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Prospects for improving public control over the observance of the rights of convicts

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Abstract

Using the dialectical method the publication was devoted to determining the prospects for improving public control over the observance of the rights of convicts in Ukraine. A clear distinction is indicated between state and non-state control, i.e.: (execution of control functions on observance of rights, exercise of moral and educational influence, educational work, placement of released persons, etc.), and standardization of relevant provisions in the corresponding legislation. It is argued that ensuring openness and transparency of the activities of penitentiary bodies and institutions is not the goal of public control, and the approach to its interpretation should not be equated with such concepts as «aid» and «sponsorship». In the conclusions it is substantiated that in order to reflect in the Ukrainian legislation the principle of openness of penal institutions for the society, it is necessary to overcome: formalism of public control by the observation boards over the

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implementation of the rights of convicts; to grant the right to exercise public control to other subjects of public control, in particular to the mass media, along with the active borrowing of progressive international practices in the specified field.

Keywords: penitentiary system; rights of convicted persons; public control; penal enforcement activity; observation commissions.

Perspectivas para mejorar el control público sobre la observancia de los derechos de los convictos

Resumen

Mediante el método dialéctico la publicación estuvo dedicada a determinar las perspectivas para mejorar el control público sobre la observancia de los derechos de los condenados en Ucrania. Se indica una clara distinción entre el control estatal y no estatal, esto es: (ejecución de las funciones de control sobre la observancia de los derechos, ejercicio de la influencia moral y educativa, trabajo educativo, colocación de los liberados, etc.), y la normalización de las disposiciones pertinentes en la legislación correspondiente. Se argumenta que garantizar la apertura y transparencia de las actividades de los órganos e instituciones penitenciarias no es el objetivo del control público, y el enfoque de su interpretación no debe equipararse con conceptos tales como «ayuda» y «patrocinio». En las conclusiones se fundamenta que para reflejar en la legislación ucraniana el principio de apertura de las instituciones penales para la sociedad, es necesario superar: el formalismo del control público por parte de los consejos de observación sobre la aplicación de los derechos de los condenados; otorgar el derecho a ejercer el control público a otros sujetos de control público, en particular a los medios de comunicación social, junto al préstamo activo de prácticas internacionales progresivas en el campo especificado.

Palabras clave: sistema penitenciario; derechos de los condenados; control público; actividad de ejecución penal; comisiones de observación.

Introduction

Adequate functioning of any civil society depends on the interrelationship of state authorities and public entities in the field of control, such activity

of the relevant entities is the main component of the development of a democratic and effective state.

Public control, as a specific form of human activity, is a social activity, and a person is its subject and object. It formulates control goals, determines the means of achieving them, and evaluates the degree of achievement (Mukshymenko, 2010). Under the condition of effective and proper functioning of the system of public control and activities of public organizations, society can develop on a democratic basis, create conditions for the realization of the rights and responsibilities of its citizens.

The importance of public control over the observance of the rights of convicts in Ukraine also lies in the direct involvement of the public, clarification of their opinions, proposals for improving control and the penitentiary system in general. The specified type of control is actually an additional means of ensuring legality and transparent functioning of law enforcement agencies. The presence of public control guarantees the absence of arbitrariness and the use of illegal methods of activity by representatives of the penitentiary system, and on the other hand, supervision of the proper observance of the state's obligations regarding the social security of such a category of citizens as convicts.

The special interest of public control over the closed criminal-executive system is due to numerous discovered facts of gross violation of the rights of persons who are in places of forced detention. Such facts provoke a universal resonance and stimulate the activity of public formations. Under such conditions, one of the key tasks of the state in this area is to ensure the openness and transparency of the activities of criminal enforcement institutions, their control by institutions of civil society, and the creation of conditions for public participation in solving the tasks set before such institutions and bodies.

To date, a number of normative decisions have been adopted in Ukraine in the researched area, active work is being carried out on their practical implementation, but the issue of public control over ensuring the rights of persons in prisons and detention centers is still debatable. The main reason for this is the imperfection of modern national legislation, its non-compliance with international standards in the specified area, as well as the low efficiency of its implementation mechanisms.

Also, in the current conditions of the formation of civil society, a clear distinction between non-state (public) control and state control becomes especially relevant (Tereshchuk, 2015). Clarification of these issues in the scientific article will allow a more thorough and holistic characterization of public control as one of the areas of activity aimed at increasing and improving the functioning and organization of the penitentiary system of Ukraine, proper protection of the rights and legitimate interests of convicts in places of punishment.

1. Methodology of the study

The methodological basis of the scientific article is the dialectical method, which was used when studying the unity, interrelationship, and differences of such concepts as «state control» and «public control» in the criminal and executive sphere, as well as when distinguishing the concepts of «public control», «help» and «patronage». With the help of the historical method, the sources of the formation and development of the essence of public control over the observance of the rights of convicts were identified. With the use of analysis and synthesis methods, the place and role of the researched type of control over the observance of rights in places of punishment is determined. The structural-functional method, methods of classification and grouping helped in the study of the complex of functions covered by the concept of public control.

The logico-semantic method was used to clarify the peculiarities of the regulation of provisions on the implementation of public control in the specified area, to clarify the powers of observation commissions, to determine the essence of the best world practices of public control over the observance of the rights of convicts. The comparative legal method was used in the process of researching the foreign experience of implementing public control in the specified area and the possibility of its implementation in domestic legislation.

The hermeneutic method is applied to the scientific analysis of the provisions of the national legislation in terms of the application of public influence on compliance with the law in penitentiary institutions. The statistical method was used to generalize the survey results. The formal-logical method was used to substantiate proposals for clarifying and supplementing the provisions of industry legislation.

2. Analysis of recent research

Scientists (Kolb and Makhnitskiy, 2019; Tereshchuk, 2018; Barabash and Pavshuk, 2010; Vitvitskiy, 2013) made a significant scientific contribution in the field of the researched topic analysis of public influence on the state of compliance with the law in places of execution. However, despite the significant number of scientific developments related to the participation of the public in the observance of individual rights in the institutions of the penitentiary system, the issue of a clear distinction between state and public control, and the normalization of certain areas of activity of subjects of public control in the observance of the rights of convicts, do not lose their relevance.

In addition, issues regarding the normalization of individual provisions aimed at improving the general situation in the researched area remain quite debatable. The above-mentioned circumstances determined the choice of the topic and the main directions of the research.

3. Results and discussion

In the doctrine, public control is understood as the public verification by public society of the activities of the state in accordance with its declared goals, the adjustment of these activities and the goals themselves, the subordination of state policy, the activities of its bodies and officials to the interests of society, as well as the supervision of civil society over the activities of state and local bodies self-government, aimed at protecting and ensuring the rights and legitimate interests of a person and fundamental freedoms and respect for them (Zakharov, 2023).

From the analysis of scientific points of view on the concept and essence of public control, we see an opportunity to single out the most important features of the investigated type of control: it has specific tasks and goals; carried out by specific subjects: both individual (citizens) and collective (public associations, organizations, etc.); subjects of public control act on behalf of the public, not the state; decisions of subjects of public control are of a recommendatory nature and are mostly preventive in nature; public control concerns virtually all areas of activity of law enforcement agencies in the state; subjects of public control do not have the right to interfere in the operational activities of the controlled structure (law enforcement agencies) (Barabash and Pavshuk, 2010; Vitvitsky, 2013; Tereshchuk, 2018).

Given the lack of an unambiguous approach to defining the content of public control both in science and in normative legal acts, we believe that the normative consolidation of this concept would make it possible to avoid a number of inconsistencies in the specified field of legal relations.

The goals of public control over the observance of the rights and legitimate interests of persons serving sentences in places of deprivation of liberty are subordinated to the general constitutional goal of recognizing a person as the highest social value.

Therefore, public control should ensure the effective operation of bodies and institutions for the execution of punishments in order to ensure the realization of their rights by the persons detained in them. The conditionality and justification of the goals of public control are determined by various factors. First of all, they must comply with the provisions of the Constitution, in addition, they depend on the general political goals that are currently being faced by the system of execution of criminal punishments.

We share a position A. Mukshimenko's that the main goal of public control over this process is to ensure unwavering observance of the rights and freedoms of a person and a citizen, taking into account the restrictions established by the court verdict and the law regarding persons detained in penitentiary institutions. At the same time, the principled observance of the constitutional rights of individuals must correspond to the needs and will of society, its primary subject – the people (Mukshymenko, 2010).

The specified goal is strategic and consists in creating conditions for the observance of human and citizen rights in individual bodies and institutions for the execution of punishments. The authors of some literary sources come to the conclusion that the goals of monitoring the activities of the penitentiary system personnel are subordinated to the general goals of criminal punishment and are oriented towards their implementation. This is also recognized as fair in relation to public control over the activities of bodies and institutions for the execution of punishments (Zubarev, 2006).

At the same time, it must be stated that state bodies sometimes misinterpret the content of control activities, especially when it concerns public control. Thus, the Law of Ukraine «On the State Criminal Enforcement Service of Ukraine» No. 2713-IV dated 23.06.2005 lists the following among the principles of its activity: interaction with state authorities, local self-government bodies, associations of citizens, charitable and religious organizations; openness to democratic civilian control.

However, in practice, these concepts are often mixed. For example, the State Department for the Execution of Punishments comments on its understanding of public control in the Concept of Social Partnership of Public Organizations and Penitentiary Bodies and Institutions: «Achieving the goal of correction and resocialization of convicts corresponds to the moral and spiritual interests of society, which necessitates the active participation of public organizations in the process restoration of convicts in the social status of a full member of society, returning them to an independent, generally accepted social and normative life in society.

The country's history has rich experience in the activities of various public institutions, which voluntarily performed the functions of caring for those members of society who are in places of deprivation of liberty...» (Law of Ukraine No 2713-IV, 2005).

Thus, we see the desire of individual state structures to shift the emphasis from public control as such to control as a form of social partnership and assistance (patronage) to persons in prisons. This state of affairs is unacceptable in a democratic legal society.

It is important to emphasize that the goal of public control over the observance of human rights and freedoms during the execution of criminal punishments cannot be the same as ensuring the openness and transparency

of the activities of the criminal enforcement service as a subject of criminal proceedings, administrative and legal relations. If such an approach is used, a dangerous tendency may arise for the penitentiary service to implement the principles of openness and transparency through subjects of public control, and the rights and powers of other representatives of civil society will be limited, unreasonably limited. It is also worth emphasizing that ensuring openness and transparency is the task of the authorities, not civil society institutions, which work to prohibit the definition of such a goal for public control.

Therefore, it should be emphasized that the purpose of public control over the observance of human rights and freedoms during the execution of criminal punishments cannot be equated with the purpose of ensuring the openness and transparency of the activities of the criminal enforcement service as a subject of administrative and legal relations.

In case of continuation of lobbying of this kind of approach, there may be a dangerous tendency for the penitentiary service to implement the principles of openness and transparency exclusively through subjects of public control, and the rights and powers of other representatives of civil society will be unduly limited. It is also worth emphasizing that ensuring openness and transparency is the task of authorities, not institutions of civil society, which indicates the fallacy of defining such a goal for public control.

The process of reforming the criminal-executive system of Ukraine was reflected in the Criminal-Executive Code of Ukraine in 2003, which defined a special place for public control and established one of the main principles of criminal-executive legislation – public participation in the activities of bodies and institutions for the execution of punishment. So, we can talk about increasing the role of public organizations in creating proper conditions for serving a sentence, ensuring compliance with human rights and freedoms, assisting in the social adaptation of citizens after release, conducting educational activities, as well as preventing them from committing new criminal offenses.

According to the Criminal Executive Code of Ukraine, citizens' associations, religious or charitable organizations, and individuals may take part in the correction and resocialization of convicts and conduct social and educational work with them (Criminal Executive Council Of Ukraine, 2003).

In order to ensure public control over the observance of the rights of convicts during the execution of criminal sentences, in accordance with the Resolution of the Cabinet of Ministers of Ukraine «On Approval of Provisions on Monitoring Commissions and Boards of Trustees at Special Educational Institutions» No 429 dated 01.04.2004, monitoring commissions are created (Resolution Of The Cabinet Of Ministers Of Ukraine No 429, 2004).

According to the idea of the legislator, the formation of observation commissions by executive committees and state administrations with the simultaneous mandatory inclusion of representatives of public organizations in them is the optimal form of combining the efforts of the authorities and the public.

The authorities have a real opportunity to provide financing and organizational and technical support for the measures being implemented, to provide the form of official prescriptions to the decisions of the observation commission, and public organizations have not only financial opportunities for this, but also free time and desire. In addition, observation commissions are a kind of connecting link between the authorities, society and the convicted (released).

Today, the participation of the public in the process of execution of criminal punishments is axiomatic, and the involvement of various groups of civil society in the process of reforming the penitentiary system is an integral part of the humanization and democratization of the criminal-executive system and ensures its openness and transparency.

It is worth noting that the course of humanizing the criminal justice system, which was chosen by the world community, has both its supporters and opponents. The first indicate that the conditions of a person's stay in places of deprivation of liberty characterize the level of development of the respective society. Others point to the fact that no country has been able to prove that more humane treatment of criminals would lead to an overall decrease in crime.

In many countries of the world, schemes of interaction between the public and law enforcement agencies have already developed and are successfully functioning, in other countries they are searching for and testing their own models. Despite the fact that each country follows different paths, taking into account traditions, culture and national characteristics, the existing world experience shows that there are a number of general trends and principles of building structures (in particular, observation commissions or observation councils), implementation of public control and patronage , which would be expedient to implement in Ukraine.

For example, in Great Britain there are Councils of Inspectors at each prison, and in Germany – Advisory Councils, the typical tasks of which are: providing reports to the management of the prison and penitentiary system regarding existing problems and proposals for improving certain areas of work, considering complaints, promoting the social adaptation of convicts after release and other. Monitoring commissions created in each region have the right to check the living and maintenance conditions of detainees, accused and convicted persons.

Members of the commissions may visit pretrial detention centers, prisons, and colonies without special permission (but without fail to notify the administration). The conversation with the human rights defenders should take place only in such conditions that the representative of the administration can see and hear them, and it is allowed to have a one-on-one conversation with the convicts (Kochergan and Danovsky, 2023).

Kazakhstan is considering whether to develop and implement a system of public accreditation of correctional facilities based on international and national quality management standards. The results of such accreditation should affect the funding of institutions, salaries of their employees, promotion of staff, and even the decision on the further operation of a specific correctional institution that received a low rating score when assessing the quality of work with convicts, respect for human rights and freedoms. In other countries, purely state control over the activities of correctional institutions was abandoned, independent non-state accreditation centers were created instead, for example, the American Association of Correctional Institutions (Kochergan; Danovsky, 2023).

In addition, not only penitentiary institutions, but also services that carry out alternative types of punishments should be in the field of public control. This type of control cannot be reduced to the activities of the existing public monitoring commissions, its circle of subjects should be much wider at the expense of representatives of human rights organizations, academic circles, religious associations and charitable foundations, which will be an important prerequisite for the prevention of ill-treatment and torture.

Reforming the criminal justice system of Ukraine in a European way consists primarily in increasing the role of public organizations in the process of creating appropriate conditions for serving punishment, conducting educational activities, ensuring compliance with human rights and freedoms, promoting the social adaptation of citizens after release, as well as preventing them from committing new crimes (Tereshchuk, 2018).

Increasing the efficiency of the monitoring commissions - institutions that were formed in accordance with the Resolution of the Cabinet of Ministers «On the approval of provisions on monitoring commissions and boards of trustees at special educational institutions» (Resolution Of The Cabinet Of Ministers Of Ukraine No. 429, 2004) is one of the important conditions for achieving the specified tasks.

They are responsible for organizing public control over the observance of the rights and legitimate interests of convicts and persons released from serving their sentence; educational work with persons released early from serving a sentence; monitoring the behavior of persons during the unserved part of the sentence; providing assistance in the full resocialization of those released from serving their sentence.

Despite the supposedly democratic approaches to the normative consolidation of public participation in the activities of criminal enforcement institutions in the form of the functioning of observation councils, their activities both in Ukraine and abroad are subject to sharp criticism by national and international human rights and public organizations. Criticism concerns the impossibility of influencing the administration of penal institutions in case of violation of the rights of convicts, the lack of real opportunities to help released persons and the organization of control over their behavior. In addition, due to the relatively short existence of this institute, there are many organizational and legal problems that arise in the process of interaction of commissions with bodies and institutions of the criminal enforcement system (Tereshchuk, 2018).

An analysis of the contents of the Regulations on Observed Commissions, approved by the Resolution of the Cabinet of Ministers of Ukraine No 429 dated 01.04.2004, proved that the specified public control is formal and does not relate to essential aspects of criminal enforcement activities, in particular, issues related to the use of physical force, special means, straitjackets and weapons to convicts deprived of their liberty (Resolution Of The Cabinet Of Ministers Of Ukraine No 429, 2004), and most of the provisions of the Regulation do not correspond to the content of those changes and additions made to the Criminal Code of Ukraine, in particular, those related to reducing the conditions of serving sentences in the form of deprivation of liberty to European standards, as well as with the relevant articles of the Law of Ukraine «On the National Security of Ukraine» (On The National Security Of Ukraine., 2018).

The importance of amending the legal framework and substantive elements of public control in the field of execution of punishments is also due to the fact that in the current Criminal and Executive Code of Ukraine, if based on the requirements of Art. 25 of the specified code, this form of activity of public organizations is essentially reduced to its two types: a) providing assistance to bodies and the institution of execution of punishments in the correction of convicts and carrying out social and educational work (Part 1 of Article 25 of the Criminal Procedure Code of Ukraine); b) exercise of control by the only legitimate body – observation commissions (Part 2 of Article 25 of the Criminal Code of Ukraine) (Criminal and Executive Code of Ukraine, 2001).

As individual scientists emphasize, neither observation commissions nor other public associations can, for these reasons, properly implement in their practical activities the following principles of civil control in Art. 4 of this Law, as:

1. clear delineation of the functions and powers of the political leadership in the sphere of execution of punishments of Ukraine;

2. interaction and responsibility of state authorities and bodies managing the sphere of punishments for the implementation of state policy in terms of strengthening legality and public order for timely and comprehensive material and financial support of bodies and institutions for the implementation of punishments for the implementation of the functions assigned to them;
3. transparency of expenses for the maintenance of bodies and institutions for the execution of punishments;
4. openness to the public of information about the activities of the State Criminal Enforcement Service of Ukraine, which does not constitute a state secret, taking into account the specifics of state law enforcement bodies defined by law (responsibility of officials for the timeliness, completeness and reliability of the information provided, and response to citizens' appeals , public organizations, media appearances (Kolb and Makhnitskiy, 2019).

There is no doubt that the control over the observance of the rights of convicts when their legal status changes should be the subject of public attention. At the same time, practice shows that approval of decisions and submissions of institution administrations to courts regarding convicts with observation commissions in most cases takes place formally. In our opinion, the mandatory approval of resolutions and submissions of the administration of the correctional colony with the observation commission, which change the conditions of detention of convicts, should be carried out only in the event of an increase in the amount of established legal restrictions and changes to stricter conditions of detention.

Given the need to improve the organization of public control over the observance of the rights, basic freedoms and legitimate interests of convicts and persons released from serving a sentence, assistance to bodies and institutions for the execution of punishments in ensuring the process of correction of convicts and creating appropriate conditions for their detention, as well as assistance in providing effective assistance in social adaptation to persons released from serving a sentence, on 25.11.2022 the Cabinet of Ministers of Ukraine approved Resolution No 1314 «On Amendments to the Regulation on Monitoring Commissions (Resolution The Cabinet Of Ministers Of Ukraine No. 1314, 2022).

The main tasks of observation commissions are determined by the Regulation on observation commissions: the organization and implementation of public control over the observance of the rights, fundamental freedoms and interests of convicts during execution of criminal sentences in institutions of execution of sentences; carrying out regular visits to penal institutions for the purpose of monitoring and conducting inspections of the state of compliance with the rights, fundamental freedoms

and interests of convicts during the execution of criminal sentences in penal institutions (during the period of martial law, the monitoring commission may decide to stop visits to penal institutions).

Providing assistance in social adaptation to persons who have served a sentence of restriction of liberty or deprivation of liberty for a certain period, as well as those released from further serving the specified types of punishments on the grounds provided for by law; assistance to subjects of social patronage in the implementation of a complex of legal, economic, organizational, psychological, social and other measures, in particular, the provision of services aimed at the social adaptation of released persons, and probation authorities in the implementation of a complex of measures aimed at the correction of social probation subjects behavior or its individual manifestations.

The formation of socially favorable changes in their personality; assistance to bodies and institutions for the execution of punishments in the creation of appropriate conditions for the detention of convicts, their material, household and medical and sanitary support, the implementation of health and preventive measures, the preparation of convicts for release, the involvement of public and charitable organizations, executive authorities, local bodies in such activities self-government, enterprises, institutions and organizations regardless of the form of ownership and citizens; participation in the preparation of convicts for release, as well as assistance in determining the place of residence, etc. (Resolution of the Cabinet of Ministers of Ukraine No. 1314, 2022).

Currently, the activity of the observation commissions, although relegated to the background in connection with the military actions on the territory of Ukraine, still continues to be criticized by some human rights and public organizations, primarily for the existing formalism, the impossibility of influencing the administration of institutions for the execution of punishments in the event of a violation the rights of convicts, lack of real opportunities to help released persons and organize control over their behavior. For example, monitoring commissions are entrusted with the functions of approving decisions of the administrations of penal institutions regarding changes in the legal status of convicts (parole, early release, replacement of the unserved part of the sentence with a lighter one, exemption from serving the sentence of pregnant women and women with children under the age of three years, changing the conditions of detention of convicts, etc.).

Conclusions

The further development of public control over the observance of the rights of convicts in Ukraine should be based on the principle of independence of the subjects of such control. Based on the idea of demarcating spheres of influence, it is advisable to observe a clear separation of the functions of the state and society in places of execution of punishments.

Standardization in the relevant legislation needs to reflect the fact that the main functional duty of the administration of bodies and institutions for the execution of punishments is exclusively the execution of punishments, that is, the exact and consistent execution of court sentences, the isolation of convicts or the application of other restrictions to them. The function of control over the observance of rights, exercise of moral and educational influence, educational work, placement of the released, etc., must rely on society.

Given the lack of an unambiguous approach to defining the content of public control in science and in normative legal acts, the normative consolidation of this concept would make it possible to avoid a number of inconsistencies in the specified field of legal relations. Ensuring the openness and transparency of the activities of penitentiary bodies and institutions cannot in any case be the goal of public control, and the approach to the interpretation of «public control» should not be equated with such concepts as «help» and «patronage».

Today, Ukraine is on the way to reforming criminal law in accordance with the best international practices. The principle of openness of penal institutions to society, as the main principle of penitentiary rules, must be reflected in Ukrainian legislation, since the legally established possibility of the public to take a real part in the activities of penal institutions, as well as in the correction and resocialization of convicts is one of the main means of implementing the ideas and traditions of a democratic civil society.

For this purpose, first of all, it is necessary to overcome such negative phenomena as: the formalism of public control by observation councils on the observance of the rights of convicts; renewal; granting the right to exercise public control to other subjects of public control, in particular mass media; active borrowing of progressive experience of foreign countries in the specified field.

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