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Comparative Legal Analysis of General Provisions of Penal Codes of the Republic of Belarus and the Russian Federation

PAVEL V. TEPLYASHIN
Siberian Law Institute of the Ministry of Internal Affairs of Russia, Krasnoyarsk, Russia, pavlushat@mail.ru, https://orcid.org/0000-0002-6737-749X

Abstract

Introduction: the article shows a significant scientific interest in general provisions of penal codes of the Republic of Belarus and the Russian Federation, which contain fundamental and goal-setting legal guidelines that set the ideological and normative tone for the implementation of the entire complex of penal enforcement measures and means. *Purpose:* to determine similar and distinguishing features of general provisions of Belorussian penal legislation and, on this basis, to identify such regulatory guidelines that may be of interest for improving the domestic regulatory framework in the field of implementing criminal law measures. *Methods:* the research methodology mainly covers the analysis and synthesis of socio-legal phenomena, generalization and concretization, formal-logical and systemic-structural analysis of legal doctrine, hermeneutic study of legal norms, as well as the comparative method. Results: it is established that, according to their basic characteristics, penal codes of the Republic of Belarus and the Russian Federation have almost complete structural identity. The first one outlines boundaries of the subject of legal regulation and the competence of state bodies in the penal enforcement sphere, as well as correlates penal legislation and international legal acts in more detail. However, Russian legislation, unlike the Belarusian one, provides for a norm on the operation of penal legislation of the Russian Federation in relation to convicted military personnel and a closed list of corrective measures. With minor differences, the tasks and principles of penal legislation, the grounds for the execution of punishments and other criminal law measures are almost identical. *Conclusions:* the Belarusian legislator emphasizes the importance of the normative structure of penal law, whereas the Russian one underlines its intended purpose. It is important for the Russian legislator to deeper “embed” legal guarantees of the legal status of convicts in general provisions of penal legislation, as well as to make other decisions to optimize its conceptual positions.

Keywords: Belarusian criminal policy; codified act; punishment; penitentiary legislation; coercive measures.

5.1.4. Criminal law sciences.

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Introduction

Foreign socio-legal realities in the field of penitentiary relations have long been the subject of close attention of scientists who not only show research curiosity, but carry out a constructive analysis of the legal nature, socio-legal essence and factual prerequisites of phenomena and processes occurring in various areas of the world penitentiary reality. Accordingly, conducting comparative legal penitentiary research is not only a means of expanding theoretical capacities of the science of penal law and educational horizons, but also a tool for optimizing legislative and law enforcement mechanisms for the execution and serving of criminal penalties and the application of other criminal law measures. Moreover, the results of such studies ensure formation of conceptual attitudes and strategic directions for the penal system development that are more sensitive to the effects of external factors. It is no coincidence that the Concept for the Development of the Penal System of the Russian Federation for the period up to 2030 in Section XXI establishes that the study and practical implementation of the experience of penitentiary systems of foreign countries in the penal system of the Russian Federation is one of the most important tasks for further improvement of penal system activities. This guideline demonstrates practical significance of comparative studies in the field of studying foreign punitive theory and practice.

The penitentiary experience of both distant and neighboring countries is of scientific interest. It is characterized, on the one hand, by rather non-standard characteristics for a domestic researcher. The researcher perceives it ambiguously and immerses into deep and diverse scientific contemplations. On the other hand, it is characterized by very homogeneous indicators, but requiring a more approximate approach to the domestic legal system and informative comparative research. In this methodological context, attention should be paid to penitentiary legislation of the member states of the Commonwealth of Independent States, in particular the Republic of Belarus, which has a largely common historical past, mutually beneficial solidarity trends in socio-economic and geopolitical development. It should also be noted that these countries are members of the Collective Security Treaty Organization, the Shanghai Cooperation Organization, and the Eurasian Economic Union.

The Republic of Belarus and the Russian Federation share approaches to the formation and implementation of legal architecture of the legal influence on public relations and the legislative and law enforcement mechanism for the execution of criminal penalties, application of other criminal law measures and treatment of convicts. They desire to jointly optimize efforts to combat crime. So, Article 9 of the Agreement between the Russian Federation and the Republic of Belarus on Improving the Effectiveness of Cooperation in Combating Crime signed in Brest on September 15, 2014 establishes a provision according to which the parties will strive to develop and harmonize their national legislation in the field of combating crime. Such development and harmonization, as well as further formation of the so-called model legislation, are impossible without scientific analysis of the legislation of the Union states, including in the field of regulation of penal relations. Moreover, criminal legislation of the Union states contains largely similar concepts of punishment, their systems, and approaches to their appointment are almost identical.

In this regard, we back the opinion of N.N. Kutakov and D.G. Metlin, who rightly point out that “the penal policy of the Republic of Belarus deserves serious attention, primarily due to the general legal framework that has been in force on the territory of the USSR for a long time, as well as in order to develop interstate relations in the conditions of the Union State (the Union of Belarus and Russia). The proximity of penal legislation of the two states is mainly manifest-

ed in setting a common goal for the application of criminal punishment in the form of imprisonment, that is to correct convicts and prepare them for returning to society and usual living conditions in society" [1, p. 350]. In turn, A.L. Agabekyan positively notes that an integrated penal system is being formed in many states of the post-Soviet space, including the Republic of Belarus [2, p. 146]. The presented judgments indicate significant intersections in the field of penitentiary reality of the Union states.

We cannot but note specific turbulence of scientific research in the field of discussing prospects for further development of penal systems of the Union states and, consequently, adoption of conceptual decisions on strategic planning and relevant legal acts. So, conceptual solutions are embedded in such documents as, for example, decrees of the President of the Republic of Belarus No. 242 of May 28, 2014 "On improving activities of the penal system of the Ministry of Internal Affairs" and No. 319 of September 9, 2022 "On optimizing the penal system", the Concept for the Development of the Penal System of the Russian Federation up to 2030. Normative guidelines for such development are laid down in norms-goals, norms-principles and basic norms-definitions of penal legislation. Consequently, general provisions of penal codes of the Republic of Belarus and the Russian Federation, which contain fundamental, goal-setting and principled legal guidelines that set the ideological and normative tone for implementing the entire complex of penal enforcement measures and means, are of considerable scientific interest.

Determination of comparative legal differences on this basis makes it possible to identify reserves for further optimization of the regulatory and scientific-theoretical foundations of the execution of criminal penalties and other measures of criminal liability.

Results

The Penal Code of the Republic of Belarus is a codified legal act that entered into force on January 11, 2000. This act was adopted in order to influence public relations that arise and function due to the execution and serving of criminal penalties provided for in Article 48 of the Criminal Code of the Republic of Belarus and the execution of other criminal law measures. Based on their fundamental characteristics, penal codes of the Republic of Belarus and the Russian Federation are of similar structural content. Thus, each codified act is divided into two parts (General and Special), which reflects the traditional approach in the Romano-Germanic legal system to the structure of a codified legal act. These parts cover 11 and 8 sections, 27 and 24 chapters, respectively. Moreover, the first chapters have the same name – "General provisions", but consist of a different number of articles – 7 and 9, respectively. The legal provisions enshrined in these articles provide for the formal legal basis for the implementation of relevant penal legislation, its general structure and content, its place in the general regulatory hierarchy, establish grounds, goals, objectives and ideological principles for the execution of criminal penalties and other criminal law measures, contain the concept of correction and they reveal the means of correction.

General provisions of the Belarusian penal legislation begin with the provision that it consists of the Penal Code of the Republic of Belarus and other legislative acts defining the procedure and conditions for the execution and serving of sentences, as well as the application of other criminal law measures. A similar provision is contained in Part 1 of Article 2 of the Penal Code of the Russian Federation. Part 1 of Article 1 of the Code establishes objectives of penal legislation, such as correction of convicts and prevention of new crimes by both convicted and other persons. It is worth mentioning that, according to Part 1 of Article 2 of the Penal Code of the Republic of Belarus, exactly the same goals of the penal legislation correspond to the goals of criminal liability fixed in Part 2 of Article 44 of the Criminal Code of the Republic of Belarus. In this regard, attention should be paid to the priority of criminal liability in the paradigm of normative and scientific foundations of the Belarusian legislation on the execution of sentences. So, A.A. Tit proves this thesis, "penal policy, being an integral element of the fight against crime, requires the legislator and the scientific community of the Republic of Belarus to develop effective foundations for the implementation of criminal liability" [3, p. 66].

This approach of the Belarusian legislator highlights a clearer perception of limits of legal regulation of penal relations. In addition, Part 2 of Article 2 of the Penal Code of the Republic

of Belarus establishes general provisions and principles for the execution of punishment and other criminal law measures provided for by the criminal law of the Republic of Belarus more completely than Part 2 of Article 2 of the Penal Code of the Russian Federation. This provision also fixes the procedure and conditions for the execution and serving of these measures of criminal legal impact, as well as the use of correctional and preventive measures against convicts, the legal status of convicts and the system of guarantees for protecting their rights and legitimate interests, the procedure for the activities of bodies and institutions executing punishment and other criminal law measures, as well as the participation of state bodies, other organizations, public associations and citizens in the correction of convicts, the procedure for release from punishment and assistance to released persons in social adaptation. This fundamental setting, first, outlines boundaries of the subject of legal regulation, and second, sets the sequence of fixing relevant sections of the penal law.

Against this background, there are certain perturbations in the Russian research field regarding some sub-institutions, which the scientific community does not always attribute to penal legislation, in particular, the legal nature of probation is not defined unanimously [4–6].

Goals of penal legislation are given with a slight hermeneutical discrepancy. So, Part 1 of Article 2 of the Penal Code of the Republic of Belarus stipulates regulation of the execution and serving of sentences and other criminal law measures by convicts, definition of the means to achieve goals of criminal liability and social adaptation of convicts in the process of its implementation, protection of the rights and legitimate interests of convicts, while in Part 2 of Article 1 of the Penal Code of the Russian Federation, in addition to such tasks, the provision of assistance to convicts in social adaptation is slightly isolated and somewhat differently formulated. It seems that this (the fourth in a row) task was a methodological incentive for the adoption of Federal Law No. 10-FZ of February 6, 2023 “On Probation in the Russian Federation”.

It is objectionable that there is no such thing as freedom in the protective task formulated by the Belarusian legislator, fixed in the Russian version (“protection of their [convicts’] rights, freedoms and legitimate interests”). As it seems, this is not an entirely logical solution, since, for example, Article 12 of the Penal Code of the Republic of Belarus stipulates ensuring freedom of religion of convicts, which indicates the need to set the task of consolidating this element of the legal status of convicts in the protective task.

We should also pay attention to more complete consolidation of the competence of state bodies in the penal enforcement sphere in the Penal Code of Belarus than that provided for in Article 4 of the Penal Code of the Russian Federation. Thus, Part 3 of Article 2 of the Penal Code of the Republic of Belarus fixes the following provision: “The Council of Ministers of the Republic of Belarus and the republican bodies of state administration, within the limits of their competence, are entitled to adopt normative legal acts based on the law on the execution of punishment and other criminal law measures. These regulatory legal acts may not impose restrictions on convicted persons unless such restrictions are provided for by law”. Against this background, a similar provision, enshrined in Article 4 of the Penal Code of the Russian Federation “Normative legal acts on the execution of sentences”, has a more modest content: federal executive authorities are entitled to adopt normative legal acts on the execution of sentences based on the federal law. After all, it does not contain a reference to the idea of the inadmissibility of violating the rights of convicts.

The provisions set out in Article 3 of the Penal Code of the Republic of Belarus and Article 3 of the Penal Code of the Russian Federation concerning the relationship between penal legislation and international legal acts are quite similar. In particular, the provision is identical that if an international treaty establishes different rules for the execution of punishment and the treatment of convicts than those provided for by penal legislation, then the rules of the international treaty apply directly. However, the Belarusian legislator prudently clarifies that even with such a conflict, national rules apply when it follows from an international treaty that the application of such norms requires the issuance of an internal act. These tricks of legal technique deserve a positive assessment, since they minimize the

situation of "tying the hands" of a law enforcement officer in the implementation of national interests in the penal sphere.

With a slightly different textual interpretation, but with identical meaning, the codes fix norms regarding operation of penal legislation in space and time (Article 4 of the Penal Code of the Republic of Belarus and Article 6 of the Penal Code of the Russian Federation). At the same time, the Russian legislator fixes in Article 5 of the Penal Code of the Russian Federation "The effect of penal legislation of the Russian Federation in relation to convicted military personnel", whereas no analog of such a norm has been found in the Penal Code of the Republic of Belarus. This can be explained by the Russian legislator's desire, through fundamental guidelines, to emphasize the special legal status of convicted military personnel and actually lay down guarantees for the observance of their rights, freedoms and legitimate interests, as well as the basis for the procedure for serving criminal sentences.

The grounds for the execution of punishment and other criminal law measures are virtually identically fixed in Part 1 of Article 5 of the Penal Code of the Republic of Belarus and Article 7 of the Penal Code of the Russian Federation – a verdict or a court ruling changing it that has entered into force, as well as an act of pardon or an act of amnesty.

Such cornerstones of the general provisions of penal legislation as principles are practically identical. In this part, the Union penal legislation is based on such a variant of consolidating principles as their enumeration, but not meaningful disclosure in each separate penal norm. It is acceptable to criticize such a model of consolidating principles. After all, their disclosure in a normative codified act would make it possible to better identify the ideological orientation of the entire penitentiary (this category is considered in the broadest sense of the word) legislation, and improve understanding of the specific components of fundamental principles in the process of executing punishments and other criminal law measures. In this regard, we back the opinion of T.G. Tereshchenko and O.V. Volod'kina that "without defining the concept and essence of principles of penal law and penal legislation, it is impossible to effectively reform the penal system, since the principles determine directions of legislative development, allow for a deeper understanding of the goals and objectives set for the penal system, the essence of the means to achieve them" [7, p. 69].

If we compare principles of penal legislation, we cannot but identify some minor differences. Thus, Article 6 of the Penal Code of the Republic of Belarus contains such a conceptual idea as a combination of coercive measures with educational influence, whereas a similar idea provided for in Article 8 of the Penal Code of the Russian Federation establishes the fundamental principle of combining punishment with correctional influence. It seems that not so much coercive measures as criminal punishments are associated with the full extent of coercive influence on the personality of the convicted person. Moreover, the term "coercive measures" in the Belarusian penal legislation is not disclosed, which significantly complicates understanding of the principle under consideration, and it is associated only with the concept of "coercive measures of an educational nature", which refers solely to the implementation of criminal liability of minors (in particular, Article 117 of the Criminal Code of the Republic of Belarus, Article 185 of the Penal Code of the Republic of Belarus). It is also not entirely clear why it is proposed to combine coercive measures with educational influence. After all, measures of non-punitive (non-repressive) influence, which are opposed to measures of a coercive nature, are not limited only to educational influence, but also objectively involve public, pedagogical (educational) and other ones. Consequently, the Belarusian legislator formulates the principle under consideration rather narrowly in the substantive sense.

When comparing such fundamental categories as correction of convicts and the main means of correcting convicts, it should be noted that there is a clarifying preliminary provision in Part 1 of Article 7 of the Penal Code of the Republic of Belarus stating that "the application of punishment and other criminal law measures is aimed at correcting convicts and preventing the commission of crimes by both convicts and other persons". This provision has actually "migrated" from the norm that establishes tasks of penal legislation (Article 2 of the Penal Code of the Republic of Belarus) and its place in the structure of the first chapter of the Code

indicates the desire of the Belarusian legislator to emphasize the relevance and importance of disclosing the concept and means of correcting convicts. Although it is not entirely appropriate to include in Part 1 of Article 7 of the Penal Code of the Republic of Belarus such a goal as preventing commission of crimes by both convicted persons and others, since attention is no longer paid to it within the framework of this norm.

The concept of "correction of convicts" set out in Part 2 of Article 7 of the Penal Code of the Republic of Belarus as "formation of their willingness to lead a law-abiding lifestyle" reflects a formal legal approach to this definition, whereas in Part 1 of Article 9 of the Penal Code of the Russian Federation it is formulated from a more moral and legal position, in particular, formation in convicts of a respectful attitude towards a person and society, labor, norms, rules and traditions of human community and promotion of law-abiding behavior. However, we can agree with AA. Tit that "understanding correction as the ultimate goal of punishment among legislators of the Union State members occurs in the same semantic orientation" [8, p. 435].

Attention is drawn to the extensive list of means of correction of convicts formulated by the Belarusian legislator, which, in accordance with Part 3 of Article 7 of the Penal Code of the Republic of Belarus, in addition to the established procedure for the execution and serving of sentences and other criminal law measures, educational work, socially useful work, education for convicts, and public influence, provides for the possibility of using other correction means in order to create opportunities for voluntary implementation of educational, creative, sports and other activities by convicts. This legislative decision, being a timely innovation introduced by the Law of the Republic of Belarus of January 8, 2024 No. 349-Z "On amendments to codes of criminal liability", acts not only as a private legal technology that deserves a positive assessment, but also as a naturally flexible response to dynamic transformation of penal relations. In this regard, it is necessary to support N.V. Kiiko, who rightly believes that "the Republic of Belarus is taking systematic steps to improve penal legislation and bring it in line with generally recognized international standards in the field of administration of justice, as well as positive domestic and foreign experience" [9, p. 172]. It should be emphasized that this well-known Belarusian researcher has been proving this thesis for many years in his scientific papers [10, p. 464].

The provisions set out in Part 4 of Article 7 of the Penal Code of the Republic of Belarus and in Part 3 of Article 9 of the Penal Code of the Russian Federation are extremely similar, stating that the means of correcting convicts are applied taking into account the forms of criminal liability, type of punishment, nature and degree of public danger of the crime committed, personality of the convicted person, his/her behavior and desire to acquire socially significant adapting competencies and/or overcoming negative personality traits. However, the Belarusian legislator also introduced the necessity to take into account "behavior of [the convict] and the desire to acquire competencies significant for social adaptation and (or) overcome negative personality traits" in this provision by Law No. 349-3 of January 8, 2024. This innovation seems timely. Moreover, it is precisely such clarifications that help overcome difficult situations and even resolve socio-legal paradoxes (phenomena) that arise in law enforcement practice (for example, the so-called "community integration paradox" [11, p. 21; 12, p. 23–30; 13, pp. 87–93; 14, pp. 81–82]). Against the background of the adoption of the Federal law "On probation in the Russian Federation", this approach of the Belarusian legislator is of scientific interest for the progressive development of Russian penal legislation.

Conclusions

The expediency of a comparative study of penal legislation of the Republic of Belarus and the Russian Federation is due to common cultural and mental approaches to the formation and implementation of the legal architecture of legal influence on public relations, the desire to jointly optimize efforts to combat crime, unified scripts of the legislative and law enforcement mechanism for the execution of criminal penalties, the application of other criminal law measures, as well as similar tools for dealing with convicts.

The general provisions of penal legislation of the Union states begin with several different fundamental principles: Belarusian legislation

consists of the Penal Code of the Republic of Belarus and other acts defining the procedure and conditions for the execution and serving of sentences, as well as the application of other criminal law measures, whereas such a provision is contained only in Part 1 of Article 2 of the Criminal Code of the Russian Federation. This sequence demonstrates the Belarusian legislator's desire to emphasize the importance of the regulatory design and legislative structure of the relevant branch of law, while the Russian legislator is concerned with its intended purpose.

The Belarusian legislator has not consolidated the provision that is contained in Part 4 of Article 3 of the Penal Code of the Russian Federation and provides for the rule that recommendations (declarations) of international organizations on the execution of sentences and the treatment of convicts are implemented in the penal legislation of the Russian Federation if there are necessary economic and social opportunities. The outlined normative position of the Belarusian legislator indicates a lack of desire to find formal reasons for withdrawing from the implementation of relevant recommendations (declarations) of international organizations.

It is important to pay attention to the provision provided for in Part 2 of Article 5 of the Penal Code of the Republic of Belarus that the bodies and institutions executing punishment and other criminal law measures, no later than ten days after receiving a court order with a copy or extract from the verdict (ruling, resolution), notify the court of its acceptance for execution. This regulatory clarification emphasizes legal guarantees of the legal status of convicts and, unfortunately, is not provided for in the Penal Code of the Russian Federation. It seems permissible to supplement Article 7 of the Penal Code of the Russian Federation with Part 2 de lege ferenda. It can be of the following wording: "Bodies and institutions executing sentences and applying other criminal law measures, no later than ten days after receiving a verdict or a ruling amending it, as well as an act of pardon or an act of amnesty, notify the court of its acceptance for execution".

The extensive list of correction means formulated by the Belarusian legislator is worth considering. Part 3 of Article 7 of the Penal Code of the Republic of Belarus, in addition to those traditionally provided for in Part 2 of Article 9 of the Penal Code of the Russian Federation, establishes the possibility of using other means of correction in order to create opportunities for convicts to voluntarily exercise educational, creative, sports and other activities. This legislative decision is not only a private legal technology that deserves a positive assessment, but also an obvious response to the dynamic transformation of penal relations. It seems possible to amend the content of Part 2 of Article 9 of the Penal Code of the Russian Federation as follows: "Bodies and institutions executing sentences and applying other criminal law measures, no later than ten days after receiving a verdict or a ruling amending it, as well as an act of pardon or an act of amnesty, notify the court of its acceptance for execution".

The key conclusions outlined show rather progressive general provisions of penal legislation of the Republic of Belarus, which can and should act as a research object on the part of specialists in the field of penitentiary science and thus serve as an additional motive for optimizing conceptual positions of penal legislation of the Russian Federation.

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INFORMATION ABOUT THE AUTHOR

PAVEL V. TEPLYASHIN – Doctor of Sciences (Law), Professor, professor at the Department of Criminal Law and Criminology of the Siberian Law Institute of the Ministry of Internal Affairs of Russia, Krasnoyarsk, Russia, pavlushat@mail.ru, https://orcid.org/0000-0002-6737-749X

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