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Concept, Kinds and Limits of Security Measures

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To ensure society's life activity measures of compulsion which according to their intrinsic characteristics are not referred to legal liability measures (punishment) – security measures have been long and very widely used. However, in spite of the fact that this concept is extend enough in legal literature and legislation, its content and volume requires specification and coordination.

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To ensure society's life activity measures of compulsion which according to their intrinsic characteristics are not referred to legal liability measures (punishment) – **security measures'** have been long and very widely used. However, in spite of the fact that this concept is extend enough in legal literature and legislation, its content and volume requires specification and coordination.

It is deemed, that as general legal «security measure» category can be deduced «through categories **«source of increased danger»** and **«object of intensified protection»**. Generalisation of signs available in the domestic literature gives the grounds to assert, that **the source of increased danger is a feature of one, more often unstable, system (substance, mechanism, phenomenon, process, organism, person, social group), which development or display are subject to poor or no control and can produce irreversible destructive changes**

in this or other system. This source has a high striking effect big concentrated internal energy, huge destructive force. The started destructive process and its consequences are often irreversible.

Traditional «civilistic» interpretation and «itemized» approach according to which various objects (substances, flora and fauna kinds, waste products) or some kinds of activity are referred to sources of increased danger, are narrow and do not cover all variety of sources of increased danger. It is imperative to work out a definition of a source of increased danger which would have general legal and criminological value. In civil law there are two approaches to definition of a source of increased danger which are designated by terms *«the theory of object»* and *«the theory of activity»* ². According to the first of them the subjects of a material world possessing features dangerous for the surrounding and are not subject

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to full control from the person are considered sources of increased danger³.

The second approach was designated in item 17 of the decision of Plenum of the Supreme Court of Russian Federation on April, 28th, 1994 № 3 «On judicial practice on cases on compensation of harm inflicted to health». It explained, that it is necessary to recognise as a source of increased danger any activity which realisation gives an increased probability of a trespass due to impossibility of the entire control over it from the person, and also activity on use, transportation, storage of subjects, substances and other objects of industrial, economic or other appointment possessing the same properties⁴.

It seems to us, that jurists незаслуженно ignore the third approach which might be called *the theory of the subject*, according to which source of increased danger can be a person, social group or other subject of activity and management. For it is quite obvious, that any activity implies not only object but the subject as well.

Under theory of the subject certain *properties of the person* of biological origin or formed under the influence of negative social factors can act as special sources of danger. *Public danger* which was formed as a result of mental disease⁵ or caused by negative moral and social qualities⁶, cruelty, self-interest and other individualistic inclinations⁷ can be referred to them. A source of increased danger can be a «criminogenic person» that «is expressed in aggregate properties and qualities of the subject indicating proclivity to a crime commission and its repetition»⁸. Mental properties of the person «can be a danger source at transformation of mental energy into energy of a socially dangerous act, by means of mental intervention (for example, hypnotic, extrasensitive etc.)»⁹.

It is deemed, that a source of increased danger can be certain relations developing in a social group as well. Interpretation of the Federal

law «On bases of neglect of children and juvenile offences prevention system» allows to refer parental families if relations within them threaten physical and spiritual development of the minor to danger sources¹⁰. Communities which may be sources of increased danger are terrorist and other criminal organisations. This circumstance is actually recognised not only in Russian, but in foreign legislation, and in international legal acts as well. A source of increased danger can also be subjects of administrative, is administrative-authoritative relations¹¹.

The second category by means of which security measures can be defined is «**object of increased protection**». It is impossible to say, it is not used in jurisprudence at all. There are legislative acts on especially protected territories, protection of computer soft ware, culture monuments, etc. However, a word-combination «the object of increased protection» has neither general legal nor criminologic category status.

Any system can be considered an object of protection: person, social group, society, mankind; kinds and products of activity of the person; natural objects: fauna and flora, minerals and territories, etc. Object of protection are as material substances (organism, subjects, territory sites) and resulted public relations or certain activity.

Generalisation of opinions available in this respect has led us to a conclusion, that **objects of increased protection should be the major properties (relations) of the system in case of losing them, it either will collapse, or transformed into another and will not be able to reach the objectives set for it**. For the system to function and develop protection of its essential elements is necessary.

In the course of life activity it has become clear that for safe functioning of the person, society and mankind such objects of increased protection are life, health, freedom, honour,

dignity, sexual inviolability, property and other constitutional rights and personal freedoms; population health, public safety and morals; ecology, the constitutional system and safety of the state; peace and safety of mankind. In essence, these are the objects which owing to their special value are subject to criminal-legal protection. The current legislation separates out especially protected territories and objects, flora and fauna kinds, minerals, paleontologic objects, office, commercial, state secret, closing administrative-territorial formations, etc. into the group of the kind.

In the XIX-th century professor I.T.Tarasov noted that «people and subjects being in some cases a danger source, in other cases are subject to danger which they should be protected from by means of corresponding measures»¹². The same thought is highlighted by A.A.Ter-Akopov who correctly considers, that the future concept of psychological safety should consider psychic of the person in two aspects: as object of protection and as a danger source¹³.

From here follows, for example, that juveniles and minors owing to the intellectual, emotional and psychological immaturity represent threat and consequently their possibilities to enter certain relations should be limited, but, on the other hand, for the same reason they require special protection. Restriction of capacity of an insane is simultaneously a means of suppression of danger proceeding from him and a means of protection of his interests.

Already at the beginning of mankind development it became clear, that threat of a trespass to a human body, system principles of the organisation of the community which member he is, should be stopped rigidly, unequivocally and whenever possible «on distant approaches». Means which we name now security measures have been invented for this purpose». *Security measures are measures of not punitive*

restriction of behaviour of physical persons, the organisations (including legal bodies), applied specially for prevention of harmful influence of a certain source of increased danger or a protection of object of increased protection from harmful influence of any sources of danger. The content of security measures contain special duties and prohibitions assigned to physical persons or social groups.

They have arisen as safety reflexes. With development of not genetic forms of memory security measure were fixed in the form of a taboo, and then – in the form of the rules provided by the first version of social norm, so-called mononorm. In the course of civilisation formation protective reactions have taken shape in behavioural stereotypes and the safety rules which compulsion was supported with sanctions.

Safety rules is a set of duties and prohibitions, which the subject should observe to exclude or reduce harm caused by a source of increased danger to a minimum or to prevent causing damage to object of increased protection by any source of danger. Not all the rules regulating life activity can be named safety rules¹⁴. Rules of the person's interaction with an increased source of danger and with object of increased protection can only be referred to them.

In process of social labour division two basic types of sanctions have been singled out: stimulations (positive) and restrictions (negative)¹⁵. The latter in turn are subdivided into sanctions of restoration (indemnification), punishment and safety.

Restoration sanctions is a reaction to rule infringement (including – safety rules) resulted in damage. They are aimed at «elimination of harm caused by unlawful act to public relations, at execution of non-performed duties»¹⁶. They include: compulsory execution of a duty, cancellation of illegal acts and a duty to indemnify a loss¹⁷. Thereby the system of legal relations,

broken by default of instructions of the law by the obliged subjects is recreated¹⁸. This group of measures is inherent in civil-law branch to a greater extent. But they are also used in criminal law where restoration is carried out by indirect stimulation (art. 75 art., 76 RF Criminal code) or direct imposing a duty to eliminate harm (art. 90 RF Criminal code). The idea of compensation of damage, restoration of broken relations, reconciliation of a victim and the criminal is laid down in so-called restorative justice¹⁹.

Punishment sanctions are compulsory deprivation of certain welfare in proportion to weight of a committed offence. The purposes of general and special prevention are reached by threat or real causing of deprivations and sufferings to an offender. Calculation is simple: the punished himself, being afraid of penalty repetition, will avoid repetition of crimes as well, and to restraint of criminal aspirations of the majority of other people experience of others' sufferings might be enough. Punishment is considered as one of the major crime prevention. Mechanism of punitive influence in the legal literature is well studied. It has been historically established that the general theory of law and branch juridical sciences have a «punitive» bias and are liability-punishment theories in essence while the social-psychological mechanism and efficiency of other kinds of legal regulation are investigated insufficiently.

The safety sanction is a reaction to public danger of the person which was revealed in a socially dangerous act, or to public danger of a social group expressed in socially dangerous activity. It is a part of social norm where as a consequence of socially dangerous behaviour (activity) breaking a safety rule, restriction of possibilities of continuation of such behaviour (activity) is provided. Examples of sanctions in criminal law are forced measures of medical character, a part of forced measures of educational influence, special duties assigned to

the conditionally condemned or to the released on parole²⁰.

Restriction can be fulfilled by different ways: physical, mechanical, organizational, psychological. Security measures are more often implemented by means of imposition of special prohibitions and duties on a person committed an illegal act. Unlike a safety rule which the «third parties» contacting with a source of danger or object of protection are obliged to observe the safety sanction is applied in that case when a physical person, an organization, a social group which danger has already been revealed in socially dangerous behaviour or activity have become a danger source. In connection with legislative techniques features, and also owing to specialisation of branches of law rules and safety sanctions can be placed not only in different articles, chapters, sections of one regulatory legal act, but also in different branches of legislation.

Security measures can be aimed at the source of danger itself (atomic power station) isolating or limiting its harmful influence on the person and environment, – *preventive punishment* or at a protection of object of protection (person, secret, property) from external sources of danger – *protection measures*. As one and the same object can be simultaneously object of protection and a danger source, there can be measures of double assignment as well which combine simultaneously a function of suppression and a protection function – preventive punishment and *protection measures*. A **source of danger** or **object of protection** character can serve as the classification bases. If a danger source is criminality, a crime or a personality of a criminal, there are bases to separate out *anticriminal security measures*.

According to the level security measures can be subdivided into measures of *the general, especial and individual level*. Depending on **sphere of application** security measure are classified into *economic, social-political, ideological*.

Competition restrictions are referred to economic measures, for example separation of powers to social-political; ban of fascism propaganda- to ideological. According to the **method** it is possible to separate *physical, technical, organizational and information* security measures. Preventive punishment depending on *the application moment* can be subdivided into *urgent* and *preventive*. The first are applied to suppression of already begun harmful influence, the second for suppression of harmful influence which has not begun yet but which probability is rather high.

Depending on *a kind of social norm* which the security measure is invested in, they can be subdivided into *legal and outlawful*. Security measures in law are an interbranch institution, close to institutions of punishment, encouragement, indemnification. It is introduced in all branches of legislation.

Under *legislation branch* within which frameworks security measures are regulated, they can be subdivided into *international – constitutional – administrative – civil – criminal-legal, labour (industrial), and also civil – administrative – criminal – procedural and criminally-executive*. Under international law they allow to «suppress» the state preventively – an aggression source; under constitutional law – through separation of powers to protect power from usurpation; under administrative law- to establish special modes concerning sources of danger (weapon) and objects of protection; under civil law – to limit capacity; under family law – by means of deprivation of parental rights to protect the minor from harmful influence; under employment law – not to let under-qualified people to certain works and to provide safety precautions; in criminal law – to isolate a dangerous maniac, in criminal procedure – to detain a suspect, etc. Security measures are as objective (only not material, but social) reality, as a gravity. They exist irrespective of their social

recognition and knowledge degree. Over millions years people considered and used gravity but the law on universal gravitation opened by I. Newton allowed to do it much more effectively. The problem is more likely deals with not only recognition of security measures, but rather with definition of sphere and bases of their application.

Security measures always represent restriction of rights and freedoms of the person for this very reason their limits should be accurately designated. For this purpose *personal, territorial* and *time* approaches supplementing each other are proposed to be used. Accurate designation of security measures action limits in terms of a circle of persons they are extend over, territory on which they operate, and time of their action is necessary not only to avoid abuse, but also for optimum distribution of law-enforcement resources.

It is possible to separate out typical signs of the person that can be a source of increased danger and (or) object of increased protection (age, citizenship, disease, criminal past), and also to designate typical signs of territory on which the safety mode in space (the frontier, a closed administrative-territorial formation, a zone of counterterrorist operation) should be performed. Similarly it is necessary to work out rules of action of security measures in space. To restrict time limits of anticriminal sanctions of safety it is necessary to introduce concept «safe limitation» into the theory of law and in legislation and to establish after expiration of the term passed from the moment of socially dangerous act commission it is impossible to apply security measures.

The dynamic model of the multilevel bases of the security measures which hierarchy comprise: social, regulatory-legal, actual (material) and organizational-legal bases allow to limit the scope of security measures.

The social basis of security measures forms necessity of suppression of harmful influence of a source of increased danger or a protection of object of protection from harmful influence by means of restriction of constitutional laws and personal freedoms. Thus harm forcedly caused to the person, possessing increased danger, or to the third parties, should be less than prevented harm. Proportionality of harm is carried out by principles similar to rules of emergency or necessary defence.

International legal acts, the Constitution of Russian Federation and federal laws are *regulatory-legal ground*. Security measures are always restrictions of constitutional laws and freedoms, therefore according to p. 3 articles 55 of the Constitution of the Russian Federation their application on a by-law basis is inadmissible.

Events and actions (not only lawful, but also wrongful) can serve *actual bases* of security measures. Actual bases for application of sanctions of safety will be socially dangerous acts provided by the federal law. Applying safety sanctions, an official applying a law should proceed from presumption of absence of public danger of the person until this feature is not expressed in the concrete socially dangerous act provided by the federal law.

Acts of application in the form of a sentence, court judgements, the decision of the judge, the public prosecutor or other competent decision where individualization of safety relations takes

place are *organizational-legislative grounds*. Highlighted groups of the grounds matter at different stages of security measures application: social – for lawmaking, regulatory-legal and actual – for assigning, and organizational-legal – for execution of security measures.

Appropriate *procedure* of their assignment and execution should be an important condition of restriction of security measures limits. The more the measure limits the rights and personal freedoms, the more authoritative the body, making the decision on its assigning and execution, and the more guarantees from an arbitrariness of the procedure of acceptance and decision execution should provide. An exception is only possible for application of urgent security measures (counterterrorist operation). But also in this case a post factum careful check of validity of application of security measures necessarily should be necessarily conducted. The parliamentary and judicial control is optimum for such cases. If procedure of application of security measures contains moments limiting constitutional laws and freedom, it should be provided only by the federal law. The decision of procedural issues derogating the citizens' rights and freedoms is inadmissible in by-laws.

And, at last, *the forecast* which, unfortunately, is wanting at use of this institution both in global and individual scale should serve a necessary precondition of application of security measures.

¹ More on security measures see : Schedrin N.V. Introduction to security measures legal theory: Monograph/Krasnoyarsk : Edit.: Krasnoyarsk State Uni., 1999. 180 p.

² See: Civil law: Textbook. P. II / Under edit. A.P. Sergeev J.K. Tolstoy.SPb.: TEIS, 1996. P. 732 – 735.

³ See: *ibid.* P. 733.

⁴ See: On judicial practice on cases on compensation of harm inflicted to health: Decision of Plenum of the RF Supreme court on April 28, 1994 // Bulletin of RF Supreme court. 1994. № 7.

⁵ See.: Mikheev R.I. The insane. Social-legal essay. Vladivostok: Edit. By the Far-East University, 1992. P. 94 – 103.

⁶ See.: Volzhenkin B.V. Public danger of a criminal and criminal liability ground. // Jurisprudence. 1963. № 3. P. 90.

⁷ See.: Filimonov V.D. Public danger of a criminal's personality. Tomsk: Edit. by Tom. Univ-ty, 1970. 277 P.

⁸ See.: Burlakov V.N. Criminogenic personality and individual crime prevention. Prediction problems. SPb.: MIA Academy of Russia, 1998. P. 22.

⁹ Ter-Akopov A.A. On legal aspects of psychic activity... P. 89.

¹⁰ Article 1 of the RF Law «On bases of neglect of children and juvenile offences prevention system» specifies, that «a family which is in a socially dangerous position, – a family having children, being in a socially dangerous position, and also

a family where parents or lawful representatives of minors do not execute their duties on their education, training and (or) maintenance and (or) negatively influence their behaviour or treat them in a cruel way».

- ¹¹ For more detailed the thesis ground see.: Schedrin N.V. Kilina O.M. Security measures for authority protection and protection from it.- Krasnoyarsk: RUMC LA , 2006. P. 19-39.
- ¹² Tarasov I.T. Essay of police law science. M.: Pub., at Jakovlev's S.P. , 1897. P. 132.
- ¹³ Ter-Akopov A.A. On legal aspects of psychic activity and psychological safety of the person.. P. 89.
- ¹⁴ A.A.Ter-Akopov paid attention to this circumstance having divided special rules into two kinds: technological and safety. «Technological rules define the content and sequence of operations they provide mainly conditions of desirable result reception Special safety rules regulate an order of interaction with the various subjects representing increased danger, which can have material, physical or organizational output» (Ter-Akopov A.A.Liability for special rules of behaviour. M: Legal. Lit., 1995. P. 24).
- ¹⁵ We proceed from the definition, according to which, «sanction -is an element providing consequences for the subject realising disposition. They can be both negative – punishment, and positive – encouragement measures ...» (Malkov A.V. Theory of the state and law: the Textbook. – Jurist, 2000. P. 167).
- ¹⁶ Leyst O.E. Sanctions and liability on Soviet law. M.:Legal Lit., 1981. P. 63.
- ¹⁷ See.: Bazilev B.T. Legal liability (theoretical issues). Krasnoyarsk.Edit. by Krasnoyarsk Uni-ty, 1985. P. 35.
- ¹⁸ Vetrova G.N. Sanctions in judicial law. M.: Science, 1991. P. 80 – 108.
- ¹⁹ See., for example: Zer X. Restorative justice :new look at crime and punishment : Trans. from English. M.: MOO Centre «Judicial-legal reform, 1998. 354 p.
- ²⁰ For more detail see.: Schedrin N.V. Criminal-legal security sanctions // Criminal-legal legislation: state and development perspectives: Conference material /Krasnoyarsk State Univ-ty. Krasnoyarsk, 2002. P. 9 -21.

Понятие, виды и пределы мер безопасности

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Общепризнано, что в современном обществе растет количество и мощность источников повышенной опасности. Однако, несмотря на интенсивное исследование этой проблемы, в правовой науке до сих пор не выработаны четкие критерии источника повышенной опасности, нет его определения и в законодательстве. Статья посвящена исследованию указанной проблемы.

Ключевые слова: меры безопасности; виды мер безопасности; пределы мер безопасности.

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