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O PRAWNYCH ZASADACH ZASTOSOWANIA SIŁY FIZYCZNEJ I ŚRODKÓW SPECJALISTYCZNYCH WOBEC SKAZANYCH W ZAKŁADACH KARNYCH UKRAINY.

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Adnotacja. W artykule przeanalizowano wyznaczone w ustawie przepisy stosowane na Ukrainie wobec niepełnoletnich skazanych, którzy odbywają karę w formie pozbawienia wolności, zastosowanie wobec nich siły fizycznej, środków specjalistycznych oraz broni. Wyznaczono podstawy prawne takiej praktyki oraz opracowano uzasadnione naukowo zasady w kierunku udoskonalenia zaznaczonego rodzaju działalności w dziedzinie wykonywania kar.

Słowa kluczowe: osobliwości; zastosowanie; stosowanie wpływu fizycznego; środki specjalistyczne; broń; skazani; niepełnoletni; pozbawienie wolności; dziedzina wykonywania kary; podstawy prawne.

PRINCIPLES OF APPLICATION OF PHYSICAL FORCE ACTIONS AND SPECIAL PROTOCOLS TO PROFESSIONAL COLONIES IN UKRAINE

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Abstract. The article analyzes the grounds for the use in Ukraine of juvenile convicts serving sentences in the form of deprivation of liberty, measures of physical influence, special means and weapons, as well as the peculiarities of law enforcement practice on these issues, as well as scientific substantiated measures for the improvement of this type penitentiary activities.

Key words: feature; application; measures of physical influence; special means; weapon; condemned minors; deprived of liberty; scope of punishment; legal grounds.

ПРО ПРАВОВІ ЗАСАДИ ЗАСТОСУВАННЯ ЗАХОДІВ ФІЗИЧНОЇ СИЛИ І СПЕЦЗАСОБІВ ДО ЗАСУДЖЕНИХ У ВИХОВНИХ КОЛОНІЯХ В УКРАЇНІ

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Анотація. В статті здійснено аналіз визначених у законі підстав застосування в Україні до неповнолітніх засуджених, які відбувають покарання у виді позбавлення волі, заходів фізичного впливу, спеціальних засобів і зброї, встановлено особливості правозастосовної практики з цих питань, а також розроблені науково обгрунтовані заходи щодо удосконалення зазначеного виду діяльності у сфері виконання покарань.

Ключові слова: особливість; застосування; заходи фізичного впливу; спеціальні засоби; зброя; засуджені; неповнолітні; позбавлені волі; сфера виконання покарань; правові підстави.

Formulation of the problem Studying the content of the Constitution of Ukraine, this normative legal act contains a number of rules that directly relate to the subject of study in this scientific article [1]. In particular, in Art. 3 of the Basic Law states that people, their lives and health, honor and dignity, inviolability and safety are recognized in Ukraine as the highest social value. At the same time, human rights and freedoms determine the content and direction of the state's activities, and their approval and provision is the main responsibility of the state.

Moreover, as it follows from the content of Part 2 of Art. 19 of the Constitution of Ukraine, bodies of state power (including penal institutions and institutions) and their officials must act only on the basis of, within the limits of authority and in the manner prescribed by the Constitution and laws of Ukraine.

In the context of the subjects under study, attention is also drawn to the norms of the Constitution of Ukraine, which are directly related to the regulation of social relations related to the use of measures of physical influence, special means and weapons to the convicts, including minors, which is discussed in the Art. 106 of the Criminal Procedure Code (CEC) of Ukraine [2], namely:

- 1) Art. 27 of the Basic Law, which states that each person has an inalienable right to life;
- 2) Art. 28 - No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment;
- 3) Art. 29 - Everyone has the right to liberty and personal integrity;
- 4) other norms of the Constitution of Ukraine.

Full extent, the said legal provisions should apply also to juveniles serving sentences in the form of deprivation of liberty. As for this, it is stated in Art. 52 of the Constitution of Ukraine, any violence against a child is prosecuted by law.

At the same time, in part 3 of Art. 106 CEC of Ukraine states that juveniles (according to the international classification and in accordance with the Convention on the Rights of the Child, these persons are called "children" [3]) who commit group or

armed surveillance or resistance that threatens the life and health of staff of the colony or other persons, the use of measures of physical influence, special means and weapons is allowed.

Thus, it must be recognized that there is a legal conflict when, on the one hand (in particular, Article 52 of the Constitution of Ukraine), the use of violence against the child is unequivocally prohibited, and, on the other hand (Article 3, Article 106 of the Criminal Code), such violence to the indicated persons is considered lawful. At the same time, if we proceed from the contents of Art. 8 of the Basic Law, according to which the Constitution of Ukraine has the highest legal force, the provisions of Part 3 of Art. 106 CEC should be recognized as contrary to this law.

Given these circumstances, it is undoubtedly very important to give an answer to this applied problem and to the scientific level, which caused the choice of this article, its subject, purpose, and the main task - to develop scientifically grounded proposals aimed at improving the legal basis for the use of curtailment measures to juvenile convicts in places of deprivation of liberty.

State of research. The results of the study of scientific literature show that the scientists, in the first place, the so-called administrative and criminal-legal direction, are actively engaged in the development of this issue, although experts in criminal-executive law are not left to this side. These include, in particular: K.A.Avtukhova, O.M. Banduruk, V.I. Borisova, I.G. Bohatyreva, V.V. Vasilevich, V.V. Golin, B.M. Golovkina, O. M. Dzhuzha, T. A. Denisov, S. F. Denisova, V. I. Ghentuya, V. J. Konopelskogo, I. M. Kopotuna, M. A. Linenko, A. M. Litvinova, V. A. Merkulova, A. V. Savachenko, A. Kh. Stepanyuk, V. M. Trubnikova, S.J. Fahrenyuk, I. S. Yakovets and others.

In addition, on the doctrinal level, the question of the peculiarities, taking into account the constitutional provisions, the application to minors in places of imprisonment of measures of physical influence, special means and weapons has not been studied sufficiently (this, in turn, affects the effectiveness of enforcement practice in the field of execution punishments), which became decisive in determining the title of this scientific article.

Statement of the main provisions. As noted in Part 3, Art. 106 CEC of Ukraine, it is prohibited to use measures of physical influence, special means and weapons, along with other categories of convicts, to minors, except for cases of group or armed assault that threatens the life and health of colony or other personnel or armed resistance.

Based on these normative provisions, it is possible to distinguish the following features of law enforcement practice on the specified issues, namely:

- a) the use of mortification of curbing a group attack minors;
- b) use their in an armed attack
- c) the application of the measures specified in the law for curbing an armed attack.

In the first case the answer to the legality and conditions on the use of force against juvenile offenders can be found in the explanations of Plenum of the Supreme Court of Ukraine, reflecting the content of the said issues ("On self-defense" [4] "On the violation of a prison" [5]; "On Judicial Protection of Law Enforcement Officials and the Court" [6], etc.). The basic motif of court decisions in this case is that recognized lawful acts or omissions of subjects of application of mortification, if other means or measures

to avoid this was not possible, or if these measures (tools) did not give the expected result.

- a) disproportionality of means of attack and protection;
- b) the inconsistency of the circumstances of the attack and protection;
- c) the disproportionality of the number of attackers and the number of defended persons;
- d) other situations [4].

Taking into account the specified and requirements of Art. 52 of the Constitution of Ukraine, there should be Part 3 of Art. At the end of the sentence, add 106 words at the end of the sentence with the phrase "if other means and measures did not succeed in curbing the violent and other illegal actions or inactivity of the convicted" and to lay down the specified norm of the Code in the new wording.

At the same time, under other means (measures) the mortification should be understood:

- 1) verbal (verbal) methods of influence;
- 2) demonstration of the possibilities of special means (in particular, their use up or in the other direction from convicts, etc.);
- 3) appeal to offenders most authoritative persons in this situation from the staff of the colony, pedagogues or convicts serving the sentence;
- 4) the actions of psychologists and other such specialists who have a legal permission to treat citizens (so-called "fortune-tellers", psychics, pastor, etc.).

As to the second case - the use of juvenile convicts in places of deprivation of liberty measures of physical influence, special means and weapons - in this situation, as practice shows, there are also reservations. Thus, in the resolution of the Plenum of the Supreme Court of Ukraine of 26.04.2002, No. 3 "On judicial practice concerning the abduction and other illicit handling of weapons, combat supplies, explosives, explosives or radioactive materials," it is indicated that in all cases the courts are obliged to establish the legality of their application by persons who possessed these means on legal grounds [7]. Language, if we compare this with the problems of resorting to juvenile detention in prisons, is that in all cases of armed attack, colony personnel should be aware of the totally dangerous consequences of using juvenile convicts of those or other means and weapons and, accordingly, counteracting the latter defined in art. 106 KVK means of physical influence, special means and weapons. Thus, the presence of a small minor metallic sharpening can not be the reason for the use of firearms by the personnel of the colony, if it was not dangerous for the collision of the sides of the distance.

Proceeding from this, Part 3 of Art. 106 KVN should be supplemented with the second sentence of the following content: "The use of these means and measures for a juvenile convict is allowed taking into account the circumstances, the type of weapon possessed by the offender, as well as the distance of the collision of the parties to the conflict."

Similar conditions must also be observed in the third situation, which is related to the use of juvenile restraining measures in armed resistance against juvenile convicts in places of deprivation of liberty.

It is precisely in view of this component that some statistics on the use of physical activity measures, special means and weapons condemned in Ukraine testify to the need to solve this problem. Specifically, the main reason to use handcuffs offenders (62.2%

in the structure of applications curbing measures) is convicted of committing physical dispute (58%) and attempt to commit self-mutilation and suicide (23%) [8, p. 22].

The latter also served as grounds for applying to prisoners, deprived of liberty, rubber batons (99% in the structure of the use of these special means), physical strength (78%); special means of annoying action (92%) and stray shirt (100%) [8, p. 23].

In general, the analysis of cases of resorting to incarcerated measures in places of deprivation of liberty showed that the main reason for their application was to make the last physical resistance or inadequate behavior (67% of the total) [8, p. 23], which, in turn, are integral elements of a group or armed attack and armed resistance of offenders in the colonies, which only confirms the relevance of the issues under study in this scientific publication and emphasizes the attention of scientists and practitioners on the need for its solution on the doctrinal, practical (law enforcement) and regulatory - legal levels [9].

Of course, the decision of the Constitutional Court of Ukraine regarding the compliance of Part 3 of Article 3 could be the methodological grounds for the improvement of the legal mechanism on specified issues. 106 CEC of Ukraine Art. 52 of the Constitution of Ukraine. However, there is another fact that is obvious: without quantitative developments in science, neither theorists, practitioners nor judges to make judicious, substantiated and legitimate decisions in essence will continue to be extremely difficult.

Especially since other provisions of Art. 106 CEC of Ukraine concerning the application of curbing minors sentenced to prison, except parts 5 and 6 of this Article Code not evolved since its adoption (July 11, 2003) [2], despite the fact that during this time The new Code of Criminal Procedure of Ukraine [10], the Law of Ukraine "On the National Police of Ukraine" [11] "On the Prosecutor 's Office" [12] and other normative and legal acts, which in varying degrees relate to the issues of application of measures of physical influence, were issued. , special means and weapons to the convicted prisoners admitted free will.

Thus, taking into account the characteristics of the application of measures to curb juvenile offenders in prison is not only and not so much cognitive (theoretical and doctrinal), much practical significance because the issue is closely linked with the constitutional provisions defining the legal status of these individuals, and with international legal requirements defining the legal status of these persons [3].

References:

1. Constitution of Ukraine: adopted on June 28, 1996 / Information from the Verkhovna Rada of Ukraine. 1996. No. 30. Art. 141
2. The Criminal-Executive Code of Ukraine: Adopted on July 11, 2003 // Bulletin of the Verkhovna Rada of Ukraine. 2004. № 3-4. P. 21
3. UN Convention on the Rights of the Child. [Electronic resource]. Legislation of Ukraine. Access mode: http://zakon.rada.gov.ua/laws/show/995_021.
4. On judicial practice in matters concerning the necessary defense Resolution of the Plenum of the Supreme Court of Ukraine of 26.04.2002 №1 // Resolution of the Plenum of the Supreme Court of Ukraine in criminal cases / Order: V.V. Rozhnov, A.S. Sizonenko, L. D. The gateway Kyiv, 2011. 169-171.

5. On judicial practice in cases on crimes connected with violations of the regime of serving sentences in places of deprivation of liberty: Resolution of the Plenum of the Supreme Court of Ukraine dated 26 March. 1993 № 2 // Resolution of the Plenum of the Supreme Court of Ukraine in criminal cases / Order: V.V. Rozhnov, A.S. Sizonenko, L. D. Udalova. Kyiv, 2011. 109-116 p.
6. On the application of laws by the courts, which provides for responsibility for encroachments on the life, health, dignity and property of courts and law enforcement officers: Resolution of the Plenum of the Supreme Court of Ukraine of June 26, 1992, No. 8 // Resolution of the Plenum of the Supreme Court of Ukraine on criminal affairs / order: V.V. Rozhnova, AS Sizonenko, L.D. Shuttle Kyiv, 2011. 100-108.
7. On judicial practice concerning the abduction and other illicit use of weapons, war materials, explosives, explosive devices or radioactive materials: Resolution of the Plenum of the Supreme Court of Ukraine dated April 26, 2002 No. 3 // Decision of the Plenum of the Supreme Court of Ukraine in criminal cases / order. : VV Rozhnova, AS Sizonenko, L.D. Shuttle Kyiv, 2011. p. 176-182.
8. About the activity of the units of protection, supervision and fire safety of penitentiary institutions in 2016: inform. bullet - Kyiv: Ministry of Justice of Ukraine, 2017. 43 p.
9. Popov G. In Protecting the Office of Public Prosecutor's Rights and Freedoms of Children: Monograph. Kyiv: Publishing House "Art Eks", 2016. 384 p.
10. The Criminal Procedural Code of Ukraine: Adopted on April 13, 2012 // Bulletin of the Verkhovna Rada of Ukraine. 2013. № 9-10, № 11-12, №13. Art. 88
11. About the National Police: Law of Ukraine dated July 2, 2015 No. 580-VIII // Information from the Verkhovna Rada of Ukraine. 2015. No. 40/41. Art. 379
12. On the Prosecutor's Office: Law of Ukraine dated October 14, 2014 No. 1697-VII // Bulletin of the Verkhovna Rada of Ukraine. 2015. No. 2/3. Art. 12