

REPLACING PENALTIES

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The subject. The article deals with the problem of the use of "substitute" penalties. The purpose of the article is to identify criminal and legal criteria for: selecting the replacement punishment; proportionality replacement leave punishment to others (the formalization of replacement); actually increasing the punishment (worsening of legal situation of the convicted).

Methodology. The author uses the method of analysis and synthesis, formal legal method.

Results. Replacing the punishment more severe as a result of malicious evasion from serving accused designated penalty requires the optimization of the following areas: 1) the selection of a substitute punishment; 2) replacement of proportionality is serving a sentence other (formalization of replacement); 3) ensuring the actual toughening penalties (deterioration of the legal status of the convict). It is important that the first two requirements provide savings of repression in the implementation of the replacement of one form of punishment to others.

Replacement of punishment on their own do not have any specifics. However, it is necessary to compare them with the contents of the punishment, which the convict from serving maliciously evaded. First, substitute the punishment should assume a more significant range of restrictions and deprivation of certain rights of the convict. Second, the performance characteristics of order substitute the punishment should assume guarantee implementation of the new measures.

With regard to replacing all forms of punishment are set significant limitations in the application that, in some cases, eliminates the possibility of replacement of the sentence, from serving where there has been willful evasion, a stricter measure of state coercion. It is important in the context of the topic and the possibility of a sentence of imprisonment as a substitute punishment in cases where the original purpose of the strict measures excluded. It is noteworthy that the Plenum of the Supreme Court in this regard invites the conflicting recommendations.

Conclusions. It is difficult to agree with the opinion about the inadmissibility of replacement additional punishment basically consistent. The thesis about the supportive role of additional punishment is currently not the case. It seems necessary to the rejection of the criminalization of willful evasion from serving the additional penalties and the establishment of common consequences of such deviations only, depending on the type of punishment, not his status as primary or secondary.

Keywords: saving repression: the replacement of punishment by more severe; replacing penalties, criminal law, law enforcement.

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1. Justification of the substitution of punishment.

Replacement of the punishment with more stringent ones, being a kind of criminal liability, is designed to ensure the deterioration of the legal status of the convicted person who has maliciously evaded from serving the appointed form of punishment, by applying another, more stringent coercive measure.

Therefore, one can not agree that the meaning of establishing appropriate penalties "should not consist in increasing 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 it could be really executed "[1, 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 deliberate actions of the convicted person who purposefully and maliciously avoid the undergoing 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 not only "unlike the first could be really executed", but would be more severe and repressive in relation to the originally appointed.

At the same time, the solution of a number of fundamental questions requires optimization: 1) choosing a substitute punishment; 2) the proportionality of substitution of sentences for others (formalization of replacement); 3) ensuring the actual tightening of punishment (deterioration of the legal status of the convict).

2. Choose of a substitute punishment.

N.S. Tagantsev wrote that substitutes for punishments are appointed only if the punishment laid down in the law for a known act cannot be applied to the perpetrator on any grounds - factual or legal. In these cases "one major punishment is often replaced by another, but there are such punitive measures that are used only as substitutes for punishment [2, p. 235]. M.M. Nurmiev defines "substituting punishments" as certain types of punishments that are used instead of the articles of the Special Part of the Criminal Code stipulated in the sanction, or instead of the punishment already imposed in the process of execution and serving, if there are grounds defined in the criminal law. Recognizing that, in terms of its social nature and legal nature, the substitute types of punishment do not differ from the punishments provided for in the articles of the Special Part of the Criminal Code of the Russian Federation and are appointed by the court when convicting, it insists on the specifics of substituting punishments: it consists in the grounds for their application, social and legal purpose, as well as the consequences that result from the application of these penalties [3, p. 6, 12].

It seems that substituting punishments by themselves do not have any specifics. However, it is necessary to compare them with the content of punishment (measures of a criminal-legal nature), from the serving of which the convicted person maliciously evaded. First, a substitute for punishment should imply a more substantial range of restrictions and deprivations of those or other rights of the convict. Secondly, the specifics of the execution of substituting punishment should presuppose guarantees for the implementation of a new measure (a more stringent level of control over the behavior of a convicted person, the possibility of serving a sentence in a specialized institution, in particular, in a correctional center, a detention house or a correctional institution). It is important to remember that toughening of punishment is a specific form of implementation of criminal responsibility.

The choice of "substitute punishments" proposed by the legislator, as well as their establishment in the norms regulating the replacement of specific types of punishment, is reasonably criticized. The current law allows for the possibility of substituting imprisonment not only with punishments in the form of correctional and even compulsory works, but in some cases also with a fine.

V.N. Orlov notes that the ability of elements of the penal system to interchangeability does not currently meet the requirements of international legal instruments. In particular, Rules 143 and 144 of the Tokyo Rules state that if a measure not related to imprisonment turns out to be ineffective, this should not automatically lead to the application of the measure of imprisonment (item 143). In the event of a change or cancellation of this non-custodial measure, the competent authority seeks to establish a suitable alternative measure not related to imprisonment. Punishment in the form of imprisonment can be imposed only in the absence of other suitable alternative measures (item 144). According to V.N. Orlov, punishment without isolation of the convicted

person from society can be replaced with punishment related to the isolation of the convict from society, only if all other punishments that are not associated with isolation have been exhausted. All punishments that are not related to the isolation of the convict from society must be interchangeable [5, p. 14].

As substitutes for penalties, in particular, compulsory, corrective, forced labor, restriction of freedom, arrest, and, in cases provided for by law, and imprisonment may take place. In this regard, it should be borne in mind that in relation to all these measures of state coercion, there are significant restrictions in the application (Part 4, Article 49 and Part 5, Article 50 of the Criminal Code, Part 6, Article 53, part 7, Article 53.1 of the Criminal Code). As a consequence, this in some cases excludes the very possibility of replacing the punishment imposed by the court, from serving which a malicious evasion took place, by a more stringent measure of state coercion, as punishment "substitutes" can not be applied to certain categories of convicts. It is important in the context of the topic and the possibility of applying punishment in the form of deprivation of liberty as a substitute for punishment in cases where the original appointment of this strict measure was excluded. It is noteworthy that the Plenum of the Supreme Court of the Russian Federation in this regard offers mutually exclusive recommendations. Thus, in the sec. 2, paragraph 21 of the Decision of the Plenum of the Supreme Court of the Russian Federation of February 1, 2011 No. 1 "On judicial practice in the application of legislation regulating the specifics of criminal responsibility and punishment of minors" it is noted that in case of malicious evasion of a minor convicted from payment of a fine designated as the main punishment, it is in accordance with Part 5 of Art. 46 of the Criminal Code replaced by another type of punishment, taking into account the provisions of Art. 88 of the Criminal Code. Para. 2 sec. 24 of the same Resolution confirms that the provisions of the Criminal Code of the Russian Federation on the replacement of punishment in the form of compulsory labor, correctional labor, restriction of freedom in case of malicious evasion of their serving are not applicable to those categories of juvenile convicts who, in accordance with Part 6 of Art. 88 of the Criminal Code cannot be sentenced to imprisonment. And, on the contrary, para. 4. Clause 16 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of October 29, 2009 No. 20 contained the opposite conclusion: the provisions of the Criminal Code of the Russian Federation on the replacement of punishments in case of malicious evasion of their serving a sentence of imprisonment are applied by the court even regardless of the fact whether the punishment in the form of deprivation of liberty was sanctioned by the article of the Special Part of the Criminal Code of the Russian Federation, on which the punishment was imposed. It is clear, however, that the law enforcer, by replacing the punishment with more stringent ones, can not fail to focus on the limits of the statute sanction of its Special Part. In case of malicious evasion of payment of a fine in the amount calculated on the basis of the multiple value of the object or the amount of commercial bribery or bribe designated as the main punishment, the penalty is replaced by punishment precisely within the limits of the sanction provided for by the relevant article of the Special Part of the Criminal Code of the Russian Federation (p. 5 of Article 46) .

3. Proportionality of substituting sentences for others (formalization of replacement).

However, before improving the mechanism for replacing specific types of punishments with stricter ones, it is necessary to determine the algorithm of such a substitution providing a transition to a more strict measure of state coercion. An interesting and productive approach is offered by E.A. Timofeeva: the criminal punishment is inherently a punishment: hence, the greater the amount of punishment there is, the more serious must be the evasion from it and the threaten of the punishment [6, p. 10].

A.V. Titarenko sees the most adequate option for replacing punishment in case of malicious evasion from its serving, when the new more severe punishment will be conditioned by the sanction of the composition that was established in the act of the convict. And thus, punishment without isolation from society can be replaced by deprivation of liberty without regard to the size and the term of punishment, from which the convicted evaded [8, p. 64]. This approach was used earlier and

is currently partially applied to the fine. Thus, when choosing the type and size (term) of substituting punishment, it is proposed to optimize the choice of "substitute punishment", for example, to replace, if possible, the next penal system or sanction of the corresponding article of the Special Part for the replaced measure of state coercion.

When determining the type of substituting punishment, it is suggested to take into account: a) the kind of punishment that the convicted person evades from serving; b) the nature of the violation of the order of serving the sentence; c) whether the punishment from the serving of which evasion takes place is the main or additional one. The prevailing view is the need of proportionality of such a substitution, while the proportions established in the current law, as well as their absence with regard to the replacement of the fine, are evaluated critically. The legislation establishes various consequences of malicious evasion from serving a fine depending on its status (as a main or additional punishment). Many authors propose to introduce responsibility for evasion from serving a sentence in the form of deprivation of the right to occupy certain positions or engage in certain activities [9, p. 194-195; 10, p. 156; 3, p. 8, 20; 11, p.74; 12, p. 239; 13, p. 6, 13; 14, p. 189] and to differentiate it depending on whether it acts as a primary or additional [15, p. 19-20], since the deviations from the main and from the additional punishments have a different degree of danger, and the specifics of additional and basic punishments do not allow applying general replacement rules to them [16, p. 335].

4. The admissibility of substituting additional punishment

Claims about the diversity of the risk of avoiding of serving the same kind of punishment (especially in case of identity of its content and duration) are based, in fact, only on the non-controversial thesis of the auxiliary role of additional punishment and its supposedly less punitive component. Objection to the inadmissibility of a one-time or consistent application of the two main penalties is not convincing too. The law excludes this possibility only when assigning punishment for a single crime, and not when it is performed (served). Moreover, a one-time appointment of two or more basic penalties in the aggregate of crimes (sentences) is directly permitted in cases provided for in Part 2 of Art. 71 of the Criminal Code. Sometimes we make an erroneous conclusion that the replacement, for example, of the deprivation of the right to engage in certain activities designated as the main one, is expedient only with punishments related to deprivation of liberty, because the purpose of depriving the right to engage in certain activities is to remove the perpetrator from the sphere in which his participation will harm public relations [18, p. 263].

The thesis of the auxiliary role of additional punishments is predominant in the criminal law doctrine. N.F. Kuznetsova noted: "They cannot therefore be more severe than the basic penalties. Functions of additional punishments consist in specification of the main penalties" [19, p. 26]. It is stated that the main purpose of imposing additional punishment is to increase the impact of the main punishment, and not more [20]. M.M. Nurmiev agrees that it is difficult to implement the principle that additional punishments should be less stringent in the scope of legal restrictions than all the main types of punishment; however, in his opinion, the court must strictly enforce this requirement [3, p. eleven]. However, we cannot agree with the last part of the conclusion.

Firstly, it should be borne in mind that the current criminal legislation allows the possibility of imposing an additional punishment, which in fact clearly exceeds in its severity (and quite often - substantially) the punitive component of the main measure of state coercion (for example, when assigning compulsory works with a fine of five hundred thousand rubles, or with a fine in minimum values with deprivation of the right to occupy certain positions or engage in certain activities). Secondly, certain types of punishments that can be used as additional punishments are directly recognized as more stringent than certain basic types of punishment in the list of punishments (Art. 44 of the Criminal Code of the Russian Federation). Thirdly, it is impossible to ignore the

peculiarities of the execution of punishment under conditional condemnation: in this case the additional punishment is executed realistically, thereby acquiring the character of the dominant coercive measure. Fourthly, in assessing the comparative severity of basic and additional punishments, one should keep in mind the legal consequences of malicious evasion from their serving (for example, malicious evasion of serving a restriction of freedom appointed as an additional punishment is currently criminalized, and under certain conditions the consequences of evasion from serving of this measure as additional may be more significant than in the case of the initial application of the restriction of liberty as the main form of punishment). At the same time, we cannot disagree with D.S. Dyadkin is that the commensurability of various types of punishment is achieved by the presence of a specific quantitative measure, while the property of an individual punishment to act as a primary or additional type is unambiguously a qualitative characteristic that does not affect the commensurability of the measures themselves of certain types of punishment [20].

For these reasons it seems necessary to abandon the criminalization of malicious evasion from serving additional types of punishment and the establishment of unified consequences of such evasion only depends on the type of punishment.

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