

Research article

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Rationality of Coercion as a Principle to Regulate Execution of Prison Sentences

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Abstract

Introduction: the article discusses the regulatory framework and practice of implementing a principle of rational use of coercive measures enshrined in Article 8 of the Penal Enforcement Code of the Russian Federation. Ambiguity of its understanding is noted in the theory of penal enforcement law. *Research:* using a systematic approach as a methodological basis, the author substantiates that this principle is not reduced to the economy of coercion, but assumes its necessity and sufficiency in specific conditions of penal enforcement activity. Singling out penalties from the entire system of coercive measures, the author simultaneously identifies subsystems of disciplinary (penal enforcement) and criminal liability of convicts in places of deprivation of liberty. They, in turn, can be studied as model systems enshrined in the law, and systems of measures implemented in practice. Using the published data of departmental statistics of the Federal Penitentiary Service as arguments, the author shows that both systems in the enforcement of imprisonment do not fully achieve their goals, and therefore the principle of rationality of coercion is not implemented effectively enough. *Conclusions:* it is proposed to change the name and content of Article 321 of the Criminal Code of the Russian Federation to “Systematic malicious violations of the established procedure for serving a sentence” and amend its content. At the same time, a list of malicious violations of the order of serving a sentence established in Part 1 and Part 2 of Article 116 of the Penal Enforcement Code of the Russian Federation should be revised; an intermediate category of major violations should be introduced and a repeated mere violation should be excluded from their number of malicious ones. In addition, a head of the institution should be entitled not to recognize a violation as malicious when a convicted person commits an act provided for in Part 1 of Article 116 of the Penal Enforcement Code, depending on circumstances of the case and identity of the culprit.

Key words: penitentiary law and order, rationality of coercion, penitentiary liability.

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Article 8 of the Penal Enforcement Code of the Russian Federation establishes a principle of rational use of coercive measures. It

is noteworthy that there is a contradiction in the text of this article: its name speaks about principles of legislation, and the content – about a law enforcement principle.

In addition, regulatory and legal bases of penal enforcement activities are not reduced only to penal enforcement legislation (the Code and other federal laws). It is necessary to keep in mind other regulatory legal acts on the execution of punishments (Article 4 of the Penal Enforcement Code). In this regard, in theoretical, rule-making and law enforcement aspects, it is more accurate to understand this and other principles fixed in Article 8 as principles of penal enforcement legal regulation. This position was previously justified by the author in the collective monograph devoted to a theoretical model of the General Part of the amended Penal Enforcement Code of the Russian Federation [8, pp. 64–65]. Taking into account the above, this principle should be considered as the one of rationality of coercion.

In the theory of penal enforcement law, there is still no proper certainty whether this principle is independent or constitutes the content of other principles; what is its relationship with principles of legality, humanism, differentiation and individualization of the execution of punishments, stimulation of law-abiding behavior of convicts, etc. [21, pp. 80–82]. Some researchers believe that the principle of rational use of coercive measures should be replaced by a general legal principle of incentives [18, pp. 168–173]. It is hardly possible to agree with this, because proposed generalization does not reflect two opposite vectors of incentives: positive (encouragement) and negative (sanctions and other coercive measures). We cannot but consider the specifics of such a voluminous and multifaceted sphere of coercion as execution of punishment, which by definition (Article 43 of the Criminal Code of the Russian Federation) is a state coercion measure itself, in particular, deprivation of liberty. Correct understanding of the principle of rationality of coercion as the one of penal enforcement regulation is critical not only for rule-making, but also for accurate organization of penal enforcement activities, formation of professional mentality of employees of the penal enforcement system and its correct perception by society.

S.N. Smirnov considers rationality as a single principle of using coercive measures and convict correction means and describes it as “reasonableness, rationality, expediency”

[15, pp. 54–56]. However, it hardly clarifies its specific content, as all means of influencing convicts should be reasonable and expedient. The author’s reference to necessary sufficiency of all measures as a criterion of rationality of the latter just testifies to impossible use of the principle as a single means of correction and stimulation for convicts. After all, the vectors considered from such positions and intensity of these means are directly opposite: with positive development of the convict’s personality, the degree of coercion against him/her should decrease, and non-punitive corrective effect should expand. On the contrary, changes for the worse require the use of stricter coercive measures, which in turn narrow possibilities of positive corrective action [19, pp. 134–138].

Undoubtedly, that the most important component of the principle of rationality of coercion is its economy. According to N.I. Lankin, it is more correct to consider this principle as a principle of economy of coercive means (economy of repression) [5, p. 49]. Agreeing with the term “economy” itself in this context, we would like to clarify that economy of repression in the penal sphere is not identical to economy of coercion. The latter is much broader: it should permeate the entire complex of compulsory measures fixed by the penal enforcement legislation. These are measures expressing a degree and quality of isolation of convicts (their placement, detention conditions, number of parcels permitted, etc.), penalties (Articles 115-117, 136 of the Penal Enforcement Code of the Russian Federation, etc.), security measures (Articles 82,85,86 of the Penal Enforcement Code, Chapter 5 of the Law of the Russian Federation of July 21, 1993 “On institutions and bodies executing criminal penalties in the form of imprisonment”). The latter are often defined as instruments of restraint in international acts.

Rules and principles of their application are determined, in particular, by the UN Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) adopted in 2015. Article 36 of the Rules states that “discipline and order should be maintained by introducing only those restrictions that are necessary to ensure reliability of supervision, safe functioning of the prison institution and compli-

ance with proper rules of a dormitory". At the same time, "instruments of restraint must not be applied for any longer time than is strictly necessary, patterns and manner of use of instruments of restraint shall be the least harsh of those that are necessary (emphasis added) and reasonably applicable, and they should be removed as soon as possible after the risks ... cease to exist" (Article 48).

Requirements of economy of coercion are relevant not only in relation to security measures, but also to changing imprisonment conditions, as well as penalties applied to convicts. The Nelson Mandela Rules instruct the institution administration to ensure "proportionality of disciplinary punishment and violations" (Article 39), never use "instruments of restraint as punishment for disciplinary violations" (Article 43), and use solitary confinement only as a last resort and for the shortest possible time (Article 45).

We should mention an important specific criterion of rationality of coercion when depriving liberty, such as economy of coercive means both in the field of liability and security measures. This aspect has become a theoretical basis for formulating a principle of economy of coercion by the author in the mentioned Theoretical model of the General Part of the amended Penal Enforcement Code of the Russian Federation. Draft Article 19 stipulates that, first, "coercion in the execution of criminal penalties and other measures of a criminal legal nature is justified only when other forms of treatment and control are ineffective or are assumed to be as such with regard to the level and nature of actual or possible unlawful behavior of the convicted person and risks that arise". Part 2 of the Article under study states that "stricter coercive measures are justified only when less stringent ones do not give results". Finally, Part 3 of Article 19 discloses that "instruments of restraint are used only for the time required" [8, p. 83].

Nevertheless, it does not follow from what has been said that economy of coercion is the only criterion of its rationality. Here it seems very constructive to analyze all legal coercive measures in the sphere of imprisonment execution as an integral complex, a certain system of law enforcement (regime) in correctional institutions, consisting, among other

things, of a legal liability subsystem. The latter, in turn, consists of a subsystem of disciplinary liability measures and a subsystem of criminal liability measures of convicts. Due to the limited scope of this article, it is liability measures that will be the subject of further consideration.

Among other philosophical interpretations, the most valuable is the so-called target methodological approach, which received a detailed justification in the works of V.N. Sagatovskii and others [17, pp. 73–75; 10, 69–75]. The system is considered as an object whose actions to achieve the goal are ensured by the construction of this object, that is, by totality of its necessary and sufficient elements that are in certain relationships. In this regard, integrity of any system is determined by its ability to achieve certain goals. When applying this variant of a systematic approach to public life (and to legal phenomena as well), the terms "goal" and "task" differ only in varying degrees of concretization. At least two aspects of the systemic approach are theoretically possible in this field: descriptive (isolation of systems from the whole variety of existing objects and constructive (construction of systems with specified goals and external conditions) [16, p. 72].

Necessity and sufficiency of system's elements are its defining properties. Opposite characteristics will be their redundancy or insufficiency that reduce or completely eliminate system qualities of the object. It is clear that the degree of necessary sufficiency can be more or less reasonably assessed only with regard to objectives of the system and totality of existing external conditions (factors).

These seemingly abstract philosophical judgments can be used as a methodology for scientific analysis of consistency between coercive measures in general and legal liability measures of convicts in particular. In turn, such consistency is a necessary condition for rationality of coercive measures.

To start with, we should consider the issue of objectives of the legal liability measures system. It is necessary to distinguish between effectiveness of norms and effectiveness of measures based on them. Therefore, two interrelated aspects are obvious here. First, it is a system of liability measures, which the state

actually applies to execute penal enforcement (disciplinary) and criminal law enforcement. Second, it is a legal model fixed in the law. For the latter, the goal is obviously its full and consistent implementation in law enforcement. The purpose of the system of coercive measures as a set of measures actually used by the state is usually considered as provision of law and order in institutions, and “prevention of prison offenses” [11, p. 4–5]. In our opinion, a deeper level of understanding of the issue presumes provision of a legal punishment measure (quantitative-qualitative characteristics) that is adequate to the state, structure and dynamics of crimes committed in a penitentiary institution and typical personality traits of individual groups of prison offenders.

In literature considerable attention is paid to typical characteristics of offenders committed crime in penitentiary institutions [11, pp. 39–41; 9, pp. 70–102; 2, pp. 59–99] therefore, we will focus on prison offenses within the framework of this article.

It is known that, in recent years the total number of convicts in Russian correctional facilities has been steadily decreasing. If in 2016 it was 480,039 people, then as of July 1, 2021 it decreased by 30 percent, up to 341,335 people. Reduction in the use of real deprivation of liberty naturally led to deterioration of the composition of convicts in correctional institutions, due to a greater number of those convicted of serious and especially serious crimes, as well as those previously convicted. In 2015, the share of such persons among those sentenced to imprisonment was 60%, in 2017 – 62.5%, and in 2018 – 65.6% [3, p. 46].

Data of departmental statistics of the Federal Penitentiary Service of the Russian Federation reveal that, in 2020, in penitentiary institutions the crime rate showed an upward trend and amounted to 2.59 per 1,000 people (in 2019 – 2.19). A total of 1,184 crimes were registered. At the same time, the number of registered “specially considered” crimes decreased by 17.8% (from 45 in 2019 to 37 in 2020). For the first 6 months of 2021 alone, 561 crimes had been registered in places of deprivation of liberty, with the largest part of them (413) – in correctional facilities.

At the same time, there is no information in the available departmental statistics about

crimes, such as causing violence against a representative of the authorities (Article 318 of the Criminal Code of the Russian Federation) and disorganization of the activities of institutions providing isolation from society (Article 321 of the Criminal Code of the Russian Federation), not to mention that these crimes are now generally excluded from the category “specially considered”.

Dissolution of such acts in the group “other crimes” leads to the increase in their latency and hinders conduct of adequate criminological analysis of the operational situation in correctional institutions and purposeful fight against them. It was noted that crimes under Article 321 of the Criminal Code of the Russian Federation account for 18% of the structure of penitentiary crime and their number is increasing [11, p. 19]. According to the data published earlier, the change in the number of crimes qualified under Part 3 of Article 321 of the Criminal Code of the Russian Federation has no clear trend (in 2016 – 8, in 2017 – 6, in 2018 – 13, in 2019 – 17, in 2020 – 13) [7, p. 354]. Ultimately, there is certain discrepancy between the data on the state of crime in the penal system and information about violations of the order and conditions of serving a sentence (regime).

According to statistics, for the 1st half of 2021, the rate of convicts’ regime violations compared to the same period in 2020 per 1,000 convicts had gone up by 6% and amounted to 782. The rate of malicious regime violations per 1,000 convicts accounted for 26, and in correctional facilities it increased by 26%. In January–June 2021, 276,972 regime violations were committed by convicts in correctional facilities, including 9,000 malicious ones. Among the latter, it was manufacture, storage or transfer of prohibited items (4,163), followed by repeated violation committed during the year (2,921). Job refusals closed the top three (1,005). Threat, disobedience to or insult of institution administration representatives (719) were also widespread. During the specified period, 192 cases of such violence were recorded, including 68 with injury to health; employees used special means and gas weapons against convicts 4,986 times.

Other malicious violations of the order and conditions of serving a sentence, fixed in Part 1 of Article 116 of the Penal Enforcement

Code of the Russian Federation, are reflected extremely sparingly in the disciplinary practice of correctional colonies, but their comparison with results of operational regime activities discloses a high degree of their latency (including artificially created).

In the first half of 2021, among 80,488 convicts who were on the watch list, 8,683 were prone to the use of alcoholic beverages, narcotic and psychotropic substances. During this period, 15,715 liters of artisanal alcoholic beverages and 4,800 liters of industrial production ones were confiscated in institutions. However, only 111 malicious violations, such as the use of alcoholic beverages or narcotic drugs or psychotropic substances were recorded.

At the end of the 1st half of 2021, among those on the watch list 955 people were “leaders and active participants of criminal groups”, 1,343 – “organizing and provoking group counteractions to legitimate demands of the administration”, 986 – serving sentences for disorganizing activities of correctional institutions and mass riots. At the same time, not a single fact of preparing strikes or other group disobedience, as well as organizing groups of convicts aimed at committing malicious violations was indicated in the departmental statistics of malicious violations.

In the first half of 2020, 197 convicts who were recognized as requiring compulsory treatment were on the watch list of correctional facilities. However, not a single case of convicts’ evasion from such treatment was recorded among malicious violations in the same period.

Against this background, the situation is worrisome: in the totality of malicious violations of the order and conditions of serving sentences reflected in departmental statistics, the provisions of Part 2 of Article 116 of the Penal Enforcement Code are gradually beginning to prevail: repeated mere violations during the year. Unfortunately, statistics of the Federal Penitentiary Service of Russian Federation does not reflect the structure of this population.

Incorporating a specific list of malicious regime violations in Part 1 of Article 116 of the Penal Enforcement Code of the Russian Federation was reasonably regarded as a way to reduce arbitrary discretion of the correctional

institution administration in the application of the most severe disciplinary penalties [4, pp. 306–307]. Part 2 of this Article was considered as a kind of forced exception. Now this exception has actually turned into a rule: out of 9,000 malicious violations registered in the first half of 2021, 2,921 (31.6%) were repeated mere violations.

Returning to model systems and systems of measures, it will be fair to conclude that the model system currently fixed in Part 1 of Article 116 of the Penal Enforcement Code in terms of malicious violation types does not achieve its goals, since the legal possibilities are insufficiently used in practice. In our opinion, this is also true for the system of penalties reflected in Article 115 of the Penal Enforcement Code of the Russian Federation. It begins with a reprimand (paragraph “a” of Part 1 of Article 115) and disciplinary fine (paragraph “b” of Part 1 of Article 115), which among the measures applied are not reflected in statistics of the RF Federal Penitentiary Service, where placement of convicts in an isolation cell (91%) predominates among penalties.

The rate of convicts’ regime violations grew by 8% in 2020 compared to 2019, and by 6% in the first half of 2021 compared to the same period of the previous year. The rate of malicious violations per 1,000 people amounted to 26 and 20, respectively, and in correctional facilities it increased by 29%. Paradoxically, but at the same time, both the total number of convicts recognized as malicious violators and the use of single-space ward-type rooms as a liability measure have been decreasing. If in 2016 22,310 convicts were recognized as malicious violators, then in 2017 there were 20,664 of them, in 2018 – 18,938, in 2020 - 17,370, and in the first half of 2021 – 16,340 people.

The average annual number of convicts in single-space ward-type rooms in 2016 was 2,092 people (approximately 50% of the limit), in 2018 – 1,685 (45%), in 2020 – 1,274 (35%), in the first half of 2021 – 1,224 (33%). As a result, it is difficult to explain the following: the total number of convicts in places of deprivation of liberty decreased by 30% in 2016–2021 (with deterioration in their quality), then the number of malicious violators declined by 42%. Thus, single-space ward-type rooms as one of the most acute legal penalties are now

used by barely a third, which also indicates insufficient effectiveness of the system of disciplinary sanctions provided for in the law and the procedure for their application.

Ultimately, considering this in terms of the systemic characteristic of necessary sufficiency, we should emphasize that the principle of rationality of coercion is not fully implemented in practice.

To a large extent, this is also true for another subsystem of liability measures – criminal liability. First of all, we are talking about the need for a certain amendment of Article 321 of the Criminal Code of the Russian Federation “Disorganization of the activities of institutions providing isolation from society”. According to the reasoned stance of many scientists and practitioners, its preventive potential is still far from being fully used.

Reasons for this are largely of a bureaucratic nature: in the specifics of statistical accounting (see the stated above), in reporting in the penal enforcement system. We cannot but consider Article 321 itself. To begin with, its name is unsuccessful and does not correspond to the *actus reus* of the act provided for in this article and degree of its completeness (giving rise, for example, to the question whether it is a formal *corpus delicti* or a material one). It also does not correspond to public danger of this act, clearly overestimating it. In this regard, we find it important to back the authors who believe that disorganization of a correctional institution’s activities is not included in objective elements of the crime, therefore, it is necessary to abandon the use of this term in the text of the criminal law [12, p. 7]. Proposals to consider disorganization as a significant goal of organized criminal groups [6, p. 14] can hardly be accepted due to impossibility of its reliable identification with the help of criminal procedural means.

History of the issue is an additional supporting point. As known, the Criminal Code of the RSFSR adopted in 1960 in the first years of its existence did not stipulate criminal liability for such acts. In that relatively short period, in such cases, Article 77 of the Criminal Code of the RSFSR (banditry) was actually used by analogy. Article 77 of the Criminal Code was in the Chapter “Other state crimes”. Only later, in 1962, Article 771 “Actions that disorganize

work of correctional labor institutions” was included in the Code, fixing liability of particularly dangerous repeat offenders and persons convicted of serious crimes. Article 771 was also in Chapter 2 “Other state crimes”, which indicated its high public danger.

But not all such wrongful acts could be qualified under Article 771 according to the degree of their danger, therefore it was proposed to supplement the Code with an article on criminal liability of convicted persons for malicious regime violations [14, p. 55]. But only twenty years later, in 1983, Article 1883 “Malicious disobedience to requirements of the correctional institution administration” was introduced into the Criminal Code. Convicts who have been transferred to a cell-type room (solitary cell) or to prison earlier in the year fall under this article. Part 2 of Article 1883 stipulated increased liability for particularly dangerous recidivists or convicted of serious crimes.

This offense, in contrast to the one provided for in Article 771, was in Chapter 8 “Crimes against justice”. Thus, this crime was still recognized as having less public danger than actions that disorganize work of penitentiary institutions.

When working out the 1996 Criminal Code of the Russian Federation, an article similar to Article 771 of the Criminal Code of the RSFSR was not included in the Code. However, its name was given to Article 321 of the Criminal Code in Chapter 32 “Crimes against the order of management”, replacing Article 1883 of the Criminal Code of the RSFSR. Such a symbiosis hardly contributed to proper realization of preventive capacities of Article 321 of the Criminal Code, creating a distorted idea of the degree of its public danger.

Conclusion

In our opinion, such an article could now be transformed into an article “Systematic malicious violations of the established procedure for serving a sentence”. We agree with Professor A.L. Remenson stating that “when malicious regime violations turn into a system, they acquire quality of public danger, and if other corrective actions taken by the penitentiary institution administration are unsuccessful, they should entail criminal liability” [13, p. 31].

Application of such a norm should be preceded by imposing a disciplinary penalty to

convicts within a year for a malicious violation of the established procedure for serving a sentence in the form of expulsion to ward-type rooms, single-space ward-type rooms, solitary cells. Thus, the proposed norm, obviously, on the one hand, will turn into a blank one, and on the other hand, it will assume the so-called criminal-executive prejudice. Consequently, its introduction into the Criminal Code is possible only in close connection with amendment of relevant provisions of the Penal Enforcement Code. In this regard, at first, Part 1 of Article 116 of the Penal Enforcement Code needs revision in the direction of reducing torts. It should fix only those violations that are really dangerous for the existing law and order in institutions, threaten security and manageability of detention places and reflect actual malice of violators. It is advisable, for example, to exclude from the number of malicious violations the convicts' refusal to work or their use of alcoholic beverages, if the latter is not associated with acts of a violent nature, petty hooliganism, etc. At the same time, the list of malicious violations should include convicts' commission of acts of self-mutilation or hunger strike in order to compel the administration to perform clearly illegal actions or terminate legal actions. For instance, Article 361 of the Criminal Code of the Republic of Kazakhstan provides for criminal liability of convicted persons for "committing an act of self-mutilation by a group of persons held in institutions providing isolation from society in order to destabilize normal activities of institutions or hinder legitimate activities of insti-

tution employees". Unfortunately, the degree of actual applicability of this norm is unknown to us.

Second, some of such violations can be differentiated into a separate intermediate group of major regime violations, which, on the one hand, could be grounds for application of penalties in the form of placement in ward-type rooms, and on the other hand, would not constitute the above-mentioned criminal-executive prejudice. A similar gradation of offenses committed in penitentiary institutions into minor, less grave, grave (malicious) and especially grave (especially malicious) has already been proposed in literature [20, p. 10–13; 21].

Third, repeated regime violation within one year should not be considered malicious, if for each of these violations the convicted person was subjected to punishment in the form of placement in a penal or disciplinary detention center, and it should be excluded from Article 116. If necessary, such a violation could be recognized as major.

Fourth, the head of an institution should be entitled not to recognize the violation as malicious, when a convicted person commits an act under Part 1 of Article 116 of the Penal Enforcement Code, depending on circumstances of the case and identity of the perpetrator.

Finally, it is necessary to strengthen non-departmental, including public control over placement of convicts in cell-type premises, thereby eliminating the ground for reproaches to the administration from some human rights defenders and convicts for a biased attitude towards the latter.

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