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Improving Disciplinary Measures against Persons Serving Restriction of Liberty and a Suspended Sentence

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Abstract

Introduction: the article analyzes problems of stimulating law-abiding behavior of persons sentenced to restriction of liberty and a suspended sentence. The specifics of disciplinary measures enshrined in the norms of two similar legal institutions are consistently disclosed. Many convicts continue to violate the established procedure for serving their sentences and evade the duties imposed on them by the court. Every year, statistics show an almost constant number of persons removed from the register of criminal executive inspections in connection with the commission of a repeat crime. The situation is complicated by the fact that this is happening against the background of an ever-increasing number of persons sentenced to punishments and criminal law measures not related to deprivation of liberty. The analysis of the practice to implement norms of the current penal legislation shows that the staff of criminal executive inspections do not always effectively apply incentives to encourage law-abiding behavior of convicts, focusing on penalties. The need to change a system of measures to promote law-abiding behavior in legal institutions of restriction of liberty and a suspended sentence is considered through the prism of activities of foreign probation services, as well as psychological reactions of persons registered with criminal executive inspections. What is more, the article presents the point of view of practitioners whose professional activity is directly related to the execution of punishment in the form of restriction of freedom and monitoring of the conditionally sentenced. *Purpose*: to substantiate the need to improve means of stimulating law-abiding behavior applied to prisoners sentenced to restriction of liberty and a suspended sentence, as well as to formulate specific proposals for their development. *Methods*: comparative analysis; methods of deconstruction and appercipation; survey conducted by means of questionnaires with open questions; formal-logical methods. *Conclusion*: recommendations have been developed to improve measures aimed at stimulating law-abiding behavior of persons sentenced to restriction of liberty and a suspended sentence. First, Part 1 of Article 74 of the Criminal Code of the Russian Federation should fix the norm that in case a person serving a suspended sentence is assigned an additional type of punishment and before the expiration of the probation period he/she has corrected his/her behavior and has already served at least half of the term of the additional type of punishment, then the court on the recommendation of the body exercising control over his/her behavior is entitled to cancel a suspended sentence and remove the criminal record from a convicted person with exemption from an additional type of punishment. At the same time, it will be necessary to amend Article 86 of the Criminal Code of

the Russian Federation to eliminate contradictions related to the current order of repayment of the criminal record of a person sentenced to a milder punishment than imprisonment. Second, it is necessary to establish the opportunity for convicts serving restriction of liberty to be released on parole in the legislation. Third, it is advisable to supplement Article 58 of the Penal Code of the Russian Federation by the provision that a convicted person is recognized as maliciously evading from serving a sentence in the form of restriction of freedom by a resolution of the inspection head and the imposed penalty in the form of an official warning remains relevant until all penalties are lifted or extinguished.

Keywords: punishment; incentives; penalty; probation; probation period; disciplinary impact.

5.1.4. Criminal law sciences.

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Introduction

The retributivism theory with its radically punitive orientation and the main goal of "causing the guilty person suffering commensurate with the crime" has won a large number of opponents. Even R. Garofalo [1, p. 47] and Ch. Bekkaria [2, p. 89] noted that the purpose of punishment should be to deter people from committing crimes, and not social revenge. Modern penology postulates fully correspond to this statement. Alternative measures of criminal legal impact, carrying fewer restrictions on the rights and freedoms of convicts in comparison with deprivation of liberty, are also designed to provide private and general prevention. However, repeated criminality among persons serving sentences and measures of a criminal nature without isolation from society continues to remain at a high level. Thus, in 2015, 11,549 convicts were removed from the register of criminal executive inspections (CEI) in connection with the commission of a new crime (this is 3.76% of the total number of the registered persons). We observe similar indicators in 2016 – 10,652 (2.51%), in 2017 – 15,692 (3.11%), in 2018 – 19,002 (3.72%), in 2019 – 19,413 (3.99%), in 2020 – 16,732 (3.6%), and in 2021 – 15,929 (1.76 %). Meanwhile, inspections' performance cannot be assessed only by repeat crime rates. It is worth mentioning that English and Welsh probation services, similar in their functionality to the Russian counterpart, do not consider the presence or number of repeated violations as the main indicator of effectiveness of employees' activity, but the statistics of risk changes, indicating the success of corrective measures [3].

Crime commission risks are changed due to continuous corrective impact throughout the entire period of person's registration with the inspection. An indispensable condition for corrective measures to be effective is the accurate and strict enforcement of laws, strengthening of law and order and a stable criminal situation. Legal, organizational, psychological, social and other means, in particular incentives and penalties, provided for by the current penal legislation, applied to convicts, help employees of criminal executive inspections. Taking into account the similarity of the legal status of persons sentenced to restriction of liberty and a suspended sentence, as well as their significant number, it becomes necessary to find ways to enhance measures for promoting convicts' law-abiding behavior.

Research methodology

The method of comparative analysis is used to compare practical activities of the inspection staff and foreign probation services. With the help of deconstruction and appercipation methods, separate fragments of scientific and applied literature are used to prove the authors' stance and identify problems in the field of stimulating law-abiding behavior of persons serving sentences and criminal law measures not related to imprisonment. As for the empirical basis, in May 2021, scientists from the Research Institute of the Federal Penitentiary Service of Russia con-

ducted a face-to-face survey of 50 inspections employees in 10 territorial bodies using questionnaires with open questions. The respondents hold the following positions: head of the branch of the criminal executive inspection – 60.7%; deputy head of the branch – 9.3%; senior inspector of the branch – 14.8%; inspector of the branch –15.2%. All survey participants have higher education, the service experience in the stated positions is more than 10 years (59.8%), 6–10 years (24.6%), 2–5 years (15.2%). Formal logical methods substantiate the reliability and validity of the conclusions and recommendations formulated by the authors.

Results

Restriction of liberty and a suspended sentence are two essentially similar legal institutions in Russia [4], despite the fact that the first is called punishment, and the second is a criminal law measure. At the same time, the legal nature of a suspended sentence is not fully defined [5–8]. It should only be noted that, in essence, this measure of criminal legal impact is reduced to the imposition of a suspended sentence, which is not carried out if the guilty person proves his/her correction during the probation period. The Concept for the development of the penal system of the Russian Federation up to 2030, approved by the Decree of the Government of the Russian Federation No. 1138-r of April 29, 2021, fixes the priority task to boost effectiveness of individual preventive work to prevent offenses among convicts, which actualizes the search for new and improvement of existing measures to stimulate law-abiding behavior. The essence of these measures is based primarily on inter-related functions: 1) individualization of punishment, which plays a primary role in the educational impact on convicts; 2) ensuring implementation of both basic and optional means of correction.

At the same time, the concept of "means of stimulating law-abiding conduct" should cover not only incentives and penalties, which are directly referred to by the legislator, but also other measures provided for by current legislation that improve the legal status of convicts or are aimed at providing them with any benefits and advantages (positive impact measures), or, on the contrary, they are aimed at depriving benefits, advantages and deterioration of legal status (measures of negative impact). For example, the early cancellation of a suspended sentence and removal of the criminal record from a convicted person fixed in Part 1 of Article 74 of the Criminal Code of the Russian Federation is a measure of positive impact, while the replacement of the unserved part of punishment in the form of restriction of freedom for forced labor or imprisonment is a measure of negative impact.

Some scientists consider concepts "disciplinary measures" and "penalties" as equivalent. Thus, V.N. Chornyi notes that "an important place belongs to disciplinary measures. Penalties applied to convicts represent one of the types of legal liability that has a number of specific features ..." [9, p. 5]. From this context, it is obvious that disciplinary measures and penalties are used as interchangeable.

We believe the concept "disciplinary measures" be generic in relation to penalties, since discipline of any person, not only convicts, is a balance that combines both positive measures to stimulate proper behavior and negative ones. E.A. Sizaya proposes to establish a general incentive principle in the penal legislation instead of the sectoral and special principle "the rational use of coercive measures, means of correcting convicts and stimulating their law-abiding behavior". Thus, this principle, which implies both coercive measures (penalties) and incentive measures, will become more understandable and specific for a law enforcement officer [10, p. 49].

Besides, some researchers refer certain measures of positive impact to criminal law measures. Thus, I.E. Zvecharovskii considers conditional early release, replacement of the unserved part of the punishment with a milder type of punishment, amnesty, etc. to be criminal law measures [11, p. 7]. However, these incentive institutions do not quite fit into the outline of measures of criminal legal impact, since they are not intended for a direct reaction of the state to a socially dangerous act committed, but serve for subsequent differentiation and individualization of punishment. We agree with E.V. Medvedev that the types of exemption from punishment "are not authentic means of criminal law applied for the crime commission. All types of release from punishment, its serving, postponement, as well as types of substitution of punishments

are integral elements of the punishment system that cannot exist outside its limits" [12, p. 142–143].

Based on the above conclusions, we propose to consider the following concepts as equally significant for the purposes of this article: means (measures) of stimulating law-abiding (lawful) behavior; incentives for law-abiding (lawful) behavior; disciplinary means (measures).

Incentives and penalties are a common practice for many countries to stimulate law-abiding behavior of convicts [13, p. 16]. Applying these stimuli on feelings and emotions of persons undergoing punishments and criminal law measures without isolation from society, it is possible to encourage them to comply with the norms established in society and the state. At the same time, various reactions of convicts generated by such stimuli are predictable: in the case of penalties – anger, aggression, despair, hopelessness, fear, irritation, anxiety, confusion, resentment, panic; in the case of incentive measures – satisfaction, joy, inspiration, indifference, surprise, etc. However, if a convicted person does not react correctly to the penalties and incentives imposed, or there is insincerity in his/her positive actions, achieved only due to the existing control of the penitentiary staff, then later this will still affect the formation of promising lines of behavior. Otherwise, the strictest measure of influence will be applied to him/her. Legislations of many foreign states fix the same. For example, A.V. Serebrennikova writes that in accordance with the criminal codes of Switzerland and Austria, the court is authorized to cancel a suspended sentence if, during the probation period, a person registered with the competent authority who has an official warning commits a repeat crime or misdemeanor violating instructions of the court, and also continues to evade protective supervision or otherwise neglect the trust granted to him/her [14, p. 152].

J. Leibrich mentions about a "tortuous" path from crime to law-abiding behavior. His research shows that about half of the convicted persons and persons with the suspended or expunged criminal record still adhere to antisocial behavior: they abuse alcohol, take narcotic and psychotropic substances, have been caught in fights, hooliganism or conflicts with law enforcement agencies [15, p. 134]. The commission of the above actions can be considered as patterns of criminal behavior, that is, behaviors similar in psychological mechanism to criminal acts. At the same time, incentives for legal behavior can and should act as prevention of immoral behavior and minor offenses.

F. Doherty rightly points out the need to empower probation service employees with broad powers to ensure convicts' compliance with the established rules. The case of Harris County, Texas, the USA is rather indicative: there probation service employees can adjust seemingly inflexible norms governing their activities to ensure probation conditions. For instance, in order to employ convicts, the Harris County Probation Department follows a policy according to which unemployed convicts are required to submit an application to four employers every weekday to show the sufficiency of their efforts to find employment. In 2013, the court, on the recommendation of the probation inspector, appointed a two-year prison term to the supervised person, since excessive discrimination was found in the submission of applications for employment: the convict tried to find a job only in those organizations that were related to his profession. This decision was not overturned in the Texas Court of Appeals [16, p. 313–314].

In the above case, we state that probation service inspectors have significant powers, but at the same time there is a variety of sanctions on their wards. A similar pattern is observed in all American probation services, there are various possibilities of disciplinary measures against those convicted of violating probation conditions. To petition the court to cancel the probation period and send a person to prison is the most severe possible option. Probation officers are required to respond to every violation committed by a convict. So, it is possible to apply a reprimand, tighten reporting requirements, restrict travel or strengthen the so-called open surveillance. If violations are repeated, there is a positive test result for the presence of narcotic drugs or prohibited drugs in the blood, a new arrest occurs for acts that are not a criminal offense, then stricter sanctions are applied, such as increased supervision, curfew, home detention, electronic monitoring, placement in a reception center for monitoring [16, p. 314].

The application of disciplinary measures to convicts who are registered with criminal executive inspections in a similar way acts as a kind of intermediate stage before the cancellation of a suspended sentence or replacement of punishment with a more severe type. Also, in the case of a suspended sentence, disciplinary measures are directly related to the possibility of a person to be removed from the register ahead of time and be not convicted. At the same time, incentive measures and penalties in relation to the specified category of convicts are not established by law, and the disciplinary impact is carried out on the basis of provided by Article 190 of the Russian Penal Code warnings about possible cancellation of a suspended sentence, issued by the staff of the criminal executive inspections in written form.

In addition, according to paragraphs 124–126, 128, 129 of the Rules on organizing execution of punishments and criminal law measures without isolation from society, approved by the Order of the Ministry of Justice of the Russian Federation No. 142 of May 20, 2009, when convicts evade performance of the duties assigned to them by the court or when they violate the public order and get an administrative penalty, the inspection summons the convicted or visits them at their place of residence and conducts preventive conversations. In case of repeated detection of the facts that they evade performance of the duties assigned to them by the court or violate the public order and get an administrative penalty, the inspection again issues a warning about the possibility of a suspended sentence no later than three working days. If those serving a suspended sentence systematically violate the ublic order during the probation period, for which they are brought to administrative liability, systematically fail to fulfill the duties assigned to them by the court or disappear from the control, the inspection within three days (excluding weekends and holidays) from the moment of establishing these facts sends the court a submission about cancellation of the suspended sentence and execution of the sentence imposed by the court verdict [17].

It should be noted that inspection employees actively use the only opportunity to stimulate the law-abiding behavior of this category of convicts in the form of a warning. According to the Report of the Federal Penitentiary Service of Russia – FSIN-1 from 2015 to 2021 (Section 15 “Information on the activities of criminal executive inspections”), in 2021, 12,426 conditionally convicted persons violated probation conditions (0.96% less than in 2020), including in relation to 11,669 people the materials to cancel a suspended sentence, extend probation or assign additional duties were previously sent to the court (by 0.52% more than in 2020).

In practice, questions arise about the expediency of applying incentive measures, such as cancellation of a suspended sentence and removal of the criminal record, to conditionally convicted persons, if they are assigned an additional punishment. As prescribed by Paragraph 12 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 21 dated December 20, 2011, in case an additional type of punishment is assigned to a conditionally convicted person, but he/she has proved his/her correction by his/her behavior before the expiration of the probation period, then the court is entitled to cancel a suspended sentence and remove the criminal record only after he/she has served an additional sentence.

In the Russian Federation, there is a shift in disciplinary impact to punishments and in criminal law measures without isolation from society – to penalties. For example, according to the above-mentioned report of the Federal Penitentiary Service of Russia, in 2021, 267,274 convicts registered with criminal executive inspections had a warning or an official warning, while incentive measures were applied to 590 convicts. The approximate ratio of incentive measures to penalties was 1:453. There are several reasons for a negligibly small number of incentives. First, of all the persons registered with inspections, the use of incentive measures, according to the current penal legislation, is possible only to those serving a sentence in the form of restriction of liberty. Second, employees, executing punishment in the form of restriction of liberty, are more focused on the application of penalties, as this is one of the indicators of statistics, which is regularly compared with similar peri-

ods of the past years, which ultimately affects assessment of the inspection's performance. Third, there is excessive attention to incentive measures on the part of prosecutors, who consider them as corruption-causing factors and require employees to provide sufficient grounds for their application.

It seems that leveling the percentage of the number of incentives and penalties, expanding the powers of employees of criminal executive inspections in this aspect, as well as the inclusion in the penal legislation of new incentives for law-abiding behavior of convicts will serve as an additional impulse to the development and improvement of disciplinary practice and educational impact in general. Based on the principles of pedagogy, the ratio of incentives and penalties should be approximately 1:1. One of the steps to strengthen incentive measures is an increase in the number of measures applied in the form of early deregistration of persons sentenced to probation.

The results of the study conducted by the Research Institute of the Federal Penitentiary Service of Russia indicate that 73.2% of the surveyed employees of criminal executive inspections consider it appropriate to provide in Part 1 of Article 74 of the Criminal Code of the Russian Federation a norm that persons sentenced to a suspended sentence can be completely released from serving and additional punishment if they have proved correction by their behavior. On the one hand, such a measure will make it possible to equalize the legal status of probationers, both having additional punishment and not having it, but on the other hand, additional punishment has an important preventive value, especially when the court appoints deprivation of the right to occupy certain duties or engage in certain activities.

Taking this into account, it seems reasonable to supplement Article 74 of the Criminal Code of the Russian Federation with Chapter 1.1 as follows: "if a convict serving a suspended sentence has been assigned an additional type of punishment and, before the expiration of the probation period, he/she has proved his/her correction by his/her behavior, fulfilling the requirements provided for in Part 1 of this article, and has also served at least half of the term of the additional type of punishment, then the court, at the suggestion of the body exercising control over behavior of a conditionally convicted person, may decide on the cancellation of a suspended sentence and removal of the criminal record from a convicted person with exemption from an additional type of punishment. At the same time, if an additional penalty is imposed on a conditionally convicted person in the form of a fine, then a suspended sentence can be canceled only if the fine is paid in full".

It is worth paying attention to the fact that such changes will contradict the current version of Article 86 of the Criminal Code of the Russian Federation, since, based on Paragraph "b" of Part 3 of this article, a criminal record against persons sentenced to milder types of punishments than imprisonment is extinguished after one year after their completion (execution). In this regard, we agree with the opinion of T.G. Chernenko, who, based on the lesser public danger of conditionally convicted persons in comparison with persons sentenced to real imprisonment, proposes to establish more lenient rules for repayment of criminal records than for persons to whom a conditional conviction is not applied. Thus, it is advisable to supplement Article 86 of the Criminal Code of the Russian Federation with the provision stipulating that the criminal record of persons serving a suspended sentence and having additional punishment should be extinguished immediately after serving an additional sentence or abolition of a conditional sentence in accordance with Part 1 of Article 74 of the Criminal Code of the Russian Federation [18, p. 129]. In addition, it will be necessary to adjust Paragraph 12 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 21 of December 20, 2011 in accordance with the above-mentioned amendments to the criminal law.

The absolute advantage of domestic legislation is the existence of norms that establish incentives and penalties applied to persons sentenced to restriction of liberty. The procedure for their application is regulated by articles 57–59 of the Penal Code of the Russian Federation, as well as sections 5 and 6 of the Rules on organizing execution of punishment

in the form of restriction of liberty, approved by the Order of the Ministry of Justice of the Russian Federation No. 258 of October 11, 2010. In addition, incentive measures should include, for example, termination of the use of technical supervision and control means against this category of convicts [19, p. 103].

According to the Report of the Federal Penitentiary Service of Russia – FSIN-1 from 2015 to 2021, in 2018, 515 persons sentenced to restriction of freedom had incentives, which comprised 1.34% of the total number of persons sentenced to restriction of freedom registered with criminal executive inspections at the end of the year. Similar indicators were observed in the subsequent three years: in 2019 – 549 convicts (1.41%), in 2020 – 601 convicts (1.56%), and in 2021 – 590 (1.6%). In this case, we see a slight increase in the applied incentive measures. Meanwhile, during this period, the number of persons sentenced to restriction of liberty registered with inspections at the end of the year slightly decreased (from 38,370 people in 2018 to 36,971 people in 2021). The very possibility of applying incentive measures to convicted persons is the most important means of correcting their behavior along with educational work. The system of incentives and penalties, should be diverse, contain measures of approximately the same order together with less or more significant measures, thus consolidating foundations of a progressive system of serving sentences. In this regard, the extent of authorities of probation officers in Pakistan is noteworthy. In order to stimulate law-abiding behavior of persons under supervision, they can apply incentives using various social, entertainment and educational opportunities of a separate territorial entity [20, pp. 3–4]. Incentives are as such: the right to free full-time or distance learning (taking courses, trainings; attending conferences, lectures, webinars and seminars); the right to free admission to museums, exhibitions, galleries, sports, cultural and spiritual events.

French and English criminal proceedings have a distinctive feature: presence of separate judges who resolve issues at the sentence execution stage. They exercise control over convicts with the help of reports provided by probation officers, on the basis of which the court can mitigate restrictive measures applied against the convict [21, p. 226]. Thus, convicts should work on accumulating evidence, including incentives, demonstrating the possibility of a court decision to reduce the scope of restrictive measures. It is the convicted person him/herself who has to prove such a right; it makes him/her responsible for his/her behavior and at the same time allows him/her to assess progress in achieving punishment goals.

It is obvious that in order to positively stimulate law-abiding behavior of convicts serving a sentence of restriction of liberty as the main punishment, it is rational to provide for the possibility of being released earlier than the term indicated in the court verdict. Based on Part 1 of Article 74 of the Criminal Code of the Russian Federation, the court is entitled to apply an incentive norm to a conditionally convicted person in the form of cancellation of a suspended sentence and removal of the criminal record from him/her, but no such incentives for early release are provided for persons sentenced to restriction of liberty. Those sentenced to a suspended sentence and restriction of liberty are almost in the same conditions. The legal restrictions and obligations provided for in Part 5 of Article 73 of the Criminal Code of the Russian Federation in relation to a conditionally convicted person and Part 1 of Article 53 of the Criminal Code in relation to those sentenced to restriction of liberty are similar in nature and scope. Therefore, from our point of view, those sentenced to restriction of freedom are unreasonably deprived of the opportunity to be released early.

In the Republic of Belarus, in contrast to the Russian Federation, conditional early release is applicable to persons serving sentences in the form of deprivation of the right to hold certain positions or engage in certain activities, correctional labor, restrictions on military service, restrictions on freedom [22, p. 203].

Soviet scientists-penitentiaries insisted on the early release of persons in respect of whom criminal punishment goals had been achieved. Thus, B. S. Utevskii notes that a convict serving to forced labor strengthens character traits and skills that help attract him/her to work, deter him/her from commit-

ting further crimes, and raise his/her overall development level. But this task can be solved even before the expiration of the term appointed by the court [23, p. 5].

The convict's desire for early release is fully correlated with the provisions of the goal-setting theory, the developer of which is the American psychologist E. Locke [24]. Considering conclusions of this theory within the framework of the problem to stimulate law-abiding behavior of convicts, it can be predicted that if early release is the final goal for a person subjected to punishment, then all his/her behavior will be determined by the stated goal, and, accordingly, we can expect it to be exceptionally positive.

In our opinion, conditional release implies the mandatory presence of restrictions and prohibitions imposed on a person after his/her early release from punishment. Taking into account the nature of conditional release, those sentenced to restriction of their freedom will again be monitored by penal enforcement authorities, possibly with a set of lesser restrictions and prohibitions. In case of evasion of the duties assigned to the released person or commission of an administrative offense that encroaches on the public order, the inspection is entitled to send the court a submission about cancellation of conditional early release and execution of the unserved part of the punishment in the form of restriction of freedom. If a released person commits a grave or especially grave crime, the unserved part of the punishment in the form of restriction of freedom will be added to the punishment imposed by a new court verdict. These guarantees will serve as a means of preventing commission of violations and will have a greater impact on a released person.

M. Hamilton argues that when assessing risks of committing repeat crimes in the future, the court does not take into account rehabilitation successes, that is, the defendant's achievements associated with past criminal behavior (restoration of damage caused by his/her actions, performing socially useful work, presence of offenses, etc.) [25, p. 130–132]. It seems reasonable that such findings can be relevant not only for assessing recidivism risks, but also for making a decision on conditional early release from punishment of those sentenced to restriction of liberty. The researcher, analyzing dynamic risk factors of repeated offenses, touches on the problem of consolidating positive efforts of convicts who cease to resist correctional influence registered by the probation service. Such consolidation consists in reward, which, in turn, also helps some people to cope with a sense of guilt suppressing their will and reduce risks of repeat crime, and also encourages convicts to re-evaluate their past and stop identifying themselves with destructive elements, gives them faith that a person can change over time. In the longer term, it is also a successful reintegration of the convicted person into society, but it all starts with the application of the least amount of encouragement to him/her.

An incentive measure in the form of early release should be applied to convicts serving restriction of liberty exclusively as the main type of punishment. At the same time, it is reasonable to establish a formal condition for release, such as actual completion of at least half of the sentence imposed by the court, and for minors – at least one third of the sentence due to their individual psychological characteristics of personality development. It is rational to determine a six-month minimum term for adult convicts and a three-month term for minors, after serving which parole will be possible, since employees of criminal executive inspections require a certain amount of time to study convicts' identity and degree of their correction.

In general, the application of the most significant incentive measure in the form of early release to persons sentenced to restriction of liberty should be considered as an effective means of stimulating law-abiding behavior that can have an effective educational impact, as well as ensure achievement of the goals of correction and prevention of crimes among this category of convicts.

Penalties are another side of disciplinary impact on those sentenced to restriction of liberty. In accordance with Part 2 of Article 58 of the Penal Code of the Russian Federation, in case a convicted person violates the order and conditions of serving a sentence in the form of restriction of freedom, an inspection officer imposes disciplinary punishment

in the form of a warning. If a convicted person commits any of the violations listed in Part 1 of Article 58 of the Penal Code of the Russian Federation within one year after the issuance of the warning, then the inspection applies to him/her a measure of punishment in the form of an official warning about the inadmissibility of violating the restrictions established by the court.

According to the FSIN-1 Report, the following disciplinary practice of those sentenced to restriction of freedom has developed in recent years: in 2018, 23,541 convicts violated the order and conditions of serving their sentences (61.35% of the total number of those sentenced to restriction of freedom registered with the criminal executive inspection as of the end of the year); in 2019 – 24,825 people (64.04%); in 2020 – 24,343 people (63.13%), and in 2021 – 24,014 people (64.95%). In addition, in 2018, 22,412 persons sentenced to restriction of liberty had a warning or an official warning, in 2019 – 23,536, in 2020 – 23,143, and in 2021 – 22,795. Thus, the proportion of persons who violated the order and conditions of serving their sentences among convicted persons registered with the criminal executive inspections always exceeded 60% at the end of the year, which indicates increased crime commission risks among this category of persons. In the above statistics, we see insignificant annual differences in the number of convicts subjected to disciplinary punishment. This fact also indicates almost unchanged indicators for disciplinary misconduct among registered persons since 2018.

The above situation is partly triggered by the existence of certain flaws in the legal mechanism for bringing those sentenced to restriction of liberty to disciplinary liability. In accordance with Paragraph "a" of Part 4 of Article 58 of the Criminal Code of the Russian Federation, a person sentenced to restriction of liberty is recognized as maliciously evading serving a sentence if, within one year after the application of a penalty in the form of an official warning, he/she again violates the order and conditions of serving a sentence. This circumstance serves as the basis for the inspection employee to send the court a submission about replacement of restriction of liberty with forced labor or imprisonment (Part 5 of Article 58 of the Penal Code of the Russian Federation). The difficulty lies in the fact that if the court refuses to satisfy this submission, no other stricter disciplinary measures can be imposed on him/her according to the penal legislation.

As a result, a deadlock situation develops when employees cannot impose a penalty on the convicted person who is recognized as maliciously evading serving a sentence if he/she again commits violations. In practice, this problem is solved by receiving an explanatory note from the person who has again violated the order and conditions of serving a sentence, and by sending another submission to the court to replace the unserved part of the punishment in the form of restriction of freedom with forced labor or imprisonment.

Moreover, Part 4 of Article 59 of the Penal Code of the Russian Federation prescribes to consider a convicted person as having no penalty if a new penalty is not applied within one year from the date of its imposition and, accordingly, in this case, a person maliciously evading from serving a sentence in the form of restriction of freedom will be no longer considered as such. So, we will dwell on the following situation: in January 2021, a penalty in the form of an official warning was applied to the convicted person, and in December 2021, he violated the order and conditions of serving his sentence. In this regard, the inspection sent a submission to the court to replace the unserved part of the punishment in the form of restriction of liberty with forced labor or imprisonment. The court issued a decision to refuse it; hence, from January 2022, this convict was considered to have no penalties according to Part 4 of Article 59 of the Penal Code of the Russian Federation.

Court decisions on the refusal to satisfy submissions on the replacement of the unserved part of the punishment in the form of restriction of freedom with forced labor or imprisonment may have two groups of reasons: 1) presence of certain shortcomings in the application of penalties and interpretation of the penal legislation regarding the recognition of the convicted person as a malicious evader from serving a sentence; 2) the court's subjective perception of the inexpediency of replacing the sentence at the moment and the need to give a convicted person the opportunity to improve within the framework of serving a sentence not related to deprivation

of liberty, that is, to give him/her a second chance. Additionally, in such cases, the court may motivate its decision by various difficult life circumstances of the convicted person.

Here is an example from judicial practice concerning the first group of reasons. The head of the Dimitrovgrad Branch of the Criminal Executive Inspection of the Federal Penitentiary Service of the Russian Federation in the Ulyanovsk Oblast filed a submission to the court to replace the unserved part of the punishment in the form of restriction of liberty with imprisonment. The court concluded that there were no grounds for recognizing G. maliciously evading from serving a sentence in the form of restriction of liberty, since the convicted person, after issuing him an official warning, committed an administrative offense that affects public safety, and not the public order. After the official warning was issued, he committed an administrative offense under Part 1 of Article 20.6.1 of the Administrative Code of the Russian Federation, which was not disputed by the convict. The court found that the above circumstances were not grounds for satisfying the submission of the inspection, since, according to Paragraph "d" of Part 1 of Article 58 of the Penal Code of the Russian Federation, violations of the order and conditions of serving a sentence in the form of restriction of liberty include the commission not of any administrative offense, but related to the public order violation, for which the convicted person was brought to administrative liability (Decision of the Dimitrovgrad City Court of the Ulyanovsk Oblast of June 10, 2021 in case No. 22-64/2021).

Another situation illustrates reasons for the courts' refusal to satisfy the submission of replacing the unserved part of the punishment in the form of restriction of liberty with deprivation of liberty. The head of the Krasnokamsk District Branch of the Criminal Executive Inspection of the Main Directorate of the Federal Penitentiary Service in Perm Krai sent the court a submission to replace an unserved term of restriction of liberty of the convicted A. with imprisonment.

As follows from the court decision under consideration, A. on April 20, 2017 was brought to administrative liability under Article 20.21 of the Code of Administrative Procedure of the Russian Federation, for which the inspection issued a warning to the convict. During the period from July 8 to July 14, 2017, A. was not at his place of residence, in connection with which, by the decision of the inspection, this period was not included in the term of the sentence served. By the Resolution of the Krasnokamsk City Court of Perm Krai of July 21, 2017 Zh., was imposed an additional restriction "not to leave the place of residence from 21:00 to 06:00 o'clock". Meanwhile, on July 21, 2017, Zh. again committed an administrative offense under Article 20.21 of the Administrative Code of the Russian Federation, for which he was given an official warning. On October 20, 2017, Zh. was not at his place of residence, thereby violating the obligation imputed to him, which, together with previously committed violations, became the basis for sending a submission to the court to replace the remaining part of the restriction of liberty with deprivation of liberty.

The Court, having taken into account the information about the identity of the convicted person, in particular the presence of a disease and disability of Group 3, as well as two young children, decided to refuse to satisfy the submission of the criminal executive inspection. Thus, despite the actual establishment of all the grounds provided by law for replacing the unserved part of the punishment in the form of restriction of liberty with deprivation of liberty, the court did not satisfy the submission (Resolution of the Krasnokamsk District Court of Perm Krai of December 13, 2017 in case No. 22-457/2017).

In this regard, in order to further influence persons in respect of whom court decisions based on the second group of reasons were made, it seems appropriate to fix the provision of the Penal Code of the Russian Federation stipulating official granting of the convicted person the status of maliciously evading punishment. He/she will have this status until the repayment or removal of all penalties imposed on him/her. If, after the court's refusal to satisfy the submission to replace the unserved part of punishment in the form of restriction of liberty with forced labor or imprisonment, a convict again violates the order and conditions of serving a sentence, it will be the basis for sending another submission of replacing the unserved term of punishment in the form of restriction of liberty with forced labor or imprisonment.

In order to implement such a legal structure to promote law-abiding behavior of persons sentenced to restriction of liberty, it is proposed to formally endow a person with the status of maliciously evading punishment simultaneously with sending to the court the submission of replacing the unserved part of the punishment with a more severe one. Thus, as established by the current legislation, after the first violation, a penalty in the form of a warning is imposed. If a person commits a violation again within a year after the warning is issued, then a penalty in the form of an official warning is imposed on him/her. After a new violation has been committed within one year by a person who has an official warning, a resolution is issued by the head of the criminal executive inspection on the recognition of the convicted person maliciously evading from serving a sentence and a penalty in the form of an official warning is imposed. In turn, this fact obliges the inspection to send to the court a submission to replace the unserved part of the punishment in the form of restriction of liberty with forced labor or imprisonment.

These changes in the law will prevent impunity in case the court refuses to replace the unserved part of the punishment in the form of restriction of liberty with forced labor or imprisonment. It should be noted that one of the arguments for making these changes to the current penal legislation is that, according to Part 4 of Article 116 of the Penal Code of the Russian Federation, a person sentenced to imprisonment is recognized as a malicious violator of the established procedure for serving a sentence by a resolution of the head of a correctional institution on the recommendation of the correctional institution administration simultaneously with the imposition of a penalty. Moreover, if the head of the correctional institution issued a resolution recognizing a convicted person as a malicious violator of the established procedure for serving a sentence, then a convict maintains this status up to the moment of release, since no norms of the Penal Code of the Russian Federation fix the procedure for terminating this status in the process of serving a sentence. This circumstance is regularly discussed in scientific works on penological topics [26, p. 65].

Consequently, a person sentenced to restriction of liberty should be recognized as maliciously evading serving a sentence and imposed a penalty in the form of an official warning. In this regard, it is advisable to supplement Part 4.1 of Article 58 of the Penal Code of the Russian Federation as follows: “a convicted person is recognized as maliciously evading from serving a sentence in the form of restriction of liberty by a resolution of the head of the inspection, is imposed a penalty in the form of an official warning and maintains this status until all penalties are lifted or extinguished”. At the same time, if restriction of liberty is appointed as an additional type of punishment, then a convicted person, recognized in accordance with the established procedure as maliciously evading serving a sentence, is subject to criminal liability under Part 1 of Article 314 of the Criminal Code of the Russian Federation.

Conclusion

For a long time, the Russian legislator, in the aspect of the educational impact exerted on convicts, made a bias towards the institution of deprivation of liberty. Alternative types of punishments did not receive due attention in terms of the development of disciplinary practice. Meanwhile, incentives and restrictions are important for correction of convicts, regardless of the degree of rights and freedoms restriction. Despite the very fact of conviction, specific circumstances improving or worsening convicts’ situation are still most effective. This is easily explained by the well-known statement of K. Marx and F. Engels that “being determines consciousness” [7, p. 491]. Only real things of objective reality are able to influence behavior of wards of criminal executive inspections.

Restriction of liberty and a suspended sentence are essentially similar legal institutions and can be considered together in the aspect of applying measures to convicts to encourage law-abiding behavior. Undoubtedly, incentives not only stimulate social activity (compliance with the established rules of serving a sentence or criminal law measures, fulfillment of duties imposed by the court, participation in educational activities, etc.), but also contribute to correction and resocialization of convicts. In contrast to incentive measures, there are penalties, the application of which should also be balanced, objective and justified. Therefore, the system of disciplinary measures should give law enforcement the opportunity to choose a method of en-

couraging or bringing to disciplinary liability that corresponds to behavior of the convicted person. The progressive process of their application trigger achievement of punishment goals and exclude the possibility of avoiding liability in the case of non-compliance with the regulations.

Our research has revealed a number of gaps among disciplinary measures exerted on those sentenced to a suspended sentence and those sentenced to restriction of liberty. So, we propose the following:

– to supplement Part 1.1 of Article 74 of the Criminal Code of the Russian Federation as follows: "if a convict serving a suspended sentence has been assigned an additional type of punishment and, before the expiration of the probation period, he/she has proved his/her correction by his/her behavior, fulfilling the requirements provided for in Part 1 of this article, and has also served at least half of the term of the additional type of punishment, then the court, at the suggestion of the body exercising control over behavior of a conditionally convicted person, may decide on the cancellation of a suspended sentence and removal of the criminal record from a convicted person with exemption from an additional type of punishment. At the same time, if an additional penalty is imposed on a conditionally convicted person in the form of a fine, then a suspended sentence can be canceled only if the fine is paid in full". At the same time, it will be necessary to amend Article 86 of the Criminal Code of the Russian Federation to eliminate contradictions related to the current procedure for repayment of the criminal record of a person sentenced to a milder punishment than deprivation of liberty;

– to establish in the penal legislation the opportunity to be released on parole for convicts serving restriction of liberty as the main type of punishment. At the same time, it seems important to establish a formal basis for parole for those sentenced to restriction of liberty in the form of actual serving at least half of the sentence imposed by the court, and for minors – at least one third of the sentence;

– supplement Article 58 of the Penal Code of the Russian Federation with Part 4.1 stipulating that "a convicted person is recognized as maliciously evading from serving a sentence in the form of restriction of liberty by a resolution of the head of the inspection, is imposed a penalty in the form of an official warning and maintains this status until removal or repayment of all penalties".

REFERENCES

1. Garofalo R. Criminologia. Torino, 1891. 270 p.
2. Bekkaria Ch. On crimes and punishments. New York, 2009. 151 p.
3. Simonov Yu.I. Diary of a trip to England: studying probation. Available at: https://yvision.kz/post/772565 (In Russ.). (Accessed August 15, 2021).
4. Dyad'kin D.S. Competition of the norms on the imposition of punishment in the form of restriction of freedom with the norms on a suspended sentence. Ugolovnoe pravo = Criminal Law, 2010, no. 3, pp. 34–37. (In Russ.).
5. Zhizhilenko A.A. Draft law of the Minister of Justice on conditional imprisonment. Pravo = Law, 1907, no. 16–17, pp. 1,187–1,199. (In Russ.).
6. Karpets I.I. Individualizatsiya nakazaniya [Individualization of punishment]. Moscow, 1962. 152 p.
7. Kravets Yu.P. Uslovnoe osuzhdenie po sovetskomu ugolovnomu pravu: avtoref. dis. … kand. yurid. nauk [Conditional conviction under Soviet criminal law: dissertation abstract]. Moscow, 1991. 24 p.
8. Yakubovich M.I. On the legal nature of conditional conviction. Sovetskoe gosudarstvo i pravo = Soviet State and Law, 1946, no. 11–12, pp. 55–59. (In Russ.).
9. Chornyi V.N. Distsiplinarnaya praktika i distsiplinarnye mery v tyur'makh evropeiskikh gosudarstv: analit. obzor [Disciplinary practice and disciplinary measures in prisons of European states: analytical review]. Ryazan, 2014. 47 p.
10. Sizaya E.A. The principle of rational application of measures of coercion, means of correction of convicts and stimulation of their law-abiding behavior. Zakon i pravo = Law and Legislation,2008, no. 7, pp. 47–49. (In Russ.).
11. Rossiiskoe ugolovnoe pravo: kurs lektsii: v 2 t. T. 2. [Russian criminal law: course of lectures: in 2 volumes. Volume 2]. Ed. by Korobeev A.I. Vladivostok, 1999. 572 p.
12. Medvedev E.V. Funktsii ugolovnogo prava i mery ugolovno-pravovogo vozdeistviya kak sredstva ikh realizatsii: monogr. [Functions of criminal law and measures of criminal legal

impact as a means of their implementation: monograph]. Ulyanovsk, 2020. 384 p.
13. Whitehead P. Thompson J. Knowledge and the probation service: raising standards for trainees, assessors and practitioners. New Jersey, 2004. 240 p.
14. Serebrennikova A.V. Conditional conviction in criminal codecs of Austria and Switzerland. Soyuz kriminalistov i kriminologov = Union of Criminolists and Criminologists, 2018, no. 2, pp. 15–155. (In Russ.).
15. Leibrich J. Straight to the point: angles on giving up crime. Dunedin, 1993. 312 p.
16. Doherty F. Obey all laws and be good: probation and the meaning of recidivism. Georgetown Law Journal, 2016, vol. 104, pp. 291–354.
17. Ob utverzhdenii Instruktsii po organizatsii ispolneniya nakaza-nii i mer ugolovno-pravovogo kharaktera bez izolyatsii ot obshchestva: prikaz Minyusta Rossii ot 20.05.2009 № 142 [The Rules on organizing execution of punishments and measures of a criminal-legal nature without isolation from society, approved by the Order of the Ministry of Justice of the Russian Federation No. 142 of May 20, 2009]. Access from the reference legal system "Garant".
18. Chernenko T.G. Some problematic issues of calculating the terms of criminal record. Vestnik Tomskogo gosudarstvennogo universiteta. Pravo = Tomsk State University Journal of Law, 2020, no. 36, pp. 126–135. (In Russ.).
19. Ispolnenie ugolovnogo nakazaniya v vide ogranicheniya svobody: ucheb. posobie [Execution of criminal punishment in the form of restriction of freedom: manual]. Ed. by Potapov A.M. Vologda, 2018. 133 p.
20. Khan A. Probation and parole system: a case study of Pakistan. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256316 (accessed April 25, 2021).
21. Fernando R. Desistance from crime and probation supervision: comparing experiences of English and French probationers. Probation Journal, 2021, vol. 68, no. 1, pp. 224–242.
22. Tit A.A. Legal nature of parole in the criminal legislation of the Russian Federation and the Republic of Belarus. Vestnik Moskovskogo universiteta MVD Rossii = Vestnik of Moscow University of the Ministry of Internal Affairs of Russia, 2017, no. 5, pp. 202–206. (In Russ.).
23. Utevskii B.S. Dosrochnoe osvobozhdenie i amnistiya [Early release and amnesty]. Moscow, 1927. 68 p. (In Russ.).
24. Locke E.A., Latham G.P., Smith K.J., Wood R.E. A theory of goal setting and task performance. New Jersey, 1990. 413 p.
25. Hamilton M. Back to the future: the influence of criminal history on risk assessment. Berkeley Journal of Criminal Law, pp. 76–133. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555878 (accessed January 26, 2021).
26. Novikov E.E. Actual problems of legal regulation of the application of penalties in correctional institutions. Vestnik Kuzbasskogo instituta = Bulletin of the Kuzbass Institute, 2016, no. 2, pp. 59–67. (In Russ.).
27. Engels F., Marx K. Sochineniya T. 12. Ch. 1: K kritike politicheskoi ekonomii [Essays. Volume 12. Part 1: For a Critique of the Political Economy]. Moscow, 1935. 771 p.

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