КРИМІНАЛЬНЕ ПРАВО, КРИМІНАЛЬНО-ВИКОНАВЧЕ ПРАВО ТА КРИМІНОЛОГІЯ

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MODERN APPROACHES TO THE DEFINITION OF LAW BRANCHES NAMES, WHICH REGULATE THE EXECUTION OF THE PUNISHMENT IN UKRAINE

The article analyzes different approaches to the definition of law branches names, which regulate the execution of the punishment in Ukraine. It was proved that the use of the term "penal law" is impractical and unreasonable. It is noted that a presumption of understanding Criminal Executive law in natural law provides grounds for the assertion of the possibility of broad interpretation.

Key words: *criminal executive law, penal law, criminal executive legislation.*

Стаття присвячена аналізу різних підходів до назви галузі права, що регулюють виконання покарань. Доведено недоцільність і безпідставність застосування терміну «пенітенціарне право». Відмічається, що покладення в основу розуміння кримінально-виконавчого права саме природного права дає підстави для твердження про можливість його широкого тлумачення.

Ключові слова: *кримінально-виконавче законодавство, кримінально-виконавче право, пенітенціарне право.*

Статья посвящена анализу различных подходов к названию области права, регулирующего исполнения наказаний. Доказана нецелесообразность и безосновательность применения термина «пенитенциарное право». Отмечается, что возложение в основу понимания уголовно-исполнительного права именно естественного права дает основания утверждать о возможности его широкого толкования.

Ключевые слова: *уголовно-исполнительное законодательство, уголовно-исполнительное право, пенитенциарное право.*

The problem statement. The desire to introduce some cosmetic changes in legislation sometimes pushes scientists and practitioners in an attempt to substitute the term "Criminal Executive law" another term – "Penal law". Without going into the debate on the definition of the content of last category, we consider it necessary to note that such innovations are very dangerous and do not reflect the essence of the real needs basic knowledge of science categories.

In particular, practitioners evoke that they are serving it in the Penitentiary service, and the system has a name – the Penitentiary, cadets and students of specialized educational institutions are taught in courses like "Theory of Penitentiary", "History and the Theory of Penitentiary", "Penal law". There are thesis "Staffing of the penitentiary system in Ukraine", "Legal problems of reforming the Penitentiary system", a monograph on the Ukrainian "Penitentiary science" and so on.

It is alleged that the prison department name change is only a question of terminology, the practical value of which should not be exaggerated, and some scientists refer that the statutory (or rather – "legalization") the term "Penitentiary" Decrees of the President of Ukraine for 2010–2011 is starting to recognize the existence of penal science as a separate branch of scientific knowledge [1, c. 151].

Such transformation Criminal Executive law in the Penitentiary, in our view, requires detailed analysis of the arguments that are supporters of the modern understanding changes the name of law, which regulates the process of execution of punishment. This issue is devoted to our article.

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Literature review and state of the study. The term "Penal law" occupies a central place in the scientific knowledge of penal procedure, to determine the content of the concept and therefore always caused heated discussion representatives of science. The concept of "Penitentiary law" began actively discussed only in recent years, although the foundations that were laid by the Kiev school back in the mid 90's, before the adoption of the Criminal Executive Code of Ukraine. A significant contribution to this discussion, made by such Ukrainian scholars, V. Badyra, A. Gel, T. Denisova, A. Dzhuzha, O. Kolb, A. Lysodyed,, G. Radov, A. Stepaniuc, V. Trubnikov, V. Filonov, O. Frolov, I. Yakovets and others. However, recent legislative changes and the current penal reform necessitate a comprehensive study of this issue in order to determine whether or not grounds for name change in law, which regulates the process of execution of criminal penalties.

Important for disclosure of selected subject is address to the history of the prison department. Before the revolution of 1917 and the beginning of 20 years of the twentieth century, science was used the term "Penitentiary" and derived from it. The word "Penitentiary" comes from the Latin word "poenitentiarius", which translated into the Ukrainian language means repentance, internal self–cleaning" [2, c. 38]. In foreign concepts XVIII and in the Russian Empire was a common view that the meaning of being sentenced to imprisonment is the religious influence on him, which means the guilty repentance and forgiveness of his sins. Later the term "Penitentiary" has acquired the meaning of "corrective". In other words, the prison system is understood as a system focused on the process of repentance and amendment. However, the main point corrections said, and said all the classics penitentiary direction in such a system is precisely the prison in the classic sense of its construction.

Thus, the name "Penitentiary system" can be used to describe the totality of the prisons of different types or species, as do other countries. In this respect it is important to note that the basic Law of Ukraine "On the State Penal Service of Ukraine" in Art. 6 fixes: The State Penal Service of Ukraine under the law carries enforcement and law–enforcement functions, and consists of a central executive body that implements the state policy in the sphere of execution of criminal penalties, its local authorities, criminal executive inspection of penal institutions, detention centers, paramilitary groups, educational institutions, health care institutions, penal institutions of enterprises, other enterprises, institutions and organizations established to ensure that the objectives of the State penitentiary service of Ukraine.

Thus, the Penal Service in addition to penal institutions, include other elements, including penal authorities (Ministry of Justice of Ukraine, interregional administration, probation). This is important because the implementation bodies never ever not named prison and standards in which the term «penitentiary» refer exclusively sentence of imprisonment.

Ukraine rejected the punishment in the form imprisonment, Ukrainian prisons eliminated or converted in the colony, with a completely different way of staying in them prisoners. Given this disappeared and reason to believe the existence of base in Ukraine to implement the idea of the prison, which requires holding in the cell (in the classical form alone). This does not provide any argument in favor of its return, but even subject to availability – hardly limited budget and a difficult economic situation will make it possible to rebuild colony in prisons or build new facilities. Therefore, we can assume that the return to prison has a very abstract term. But now a number of experts stubbornly try to revive the term "penitentiary", trying to artificially fill it with some other content.

In our opinion, the allocation of the so–called Penitentiary law or transformation Criminal Executive law is ill–founded attempt to create an artificial idea of initiating progressive changes in scientific approaches. The first institution for the punishment was a prison and, as already mentioned, precisely because of this fact penitentiary system became known as the prison as other institutions was not simple. And researchers studying this phenomenon have identified a new area of scientific knowledge as the science of prison [3, c. 3].

For allocation this field of scientific knowledge as "Penitentiary law" it is not to hold a simple renaming Criminal Executive law in the Penal Law. It should first find out the need and the possibility of removing Penitentiary law as a separate branch of law in Ukraine, distinct from the existing Criminal Executive law, and to identify its subject and method of legal regulation, other reasons allocation separate branch of law. And this cannot be done, because in Ukraine is still not even made clear isolation and common understanding of the term "penitentiary". Also keep in mind that scientific field does not occur spontaneously, it is quite a complicated process. The need for and feasibility of isolating new branch of law in the legal system of Ukraine is very important and requires close attention of scientists.

The researchers rightly noted that in the classification of branch of law should guide features areas of public life, which is characterized by a pronounced specificity quality and social significance and a large number of regulations that do not fit into any of the traditional branches of law [4, c. 331].

And what are the rules now, not only concerning Penitentiary law, and not fit into to Criminal Executive law? We did not find such rules.

In fact, all possible emergence of new branches of law can be reduced in two basic: 1) the spread of legal regulation on the part of social reality, which had not previously been the subject of legal regulation; 2) separation of one or more branches of law interconnected set of rules (legal institutions), which acquired a qualitatively new properties. And it is important to clearly and specifically answer the question of when and why we can assume that generated new branch of law actually occurred. For this you must first determine whether the stock some intermediate (transitional) forms, whose presence could indicate the possibility of a new branch of law. In the first case such intermediaries shall be considered as the emergence legal institution (which sometimes join the existing branches of law), in which novelty, the specificity of the subject of regulation led to the emergence of new properties in terms of method, principles and mechanisms of legal regulation. If there is a new branch of law by separation from one or more existing branches of law given set of rules, which acquired qualitatively new features, such intermediate (transition) shall be considered as the emergence of integrated cross–sectorial "boundary" Legal Institute [5, c. 72]. Regarding the penitentiary direction (even if proof of its feasibility isolation) none of the provisions has no a place. Thus, one could argue that the reasons for the emergence of such a law, penitentiary Law as currently defined.

It should be emphasized that the main objectives of the science Criminal Executive law defines as A. Stepanyuk are: a) research of the objective laws Execution of Punishment that govern the activities of and penal institutions, and b) formulation of certain expressed in generalized form requirements of drawn to execution and serving sentences, as well as the participants of this activity [6]. It is this, and not to attempt to justify the expediency of changing names, and have directed efforts of scientists.

Based on the goal of this article and the very definition of modern approaches to the name of the law, which regulates the process of execution of criminal penalties, it seems appropriate to apply the provisions of the Constitution of Ukraine and its official interpretation. Important in this context is the judgment of the Constitutional Court of Ukraine in the constitutional petition of the Supreme Court of Ukraine on the constitutionality of Ukraine (constitutionality) of the provisions of Article 69 of the Criminal Code of Ukraine (the case of the more lenient penalty) number 15–rp of 02.11.2004 p. [7], which particularly says that Ukraine is a legal state (Art. 1 of the Constitution of Ukraine). According to the first paragraph of Article 8 of the Constitution of Ukraine is recognized and effective rule of law. The rule of law requires the state to its implementation in law–making and law enforcement activities, including laws that its content should be first soaked with ideas of social justice, freedom, equality and so on. One manifestation of the rule of law is that the Law is not limited legislation as one of its forms, and includes other social regulators, including morality, traditions, customs, etc., which are recognized by the society and due to historically achieved cultural level of society. All these elements combined right quality that corresponds to the ideology of the validity idea of law, which largely was reflected in the Constitution of Ukraine.

Such understanding of law not give rise to his identification with the law, which can sometimes be unfair, including restrict the freedom and equality of individuals. Justice – one of the basic principles of law is critical in defining it as a regulator of social relations, one of the human rights dimensions. Normally justice considered as property of law, as expressed in particular in the scale equal legal behavior and proportionality in legal responsibility infringement.

In the area realization of the right principle of justice is manifested, in particular, equality before the law, compliance with crime and punishment, purposes and means of the legislator, elected to achieve them (p. 4.1. of said decision).

As a result, the above is confirms the thesis that the law is a phenomenon much broader than normative (legislative) its component. Regarding the place of law in this concept, it should give the idea some scientists who do not identify Law with the rules and noted that Criminal –Executive law has a special system of law, created to regulate the activities of bodies and penal institutions and social relations certain type [8, c. 23]. In other words, the rules and their system – only a single element of Criminal Executive of law and it is not exclusive.

In the science Criminal Executive law and in practice execution of punishment constant is the idea that Criminal Law regulates not only the direct order and conditions of execution and serving sentences, but also to some extent the special education process, where provisions and categories of pedagogy, psychology and economics [9, c. 10]. And if you do not consider this factor when determining the meaning of the considered branch of law – we again get a definition that does not reflect all the essential characteristics of this legal phenomenon.

Thus, analyzing the problem of understanding the concept Criminal Executive law, given the lack of a unified definition and ambiguity of the characteristics of this phenomenon, we consider it appropriate to outline its basic epistemological characteristics, namely the need to distinguish between right and law; Law to be regarded as a social phenomenon related categories such as justice, freedom, equality, humanism; Law should be seen in close connection with human rights [10, c. 47]. At first glance, the thesis expressed by supposedly cannot be clearly perceived in the context Criminal Executive law, especially given the specificity of the method of legal regulation Public relations – imperative order or method that does not allow for objections. V. Badyra notes in this regard that, although convicted and staff are in a constant state of interdependence, but it in no way be regarded as equal partnership, because there is unequal legal status for prisoners have almost no right to vote, they are dependent on other prisoners, and even to a greater extent from employees of the colony, so that the problems of food, health care, labor and all other aspects of life in prison is dependent on the staff [11, c. 82]. However, in the course execution of the sentence may use other methods, including the method of persuasion, discretionary method (these methods are specific to the process of realization of natural rights, regardless of the industry in which it occurs).

Specific features of individual rights and freedoms of persons serving a criminal sentence mainly include: 1) they are inherently inalienable, natural rights of every human being, and therefore not directly follow from person belonging to the citizenship of the State; 2) these rights and freedoms are inalienable and belong to everyone from birth; 3) that such rights and freedoms that are necessary to protect life, liberty, dignity as human beings, as well as other natural law, is closely related to its individual, private life; 4) they are particularly important for each person, so in case of their infringement is always negatively affects a person [12, c. 60]. From here – formalization of these rights and freedoms of prisoners in the regulations is not always required, and their presumed existence independent of the will of the legislator, people or other entities. At the same time they are covered by the notion Criminal Executive law. A presumption of understanding Criminal Executive of law is natural law provides grounds for the assertion of the possibility of broad interpretation.

Summarizing all the above, we can state that this definition should include the following principal provisions: penal law – a system of general concepts, regulations, rules, codes of conduct and other regulators relations arising in the process and on the execution of criminal penalties, based on natural rights and freedoms, and guaranteed by the state and socially active members of society.

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МУРАВЙОВ К.В.

ШЛЯХИ ВДОСКОНАЛЕННЯ ЗАБЕЗПЕЧЕННЯ ДОТРИМАННЯ ПРАВ ОСІБ, ЯКІ ВІДБУВАЮТЬ КРИМІНАЛЬНЕ ПОКАРАННЯ

У статті на основі аналізу норм чинного законодавства України визначено можливі шляхи вдосконалення забезпечення дотримання прав осіб, які відбувають кримінальне покарання. Зазначено, що під правами осіб, які відбувають кримінальне покарання, слід розуміти комплекс закріплених у законах України та міжнародно-правових актах прав, які встановлюються за особами, котрі відбувають кримінальні покарання, в обсягу, відповідному правам усіх інших громадян, за винятком обмежень, установлених законодавством та вироком суду.

Ключові слова: *вдосконалення, забезпечення, дотримання права, кримінальне покарання, нормативно-правовий акт.*

В статье на основе анализа норм действующего законодательства Украины определены возможные пути совершенствования обеспечения соблюдения прав лиц, отбывающих уголовное наказание. Отмечено, что под правами лиц, отбывающих уголовное наказание, следует понимать комплекс закрепленных в законах Украины и международных правовых актах прав, которые закреплены за лицами, которые отбывают уголовное наказание, в объеме, соответствующем правам всех граждан, за исключением ограничений, установленных законодательством и приговором суда.

Ключевые слова: *совершенствование, обеспечение, соблюдение права, уголовное наказание, нормативно-правовой акт.*

The article based on an analysis of the current legislation of Ukraine identified possible ways to improve the enforcement of the rights of persons serving a criminal sentence. It is noted that when the rights of persons serving a criminal sentence, should understand complex enshrined in the laws of Ukraine and international legal acts of the rights established for persons serving a criminal sentence in the amount corresponding to the rights of all other citizens, except for the limitations established by law and court verdict.

Key words: *improvement, maintenance, human rights, criminal penalties, legal act.*

Вступ. Сьогодні наша держава перебуває на шляху свого становлення і розбудови, які охоплюють усі сфери життя суспільства. Не оминув цей тривалий та складний процес і функціонування органів та установ, які виконують кримінальні покарання. Суттєві зміни відбулись у законодавчому забезпеченні діяльності цих інституцій. Однак, незважаючи на це, існує ціла низка суттєвих проблем у механізмі реалізації державної політики у сфері виконання покарань,

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