Legal and Penitentiary Safety and the Concepts Relation

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Abstract: The increasing role of confinement in a penal system requires guarantee of discipline and safety of the prisoners. Intentional crimes committed in detention facilities and institutions of confinement are an inevitable consequence of the destructive characteristics of these places which increases the social danger of such acts. The majority of legislative measures aimed at safe and efficient functioning of the institutions of confinement often don’t have any practical application. Meanwhile, the imperfection of the penal system in a form of confinement caused by the economic volatility and the lack of necessaries leads, in its turn, to the failure to achieve its objectives by means of penalty. As a result, it induces the increase of crime which undermines the economy and the normal functioning of the state as a complex sociopolitical institution. This can only be overcome by giving appropriate powers to people being highly competent in the field of execution of criminal sanctions. The concepts “legal safety” and “penitentiary safety” stated by the author are provided as required conditions and the result of safety provision to processes and subjects of execution and service of caption and criminal sentences.

Key words: Legal safety • Penitentiary safety • Criminal-executive legislation • Crime in institutions of confinement • Criminal subculture

INTRODUCTION

The current legislation and departmental legal-regulatory acts do not reveal, unfortunately, the meaning of the concept “penitentiary safety”, which condition the necessity of its doctrinal interpretation. The literature proposes to consider the “penitentiary safety” as the concept of penal-executive law, in other words, as a part of legal safety in the sphere of criminal-executive legal relationships, the subjects of which are both an individual and society and state. The author of this article perceives the penitentiary safety in a different way, as intersectorial concept. Penitentiary safety means immunity and security of essential interests of convicted, treatment of them within the frames of law and moral, as well as security of the interests and rights of a man, society and state from threats and dangers that can come from persons convicted to any types of sentences.

Safety as a form of social life and security state of essential interests of a man, society and state is in direct dependence on means that used and applied to reach it. Application of these or other means to reach the safety is conditioned with evaluation of threats and dangers. The more real occurrence of threat of danger, the more volume of forces, means and methods must be to prevent their occurrence. Certain gradation availability of threat and dangers reality conditions the necessity of such approach to measures and means for safety provision [1].

It is obvious that the means of criminal-executive law are not enough to provide penitentiary safety. Possibilities of all directions of criminal policy must be mobilized: except for criminal-executive as well as penal, procedural-criminal and criminological policy. At the same time one cannot help admitting that it is the possibilities of criminal-executive law have the basic meaning to provide the penitentiary safety.

Subject to application particulars of various means of arrangement and performance of protection and supervision the organizations of penalties execution will provide the public safety of different level depending on possible threat. Thus, a various set of means of correctional treatment under execution as deprivation of
liberty and alternative penalties related to labour influence makes it possible to say about various levels of penitentiary safety provision, which does not exclude the common direction of their purposes and targets.

Criminal-executive legislation as one of its approaches fixes the approach of penalty association with correctional treatment. In the Kazakhstan criminal-executive system special attention is paid to labour, which is considered not only as one of the effective means of training of convicted persons, but also as one of the main criteria to evaluate the correction level of the convicted persons. The approach of sentence association with such correctional measure as labour is implemented at execution not for all sentences. More completely its implementation can be traced at execution of sentences types relating to ... Every type of safety presents itself as secure from certain dangers and vice versa, peculiarities of dangers predetermine a required type of safety (secure) and means, methods, content of its provision (implementation, protection, guarding) and self-sufficiency. Legal safety In the law and other legal-regulatory acts the main “legal” dangers are separated as the most widespread and harmful at blocking of their application in the positive law space, discrepancy (conflicting), corruption, uncertainty of norms’ legal meaning, which condition the legal dangers of law enforcement: infringement (disregard of observance) of legal principles, main rights and freedoms, abuse of rights, surplus discretion of enforcement persons, etc.

Harmfulness of “legal” dangers is that they admit legal possibility not only of one maxims and legal decision, but variants that opposite to each other, including formally legal decisions relating to surplus discretion of enforcement persons, their abuse of rights. “Legal” dangers are antipodes of law – unlaw in the positive law in the legal system, factors of legal, law contradictions and conflicts in the law enforcement, legal nihilism of enforcement persons, etc.

Complex of “legal” and juridical dangers forms in the legal reality an actual unlegal - quasi-legal juridical practice of legitimate application by enforcement persons (layers, investigators, judges, employees of criminal-executive system of Kazakhstan - further as KCES, etc.) of legal and juridical dangers as the means of corruption technology, mechanism of quasi-legal and juridical practice existence, that is not a legal quality of juridical securing of rights and liberties including the right for safety and types of social safety. This mechanism is composed of the “legal” dangers level, the juridical dangers level, “felonious society” social level – that satisfies its unlawful needs by participation in formation and reproduction of dangers of the first and second levels, tampering and introduction of enforcement persons to the system of corruptive and other criminal relationships - antipodes of legal relationships including the safety legal relationships.

Legal safety as an independent type of safety is the security of legal regulatory acts and law enforcement from “legal” and juridical dangers that defines the legal quality of secure and secured types of social safety by means of legislation without dangers and law enforcement.

Penitentiary safety Dangers of the society penitentiary sphere are composed of three main and interrelated kinds of social dangers: 1) attributable to criminal characters (individuals) in any sphere of social existence dangers of criminal subculture of life activity; [2] 2) criminal-executive dangers; 3) penitentiary dangers.

Criminal-executive dangers- harmfulness are:

- Non-fulfillment or improper fulfilment of criminal-executive obligations of arrested and convicted - criminal-executive infringement of the law;
- Arisen civil, administrative, criminal infringements of the law in execution because of criminal (prisonous) subculture, interpersonal and every day relations of one arrested and convicted in relation to Others, their personal safety;
- Infringements of fire, ecological, production safety regulations;
- One arrested and convicted involve others into the relations of criminal subculture of life activity, into non-fulfillment or improper fulfillment of criminal safety;
- Infringements of fire, ecological, production safety regulations;
- One arrested and convicted involve others into the relations of criminal subculture of life activity, into non-fulfillment or improper fulfillment of criminal-executive obligations;
- Making illegal or formally legal criminal-executive sentences and other abuse of criminal-executive law (rights), non-fulfillment of criminal-executive obligations by employees;
- Maintenance of organizational, materials, ideological principles of prisoner subculture of life activity within the convicted environment in performance of arrests and punishments; [3]
- Other actual danger of said infringements can be physical, property, moral, criminal-executive, civil, etc.
The identified dangers are infringements of criminal-executive, criminal, investigation and search operations, labour, civil, pension, fire-prevention, sanitary and other legislation. The aggregate of all these dangers forms the type of criminal-executive dangers in widespread meaning. In a restricted sense the criminal-executive dangers are deviations from norms requirements of only penitentiary (criminal-executive) legislation and law of custody. The essential sign (property) of the criminal-executive dangers is the degree and direction of their injuriousness, that infringes but not destructing the criminal-executive process. Disorganizing execution and serving of danger is penitentiary.

Penitentiary dangers-harmfulness to personality, society, state in and beyond the KCES are:

- Low management level of security and non-security of criminal-executive regime, process and safety that stipulate anti-penitentiary harmfulness of danger occurred in criminal-executive system;
- Demand for legal, juridical dangers and quasi-legal practice, quasi-penitentiary relationships created by their use; [4]
- Substitution of legal means, methods, organization and management procedure of the whole penitentiary process are illegal:
- Infringements and crimes prepared and performed by arrested and convicted against the management procedure, employees, law-abiding arrested and convicted persons during serving (penitence), their communities;
- Low level of presence and predominance of refuses of arrested and convicted persons from subjective penitentiary serving processes;
- Creation and criminal activity of organized criminal groups of arrested, convicted, employees in the institutions; [5].
- Other attributable to penitentiary sphere of the society and kinds of dangers caused by it correspond to two interrelated kinds of social safety in the penitentiary sphere: a) criminal-executive safety, including persons safety of life and health of arrested, convicted, favourable domestic, housing, laboring and other environmental conditions, legal culture, legality of executive process of arrests and criminal statements; b) penitentiary safety of serving, including safety of subjective penitentiary (repentance) processes, personality of the penitentiary process subjects, employees’ life of penitentiary life activity, etc. The indicated kinds of safety of execution and serving of arrests and criminal sentences is the system of internal penitentiary safety for KCES.

Serving is conditioned and associated with execution, but it is relatively independent, first of all, that it is the sphere of comparative freedom of personal individual choice of penitentiary (assumption or refusal of the penitence process by the arrested and convicted person: repentance, correction, recovery and social adaption [6]) serving. Provision of criminal-executive safety is dependent on legality of criminal-executive process and penitentiary principles of execution, which form subjective penitence processes of serving. Safety and legality of the criminal-executive process are interrelated, but not identical: provision of criminal-executive safety results the criminal-executive process in the legal level, in which the necessity to apply the protection safety measures fall away and the sources do not develop harmfulness of criminal-executive dangers into penitentiary one. Thereby, the criminal-executive safety provides execution legality of arrests and criminal sentences, penitentiary principles (humanism, democracy, etc.) and rights, including the entitlement for penitence and safety, formation by penitentiary principles execution of penitential relationships of serving, penitentiary culture and law and order.

Penitentiary safety of a person, society, state consists of internal penitentiary safety in KCES and external safety of KCES for a person, society, state from penitentiary (generated in the penitentiary system) dangers. Unity of internal and defined by it external penitentiary safety of person, society, state is an independent kind of national safety – penitentiary safety. The internal penitentiary safety is composed as a unity of penitentiary execution safety and penitentiary serving, as well as safety of moral, domestic, working and other environment to perform the whole penitentiary execution and serving, its organization and management. The external penitentiary safety is the safety and secure of person, society, state beyond the criminal-executive system from destructive penitentiary law order of actions of employees, arrested, convicted in KCES, that condition their felonious actions from KCES in relation to a person, society, state beyond the KCES.

Relation of legal and penitentiary safety. Provision of penitentiary safety is conditioned to legal safety (certainty) of penitentiary legislation that excludes corruptive, conflicting norms, blanks, etc. available in it. Corruption, consisting in establishment for enforcement
person of unreasonably wide limits of discretion and possibility of undergrounded application of exclusions from general rules, for example, contain competence and capacity, stated in KCES, of heads of Corrective Institutions, by the formula “can” - provisional establishment of possibility to perform actions to secure separate rights of convicted in “Visits to convicted...”, “Trips of convicted...”, “Encouragement measures for convicted...”, “Procedure for encouragement measures apply...”, “Disciplinary measures applied to convicted...”, etc.

Danger of law enforcement is divergence of norms and principles of criminal-executive law, that define the legal status of persons who serving and executing the criminal sentence. For example, first, the principles of criminal-executive legislation were humanism, democracy and equality of convicted before the law, rational application of enforcement measures, sentence connection with correctional influence and others. However, the principles equality of legality, humanism, democracy in secure (performance, protection, guarding) of the employees’ rights for criminal execution of sentences of convicted persons is not taken into account in the legislation. For example, the Criminal-executive system of the Republic of Kazakhstan (KCES) regulates in details the rights of convicted persons, these rights provision is guaranteed (subject to restrictions related to courts, the European court on human rights, actions of conviction), but does not pay attention to proper protection to the sentences executors, in “About institutions...”, which very briefly defines personal rights of employees, assigns only the principle of legality, humanism, respect of the human rights widely related to the convicted persons’ rights secure by the employees.

Comparison of volumes, degree of detailed elaboration, guaranteed personal rights protection of convicted and employees of KCES and principles determined them in the legislation allows to note comparative incompleteness, inconsistency, discrepancy, disbalance of the convicted persons’ and employees’ rights regulation and guarantee of their secure, in other words, imbalance of protection (safety) of employees’ rights with the convicted’ rights protection. This disbalance sidelines the employees’ rights secure to the second background of interdepartmental (less priority and public) purpose and target. However, importance of personal and official rights secure for convicted employees for the penitentiary process is equal to the meaning in the penitentiary law of provision priority of convicted persons’ rights. The equilibration is a legislative and enforcement issue, the settlement of which is conducive to succeed the humanization of criminal-executive and the whole penitentiary process in the community of employees and convicted, in which “execution” is implementation of official rights, obligations by the employees and the convicted persons’ rights secure, “serving” is execution of the obligations by the convicted persons and self-sufficiency of the rights related to performance of the obligations by the employees. The equilibration is the factor of unity of execution and serving processes that consists that competence of executors and arrested, convicted persons are interrelated and interdependent and actions to implement them are the content of penitentiary process and unity of component processes, at that the executors’ rights are correspondent with the obligations of convicted persons, rights of convicted person and obligations of the sentences executors [7].

Juridical equality of main subjects of penitentiary process, its legality and penitentiary means of arrests and criminal sentences execution define the freedom of choice to arrested and convicted persons of subjective form of serving (penitence) process or its denial, opposition to execution, provision of kinds of penitentiary safety. Actual disbalance of the rights provision for arrested, convicted persons and employees can be increased with active self-defense of rights by convicted, including by appeal to the public prosecutor’s office, the courts, the European court on human rights, actions of supervising, human rights protecting bodies and organizations. Self-defense can intensify the contradictions of legal interests of arrested, convicted persons and employees, impartially and constantly existence of their confrontation in serving and sentence execution until conflicts result in protest infringements of arrested and convicted [8]. Contradictions enclose the conflict potential under insufficient material secure of implementation of the arrested, convicted persons’ rights declared by the law, in the absence thereof regime and conditions for execution and serving required by the law, that result in non-achievement of actual security law order and penitentiary serving purposes fro arrests and criminal sentences [9]. Non-settled legal, juridical, related to them organizational, personality, everyday life and other issues of organization and management of penitentiary process complicate execution of fulfillment algorithm by employees prescribed by the law, by the arrested persons - arrests and criminal sentences serving, stipulate infringements of employees that are direct dangers to criminal-executive process, its subjects, their rights, which in their turn, become the factors of criminal-executive dangers of arrested and convicted persons.
The essence of the penitentiary safety provision is in materialization of penitentiary rights competence content, including the right for penitence and safety, principles and stipulated by them legal phenomena of legality, humanism, democracy, legal justice, equality, penitence, etc., materialized aggregate of which creates safety - the protection condition of penitentiary processes, relations, their subjects and other elements of life activity area in the criminal-executive system. The main (subjective) form of this protection (safety) is the state of the subjects’ penitence as a result of secure availability of penitentiary execution of arrests, criminal sentences and self-sufficiency of arrested, convicted penitential in their serving, in other words, penitentiary (penitential) execution and serving is the source ad the main object of secure and self-sufficiency of safety of penitential individual as the basis of the whole penitentiary safety, as the penitential individual of the arrested and convicted, a personality of employee who maintenance their penitence, cannot be the source of anti-penitentiary dangers. Reforming taking place in KCES of Kazakhstan establishes legal and organizational conditions to executive and serving the arrest, criminal sentences and provision of internal (in the KCES) and external (beyond the KCES) penitentiary safety of a person, society and state. The secured penitentiary safety can be determined as the reality of legality, humanism, democracy, subjective processes of penitence in the practice of execution and serving of arrests and criminal sentences. Per se, the provision of penitentiary safety is manifestation and implementation of humanism and penitence and the actual penitentiary humanism is the secured penitentiary safety. Conditioned with the security of penitentiary legislation the security of the rights of arrested, convicted and employees, legality, democracy, penitence and safety of execution and serving of arrests and criminal sentences is legal penitentiary humanism and legal penitentiary safety. Infringements of law are unlawful, in a varying degree, dangerous activity of different subjects of legal relationships, expressed in infringement of common social prohibitions, come from the state, in various spheres of life activity of the society, including the penitentiary system. One of the ways to secure the safety and neutralize and prevent from the above mentioned actions is an adequate first of all, legal opposition to them.

In the last years the term “opposition” received a wide spread in the legislation, in mass media, in juridical practice, in everyday life, owing to different social phenomena [10]. This term is shown also in a great number of acts and by-laws. Besides, one can also find cases of indirect reflection in the legislation (subject to its substantial side) phenomena, identified with the term “impact”.

From application context of the term “opposition” in the legislation, with regard to negative social phenomena, the other side of the term under study is discovered - opposition to social useful and required phenomena. For example, the term “opposition” is widely used in relation to the crimes investigation in the juridical theory and practice. Thus, in opinion of several authors research of opposition to investigation acquired some special urgency and acuity. This is caused by scope of organized underworld activity associated with corruption of employees of power structure and law machinery. In the past opposition to investigation was understood mainly different forms and ways of crimes subreption, today the opposition to investigation can be determined as deliberate activity in order to prevent and in the last analysis, truth establishment on criminal case.

CONCLUSION

In whole, summarizing the particulars of the term use “opposition” in the legal regulation of public relationships, we can make a conclusion that with the help of legal instructions the directly opposite variants of opposition are established. The question is that legal norms, which contain the reference on negative opposition, are themselves the means of positive opposition to negative phenomena, as these norms are preliminary constructed as protective and consist of the patterns of prohibited behavior under threat of juridical responsibility.

REFERENCES