

# КРИМІНАЛЬНЕ ПРАВО І КРИМІНОЛОГІЯ

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## LEGAL ASPECTS OF ENSURING RIGHTS, FREEDOMS AND LEGITIMATE INTEREST OF PERSONS, CONVICTED TO DEPRIVATION OF LIBERTY IN UKRAINE

*A comparative legal analysis of the rights, freedoms and legitimate interests of persons sentenced to imprisonment in Ukraine, gives an overview of the state of compliance of national legislation on this major international legal acts and decisions of the European Court of Human Rights, argues the need for reform of penal legislation.*

**Keywords:** deprivations of liberty for a definite term condemned, man, citizen, legal Status, protection mechanism, guarantees compliance rights.

Striving to conclude the Association Agreement with the EU, Ukraine is bringing its national legislation into accord with main international legal acts and the judgments of the European Court of Human Rights, and special attention in this field is to be paid to normative legislative acts which regulate rights, freedoms, legitimate interests of a person and citizen in Ukraine, and separate categories of people in particular. It means persons, staying in imprisonment places, the legal status of which is regulated by the Criminal Executive Law, besides others.

In order to obtain full idea about the legal status of persons convicted to imprisonment, it is necessary to define the extent of their rights, duties and legitimate interests, mechanisms of their defense and guarantees of realization, taking into consideration the peculiarities of the place of imprisonment. The correspondence of national criminal and executive legislation to modern commonly defined standards in the field of human rights in general, including particular categories of persons convicted to imprisonment, will reflect the attempts of Ukrainian state not only to be guided by European standards, but also the real possibility to implement the assumed obligations to solve the problems of human rights.

The legal aspects of classification of rights and freedoms of persons, convicted to imprisonment, their correlation with commonly defined human rights and freedoms, formation of the mechanism of their ensuring and guarantees from the side of state authorities have always been actual and lay

in the foundations of the investigations of the researchers in the field of penitentiary legislation, such as A. I. Zubkov, O. S. Mikhlin, A. E. Natashev, M. P. Melentyev, P. G. Ponomaryov, G. O. Radov, A. S. Remenson, V. I. Seliverstov, M. O. Struchkov, V. P. Sevastyanov, V. M. Trubnikiov, I. V. Shmarov and others. Today the problem investigated in this research is not solved yet, and the necessity of the further reformation of the national legislation, concerning the above mentioned question, is confirmed by the President's Decree Number 631/2-12 of November 8, 2012 "On the Conception of state policy in the sphere of reforming State Criminal Executive Service of Ukraine".

These provisions stipulate the topicality of the research theme.

The aim of this article is to define the ways of reforming criminal executive legislation of Ukraine in the context of international legal acts, which regulate main human rights and freedoms.

Before discussing the question of real situation in the sphere of ensuring rights, freedoms and legitimate interests of person, convicted to imprisonment, their guarantee according to the current legislation of Ukraine, it is necessary to mention that, due to the norm of Article 3 of the Constitution of Ukraine, a person, his/her life and health, honor and dignity, personal immunity and safety are considered to be the highest social values in Ukraine; human rights and freedoms and their guarantees define the contents and directions of state activities; the state is responsible to a person for its activities; to maintain and ensure

human rights and freedoms is the main duty of a state [1].

Taking into consideration that the Constitution in fact contains main human and civil rights and freedoms, defined in the Universal Declaration of Human Rights. Indisputable is the fact that the persons, convicted to imprisonment in Ukraine, have not only the rights of the citizen of Ukraine, but also commonly defined human rights.

The most important step to the strengthening of legal status of convicted persons is the provision of Article 63 of the Constitution of Ukraine, saying that a person is not responsible for refusing to give evidences or explanations concerning oneself, members of one's family or close relations, which are defined by the Law.

A suspected, accused person or defendant has the right to defense.

Convicted person exercises all human and civil rights, except the restrictions, defined by law and prescribed by court decision. Taking into account the above-mentioned provisions, it is possible to come to conclusion, that human and civil rights and freedoms are expected to establish legal and factual conditions of living for a person, even when staying at imprisonment places.

On the face of it, the norms of criminal executive law regulate the legal status of a person, convicted to imprisonment. Some of them directly limit his/her general civil rights, the others insert certain changes, and the rest of them establish special rights and duties. However, the norms of criminal executive legislation are far from complete definition of legal status of a person, convicted to imprisonment. Thus, the norms of criminal executive law hardly reflect the questions of main rights and duties of the citizens of Ukraine, consolidated by the Constitution, concerning imprisoned persons. Many kinds of relation in the spheres of family and marriage, succession and other are beyond the legal regulation. So, when defining the legal status of a person, convicted to imprisonment, it is necessary, first of all, to consider the essence of this kind of penalty.

The most wide-spread classification provides the distribution of rights and duties of convicted persons into constitutional (general) and special. General rights and duties of convicted persons include their rights and duties as the citizens of Ukraine, consolidated in the constitutional norms and norms of special legislative branches. Special rights and duties include the rights and duties of convicted persons, defined by current criminal executive legislation [2, 117].

Analyzing the legal status of persons, convicted to imprisonment, due to the current criminal executive legislation, it is possible to conclude, that the extent of limitations and deprivation for convicted persons is not defined properly. Thus, the provisions of Article 9 of Criminal Executive Code contain the main duties of convicted persons. In the similar way the law-makers analyze the legal status of persons, convicted to imprisonment. Article 107 of Criminal Executive Code of Ukraine enumerates the rights and duties, but does not describe the rights and duties, which are necessary to understand according to the meaning of law, and their list is comprehensive.

To our mind, when it is said about the persons, convicted to imprisonment, the law should contain all the rights and duties without any exception, which these persons have and could use during the imprisonment. These changes in the law-making should ensure and guarantee their strict execution by the officials of state penitentiary system.

Besides, more detailed analysis of the legal status of persons, convicted to imprisonment, shows that not all the spectrum of rights and duties is fixed in the criminal executive legislation. This could be explained by the fact, that some of them flow out of other branches of law. However, notwithstanding this branching, it can be assumed that their full list should be included (expounded concretized contents) in the current criminal executive legislation, taking into consideration the branch reference and regulation of life of persons, convicted to imprisonment, during serving their sentences.

To our opinion, the provisions of Part 1 Article 8 of Criminal Executive Code of Ukraine, containing the following definition: "... convicted persons have the right to obtain information about their rights and duties [3]", could not be regarded as a norm, which in fact guarantee the observance and protection of full extent of human and civil rights and freedoms, to persons, convicted to imprisonment.

Besides, neither the above-mentioned norm nor the other norms of the Criminal Executive Code of Ukraine contain the procedure of obtaining and providing this information. In fact, practical value of this norm is reduced to zero, thus giving the possibility to abuse from the side of officials in the places of imprisonment.

We consider that Article 8 of Criminal Executive Code of Ukraine should be

complemented by the text, containing the complete list of rights, which have all the categories of convicted persons in Ukraine, including the persons, convicted to imprisonment. These rights are defined by international laws and norms, international agreements, conventions, acts and regulations, which confirm these rules (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, regional conventions and agreements):

- 1) the right to life and personal immunity;
- 2) the right to freedom from tortures or other cruel treatment;
- 3) the right to health (without references to any limitation, which are in fact included in part 1 Article 8 of Criminal Executive Code of Ukraine [3]);
- 4) the right to proper legal procedures (not only to legal assistance, given by a lawyer or any other specialist in the sphere of law, as stated in part 2, Article 8 of the Criminal Executive Code of Ukraine. Moreover, it should be noted, that the norms of the Criminal Executive Code do not contain references to certain procedures, concerning the questions of obtaining legal assistance in case when a convicted person does not have any financial possibilities);
- 5) the right to freedom from discrimination of any kind;
- 6) the right to freedom from slavery;
- 7) the right to freedom of thought and conscience;
- 8) the right to freedom of religion or belief;
- 9) the right to inviolability of family life;
- 10) the right to personal development [4].

This ascertaining of main rights and freedoms of a person and a citizen in criminal executive legislation can demonstrate, that the state of Ukraine takes every possible measures to create the mechanism of guarantees and protection of international standards of rights and freedoms of a person, even in the conditions of depriving liberty.

However, it is clear, that observance of some rights could be limited by the fact of physical isolation of a convicted person from the society: the right to personal freedom; the right to freedom of travel; the freedom to express one's thoughts, the freedom of association with others, etc. This, in general sense, is stated in Article 64 of the Constitution of Ukraine, namely: ... «constitutional rights and freedoms of a person and a citizen

could not be restricted, except the cases, specified by the Constitution of Ukraine».

At the same time, Part 2 Article 64 of the Constitution of Ukraine states, that the following rights and freedoms cannot be restricted: 1) the equality of citizens before the law; 2) the right to citizenship; 3) the right to life; 4) the right to respect dignity of a person; 5) the right to apply to state authorities; 6) the right to housing; 7) the right to marriage; 8) the equality of children in their rights; 9) the protection of rights and freedoms of a person and a citizen; 10) compensation for moral and material losses at the expense of state; 11) the right to know one's rights and duties; 12) irreversibility of the operation of laws and other normative legislative acts; 13) the right to legal assistance; 14) non-obligatory fulfillment of evidently felonious orders or directions; 15) impossibility of double institution of criminal proceedings; 16) the right to be considered innocent in committing a crime; 17) the right not to be responsible for refusal to give evidence or explanation concerning oneself, members of one's family and close relation [1].

Ascertaining of impossibility to limit the above-mentioned rights and freedoms in the Basic Law of Ukraine, to our mind, is one of the weightiest guarantees from the side of state. This provision confirms fundamental principles and direction of the state policy in the sphere of law. Besides, it should be noted that the complex of above-mentioned rights repeats, in fact, similar provisions of International Covenant on Civil and Political Rights [5], and reflects the intention to protect these rights and freedoms. The realization of these rights cannot prevent from the achievement of the aim and objectives of penalty.

Taking into account the ideas, mentioned earlier, we consider, that even this list of rights should be fixed by law-makers in Article 8 of Criminal Executive Code of Ukraine, in order to have full idea of the rights, which convicted persons should possess. Those rights should be realized in a certain way and protected in the process of serving one's sentence.

As it was mentioned above, in the science of criminal executive law, besides main rights and duties, there are specific (special) rights and duties of persons, convicted to imprisonment. Special duties of convicted persons are defined either in the form of prohibition, or, vice versa, in the form of obligation to act in one way or another.

The list of prohibitions for persons, convicted to

imprisonment, is given in Part 4, Article 107 of Criminal Executive Code of Ukraine. Their analysis allows coming to the following conclusions:

1) the prohibition to fulfill certain actions is dictated by the necessity to ensure constant surveillance over the persons, convicted to imprisonment, to prevent possible escapes, to eliminate the reasons and conditions, which facilitate persistent infringements of regime or even commitment of crimes;

2) prohibition to leave the specially designated for imprisonment territory or place of work without permission, and to stay without administration's permission in the residential areas, or the department where they do not live, or at the working places where they do not work; to place photos, reproductions, postcards, newspaper or magazine cuts, on the walls, bedside tables, beds and working places; without permission to replan, change constructive elements of buildings and construction in the establishment of executing penalties; to build any constructions on the territory of industrial objects (bath-houses, laundries, showers, safes, houses, booths, premises for leisure, heating etc.) promotes constant surveillance and stopping or regime infringements.

Concerning the duties of persons, convicted to imprisonments, it should be noted, that these duties are included in Part 3 Article 107 of Criminal Executive Code of Ukraine and are the following: observance of the norms, which define the order and conditions of serving one's sentence; the daily routine of a place of imprisonment, legitimate interrelation with other convicts, staff and other persons; maintaining the room clean and neat, careful relation to the property of a colony and objects using in the process of work, only according to their purpose; fulfillment of all legitimate requirements of administration; fulfillment of necessary work for self-service, improvement of territory, maintenance of sanitary-hygienic norms, the demands of fire safety and industrial safety. The duties of this category of convicted persons are defined in details in Para 29 of Inner regulations in penal institutions (the state of 2007), approved by the State Penitentiary Department Order Number 275 of December 25, 2003 with further amendments, according to which the persons, convicted to imprisonment, have the duties concerning: "... keeping their dwelling and working places clean and neat; make their beds according to established pattern; to keep food and personal belongings at specially designated and equipped

places; in prescribed manner to work for improvement of the territory of imprisonment place and conditions of living; to take care of state property; to work diligently; to move only in order beyond the local sectors on the territory of correctional institutions, to wear established breast signs according to prescribed pattern; during serving the sentence in detention cells to go out for walks and keep the rules of walks; to perform the duties in cells; when meeting staff members and visitors in correctional institutions get up and greet them, be polite during communication" [6].

Thus, special duties in the form of prohibitions have punitive character, though their unflinching fulfillment at the same time has discipline influence as its aim. The main task of the duties to act in a certain way is to form conscious discipline and self-discipline of convicted persons, development of collective feeling, involvement to the rules of communal life. Moreover, you can't but agree that such important components of rights, freedoms and legitimate interests of person, convicted to imprisonment, as obligations and prohibitions, which in fact define the limits of legal status of persons of this category in certain conditions of detention, should not be included in full extent in normative legal acts, adopted by the legislative branch of power.

And finally, the discrepancy of the norms of national criminal executive legislation and European standards was constantly underlined in the reports of Commissioner for Human Rights in the Ukrainian Parliament, and also in the reports of authoritative international institutions – UN Committee Against Torture, UN Human Rights Committee, European Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These reports became the foundations for approving the Conception of state policy in the sphere of reforming State Criminal Executive Service of Ukraine by the President on December 8, 2012. The aim of the Conception is to define priorities and ways of reforming of State Criminal Executive Service of Ukraine, the activities of which should be based upon the principles of lawfulness, humanism, observance of human and civil rights, international standards for treatment of prisoners" [7]. Taking into consideration, that adoption of such programmer is not the first attempt of the state of Ukraine to raise the legal status of a person and a citizen in Ukraine to international standards in general, and taking into account the peculiarities of imprisonment, we consider that ways and methods of solving problems in this sphere, declared in the

Conception, in case their due realization will achieve their objectives.

The results of this research allow drawing the following conclusions:

1. Current criminal executive legislation should be widened to all the extent of rights, which person, convicted to imprisonment, has during serving the sentence, which are specified in international documents and the Constitution of Ukraine.

2. Limitations of human and civil rights, guaranteed by the law, could be established by a legal act, having not less power. Especially as they cannot be provided by the directions of officials of criminal executive institutions or the Ministry of Justice.

3. All the activities of staff, concerned the imprisoned persons, should be based exclusively on the strict observance of law, and departmental normative legislative acts could only define the rules of behavior of particular actions in order to achieve full and indisputable fulfillment of law, but not to give wide explanation of legislative acts according to personal discretion of corresponding executive institution.

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#### Ю. А. Чеботарьова

Правові аспекти забезпечення прав, свобод і законних інтересів засуджених до позбавлення волі в Україні

У статті проведений порівняльно-правовий аналіз прав, свобод і законних інтересів засуджених до позбавлення волі в Україні, подано загальне уявлення про стан відповідності норм національного законодавства з цього питання основним міжнародно-правовим актам та рішенням Європейського суду з прав людини, доведено необхідність реформування кримінально-виконавчого законодавства.

**Ключові слова:** позбавлення волі на певний строк, засуджений, людина, громадянин, правовий статус, механізм захисту, гарантії дотримання прав.

#### Ю. А. Чеботарёва

Правовые аспекты обеспечения прав, свобод и законных интересов осужденных к лишению свободы в Украине

В статье проведен сравнительно-правовой анализ прав, свобод и законных интересов осужденных в Украине, подано общее представление о состоянии соответствия норм национального законодательства по этому вопросу основным международно-правовым актам и решениям Европейского суда по правам человека, определена необходимость реформирования уголовно-исполнительного законодательства.

**Ключевые слова:** лишение свободы на определенный срок, осужденный, человек, гражданин, правовой статус, механизм защиты, гарантии соблюдения прав.