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Describing the Specifics of the Concept and Role of Legal Technique in the Development of Penitentiary Law at the Present Stage

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Abstract

Introduction: modern conditions of the development of our state require new approaches to the concept and tools of legal technique. A broad approach to the concept of legal technique significantly increases the scope of its responsibility, going beyond the exclusively external processing of legal acts, ensuring internal consistency and social conditionality of the norms of law. In this regard, the implementation of instrumental capabilities of legal technique can have a positive impact on the development of new branches of law and, in particular, penitentiary law. *Methods*: principles of dialectical-materialistic cognition, requiring an objective and comprehensive study of the subject in the totality of its contradictory sides, as well as a set of general scientific (analysis, synthesis, induction and deduction) and private legal (formal legal) methods. *Purpose*: to analyze applied possibilities of a broad approach to legal technique as a technique of legal regulation in the formation and development of new penitentiary law as a relatively independent branch of modern Russian law. *Conclusion*: the composition of legal technique as a technique of legal regulation directly includes normative and procedural technical and legal means (techniques), which help improve legislation and its social effectiveness. Improving social effectiveness of penal law is inseparable from the ideas and values of humanizing the execution of criminal penalties. Strengthening of this trend, combined with gradual expansion of the subject of penal law, create the necessary prerequisites for the formation of a relatively new branch of penitentiary law, the emergence of which is possible with the advent of either an updated version of the Penal Code or with the adoption of the Penitentiary Code. The article presents concrete proposals to improve both existing and new legal institutions, the emergence of which would make it possible to reasonably talk about penitentiary law.

Keywords: legal technique; legal regulation; branch of law; penitentiary law; legislation; norms of law.

5.1.1. Theoretical and historical legal sciences.

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Introduction

At the present stage of the development of legal science, there is a clear trend towards a broad understanding of legal technique. This approach is based on the idea of legal technique as a technique of legal regulation. It should be noted that back in the early 20th century, Western European legal scholars considered technique in close connection with law and legal regulation. Thus, G.I. Muromtsev focuses on the following approaches to this phenomenon: a view on the technique of the art of adapting abstract principles to legal life is reflected in the works of I. Kohler and J. Ripert; W. Stammler draws attention to the connection of technique with the intellectual side of lawmaking, development of scientific concepts and systematization of law; L. Duguit and R. Demogue perceive technic as an instrumental phenomenon, a set of tools and procedures that ensure achievement of legal goals [1, pp. 16–17].

Researchers also point to the inseparable nature of law, technique and regulation, while considering technique as a means of achieving certain goals, in particular establishment and maintenance of order in society [2, p. 7].

There is a certain return to the origins in the perception of legal technique. The initial approaches formulated at the beginning of the 20th century turn out to be very relevant in the 21st century. It seems that one of the important consequences of a broad understanding of legal technique is the desire to move away from the formal dogmatic perception of law, to consider it as a regulator that can and should adjust to the rhythm of public needs and interests. In other words, legal technique acts as a tool that ensures social conditionality and development of law, its improvement.

Legal technique as a means of forming penitentiary law

Formation of new branches of law is a rather complex process, largely determined by the objective laws of social development. In this regard, the branch of law is a sustainable entity that is less dependent on the discretion of the state and its officials than the content of any law.

Polar views on penitentiary law are expressed in legal science. Some scientists (A.M. Bobrov, N.A. Mel'nikova) consider it premature to assert the emergence of penitentiary law. Their argument is based around the thesis of the absence of an independent subject and method of regulation, therefore, neither at present nor in the long term, there is no reason to single out penitentiary law as a new branch or sub-branch of law [3].

We partly agree with these authors. Nowadays, it would be a mistake to assert the existence of an independent subject and method of penitentiary law, qualitatively different from the subject and method of penal law. However, we believe that A.M. Bobrov and N.A. Mel'nikova are mistaken in excluding the very possibility of the emergence of penitentiary law as an independent branch. At least, this point of view is debatable due to the continuity of social and state development, therefore, it is impossible to exclude the gradual evolution of penal law into penitentiary law. In addition, the features of modern criminal and penal policy directly contain prerequisites that contribute to the formation of an appropriate regulatory complex. We will focus on the content of these features a little later.

It is worth mentioning that the term "penitentiary law" is gradually entering the circulation of legal science. Some scientists admit a direct analogy of penitentiary and penal law (R.B. Golovkin [4, p. 25], V.A. Utkin [5, p. 70]). Other researchers note that it is currently acceptable to talk about the existence of a complex phenomenon. Thus, S.M. Oganesyan believes that penitentiary law should be considered as a complex branch of law [6], while R.A. Romashov – as an intersectoral normative community [7].

The broad approach is based on the idea of comprehensive regulation, according to which the subject of penitentiary law includes elements of other sectoral entities. For example, R.A. Romashov argues that penitentiary relations have a common object – *penitentiary environment*. It is precisely this feature that makes it possible to talk about penitentiary law as an intersectoral normative community that unites both specialized legal acts and acts indirectly related to penitentiary communications [8, p. 242]. That is why "the normative community of penitentiary law, along with the norms and institutions of penal law, includes the norms of criminal, criminal procedure, constitutional, administrative, civil, labor law and other branches" [9, p. 215].

In our opinion, the position of R.A. Romashov is only partially true. The phenomenon of intersectoral normative community is rather debatable. There is no clarity on the status, features and place of this community in the system of Russian law. It is unclear whether it should be considered as an intersectoral institution or a complex branch of law. The latter concept has been subjected to reasonable criticism in Russian legal science and has not been widely used, unlike the concept of "complex institution".

Complex institutions are quite common in Russian law, the simplest of them is the institution of property. In this regard, let us make an assumption clarifying the idea of penitentiary law as an intersectoral normative community. Penitentiary law includes penal law, as well as a number of complex institutions consisting of norms of various branches of law. Thus, it is necessary to talk about gradual expansion of the subject of penal law, quantitative changes at a certain stage can lead to the emergence of penitentiary law.

Nowadays, penitentiary legal relations and emerging penitentiary law are characterized by their complexity, as R.A. Romashov rightly writes. In this regard, we would like to note that penitentiary legal relations can serve as a law-forming factor for the development of criminal law and emergence of certain compositions. For example, in accordance with Article 321 of the Criminal Code of the Russian Federation, convicts' actions to harm the life and health of other convicts committed in order to prevent their correction are criminally punishable. In other words, correction and educational work as the most important guidelines of the penal legislation are provided by measures of a criminal legal nature. The establishment of liability is a direct consequence of the fact that opposition to the educational process has a serious disorganizing effect on activities of penitentiary institutions.

It seems that the complex nature of the subject of emerging penitentiary law has a corresponding impact on the method of regulation. As is known, the method of regulation is understood as a set of techniques and methods of influencing public relations, while the method of regulation is considered an additional criterion for the formation of the relevant branch.

Current penal law, and, accordingly, penitentiary law as its possible successor, regulates not only the process of serving a criminal sentence, but also a number of other relations (in particular, labor and educational relations). Unlike the dispositive method used in labor law, current penal legislation is based on imperative principles, since it contains a prohibition to stop work to resolve labor conflicts, while refusal to work or termination of work is a malicious violation (articles 103 and 116 of the Penal Code of the Russian Federation). A similar approach can be found in the analysis of the method of legal regulation. In particular, Article 108 of the Penal Code of the Russian Federation establishes the obligation of vocational training or secondary vocational education for convicts who do not have professional skills for work in a correctional institution.

Thus, the method of regulating labor and educational relations differs significantly from the method of labor and educational law. The given example justifies the position of R.A. Romashov, who emphasizes the complex nature of penitentiary legal relations.

The use of specific technical and legal tools makes it possible to ensure specifics in the content of the subject and method of legal regulation. First of all, this specifics manifests itself in the nature of legal structures and legal regulations.

In our opinion, the complex nature of public relations regulated by current penal law contains a prerequisite for further development and expansion of the subject of penal law. This trend is stable and in the foreseeable future may contribute to the emergence of penitentiary law as a full-fledged branch of Russian law. Legal technique plays an important role in this process.

At the present stage, humanistic principles prevail in the practice of execution of criminal penalties. The role of legal technique is to review certain provisions of current penal legislation in terms of increasing guarantees of the rights and legitimate interests of convicts. It should be noted that the current Concept for the Development of the Penal System up to 2030 stipulates improvement of the effectiveness of ensuring the rights of persons in custody and serving sentences. At the same time, it establishes specific measures to improve the

situation of these persons, such as increasing a number of visits, parcels, telephone conversations; realizing the right of suspected, accused and convicted persons to send and receive e-mails, electronic appeal to human rights commissioners; creating an accessible environment for the disabled; enhancing standards of clothing, food, and living space.

The implementation of these steps shows humanistic orientation of the penitentiary policy. In this regard, we back the statement of R.A. Romashov that punishment should be perceived not as punishment, which demonstrates the power and ruthlessness of the state against a small person, but as punishment that promotes awareness of guilt for the crime committed and active repentance. In other words, penitentiary law is not just a terminological "reinvention" of the name of penal law familiar to us, but ideological changes related to the perception, creation and implementation of technical and legal tools for legal regulation of penitentiary relations. At the same time, the changes should cover legal norms and the attitude towards them and their addressees.

Thus, large-scale changes in penitentiary legislation are impossible without the meaningful use of legal technique. It is worth mentioning that the role of technique should not be limited only to registration of the state will. The functional purpose of legal technique is to optimize and improve legislation.

Elimination of various kinds of defects is an important purpose of legal technique. For example, Yu.P. Kolesnikova points out the existence of drawbacks associated with the determination of the status of subjects, incorrect identification of the object, establishing the grounds for legally significant consequences, as well as inconsistency of the fixed consequences [10, pp. 45–48].

Besides, it is necessary not only to eliminate existing drawbacks, but also to develop existing institutions, and in some cases to form new ones. O.V. Demidov draws attention to the need to use legal techniques to clarify the content of penal legislation norms [11, pp. 30–31].

It is worth noting that a broad approach to the legal technique concept is associated with the perception of it as a means of implementing legal logic. The concept of the latter does not have an unambiguous interpretation. We agree with the position of V.K. Babaev [12, p. 20], who includes formal and dialectical logic in the general concept of the logic of law, thereby objective state-legal patterns are at the heart of legal logic. A detailed analysis of these patterns is associated with characterization of the substantive rules of legal technique; however, due to the volume of the article and the nature of the subject matter, the analysis of these patterns in the context of the interaction of the logic of law and legal technique seems superfluous.

Consideration of legal technique as a technique of legal regulation actualizes the issue of its composition. In other words, it is necessary to analyze technical and legal tools with which the improvement and development of penitentiary law is carried out.

Technical and legal tools for improving penitentiary law

According to M.L. Davydova, the composition of legal technique should include technical and legal means (techniques) and rules. Of interest is the idea of including normative (legal prescriptions) and doctrinal (concepts, definitions, classifications) [2, p. 26], substantive (aimed at choosing a regulatory option, its correct consolidation and implementation) and procedural elements (various procedures of legal activity that can significantly improve its quality) [2, p. 28].

It seems to be extremely problematic to carry out an exhaustive review of the technical and legal tools. In this regard, the focus will be on only a few of them.

The concept of "conscientiousness in serving a criminal sentence" is among the relatively new technical and legal means, the use of which is necessary for further development of penitentiary law. Current penal legislation does not contain this concept. At the same time, individual institutions are closely linked to it. In particular, we are talking about malicious evasion from serving a sentence. This concept is used in relation to compulsory labor (Article 30 of the Penal Code of the Russian Federation), a fine (Article 32 of the Penal Code of the Russian Federation), correctional labor (Article 46 of the Penal Code of the Russian Federation), restriction of freedom (Article 58 of the Penal Code of the Russian Federation); however, for unknown reasons, it is absent in relation to deprivation of liberty.

It seems that the execution of punishment is connected with the convict's active performance of certain duties arising from the nature of criminal punishment. With regard to deprivation of liberty, the physical presence of a person within the institution cannot yet indicate the serving of a sentence in the sense of conscientious fulfillment of the duties assigned to him/her.

Unfortunately, at present, systematic commission of violations, including malicious violations of the established regime, cannot be qualified as malicious evasion from serving imprisonment. In fact, we can talk about consolidating a purely formal approach to the process of serving a criminal sentence. At the same time, the formation of penitentiary law should also be based on a balanced system of the duties conscientiously performed.

The concept of "conscientiousness of serving a criminal sentence" in legislation could be of the following wording: "convicts serve a sentence conscientiously". The period of evasion from fulfilling the duties established by the relevant criminal punishment cannot be included in the term of the criminal punishment served". It should be noted that specific signs indicating evasion from serving imprisonment require separate consideration. In our opinion, it is necessary to conduct separate studies aimed at identifying specific types and forms of evasion from serving a sentence. It can be assumed that these forms are associated with the systematic commission of malicious violations of the established regime of serving a sentence. However, the question whether a malicious violator is evading serving his/her sentence remains open and requires a separate analysis. At the same time, the legislative consolidation of this concept will help develop a unified approach to the organization of the execution of criminal penalties.

In addition, the presumption of conscientiousness could clarify the question of the conditionality or unconditionality of commutation. According to M.R. Balasanov, a conditional nature of the application of commutation is an effective way to eliminate the unjustifiably preferential position of persons who maliciously evade serving a substitute punishment [13, p. 192]. In other words, if a convicted person does not fulfill the assigned duties conscientiously when serving a milder sentence than imprisonment, then there should be a mechanism for returning the original criminal punishment.

Prejudice is among the noteworthy technical and legal means of developing penitentiary law. D.S. Dalanov rightly points out the need for legislative consolidation of penitentiary prejudice [14, p. 33].

A striking example of normative technical and legal means are statutory concepts that not only organize and systematize legal regulation, but also act as a legal prescription themselves. For example, an important construction is the recognition of a convicted person as a malicious violator of the established regime of serving a sentence. Currently, the grounds and procedure for recognizing a convicted person as a malicious violator are regulated by Article 116 of the Penal Code of the Russian Federation. We would like to draw attention to two technical and legal disadvantages of the existing legal framework. First, the fact of recognition is directly dependent on the type of punishment and not on the personality of the convicted person and the nature of the violation committed by him/her. Second, the legal framework does not provide for a mechanism for removing the status of a malicious violator.

We believe that this gap should be eliminated. It should be borne in mind that recognizing a convicted person as a malicious violator is not a punishment measure, but it can lead to certain negative consequences for the convicted person in the form of changes in conditions of detention, transfer to prison, and establishment of administrative supervision after release. In this regard, we believe that convicts should be recognized as malicious violators exclusively for their commission of the most dangerous violations of the regime. In addition, in the absence of violations of the established regime during the year, the status of a malicious violator should be removed from the convicted person. This measure will increase convicts' motivation to correct and abandon violations of the regime of serving their sentences.

A relatively independent direction of improving penitentiary law is the development of its procedural nature. Let us draw attention to the fact that penal law occupies an intermediate position between norms of procedural and substantive law. On the one hand, penal law con-

tains norms that fix the procedure for serving a sentence, on the other hand, the procedural side is not sufficiently expressed, there are no clear stages that would be separated from one another. Legal procedures of penal law, having no procedural nature, actually turn out to be substantive. However, a full-fledged characterization of penal law as a branch of substantive law is also problematic, since it (at least at present) is derived from the branch of criminal law and is intended to logically complete the mechanism of protective legal relations.

The current model of the Penal Code of the Russian Federation mainly tends to the model of the substantive law code, since it does not contain separate procedural elements. In this regard, the Order of the Ministry of Justice of the Russian Federation No. 110 of July 4, 2022 "On Approval of the Internal Regulations of Pre-Trial Detention Facilities of the Penal System, the Internal Regulations of Correctional Institutions and the Internal Regulations of Correctional Centers of the Penal System" (hereinafter – the Order of the Ministry of Justice of the Russian Federation No. 110) is noteworthy. The specified by-law actually defines numerous procedures for the execution of criminal punishment related to the receipt of parcels by convicts, the exercise of the right to a date, going to work, eating, purchasing food, providing additional paid services, conducting searches, seizure of prohibited items, as well as a number of other issues. Moreover, in addition to the procedural rules themselves, the order also contains material norms concerning the legal status of convicts, in particular lists their basic rights and obligations.

It seems that the subject of regulation of this order goes beyond the subordinate level, in terms of its role and significance, this act may well be characterized as "law in the material sense of the word". In this regard, it is worth paying attention to the content of Article 2 of the Penal Code of the Russian Federation, which in Part One establishes that penal legislation consists of the code and other federal laws, and in Part Two contains a list of individual legal procedures related to the subject of penal legislation (the procedure and conditions for the execution and serving of sentences, the use of means of correction of convicts; the procedure for activities of institutions and bodies executing punishments; the procedure for release from punishment; the procedure for providing assistance to released persons).

Thus, formally, in accordance with Article 2 of the Penal Code of the Russian Federation, the Order of the Ministry of Justice of the Russian Federation No. 110 cannot be included in penal legislation, although in fact the role and significance of this act are comparable to the Penal Code of the Russian Federation itself. The way out of the existing formal contradictions may be the inclusion of procedural norms in the Penal Code of the Russian Federation. Undoubtedly, this will lead to an increase in the volume of the code, but it will ensure greater stability of regulation, as well as change in the practice of the predominance of the role of subordinate regulation. The issue of attributing individual procedures to the level of legislative, rather than by-law regulation, should be the subject of separate consideration.

We consider it possible to talk about the gradual evolution of penal law as a related substantive procedural branch towards a full-fledged procedural branch of law due to the emergence of clear, formalized and separated legal stages. Nowadays, there are certain prerequisites for this. At least, we can talk about two major stages: 1) serving a sentence; 2) monitoring a person who has served a criminal sentence.

If everything is clear about the first stage, then objections may arise regarding the second: the person has served his sentence, which means that penitentiary law "loses contact with this person". However, this seems to be incorrect. First, it is necessary to point out the currently operating institution of administrative supervision as a preventive measure due both to the degree of public danger of a person who has previously committed a crime and the nature of penitentiary legal relations (in particular, we are talking about recognizing a convicted person as a malicious violator, which indicates significant or numerous violations of the regime). Second, the Law on Probation provides for assistance to certain categories of convicts.

We consider V.N. Chernyi's statement to be fair that the subject of penal legislation should not be limited to regulating the means of correcting convicts as the purpose of criminal punishment. This branch of legislation should become a resocialization branch, "to include

the regulation of those relations that arise in a convicted person as a subject who has served his/her sentence, but retains a restrictive legal status during his/her criminal record" [15, p. 28]. In other words, penitentiary law as "resocialization law", as interpreted by V.N. Chernyi, it should maintain its influence on individuals until the moment of repayment of the criminal record. V.E. Yuzhanin agrees with the researcher's position, noting that the expansion of the subject of penal law is possible only within the time limits of a criminal record [16, p. 36]. A.Ya. Grishko also adheres to the trend of expanding the subject of penal law and believes that relations related to administrative supervision of persons released from places of deprivation of liberty also relate to the subject of penal law [17, p. 89].

We believe that the currently operating institution of administrative supervision can be supplemented by the institution of administrative monitoring, which provides an opportunity for the state to obtain information about a person (at least about the place of residence and work) who has served a criminal sentence until the conviction is removed from his/her criminal record.

The attention to persons who have served a criminal sentence is conditioned by the following statistical data of the Judicial Department at the Supreme Court of the Russian Federation. So, in 2023, 99,891 people committed crimes with various types of recidivism; 13,894 people were released early and committed crimes; 111,161 people committed a crime without serving a criminal sentence; 216,521 people had unexpunged or outstanding convictions at the time of the judicial review of the case [18]. These figures clearly illustrate that after a person is released from a correctional institution, penitentiary legal relations should not be terminated.

We would also like to draw attention to the fact that in some cases there is a kind of substitution of technical and legal means. For instance, A.L. Santashov and co-authors make an interesting assumption about changes in legal technique in connection with the implementation of humanistic ideas. Thus, the axiom of public danger of a person is replaced by a specific presumption in connection with the exclusion of juvenile correctional facilities of enhanced regime for juvenile convicts who have previously served imprisonment [19, pp. 108–109].

In conclusion, we would like to note that technical and legal tools can also be used to increase the level of social conditionality of norms. The Russian economy needs an influx of workers, that is why forced labor is one of the means to solve this problem. In particular, V.I. Seliverstov points out that in correctional centers, according to the results of the same census, 97.6% are provided with labor [20, p. 44]. At the same time, there is a negative trend associated with the imposition of this type of punishment. In fact, the proportion of those sentenced to forced labor by court verdict remains almost unchanged [20, p. 45]. In accordance with the statistical data of the Judicial Department, in 2023, forced labor was imposed to 15,342 people [21].

V.I. Seliverstov draws attention to the fact that the main obstacle to the appointment of forced labor is an "exotic" procedure for the appointment of forced labor provided for in the Criminal Code of the Russian Federation. It requires additional reasoning from the court [20, p. 46].

It seems that the current restriction on the discretion of judges regarding the appointment of forced labor is excessive and illogical. The clause on the alternative of forced labor to imprisonment contained in Part 1 of Article 53.1 of the Criminal Code of the Russian Federation seems excessive, and we also consider it unjustified to establish the procedure for assigning forced labor contained in Part 2 of Article 53.1 of the Criminal Code of the Russian Federation. We believe that only the possibility of imposing additional punishment is subject to justification. If the punishment is one of the main ones, then the requirement to justify it is excessive and should be excluded. In this regard, it is necessary to invalidate parts 1, 2 of Article 53.1 of the Criminal Code of the Russian Federation. The removal of unnecessary restrictions will provide courts with more opportunities to assign forced labor.

Conclusion

In the framework of this article, an attempt is made to show how important it is to interpret legal technique as a technique of legal regulation. It is unacceptable to reduce the role of legal technique only to external attributes of legal acts, ensuring their "external beauty". Legal technique is connected with internal deep pro-

cesses of regulation in general and reflects the patterns and logic of legal regulation.

In this context, legal technique is designed to ensure social and legal effectiveness of legislation, as well as its corresponding change and development, the natural result of which may be the emergence of a relatively new branch of penitentiary law.

The formation of penitentiary law as an independent branch is closely dependent on the use of legal technique in terms of both improving existing and forming new legal institutions. In this regard, special attention should be paid not only to formal, but also to substantive, procedural, doctrinal and normative technical and legal instruments.

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