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FOREIGN EXPERIENCE OF APPLICATION TO CONVICTS OF MEASURES TO APPEASE

In article considered the question of international legal approaches and practice of application to convicts, imprisoned, measures of appease.

In addition, based on the results of the current research, the international legal acts on the issues of the application to the convicts in the places of their isolation (and namely, in this sense are used in this work such terms, that are enshrined in the specified sources and relate to the characteristic of these individuals) of the restraint measures that are classified into: 1) the international legal acts of the general nature, that is, those which are set out the general principles and approaches that are related to the legal restrictions, which are imposed on the convicts; 2) the international legal sources of the specialized content, that is, those that directly regulate the issues of the execution – the serving sentences and the treatment with the convicts; 3) the international legal acts that directly relate to issues that are related to the application the restraint measures to convicts.

Keywords: *foreign experience; corrective measures; convicts; staff of penal institutions.*

В статье рассмотрены вопросы международно-правовых подходов и практики применения к осужденным, лишенным свободы, мер усмирения. Наряду с этим, исходя из результатов данного исследования, международные правовые акты по вопросам применения к осужденным в местах их изоляции (а именно в таком значении употребляются в этой работе те сроки, которые закреплены в указанных источниках и относятся к характеристике этих лиц) мероприятий усмирения, классифицированы на: 1) международно-правовые акты общего характера, то есть те, в которых определены общие принципы и подходы, касающиеся правоограничений, которые устанавливаются для осужденных; 2) международно-правовые источники специального содержания, то есть те, которые непосредственно регулируют вопросы исполнения - отбывания наказаний и обращением с осужденными; 3) международно-правовые акты, которые непосредственно относятся к вопросам, связанным с применением к осужденным мер усмирения.

Ключевые слова: зарубежный опыт; осужденные; меры усмирения; персонал учреждений исполнения наказаний; уголовное преступление.

Formulation of the problem. A one of the tasks of modern reform of bodies and punishment execution institutions, which are enshrined in the Concept of the reform (the development) of the penitentiary system of Ukraine in September 2017, determined development of legislation in the field of functioning of the IIW and the PEI in accordance with legislation of the EU.

Accordingly, the putting the question regarding the international legal approaches and the practice of the application to convicts that are deprived of liberty, of the restraint measures is obvious and such that has theoretical and applied importance.

However, it should be borne in mind that the need to harmonize of the domestic law with the rules of international law applies, in particular, not only the legal space of the EU, but also of the legal space of other international associations that exists in the Europe.

Analysis of recent research and publications. The carried out in the course of current study analysis of the scientific literature and regulatory and legal acts concerning the content of the activity, which is related to the application of preventive measures to convicted, who were held in places of deprivation of liberty showed that scientists such as: K. Avtukhov, Ye. Barash, Yu. Baulin, V. Holina, B. Holovkin, O. Kolb, V. Konopelskiy, I. Kopotun, A. Savchenko, A. Stepaniuk and others.

Setting objectives. The purpose of this scientific article are consideration of questions of application to convicts of measures to appease in provisions of separate international docu-

ments, that is those, that make research interest considering their basic importance or insufficient readiness and also formulation on this basis of the corresponding conclusions.

Presenting main material. Along with this, a kind of moment of «the truth» and, in fact, «the litmus paper», which reflected the nature of the explored in this work theme, the results of studying foreign practical experience on the issues have become that are related to the content of the application to the convicts that are deprived of liberty that are defined on the normative legal level, of the restraint measures.

As it is established in the course of this scientific search, the specified activity of the personnel of the correctional institutions (the prisons), basing the standard of the normativity, three groups can be classified, namely:

a) the states, in which the legal grounds, type and procedure of the application to the convicts in the places of the isolation (the deprivation of the liberty) are defined in the CEC and special laws (the states of the previous USSR; Serbia; Cuba; others);

b) the states, which regulate this question on the level of the special laws (the Republic of Poland; Germany; USA; the Republic of Turkey; others);

c) the states, in which the specified issues are regulated by the norms of the criminal and civil law (Thailand; Switzerland; Norway; China; etc.).

In the first qualifying group, in terms of the practical relevance of the results of the current study, the normative legal regulation of the specified problematic in the Republic of Belarus attracts attention.

First of all, it is discussed that in the CEC of the Republic of Belarus, along with the general provisions of the application to the convicts of the physical force, the special means and the weapon (the art. 77), the separate rule focus on each of the set of the restraint measures that essentially meets the requirements of international legal acts on these issues and, in turn, is an additional argument regarding the supplementing the CEC of Ukraine with similar norms.

Another feature of the CEC of the Republic of Belarus is that in every norm it is discussed the personnel of the PEI and the military personnel, who are involved in the specified activity, which equals the legal status of this two entities in the application of the restraint measures.

Among other features of the CEC of the Republic of Belarus are the following:

1) in the general provisions (the art. 77) the provision for the state of necessary defense and absolutely necessary is enshrined, in which the persons of the number of personnel of the correctional institutions and military personnel are able to act, what is important in view of the recognition of their activities as lawful, as circumstances that preclude the crime of the action.

It seems that such an approach could be used in the CEC of Ukraine.

At the same time, in the general provisions of the CEC of the Republic of Belarus no word has been spoken about such ground of the application of the detained in the law restraint measures as the apprehending the offender, as well as about another circumstances that exclude the crime of the action and therefore, in this sense, the CEC of

Ukraine is more sophisticated than this Code;

2) the provision about the application of the determined in the law restraint measures are related to all convicts, who are serving sentences in the correctional colonies (the art. 77 of the CEC of the Republic of Belarus),

According to the art. 64 of the CEC of the Republic of Belarus, the correctional institutions include:

- the correctional and educational colonies;
- the prisons and the medical institutions;
- the IIW, which commit the functions of the correctional colonies regarding the convicts to the deprivation of liberty, left in the investigative isolation ward for implementation works on maintenance.

Given the specified, it was logical, in this regard, to supplement the part 6 of the art. 106 of the CEC of Ukraine with the phrase «as well as with the Law of Ukraine 'On the National guard of Ukraine» and present it in the new redaction:

«The execution of the physical force, special means and weapon is also allowed in other cases that are stipulated by the Laws of Ukraine «On the National guard of Ukraine», as well as by the Law of Ukraine «On the pre-trial detention».

This approach is based on the following provisions:

a) the part 4 of the art. 3 of the CEC of Ukraine, according to which the convicts that were left in the IIW for the work with housekeeping, are kept in the isolation from others on conditions that are predicted by this Code for the correctional colonies of the minimum level of the safety with the general conditions of the keeping and correctional

colonies of the medium level of the safety;

b) the art. 90 of the CEC of Ukraine, in which the procedure for temporary detention in the IIW and the transfer of convicts from the arrest house, the correctional center, the disciplinary battalion or the colony to the investigative isolation ward is enshrined;

c) the art. 18 of the Law of Ukraine «On the pre-trial detention», in which the grounds of the application of the measures of the physical influence, the special means and the firearm in the IIW are determined [16];

d) the art. 19 of the Law of Ukraine «On the pre-trial detention» in which the grounds of the legal grounds for the introducing a special regime in the places of the pre-trial detention».

In addition, in the part 7 of the art. 77 of the CEC of the Republic of Belarus the provisions are enshrined about that the unlawful application of the physical force, the special means and the weapon entails the liability that is established by the legislation of the Republic of Belarus.

Given the specified and in the order of the prevention of the unlawful application to the convicts that are deprived of liberty, of the restraint measures, it would be logical to supplement the art. 106 of the CEC of Ukraine with the part 12 of the following content:

«The unlawful application to the convicts that are deprived of liberty, of the physical force, special means and weapon entails the liability that is established by the legislation of Ukraine».

Among other countries of the I group attracts attention the normative legal regulation of the issues that are related to the application to the con-

victs that are deprived of liberty, of the restraint measures in the Russian Federation.

Thus, in the part 1 of the art. 86 of the CEC of the RF it is specified that in the cases where the prisoners commit the resistance for the personal of the correctional institutions, the malicious disobedience to the requirements of the personnel, the manifestations of rage, the participation in riots, the taking of hostages, the attacks on citizens or the committing other socially dangerous acts, as well as the escape or detention of persons who escaped from the correctional institutions, in order to prevent the specified unlawful actions, but directly – the prevention of the inflicting of the harm by these convicts to the convicts or them self, the physical force, special means and weapon are applied.

In this regard, the procedure of the application of the specified measures of the safety in the part 1 of the art. 86 of the CEC of the RF, as this follows from the content of the part 2 of this article of the Code, determined by the legislation of the Russian Federation [24].

Another feature of the RF is that the art. 86 has a name «The measures of the safety and the foundations of their application», despite the fact that in the norms of the international law, as actually in the Ukraine, the restraint measures are discussed [6].

In addition, if in the PEI RIO of Ukraine, a special section of the XX is devoted to this issue, then in the PEI RIO of the RF it is not considered at all [15].

As established in this study, the specified above two approaches (the Republic of Belarus and RF) in this or another measure characteristic for the CEC of other states of the I group [21, p. 246–250].

Regarding the content of the normative legal regulation of the issues, regarding the application to the convicts that deprived of liberty, of the restraint measures, which are characteristic for countries of the II group, then in this case it should be noted that the specified activity is determined not by the CEC norms, but by special laws.

Thus, in the art. 256 of the CEC of the Republic of Belarus it is specified that the application of the measures of the immediate influence, the application of weapon or the service dog to persons that are deprived of liberty, are regulated by the individual law [13, p. 82].

The analogical approach on the specified issues is applied in the Germany [25, p. 133-139] and France, in which the main sources of the law that regulate the procedure of the execution of sentences, is the CC and the relevant laws (for example, «On the regulation of the issues of the serving the preventive conviction and on execution of the sentences in the metropolis») [17, p. 604].

To the third group relate the states, in which the personnel of the correctional institutions or does not carry special means at all (Switzerland [19, p. 84]; Norway [26, p. 231-234]; Denmark [8, p. 226-229]; others) or its application in the service activity is limited [5, p. 52-59].

Thus, in 2013 in Thailand the decision was accepted prohibit the application of shackles for the convicts to death penalty in the prison of the maximum level of safety [5, p. 54].

In turn, USA prisons have increasingly used the specialized technique in the supervision of the convicts: from the portable personified devices of alarm to the supervision robots that allow security in the correctional colonies [5, p. 55].

In the Great Britain, the personnel of the prisons, although it is not provided with the special means of the protection, but in the official activity it uses them only on the order of the director in the cases that are specified in the law [5, p. 56].

At the same time, these institutions is absent the radio communication and the departmental dedicated networks of the telephone connection, significantly reduces the likelihood of the escaping of convicts from the prisons [5, p. 56].

Instead, in Norway, the main direction of the work with convicts is not so much the provision of their isolation as the provision of their personal safety [26, p. 234].

In the context of the content of the subject of the current study, in particular in the part of the development of the legal foundations of the application of the restraint measures to convicts that are deprived of the liberty, deserves the attention of the practice of counteraction to the illegal starvation from the side of the latter in Armenia, which is based only on the norms of the international law on these issues, as well as builds taking into account the decisions of the European Court of the rights of human [1, p. 5].

In order to prevent conflicts between the convicts and personnel of the prisons in Sweden the proper conditions for the serving and execution of the sentence in the form of the deprivation of liberty were created for these subjects (under the law of that state – from 14 days to the life imprisonment).

Thus, the convicts are kept in the single hotel type cameras, and the functions of the supervision by the personnel of the prisons largely is carried out by technical means [7, p. 84-86].

As D. Mak-Manus noticed in this regard, we will never learn to respect the rights of the prisoners, if we unless we truly start to respect the rights of the prison personnel [14, p. 5-6].

Indicative in this sense we can call the organization of the preventing of the personnel of the prisons in France for the work, in particular, with the radical tuned convicts (the potential offenders that are classified into 3 groups, depending on the public safety), who are held in the special sectors of the strengthened isolation (no more than 2 persons in the one camera and 100 persons in the one prison) and the contact of whom with the personnel of the prisons is minimized – the issues of the supervision and communication execute the means [18, p. 203-207].

As the results of the current study showed, the relevant legal guarantees of the activity of the personnel of the correctional institutions have been created in the criminal legislation of the foreign states.

Thus, the status of the necessary defense of these persons regarding the convicts should be stated by:

- «the available danger of the unlawful encroachment» (the CC of the Italian Republic);
- «the unlawful attack or the immediate threat» (the CC of the Swiss Confederation);
- «the immediate threat of the causing of the unlawful harm» (the CC of Japan);
- «the application or the real (the looming) threat of the application of the physical force» (the CC of the New York State); others [22, p. 224].

At the same time, in the CC of the Spain the prohibition of provocation of necessary defense from the side of the defending party is disused (paragraph 4

of the art. 20); and in the CC of Argentina, the lack of the sufficient provocation of necessary defense from the side of the defending party is disused [22, p. 225].

In Israel, the approach to the provision of the security in correctional institutions was quite original: its basis consists of the application of the system «DoqGuard» – of the patented security organization system that is based on the natural instinct of dogs that are used in the protection of objects of these institutions [3, p. 515-518].

In addition, in Japan, the priority direction in training of the personnel of the prisons and other correctional institutions is the physical training of these persons, which they are engaged in throughout the course of study in special schools (from 15 to 21 months) and constantly during their service activity [2, p. 310-311].

One of the circumstance that are due to this approach is the absence in the CC of Japan of the criteria and the clear boundaries of the necessary defense, as well as the concept and the possibilities of its exceedance.

In addition, the CC of this state has no norms on imaginary or real defense, the excess of defense and the form of guilt, in doing so [20, p. 320], what is an important element of the activity of the personnel of prisons in the application of the restraint measures regarding the convicts that are deprived of liberty.

In its turn, in the CC of the People's Republic of China (the PRC) the definition of the necessary defense is not only provided (the part 1 of the article 20), but also the listed encroachments for the avoidance of which the prevention of the personal injury or death to the person, who encroaches,

are not the exceedances between the necessary defense and does not entail an onset of the criminal liability (the part 3 of the article 20) [20, p. 320-321].

At the same time, both in the CC of Japan and in the CC of China do not clearly provide such a sign of the necessary defense as the proportionality, and the norms governing the excess of the required defense are rather blurred that creates the difficulty in the qualification the actions of a person who is in the conditions of protection of the rights and interests of the person, society and state [20, p. 321].

Conclusions. As established in this study, in the foreign practice there are other moments (both positive and negative) that should be taken into account when the solving of tasks, which are related to the application to convicts that are deprived of liberty, of physical force of the special means and weapon [9, p. 48-50].

In particular, the analysis of the norms of the international law and the foreign practice of the application to convicts that are deprived of the liberty, of the restraint measures and their comparison with domestic counterparts indicates the available potential opportunities for the abuse by their own right of the personnel of colonies in these situations [10, p. 105-114].

First of all, their number includes:

a) the evaluation concepts (the terms) that have been used in the current legislation of Ukraine (the articles 36-43 of the CC and the article 106 of the CEC) [11, p. 9-11];

b) the not enough high level of the general and legal culture as important determinants of the conscience of personnel of the colonies;

c) the existence of certain opportunities in the law for the abuse of their own right by the personnel of colonies;

d) the unlawful activity of the personnel of the colonies in this case has the hidden or disguised nature (in the form of the provocation of the necessary defense, in particular), that is, the criminal-law behavior of these persons contradicts the 'the spirit' of the law, its principles, natural law, etc. [4, p. 25-26].

Namely the specified problems made the content of the tasks of the current scientific study and determined the nature and the directions of activity that is aimed at the improving the legal mechanism of the application of the measures of physical influence, special means and weapon to the convicts in the places of the deprivation of liberty in Ukraine, taking into account, in so doing, the requirements of the international legal acts both the mandatory and the recommendatory nature and the positive foreign experience [12, p. 32-34].

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Зарубіжний досвід застосування до засуджених заходів вгамування

У статті розглянуто проблемні питання міжнародно-правових підходів та практики застосування до засуджених, позбавлених волі, заходів вгамування. Поряд з цим, виходячи з результатів даного дослідження, міжнародні правові акти з питань застосування до засуджених у місцях їх ізоляції (а, саме в такому значенні вживаються у цій роботі ті терміни, що закріплені у зазначених джерелах та відносяться до характеристики цих осіб) заходів вгамування, класифіковані на: 1) міжнародно-правові акти загального характеру, тобто ті, в яких визначені загальні принципи і підходи, що стосуються правообмежень, які встановлюються для засуджених; 2) міжнародно-правові джерела спеціального змісту, тобто ті, що безпосередньо регулюють питання виконання – відбування покарань та поведінням із засудженими; 3) міжнародно-правові акти, які безпосередньо відносяться до питань, пов'язаних із застосуванням до засуджених заходів вгамування.

Такий підхід не тільки дозволив співставити зміст аналогічних нормативно-правових джерел національного та міжнародного права, але й розробити низку науково обґрунтованих пропозицій, спрямованих на удосконалення правових підстав та порядку застосування в Україні заходів фізичного впливу, спеціальних засобів і зброї до засуджених, позбавлених волі.

Ключові слова: зарубіжний досвід; заходи вгамування; засуджені; персонал установ виконання покарань; кримінальне правопорушення.