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PROBLEMS OF NATIONAL PUBLIC AND PRIVATE LAW

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PROBLEMS AND PERSPECTIVES OF ESTABLISHING PRISON INSPECTIONS IN UKRAINE

The article is focused on problems of establishing of internal and external prison inspections which are strongly recommended by numerous international human rights standards. The article is also focused on problems of the supervision over penitentiaries conducted by the Prosecution Office of Ukraine. The article contains recommendations and proposals for the Ministry of Justice of Ukraine and the State Penitentiary System of Ukraine in the sphere of shaping and implementing of the national prison policy. The article stresses on the importance of the new UN standard in the sphere of treatment of prisoners adopted in May 2015 (so called the Mandela Rules), which contain very important provisions on the issues of establishing of prison inspections. It is also focused on the draft Amendments to the Constitution of Ukraine presented by the President of Ukraine in November 2015.

Key words: prison inspection, European Prison Rules, Mandela Rules, Prosecution office, human rights of prisoners, national prison standards.

During the years of Ukrainian independence a lot of projects focused on the rights of prisoners and prison reform were implemented in Ukraine. At the same time it could sound strange that one very important component of prison reform started only a few months ago. It is about establishing prison (penitentiary) inspections in Ukraine (so-called twofold inspection mechanism) and shaping national Ukrainian prison standards.

Having paid a brief look at contemporary international and European prison standards it is easy to conclude that prison inspections is not something unusual for contemporary states (not only in Europe). Moreover, prison inspections are seen as normal and necessary element of the penitentiary system of any democratic state.

This element of any national penitentiary system was recommended by the United Nations in 1955. Therefore, it is necessary to confess that issues of establishing a system of independent twofold governmental prison inspection appeared in Ukraine on the agenda only some months ago. It became the reality only due to the initiative of the Council Europe within the framework of the Project "Further Support for the Prison Reform in Ukraine" (started from 03.07.2015).

Therefore, this article is about one of the most important and urgent problems of national prison reform. It is about establishing a system of regular independent internal and external prison inspections in Ukraine.

In view of the above, the aims of this article is to: 1) to highlight the basic provisions of international prison standards relating to establishing and functioning prison inspections; 2) to analyze the problem of prosecutorial supervision over execution of judgments in criminal cases in the light of the constitutional changes on justice (registered in the Verkhovna Rada of Ukraine by the President of Ukraine on 11.25.2015); 3) to make recommendations concerning establishing in Ukraine twofold prison inspections.

Outlining the main idea of this article, first of all we should recall that the United Nations Standard Minimum Rules for the Treatment of Prisoners (adopted in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31.07.1957 and 2076 (LXII) of 13.05.1977) contained relevant recommendations for establishing prison inspections as an integral part of any national prison system.

The Rule 55 of this important international standard was focused on issues of prison inspections. It stresses that 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.

The European Prison Rules (Recommendation R(87)3, adopted on 12.02.1987 at the 404th meeting of the Ministers' Deputies) also contained very important provisions concerning government prison inspections

In particular, the European Prison Rules made a special focus that the purposes of these rules were to provide realistic basic criteria against which prison administrations and those responsible for inspecting the conditions and management of prisons could make valid judgments of performance and measure progress towards higher standards.

The European Prison Rules (1987) state that there shall be regular inspections of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be, in particular, to monitor whether and to what extent these institutions are administered in accordance with existing laws and regulations, the objectives of the prison services and the requirements of these rules.

According to the new version of the European Prison Rules (Recommendation № R(2006)2, adopted on 11.01.2006 at the 952nd meeting of Deputy Minister), all prisons shall be subject to regular government inspection and independent monitoring.

The Rule 92 states that 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.

Finally, according to the new UN Standard Minimum Rules for the Treatment of Prisoners 2015 (the so-called the Mandela Rules), there shall be a twofold system for regular inspections of prisons and penal services (Rule 83):

- (a) internal or administrative inspections conducted by the central prison administration;
- (b) external inspections conducted by a body independent of the prison administration, which may include competent international or regional bodies.

In both cases, the objective of the inspections shall be to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and corrections services, and that the rights of prisoners are protected.

According to the Rule 84, inspectors shall have the authority:

- (a) to access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention;
- (b) to freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview;
- (c) to conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits;
- (d) to make recommendations to the prison administration and other competent authorities.

External inspection teams shall be composed of qualified and experienced inspectors appointed by a competent authority and shall encompass health-care professionals. Due regard shall be given to balanced gender representation.

According to the Rule 85, every inspection shall be followed by a written report to be submitted to the competent authority. Due consideration shall be given to making the reports of external inspections publicly available, excluding any personal data on prisoners unless they have given their explicit consent.

The prison administration or other competent authorities, as appropriate, shall indicate, within a reasonable time, whether they will implement the recommendations resulting from the external inspection.

The issues of prison inspections are also reflected in other international human rights standards concerned with imprisonment or detention.

For example, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/43/173, 09.12.1988) stressed that in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

Recommendation CM/Rec(2014)3 of the Committee of Ministers to member States concerning dangerous offenders (adopted on 19.02.2014 at the 1192nd meeting of the Ministers' Deputies) also contains provisions concerned with prison inspections. It states that staff and agencies dealing with

dangerous offenders should be subject to regular government inspection and independent monitoring.

Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures (adopted on 5 November 2008 at the 1040th meeting of the Ministers' Deputies) also points out that the execution of any sanction or measure shall be subjected to regular government inspection and independent monitoring. It states that institutions in which juveniles are deprived of their liberty and authorities implementing community sanctions and measures shall be inspected regularly by a governmental agency in order to assess whether they are operating in accordance with the requirements of national and international law, and the provisions of these rules.

As far as the Ukrainian penitentiary reform is concerned, approval of the national prison standards and establishment of both internal and external prison inspections is more than urgent issue in the light of the fact that prosecutors will be deprived of one of their traditional functions, namely the function of supervision over observance of laws during execution of court decisions in criminal cases. Related Amendments were presented by the President of Ukraine at the draft Law on Amendments to the Constitution of Ukraine (on justice issues) (№ 3524 on 25.11.2015).

According to the proposed Amendments, § 9 of Section "Transitional Provisions", "the prosecutor's office continues to perform ... the function of supervision over the observance of laws in the execution of judgments in criminal cases - to the enactment of a law on the establishment of a twofold system of regular prison inspections", which is another example of the direct impact of international standards (in particular of the Mandela Rules) on constitutional development in our country.

The explanatory note to the draft Amendments to the Constitution of Ukraine (concerning justice) stated that "under the proposed changes prosecutors will continue to perform a function of supervision over the observance of laws in the execution of judgments in criminal cases - to the enactment of a law on the establishment of a twofold system of regular inspections of prison (according to the 83 - 86 of the Standard Minimum Rules of the United Nations concerning the treatment of prisoners (the Rules Mandela), Rules 9 and 92 of the European Prison Rules)".

Arguing about prosecutorial activities in this sphere, we cannot say that prosecutors exercise this function poorly or well (although this activity remains extremely hidden from the public). In our deep conviction, this function is in principle deeply unnatural for the prosecution because the prosecution can not be an effective guarantor of the rights of the convicted person.

In light of the international and European standards, prosecutor of Ukraine in the implementation of this function is an example of a strange mixed model of external inspection and independent monitoring.

While supervising over execution of court decisions in criminal cases, prosecutors are focused on finding violations of law and regulations. Therefore, they cannot **go beyond national legislation**, as well as they cannot operate with "international and European standards" and "best practices". Prosecutors do not deal with "efficiency" and "effectiveness".

In other words, prosecutors in their activities aimed at "minimum", when effective and efficient prison management and prison policy implementation requires achieving "maximum".

The most important aspect is also concerned with a simple idea that the prosecutor was a representative of the body which had a direct task to unleash the criminal repression against a certain person in a certain criminal case. Therefore, a prosecutor cannot be the person entrusted with functions care and protection of this person while he/she serves a criminal sentence.

On our opinion, combining two functions by the prosecutor (procedural guidance and supervision over execution of court decisions in criminal cases) is highly illogical and unnatural because we are talking about a combination that can not be combined in principle.

Not coincidentally, in 1996 experts of the Council of Europe in their report "Assessment of the prison system of Ukraine" (Report of the Expert Mission of the Council of Europe in Ukraine in June and August 1996) provided the Ukrainian government with the following recommendations for prosecution service and prison inspections:

- to establish as soon as resources are available, the inspection body that will be coordinated with the central level, will be independent and will have the regional group, including the prison system experienced workers, representatives of other civil society organizations, including NGOs;

- to cancel after the establishment of an independent inspection body supervisory functions of the prosecutor;

- to carry out a full inspection of each institution at least once a year;

- to submit a written report of each inspection the appropriate Minister;

- to make public the report of each inspection, together with the answer the Minister, except annex containing personal information;
- to provide a written report to Parliament on the work carried out and findings.

Taking the above into consideration, we can present the following description of the primary steps in reforming the Ukrainian penitentiary system in view of the provisions of the Mandela Rules (2015), the European Prison Rules (2006) and other international standards.

1. Public prosecution and supervision over legality in prisons.

Mentioned before draft Amendments to the Constitution of Ukraine (on justice issues) aimed at reducing of interference of prosecutors to prison issues.

We think that such a reduction is quite natural. The Soviet era and the period of independence of Ukraine more than convincingly demonstrate that the prosecution service is unable to respond quickly to violations of prisoners' rights. The General Prosecution Office can hardly be a tool for improving of penal policy in terms of guaranteeing the prisoners' rights. Therefore, canceling the function of supervision over execution of court decisions in criminal cases is a reasonable step given the further reform of the Ukrainian prison system.

Moreover, the draft Amendments to the Constitution of Ukraine does not leave anything other than take for granted the fact that the prosecutors should not spray their attention to a lot of functions. It would be much better for them (and for the whole Ukraine) to perform at least its main function (of course, it refers to procedural guidance and public prosecution in the court).

The only question is who is able to replace the prosecutor in the performance of this function to protect the rights of prisoners. We believe that this change should take place through establishing prison (penitentiary) inspections within the Ministry of Justice of Ukraine and the State Penitentiary Service of Ukraine in accordance with national and international prison standards.

2. Prison Inspections.

The Mandela Rules (2015) and the European Prison Rules (2006) contain clear and well-shaped recommendations concerning establishing a twofold system of prison inspections in Ukraine. Moreover, the Mandela Rules deserves to be transposed into national legislation with very minor modifications because of their clear and comprehensive provisions. The Ministry of Justice of Ukraine and the State Penitentiary Service of Ukraine virtually nothing remains but to take measures to create relevant departments within their organizational structures.

3. The Parliamentary Commissioner for Human Rights.

In the European states prison inspection is a very important part of the national preventive mechanism. The Ukrainian model of the national preventive mechanism is associated with the Parliamentary Commissioner for Human Rights and the relevant Department within the Secretariat of the Commissioner (Department for Implementation of the National Preventive Mechanism). Paying tribute to the work of the Commissioner for the protection of human rights in Ukraine, it is necessary to define certain things that indicate that the Commissioner's activity does not preclude and does not substitute prison inspections.

Firstly, the Commissioner can hardly "cover" the entire territory of Ukraine as prison inspection will do it.

Secondly, the Commissioner has to protect human rights not only in prisons but also in other places of the deprivation of freedom. This factor makes impossible mentioned above "regularity" of prison inspections which particularly specified in international standards.

Thirdly, the Commissioner (as is the case for the Prosecution Office) aims at "minimum" of human rights which must be respected in prison, while prison inspections aim at ensuring of "maximum" of services that can "take" from a prison in the context of provision of rehabilitation services and guaranteeing secure environment (both for prisoners and staff).

Finally, a reference to the fact that prison inspections should be "governmental" (not parliamentarian) gives the final answer to the relevant question.

In other words, prison inspection in the form, as proposed in the Mandela Rules and European Prison Rules, is not a natural for the Commissioner for its purposes and objectives. In addition, the Commissioner can not provide the depth and frequency of such inspections.

4. The Ministry of Justice.

Thus, we believe, a key initiative for establishing prison inspection and implementation of national prison standards should belong to the Ministry of Justice. By this time the Ministry of Justice showed (and

continues to show) more than excessive shyness in shaping the national penal policy. We can guess that such shyness is more than unnatural.

This, in our opinion, is clear: the Ministry of Justice, which is responsible for shaping penal policy in Ukraine, can not exclude itself from evaluation of results of implementation of such policy. Meanwhile, the most effective tool for evaluating the results of the implementation is prison policy is prison inspection reports.

5. Principles of prison inspections.

Principles of activities of prison inspections should not have anything to do with the principles of prosecutorial inspections where attention were focused on achieving the targets on the number of persons brought to disciplinary responsibility. The purpose of any inspection should be making recommendations to ensure "healthy climate" in prison. Prison inspections should not make mandatory orders for a prison governor, whose members cannot sometimes perfectly know internal climate of the particular institution.

The task of a prison governor after receipt of such recommendations is to study them and to make response to them. As a result, a prison governor will be accountable before society for their performance or failure. In any case, a prison governor has to provide clear explanations on the reasons of failure or partial performance of these recommendations.

The results of any prison inspection should be widely published on the websites of the Ministry of Justice of Ukraine and the State Penitentiary Service of Ukraine in a format suitable for download and further use while explaining how these recommendations were implemented.

Making conclusions, we can say that establishing both internal (within the State Penitentiary Service of Ukraine) and external (within the Ministry of Justice of Ukraine) prison inspection is one of the most important areas of prison reform in Ukraine. Filling this vacuum is urgently required taking into account international experience and human rights standards.