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Legislative perspectives of ensuring public control over the observance of the rights of convicts in Ukraine

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Abstract

The study conducted an analysis of the concept of public control over the observance of the rights of convicted persons in the field of enforcement of sentences and parole. On the basis of the use of general methods and reflective points of view, the definition of public control over the observance of the rights of convicted persons was formulated. In addition, the use of separate special scientific methods provides arguments for the expediency of making changes in the Criminal Executive Code of Ukraine, by enshrining in it a separate chapter that would regulate legal relations in the sphere of public control and on the sphere of observance of the rights and interests of convicted persons in places of punishment; as well as a separate article that would define the content, forms and types of public control over the functioning of bodies and institutions of execution of punishment and probation. It was concluded on the necessity of observance of the rights and legitimate interests of a

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person in the sphere of execution of punishment and probation, since, by their nature, they do not belong to public associations.

Keywords: public control; criminal enforcement activity; legislative activity; penal institutions; probation bodies.

Perspectivas legislativas para garantizar el control público sobre la observancia de los derechos de los condenados en Ucrania

Resumen

El estudio llevó a cabo un análisis del concepto del control público sobre la observancia de los derechos de los condenados, en el campo de la ejecución de las penas y la libertad condicional. Sobre la base del uso de métodos generales y puntos de vista reflexivos, se formuló la definición de control público sobre la observancia de los derechos de los condenados. Además, el uso de métodos científicos especiales separados brinda argumentos para la conveniencia de realizar cambios en el Código Ejecutivo Penal de Ucrania, al consagrar en él un capítulo separado que regularía las relaciones legales en la esfera del control público y sobre la esfera de la observación de los derechos e intereses de condenados en los lugares de pena; así como un artículo separado que definiría el contenido, las formas y los tipos de control público sobre el funcionamiento de los órganos e instituciones de ejecución de penas y de libertad vigilada. Se llegó a la conclusión sobre la necesidad de la observancia de los derechos e intereses legítimos de una persona en el ámbito de la ejecución de las penas y la libertad condicional, ya que, por su naturaleza, no pertenecen a asociaciones públicas.

Palabras clave: control público; actividad de ejecución penal; actividad legislativa; instituciones penales; órganos de libertad condicional.

Introduction

Public control over the activity of a person's rights and legitimate interests in any sphere of public life is a prerequisite and an indispensable element of building interaction between the public and other state institutions, law enforcement agencies, justice agencies, etc., as a result of which the effectiveness of their activities increases.

However, like any other control over the activities of state authorities, public control in the field of rights enforcement by justice bodies has certain problems in its organization and functioning, which should be paid attention to. In particular, as statistics show, in the process of criminal enforcement activities, there are cases of suicides among convicts, their self-mutilation, injuries, etc., annually, one of the conditions of which is formal, and in some cases, no public control over the sphere of execution of punishments in Ukraine (Batyrgareeva & Babenko, 2020, p. 164 183).

The activities of subjects of public control in the field of execution of punishments and probation of Ukraine were constantly subjected to justified criticism by scientists, practitioners and the public. One of the main topics of discussion in this regard is the state of effectiveness of observation commissions, which is quite low and such that it does not ensure proper social monitoring (constant control over the observance of the rights of convicts while serving a criminal sentence (Part 2 of Article 25 of the Criminal Executive Code (hereinafter – CEC of Ukraine) for this branch of public relations (Criminal and executive code of ukraine. Law of ukraine, 2004; Eroshenko, 2012, p. 383).

Taking into account the situation that has developed around the activities of the specified participants in criminal and executive legal relations, including issues of public control, the Ministry of Justice of Ukraine in 2022 adopted Resolution No. 1314 «On amendments to the regulations on supervisory commissions» (On amendments to the regulations on supervisory commissions. resolution of the cabinet of ministers of ukraine, 2022), which causes a lot of comments among scientists and practitioners.

Of scientific and practical interest are questions related to the content of the concept of «public control in the field of execution of punishments», which has not been finally formulated at the legal and scientific level, and clear legal principles of public control over the observance of the rights and legitimate interests of convicts in the field of execution of punishments have not been developed, which, along with insufficient preventive activities and the level of public participation in the mentioned process, actualized the choice of the topic of the scientific article.

1. Methodology of the study

The research used works on the problems of criminology, penitentiary, administrative law and process. The methodological basis of the article is the provisions and conclusions of the general theory of cognition. Taking into account the complex approach to conducting research, the following general philosophical and special methods were used. In particular, the dialectical method was used in the study of the essence and content of such

concepts as «state control» and «public control» over the observance of the rights of convicts in the sphere of execution of punishments and probation.

With the help of the historical method, the formation of scientific opinion regarding the essence of public control over the activities of the bodies of execution of punishments has been clarified. The formal-logical method was used during the scientific elaboration of normative legal acts, as well as for the interpretation of the control function of the public on the legality of the rights of convicts. The use of statistical methods made it possible to form a general and objective view of the state of legislative regulation of ensuring public control over the observance of the rights of convicts in Ukraine. Such methods as systemic, sociological, comparative-legal, statistical, system-structural analysis are also applied.

2. Analysis of recent research

The analysis of the scientific literature proved that many criminologists are engaged in the development of problems of increasing the level of public control over the process of execution of punishments (Garashchuk, 2002, p. 253; Zakharov, 2009; Tereschuk, 2018; Kolb *et al.*, 2020; Batyrgareeva & Babenko, 2020, pp. 164183) and others.

However, at the doctrinal and legislative level, the issues of state and public control over the observance of the rights of convicts remain undistinguished, and some areas of activity of subjects of public control in the field of execution of punishments require substantial refinement. The specified circumstances determine the expediency of a scientific analysis of the specified activity, the development of scientifically based proposals aimed at eliminating certain shortcomings and developing ways to overcome them.

3. Results and discussion

Currently, there is no established understanding of the term «public control» in scientific sources. In particular, V. Garashchuk refers to control as inspection, as well as observation for the purpose of inspection to counteract something undesirable, to detect, prevent, and stop illegal behavior on the part of anyone (Garashchuk, 2002, p. 253). E. Zakharov, public control is understood as public verification by civil society of the state's activities for compliance with its declared goals, adjustment of these activities and the goals themselves, subordination of state policy, activities of its bodies and officials to the interests of society, as well as civil society's supervision of the activities of state bodies and authorities of local self-

government, aimed at protecting and ensuring human rights and legitimate interests and fundamental freedoms and respect for them (Zakharov, 2009).

In our opinion, public control over the observance of the rights of convicts in the field of execution of punishments and probation is the activity of public associations regulated at the legislative level, aimed at checking the observance of the rights and legitimate interests of subjects of criminal-enforcement legal relations in the process of execution / serving of punishments, as well as guarantees of their implementation, and in connection with this, taking appropriate comprehensive actions to eliminate and counteract the determinants that cause the commission of illegal encroachments on the specified objects of legal protection.

The subject of public control over the process of execution and serving of punishments should be understood as a set of procedural requirements that are put forward to the actions of the administration of institutions for the execution of punishments and probation bodies (serving sentences in places of deprivation of liberty; applying disciplinary sanctions to convicted persons; providing assistance in the event of release from punishment or serving it, etc.). In this regard, the rights of convicts are defined in Art. 8 of the CEC of Ukraine (Criminal and executive code of Ukraine. Law of Ukraine, 2004), and the personnel of penal institutions - in Art. 18 of the Law of Ukraine «On the State Criminal-Executive Service of Ukraine» (On the state criminal-executive service of Ukraine. Law of Ukraine, 2005).

The content of the Central Committee of Ukraine certifies that it does not include proper legal mechanisms for ensuring the rights of the public on these issues. They are not defined in special laws that regulate the activities of public associations, in particular, in the Law of Ukraine «On Public Associations».

Enshrined in Part 2 of Art. 25 of the CEC of Ukraine, the legal principles of public control over the process of execution / serving of punishments are essentially reduced to the activities of the guardianship councils at educational colonies (Criminal and executive code of Ukraine. Law of Ukraine, 2004). This kind of control over the sphere of execution of punishments cannot be called effective. An additional evaluative argument in this regard is the prescriptions of Part 2 of Art. 25 of the CEC of Ukraine, according to which, in the cases established by this Code and the laws of Ukraine, public control over the observance of the rights of convicts during the execution of criminal sentences can be carried out by public associations (Criminal and executive code of Ukraine. Law of Ukraine, 2004).

In the draft of the Law of Ukraine «On the penitentiary system: the draft Law of Ukraine, 2021», only one legal norm is devoted to this problem – Part 1 of Art. 65, which states that public control over the functioning of bodies

and institutions of the penitentiary system is carried out in accordance with the CEC of Ukraine.

In the 2017 Concept of Reform (Development) of the Penitentiary System of Ukraine, among the main tasks of the reform, which are enshrined in the specified state program, there is also no reference to the need to change public control over the observance of the rights and legitimate interests of a person in the field of execution of punishments. We can talk about this problem only in general terms in the context of such a task, which was reflected in Chapter I «General Provisions» of the Concept, namely, one of the main tasks of the reform is the development of legislation in the field of operation of pretrial detention centers and institutions for the execution of punishments in accordance with the legislation of the European of the Union. However, given the content of the draft Law of Ukraine «On the Penitentiary System», it is premature to talk about it.

It is worth noting that today in Ukraine there are certain legal developments related to the content of public control. In particular, the Law of Ukraine «On National Security» enshrined in Art. 10 «Public supervision», which, in particular, states that: «citizens of Ukraine participate in the implementation of civil control through public associations of which they are members, deputies of local councils, personally by applying to the Commissioner of the Verkhovna Rada of Ukraine for human rights or to state bodies in the manner established by the Constitution of Ukraine, the Law of Ukraine «On Public Associations» and other laws of Ukraine (On the national security of Ukraine. Law of Ukraine, 2018).

At the same time, the sphere of public supervision in accordance with Part 1 of Art. 10 of this Law, may be limited exclusively by the Law of Ukraine «On State Secrets»; during the implementation of civil control, the public has the opportunity to: receive relevant information from state bodies in the established manner, except for that which has limited access; conduct research; publicly present their results; to create public funds, centers, teams of experts, etc. for this purpose; conduct public examination of draft laws, decisions, programs, present their conclusions and proposals for consideration by relevant state bodies; participate in public discussions and open parliamentary hearings on relevant issues» (On the national security of Ukraine. Law of Ukraine, 2018).

We believe that taking into account the provisions of Art. 24 «Visiting institutions for the execution of punishments» of the CEC of Ukraine, which defines the subjects of public control in the field of execution of punishments, it would be logical to supplement the Code with Article 25-1 «Content, forms and types of public control over the functioning of bodies and institutions for the execution of punishments» and place in a separate chapter (Harasym, 2022, p. 300).

Also, the following forms and types of this type of public activity are provided for in Chapter VIII «Public control of the police» of the Law of Ukraine «On the National Police»: report on police activity; adoption of a resolution of no confidence in the heads of police bodies; interaction between heads of territorial police bodies and representatives of local self-government bodies; joint projects with the public; involvement of the public in considering complaints about the actions or inaction of police officers (Articles 8690) (On the national police. Law of Ukraine, 2022).

In our opinion, it is precisely this content of public control that should be defined in the Central Committee of Ukraine, by establishing a separate chapter «Public control in the field of execution of punishments and probation» in it, taking as a basis the relevant provisions of the Law of Ukraine «On the National Police» and removing from the chapter 4 of this Code of provisions of part four regarding this type of control (Harasym, 2022: 299).

In addition, the draft Law «On the Penitentiary System» contains provisions on public control not only of observing the rights of convicts during the execution of sentences, as defined in Art. 25 of the CEC of Ukraine, but also on the functioning of bodies and institutions of the penitentiary system, which is a broader type of activity related to the process of execution / serving of punishments (On the penitentiary system: the draft Law of Ukraine, 2021). We consider this approach to be somewhat simplified and formal, since it lacks its corresponding directions defined in the Laws of Ukraine «On the National Police» and «National Security».

Some scientists rightly point out that based on the content of paragraph 1 of the Regulation on the Monitoring Commission, developed in 2020 by the Ministry of Justice of Ukraine, in the direct understanding of the semantic meaning of the word «community» (persons who act on behalf of the community, not the state) (Eroshenko, 2012, p. 149), observation commissions cannot be classified as full-fledged subjects of public monitoring in the field of execution of punishments and probation in Ukraine.

In particular, Resolution No. 1314 proposed the tasks, powers and procedure for the formation of observation commissions, as well as the coordination of their activities by local state administrations (and, in accordance with the requirements of the Law of Ukraine «On Local State Administrations», only subjects of state functioning and management) (On amendments to the regulations on supervisory commissions. Eesolution of the cabinet of ministers of Ukraine, 2022). Moreover, the specified normative-legal mechanism contradicts the content of the Law of Ukraine «On Public Associations» and the principles of formation and activity of these subjects of public relations, since in Resolution No. 1314, the legal status of observation commissions can be attributed to specific states and

public entities, and therefore, control in this case should not be called state, but state-public.

The content used in Part 2 of Art. 25 of the CEC of Ukraine (Criminal and executive code of Ukraine. Law of Ukraine, 2004), the phrase «public control over the observance of the rights of convicts», since in fact it is of a currently defined socio-legal nature, observation commissions carry out precisely the state-public, and not the specified a type of social monitoring in the field of execution of punishments and probation.

In our opinion, the separate rights of observation commissions, which are enshrined in paragraph 6 of Resolution No. 1314, nonsensical. In particular, subsection 1 states that the specified subjects of public control have the right to listen to the information of officials of bodies and institutions for the execution of punishments, etc. at their meetings (On amendments to the regulations on supervisory commissions. Resolution of the cabinet of ministers of Ukraine, 2022). Nothing is said about the decisions that the observation commission has the right to make as a result of such actions (this is nothing more than scholasticism (formality, detachment from real life and practice, etc.)) (Eroshenko, 2012, p. 632). At the same time, such mechanisms are provided at the legislative level. In particular, articles 86-87 of the Law of Ukraine «On the National Police» in this regard state that, based on the results of a public hearing of the relevant police chiefs, a resolution of no confidence may be adopted in relation to them, which, in turn, may become one of the legal grounds for dismissal these persons from their positions or from the police (On the national police. Law of Ukraine, 2022).

Obviously, the right of observation commissions to listen to officials of bodies and institutions for the execution of punishments should be formulated in the same sense, which would undoubtedly allow to increase the level of public control in the sphere of execution of punishments and probation of Ukraine.

Also, despite the fact that in the current CEC of Ukraine, chapter 26 (Articles 160–162), which regulated the issue of public control over the behavior of persons released from serving a sentence, in Clause 6 of Resolution No. 1314 (On amendments to the regulations on supervisory commissions. Resolution of the cabinet of ministers of Ukraine, 2022), in particular, such a right is granted to supervisory commissions, which contradicts the provisions of Articles 19, 63, 92 of the Constitution of Ukraine (Constitution of Ukraine) and the principles of criminal law implementation, execution and serving of punishments provided for in Article 5 of the CEC of Ukraine (Criminal and executive code of Ukraine. Law of Ukraine, 2004).

The granting of the right to the members of the observation commissions to make audio and video recordings and distribute the received information, review reports, conduct audits, etc. (subparagraph 1 of paragraph 7 of Resolution No. 1314) also raises questions (On amendments to the regulations on supervisory commissions. Resolution of the cabinet of ministers of Ukraine, 2022), without reservations specified in this regard in the Constitution of Ukraine, legislative acts on access to personal data and public information, etc. After all, in no law of Ukraine, which refers to the specified types of activities (conducting audits, inspections, other control and supervisory measures, etc.), such powers are not granted without appropriate procedures, even for state authorities.

Therefore, taking into account the deterministic complex of extraordinary events in places of execution of punishments and modern trends of legislative regulation of this activity in interaction with other law enforcement agencies, it is obvious and necessary to modify public control over the observance of the rights and legitimate interests of individuals in places of execution of punishments in Ukraine.

Conclusions

Public control over the observance of the rights and legitimate interests of convicts in the sphere of execution of punishments and probation is the activity of public associations regulated at the legislative level, aimed at verifying the observance of the rights and legitimate interests of subjects of criminal-executive legal relations in the process of execution / serving of punishments, and as well as guarantees of their implementation, and in connection with this, taking appropriate comprehensive actions to eliminate and counter the determinants that cause the commission of illegal encroachments on the specified objects of legal protection.

Based on the relevant provisions of the Law of Ukraine «On the National Police», appropriate changes should be made to the current Criminal Executive Code of Ukraine - to provide for a separate chapter «Public control over the sphere of execution of punishments and probation», as well as to supplement it with Article 25-1 «Content, forms and types of public control over the functioning of bodies and institutions for the execution of punishments».

The analysis of individual legislative initiatives aimed at normalizing legal relations in the sphere of ensuring public control over the observance of the rights of convicts in Ukraine led to the conclusion that from the content of Resolution No. 1314, it can be seen that the relevant observation commissions have an indirect relation to the content of public control over the observance of the rights and legitimate interests of a person in the

field of execution of punishments and probation, since by their socio-legal nature and principles of creation, they do not belong to public associations.

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