

Optimization principles of penal execution system of Russia
in the context of European penitentiary practice

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Introduction

Before the Concept of development of the penal execution system of the Russian Federation has been adopted for the period until 2020 (hereinafter referred to as Concept), existed romantic notion about European traditions and experience of the execution of criminal penalties. The Concept postulates that increasing contacts with penitentiary systems of foreign countries, international non-government organizations, research, educational and scientific centers of the United Nations, Council of Europe, European Union, the States Members of the Commonwealth of Independent States and countries further afield is to suppose study and dissemination of the foreign example in the sphere of the penal execution and detention.

This provision is of a declarative nature, however, and it is obvious that foreign example in the sphere of the penal execution and detention can be of various natures, and accordingly its ‘dissemination’ is able to have both positive and negative meanings for the optimization of the domestic penal execution system. This statement is based on the fact that the provision under review is found in the document which is the cornerstone of the penal execution policy of the Russian Federation, and it explains special requirements for all the legal regulations. Government regulations contained in the Concept mean critical path activities, forms and methods of improvement and development of the penal execution system, its link with state organs and institutions of civil society which provides functioning of the penal execution system for the period until 2020. Exactly, it is this system of ways helping solve the purposes and tasks presented in the second chapter of this document that expresses the essence of the Concept. Accordingly, all the provisions of the document express the leading

idea of optimization of the penal execution system and depict in complex the chosen variant of the execution of criminal punishment. Consequently, further provisions of the Concept must develop and express the formulated points. Moreover, these provisions materialize the sense of build-in system of directives pointed to attain the stated purposes and to solve the tasks formulated in the Concept.

It is important to maintain the idea of Shevelyov V.G. that «the priority areas for the reforming are put in the main principles that underlie the process. These principles depict the notions of humanity, human dignity, social orientation and effective management and they are determining factors for the effective functioning of modern penitentiary system» (Shevelev, 2018: 23). Exactly, these principles form the sustainability of legal provisions contained in conceptual documents which define vectors of the penal execution policy. To follow this, the positive quality of the existing penal execution policy defines establishment and development in the penal execution legislation, in judicial and other law enforcement practices of the constitutional principles, rules and norms of the international penitentiary law and positive example of appellation of detainees in foreign (first and foremost European) countries. Moreover, realization of in fact liberal reform of the penal execution legislation demands its exact matching with the penal execution policy. And we know that liberalism in the sphere of detainee treatment is in many ways the result of influence of European penitentiary ideology. This statement is strengthened by retrospective tendencies of functioning of the domestic penitentiary system studying which Yakovleva O.N. and Malchuk O.I. point out that when the system of places of detention was transferred from the Ministry of Internal Affairs to the jurisdiction of the Ministry of Justice of the Russian Empire reformers drew on the Western European experience (Yakovleva, Malchuk, 2017: 11). Bikov A.V. notes in turn that «the government through the Ministry of Justice and the Central Prison Administration did not only tried to show its commitment to advanced achievements of the Western European penitentiary science, one of the first priority was to join Russia the international penitentiary community» (Bykov, 2015: 29).

In modern history the Russia's accession to the Council of Europe and the subsequent ratification of the European Convention on Human Rights and major freedoms in 1950 (hereinafter referred to as Convention) resulted in considerable reformation for treatment of convicts and detainees and transferring of the penal execution system from the Ministry of Internal Affairs of the Russian Federation to the Ministry of Justice of the Russian Federation. Later on the intended movement of the penal execution system and legislation has become inert and unstable. After the Concept having existed for five years, it was decided not to increase the efficiency of penal execution institutions and agencies executing punishment up to the level of European treatment standards and to transfer to rather abstract development of the activity of penal execution institutions and agencies executing punishment, but to take international standards into account. But in any case International Law and European Law when united they represent the value of the natural legal content of law. In particular, A.Ashworth points out that «unified European Law possesses greater legal force than national law.... The reason of it is the consequence that the International Criminal court was created precisely to realize this right and on the basis of observance of Human Rights» (Ashworth, 1999: 63).

Statement of the problem

Comparative legal analyses of European penitentiary systems gives an opportunity to expand the domestic penal execution policy with a number of interpreted principles: 1) synchronization of the existing penal execution legislation with the natural and inalienable rights, freedoms and legal interests of a convict when they are directly or implicitly set out in penal execution norms; 2) mutual account on the interests of f person, society and state; 3) feasibility excluding the priority of any political purposes and pre-completion legal conformity; 4) systematic process which provides clearly defined time sequence of publication and realization of both material and procedural norms in the sphere of treatment of convicts; 5) relevance of the legal force of legal acts and by-laws; 6) consistency that avoids duplication and contradic-

tions between national and international law from the point of view of social economic opportunities to realize corresponding standards.

The Concept analyzes through the prism of denoted principles and shows a number of problematic areas that reveal a certain inconsistency and contradiction of penal execution policy. However, we are at first to follow the objective of the Concept to improve the activity of penal execution institutions taking onto account international standards and needs of social development and this objective can hardly be viewed as a purpose for it should be focused on a certain result and not to be an activity. The category «improvement» doesn't imply accuracy of a certain process and with all this it is making ephemeral the follow-up activity. The more accurate is the term «optimization» for it is more precise when we want to show efficiency and commitment for the better result having some values of certain indicators: on the level of the whole penal execution system it may be the total cost for its functioning, on the level of certain directions it may be some extent in reducing of a number of convicts detained in the same premises of the correctional institution.

The Concept consolidates that in the labor activity of convicts it is important to work out the question on the exclusion of necessity of labor for those sentenced to imprisonment. According to the Concept of the federal target programme «Development of penal execution system (2017-2025)» «when convicts are forced to productive work it is one of the sanctions to realize penal execution policy of the state». Similar contradictions do not allow to follow a number of above said principles in full size.

Discussion

As it can be shown in the process of realization of the domestic penitentiary policy we break the idea of synchronization of the existing penal execution legislation with the natural and inalienable rights, freedoms and legal interests of a convict when they are directly or implicitly set out in penal execution norms. And necessary precondition are not created to form legal timing of labor of convicts, it doesn't help decide the most important conceptual questions of productive activity of correctional

institutions, employment of convicts and individualization of labor as the means of rehabilitation. When addressing to labor activity of convicts some questions of creation and development of penitentiary production in Russia stay open, and it demands to work through the problems of realization of subjective rights and legal interests of persons detained in custody.

We think that the subsection «Provision for security regime» doesn't reflect mutual account of interests of a person, society and state. For example, according to Rule 3 of the Minimal standard rules of the UN concerning treatment of detainees (Mandela Rules) in 2015 penitentiary security doesn't have «to aggravate sufferings» of persons isolated from the rest of the world. In this subsection of the Concept some points are emphasized - the solution of the questions of detainees' security within the prism of how to accommodate convicts in crowded dormitories and approaches to segregation of the convicts, and all this suggests the idea of increasing importance of interests of security in contrast with the reduction of the role of security as the means of correction and legal construction provided in Article 82 of the Execution Penal Code of the Russian Federation. Thus, the differentiation of treatment conditions of detainees is expected, and accordingly, the security requirements as well. However, the increasing tendency of applications of the convicts to the European Court on Human Rights (hereinafter referred to as ECHR) on insufficient treatment and accommodation conditions, poor sanitation and health care, violations by the correction institution administration, a number of claims concern the situation when the established security requirements violate a number of constitutional rights of those persons, and what is the most symptomatic, they violate the provisions of the European Convention on the Protection of Human Rights and Major Freedoms of 1950 – all this is not taken in account. For example, the essence of the decision of the ECHR on July 4, 2013 on case «Antchugov and Gladkov vs. Russia» (claims №11157/04 and №15162/05) comes down to the idea that the fact of staying in the detention cannot be taken into account as the reason provided in Part 3 Article 32 of the Constitution of the RF for deprivation of convicts of the right to vote. In its turn the ECHR in its

decision on the case «Khoroshenko vs. Russia» (claim № 41418/04) on June 30, 2015, came to the conclusion of inadmissibility of explicit prohibition for a convict sentenced to life imprisonment on strict security terms to have long visits during first 10 years of imprisonment specifying in point 148 that this sanction doesn't provide equitable balance between the right of complainant to protect private and family life on the one hand and objectives the state-respondent addresses to, on the other hand, and to the conclusion that the state-respondent abused the latitude within that relationship. The studying of the practice of the ECHR shows its praetorian character of activity expressed in gradual expansion of widening of influence of court decisions on the necessity of correction of the national legislation and the domestic one as well. We should share the opinion of a number of authors who criticize the ECHR decision on the problem if the persons suffering heroin addiction have the right to be cured with opioid agonist (Junod et al., 2018: 31-36; Rogan, 2017: 3-9). Thus, the ECHR when referring to the Article 3 of the Convention came to the conclusion that Member States of the European Council which refuse to cure the convicts suffering drug addiction with opioid agonist (substitution therapy) are to guarantee that another alternative approach to the treatment of drug addicted convicts will have the same affect (Opioid agonist treatment..., 2018). With all this, the Russian Federation has to optimize the national practice of treatment of drug addicted convicts moving in one of two directions and each of them becomes extremely complicated and ambiguous task including medical, social and legal aspects.

It is necessary to join the opinion of Utkin V.A. who argued that «the subject of trial of the European court in comparison with previous cases became not “the questions of fact», but «the questions of law». In other words, “wake-up call” rang and for the law maker ...it is significant to re-evaluate some principle provisions of the domestic Execution Penal Code in the part of defining the status of convicts and differentiation of the prison security for them (Utkin, 2018: 27-28). In turn G.Cliquennois and S.Snacken, when studying the affect of decisions of the ECHR on the national penitentiary legislation of Member States of the Council of Europe they

based their study on the analyses of doctrinal resources and they came to the conclusion that court decisions got greater meaning and influence on the formation of prison securities.....they made look through the attitude to the rights of convicts, legitimacy of enforcement and contributed to improvement of detention conditions and security of detaineespositive responsibilities imposed on the state gradually lead to changes in legal, administrative, judicial and practical spheres and to adoption of internal national criminal and prison legislation providing effective observance of people's rights isolated from the rest of the world (Cliquennois, Snacken, 2018: 9-11; Cliquennois, Herzog-Evans, 2018: 114-130). The specialists studying the praetorian role of the ECHR in the strengthening of safeguards of observance of convicts' rights point out that this judicial body serves with distinction to protect rights and freedoms of those deprived of liberty, this work is in real and effective nature and not in theoretical or illusive in observance of the European Convention on Human Rights and major freedoms of 1950 (Díez, 2018: 335-361).

We think that not to pay attention on this situation in conceptual perspective is the same as to take dysfunctional position in the sphere of optimization of the penal execution policy of the RF. In that regard it is required to review the domestic conceptual foundation of security which at present continues to express primarily punitive claims of the state to the person who committed a crime. Moreover, differentiation of treatment conditions for convicts proposed in the Concept to enforce them to fulfill the established rules of prison security as private legal determination is not of a logic character since such an element as “differentiation of treatment conditions for convicts” becomes a part of the security itself in correctional institutions and that is why it cannot be directly aimed to provide the rules of detention. These rules according to the meaning of Article 82 of the Execution Penal Code of the RF materialize in the Rules of Internal regulations of correctional institutions. Exactly, established regulations of execution and serving a sentence being the cornerstone of the prison security provide different treatment conditions depending on the type of correctional insti-

tution appointed by the court, changing of conditions of serving a sentence and not the other way around.

It is important to note that provisions of the Concept which provides «development of penal execution system» don't follow the principle of feasibility since when refusing the primary core direction - absolute «prisonation» of penal execution system – the given document has lost its «conceptuality». Pointing out the essence of this moment Utkin V.A. correctly indicates that «the notion “development” itself seems to be extremely abstract, indifferent and deprived of any “energetic” meaning» (Utkin, 2018: 94). Accordingly, general directives of legal prescriptions are blurred, the thinking of acquiring of new holistic quality by penal execution system and legislation are refined, targeting indicators of «successfulness» of the current act of a declarative character are not «palpated». For example, one of the tasks of the Concept as a problematic situation on the way when reaching the objectives stated becomes «implementation of separate detention of convicts taking into account the severity of crime and criminological character of a convict». However, in the penal execution legislation there are some norms regulating separate detention of convicts depending on the severity of crime. In particular, in point «b» Part 1 Article 128 of the Execution Penal Code of the RF it is said that in colony-settlements people who were convicted for the first time for committing intended crimes of petty or medium gravity are serving sentences in the form of freedom deprivation. However, it is no easy thing to talk about the gravity of a committed crime already in the process of serving a sentence when the question of separate detention is being decided. Thus, «the gravity of a committed crime» is a criminal category that is why within the framework of penal enforcement relations its meaning has a «retrograde» and to some extent qualifying character since the correctional effect on a convict is reoriented on the current changing of his personality. Consequently, the category «the gravity of a committed crime» becomes a constituent element of a criminological characteristic of a convict and loses its importance it had in criminal legal relations (first and foremost when punishment was imposed). When separate detention is under decision this criminological

characteristic of convicts is integrated in the penal execution law. Thus, according to Part 3 Article 9 of the Execution Penal Code of the RF measures of correction of convicts, one of them is security, are taken according to the type of punishment, character and level of social danger of a committed crime, personality of convicts and their conduct. In this case, personality is evaluated comprehensively and, the criminological characteristic of this category as well.

According to Part 1 Article 117 of the Execution Penal Code of the RF when penalties are applied to a convict sentenced to imprisonment the consequences why the crime had been committed and the personality of a convict are to be taken into consideration. With all this, measures include moving of a convict to a cell or a single cell-type premises. Thus, in the Execution Penal Code of the RF legal measures of separate detention of convicts considering criminological characteristic of a convict have been already included, and the appropriate provision of the Concept has a more «proving» meaning than it contains constitutive resolution.

Compliance of the Concept to the principle of consistency causes criticism; this consistency is disturbed within the framework of the document itself (internal aspect) and when this document is referred to legal regulations (external aspect). Thus, within the framework of internal aspect we can give the following situation as an example. In particular, in the Chapter «Social and psychological work with convicts. Upbringing and education of convicts» it tells about adaptation of advanced foreign experience of a psycho-diagnostic and psych-correctional work. But it is not clear why the importance of this experience is not shown in, for example, subdivision «Labor activity, professional education and professional training of convicts». The application of these measures of correction, in particular, in European penitentiary systems has deep traditions, original ways of overcoming problems existed (Rogge et al., 2014: 230-234). For example, in England and Wales since 1993 competitive process of recruiting of teachers from colleges and universities to provide professional education and professional training of convicts has been applied. In 2003 the Fund «Education and professional training of convicts» (OLASS) was founded; since 2012 the

system of crediting inmates has been used to give them an opportunity to pay for educational service on the third college paragraph, a part or the total amount can be written off against the above mentioned fund under condition of high results in education. Czerniawski points out that this model of motivation for education though it is rather expensive for tax payers certainly contributes to decrease of recidivism in criminality (Czerniawski, 2016: 205-207).

From the point of view of external aspect it is important to refer to the following example. Thus, in subdivision «Social and psychological work with convicts. Upbringing and education of convicts» «the working out of new approaches to formation of inmates association with the account on their interest and necessity of this one for inmates themselves, improvement of legal regulations of their activity» was strengthened. However, along with this conceptual regulations on the basis of the Federal law of December 7, 2011 № 420 «On amendment to the Criminal Code of the RF and separate legal acts of the RF» Article 111 of the Execution Penal Code of the RF («Associations of convicts») is considered to cease to be valid and up till now there are not any constructive improvements in this area. The provision on introduction of methods of mediation concerning convicts in turn didn't get considerable legal institutionalization.

Also it is important to point out some gaps when the principle of correlation of legal force of normative and subsidiary legal norms is realized. Beforehand, it should be stated that in order to define legal force and, accordingly, levels of social importance, contradictory subsidiary legal act is in the first line connected with law. We can talk that some provisions of the studied document cause critics from the point of view of both legal techniques and legal content. For example, in subdivision «Observance of rights and legal interest of convicts and of persons in custody» in order to provide rights and legal interests of convicts and of persons in custody legislative regulations of the grounds and order of allowing visits of relatives and other persons using video conferences or resources of information and telecommunication network of Internet are being made possible taking into consideration the opportunities of ex-

ecution penal system. However, this formulation is not possible for the doctrinal act which can contain certain legal regulations and having no legal force can fulfill legal regulation of the certain sphere of social relations.

At last, there are some problems of realization in the Concept of the principle of consistency and this is expressed in the existed duplication and contradictions between national and international law from the point of view of social and economic opportunities of realization of the appropriate standards. Thus, it is not clear what meaning is put in the following provision: «the execution penal system has kept in many ways the features of old penitentiary system, oriented on the other society. It doesn't take into consideration the present state of economics, integration of the Russian Federation into international legal area, international standards of inmates' treatment» which is provided in Chapter 1 «General characteristic and modern state of the execution penal system». A.A.Demichev underlines: «it is obvious that in economic way Russia is lagging behind of some European countries and the problem of financing of the execution penal system is rather hard» (Demichev, 2016: 28). In the conditions of financial crises and deficit of budgeting to finance perspective investment projects including development of production sector the reality of the existed regulations can be put in doubt.

Conclusion

The major problem of the conceptual development of the execution legal system in Russia in the light of interpreted principles consists in the necessity to define with the major model of domestic penitentiary system (and here we are in the state of search) and only then we can realize an appropriate account, in fact realization of international standards of convicts treatment. And it is important to resume that recommendable provisions in the essence, in particular, European penitentiary rules are not realized in full extent not only because of social economic but cultural mental character in western penitentiary systems (Aebi et al., 2015: 427-443; Parrott, 2015: 148-164) and that is why they should be interpreted in legislative constructions of the execution penal legislation in Russia with the utmost care.

As we see it, the set out critical notes can be taken into account in the process of preparation of the Concept of modernization of the execution penal system (2021-2030) worked out at present as political legal document defining major vectors, ideology development and reforming of the execution penal system.

Thus, the given material reveals some problems of conceptualization of execution penal policy of the Russian Federation and reflects appropriate patterns of European penitentiary ideology and forms scientific preconditions of the further optimization of the execution penal legislation of Russia.

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