

## THE PROBLEMS OF CONSTRUCTING THE DUALISTIC SYSTEM OF MEASURES OF CRIMINAL AND LEGAL CHARACTER

*Alexandra Bokovnya,*

*Kazan Federal University, Faculty of Law, Criminal law Department, at240886@gmail.com*

*Fedor Sundurov,*

*Kazan Federal University, Faculty of Law, Criminal law Department, kafedra.ksu@yandex.ru*

**Abstract.** The proposed article studies the insufficiently studied problem of dualism in the construction and regulation of the application of criminal law to persons who have committed crimes. The authors distinguish two levels of legal consequences caused by the crime commission: 1) the system of punishments and 2) the system (or aggregate) of other (besides punishment) criminal legal measures. As a historical trend (which is still observed today), they recognize the increasing saturation of criminal legislation with non-punitive measures. In their opinion, in terms of successfully solving the tasks of criminal law, an optimal combination of punishment and other measures of a criminal legal nature, that is, proper corrective and preventive measures, is needed. The article reveals a different approach to the regulation of the punishment system; if, for example, there are 13-17 types of punishment in Russia and a number of neighboring countries, there are only 3 “ordinary” punishments in the Criminal Code of Poland. This diversity is even more evident in the regulation of other criminal legal measures. The authors positively assess the dualistic system of measures in criminal law and believe that it should be improved in terms of their humanization and differentiation depending on the severity of the crimes committed, the identity of the perpetrators and other significant criteria.

**Key words:** crime; criminal law; criminal liability; punishment; other criminal legal measures; punishment system, system of other measures; purpose of criminal responsibility; punitive impact; non-punitive measures.

**Introduction.** The modern criminal legislation provides for a very wide range of measures, content, functions, and conditions of their application for persons found guilty of committing crimes - from exemption from criminal responsibility or, refusal from criminal prosecution to life imprisonment or death penalty. This diversity and a significant number of criminal legal measures, on the one hand, create conditions for a more consistent individualization of criminal responsibility, and on the other hand, they objectively create certain difficulties in their legislative regulation and law enforcement. The structure of criminal legal measures depending on their connection with the criminal liability can be described as follows in general terms: 1) the punishment system; 2) the system of other measures of criminal law. Determining the optimal ratio of designated substructures in the criminal law is a fundamental problem of criminal law. [1]. Until the 19th century, criminal law was known for one of these structures - punishment with inherent cruelty, which personified a kind of "bloody code" of the Middle Ages. [2] And only later, the practice of regulating and applying the death penalty and other cruel punishments, sometimes for the slightest of crimes, gave way to the humanization of punishment and the introduction of corrective and preventive measures into legislation. The idea underlying the evolutionary transformations in criminal law, carried out since the beginning of the 19th century, is very simple in its understanding and extremely significant for the successful opposition of human society to crime. It consists in refusing not only of those types of punishments that actually turn the criminal into a victim of criminal justice, “washing with the blood and suffering” of those who do not deserve excessively strict measures, but also in more substantially saturation of the criminal legal measures with corrective measures proper to the perpetrators in conjunction with extinction of rights designed to prevent crimes. [3] And this, we would emphasize, historical trend is observed at the present time when the new criminal codes are developed and adopted in various states or the existing laws are modified. The literature provides ambiguous assessments of the existing punishment system and the system of other measures of a criminal law nature, in particular, opinions are expressed on the limited nature of punishment in terms of a positive impact on the perpetrators or on the exclusion of the system of other measures from the criminal law.

**Materials and methods.** The article is based on the provisions of Articles 2, 6, 7, 43, 44, 45, 56, 57, 59, 73, 74, 82, 82<sup>1</sup>, 104<sup>1</sup>, 104<sup>2</sup>, 104<sup>4</sup>, 104<sup>5</sup> of the Criminal Code of the Russian Federation, Articles 44, 47, 48, 77, 68, 80, 81 of the Criminal Code of the Republic of Belarus, Articles 39, 40, 41, 44, 47, 66, 67, 68, 69, 70, 71, 72, 73 of the Criminal Code of Poland, clauses 56, 56 a, 56 b, 56 c, 56 d, 57, 61, 62 of the Criminal Code of Germany. The reliability of the results obtained is ensured on the basis of the analysis of significant and necessary array of legislation, statistical data, materials of law enforcement practice, as well as the use of modern methods of research of legal phenomena: logical, historical and legal, comparative law, system-structural analysis, etc.

**Results and discussion.** If the Criminal Code of Russia, as well as other neighboring countries, defines the concept of punishment, then it is absent in the legislation of Western and Eastern European states. Meanwhile, its legislative definition is necessary from the point of view of the interests of punishment delimitation from other measures. Uncertainty in the interpretation of punishment is also manifested in the doctrine of criminal law. Punishment is defined as a sanction, determined by a court to a criminal on behalf of the state [4], as an evil inflicted punishable for the crime committed [5], an acts of coercion [6], retaliation [7], etc. Such definitions of criminal punishment are one-sided in nature and cannot be considered exhaustive. At the same time, we should note that the German literature indicates the punitive nature of the criminal punishment. [5]

We think that the definition of punishment in the Russian Criminal Code (Part 1 of Article 43), in which formal (punishment is provided for by the Criminal Code) and essential (consists in depriving or restricting the rights and freedoms of a person who has committed a crime) are combined, is more preferable.

In contrast to the Criminal Code of the RSFSR of 1960 (Part 1 of Article 20) in determining the punishment at present, the Russian legislator does not indicate that it has a punitive nature. Penalty, understood as the aggregate of the most significant restrictions and deprivations, substantively distinguishes punishment from other measures of a criminal legal nature. Therefore, this essential feature should be reflected in Part 1 of Article 43 of the Criminal Code in the definition of punishment.

Analysis of the Criminal Codes of the Russian Federation and a number of other states testifies to the diversity of approaches to determining the content and structure of penal systems and other measures of a criminal legal nature. Thus, the Criminal Code of the Russian Federation provides for 13 types of punishments: fine, deprivation of the right to occupy certain positions or engage in certain activities, deprivation of special, military or honorary title, class rank and state awards, compulsory works, correctional works, restriction on military service, restriction of liberty, forced labor, arrest, detention in a disciplinary military unit, imprisonment for a certain period, life imprisonment, death penalty (Article 44). At the same time, it contains a single list of basic and additional types of punishments. In 2003, the Russian legislator excluded property seizure from it, and in 2006 provided for the property seizure as another criminal legal measure. In essence, we see the same set of types of punishments in the Criminal Code of the so-called near-abroad states. Although (which is quite natural) there is a certain specificity in them. For example, Part 1 of Article 48 of the Criminal Code of the Republic of Belarus stipulates 11 types of punishments that can be imposed as the main ones. [8] Part 2 of this article separately states that deprivation of a military or a special rank and a property seizure may be used as additional punishments. We should also note that the public works (an analogue of compulsory works under the Criminal Code of the Russian Federation) can be used as not only the main, but also an additional punishment in accordance with Part 3 of Article 48 of the Criminal Code of the Republic of Belarus. This Code does not provide for the deprivation of an honorary title, as well as state awards. According to the Criminal Code of the Republic of Tajikistan, the property seizure is recognized as the most severe type of punishment, following the death penalty and imprisonment (Article 47). [9] In accordance with Part 1 of Article 42 of the Criminal Code of the Republic of Lithuania, the least severe type of punishment is deprivation of public rights, and public works (an analogue of mandatory works of the Criminal Code of the Russian Federation) are recognized as less severe type of punishment than a fine. This Code does not impose the death penalty as a punishment. [10] The essential feature of the Criminal Code of the above-mentioned states is that they provide for fairly representative lists of punishments (from 8 in the Republic of Lithuania to 11 in the Republic of Tajikistan and 13 in the Republic of Belarus). The Criminal Code of some Western European states provides for a rather limited set of punishments. For example, the Criminal Code of Germany provides for temporary imprisonment, life imprisonment, fine, fine along with imprisonment [11], and prohibition of driving a vehicle as an additional punishment [12]. The Swiss Criminal Code provides for a convict prison, imprisonment, arrest and fine as the main punishments and includes five additional punishments [13]. Moreover, the third section of this Criminal Code regulates both punishments and other measures (preventive pledge, Article 57), seizure (Article 58, 59), compensation to the victim, sentence publication (Article 61), that is, there is some confusion of legal consequences in the form of punishment with the consequences of the second level, that is, with other criminal legal measures. Article 9 of the Dutch Criminal Code provides separate lists of the main types of punishments (imprisonment, public works, fine) and additional types of punishments (deprivation of certain rights, placement in a state penitentiary, seizure, sentence publication). [14] The most developed and multi-stage penal system is provided for in the Criminal Code of Spain. [15] According to Article 32, the punishments imposed as basic or additional are imprisonment, deprivation of certain rights and fine. And according to their nature and duration, they are subdivided into strict (7 types in total), less strict (9 types) and small (4 types) (Article 33). It is indicative that additional punishments can be imposed for the same term as the main ones. As punishments, the Criminal Code of Spain stipulates such measures that are regulated as other criminal legal measures in the Criminal Code of Russia and a number of other states, for example, deprivation of the right to stay or visit certain areas. A comparative analysis of modern legislation shows certain patterns - the less the Criminal Code provides for the types of punishments, the more measures other than punishments are regulated, and vice versa. The regulation of punishments and other measures of a criminal law nature can be compared with two communicating vessels: the addition of fluid in one of them leads to its decrease in the other. For example, the Criminal Code of the Russian Federation, as has already been noted, stipulates 13 types of punishments, which significantly differ from each other in nature, content and conditions of their use, and only 6 other measures of criminal law not systematized among themselves: probation (Articles 73, 74), postponement of punishment (Articles 82, 82<sup>1</sup>), compulsory educational measures (Articles 91, 92), compulsory medical measures (Article 104), property seizure (104<sup>1</sup>, 104<sup>2</sup>, 104<sup>3</sup>) and court fine (Articles 104<sup>4</sup>, 104<sup>5</sup>). We see a detailed regulation of the system of punishments and other measures in the Criminal Code of Switzerland; its first chapter of the third section provides for the main punishments (convict prison (Article 35), imprisonment (Article 36), arrest (Article 39), fine (Article 48), 5 additional types of punishment (dismissal from office (Article 51), deprivation of parental or custodial authority (Article 53), prohibition to engage in a certain profession, craft or enter into commercial transactions (Article 54), expulsion outside the country (Article 55), prohibition to visit a particular restaurant (Article 56) and 5 other measures (preventive pledge (Article 57), seizure of dangerous objects (Article 58), seizure of property benefits (Article 59), compensation to the victim (Article 60) and

sentence publication (Article 61). The same chapter regulates conditional release (Article 38), conditional conviction (Article 41), and security measures: internment of “customary” criminals (Article 42), measures applied to mentally ill people (Article 43), treatment of alcohol and drug abusers (Article 44), conditional and trial release (Article 45). The punishments and other criminal legal measures are quite consistently differentiated in the Criminal Code of Poland. [16] According to Articles 32, the punishments include fine, restriction of liberty, imprisonment, imprisonment for a term of 25 years, life imprisonment. And at the same time Article 39 provides for 8 criminal legal measures: deprivation of public rights, prohibition to occupy certain positions, use a certain profession or engage in certain economic activities, prohibition to drive vehicles, seizure of objects, duty to compensate for harm, monetary compensation, cash payment and bringing the verdict to public notice. As can be seen, the Criminal Code of Poland has fairly clear distinction between punishments and criminal legal measures (as secondary legal consequences of committing a crime). It does not provide for additional punishments. And the functions of additional influence on convicts are called upon to perform, as we see it, criminal legal measures.

**Conclusions.** As can be seen, the criminal legislation of Russia and other states give different legal nature to measures of a criminal law nature; the same measures in their content are regulated as an additional punishment, either the main punishment or a criminal legal measure with the implementation of criminal responsibility or associated with the release from it and the termination of criminal prosecution. The ambiguous interpretation of the legal nature of these measures is explained by different approaches to the definition of criminal penalization of acts; if certain measures are recognized as additional punishments, then there is a desire to increase the punitive potential of punishment, and if they are envisaged as other measures of a criminal law nature, then they are not punitive, but corrective and preventive measures. The construction of a socially acceptable dualistic system of punishment and other measures of a criminal law nature makes it possible to more consistently differentiate punitive and corrective and preventive measures depending on the severity of the crimes committed, the danger of the identity of the perpetrator, and other significant criteria.

**Summary.** One of the advantages of the criminal legislation of modern states is the regulation in it, along with the punishment system, of other (besides punishment) measures of a criminal law nature, which are systematized in the Codes of some states (the Criminal Code of Poland, Switzerland, etc.), and are absent in another. It is also missing in the Criminal Code of the Russian Federation, as well as in a number of neighboring countries. The regulation of two levels of legal consequences of committing crimes, that is, the punishment system and the system (or a certain set) of other criminal legal measures, is aimed at narrowing the field of punitive influence through the application of punishment and, at the same time, achieving the goals of criminal responsibility based on the use of punitive, corrective and preventive measures. The ultimate goals of punishment and other measures are the same, but they differ from each other only in their means and mechanism of achievement. There is a variety of other criminal law measures in the criminal legislation of foreign countries. Russia should study this experience, transform penalties in the form of deprivation of the right to occupy certain positions or engage in certain activities and deprivation of a special, military or honorary title, class rank and state awards into measures to deprive specific rights and titles, as well as systematize other measures of a criminal legal nature.

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