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NATURAL AND POSITIVE LAW IN THE CONCEPT OF CORRECTING OFFENDERS

In the article it is proposed to consider the relationship of purposeful process of correcting convicted persons in places of detention based on the norms of natural and positive law with the prevention of recurrence. Most philosophers consider legal regulation as a mandatory condition for the stable functioning of the state and recognize the law, as a system of norms, which is divided into natural law and positive one. In the penitentiary practice the concept of correcting offenders, which is based on the socio-cultural norms of natural law and the mandatory norms of positive law, should become an essential knowledge of convicted persons with the aim of preventing recurrence. In penal practice the concept of correcting criminals, which are recognized as socio-cultural norms of the natural law and the binding rules of positive law, should become a necessary knowledge of the prisoners for the purpose of prevention of recurrence. The author analyzes the outstanding experience of A.S. Makarenko, as an example of a multidimensional process of “vaccination” convicts by the norms of natural and positive law for their successful resocialization. The article demonstrates the author’s method of comparative analysis of philosophical and legal ideas and also analysis of international law. The study assures that the actual task for the modern prison systems is not only serving the sentence in a safe environment, but also to help convicts to be ready for successful resocialization, as prevention of recurrence on the basis of norms of natural and positive law.

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1. Introduction

At all times the communities of the people, the states are “affected” by the phenomenon of crime. Its distinctive feature is the social nature and social conditionality of criminal acts committed by people in society against their interests and needs, socio-cultural norms and established rules of social behavior as a set of social relations with their regularities and contradictions.

Despite the wide range of efforts, crime in the world is “a chronic disease” of human communities. “The central message ... is that criminality is an integral part of how society, and its culture, is constructed. Thinking of crime as generated by abnormal individuals that is the responsibility of law enforcement and the judicial system is to ignore the endemic processes that sustain it and those who deal with it on a daily basis ” (Canter, Youngs, 2016: 8).

In this regard, the recurrent crime as an indicator of “incurability” of the society is particularly troubling. In 2015, the leadership of the Federal penitentiary service pointed out a high percentage of recidivism among prisoners: “at hearings in Public Chamber of the Russian Federation first Deputy Director of the Federal penitentiary service Anatoly Rudy said that of 673 thousand convicts 85 percent are people who were convicted two or more times”.¹

A more detailed analysis of this situation was given by scientists-criminologists: “In 2015 the problem is accentuated by a contingent of convicts in correctional colonies, when the dominant position in the prison began to occupy previously convicted persons (62,0 %). According to recidivism rates, a significant proportion were persons convicted three or more times – 48,35%. The share of persons convicted the second time made up of 13.65%”. (Avdeev, Avdeeva, 2017: 193).

The state of crime and, especially, a recurrent one, is always in the center of not only the criminal policy of the state, but also the whole society. However, “the analysis of the socio-criminological characteristics of crime in January – December 2016 shows that more than a half (674 935; APPG – 688 817) crimes committed by persons previously committed crimes. Their percentage is 56.7 % (APPG – 54, 9 %) of all preliminarily investigated crimes in the reporting period”.²

1 www.vesti.ru “Bitterish statistics: 85 percent of prisoners in Russia are recidivists”. 24 March, 2015

2 www.genproc.gov.ru “A criminality condition in Russia for January - December 2016”, Moscow, p. 8

Thus, the current situation, despite the complex law enforcement, unfortunately, is sustainable, which in turn can affect the stability of the state and its security.

Thinkers-philosophers in all times have tried to formulate the idea of an optimally functioning state, realizing the complexity and diversity of that task. Today, the search for new approaches to the concept of criminal reform in the name of stability of the state forces us to revisit the ideas of philosophy in general and philosophy of law in particular.

2. Methods

Humanity for long years of existence has developed the understanding of conditions for stable functioning of the state only in the presence of legal regulation. In the process of state development such factors are legal norms that are binding on all citizens: understanding the law as a system of norms it is in use to divide it into a natural law and a positive one.

Long-lasting, dynamic and fruitful evolution of the philosophy of a natural law, (prominent representatives of which were Aristotle, the Greek Stoics, Cicero, the Roman Stoics and the medieval scholastics), led to the understanding of the need for consideration of socio-cultural norms and rules of conduct prevailing in a natural way, coming from the needs and interests of the individual. In this way the natural law was formed as a list of freedoms and duties of man, provided he was born by nature.

Natural rights - the right to life, dignity, fair treatment, freedom of thought, etc., are not directly linked to the state, and therefore they cannot be controlled by it. They are prevalent in the socio-cultural environment and are supported by different forms of public opinion. "...Even in societies where "kings", "chiefs" or any formal state institutions are absent, regulators of social behavior that make social life predictable and, moreover, guarantee a more or less stable reproduction of its forms are visible... the famous American jurist Roscoe Pound suggested that "the force of politically organized society". (Marques Guedes, 2003: 4).

At the same time the natural norms become a benchmark for the state that creates their positive analogues. Thus, the rules of positive law are mandatory requirements to conditions and organization of society, responding to the goals and objectives of the state, established at the state level and regulated by law.

The problem, including a crime as "a disease of society," consists in finding a balance in the use of norms of natural law and positive one for optimization of the functioning of the state. However, the norms of positive law can interact with the natural ones, but at the same time and contradict them. And it concerns not a solitary idea, but a whole philosophical-religious theory and dogma. The

historic confrontations between these two types of law have developed under the burden of social changes in society.

The natural norms that are treated differently may be the causes of deviant behavior of some individuals. The tyranny and violence, various kinds of abuse of citizens perpetrated by them can be explained by misunderstood religious attitudes. The norms of positive law preserve society from such attitudes.

Most of modern scholars agree with the idea that “as internally balanced social system, the legal state has few leading, necessary and sufficient signs.

1. The priority of law over the power

It requires a balanced system of legal restrictions on the activities of state authorities. The norms of law inhibit the likelihood of the arbitrariness of the authorities; prevent any attempts of the state to exercise their authority to the detriment of civil society. They forbid the state to interfere in the private lives of law-abiding citizens, forced it to reckon with the principle of the inviolability of the rights and freedoms of the individual.

2. The priority of natural law over positive one

State legislation is based on the principles of inalienability and inviolability of the natural rights and freedoms of the individual. The natural right of everyone to life, liberty, property, dignity, well-being and happiness is a fundamental social value protected by the current legislation. Laws only prove that the natural rights are not bestowed by state, but are owned by the person initially”. (Bachinin, 2004: 9)

Thus being relatively mutually independent the norms of natural and positive law determine, penetrate, interact with each other, and without them it is not possible to regulate relations in the society.

Another condition for the stability of the state is the individual who follow or does not follow the norms of natural and positive law. Thus, the concept of correcting criminals can and should rely on knowledge and acceptance of the norms of natural and positive law. This way, that is confirmed theoretically by researchers and practitioners will give possibility to reduce recidivism and overall crime.

3. Main part

High recidivism rates indicate unsolved problems: on the one hand - the problems of execution of punishment, and, on the other - with the rejection by society of people who do not accept the rules of life, embodied in the laws of the state, as well as socio-cultural norms prevalent in the society.

The value of the ideas of philosophers who defend the existence of natural law is that it appears there and then, where the human community is born. Firstly, it forms elements of subculture, and then, with the development of society and the elements of cultural that are accepted by the whole society.

Philosophy itself takes the concept of natural law on the base of analysis of the psychological, physiological, biological, cultural and socio-historical factors. In turn, the study of diverse customs, traditions and rules of human behavior, opens up some of the general and permanent rules that are derived from the generic essence of man, and that creates the culture of a society.

Unfortunately, the modern theory of natural law is far from a fairly wide recognition of the specialists of the penitentiary system. At the same time, natural law is one of the most sustainable concepts of the philosophy of law, due to the interests and needs of man, forms the set of sociocultural rules and rules of conduct. A natural law should be understood as a set of socio-cultural natural regulators of human behavior. Of course it is rather an ideal, whereas positive law is the reality that monitors and provides by the state.

Legal anthropologists focused on the socio-cultural variability are to admit the doctrine of natural law. Let us remember G. Grotius, who in his famous work “On the law of war and peace” in the Chapter “Evidence for the existence of natural law” in support of his concept brought similar thoughts of other philosophers:

“Andronicus of Rhodes wrote: “...the people gifted with a right and sound mind, firmly adhered to the so-called natural law. For those ones whose spirit is painful and upset, everything seems different, and they have nothing in line with the subject. So does not mistake the one who finds honey to be sweet, whereas for the patient it seems to be otherwise”.

The opinion of Plutarch was close to the abovementioned authors and in the life of Pompey he noted that “...by nature no man is and was not a wild and unsociable creature, but he goes wild when he get used to indulge in Vice, distorting his nature; however, following the other habits, changing his lifestyle and place of residence, he can return to his former meekness”. (Grotius, 12)

Socio-cultural disadaptation and asocialisation of criminals is a complex and has taken place process of social and cultural “fall out” of the offender from society Anthropology of deviant and later criminal behavior can be explained by the neglect firstly the norms of the natural law and then the positive one.

The concept and process of returning the offender in open society should consist of repentance and acceptance of the two systems of law. On the one hand, sociocultural norms, born by natural law and reducible mainly to the existing moral values and standards, containing the stereotypes of socially approved behavior, the system of prohibitions, sample of activities and forms of interaction,

and even conflict resolution. On the other hand – the rules of positive law, concentrated in the current legislation of the society.

“The idea that legal rules and categories define social wrongs, determines their consequences, and resolve conflict remains strong, despite the fact that jurists ... as well as anthropologists, have remarked that some societies seem to do very well without law when settling disputes. During my own fieldwork in Ladakhi village it quickly became apparent that the villagers felt no need to refer to any rules to address disputes or discipline those guilty of aberrant behavior”. (Pirie, 2013: 9).

The position of the modern scholars of the University of Oxford has underlined the importance not only of the norms of positive law, but also a specific function of social and cultural norms as regulators of social relations.

Thus, the time allotted by the court for the enforcement of penalties should be used for “passing” by the convicted the “reverse” path through repentance, the acquisition of social-psychological health in the process of psychological harmonization of the personality, and the way of knowledge and recognition of socio-cultural rules and norms of the legislation of the country.

The practice, established in places of deprivation of liberty, as a rule, is focused on the security of the convicted person and society from the convicted person, on the conditions of punishment and some kind of social assistance in solving of his humanitarian problems.

If one does not see necessity of providing conditions for prisoners to study socio-cultural and legal norms, we leave the door closed for prisoners after their release in the legal field of socio-cultural space of the country.

Understanding of the importance of social and cultural norms of the natural law and the positive law in terms of the correctional institution is the incentive and support, the need and confidence on the path of humanization of the process of correction and resocialization of convicts.

Not caring about the knowledge and acceptance by prisoners in the places of deprivation of freedom socio-cultural and legal norms of the state, we create the conditions under which it becomes impossible to re-identity them in open society, which again leads to their internal instability, the loss of moral standards, disharmony, stress, and recurrent crimes.

In the twentieth century the foreign practice of corrections was focused only on the need for security of detainees. For almost a century the foreign colleagues gave preference to the guard of prisoners, technical means of protection and security. However, in the beginning of the century originated the first institutes of social work with prisoners in places of deprivation of liberty. Staff social workers of corrections took over the care of education of convicted persons and their subsequent employment. However, later it became apparent that the creation

of technically advanced conditions of imprisonment, and efforts of social work was not enough for the solution of personal problems.

Modern international legislation (a notable example is the law concerning minors, in particular, the Rules of the United Nations for the protection of juveniles deprived of their liberty) recommends the development of an individual program of returning the minors in the socio-cultural environment of society on the basis of the formation of appropriate attitudes and skills in terms of isolation.

“One should guarantee the implementation in correctional institutions the effective events and programs in the interests of minors that would ensure maintaining of their health and self-respect, foster their sense of responsibility and encourage the formation of such attitudes and skills that would help them to develop their potential as members of society...with the aim to counteract the adverse effects of all types of detention and to facilitate their integration into society”.³

In favor of successful “soft” re-socialization in the Rules the series of events are regulated. Particular importance is attached to the staff - humane, conscientious, efficiently performing their duties with the goal of assisting offenders in their return to society. The Rules establish the right of minors to education, training and employment, leisure, medical care, freedom of religion. However, international law does not demand from convicts to study the legal and socio-cultural norms of the law of the state of re - socialization.

However, the already accumulated experience in the use of socio-cultural factors in penal practice. In the legislation of many countries enshrine measures that protect the rights of prisoners with regard to their cultural traits - from the need for general and professional education and the development of specific, individual programs for their social and cultural reintegration to provide their preferred food (vegetarian, kosher) and the ability to follow religious customs and rituals in places of deprivation of liberty.

Since the early 80-ies of the last century the names of the proponents of art-therapeutic work with prisoners are well known: Carrell C. J. Laing, 1982; Laing J. 1984; Liebmann M., 1994; B. Karban, 1994; Innes R., 1996, and other specialists. Definitely interesting is the experience of Mr. Colin Tisdale (Great Britain), who became the winner of the award for the implementation of art therapy in correctional institutions (1997). “I am sure, wrote researcher, that each client-convict must be given the opportunity of art-therapeutic work in order in particular to understand the causes of their socially dangerous behavior, ...art therapy helps understanding why a person feels anger, and, ultimately, helps to “dealing with anger”.⁴

3 Resolution # 45/113 of the UN General Assembly on 14 December 1990 , p.1.3

4 Workshop on art therapy, 2000, SPb: PETER , p. 324.

It is known that in the history of our penitentiary system there is a convincing example of the multidimensional process of acquaintance and upbringing of minors, first of all with sociocultural norms. This is the experience of Anton Semenovich Makarenko in the penitentiary institution.

He was a genius teacher and psychologist and he managed to find a golden middle in the use of “carrot and stick” in the process of correction.

He, perhaps for the first time in the world, made an attempt of the balanced use of two regulators – norms of natural and positive law: “...Anton Makarenko, first embodied the idea of training young delinquents in a special children’s colonies, which combined work with training”. (Gopal, Tikhvinsky, 2008: 580)

“Makarenko’s ideas concerning the relationship between education and other disciplines, whether in the humanities (philosophy, ethics, aesthetics) or in the natural sciences (biology and physiology) deserve serious attention. More particularly, his far-reaching investigation of the essentials of a new, socialist pattern of moral and ethical relations led him to enunciate this very important idea: make as many demands as possible on a man, and at the same time show him as much respect as possible. This idea is occasionally criticized by some modern educators for putting the principle of demanding something of people in such a prominent position in the ‘demand-respect’ dyad. Makarenko himself pointed out that from a genuinely humanitarian point of view, respect for and demands on a person were not separate categories and attitudes, but were dialectically related facets of an indivisible whole”. (Filonov, 2002: 2).

This statement of a modern scientist, formulated after nearly 80 years, confirms the relevance and prospects of Makarenko’s ideas even in our days: for and from juvenile offenders Anton Semenovich organized theaters and orchestras (brass and strings), groups of fine art and the art of reading, dancing and singing. In Kharkiv city drama theatre every day was booked a bed for juvenile offenders. He attached great importance to the culture of the staff and the aesthetics of the surrounding environment of the colonists, introduced the concept of aesthetics, beauty, discipline, etc.

In fact A. S. Makarenko placing an emphasis on natural law, in his practice realized the necessity of ideas for new penitentiary culture! Today we need to revisit his legacy and, given modern conditions, to implement his experience purposeful creation of a sociocultural environment in a closed society.

“Some of the ideas proposed by Makarenko in “Pedagogicheskaya Poem” were more original than others, but they should be considered in the context of the time and place in which they were produced. Moreover, these were not abstract proposals made by Makarenko in the isolation of an office, but as a result

of concrete, practical experiences in which success was often preceded by trial and error". (Kuzmich, Schugurensky, 2009: 4).

However, until now we almost never use the norms of the natural law as a social regulator of relations in a closed society. Instead of purposeful, consciously formed and managed external influences, socio-cultural norms is "born" inside, fueling a subculture of the criminal world.

Thus, the administration of most prisons, unfortunately, do not use the possibility of recovering and acceptance by prisoners the sociocultural rules as one of the significant factors affecting the process of successful re-socialization of prisoners and, thereby, 50% delays and complicates the process of correction.

Ongoing in Russia process of reforming of criminal executive system is aimed at further humanization of the conditions of serving the punishments and the order of execution of criminal sanctions, bringing them to international standards.

The correction of the convict, which is the goal of corrections, provides, first of all, the return to society law-abiding and socially useful citizens who have successfully completed the process of re-socialization.

4. Conclusions

A consistently high percentage of recidivism stimulates scientists and practitioners to search for new concepts and ways of correcting the convicts. Despite the almost century-old history of the social experience of A. S. Makarenko to return a minor stumble in an open society, there is a need to analyze and use relevant ideas in modern penal practice.

Implementation of the proposed penal concept of criminal reform will require, in practice, its deeper comprehension, understanding of the mechanisms and prerequisites of its implementation. It is important and necessary to establish in the minds of the convicts the balance between the rules of natural law and mandatory rules of positive law.

Today the difficult way of return of criminals from a closed society to an open one should be seen as a twofold process of recovery and acceptance by them not only of the legal norms of positive law, but also socio-cultural norms of the natural law as the mandatory conditions of life in society.

This concept definitely requires from management of penitentiary institutions not only to create the conditions for safe keeping of criminals, but a purposeful complex of socio-cultural, psycho-pedagogical and organizational-legal measures to create special conditions, which implement the norms of natural and positive law in the concept of correcting criminals.

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