

# PROBLEMS OF NATIONAL PUBLIC AND PRIVATE LAW

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## PRISON INSPECTIONS IN THE LIGHT OF FURTHER PENITENTIARY REFORM IN UKRAINE

The article is focused on the problem of establishing prison inspections in Ukraine according to recommendations of the European Prison Rules and other international prison standards. This problem becomes topical due to the future constitutional reforms in Ukraine concerned with reforming of the Prosecution Service of Ukraine where the Prosecution Service of Ukraine will be deprived of its function of supervision over legality for execution of the judicial decisions in Criminal cases. The article pays attention to different actors which are responsible for or involved in monitoring of conditions for prisoners. A special attention is also paid to distinctions between independent monitoring and governmental inspections. Conclusions are focused on the leading role of the Ministry of Justice of Ukraine in establishing external prison inspections.

**Key words:** Prison inspections, European Prison Rules, rights of prisoners, prosecution service of Ukraine

### Introduction

Prison inspections occupy a special place in the list of actors, which are responsible for protection of human rights and guaranteeing normal conditions of imprisonment.

Nowadays, it is hard to imagine an European state without well-developed system of prison inspections that deals as a part of the National Preventive Mechanism. In the majority of the European countries prison inspections (inspectorates) is a key component of the protection of prisoners' rights.

It sounds very surprising to say but Ukraine has not still established its own national system of *external* inspections, which are strongly recommended by the European Prison Rules.

The first steps in this direction were taken by the Project of the Council of Europe focused on further support of penitentiary reform in Ukraine, which was opened in July 2015. The ethos of this Project of the Council of Europe is a shift from a punitive to a rehabilitative approach. The overall objective is to strengthen the observation of human rights and rule of law in treatment of prisoners in Ukraine with two specific objectives: a) improved rehabilitative approach in prison regimes in line with European standards; b) enhanced procedures and practices for internal prison inspections and handling of prisoners complaints.

At the beginning of presenting the problems concerned with prison inspections in Ukraine, we should have a brief look at the international standards in this sphere.

Talking about the international standards of prison inspections we should mention the Standard Minimum Rules for the Treatment of Prisoners (1955).

According to Rule 55 of the Standard Minimum Rules for the Treatment of Prisoners, there shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

As far as the European standards are concerned, we should mention the European Prison Rules (2006).

Part VI of the European Prison Rules contains provisions about governmental inspection and independent monitoring. Governmental inspection and independent monitoring should be seen as two pillars of the improving the 'prison health' and protecting the prisoners' rights in the light of contemporary international standards in the penitentiary system.

According to the Rule 92 (Governmental inspection), prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements

of national and international law, and the provisions of these rules.

According to the Rule 93 (Independent monitoring), the conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public. Such independent monitoring body or bodies shall be encouraged to co-operate with those international agencies that are legally entitled to visit prisons.

Here we must make a clear and very important distinction between *inspection* of prisons made by governmental agencies that are responsible for effective and purposeful spending of the allocated budget and *monitoring* of conditions of detention and treatment of prisoners by an independent body.

The European Prison Rules make a special note on this distinction. This distinction will be very important for our further analysis of the penitentiary landscape in Ukraine.

Having pointed at the international standards of prison inspections, we must have a brief look at the system of state bodies and non-governmental actors responsible for (or involved in) activities concerned with human rights protection in penitentiary establishments in Ukraine.

According to the national legislation, the pillars of the contemporary Ukrainian “legality providing system” are:

- 1) Prosecution Service of Ukraine;
- 2) different departments of internal control of the State Penitentiary Service of Ukraine (including the Department of Internal Audit, the Department of Security, the Department of Control and Regime and other Departments of the State Penitentiary Service of Ukraine);
- 3) supervisory committees;
- 4) the Ukrainian Parliament Commissioner for Human Rights (the Ombudsman);
- 5) the Ministry of Justice of Ukraine, its bodies and other actors established by the Ministry of Justice of Ukraine (the Committee on State Prison Policy of the Ministry of Justice of Ukraine, mobile groups of the Committee on State Prison Policy of the Ministry of Justice of Ukraine).

#### **Prosecution Service**

Let us start with the Prosecution Service, which, according to the old-fashioned Soviet tradition, occupies a special place within the system of control over ‘legality’ in the Ukrainian prison establishments.

One of the Prosecution Service’s functions is ‘supervision over the legality during execution of the judicial decisions on criminal cases’. This function receives a lot of criticism from many actors, including international and European prison experts.

For example, in 1996, when the prison system was subordinated to the Ministry of Interior of Ukraine (so called the state Department for Execution of Sentences), the European prison experts conducted the first full review of the Ukrainian prison system.

Having analyzed the Ukrainian prison system, the European prison experts strongly recommended abolishing the supervisory function of Prosecution Service of Ukraine and delegating this function to the special governmental inspection.

Their recommendations were the next: “As soon as resources are available, Ukraine should create the inspection body which will be coordinated with the central level. This body should be independent and have the regional groups including the prison system experienced workers, representatives of other civil society organizations, including NGOs. Then Ukrainian government should abolish the inspection functions of prosecutors”.

As we could see, these recommendations have not been still implemented yet. At the same time, in the light of future constitutional reforms in Ukraine such recommendations become more and more topical.

During my visits to the pilot prisons with other experts of the Council of Europe within the Project “Further Support for the Penitentiary Reform in Ukraine”, I asked different prison officers a standard question concerning the effectiveness, efficiency and necessity of the prosecutorial supervision. As usual, I received negative or very negative evaluation of the prosecutors’ activities in prisons from the points of effectiveness an efficiency. Complains of prison officers were concerned mostly with too formalistic style of the prosecutorial inspections and with “over-control” style of the prosecutorial supervision.

Unfortunately, many Ukrainian prison officers share such a point of view. Very often prosecutorial inspections instead of real improving situation in prisons lead to punishing a particular prison officer or a group of prison officers even for minor violations of the Criminal-Executive Code and Internal Rules for Criminal-Executive Establishments, even taking into account not sufficient grounds for these disciplinary punishments.

Generally speaking, prosecutorial supervision has many disadvantages which in the Ukrainian

realities:

- 1) focused purely on 'legality' and formal aspects of the prison life;
- 2) concerned mostly with individual complaints;
- 3) aimed at processes, not at "standards", "best practices", "expectations" and "results";
- 4) does not deal with policies and strategies;
- 5) does not reflect "four tests of prison health".

On the other hand, today the Prosecution Service of Ukraine wants to leave this piece of responsibility by its own initiative. The Prosecution Service wants to be involved more in pure criminal process issues, not in issues of execution of the courts' decisions.

A special note should be made concerning the Prosecution Service's functions in the light of changes to the Ukrainian Constitution.

According to draft changes to the Constitution of Ukraine, the Prosecution Service will not have such a function of the supervision over legality in penitentiary institutions. It is expected that the public prosecutor's office shall function with the powers of: 1) public prosecution in the court; 2) organizing and procedurally directing during pre-trial investigation, deciding other matters in criminal proceedings in accordance with the law, supervising undercover operations of law enforcement agencies; 3) representing interests of the State in the court in exceptional cases and under procedure prescribed by law.

Therefore, we can expect that the function of supervision over penitentiary establishments will be abolished according to the European standards and recommendations.

Consequently, the question of establishing the independent governmental prison inspection will be more than actual one.

#### **Internal control**

It is obvious that *internal* inspections conducted by the different departments of the State Penitentiary service of Ukraine play a very important role in human rights protection of rights of prisoners.

On the other hand, the international standards recommend that prison inspections should be conducted also by an *independent* body.

Structural parts of the State Penitentiary Service of Ukraine can hardly satisfy with these demands.

#### **Supervisory committees**

Supervisory committees are established in every prison by the local self-governments. They assist the prison administrations in offender rehabilitation and other issues.

The supervisory committees deal mostly with individual cases. At the same time, the supervisory committees have very important powers during execution of punishments.

For example, in accordance with assigned tasks, supervisory commissions have powers to approve resolutions of a prison director to change the conditions of detention of a prisoner within a particular correctional facility if the a prison director needs to make these conditions harsher taking into account behavior of an offender.

Supervisory commissions have also powers to approve applications of a prison director concerning transferring of prisoners to another prison with a higher level of security.

They also have very abstract and general tasks to assisting prison administration in rehabilitation issues.

#### **The Ombudsman. National Preventive Mechanism**

According to the Ukrainian legislation, the Ukrainian Parliament Commissioner for Human Rights (the Ombudsman) considers complaints regarding relations arising between the applicant and state authorities, local governments and their officials and officers. Parliamentary control is to protect the rights and freedoms of the applicants, proclaimed by the Constitution of Ukraine, laws of Ukraine and international treaties of Ukraine.

The Ombudsman's Reports concerning situation in all places of deprivation of freedom are published more or less regularly.

In 2014, representatives of the National Preventive Mechanism visited 25 prisons of different types. The last Ombudsman's report (2015) was also focused on different examples of tortures and other forms of bad treatment that were found by the officers of the Ombudsmen's Office in different public bodies.

For example, according to the Ombudsman's report, the following examples of tortures were found in the Ukrainian penal institutions in 2014:

- beating on various body parts without visible traces;
- sprinkling salt in wounds in the case of self-harm;

- public humiliation by forcing to exercise extraordinary cleaning common areas and bathrooms;
- rigid fixation of handcuffs;
- rough or inhuman treatment of the detainees and prisoners by prison officers;
- unjustified restrictions not provided for by law, and abuse of security measures on prisoners and prisoners;
- negative practice of attracting prisoners to work associated with controlling the behavior of other prisoners;
- unjustified transfer from one institution to another, disciplining, limiting television viewing;
- bias official investigations, the inability to obtain legal advice and breach of sending requests, which leads to the inability to appeal against actions of the prison administration.

In 2014, taking into account different violation of human rights in prisons, the Ombudsman issues requests (submissions) on removing these gross violation of fundamental rights and freedoms in the Juvenile *Kurazh* Colony, violation of rights and freedoms of persons serving sentences in the *Temniv* Prison №100 and the violation of constitutional rights of convicts serving sentences in the *Berdychiv* Prison №70.

Unfortunately, the texts of these reports (submissions) are not available for the researcher of the web site of the Ombudsman. Consequently, the reaction of the State Penitentiary Service of Ukraine on these reports is also unknown.

No doubt that the Ombudsman and its mechanisms and agencies play a crucial role in human rights protection and prevention of tortures in prisons.

At the same time we have to point at the following problems:

1) attention of the Ombudsman is focused on huge list of possible violations of human rights in absolutely *different areas* and public bodies across Ukraine with a focus on the prevention of tortures;

2) the Ombudsman's reports are focused on very *broad list of violations* of all rights proclaimed in the European Convention of Human Rights:

3) as far as *prisons* are concerned, attention of the Ombudsman is focused exclusively on *prevention of tortures and other forms of bad treatment*, not on standards and the best practices;

4) even taking into account that the Ombudsman have powers to review any prisons, these checks are mostly the result of complaints of prisoners, their relatives and information from other sources. Therefore, it could be seen only as a form of the independent monitoring;

5) we can stress that the European Prison Rules recommend establishing independent governmental prison inspection which should act permanently and regularly. At the same time, different monitoring groups of the National Preventive Mechanism in Ukraine are representatives of the society and could not be seen as *inspections* in the meaning of the Prison Rules.

### **The Ministry of Justice**

According to the Ukrainian legislation, the Ministry of Justice is officially defined as a central governmental body that *shapes* national prison (correctional) policy.

The State Penitentiary Service of Ukraine is defined, in its turn, as a central governmental body that *implements* national prison (correctional) policy which is shaped by the Ministry of Justice.

Therefore, it would be logically to presume that prison inspection could be established as structural part of the Ministry of Justice as a body responsible for *shaping* national prison (correctional) policy.

It is surprising but the Regulation on the Ministry of Justice of Ukraine (№ 228, adopted on July 2, 2014) does not contain any provisions concerning the role of the Ministry of Justice in shaping the Ukrainian national prison policy, evaluating the best prison practices and issues of prison inspection.

In general, it could be said that the Ministry of Justice of Ukraine avoids its direct responsibilities concerned with shaping the national prison policy and, consequently, evaluating the results of this policy for a particular period.

At the same time, the Ministry of Justice took some steps towards establishing external mechanisms

In 2014, it established a *Committee on State Prison Policy*, which could be seen as an advisory body, attached to the Ministry of Justice.

At the first glance, this Committee can be presented as a prison inspection as it is noted in the European Prison Rules. For example, it can demand documents for review, invite experts and different specialist for evaluation prison life in different prisons etc. On the other hand, it is obviously that the Committee on State Prison Policy can hardly be seen as a real prison inspection because of absence of inspection powers.

The Committee on State Prison Policy has a right to establish *mobile groups*, which can be seen

more or less as independent inspections with some exclusions and notes. These exclusions and notes are:

- 1) members of these mobile groups *do not* do their tasks on regular basis;
- 2) members of these mobile groups are mostly *officers from the State Penitentiary Service of Ukraine* with involvement of NGOs;
- 3) there could be *lack of independence* in activities of the mobile groups;
- 4) their activities are concerned with *individual complaints*;
- 5) their activities are mostly focused in the investigations of some kind negative events (tortures, other human rights violation) rather than on the developing recommendations and shaping the best practices (including new forms and methods of offender rehabilitation).

In other words, the mobile groups of the Committee on State Prison Policy are mostly the form of *ad hoc* reaction of the Ministry of Justice of Ukraine on complaints on tortures and other harsh violation of human rights but not independent regular inspections.

#### **Conclusions and recommendations:**

Contemporary Ukrainian penal landscape shows the absence of the prison inspections in Ukraine in the form as it is recommended by the European Prison Rules.

In fact, the Ukrainian governmental structure does not have a special independent *prison inspection*, which can evaluate to which extent prisoners are treated in accordance with international norms and that prisons are operated to best standards.

From the list of all actors, which are involved in securing the prisoners rights, the Ombudsman, supervisory committees and different mobile groups are different forms of *independent monitoring*.

Shaping prison (correctional) policy and implementing the best methods of offender rehabilitation *should not* be artificially narrowed to preventing tortures. Nevertheless, the main attention of all public and not-public actors is mostly focused mainly on prevention of bad treatment.

This problem should be defined as one the main system problems of the Ukrainian prison system.

Internal inspections of the State Penitentiary Service of Ukraine cannot be seen as an example of the inspection that is recommended by the European Prison Rules taking into account the absence of their independence and scope of their tasks, which are mostly concerned with checking whether prison officers comply with formal legal norms rather that satisfy with international standards.

It is obvious that the methods of offender rehabilitation could be restricted in terms of the Criminal-Executive Code of Ukraine and Internal Prison Rules. Therefore, the approach that characterizes activities of the *internal* inspection of the State Penitentiary Service of Ukraine and prosecutorial supervision of the Prosecution Service of Ukraine automatically leads to the extreme formalization of the rehabilitation concept and deprives it the perspectives for further development.

The Prosecution Service of Ukraine should be deprived of the function of “*supervising the legality during execution of sentences in criminal cases*” because of the extremely formal nature of the prosecutorial supervision and focusing attention purely on processes, *not* on outcomes. There are some perspectives that such a reform will be implemented soon.

Therefore, a question will be concerning the establishing the permanent *prison inspections* within the *Ministry of Justice of Ukraine*.

They could be established on the basis of the Commission on State Prison Policy of the Ministry of Justice *without* dominant role of the prison officials from the State Penitentiary Service of Ukraine.

Proposed Prison Inspection of the Ministry of Justice of Ukraine should not deal with individual complaints of prisoners.

It should deal only with strategies, policies and international standards and evaluate the effectiveness and efficiency of particular prison policies, practices and programmers after inspecting concrete prisons according to developed plans.

The results of these inspections should be regularly published on the official web sites of the Ministry of Justice of Ukraine and the State Penitentiary Service of Ukraine for sharing the examples of the best practices.

These inspections should *not* be punitive by nature as, for example, the contemporary prosecutorial inspections.

Taking into account that the Ministry of Justice of Ukraine is responsible for national prison (correctional) policy, the Ministry of Justice of Ukraine should have a statutory obligation to analyze the results of all prison inspections and shape national standards related to the “*prison health*”, methods of offender rehabilitation and safer prison environment.