

NON-PUNITIVE MEASURES OF CRIMINAL AND LEGAL NATURE (SECURITY MEASURES) UNDER LEGISLATION OF THE EUROPEAN UNION



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Introduction

Currently, majority of states, having in mind the purpose of resocialization of a guilty person as the main purpose of a criminal law, follow the principle of dualism of punishments and other means of criminal influencing, first of all the so-called "security measures", in their criminal and legal policy.

Comparative analysis of the system of non-punitive measures of criminal and legal nature (security measures) of certain countries of the European Union allows to determine basic provisions that characterize the tendencies in the criminal and legal policy of the said countries with regard to regulation of the criminal effects of a committed crime in the form of a punishment and adopt this positive experience.

Status of research. Works E. L. Biktimerova, K. M. Karpova, V. M. Kutsa, A. A. Pavlova, M. I. Panov, Y. A. Ponomarenko, N. Y. Skrypchenko, A. M. Yashchenko and other national scientists have been dedicated to the study of the issue of the measures of non-punitive nature (security measures). Despite the scientific studies of this issues, still today the common notion of non-punitive measures of criminal and legal nature is absent, the study of non-punitive measures of criminal and legal nature (security measures) under the legislation of the European Union states has not been carried out.

Purpose of the Article is the study of non-punitive measures of criminal and legal nature (security measures) under the legislation of the European Union states.

Presentation of the main material. For centuries, application of punishments used to be one of the few, if not the only mean of performance of the tasks of criminal law,

however, from the second part of the XIX century there emerged an understanding that legal arsenal of this field should be much broader. Recently it has become practically generally recognized that for performance of guarding and preventive tasks criminal law can and should foresee along with punishment, some other (non-punitive) coercive measures. For this reason, national and foreign criminal law divide all measures of criminal and legal influence into two categories: 1) punitive and 2) other measures of criminal and legal influence, which are called "security measures" in foreign law.

Criminal code (hereinafter – "CC") of Ukraine applies for this aim the notion "other measures of criminal and legal nature", which are defined in science as "coercive measures provided for in criminal law, applied by a court with regard to a natural or legal person in order to eliminate the conditions that facilitate

committing socially dangerous acts.” [1, p. 467-468].

National legislator includes to the category of non-punitive, other measures of criminal and legal nature coercive measures of medical nature, compulsory treatment, special confiscation and measures regarding legal persons (chapters XIV “Other measures of criminal and legal nature” and XIV-1 “Measures of criminal and legal nature regarding legal persons” of the CC of Ukraine). Having in mind the nature, and majority of scholars agree with it, these measures also include compulsory re-education measures. [2]

Foreign list of these types of measures, for instance in the legislation of the European Union states (hereinafter – “EU”), and their application is wider than in Ukrainian criminal law. Unlike punishment, security measures do not aim to take revenge or intimidate but aimed at elimination of “dangerous condition” of a person who has committed or has not committed but may commit a socially dangerous act.

Going ahead with the analysis of the security measures provided for by the CC of certain EU countries, it should be noted that legislators seek to emphasize the importance of the principle of legality during application of these measures, and set out general principles for their application. Under the Criminal Code of Italy, and in accordance with Part 3 of Art. 25 of the Constitution of Italy of 1947 [3], no one may be subjected to a security measure not provided for by the criminal law in force. We should note that Part 2 of Art. 1 of the Criminal Code of Spain specifies that security measures may only be applied when the cases previously established by law concur, and Art. 6 of the Criminal Code of Spain specifically stipulates that security measures shall be based on the criminal risk of the subject on whom they are imposed. The same article also indicates that security measures may not be onerous, nor last longer than the punishment abstractly applicable to the act committed, nor exceed the limits necessary to prevent danger caused by a guilty person. [4]

CC of the EU states distinguish the following measures of corrective and security measures:

1. Security measures related to isolation from society. In their application, the court should establish that the person while being on the outside, is danger to other

people, state and society. Isolation-related security measures include:

1. *Placing in a facility for offenders with mental disorders.* This measure is provided for in § 21 of the CC of Austria [5], Art. 217 of the CC of Italy [6] (placement in a special medical facility in accordance with the Criminal Code of Italy is possible in respect of persons convicted of a deliberate crime to reduced sentence due to mental disorder), Art. 37 of the Criminal Code of the Netherlands (CC of the Netherlands provides for the possibility of compulsory treatment of persons with mental disorders and who have committed a criminal act at hospital. (Art. 37a-38i of the CCC of the Netherlands) and as an outpatient (Art. 38-38b of the CC of the Netherlands), at the same time, application of coercive measures of a medical nature may not restrict the freedom of worship, religious or other beliefs or restrict the constitutional rights of the person to whom this security measure is applied) [7], § 63 of the CC of the FRG (measures applied to the mental patients consist in placement of a patient to a hospital or a shelter) [8], Art. 96 of the CC of Spain [4]. The CC of Bulgaria regulates application of this security measure in a quite detailed way [9]: a) transfer of such a person to his relatives who have undertaken an obligation to provide for his treatment under control of a psycho-neurological hospital; b) coercive treatment in a psycho-neurological hospital (it is applied to the mental patients who, because of his or her mental state and the nature of the committed socially dangerous act, requires hospital care and compulsory treatment); c) compulsory treatment in a special psychiatric hospital or in a special department of a general psychoneurological institution (Art. Art. 89-92 of the CC of Bulgaria). The CC of Denmark points on psychiatric treatment in a hospital in case of need as on different types of security; sending a person temporarily or for the term of the sentence to a hospital, appropriate place of residence or institution for special care; sending to a hospital for the mental patients or to an institution for persons with severe mental disorders; delivering to care which corresponds to a mental disorder; sending to a suitable house or institution to receive the necessary care (§ 68-70 CC of Denmark) [10].

2. *Sending to a facility for offenders suffering from drug or alcohol addiction, - §*

22 of the CC of Austria [5], Art. 218 of the CC of Italy (special medical institutions accommodate persons convicted of deliberate crime for reduced punishment as a result of chronic alcoholism or drug addiction) [6], § 64 of the CC of the FRG [8], § 68-70 of the CC of Denmark (in Denmark, treatment for alcoholism or drug addiction or addiction to similar medical substances is carried out, if necessary, in a hospital or in a special institution) [10], Art. 96 of the CC of Spain [4].

In addition, dangerous recidivists have to be placed to special institutions (§ 23 of the CC of Austria) [5]; keeping in custody the persons “found guilty of murder, robbery, imprisonment, serious violent crime, threatening, arson or attempted one of these offenses” and carrying “obvious danger to life, body, health or freedom of others” in connection with previously committed crimes for isolation and security (§ 70 of the CC of Denmark) [10]; placement to a reformatory (special correctional institution in Spain) – juvenile offenders (Art. 219 of the CC of Italy, Art. 96 of the CC of Spain) [6; 4]; placement of persons convicted of a deliberate crime to a special hospital to reduced punishment for deafness (Art. 220 of the CC of Italy) [6]. Of a particular note is the preventive detention provided for by § 66 of the Criminal Code of the FRG. This security measure is imposed if a person has already been sentenced to imprisonment and found to be dangerous for the society “due to his / her tendency to commit serious criminal acts, namely, those resulting in serious moral or physical harm to the victim” [8].

II. Security measures and remedies related to restriction of liberty.

These security measures relate to freedom of movement and consist in the following prohibitions: sending to an agricultural settlement or an employment establishment (Ar. 221 of the CC of Italy) [6], an obligation to stay in a certain area, as well as a ban on living and staying in certain areas (Art. 105 of the CC of Spain) [4], ban on living in one or more communes or provinces (Art. 228-235 of the CC of Italy – the minimum period of such prohibition shall not be less than one year. This security measure applies to persons who have committed crimes against the state or public order, as well as crimes that affect other social relations, but because of political

reasons or in case of certain social or moral circumstances. A prerequisite for this security measure is commitment of a crime in a particular area) [6], necessity to live in an appropriate house or institution (§ 57 of the CC of Denmark) [10].

III. Property security measures are mainly represented by *confiscation* (§ 26 of the CC of Austria, 236-240 of the CC of Italy, § 25-27, 54, 75, 76a of the CC of Denmark, Art. 1-6 chapter 36 paragraph 3 of the CC of Sweden) [5; 6; 10; 11]. At the same time, Art. 36e of the CC of the Netherlands also distinguishes confiscation of income, obtained through crime [7], and § 75-77a of the CC of Denmark also distinguishes confiscation of property on a level of ordinary confiscation. [10]. Confiscation is provided for in paragraph 8 part 1 § 11 of the CC of the FRG “Persons and things», except for security measures and corrective measures” (§ 73-73a, 73c of the CC of the FRG) [8].

CC of the above countries distinguish the following forms of compensation as: “compensation of damage” (Art. 105 of the CC of Spain, Art. 8 chapter 1 part 1 of the CC of Sweden) [4; 11], “compensation of material and moral damage” (Art. 105 of the CC of Spain) [4], “payment of compensation for any damages caused in the result of a crime” (§ 57CC of Denmark) [10].

Apart from the above property security measures and corrective measures, the following measures are distinguished: “seizure of benefit” (§ 20-20b of the CC of Austria) [5], “removal of a thing from circulation” (Art. 36a-36d of the CC of the Netherlands) [7], “rendering the objects unfit” (§ 73-73a, 73c of the CC of the FRG) [8], “a bond as a guarantee of proper behavior” (Art. 236-240 of the CC of Italy) [6], “adherence to the probation service decision regarding restrictions on disposing of their income and capital and fulfilling their economic obligations” (§ 57 of the CC of Denmark) [10], “participation in charity events of the bodies for the protection of childhood and youth, and if necessary – of a special nature, and implementation of the prescriptions issued by the social security bodies” (§ 57 of the CC of Denmark) [10], “c” (Art. 7-9 chapter 36 part 3 of the CC of Sweden) [11].

IV. Security measures and corrective measures not connected with restriction of liberty and restriction of property rights are quite different and do not restrict rights in different spheres of life. These include:

1. *Professional disqualification* (Art. 105 of the CC of Spain) [4]. CC of the DRG refers to this security measure and corrective measure as to “a prohibition on a profession, that is a prohibition on a profession, craft, or type of craft” (§ 68-68c, 69-70 CC of the FRG) [8], and the CC of Austria – removal from a post (§ 27 of the CC of Austria) [5]. Such restriction as “refusal to engage in business activities requiring special public sanction or permission”, provided for in the CC of Denmark, is closely related to the above restrictions. Deprivation of the right to continue to carry on business or to carry it out in certain forms, if the crime is associated with an obvious risk of abuse of that right is also a variant of this legal consequence. The same rules apply to other forms of business activity, if it is justified by special circumstances. According to the same rule, a person may be deprived of his or her right to be the primary shareholder of a joint-stock company or to be a manager or a member of the board of a joint-stock company, or a company or association that provides for special public authorization or a fund (§ 78-79 of the CC of Denmark) [10].

2. *Establishment of a supervision*. This security measure is provided for in the Art. 228-235 of the CC of Italy [6], § 68-68c, 69-70 CC of the FRG [8], § 57 CC of Denmark [10].

3. *Expulsion of a foreigner from the state* (Art. 235 of the CC of Italy) [6]. In Spain, this measure applies to a narrower group of people – only to foreigners who are illegally staying in Spain (Art. 105 of the CC of Spain) [4].

In addition to the above, in the CC of the studied countries there can be found such security measures and corrective measures, not related to restriction of liberty and restriction of property rights, such as deprivation of the right to drive vehicles (Art.

105 of the CC of Spain, § 68-68c, 69-70 of the CC of the FRG) [4; 8]; deprivation of a license for weapons (Art. 105 of the CC of Spain) [4]; ban on visiting taverns and places where alcoholic beverages are traded (Art. 233 of the CC of Italy) [6]; abstaining from alcohol, narcotic or similar medical substance abuse (§ 57 of the CC of Denmark) [10]; warning; adherence to special conditions regarding offender’s place of residence, work, education, leisure or communication with certain persons (§ 57 of the CC of Denmark) [10].

In the CC of Slovakia security measures have been called “protective” and include preventive detention; protective treatment; security care; security supervision; removal of things; cash withdrawal; seizure of property [12].

The CC of Poland provides for criminal and legal measures along with punishment. These, in accordance with Art. 39 of the CC, include: deprivation of public rights, prohibition to occupy certain positions, perform a certain profession or engage in certain economic activities, prohibition to operate vehicles, confiscation of property, obligation to compensate damages, monetary compensation, monetary payment, public announcement of a sentence [13].

French criminal law also knows a category known as “security measures”, despite the fact that, since 1986, the French Criminal Code has abandoned the dualistic system of criminal sanctions (system of penalties and security measures system). Nevertheless, this category of measures continues to remain in the arsenal of criminal and legal means of French law, however, now security measures have changed both their name and their legal status: since 1986, these are the penalties that deprive or restrict rights. According to Art. 131-6 of the CC of France, these include: deprivation of driving licenses; a ban on driving certain vehicles; special confiscation of things; prohibition on engaging in any professional, commercial or industrial activity; prohibition on carrying or storing weapons; prohibition on living in certain places and others [14].

Conclusion

Having in mind the above, we conclude that corrective and security measures are significantly different from criminal punishment, serve for the benefit of society and facilitate achievement of the goals of the criminal policy. However, their application for the purpose of general benefit is far from being unconditional, especially from the point of view enshrined in the Basic law on human rights. Finding a balance of interests in this area is a priority for the legislator and the executor of law. We believe that in the near future, the priority areas for implementation of criminal policy in Ukraine will be improvement of existing legislative provisions on "other measures of a criminal nature". In order to further humanize domestic criminal law, new types of such measures should be developed and implemented, taking into account the positive experience of the EU countries (for example, deprivation of public rights, prohibition of staying in certain areas, preventive supervision, public announcement of sentence, etc.).

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