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Penitentiary Law: Phenomenology and Consistency

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Abstract

Introduction: law as a systemic phenomenon is represented by 2 theoretical models: a dynamic process and a static construction. Law in dynamics is interrelated stages that together make up the phenomenon of legal life. A constructive (legal and technical) approach to understanding law presupposes its perception as a set of interrelated and interacting means created and used to streamline and protect public relations that have developed at a certain historical stage in a separate socio-cultural environment. Interchangeability of the words "law" and "legislative act" in the Russian legal language causes confusion of the concepts "system of law" and "legislative system", which results in terminological identification of the categories "branch of law" and "branch of legislation". The problem of understanding penitentiary law and determining its place in the legal system and the legislative system should be solved taking into account the cyclical nature of Russian political and legal genesis. In modern Russia, introduction of the word "penitentiary" into terminology is connected, on the one hand, with the desire to Europeanize traditional legal institutions by simply renaming them (penal law – penitentiary law). On the other hand, the use of the term "penitentiary" in relation to the system of execution of criminal penalties, as well as to the totality of legal acts regulating public relations in this area, is intended to show transformation of punishment from the institution of state repression into a means of correction and prevention. *Purpose*: to carry out a systematic analysis of law as a dynamic process and a formalized structure, with an emphasis on understanding penitentiary law and determining its place in legal and legislative systems. The *methodological basis* is formed by general scientific (systemic, structural, functional), private (comparative legal analysis, intersectoral synthesis, legal systematics) and special (theoretical and legal modeling, cyclic political and legal genesis) legal reality cognition methods. *Conclusions*: consideration of penitentiary law should be carried out in the context of correlation of the categories: system of law, legal system,

system of legislation. Taking the method of cyclic political and legal genesis as a basis, it is proposed to consider penitentiary law with regard to the specifics of organization and functioning of the penal systems of the Russian Empire, Soviet Russia (RSFSR/USSR) and the Russian Federation. In modern Russia, penitentiary law is an intersectoral normative community that unites legal acts regulating public relations in the field of penitentiary life. It makes no sense to talk about penitentiary law as a newly formed branch of the system of law, due to the perception of the latter as an objective category (logical speculative construction). At the same time, penitentiary law, penitentiary system, penitentiary science are well-established terminological constructions filled with various semantic connotations both in scientific research and legal acts.

Keywords: system of law; legal system; legislative system; penitentiary; penitentiary law; penitentiary science; penal system.

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Introduction

Problems of understanding and system analysis of law are among the eternal ones and attract attention of legal scholars working both in the field of the general theory of law and branch and applied jurisprudence. At the same time, often, “branch specialists” and “applied scientists”, considering theoretical issues, neglect the general theory, using their own visions as basic foundations to build further reasoning, including critical ones.

Identification of new branches in law, including of *intersectoral* (emphasis added) character, represents a technical and legal innovation of post-Soviet law, with its permanent changeability, characteristic of both the current sectoral legislation and the theory of the system of law. Therefore, some authors’ proposal to identify penitentiary law as a branch of the modern Russian law do not contain a fundamental novelty and do not qualitatively differ from similar aspirations to substantiate the independent sectoral status of mining, medical, educational, or railway law.

Without trying to challenge the points of view expressed, considering them permissible, due to the subjective nature of the process of scientific cognition itself, the author within the framework of the proposed article will try to show features of considering penitentiary law in the context of the general theory of systemic understanding of law and compare categories, such as a system of law, a legal system, and a system of legislation.

Reasoning will be based on the method of cyclical political and legal genesis, in accordance with which penitentiary law, in terms of general theory, is an objectified category that arises simultaneously with the organizational and functional design of a specialized state system to execute criminal penalties and changes with it.

Consistency as a universal feature of law

Law as a socio-cultural phenomenon is at the same time a dynamic process (law-making and law-realization) and a construction (a set of structural and functional elements).

Consistency of law as a process represents an alternation of legal life stages. Any legal form once arises, acquires and loses its legal force, has an ambiguous regulatory and protective effect on public relations.

The constructive (legal and technical) approach to understanding law presupposes its perception as a set of interrelated and inter-

acting means created and used to streamline and protect public relations that have developed at a certain historical stage in a separate socio-cultural environment.

The system characteristic of law dynamics assumes two main approaches: linear (traditional) and cyclic (discrete).

Linearity means that law preserves legal force in terms of values, principles, technologies of law-making and law-realization activity, which are fixed by the legal tradition. At the same time, it is possible to talk about a legal tradition that has taken place only when the above-mentioned values, principles and technologies remain relatively unchanged in three or more successive human generations, whose representatives act as subjects of law-making and law-realization relations.

Cyclicity (discreteness) of law means that individual stages of legal life are essentially different lives, each of which is associated with a qualitatively different paradigm of legal understanding from the previous one, and its (law) structural and content characteristics. At the same time, just as in human life, where the generation of fathers can leave a generation of children both positive (real estate items, financial assets, good name, etc.) and negative (debts, memory of crimes and betrayals committed by their ancestors, etc.) legacy, or nothing in principle, provided that the same generation of children (descendants) either did not appear at all, or refused in its dynamics from the experience accumulated by the fathers. Phases (stages) of conditional birth, growing-up, adulthood, aging, and death are necessarily represented in each completed cycle of legal life, as well as in any other life form. In cyclic (discrete) law, each subsequent legal cycle is based on the denial of historical experience of the previous one. Regardless of whether such denial is recognized at the state level or, on the contrary, the state in the person of its founding fathers proclaims the eternity of its own foundations, drawing a historical line from the modern state into the mists of time of a single and, very importantly, inseparable state history, each subsequent legal cycle acts as a gravedigger of the preceding one and puts its birth in direct dependence on the completion of an earlier stage of development, similar to biological death. With regard to the systemic dynamics of Russian law, the above means that the fact of the emergence of the Soviet socialist state and law was due to collapse of the state-legal system of imperial Russia. In turn, the modern post-Soviet Russian state-legal system was formed due to destruction of the Soviet analogue. Within the framework of each of these cycles, two of which (imperial and Soviet) are complete (closed), and the existing (post-Soviet) – current, there were and are qualitatively different ideas about both the legal phenomenon itself (law-understanding) and its constructive system.

The systematic nature of the law, understood as an established, formed structure, in relation to cyclic law genesis, suggests that there is no single idea of the law unchanged for various discrete cycles, and there cannot be.

In the Russian Empire, law, on the one hand, is the will of the reigning monarch (the Emperor of All Russia, owner of the Russian land), on the other – the tradition of the "Russian world", represented at its core by a rural community bound by mutual responsibility, or – the eternal belief in some kind of justice, with simultaneous disbelief to the official and the state law, since one law is for the rich, and another for the poor.

In Soviet Russia, law is the will of the ruling class – the working people (working class, collective farm peasantry and working intelligentsia, united in the "indestructible bloc of communists and non-party"), elevated into law. Soviet socialist law is opposed to bourgeois (Western) law and based on qualitatively different value priorities and principles of construction and functioning from the latter.

In modern Russia, law is a complex of formal legal acts and processes emanating from the state, expressing the will of *the entire* (emphasis added) people of Russia, based on values and principles of natural law and based in their construction on the basic value – a person, his/her rights and freedoms (Article 2 of the 1993 Constitution of the Russian Federation).

The difference in approaches to understanding of law entails a difference in ideas about the system of law, perceived simultaneously as a theoretical abstraction – a specu-

lative logical construction and a phenomenon of socio-cultural reality that has developed in a certain nation, at a certain historical stage – living law.

Summarizing the above, it should be concluded that any reasoning about the consistency of law should be carried out, first, based on the differentiation of the dynamics and statics of legal matter, and, second, taking into account the specifics of legal phenomenology and functionality within certain cycles of political and legal genesis.

System of law and system of legislation

Relationship between the concepts "law" and "legislative act", as well as their derivatives – system of law and legislative system, is among the most discussed in both general theoretical and branch legal sciences. Moreover, researchers are often misled by the unity in the names of concepts that differ significantly from each other both in the form of external expression and content. In the Russian language, the words "law" and "right" can both be identified and contrasted, which is not possible, for example, in the Anglo-American legal and linguistic tradition, where these words denote qualitatively different categories.

The system of law is a purely theoretical construction that does not directly depend on a certain socio-spatial-temporal continuum. Within the framework of the latter, a system of national legislation and a national legal system are being formed and functioning.

The system of law characterizes law as a separate structure that arises, in a formal legal sense, simultaneously with the state (by the way, from the same moment we should talk about the appearance of phenomena of crime and criminality) and transforms with it. In the general theoretical understanding of the legal system, it is advisable to distinguish only three branches: public positive (mandatory), public negative (prohibitive) and private (permissive) law. The proposed approach is conditioned by three basic means of legal influence: prohibition, obligation and permission. These means, of course, in various proportions form legal systems in all the states that have ever existed and exist.

In the 1930s, 1950s and 1980s Soviet legal science, discussions on the criteria of branch division in law pursued the goal not to consider the problems indicated in their name, but more global issues related to understanding and structuring of Soviet socialist law, opposed to the bourgeois "pseudo-law", developed in the countries of the capitalist West, at that time opposed to the collective socialist East. Moreover, as most researchers note, within the framework of the first discussion, its participants were engaged not so much in branch division, as in solving the question of a new characteristic of law in terms of its substantive organization [6]. Soviet scientists faced the task to substantiate the transition from revolutionary law and revolutionary legality of the initial stage of constructing the proletariat dictatorship state to socialist law and socialist legality of the workers' democracy state. Unlike the Russian Empire's theory of law, based on basic principles of traditional European (bourgeois) law, the Soviet legal theory categorically rejected division of law into public and private, believing that there should be nothing "private" in the state of a new historical type, including law. Thus, the pragmatic meaning of the discussion of the 1930s was reduced to sectoral structuring of Soviet socialist law and defining the subject and method of sectoral regulation.

The discussion of the 1950s was aimed at a more thorough study and adaptation of a systematic approach to humanitarian studies in general and legal science in particular. It generated a legal category "system of law" in its modern sense [6]. At the same time, the most acute controversy was caused by issues related to the discussion of the subject of legal regulation in the field of civil law, deprived in the conditions of the Soviet period of the opportunity to operate with such significant categories as private property, private entrepreneurial activity, commercial activity, etc.

Speaking about the third discussion that unfolded in the 1980s, it seems appropriate to quote words of one of V. Tsoi's songs: "Changes, we are waiting for changes ...". The deep crisis that was clearly identified in this historical period led to the desire to find a legal solution related to optimization of the state legal system, which at that time was clearly unable to overcome the emerging challenges and threats that ultimately led to the collapse

of the USSR and destruction of the world system of socialist law. At the same time, the participants of the discussion, in their arguments, tried to adapt the rapidly aging dogmatic Soviet socialist law to innovations of the continuously changing socio-legal reality.

The conducted comparative analysis shows that, in essence, the debates of that time were devoted not to theoretical concepts and principles characterizing the legal system as a whole and its individual constituent elements (institutions, sub-sectors, arrays) in particular, since they were widely known, used both in scientific circulation and practice and did not cause much controversy, but to determination of the numerical composition of separate branches of law and justification of the need to include the new ones in the existing system. However, this approach involved confusion of "theoretical" branches of law with "practical" branches of legislation. Accordingly, it actualized the issue of identifying correlation between concepts of the system of law and the system of legislation within the framework of the national legal system of Russia. In the modern Russian theory of law, these concepts are correlated as content and form; abstract and concrete; theoretical and practical. The system of law is a theoretical model of the normative structuring of law, regardless of its national-historical specifics. The approach to understanding law as a normative macrosystem is based on determination of the primary element – the rule of law, the logical structure of which (disposition – a standard of prohibited, mandatory, possible behavior; hypothesis – conditions ensuring implementation of a behavioral standard defined in the disposition; sanction – legally significant consequences of implementation of the corresponding behavioral standard), essentially coincides with the structuring of law as a logical abstraction. It is for this reason that it is advisable to distinguish only 3 branches in the theoretical system of law. As mentioned earlier, this is a public positive (binding), public negative (prohibitive) and private (permissive) law. As for separation of other branches, we do not mean law, but legislation; changes in the field of legislative regulation triggered formation of new branch directions. Scientific specialties were consolidated in accordance with the Decree of the Ministry of Education and Science No. 118 of February 24, 2021. All branch areas of scientific research in jurisprudence were reduced to five groups: theoretical and historical legal sciences, public legal (state legal) sciences; private legal (civil legal) sciences; criminal legal sciences; international legal sciences. With the first and fifth groups being removed from the above list (the first – due to the general legal nature, and the fifth – due to qualitative difference between international and national law), we get the same three-part structure of the legal system mentioned earlier.

As for the legislative system, it is indeed constantly changing both in terms of an increasing number of branches, and in terms of content. Unlike the system of law, which represents an objective category existing, as already noted, regardless of the specifics of the state structure and national-historical cultural characteristics, the system of legislation, its structural and content composition, is formed by the state. The list of branches of Russian legislation was previously fixed by the Decree of the President of the Russian Federation No. 2171 of December 16, 1993 "On the general legal classifier of legislation branches". Nowadays the Decree of the President of the Russian Federation No. 511 of March 15, 2000 "On the classifier of legal acts" determines crucial subjects of legislative regulation, on the basis of which the relevant branches of legislation are formed.

The observed confusion of the concepts of branch of law and branch of legislation, caused primarily by the terminological interchangeability of the terms in the Russian language, leads to the situation when speaking about the emergence of new branches of law, the authors mean branches of legislation of the same name, or rather legal acts united by certain subjects of legislative regulation. So, it is widely discussed whether advertising law, sport law, transport law, urban planning law, etc. should be considered as new branches of law. In addition, as independent branches of law, some authors propose to consider generalities of legal acts regulating certain types of legally significant activities, considered regardless of the sphere of public relations within the framework of which this activity is

carried out. We are talking about personnel law, disciplinary law, digital law, energy law, consumer law, etc. It seems rather simple to create a new branch of law. An adjective is attached to the noun "law" (mining, pipeline, compulsory, compensatory, etc.) and the job is done, a "new branch of law" is formed. Despite the obvious absurdity of the methodology of such "law formation", it continues to inspire "searches and discoveries" of those who believe that the theoretical model of law can be transformed as permanently as the branch legislation permits [3].

To the issue of categorical status of penitentiary law

The publication of A.M. Bobrov and N.A. Mel'nikova "Is There Any Reason to Single Out Penitentiary Law in the System of Russian Law?" prompted us to write this article [4]. Having responded to the request to act as a reviewer on the named work and noting, not without pride, that the authors chose our scientific works as the most frequently cited, at the same time, we could not agree with a number of formulated provisions and conclusions that made us contemplate on the issue. At the same time, as well as the abovementioned authors, we considered it necessary to initially present our understanding of the system of law and the system of legislation, with an emphasis on their relationship.

It is obvious that the system of law and the legislative system are different phenomena. To argue with this, as well as to prove the evidence of the stated position, does not make sense.

The system of law is a set of legal norms, the system of legislation is a set of legislative acts.

What is penitentiary law and what kind of the system formation is it part of?

The answers to these questions, according to A.N. Bobrov and N.A. Mel'nikova, should be sought in the history of "prison science", hereinafter referred to as "penitentiary science". With all due respect both to the authors themselves and to "Her Majesty Science" we cannot agree with this stance. The institution of punishment arises long before its scientific understanding. Criminal punishment in the form of prison isolation, which aims not only to punish the crime committed, but also to correct the convicted person, emerged in Europe in the age of Enlightenment and was based on the idea of rational organization of society and all processes in it. To continue this idea, the perception of punishment was also rationalized. On the one hand, legislators tried to distribute punishments more evenly, since in previous eras not all criminals had been punished. Punishment had been imposed disproportionately to the public danger of the crime committed. The main task of the archaic punishment was to demonstrate state power and its ruthlessness in relation to real and potential criminals. Hence, punishment combined cruelty, entertainment (publicity) and transience.

Enlightenment thinkers took on the task to develop such systems of punishments that would no longer demonstrate the power and ruthlessness of the state, but the wrongness of the crime itself as a form of human behavior. Scholars wanted punishments to show the essence of the crime and the damage it caused to society. The punitive effect was combined with correctional and educational. Hence, the prison system was most suitable not so much for punishing criminals (since it did not meet the previously designated characteristics of the punitive punishment institution, providing neither entertainment nor transience of the punitive effect; cruelty was hidden from the broad masses behind the walls of prison casemates and significantly lost its preventive value), as for their re-education. One of the aspects of total rationalization and specialization of social life in the conditions of the Enlightenment is the emergence of the phenomenon of discipline, which involves analysis and formalization of each action performed by a person, subordination of these actions, both individually and in their totality, to a strict order. Decomposition of actions into details and arrangement them in strict sequences covering long periods of time and a significant number of people was a special industrial way of subordinating a person to the authorities, whether it is the power of a prison guard, school teacher, or army commander. Due to that structure of public organization and social management implementation, a disciplinary institution with a guarded external perimeter, strict daily rou-

tine, constant supervision and control over convicts became the main candidate for the role of a machine for re-educating criminals and embedding them in the global state machine, where in the same way institutional formations, such as schools, hospitals, plants and factories, and army units, operated.

In the Russian Empire, the centralized system of state administration in the field of criminal penalty execution was created in 1879, when the Main Prison Department was established as part of the Ministry of Internal Affairs [5]. The traditional approach for Russia, when the Russian word denoting a particular phenomenon is mechanically replaced by a foreign one, was also involved in this case. The prison system was called penitentiary, and penitentiary studies replaced prison studies as a direction of scientific research and educational process. In fairness, it should be noted that the very fact of borrowing Western European experience, including in the field of execution of criminal penalties, should not be considered as a negative. Russia had always demonstrated the highest rates of development in the conditions of openness to positive developments in various spheres of public life. The transition to a European-type penal system involved humanization of the institution and the shift of emphasis in its execution from punitive to correctional. The introduction of the word "penitentiary" (from Lat. poenitentiarium – house of repentance) and its derivatives into the penal terminology was connected with correction of criminals on the basis of understanding a negative nature of the crime and perceiving it as an unconditional evil, followed by repentance and redemption of guilt [1]. The same purpose was pursued by "correctional houses" created in the penal system of the Russian Empire [2]. Can we say that the introduction of the word "penitentiary", etc. into the "Russian penal language" led to practical transformation of the prison punitive system into correctional (penitentiary), and prison science into penitentiary? Surely not. By itself, the fact of replacing one name with another does not always mean qualitative transformations of the meanings and contents of the reassigned phenomena. The article by A.N. Bobrov and N.A. Mel'nikova pays considerable attention to the arguments about administrative law, a special part of which, according to the authors, includes almost all militarized branches of law: penitentiary, military, migration, and police. It turns out that researchers practically take a position that they fiercely criticize throughout their publication. There is no penitentiary law as a branch of law, but there are *militarized* (emphasis added) branches of law, including penitentiary law. It is obvious that these and many other areas of public legal influence are directly related to public administration. However, it does not mean that everything, to one degree or another related to public administration, is included in the subject area of administrative law. The latter, in its current state, includes legal foundations of state organization, legal foundations of administrative justice, legal foundations of administrative responsibility as relatively independent subbranches. The system of legislative sources of administrative law is characterized by their partial codification, which, on the one hand, allows us to talk about the possibility of separating a new branch from administrative law (for example, administrative procedural law), and on the other, involves considering the administrative direction of legal regulation, to a greater extent not as an abstract branch of law, but as quite real branches of the national legislation. At the same time, reasoning about which name (police law, state law, administrative law) is more consistent with scientific, and which is pseudoscientific, in our opinion, does not make sense due to the subjectivity of the authors' points of view, guided by the monistic principle: "all points of view are divided into two: mine and the wrong one".

Let us return to penitentiary law. Indeed, in the Russian Empire, this term was not used to characterize the sectoral division of law and there is nothing strange about it. Russian scientists of the pre-revolutionary approach relied in their theoretical constructions on the continental European tradition and, to a greater extent, did not solve an abstract theoretical question: what is law and how it is arranged, but built practice-oriented constructions aimed at adapting the implemented legal institutions, principles, technologies to the realities of Russian society, initially oriented not to formally-legal regulations, but

moral attitudes. This predetermined relative inattention of Russian legal scholars of the 19th – early 20th centuries to the issues of structuring law.

Soviet jurisprudence was based on the polar concept of the world order, within which two world state-legal systems were opposed: Western (capitalist) and Eastern (socialist). Moreover, the named opposition was antagonistic (irreconcilable) in nature. What was proclaimed valuable in the capitalist West was not recognized by the socialist East and vice versa. Naturally, such an opposition could not but affect the sphere of law. However, if capitalist law, having been generally developed in Western Europe for more than 200 years (17th–20th centuries), acquired stable legal forms and legal and technical means of lawmaking and law-realization activity and was recognized by the majority of citizens, then socialist law arose as a phenomenon of a new reality on the revolutionary wave of "renunciation of the old world" and rejection of the experience of the "old life", was forced to create its own legal theory just-in-time. No doubt, issues related to the sectoral division became topical. It is quite logical that the word "penitentiary", alien to the Soviet atheistic mentality, disappeared from the Soviet penal language. In Soviet Russia, the penal system extended its influence to two categories of citizens: in relation to "enemies of the people/state" and "incorrigible" criminals (malicious repeat offenders), criminal punishment acted as a punishing sword. As for the persons belonging to working class who committed crimes due to a lack of cultural development, thoughtlessness and negligence, the state system of criminal penalties acted as a measure of preventive and corrective action. At the same time, the state supported a hypothesis about possible final eradication of crime as a phenomenon alien to the Soviet cultural tradition, oriented in its progressive development towards the construction of a classless, and therefore stateless communist society in which there will be neither crime, nor criminal, criminal procedure, penal law, nor the penal system related to these branches.

Destruction of the system of *Soviet socialist law* (emphasis added), caused by the collapse of the Soviet socialist state (USSR/RSFSR), was not accompanied by the rethinking of conceptual foundations of understanding of law. Despite criticism of orthodox normativism of the Soviet period and active introduction of conceptual pluralism and, first of all, iusnaturalism into the theory of understanding of law, legal positivism continued to prevail in the field of branch and applied jurisprudence based on the inextricable connection of law and the state and the unconditional dominance of normative legal acts in the system of formal sources of law, among which priority was given to national legislation acts and presidential decrees.

In the current situation, discussions about the structural composition of the system of law with further definition of certain branches, proposed by interested authors, acquires the character of discussion for the sake of discussion. If Soviet law, being a "historical innovation", differentiated itself from imperial law, then the law of modern Russia, stating its difference from both monarchical and Soviet, nevertheless does not make a clear distinction between the corresponding legal paradigms. It is impossible to seriously consider the renaming of state law into constitutional law as conceptual changes, and the theory of state and law into the theory of law and the state. The return of the term "penitentiary" to the legal vocabulary should be considered from different perspectives. On the one hand, the supporters of its introduction, as previously noted, showed off their intelligence due to the mechanical change of the corresponding line of names: penal system – penitentiary system; penal law – penitentiary law; institutions of the penal system – penitentiary institutions, etc. If we take this approach as a basis, then the question of whether penitentiary law is an element of the legal system of modern Russia (although we believe it is more correct to talk either about the national legal system or about the system of national legislation) boils down to the question of whether we consider we terms "penal" and "penitentiary" interchangeable. There was approximately the same situation in the mid-1990s, when the issue of changing the name of science, branch of law and academic discipline from state law to constitutional law was being resolved. At the same time, many people

insisted on the importance of such a change in terms of democratizing the state structure of Russia. Interestingly, most departments in departmental universities retained the "Soviet name" of departments of public legal disciplines, the same name was given to one of the enlarged scientific specialties (public legal (state legal sciences)).

If we proceed from the essence of penitentiary as a sphere of social activity, in which punishment is perceived not so much as penal treatment demonstrating the authorities' power and ruthlessness to the "little man" bearing in mind that there is no such thing as a get out of jail free card, but as a lesson taught to realize person's own guilt for the crime committed, then the situation is completely different. Article 2 of the Constitution of the Russian Federation, fixing that a "person, his/her rights and freedoms are the main value", fills the system of executing punishment with the meaning qualitatively different from both imperial and Soviet analogues, giving it a penitentiary (correctional, penitential) orientation. We may be accused of legal idealism. We will not argue; indeed, in modern Russia, many liberal values and principles introduced in the 1990s are perceived as not viable and chimerical. However, it does not predetermine that these values cannot be implemented in principle. Let us consider the Church as an example. This structure, working with believers does not set itself the task of cultivating one hundred percent righteous men. It does not set a task, but carries out activities for a person to stay on God's path, including in institutions of the penitentiary system, thereby realizing their penitentiary function. The same can be said about employees of the penal system who work with citizens who have violated the law and whose rights and freedoms the state recognizes as core values.

Here we ask the question once again, whether it is reasonable to talk about penitentiary law as a branch of modern Russian law? If we talk about objective law, regardless of national-historical specifics, then the answer is negative. It is possible to speak with certain reservations about penitentiary law and the penitentiary system in relation to the national legal system of Russia. This understanding makes it possible to carry out a comparative analysis of similar systems (regardless of their official name) created and functioning at various stages of Russian political genesis. In particular, the work conducted shows that the concept of organizing the Soviet penal system, without any significant changes, was adopted by the penal system of post-Soviet Russia, still being predominantly repressive and punitive, regardless of the use of the term "penitentiary".

Speaking about the place of penitentiary law in the system of national legislation, it should be emphasized that it is unacceptable to reduce legal acts regulating the social environment, in one way or another related to the execution of criminal penalties, exclusively to penal law. People serving sentences participate in various legal relations regulated by various legal acts (constitutional, civil, administrative, family, labor, etc.), while legal regulation is carried out taking into account the subject composition and content of the relevant relations, which, despite the substantive difference, have a common object – the penitentiary environment. It is precisely this feature that allows us to speak of penitentiary law as an intersectoral normative community that unites both specialized legal acts and acts that are indirectly related to penitentiary communications.

In conclusion, we would like to express our gratitude to A.N. Bobrov and N.A. Mel'nikova for the article they prepared; it prompted us to once again comprehend the phenomenon of penitentiary law. The only thing we would like to ask dear authors is to preserve in their subsequent works a correct attitude to any expressed points of view, regardless of the subjective attitude to them. We believe that the classical branches of law do not need anyone's protection, precisely because of their "classicism". Penitentiary law does not exactly claim a classical role in jurisprudence; therefore, it has no sense to protect the system of law in general and the system of Russian law in particular from it.

Representing the regulatory and protective system combining legal acts that enshrine penitentiary norms defining fundamental principles and mechanisms of the organization and functioning of the penitentiary system, establishing measures of encouragement for

positive behavior and negative responsibility for the commission of offenses, penitentiary law acts as a comprehensive means of legal influence in the field of penitentiary legal relations.

As law fulfils regulatory and protective functions, it is necessary to differentiate regulatory and protective functions of penitentiary law. The regulatory impact of penitentiary law is aimed at maintaining the established law and order in the penitentiary sphere and its positive correction. The protective effect is aimed at preventing possible offenses and providing adequate response to the illegal acts committed. At the same time, in all cases, the implementation of the norms of penitentiary law is carried out in the form of penitentiary legal relations opposed to penitentiary offenses.

As for the question expressed by A.N. Bobrov and N.A. Mel'nikova, whether the relations arising in the penal system in connection with illegal acts are penitentiary or they are not included in the subject of penitentiary law, we consider it necessary to explain the following. Law and offense, being deterministic phenomena, simultaneously act as antagonistic constructions. The offense stems from the law, just as death is a consequence of life. According to the formal legal approach to understanding law, the act not recognized as such in the relevant legal act is not an offense. And if so, then paradoxically, the offense is a consequence of the law. There is no legal act defining types and compositions of offenses, as well as establishing measures of legal responsibility for them, there is no offense. Accordingly, all legally significant (provided by law) public relations should be divided into legitimate – legal relations and illegal – offenses. It follows from the above that penitentiary legal relations are always legitimate relations. Relations arising in connection with commission (or prevention) of penitentiary offenses are no exception. These legal relations are related to implementation of the protective function of penitentiary law and are therefore called protective. Unlike regulatory legal relations based on the presumed legitimacy of consciousness and behavior of subjects of relevant penitentiary communications, protective legal relations are based on the presumed illegality of subjective consciousness and behavior. Thus, the subject area of penitentiary law includes both lawful and illegal acts of participants in penitentiary communications. At the same time, only legal relations should be considered as positive forms of social behavior in the penitentiary sphere. In turn, offenses are illegal legal facts with the prevention and counteraction of which penitentiary legal relations of a protective orientation are connected.

So, does penitentiary law exist? There is an answer. Despite the absence of a legislative definition, the phenomenon of penitentiary is quite actively used both in the scientific and educational process and official rule-making, including in the current Concept for the development of the penal system of the Russia Federation up to 2030.

Does penitentiary law occupy a certain place in the Russian legal system? If we recognize the penitentiary system existence, then it is logical to recognize penitentiary law, and if so, then this phenomenon occupies a certain place in the system of national law of Russia. Is this place clearly defined and unambiguously perceived by all researchers? The answer is negative, because there is no consensus in science, characteristic of the bureaucracy based on the power vertical, where the boss' order is still perceived as a law for the subordinate. The supreme judge, indifferent time, will show, whether the term "penitentiary" will be established in relation to organizational regulators with the help of which regulatory and protective influence is carried out in the sphere of execution of punishments. We believe that over time, penitentiary law would acquire its conceptually completed categorical status, primarily in the scientific field. And the very fact that this article was published in the journal "Penitentiary Science" inspires and pleases us.

Conclusions

1. Consistency is a universal property of law both in abstract-theoretical and praxiological understanding.

2. The concepts of the system of law, legal system, legislative system used general theoretical and branch legal science, in some cases, are not clearly distinguished, which leads to confusion of the form and content of

the categories branch of law and branch of legislation.

3. Discussions regarding separation of new branches in the legal system are dictated in most cases by subjective interests of individual authors who solve selfish tasks, usually related to obtaining academic degrees.

4. Penitentiary law as an objectified concept – the theoretical and legal model is an intersectoral normative community that is formed simultaneously with the organizational and functional formation of a specialized state system to execute criminal penalties and is modified simultaneously with it.

5. In the modern Russian law, penitentiary law is considered either as the penal law "renamed to meet European standards", which continues to be as repressive and punitive as the criminal executive law of the Soviet period, or as a "legal innovation", on the one hand, designed to show a change of the punitive and repressive objectives of the Russian penal system into correctional and educational, and on the other hand, expanding the subject of the legal impact of this community, including, along with actual penal relations, communications regulated by norms of other branches of Russian law.

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