal Code of criminal repression is applied to persons whose guilt has not been established in the commission of a crime. Thus, in criminal law introduced a presumption of guilt. 6) Customization repression (in fact - of criminal responsibility) in the application of the judicial penalty is substantially limited, and the application of monetary compensation is excluded at all, contrary to the requirement that the rough justice (P.1, Article 6 of the Criminal Code)... 7) Rules of court fine actually allow re-use of penalties and, moreover, consistent application of the two main types of punishment, although no one can be held criminally responsible twice for the same offense (P.2, Art. 6 of the Criminal Code).

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We are concerned of the formation of set of repressive measures used without condition of criminal responsibility in the Criminal Code of the Russian Federation:

- relief from criminal responsibility, as regards raises on economic offences - Part 2 of Art.. 76.1 of the Criminal Code;
- Judicial fine (Article 76.2 of the Criminal Code.);
- Imposition of a fine to the parents or legal representatives of a minor convicted in the order of Part 2 of Art. 88 of the Criminal Code;
- Separate compulsory educational measures applied on the basis of Part 1 of Art.. 90 of the Criminal Code;
- Confiscation of property transferred to third parties or organizations - Part 3 of Art.. 104.1 of the

Criminal Code).

Thus, a subsystem of other repressive (punitive) measures under criminal law has actually been formed. These measures are very diverse. In different ways we can determine their social conditioning. They are united by nature of the repression outside the system of criminal liability.

Perhaps only compulsory educational measures applied on the basis of para. 1 Art. 90 of the Criminal Code, can be stored in the system of criminal law measures, but under at least two conditions.

First, the content of these measures must be formalized and should substantially differ from the content of the "neighboring" penalties.

Popular belief that there is no penalty in the coercive measures of educational influence [1, p. 119-121] is groundless. Thus, the obligation to make amends for the harm (Art. 3 of Art. 91 of the Criminal Code) is assigned based on property status of the juvenile and the availability of appropriate labor skills. However, the law does not even define approximate limits of compensation for the damage. The presence of "labor skills" does not exclude the involvement of a minor to unskilled labor, duration of which may considerably exceed the limits set for attracting juvenile to compulsory work.

Restriction of leisure and establishment of special requirements for minor's behavior (para. 4 Art. 91 of the Criminal Code) as a criminal law measure may coincide with both the penalty of deprivation of the right to engage in certain activities, and the punishment of restraint of liberty (Art. 53 of the Criminal Code). At the same time, terms of restrictions on leisure may involve more restrictive rights than a criminal penalty. Moreover, the list of leisure constraints, unlike the components of the penalty of restriction of liberty, is not exhaustive.

Second, and most important, the repressive measures at its core must be used only as a measure of criminal responsibility (as an alternative to criminal sanctions, probation and the postponement of punishment).

The application of confiscation of property transferred to third parties or organizations requires unconditional adjustment of legislation (Para 3 Art. 104.1 of the Criminal Code). In accordance with Para. 3 Art 104.1 of the Criminal Code The property transferred by an accused person to another person (organisation) shall be subject to confiscation if the person that received the property knew or should have known that it had been received as the result of criminal actions.

As noted by K.N. Karpov, para.3 Art. 104.1 of the Criminal Code "allows the use of measures of criminal law in respect of a person who had not committed a crime and had not even been involved in its commitment [2, p. 110-111]. This formulation is not specific enough, it lets the court seize property with careless form of guilt of the purchaser, as well as from a bona fide purchaser [3, p. 146]. Thus, according to A.I. Rarog, the law permits the objective imputation [4, p. 59]. V. Egorov notes that individuals are not charged with the duty of finding the origin of the resulting property (Sec. 3, Art. 10 of the Civil Code), and therefore reasonably considers it appropriate to prohibit the confiscation of property from individuals, erring in good faith and get it on a reimbursable basis [5 , from. 21-22].

A.A. Propostin supposes that there should be the possibility of confiscation in respect of third parties who have got the property at no charge, but under the condition that the convicted person himself will not be able to execute this measure. When the property received as a result of the crime, has been transferred to "good faith" purchaser for value, the priority of interests should be set for a third party [6, p. 7]. A similar position is proposed by N.A. Lopashenko: "It's one thing when a

criminal property has been transferred without compensation to third parties, for example, has been donated. But it is another thing when a third person bought a criminally acquired property, without realizing the criminal nature of its origin. In this case, the rights of bona fide purchaser shall be protected "[7, p. 140-141]

Collection of the fine from the parents or legal representatives of a minor convicted according to para. 2 Art. 88 of the Criminal Code.

This provision of criminal law violates the principles of guilt, personal responsibility, justice and individualization of criminal responsibility and punishment, creating the possibility of "redemption" of children rich parents [8, p. thirty]. With the same success - says YA Kaszuba - legislator could mention in the Art. 88 of the Criminal Code that the compulsory work, corrective labor, restriction of liberty and imprisonment can be served by the parents of the convicted minor with their consent [9, p. 71].

N.V. Henryh admits that in these cases (para. 2 Art. 88, para. 3 of Art. 104.1 of the Criminal Code) there was the introduction in the penal matter of the civil law institutions such as the change of persons in the undertaking in the form of transfer duty and subsidiary liability. However, such a "transfer of debt" in respect of criminal law is not valid [10, p. 230-231, 233].

It is obvious that the criticized position of para. 2 Art. 88 of the Criminal Code should be excluded from the Criminal Code.

Compensation in excess of the damage caused by the crime, or income derived from the commission of a crime - Part 2 of Art. 76.1 of the Criminal Code

Monetary compensation takes a special place in the repressive measures applied outside the criminal liability (Art. 2, Art. 76.1 of the Criminal Code). In the beginning of the last century M.F. Vladimirsky-Budanov noted that "in the era of revenge the purpose of punishment is retribution, or evil for evil, and in the era of ransom to the same goal joins another, purely state aim of financial gain" [11, p. 326]. M.B. Kostrova directly recognizes: to date the Russian criminal law has a new feature, and namely a "fiscal" one [12, p. 45]. The appearance of the monetary compensation and the judicial fine in the system of measures of criminal law abundantly confirm this thesis.

The legal nature of the "monetary compensation" is not defined in the law. Its repressive component is certain: it is comparable with the maximum values of the fine as a penalty [13, p. 206]. "It is not an exemption from criminal liability, - thinks N.A. Lopashenko, - it is and enslavement under the guise of the offender" [14, p. 130-131]. In July 2016 the amount of compensation was significantly reduced, but remains significant. However, it should be noted that the rate is calculated not for the average citizen of Russia with the average income. Because the opinion of "enslavement" seems to put it mildly, exaggerated. But the main question is the other. And it is articulated by N.A. Lopashenko: "Why do we speak about relief from criminal responsibility?" [14, p. 132]. Exemption from criminal liability is expressed in the act of the competent public authority to release the perpetrator of a criminal offense, from the obligation to undergo a court conviction and undergo measures of state-forcing of criminal law. In this case, however, not just a forced measure is applied to a person, but the measure is comparable to a very strict punishment.

A similar measure is the judicial fine.

Judicial fine (Art. 76.2, chapter 15.2 of the Criminal Code)

The law imposing a fine the court was sharply criticized [15, p. 90-107]. As rightly noted by L.V. Inogamova-Khegai, the idea of using a measure of criminal law with the same name and content

(eg, fine) as two different measures completely "desystematizing" the nature of criminal legislation and make difficulties in enforcement [16, p. 146].

Federal Law of 07.03.2016, № 323-FZ list has supplemented of other measures of criminal law by judicial fine (Section 15.2 of the Criminal Code). It is a repressive measure but not a criminal penalty, so its use does not involve a criminal record. However, there are no differences between the judicial fine and the fine as a punishment.

The maximal amount of judicial fine depends on whether it is provided as the sanction of the corresponding article of the Criminal Code as the main penalty. The law does not prohibit the imposition of a judicial penalty for minors. This fine shall be paid only by a minor "liberated" from criminal responsibility.

The failure to pay a fine in the period set by the court entails the abolition of this measure under the criminal law, and the person is subject to criminal liability under the relevant article of the Criminal Code of the Russian Federation on a common basis. N.E. Krylova, noted that in this case the person would serve actually two punishments for the same offense) [15, p. 101]. At the same time the non-payment of the judicial fine can not be regarded as an aggravating circumstance, but, nevertheless, can be recorded as data characterizing personality, and thereby influence the choice of the type and duration (size) of punishment. The foregoing appointment of a judicial fine (with its subsequent cancellation due to non-payment) is not an obstacle to the purpose of criminal punishment.

All the principles of criminal law have been rudely disturbed by the described "innovations" (Art. 2, Art. 76.1, Art. 76.2, chapter 15.2 of the Criminal Code). The idea of the application of criminal repression outside the criminal liability framework seems to be flawed, wrong and illegal. As rightly pointed by Y.E. Pudovochkin, the essence of the criminal punishment which distinguishes it from the other measures under criminal law, is, firstly, that it can only limit the specific terms of human rights and freedoms, impossible for exposure to other measures and secondly, that its main beneficiary is the state itself ... The "most" repressive legal tool of the state is the criminal punishment. Moreover, the scientist rightly draws attention to the "catastrophic impossibility to relate sanctions under administrative law and criminal law", which is aggravated by "bracketing" the criminal law of a number of other measures masked under crime prevention (administrative control, deprivation of parental rights, etc.) [17, p. 171, 169].

1. By their nature both the monetary compensation and the judicial fine, not being a formal punishment (and, therefore, a form of realization of criminal responsibility) are monetary penalties. Moreover, the rules of imposing a fine are identical to rules of criminal sentencing. The fundamental difference from the penalty fine is the next: the use of these measures does not imply a criminal record.
2. Quantitatively judicial fine may exceed the minimum limits of criminal punishment in the form of fine (including the case of recognition of guilt of the person in committing the offense, and assigning a fine as a criminal penalty within the sanctions of the Article of the Criminal Code). The dimensions of monetary compensation in the order of Art. 76.1 of the Criminal Code are close to the maximum values of the fine as a criminal punishment;
3. Exemption from criminal liability requires state refusal to prosecute persons alleged to have committed a crime expressed in the act of the competent public authority, which means the non-use of criminal repression. Regulatory standards analyzed, on the other hand, require mandatory use of repression, ie, virtually no exemption from criminal liability does not occur at all.
4. The use of a quasi-penalty in the form of monetary compensation and judicial fines are not an exemption from criminal responsibility, but on the contrary, the use of criminal repression (liability) in a simplified procedure.
5. N.F. Kuznetsova noted: "compensation of damage caused to life, health, property, minimal prosecution, the use as a preventive measure of remand in custody or on bail, imposition of an

administrative penalty in the form of arrest or corrective labor, etc. are imposed without guilt "[18, p. 220]. However, according to the principle of guilt (para. 1 Art. 5 of the Criminal Code), a person shall be criminally liable only for those socially dangerous actions (inaction) and socially dangerous consequences in respect of which his guilt is proved. Contrary to the requirements of the Constitution and of the Criminal Code criminal repression in this case apply to persons whose guilt has not been established in the commitment of a crime. Thus, the criminal law unceremoniously introduced a presumption of guilt;

6. Personalisation of repression in the application of the judicial penalty is substantially limited, and by the application of monetary compensation it is excluded at all, which contradicts to the requirement of fairness (Para 1 Article 6 of the Criminal Code.);

7. Rules of application of judicial fine actually allow re-use of penalties and, moreover, consistent application of the two main types of punishment, although no one can be held criminally responsible twice for the same offense (Art. 2, Art. 6 of the Criminal Code). This novel is evaluated as contrary to the Constitution and legal norms of international law guaranteeing the rights of the individual and destroys the very foundations and principles of the Russian criminal law [15, p. 106].

V.D. Filimonov rightly asserts that the measures of punitive activity are the social content of the criminal liability and limitation of rights and freedoms appropriate to the kind and size of the punishment or other measures of criminal-legal nature assigned to the person who committed the crime - a legal form of criminal liability [19 . 545]. As correctly noted by M.V. Feoktistov, "the application of preventive measures of criminal repression only because of a dangerous condition of a person due to his previous criminal activities ... can cause serious damage to the state and to the rule of law, undermine the authority of justice, lead to arbitrariness, in which a decision on the release of the convicted person ... will depend entirely on the will of the official"[20, p. 21].

As a problem of saving repression upon release from criminal liability is independent and goes beyond the scope of the subject of this study, we will confine ourselves to a statement of the possible ways to improve this institution in the context of the economy of repression. The possible ways are:

1. Increasing the range of conditions of release from criminal liability. In particular, we advocate for the establishment of mandatory exemption from criminal responsibility of the perpetrators of the theft of another's property, belonging to the categories of small and medium gravity, in the case of full compensation of crime damage (not excluding the possibility of other compensation payments to victims) and reconciliation with the victims.
2. Minimizing the requirements (conditions) for exemption from criminal responsibility;
3. Imperativeness of exemption from criminal liability;
4. The possibility of exemption from criminal liability in the pre-trial stage;
5. Minimizing the requirements for the behavior of a person exempt from criminal liability on probation.

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