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DOCTRINAL PROVISIONS OF PENITENTIARY LAW DEVELOPMENTS

The article is devoted to development of doctrinal provisions of Ukrainian penitentiary law. The role of penitentiary law doctrinal provisions in the humanization of imprisonment in Ukraine is analyzed. The necessity of penitentiary law development based on evaluation criteria is proved.

Keywords: doctrine, penitentiary law, criteria, humanization, punishment, convicted persons.

It is necessary to pay attention to the statement that in terms of Ukrainian penitentiary law there is no single understanding among scientists of doctrinal statements development idea. Some scientists think that this development is necessary but others do not suggest any developments must be carried out stressing on the presence of criminal executive law.

In our opinion, each of these approaches is adequate enough. We support the former opinion and, therefore, consider the fact that such kind of development is not researched thoroughly so we offer to examine it at the level of a scientific article.

In connection with the adoption of the resolution on the penitentiary system transfer under the auspices of the Ministry of Justice of Ukraine by the Cabinet of Ministers of Ukraine in May 2016, the new system has entered a new period of development, and it can be called a humanistic period, when the legal system is formed in accordance with the fundamentals of legal humanism, the basics of which are presented by human rights.

So, the issue of the penitentiary law doctrinal development on the basis of humanism is as relevant as ever before, not only in national but also in the global aspect. Moreover, humanism is based on the idea of anthropocentrism, where a human is in the center of the

whole concept, and depending on historical and cultural variability in approaches to the interpretation of concepts «right» and «person» the concept of «humanity law» was being transformed [1, p. 367]. The Protagoras statement that «human is the measure of all things...» [2] became a manifestation of the human's significance.

It is important to notice that after Criminal Procedure Code of Ukraine became more «humanistic», society and the majority of HR NGOs did not stop at achievements of the national penitentiary science. Today in printed and e-media, in scientific works people often argue about the necessity of humanization in terms of the execution process.

In connection with this the key question arose – is there a limit or a measure? Following 13 years of validity of the Criminal Procedure Code of Ukraine, in its area of activity a lot of humanistic changes were launched, especially in terms of execution and serving of punishments involving deprivation of liberty [3, p.27].

The issue of execution and serving of punishments involving deprivation of liberty, principles of criminal executive (correctional labor) legislation both at the theoretical and practical levels, were examined in a number of works of such scientists as G. A. Avanesov, Y. A. Antonyan, L. V. Bagriy-Shakhmatov, V. A. Badyra, O. I. Bazhanov, O. I. Bogatyriova, T. A. Denisova, A. N. Djuja, A. V. Kyrylyuk, V. V. Kovalenko, A. G. Kolb, V. A. Korchinsky, M. P. Melentev, V. A. Merkulova, P. P. Mikhailenko, A. S. Mikhlin, A. E. Natachev, A. I. Osaulenko, A. L. Remenson, T. V. Rudnik, I. A. Speranskiy, A. F. Stepanyuk, N. A. Struchkov, Y. M. Tkachevskiy, V. M. Trubnikov, B. S. Utevskiy, S. Y. Farenyk, S. V. Tsaryk, I. V. Shmarov, I. S. Yakovets and other.

The abovementioned scientists have made a significant contribution to the solution of penitentiary theory and practice issues but we notice strong lack of developments in aspects connected with the Ukrainian penitentiary policy humanization (which appears on the relevant branch of law) at the present stage and development of the penitentiary law doctrinal provisions.

The purpose of this article is to analyze the creation of Ukrainian penitentiary law doctrinal provisions and determination of its role in the humanization of punishment in Ukraine.

European integration of Ukraine provides for the establishment of proper conditions for sentencing convicted people in criminal punishment institutions of the Ministry of Justice of Ukraine, and

promotes necessary support with the adaptation to a new type of life in order not to lose valuable social connections, but to get education, acquire a new profession, and to be ready for socialization after the imprisonment.

At the same time, creation of a legal state governed by the rule of law principle in all areas of public life, internal policy and public administration mechanism through the prism of the law and its application suggests a new vision of the Ukrainian penitentiary system functioning at the modern stage of its formation and development.

The development of Ukrainian penitentiary law provides for its research in specific historical conditions, taking into account the penitentiary science, the transformation of the criminal executive legislation of Ukraine, and also due to many problematic issues of the Ministry of Justice of Ukraine functioning as a legal successor of the State Penitentiary Service of Ukraine.

Taking all the above mentioned into account, we will analyze Ukrainian penitentiary law on the doctrinal level due to the fact that its changes depend on the social requirements together with the challenges presented by the 21st century.

Numerous debates and discussions in scientific schools and mass media among practitioners show us the urgency of scientific development of Ukrainian penitentiary law. Therefore, scientists faced the task of many postulates to be revised – especially those reflecting that reflect the dogmatism of thinking, the ability to perceive new ideas which requires strong feeling of reality and professional courage.

Given that the Ministry of Justice of Ukraine is currently at a new stage of its development in the area of punishment and probation execution that is connected with the intensification of European integration processes in the penitentiary sector as well as in the whole country; development of Ukrainian penitentiary law is one of the most important long-term approaches in the system of correction and resocialization of prisoners along with training of new generation's prison staff.

Talking about the terminology of penitentiary law and prison policy, it was used and is used today as a concept and the definition is taken from international documents concerning the deprivation of liberty execution.

In our opinion, the development of main provisions of the penitentiary law doctrine will initiate the adoption of the Penitentiary

Code of Ukraine and other legal acts on the basis of the scientific recommendations («On principles of functioning of the penitentiary system of Ukraine», «Functioning of special criminal executive institution of Ukraine» etc).

Thus, the doctrine of Ukrainian penitentiary law stipulates conceptual combination of ideas, theories, principles, views of scientists on the functioning of the penitentiary system, which has full support from state and non-state institutions, civil society and promoted by the government in order to implement tasks and functions in the area of penitentiary relations. So, the doctrine of penitentiary law cannot exist by itself, it constantly exists in the legal doctrine, and therefore it should be seen as the result of juridical science.

This approach coincides with the position of A. B. Vengerova, who believes that the legal doctrine is a reflection on the impact of juridical science [4, p. 425], and also with our position according to which legal doctrine in general and the doctrine of penitentiary law in particular is a specific source of law that regulates the procedure and conditions of execution and serving sentences by convicted people and prisoners.

Also the position of A. V. Malko, who generally viewed the doctrine as an important direction of a modern legal policy, is convenient for us too [5, p. 14]. Consequently, while developing the doctrine of penitentiary law we cannot ignore such aspects as: the genesis of the penitentiary system formation and development; the role of the penitentiary policy as of contemporary national legal policy and reforms content in the penitentiary area.

Any reform of the penitentiary system is always a special nation-wide process and although it is launched by scientific elite, such kind of decision is made as a result of objective changes in society on the state level. Every reform is stimulated by the desire to change the penitentiary system, to harmonize its condition with the European standards.

The significant humanization of the criminal, criminal-procedural and criminal-executive legislation introduces new values in the penitentiary system of Ukraine. However, as a history of the penitentiary system shows, during 25 years of independence it was not able to replace the old administrative-command tradition of controlling institutions responsible for execution of punishments and the desire to adopt new democratic principles of its functioning is being rooted very slowly.

In particular, the outer side of the prison system functioning shows that it is in constant reforming dynamics and by its content does not correspond to this dynamics. If we want to recognize the prisons' reforming as an integral part of the legal reforms of the state, it is necessary to understand that it must correspond to certain requirements: comprehensive validity; timeliness, completeness of content; competence and requirements. And now we will make a short brief of these requirements for the reform:

1) comprehensive validity that is always characterized by the necessity of decision-making potential for the reforms on the basis of the most completed and reliable information, analysis, resource support, academic support, opportunities of target functions for the development of a system that is being reformed at the state level;

2) time limits of the reform defining that the decision for the reform to be made should not be of conjunctural nature and correspond to requirements and demands of the time and systemic tasks. Otherwise, delayed decisions or their non-performance can cause negative consequences for the system's development;

3) completeness of the reform's content covers the whole managed object, all areas of its activities and directions of development; it must be performed in a systematic («step-by-step») way;

4) authority is characterized by a strict adherence to the subject of the relevant rights and powers management. Unfortunately, the regular change of the state authority leads to staff turnover, instability of the system, imitation of reforms and other negative results;

5) necessity means the formation of positive changes and receipt of high-quality results from reform implementing. In this case we agree with V. G. Goncharenko, who states that reforms should not be simulated because then it turns into a reformism [6, p. 5–8].

Also it is necessary to mention that penitentiary reform is always held under the patronage of the government, and it means that the government is interested in such reform. And there is an important reason of such interest in this specific area to be reformed, therefore the government defines the Ministry of Justice of Ukraine as dominant in the area of punishments and probation execution.

The implementation of prison reforms cannot be completed without cooperation of the Ministry of Justice of Ukraine in the field of corrections and probation of non-state institutions, because their support is especially important when we speak about changing of the service status in civil society and promotion of public participation in

legislation improvement by offering views and recommendations, regulation of the procedure and conditions of execution and serving of criminal penalties, rights and interests of convicted people and people taken into custody, bringing it in line with European norms and standards and eliminating existing contradictions.

In addition, community helps to conduct inspections of remand centers and penal institutions of human rights observance during the execution and serving of criminal sentences and detention, implementation of legitimate rights and interests of convicts and people taken into custody.

The involvement of civil society representatives, primarily through community councils and supervisory committees allows us to inform the society objectively about the situation in penitentiary institutions and detention centers.

It should be emphasized that public institutions are not only directly involved in the adaptation and educational work with prisoners and exempted persons but also take an active part in the development of main directions of execution system reforming, determine main components of penitentiary policy, conduct special studies, organize discussions, seminars, scientific-practical conferences, produce relevant literature and so on. All these actions and efforts stimulate creation political situation favorable for activating the reforms of Ukrainian penitentiary system.

The analysis of such reforms in the penitentiary sector conducted by «Intellect» scientific school showed us that these reforms should be recognized as those based on humanistic basis, and talking about negative processes - reforms are claimed to be successfully started but unfortunately not completed.

So, among the basic aspects that may be taken as criteria for assessing the necessity for the development of penitentiary law doctrine, we should provide the following:

validity of the necessity to develop such doctrine (the problem of settlement, failure of existing regulatory requirements, failure to use opportunities of legal practice, etc.);

search for the possible introduction of penitentiary law in different historical periods of state development, what decisions were made and what the consequences;

transformation of the criminal-executive legislation of Ukraine in the penitentiary as a prerequisite for further development of Ukrainian penitentiary law;

qualification of possibilities to influence the situation by changing the legal regulation in the penitentiary sector and ensuring changes in criminal practice.

Consequently, Ukrainian penitentiary law is considered to be an independent fundamental branch of law and characterized by its own subject, methods, structure, legal regulation and standards. Given that penitentiary law is the successor of the criminal executive law, it should be recognized as an element of legal system – a socially legal formation that reflects social, political, material, moral and penitentiary relations that exist in the society.

It must be stated that until 2003, this branch of law was called «corrective-labor law», which admitted only a part or a sub-branch of criminal law. In addition, private institutions directly connected to the activities of correctional labor institutions (institute of deprivation of liberty, institutions on parole and anticipatory exemption, etc.), were provided for by criminal law and on its basis it was concluded that the correctional labor law does not possess its own subject and method of legal regulation.

Therefore, in the process of Ukrainian legislation amending, the correctional labor law was gradually transformed into the penitentiary law, which is significantly different from the subject of legal regulation of the correctional labor law.

It didn't take much time and now scientists are reconsidering the current processes of the penitentiary system reforming, and nobody can discredit the statement that it is the time when criminal executive law should be transformed into a penitentiary law, defining it as an independent branch in the legal system. Penitentiary law demonstrates all the characteristics necessary for its recognition as a separate branch of law – it is characterized by its own subject and method of legal regulation, as well as a system of norms that ensure its functioning.

The issue itself – urge to justify the independence of penitentiary law in the legal system – does not mean the desire to separate it from other branches of law, but rather suggests that the modern penitentiary law which is a complex set of criminal procedural provisions can be transformed by adopting a new Penitentiary Code. It will prepare new laws and regulations to regulate the procedure and conditions of execution and serving of criminal penalties.

First of all, as M. S. Pusyrev states, it is important to understand that there is no perfect legal system. Its effectiveness depends on

the timeliness and compliance of state and law of a particular country, and a particular stage of social development [7, p. 59].

So, the system of penitentiary law in Ukraine is an objective legal phenomenon, which is formed as a result of the civilization's development and features of this development. Penitentiary institutions are actually reflecting the existing system of social relations, which depends on the necessity of practice, deeply influenced by the society, and on the objective factors.

While the person is involved in committing a felony or other offense, he/she will face the legal system in the form of legal norms expression that are applied on behalf of the state. An essential feature of legal acts, regulating the procedure and conditions of execution and serving of criminal penalties is that they should be consistent both horizontally and vertically. In general, in its integrity, unity and consistency, they will form a new system of penitentiary legislation.

Thus, the Ministry of Justice of Ukraine in the area of execution of punishment and probation in implementing its activities for the humanization of punishments, adheres to the position which will allow you to maintain the mandatory method of penitentiary law and would not infringe and moreover humiliate the status of penitentiary subjects. That's why the creation of such scientific work, in the form of scientific articles, will attract the attention of a wider circle of scholars in the field of legal, psychological, pedagogical science and public community and as a result will be an important impact in the development of topical problems of national penitentiary science.

REFERENCES

1. Chebotarov, S. S. (2013). Humanistychni zasady prava: do istorii pytannia [Humanistic basics of law: history of the Issue]. *Publichne pravo – Public Law, 1,* 367–374 [in Ukrainian].

2. Kremen, V. H., & Ilin, V. V (2005). *Filosofiia: myslyteli, idei, kontseptsii [Philosophy: thinkers, ideas, concepts].* Kyiv: Knyha [in Ukrainian].

3. Bogatirev, I. G., Bogatirev, A. I., & Puzirev, M. S. (2014). Zakonodatelnyiy opyit gumanizatsii ugolovno-ispolnitelnoy politiki Ukrainyi na sovremennom etape [Legislative experience of the humanization of criminal-executive policy of Ukraine at the present stage]. *Zhurnal Femida – Magazine Themis, 8* [in Russian].

4. Vengerov, A. B. (1998). *Teoriya gosudarstva I prava [Theory of State and Law].* Moscow [in Russian]

5. Malko, A. V. (2001). *Yuridicheskaya doktrina kak vazhneyshee napravlenie sovremennoy rossiyskoy pravovoy politiki [Legal doctrine as an essential part of modern Russian legal policy].* Moscow [in Russian].

6. Honcharenko, V. H. (2014). Reformy I reformatorstvo [Reform and Reformism]. *Advokat – Lawyer, 8,* 5–8 [in Ukrainian].

7. Puzyrov, M. S. (2014). *Realizatsiia vypravnymy koloniiamy pryntsypu dyferentsiatsii ta indyvidualizatsii vykonannia pokarannia u vydi pozbavlennia voli na pevnyi strok [Implementation of the principle of differentiation and individualization in the execution of the penalty as deprivation of liberty for a certain period by corrective colonies].* I. H. Bohatyrov (Ed.). Kyiv: Vd Dekor [in Ukrainian].

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