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Conference Paper

The Problems of the Replacement of Alternative Penalties Taking into Account the Implementation of International Standards: Case of Some Post-Soviet Countries

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Abstract

International standards for the treatment of convicts without isolation from society contain the world experience of humanism in the execution of punishments and the development of the correctional system of all the countries in the world, concerning Russia and the countries of the former Soviet Union, they are adopted and implemented relatively recently. Today not all international standards have found their consolidation in the sectoral legislation of Russia and the CIS and Baltic countries. The execution of punishments is one of the most detailed regulated processes from the point of view of international regulation, as for the classification of the state as democratic, largely affects the compliance of its sectoral legislation in the penitentiary sphere with international standards. The aim of the study is to determine the features of the procedure for the replacement of alternative penalties, taking into account the implementation of international standards in some post-Soviet countries.

Keywords: international standards; alternative punishments; court; Prosecutor's office; replacement of punishments.

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1. Introduction

Since the collapse of the USSR in the 1990s active reform of criminal, criminal procedure and penitentiary legislation has been appeared in the CIS and Baltic countries in order to bring it in line with international standards: new types of punishment without deprivation of liberty are introduced, existing punishments are reformed in accordance with the principles of humanity and fundamental human rights and freedoms.

Implementation of international standards, the consideration of issues arising in execution of the sentence, best practices for the execution of sentences in his works considered by scholars such as Kazak B. B., Smirnova I. N., Worall A. [16], Marcelo F. Aebi, Christine Burkhardt, Rok Hacin, Carlos M. Tiago [9], Simon Michailidis [11], D. A. Olkhovik [22], etc.

The main approach to the study is a dialectical method of scientific knowledge of objective reality, from the position of which the object and the subject of the study are considered in a complex, in the development and relationship, interdependence, interpenetration of social phenomena. The methodological basis of the study is also formal-logical and comparative-legal methods, taking into account the processes of development of the regulatory framework.

International norms and rules provide for a wide range of possibilities for the courts to apply punishments without isolation of the convicted person from society, as well as the existence of a procedure to replace the punishments with a less severe form or mitigate the punishment, in this connection, it seems appropriative to consider the experience of resolving the issues of replacing the punishments without deprivation of liberty arising in their execution, taking into account the implementation of international standards on the example of the Republic of Estonia, the Republic of Latvia, the Republic of Belarus, the Republic of Kazakhstan. The choice of these countries is due to the fact that the former Soviet Union formed their groups, which followed two ways of reforming their sectoral legislation: the first group includes countries that have left the basis of the Soviet criminal, criminal procedure legislation-the CIS countries, the second group of countries should include the Baltic countries, criminal, penitentiary, criminal procedure legislation which has undergone fundamental changes.

From the first group of countries it is proposed to consider the experience of Belarus, since its criminal procedure law was adopted relatively long ago and is most similar to the criminal procedure code of 1960 and the Republic of Kazakhstan-the criminal procedure law of this country was adopted relatively to other CIS countries recently (2014) and includes new procedures; from the second group of countries, it is proposed to consider

the experience of the Republic of Estonia and the Republic of Latvia, as the criminal procedure law of the Republic of Latvia is interesting in the appointment of certain types of penalties by the Prosecutor, and the Criminal procedure code of the Republic of Estonia is one of the most previously adopted and well-established (with respect to the changes made annually) law. The comparison of each selected country is made taking into account the following criteria: the subjects having the authority to consider issues related to the execution of the sentence on sentencing without deprivation of liberty, the subjects participating in this procedure, the degree of their participation and authority; the possibility of appealing the final decision by the subjects.

2. Relevance of the Research

In the process of implementing international standards, there has been a steady decline in the number of court-imposed sentences of deprivation of liberty and an increase in the number of non-custodial sentences. The punishments not connected with isolation of the condemned from society, find the increasing application in punitive systems of the various States [9: 437]. Many international legal acts [7] focus on the use of alternative penalties. Paragraph 2.3. Standard minimum rules of the United Nations in respect of measures not connected with imprisonment (Tokyo rules), provided that, in order to provide greater flexibility in accordance with the nature and severity of the offense, the personality and biography of the offender and with the protection of society and to avoid unnecessary use of imprisonment the criminal justice system should provide a wide range of measures not related to imprisonment [11].

International standards permeate all stages of the execution of sentences in order to ensure the observance of human rights and the body of human rights and the realization of the legitimate interests of convicts [10], one of the subjects exercising control over the activities of institutions entrusted with the execution of punishments, including compliance with international standards, as a rule, is the court when considering issues arising in the execution of the sentence, since the court in resolving these issues establishes the legality and validity of the application to the convicted person, the measures provided by law, as well as the implementation of the legitimate interests of the convicted person – to mitigate the previously imposed punishment, replacing the unserved part with a less severe form. Thus, it seems appropriate to consider the implementation of international standards in the execution of sentences without deprivation of liberty at the stage of consideration by the court of issues arising in the execution of sentences.

3. Results

The system of international standards relating to the execution of non-custodial criminal sanctions is quite extensive. Most of the authors [16; 14] classified them on the provisions of the General (universal) character, for example the universal Declaration of human rights [13], and the international standards – United Nations standard Minimum rules for the measures not connected with imprisonment (Tokyo rules) [21]. The first relates to human rights in General, and only in some parts are the special provisions of the individual defined in the system of execution of criminal punishment. The second group of standards adopted specifically for the clarification of the relations connected with execution of punishments without isolation of the convict from society.

The universal Declaration of human rights proclaimed universal respect for human rights and freedoms, recognition and respect for human dignity, and prohibited torture and any degrading treatment. This act, although declarative, has been ratified by Russia and is mandatory for the country to join the world community. This document marked the beginning of The international bill of rights and other documents in which human rights and freedoms were enshrined. No law enforcement official may carry out, incite or tolerate any act that constitutes torture or other cruel, inhuman or degrading treatment or punishment, and no law enforcement official may invoke orders from a superior or exceptional circumstances for justification (art.5). [17; 20].

The standard of the right to liberty and security of person is reflected in articles 3 and 9 of the universal Declaration of human rights of 10 December 1948, article 9 of The international Covenant on civil and political rights of 16 December 1966, and article 5 of the Convention for the protection of human rights and fundamental freedoms of 4 November 1950 «everyone arrested or detained... has the right to trial within a reasonable time or to be released before trial. Exemption may be subject to the provision of a guarantee of appearance in court» [18].

The Convention for the protection of human rights and fundamental freedoms has its own mechanism, which includes the compulsory jurisdiction of the European Court of human rights and the systematic monitoring of the implementation of the Court's decisions by The Committee of Ministers of the Council of Europe. By virtue of article 46 of the Convention, these decisions in respect of the Russian Federation, adopted finally, are binding on all public authorities of the Russian Federation, including the courts.

For example, the Russian legislator, taking into account the practice of the European Court of human rights, in 2001, the severity of the crime in which a person was accused

or suspected, was removed from the list of grounds according to which such a person could be detained [23].

According to some authors [15], the main purpose of all documents of the Conference on security and cooperation in Europe (CSCE) (the final act of the CSCE of August 1, 1975, charters, final documents, documents, declarations, decisions) is to formalize the established multi-stage permanent mechanism for monitoring the implementation of already reached agreements in the field of human rights. The significance of these acts is that they provide a uniform interpretation and a coherent understanding of the international legal principles and norms being developed [15].

Other authors (Lunev V.V.) assign a leading role in developing international regulations, standards and guidelines on crime prevention and criminal justice Congresses of the UN [19: 95].

Thus, in 1990, it was the VIII United Nations Congress on the prevention of crime and the treatment of offenders that adopted the Tokyo rules. although they are Advisory in nature, they extend to the entire field of criminal justice (from the stage of initiation of criminal proceedings and prosecution to the subsequent re-socialization of punishment of the perpetrator). The human dignity of the offender must be respected at all stages of criminal proceedings, including in the application of non-custodial measures. The offender has the right to submit a request or complaint to a judicial or other competent independent body on matters affecting his or her personal rights in the application of such measures.

Non-custodial measures exclude medical or psychological experimentation with the offender or undue risk of physical or mental injury.

A number of authors [16] assign the documents adopted by various international associations of lawyers (standards, programs, principles), no less important role in the regulation of the sectoral legislation of the countries of international standards, pointing out that these documents are Advisory in nature for members of the associations that adopted them, as well as for all persons belonging to the same professions.

Summing up, we note that the system of international standards relating to the execution of measures of state coercion, not related to the isolation of the accused from society, is quite extensive, however, most international standards in the field of execution of sentences without deprivation of liberty found their consolidation in the Tokyo rules.

The judicial authorities of the sentencing, according to the Tokyo rules, it is recommended that the following measures not related to imprisonment, such as conditional exemption; conditional release from detention and judicial supervision; the resolution on the implementation of public utility works etc. In the rules it is also noted that any

form of release from confinement for the implementation of the program, not connected with imprisonment, should be treated as early as possible.

Under the Tokyo rules, alternatives to imprisonment can be an effective means of treating convicts in society for the benefit of both convicts and society. They contain a set of basic principles to facilitate the use of non-custodial measures, as well as minimum guarantees for persons to whom alternatives to imprisonment apply.

The criminal justice system should also include a wide range of non-custodial post-trial measures. The number and type of such measures should be determined in such a way as to allow for a sequence of sentences. The choice of a non-custodial measure is based on an assessment of the established criteria with regard to both the nature and severity of the offence and the personality, the offender's background, the purposes of the sentence and the rights of the victims. Thus, in order to realize the legitimate interests of convicts in the field of their return to society, and the use of incentive measures in the execution of sentences related to imprisonment, the state should establish a procedure for consideration by the judicial authority of the issue of replacing part of the punishment with a less severe form or the use of various measures to achieve further correction of the convict outside the penitentiary institution, while this procedure should be provided with an effective mechanism for appealing the decisions of the judicial authority., the presence of equal rights in the participating entities.

Article 9 of Chapter IV "Stage after sentencing" of the Rules states that the competent authority has a wide choice of alternative measures taken after the sentencing, in order to waive imprisonment and assist offenders for their quick return to normal life in society, i.e. decision on measures taken after sentencing, with the exception of a pardon, is considered by a judicial or other competent independent body at the request of the offender.

The decision to change or repeal non-custodial measures is taken by the judicial authority, and only after careful consideration of the facts presented by both the supervising officer and the offender.

If a non-custodial measure turns out to be ineffective, then this should not automatically lead to the imposition of a custodial measure. If this non-custodial measure is modified or withdrawn, the competent authority should seek to establish a suitable alternative non-custodial measure. Imprisonment can be imposed only in the absence of other suitable alternative measures.

Authorization to arrest and maintain the offender under supervision in cases of violation of the conditions provided by law. In the event of a change or withdrawal of a

measure not related to imprisonment, the offender has the right to appeal to a judicial or other competent independent authority.

The regional variant of the Tokyo Rules (which is especially important for Russia in connection with its accession to the Council of Europe) are the European rules on the application of public (alternative) sanctions and penalties, which were adopted as a recommendation by the Committee of Ministers of the Council of Europe in October 1992. They also aim to the maximum possible reduction of real deprivation of liberty at all stages of criminal responsibility. At the same time, no alternative sanctions can be applied if they contradict generally accepted international norms in the field of human rights. The content of such measures should eliminate the excessive risk of causing physical or mental harm to the offender.

According to paragraph 13.3 of the Tokyo Rules, when a court makes a decision on the need to take any measures against convicts, it is necessary to become familiar with its biography, personality, inclinations, level of mental development, system of values and especially the circumstances that led to the commission of the offense. To ensure that the case is conducted for each convicted person, which is the responsibility of the institution or body that executes the punishment.

In case of violation of the conditions to be observed by a convicted person, the Tokyo Rules provide for a change or cancellation of a measure not related to the isolation of the convicted person from the public only after careful consideration of the facts presented by both the employee performing the punishment or the criminal law measure and the convicted person himself. Thus, the submission of information and documents during a court session, in support of the petition filed in the submission, is the responsibility of the representative of the institution or body that performs the punishment.

At the same time, the Tokyo Rules stipulate only the right of the convicted person to appeal the court's decision to change or cancel the punishment without isolating the convicted person from society, and not to appeal the decisions of the court by all subjects of criminal proceedings.

Thus, the universally recognized human rights and freedoms are recognized and protected by international acts. The overwhelming majority of legal norms contained in international acts are aimed at protecting and ensuring the rights, freedoms and legitimate interests of the individual, including in the sphere of application of coercive measures to convicts who violate the procedure and conditions for serving sentences. To study the implementation of individual international standards in the CIS and Baltic countries, we will consider the experience of court consideration of issues related to the application of preventive measures and the execution of sentences without deprivation

of liberty of the Republic of Belarus, the Republic of Kazakhstan, the Republic of Latvia and Estonia in comparison with the Russian Federation. The most common punishments without deprivation of liberty in these countries include social (obligatory) work, restriction of liberty, probation supervision, and by their example it is proposed to consider certain aspects of the procedure for replacing punishment.

3.1. The results of the implementation of general and special international standards of individual countries of the former Soviet Union

3.1.1. Republic of Estonia

In accordance with Art. 428 of the Criminal Procedure Code of the Republic of Estonia in relation to a convicted person who evades social useful work, the probation officer shall submit a special report to the court at the place of residence of the convicted person, in which he requests the enforcement of the sentence of imprisonment for the convicted person. The judge makes a decision within ten days from the date of receipt of the report of the probation inspector on the cancellation of community service and the enforcement of the penalty of deprivation of liberty, while the court appeals the said decision [4; Article 428].

All other decisions, including those related to the execution of sentences without isolating the convicted person from the company, are made by the court on the basis of a special report, a report of a probation inspector submitted to the court. A decision taken solely by the court on matters related to the execution of the punishment is sent to the participants interested in the court decision, including the probation service and the convicted person, with the deadline for considering the report, the procedure for the court making a decision and appealing against it, the criminal procedure law of the Republic of Estonia does not regulate [4; Article 428-430], thereby the right to appeal a court decision, the timing of the consideration of a question regarding a convicted person needs more detailed regulation in order to implement international standards for appealing court decisions and to observe reasonable terms of a trial.

However, if the court resolves the issue of execution in relation to the convicted sentence of imprisonment, the latter is an obligatory participant of the court session, he also has the right to petition for bringing a lawyer, the prosecutor takes an obligatory part in the court session [4; Article 432].

Thus, the report of the probation officer attaches great evidentiary value, the defense counsel is not a mandatory participant in the court hearing, the procedure and deadlines for the court to make a decision also need more detailed regulation.

Punishment in the form of social useful applied instead work can also be of the execution of imprisonment and thus applies to a kind of criminal law measures similar to a conditional conviction in the Russian Federation. The Law of Republic of Estonia may replace the punishment as arrest or imprisonment to public works only with an approval of convicted person in contrast with the Russian Law where the opinion of guilty person is not considered at all. The Estonian analogue of the Russian form of the penalty imposed in the restriction of liberty is the replacement of imprisonment for up to six months by electronic supervision made by the court with consent of a guilty person only. At the same time, a person of whom an electronic supervision is applied has the right to withdraw his consent and stay the remaining time of his imprisonment in jail. In these cases penalties without restriction of liberty are actually applied as measures of the Criminal Law. The consent of a person to apply measure without isolating him from society allows the convinced person to express his attitude towards the punishment imposed by the court, thereby the court takes into account the interests of the convicted person.

In turn, in Russia convicted person's lack of such an opportunity produces cases in the law enforcement practice when a person doesn't want to do mandatory work or another punishments and criminal law measures without imprisonment, he intentionally breaks order and conditions of serving to replace deprivation of liberty, thus, the convicted person makes his negative description and he doesn't achieve goals of the punishment imposed, in according with international standards.

3.1.2. The Republic of Latvia (Latvia)

Chapter 61 of the Code of Criminal Procedure of the Republic of Latvia (Latvia) includes activities on the consideration of issues which may appear during the execution of condemnation and courts statement. Also there is the activity of not only the court, but also of officials when situations appear which require replacement or abolition of punishments. Thus, the Criminal Procedure Code of Latvia combines not only judicial activities in the execution of condemnation but also the regulation of criminal and executive legal relations appeared from the violation of the order and conditions of punishment by a convicted person.

Probation supervision like in Russia is punishment as restriction of liberty, can be used as an additional form of punishment at the instruction of the prosecutor, wherein, if a convicted person violates some rules, the court may replace the penalty additional punishment by calculating two days probation supervision as a single day of deprivation of liberty after receiving a statement from the State Probation Service. Thus, in additional types of punishments imposed by the prosecutor, the court has the right to decide when convicted person violates, to replace the punishment with more stringent„ the State Probation Service makes a statement on the reduction of the term of probation supervision to the convicted person.

According to the Latvian criminal procedure legislation, the senior prosecutor has the right to resolve a number of issues arising while being under penalty imposed by the prosecutor, while there is no judicial procedure for appealing against the decision of the senior prosecutor, thus there is no judicial procedure for dealing with certain types of punishment. Thus the punishment in the form of forced labour performed on socially significant works is assigned by order of the prosecutor, the Criminal Code of Latvia [5; Article 40] provides for the possibility of early release from their serving, if the convicted person has approximately served at least half of their term, while the Criminal Code and the Criminal Procedure Code of Latvia do not regulate what the «exemplary behavior» of the convicted person is. However, international standards refer to the imposition of punishment and its replacement solely within the jurisdiction of the judiciary.

Thus, Latvian legislation regulates the procedure for replacing sentences without imprisonment imposed on a convicted person, however, a number of such issues are resolved by the prosecution authorities, the convicted person takes part in considering only issues related to the replacement of sentences with imprisonment, in other cases, the court and the prosecutor's office degrees are guided by information and documents collected by institutions that monitor and supervise the convict, that is, they actually verify the legality and validity of the convictions Inspector of the surveillance service.

3.1.3. Republic of Belarus

The preventive supervision imposed in the Republic of Belarus, appointed by the court over a person in order to prevent him from committing violations, led to the adoption in the criminal procedure law of a number of rules relating to the regulation of the procedure for considering and resolving issues arising in its implementation.

Preventive supervision is correlated with a probationary period under conditional conviction in Russia and a sentence of restriction of liberty, appointed as an additional one,

while the court in the Republic of Belarus to a greater extent independently controls the person to whom preventive supervision has been appointed. The extension of the term, the requirements of preventive supervision are modified by the court at the place of residence of the person, within the term of a criminal conviction, the participation of the person for whom it is established is mandatory, as well as the representative of the internal affairs or correctional institution.

The procedure for making decisions by the court is general on all matters related to the execution of the sentence, established by the Code of Criminal Procedure of the Republic of Belarus [2; Article 402.2], according to which a convicted person is summoned to court on the enforcement of a sentence, if the latter sees the need for his presence and giving explanations, the representative of the institution executing the sentence is summoned to a court hearing only in a number of established cases. It appears that the convicted person must be called at the court session in all cases when the court resolves issues related to the execution of the sentence, and if he did not arrive, the examination should take place in his absence, however, it seems reasonable to provide for cases when a convicted notifies the court about a good reason for his non-appearance on the day of scheduled trial and the possibility of the court to postpone the meeting date.

In contrast to the Russian legislation, the Code of Criminal Procedure of the Republic of Belarus regulates in more detail the procedure for the consideration of questions on the execution of a sentence, thereby securing the legal status of the participating entities. However, the procedure for appealing a court decision is not regulated by article 402.2 of the Code of Criminal Procedure of the Republic of Belarus, in contrast to Russian legislation. Thus, in order to implement international standards in the field of the possibility of reviewing court decisions, it is necessary to regulate in detail the procedure for appealing court decisions and the circle of subjects authorized to file complaints. Criminal responsibility for evading serving sentences without isolation from society is also noteworthy: if the purpose of punishment was not achieved due to malicious evasion from serving by a convicted person, criminal prosecution is initiated against him. However, a convicted person to whom punishment is applied without isolation from society, unlike in the Republic of Estonia, does not express his consent to serve this type of punishment, i.e. if he does not want to comply with his procedure and conditions, and recognizes his evasion as «malicious», the person shall serve the rest of the sentence in terms of imprisonment, and shall be subject to criminal liability (Art. 415-419 of the Criminal Code of the Republic of Belarus). Thus, the convicted person is deprived of the possibility of replacing the punishment with alternative sanctions without isolation from

the society in accordance with the Tokyo Rules and is brought to criminal responsibility, committing a relapse. In this case, it is advisable by analogy with the Estonian legislation to consider the possibility of obtaining the consent of the convict in the appointment of a criminal punishment without isolation from society.

3.1.4. Republic of Kazakhstan

The criminal procedure legislation of the Republic of Kazakhstan, in contrast to the countries considered above, establishes a period of one month for consideration of issues arising in the execution of sentences, which contributes to the protection of the interests of interested parties – the convicted person and the institution executing the punishment, as it creates guarantees against unreasonable delay in the term of the court decision in accordance with international standards.

The participation of a convicted person is mandatory only in a number of established cases, and the participation of the Prosecutor is a prerequisite for judicial review of the issue, and the CPC of the Republic of Kazakhstan establishes cases of participation of a lawyer as a defender of the convicted person. Calling the lawyer a «defender», the CPC of the Republic of Kazakhstan refers him to the side of the defense, despite the fact that the parties are absent when considering the execution of the sentence. In this case, by analogy with the Russian legislation, it is advisable to call the defender a lawyer, with the help of which the convicted person has the right to exercise his rights. The code of criminal procedure of the Republic of Kazakhstan as well as the code of criminal procedure of the Russian Federation provides for the participation of the victim of a crime, and taking into account his opinion in resolving a number of issues, which is a positive aspect with respect to the Republic of Estonia and the Republic of Latvia, in the implementation of international standards, as a person who is a victim of a crime can report on the compensation of harm, in addition, the restoration of the violated rights of the victim is one of the tasks of the state provided by international standards.

In addition, in accordance with international norms of the CPC of the Republic of Kazakhstan regulates the procedure of appeal against the court decision on the execution of the sentence, convicted persons and the Prosecutor, however, such participant of the court session as the institutions executing the punishment, similar to the Russian legislation, are deprived of the right to file complaints; which, in our opinion, violates the principle of competition at all stages of criminal proceedings, since the scope of rights of the participants is different.

4. Conclusion

Thus, it can be concluded that international acts, such as the Tokyo rules, indicate the occurrence of issues in the execution of the sentence to sentences not related to the isolation of the convicted person from society, the consideration of which should be attributed to the exclusive competence of the court. However, their proper resolution requires the participation of a representative of the authority executing the punishment as a full participant of criminal procedural activity if execution of the sentence, but the criminal-procedural status of the bodies performing punishment, on execution of a sentence in Russia and considered foreign countries is poorly regulated by legislation and requires further development, detail taking into account international rules and standards in the Russian legislation and the legislation of the above countries. Throughout the history of its development not reflected in a separate provision that establishes the rights and obligations of institutions and bodies executing punishment, when the court is considering questions of execution of punishments.

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