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COURT PRACTICE OF APPLICATION OF CRIMINAL LEGAL MEASURES FOR IMMEDIATE COMMITMENT OF A CRIMINAL OFFENSE

ABSTRACT

The article analyses the judicial practice of applying criminal-legal measures for the indirect execution of a criminal offense. It has been established that the courts take into account the fact of indirect execution of a criminal offense when characterizing the person of the culprit and determining his social danger, namely, appoint a more severe punishment from the list of alternatives or appoint a punishment above the lower limit. At the same time, the courts quite often exempt such persons from serving a probationary sentence. At the same time, general types of exemption from criminal liability are practically not applied. This is due to the fact that, in the vast majority, intentional acts are committed in this way - minor crimes, while the condition for applying many types of exemption from criminal liability is the commission of a careless minor criminal offense. Most often, the courts classify cases of the commission of a criminal offense by means of indirect execution using a minor under the relevant article of the Special Part of the Criminal Code of Ukraine and under Art. 304 of the Criminal Code of Ukraine as the involvement of minors in criminal and illegal activities. However, quite often it is also taken into account as a circumstance that aggravates the punishment, which is very controversial. In some cases, in the case of indirect execution of a criminal offense using a minor, the courts may consider this only as a circumstance that aggravates the punishment. In cases where a minor who is involved by a criminal in the performance of the objective side of the act understands the real nature of his actions, certain coercive measures of an educational nature can be applied to such a person. Such measures of a criminal legal nature, such as coercive measures of a medical nature, coercive treatment, or coercive measures of an educational nature in the case of indirect execution of a criminal offense do not have any differences from the general procedure for applying these measures to the guilty person.

Keywords: indirect execution of a criminal offense, measures of a criminal-legal nature, punishment

JEL Classification: I38, J17, J44, J53

INTRODUCTION

In the science of criminal law, there is no unanimous opinion either on the concept of measures of a criminal legal nature or on their system. Thus, A. M. Yashchenko conditionally divides such measures into three groups: 1) those related to punishment: punishment and its types, punishment, parole from serving the punishment; measures of criminal law regulation; 2) those not related to punishment: exemption from punishment and its serving, compulsory medical and educational measures, compulsory treatment; 3) those not related to criminal responsibility: circumstances that exclude the criminality of the act, exemption from criminal responsibility [11, p. 7–8]. M.I. understands the system of such measures somewhat differently. Havronyuk: 1) measures related to criminal responsibility (punishment, including taking into account positive post-criminal behavior), exemption from punishment; criminal record; 2) measures not related to criminal liability (types of exemption from criminal liability, coercive measures of an educational nature, coercive measures of a medical nature [10, p. 6].

Since a fairly large number of criminal offenses can be committed by the method of indirect execution, let's consider how this affects the application of a certain measure of a criminal law nature to the guilty person. First of all, let's pay attention to the issue of punishment.

The relevance of the study of the judicial practice of applying criminal-legal measures for the indirect execution of a criminal offense is due to the active development of theoretical and practical activities in the field of applying criminal-legal measures to legal entities, the emergence of new obligations of Ukraine as a subject of international law, the need to create scientifically based recommendations on the improvement of criminal law legislation.

LITERATURE REVIEW

In the science of criminal law, such scientists as Danchenko K. M. and Operuk V. I. investigated the problems of applying criminal-legal measures for the execution of a criminal offense [10]; I. V. Zhuk [11], Z. A. Zaginei [12], O. P. Kulikov [17], T. M. Malinovska [13], O. V. Us [18], O. S. Bondarenko, O. M. Reznik, M. O. Dumchikov [26] and others.

In particular, in the article by N.O. Antonyuk, the criteria for the impact on the increase in the public danger of a crime committed by several subjects or with the participation of several persons, the introduction of proposals to the current criminal law regarding the improvement of regulation and differentiation of criminal responsibility in the event of the commission of a crime by several persons [1]; A.O. Vinnyk's monograph reveals the state of research on special confiscation; its social conditioning is highlighted; the legal nature and place of special confiscation in the system of criminal legal norms, as well as the purpose, grounds and conditions of application are defined, and the author's definition of the concept of "special confiscation" is given, the need to exclude property confiscation from the penal system of Ukraine is substantiated, and a number of changes and additions to the current criminal law are proposed legislation [2]; Sopilko I. M., Lykhova S. Ya. and others. in their study, they set out the key provisions of the criminal law of Ukraine concerning the general principles of the qualification of criminal offenses and considered the disputed qualification issues and the proposed ways of solving them, having analyzed the practice of the courts, regarding the qualification of criminal offenses [17, pp. 4–5]; In his monograph, E. S. Nazimko studied the principles of the institution of juvenile punishment as starting points, basic ideas and principles of juvenile criminal law, which determine the essence, content and structure of this institution, taking into account the biosocial and psychophysiological features of the studied category of persons [14, pp. 7–8].

The example of I. A. Zinoviev indicates that depending on whether the act that forms the objective side of the crime was performed by one's own act or at the expense of another person's act, the following types of accomplices who committed it are distinguished: direct (physical) and mediated (intellectual). A direct (physical) accomplice who committed an act constituting an objective part of the crime is defined as an executor (co-perpetrator) who performed an act constituting an objective aspect of the crime by his own actions or inaction, and an indirect (intellectual) accomplice – as an executor (co-executor) who performed an act that constitutes an objective part of the crime, not by his own actions or inaction, but at the expense of the action of another person. In turn, indirect accomplices who performed an act that constitutes an objective part of the crime, depending on whether such an act was performed by using another person as a means of committing the crime or its execution was entrusted (delegated) to another person, are divided into the following types, as an executor (co-executor) who used another person as a means of committing a crime, and a fiduciary co-executor. A perpetrator (co-perpetrator) who used another person as a means of committing a crime is recognized as a person who, having the characteristics of the subject of a crime, used another person as a means of fulfilling the objective part of the crime committed in complicity, realizing that he, according to under the law is not subject to criminal liability or commits a crime due to negligence. In turn, a person who entrusted (delegated) the physical performance of an act that fully constitutes the objective side of the crime to another co-performer due to the impossibility or impracticality of its performance by all co-perpetrators is recognized as a fiduciary co-performer [21].

In this context, an interesting study was conducted by I.V. Zhuk. and found out that the institution of restrictive measures in criminal law, at first glance, is evaluated positively, because they are aimed at protecting the rights and interests of a person who suffered from domestic violence. At the same time, the analysis of the current legislation shows a significant similarity of restrictive measures with other measures of state coercion, which are applied to offenders. In this regard, a question may arise about the expediency and legal validity of the changes made to the criminal legislation, given the fact that such a multitude of existing restrictive measures can cause difficulties in the law enforcement process [13]. N. Parasyuk, for example, develops the problem even more deeply, pointing out that attention should be paid to the need to observe the appropriateness and justice of the criminal law influence in the process of humanizing life imprisonment. It is argued that excessive humanization of life imprisonment may lead to a decrease in the protective function of criminal legislation and the ability to prevent new criminal offenses. It was concluded that in the conditions of martial law, an

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increase in the number of crimes punishable by life imprisonment is recorded. The position is expressed that it should be recognized as socially determined to introduce the replacement of the punishment in the form of life imprisonment with a milder one and the subsequent parole from serving the prescribed sentence if the convicted person corrects himself and shows his readiness for further resocialization. Moreover, the insider claims that the new vector of humanization of the criminal-legal influence regarding the application of punishment in the form of life imprisonment is accompanied by a lack of unity between the body of constitutional jurisdiction and the legislative branch of power. The differences lie precisely in the limits of humanization. Humanization of any sphere of criminal-legal relations must be socially determined, fair, and meet the objectives of criminal legislation. It is believed that even in modern conditions, when Ukraine is in a state of war and the number of people who commit crimes punishable by life imprisonment is increasing, the approach to humanization proposed by the legislator is quite fair and reasonable [24, p. 287–292]. However, in the end, the scientist notes, it is obvious that the application of parole from serving a sentence of life imprisonment would lead to equalization of the conditions of serving this sentence with other types of punishments, which are less severe by their legal nature. The conditions for serving a sentence of life imprisonment established by the criminal law are due to the need to isolate convicts who pose an increased danger to society. At most, foreign colleagues also justify the expediency of the compliance of the legislation in general in such a way as to achieve justice in criminal law in particular, which would not involve unjustified punishment of persons who do not have the necessary criminal elements (for example, within the limits of a soft approach) [27].

However, the scientific problem of judicial practice of applying criminal law measures for the indirect execution of a criminal offense still remains unexplored.

AIMS AND OBJECTIVES

The purpose of the article is to study the judicial practice of applying criminal-legal measures for the indirect execution of a criminal offense. This will make it possible to: establish that the courts take into account the fact of indirect execution of a criminal offense when characterizing the person of the culprit and determining his social danger, namely assign a more severe punishment from the list of alternatives or assign a punishment above the lower limit: find out that the general types of exemption from criminal liability.

METHODS

To solve all aspects and dimensions of the scientific problem proposed in the article, the following research methods were used in particular: general scientific, theoretical, and empirical, verification and refutation of hypothesis and theory, description, explanation, comparison, systematic and formal, generalization, and systematization. These methods were used, in particular, to justify the position according to which the indirect execution of a criminal offense is taken into account when choosing a certain measure of a criminal-legal nature for a person, in particular: it can be a circumstance that aggravates the punishment, it can indicate the increased social danger of the guilty person, it can be an obstacle to the application of exemption from criminal liability. In addition, the specified methodology has already been tested by us in our previous studies [25, p. 137–144].

RESULTS

It is believed that criminal offenses committed by more than one person are more socially dangerous, and the fight against them is more problematic, so both practitioners and theoreticians should pay due attention to the criminal law means of combating complicity in a criminal offense. After all, solving the issue of bringing to criminal responsibility accomplices of a criminal offense is simultaneously an answer to the question of the criminal-legal assessment of such actions by society as socially dangerous, socially acceptable, or socially neutral.

In accordance with the general principles of sentencing, in each specific case, the courts must comply with the requirements of the criminal law and must take into account the degree of gravity of the committed criminal offense, information about the identity of the culprit, and circumstances mitigating and aggravating the punishment [16].

According to Clause 9, Part 1, Art. 67 of the Criminal Code of Ukraine, an aggravating circumstance is the commission of a criminal offense using a minor or a person suffering from a mental illness or insanity. This circumstance is not mandatory for the court. He has the right not to recognize it, citing the reasons for his decision in the sentence.

In general, there are three main approaches in the judicial practice of qualifying the actions of a person who uses a minor to perform the objective side of the action. According to the first, when imposing a punishment, the courts indicate the absence of circumstances in the case that aggravate the punishment and qualify such indirect execution only under the relevant article of the Special Part of the Criminal Code of Ukraine. And if the person is a minor, then additionally under Art. 304 of the Criminal Code of Ukraine as the involvement of minors in criminal and illegal activity [4; 7]. We note that this is the most common case in the decisions of the courts of first instance that we have analyzed.

A very interesting opinion from this point of view is the opinion of Havronyuk M., who notes in his article that already today most of the developed countries of the world, gradually retreating from the postulates of the neoclassical school of criminal law and proceeding from the goal of resocialization of the guilty, as the main goal of the criminal law, in their criminal legal policy adheres to the dualism of punishments and other measures of criminal-legal influence, primarily the so-called "security measures" (in various criminal codes, the latter are also referred to as "criminal-legal measures", "corrective and security measures", "measures of influence", " other measures of criminal responsibility", "other measures", "consequences of conviction", "preventive measures", "special legal consequences of a crime", "other legal consequences of a crime", etc.). The specified dualistic approach, which was called "two-track" (from German das zweispurige System) measures of criminal law influence, is used, for example, in the criminal legislation of Spain, Austria, Switzerland, Germany, Holland, Denmark, Italy, Bulgaria, Poland, Estonia, Lithuania, Moldova, etc. Its essence is that the punishment (die Strafe) aimed at retribution and intimidation and other measures (die Massnahme) aimed at special prevention, elimination of danger, and solving the tasks of restoring the situation that existed before the act was committed are simultaneously applied.

In the second case, in identical cases, the courts see the presence of a circumstance that aggravates the punishment - "committing a criminal offense against a minor...". However, in such a case, the Supreme Court sees a contradiction, because the circumstance provided for in Clause 6, Part 1 of Article 67 of the Criminal Code of Ukraine stipulates that the act must be aimed at a minor - that is, it must be aimed at causing him certain harm [15]. In the case of indirect execution of a criminal offense, the act of the executor does not cause harm to a minor, since it is not aimed at such a person, but committed with the use of such a person.

In the third case, the courts see the presence of a circumstance that aggravates the punishment provided for in paragraph 9, part 1 of Article 67 of the Criminal Code of Ukraine. We consider the third option to be the correct one because the commission of a criminal offense involving the use of a minor interferes with the normal development of the child and causes him to form false opinions about moral values.

Since the intermediary perpetrator of the criminal offense is recognized as the subject of the offense, his identity should be taken into account when imposing punishment. Indirect execution of a criminal offense, even when ten persons who act innocently or are not subjects of a criminal offense are involved in the actual execution of the act, does not give grounds for talking about complicity in a criminal offense. Accordingly, punishment should be imposed based on the fact that the criminal offense was committed by one perpetrator, and not by a group of persons.

In our opinion, in the indirect execution of a criminal offense, courts should take into account the identity of the culprit, namely, the fact that he tries to hide his criminal actions, disguise them in the actions of other persons, uses the help of other persons, which facilitates the commission of a criminal offense and leads to the occurrence of more serious consequences All this indicates a greater degree of public danger of the guilty person. Accordingly, courts can impose a more severe punishment among the alternatives, or impose a punishment higher than the lower limit, etc.

Our analysis of the practice of imposing punishment for the indirect execution of a criminal offense shows that the courts in the vast majority impose a more severe type of punishment than alternatives to its actual execution. For example, for theft committed with the use of a minor or with the involvement of outsiders by asking for help, the courts mostly imposed the most severe punishment in the form of imprisonment for a term of 1 year (with the application of Article 75 of the Criminal Code of Ukraine) and almost did not impose punishment in the form of a fine [3; 5]. In our opinion, this is quite correct.

It should be noted that the same trend of sentencing is observed in other court decisions on sentencing for the indirect execution of a criminal offense. In cases where the indirect execution of a criminal offense resulted in serious consequences (for example, the death of the victim, or significant property damage), the courts imposed a punishment in the form of imprisonment with its actual serving.

In the cases analyzed by us, taking into account the severity of the committed act and the prescribed punishment from the list of alternatives (for example, imprisonment for a term of no more than five years), the courts quite often applied to the guilty person an exemption from serving a sentence with probation. When applying such a release, the courts also

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take into account the identity of the culprit, the commission of a criminal offense for the first time, the positive characteristics of the person from the place of work or study, the person's remorse, compensation for the damages caused by him and elimination of the damage caused. On the basis of this, they come to the conclusion that the correction and re-education of the accused is possible if he is sentenced to the punishment prescribed by the sanction of the corresponding article with his release from serving the punishment with a probationary period [9].

However, such dismissal must be properly motivated, because, as we indicated, a person who indirectly commits a criminal offense has a fairly high degree of public danger.

As for such measures of a criminal law nature, such as conditional early release from serving a sentence and replacing the unserved part of the sentence with a milder one, a criminal record, they do not have any differences from the cases of their application under normal conditions, when there is no indirect execution of a criminal offense. After all, these measures regulate social relations that arise after the punishment is imposed and the significant term of the actually imposed punishment is served. Under such conditions, a person can really prove his correction by his conscientious behavior and attitude to work.

As for measures of a criminal legal nature that are not related to criminal responsibility, in the court decisions we analyzed there were no cases of exemption from criminal responsibility in connection with effective remorse, or reconciliation of the guilty party with the victim. We associate this with the fact that in the vast majority of indirect execution of a criminal offense intentional acts are committed - minor and serious crimes, which excludes the possibility of applying the mentioned types of exemption from criminal liability. Since the condition for their application is the commission of a misdemeanor or careless minor crime. In general, indirect execution of a criminal offense is possible only with an intentional form of guilt.

DISCUSSION

At the same time, there are interesting cases in judicial practice when the labor collective applied for the bail transfer of a person who indirectly committed a criminal offense using the capabilities of individual representatives of the same labor collective as employees of a legal entity. However, the court refused to grant the corresponding request, citing the fact that it is inappropriate to bail a person into a labor group where he occupies a managerial position. After all, the possibility of carrying out educational measures with her in such a case and ensuring her correction without assigning a punishment is doubtful [8]. There are also cases when a person who indirectly committed a criminal offense related to tax evasion was released from criminal liability due to a change in circumstances. However, such a change did not concern the person of the guilty person and his loss of social danger, but the change in the circumstances of the commission of the act, to the device, write-off of the corresponding tax obligations.

For her part, T. Malinovska claims that it is violence in the family that violates many rights of those who are protected by both international and national normative legal acts. In order to prevent and prevent violence against women, non-governmental organizations, in particular women's, play an important role, they are the initiators of the development and implementation of programs aimed at reducing this scourge. The authorities should encourage cooperation at all levels with public organizations that fight violence against women and establish active cooperation with them, including the provision of material, technical, and financial support. It is necessary to promote the development of a system of consultation centers, self-support groups, and legal assistance services, the expansion of the network of crisis centers and shelters for victims of family violence, the creation of a system of assistance centers to coordinate actions to collect information and provide services to victims [13, p. 119–120].

However, there is another opinion, in particular in the international experience, in particular, that the prerequisites for complicity are the joint intention to commit the act and the joint execution of the act. A joint intention to commit an action is a mutual agreement to perform a certain action through joint actions with a division of tasks. A shared intention does not have to be clearly stated, but can also be implied, even just a thoughtful glance. The decision to commit a crime should not be made at the same time; someone can contribute successively after the commission of the crime. Mutual corrections are also possible at any time. If a person has committed an offense by exceeding the stipulated actions, he alone bears responsibility. A crime is considered jointly committed if the criminal's contribution is so significant in planning or executing the crime that without it, it would not have happened. Thus, the co-performer should not take an active part in the act; it is enough that they were significantly involved in the planning of the crime. Accomplices are punished for the same offense.

However, there is also another point of view, in particular N. Krynychnyi: «claims that incentive norms in the field of criminal law are state incentive norms that are applied on behalf of and on behalf of the state, and when defining their features, it is necessary, first of all, to single out the normative feature, that is, their direct consolidation in the Criminal

Code of Ukraine, to solve the main tasks of criminal legislation. Evidence of the characteristics of this feature for other branches of law should be provided in the study of the state incentive norms of these branches of law. Secondly, improving the incentive effect and creating a concept for the development of incentive norms and institutions, which are applied to convicts in institutions of the criminal-executive system, will allow to increase the effectiveness of their correction and contribute to the expansion of the possibility of positive stimulation» [23, p. 150–151].

CONCLUSIONS

When qualifying the indirect execution of a criminal offense, the question arises about the possibility and expediency of applying coercive measures of a medical nature to an unconvinced person in certain cases. In our opinion, such forced treatment can be applied if an innocent person, at the request or persuasion of an intermediary executor, commits a serious or particularly serious crime involving bodily harm. For example, in accordance with Part 5 of Art. 94 of the Criminal Code of Ukraine for a mentally ill person who has committed a socially dangerous act related to encroachment on the lives of other persons, hospitalization in a psychiatric care institution with strict supervision may be applied.

We also believe that in cases where a minor is used by a criminal to indirectly commit a criminal offense and understands the true nature of his actions, certain coercive measures of an educational nature (for example, a warning) can be applied to such a person. Therefore, for example, we consider the decision of the court to be correct, which applied coercive measures of an educational nature in the form of a warning and transfer to the supervision of the parents of a minor PERSON_8, who, at the request of PERSON_2, illegally, secretly, by opening the door, entered the premises of the bakery, from where he secretly stole an electric motor, which in the future, together with PERSON_2, he sold it to an unknown person [7].

Thus, the analysis of judicial practice shows that the indirect execution of a criminal offense is taken into account when choosing a certain criminal-legal measure for a person, in particular: it can be a circumstance that aggravates the punishment, it can indicate the increased social danger of the guilty person, it can be an obstacle to the application of release from criminal liability, etc.

ADDITIONAL INFORMATION

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СУДОВА ПРАКТИКА ЗАСТОСУВАННЯ ЗАХОДІВ КРИМІНАЛЬНО-ПРАВОВОГО ХАРАКТЕРУ ЗА ОПОСЕРЕДКОВАНЕ ВИКОНАННЯ КРИМІНАЛЬНОГО ПРАВОПОРУШЕННЯ

У статті проаналізовано судову практику застосування заходів кримінально-правового характеру за опосередковане виконання кримінального правопорушення. Установлено, що суди враховують факт опосередкованого виконання кримінального правопорушення при характеристиці особи винного й визначенні його суспільної небезпечності, а саме призначають більш суворе покарання з переліку альтернативних або призначають покарання вище нижньої межі. При цьому досить часто суди звільняють таких осіб від відбування покарання з випробуванням. Водночас практично не застосовують загальних видів звільнення від кримінальної відповідальності. Це зумовлено тим, що таким способом переважно вчиняють умисні діяння – нетяжкі злочини, тоді як умовою застосування багатьох видів звільнення від кримінальної відповідальності є вчинення необережного нетяжкого кримінального правопорушення. Найчастіше випадки вчинення кримінального правопорушення шляхом опосередкованого виконання при використанні малолітньої особи суди кваліфікують за відповідною статтею Особливої частини КК України та за ст. 304 КК України як втягнення неповнолітніх у кримінально-протиправну діяльність. Однак досить часто враховують це ще й як обставину, що обтяжує покарання, що є дуже суперечливим. В окремих випадках у разі опосередкованого виконання кримінального правопорушення з використанням малолітньої особи суди можуть враховувати це лише як обставину, що обтяжує покарання. У тих випадках, коли малолітня особа, яку злочинець залучає до виконання об'єктивної сторони діяння, розуміє справжній характер своїх дій, до такої особи можна застосувати певні примусові заходи виховного характеру. Такі кримінально-правові заходи, як і примусові медичні заходи, для прикладу – примусове лікування, примусові виховні заходи, у разі опосередкованого виконання кримінального правопорушення не мають жодних відмінностей від загального порядку застосування цих заходів до винної особи.

Ключові слова: опосередковане виконання кримінального правопорушення, заходи кримінально-правового характеру, призначення покарання

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