

ORGANIZATIONAL AND LEGAL ASPECTS OF ENSURING PUBLIC CONTROL OVER THE OBSERVANCE OF THE RIGHTS OF CONVICTS IN UKRAINE

ASPECTOS ORGANIZACIONAIS E JURÍDICOS DA GARANTIA DO CONTROLO PÚBLICO DO RESPEITO DOS DIREITOS DOS CONDENADOS NA UCRÂNIA

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Received: 25 Jun 2023

Accepted: 08 Oct 2023

Published: 14 Oct 2023

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Abstract: Ensuring the rights and monitoring the observance of the rights of convicts are important elements of the legal systems of modern democratic countries. The purpose of the article is to study the organisational and legal aspects of the organisation of public control over the observance of the rights of convicts in Ukrainian realities. To achieve this goal, the author uses a variety of theoretical research methods: content analysis, analysis, and synthesis, dialectical, hermeneutical, sociological, formal-logical, logical-semantic, and comparative legal methods. The results indicate that the legally defined activities of public associations to oversee the observance of the rights of convicts in the field of execution of sentences and probation can be described as public control. This control includes monitoring the observance of the rights and legitimate interests of convicted persons who are in relations of criminal and penal responsibility. The analysis of legislative initiatives aimed at regulating public control over the observance of the legitimate interests and rights of convicted persons in Ukraine indicates that achieving improvements in this area requires overcoming formalism in the implementation of public control, especially by supervisory boards. It is also necessary to introduce relevant amendments to the legislation. First of all, a separate section should be developed to regulate “Public control over the sphere of execution of sentences and probation”, where the essence and forms of this type of control should be defined. The conclusions state that the next mandatory step is to modernise public control over the observance of the rights and legitimate interests of persons serving sentences or probation in accordance with international standards and best practices in this area

Keywords: Ukraine. Public control. Observance of the rights of convicts. Humanity. Legislation. Transformations.

Resumo: A garantia dos direitos e o controlo do cumprimento dos direitos dos reclusos são elementos importantes dos sistemas jurídicos dos países democráticos modernos. O objetivo do artigo é estudar os aspectos organizacionais e jurídicos da organização do controlo público do respeito dos direitos dos reclusos na realidade ucraniana. Para atingir este objetivo, o autor utiliza uma variedade de métodos de investigação teóricos: análise de conteúdo, análise e síntese, métodos dialécticos, hermenêuticos, sociológicos, lógico-formais, lógico-semânticos e de direito comparado. Os resultados indicam que as actividades legalmente definidas para as associações públicas de fiscalização do cumprimento dos direitos dos condenados no domínio da execução das penas e da liberdade condicional podem ser descritas como controlo público. Este controlo inclui o acompanhamento da observância dos direitos e interesses legítimos dos condenados que se encontram em relações de responsabilidade penal e criminal. A análise das iniciativas legislativas destinadas a regulamentar o controlo público do respeito dos interesses legítimos e dos direitos das pessoas condenadas na Ucrânia indica que, para obter melhorias neste domínio, é necessário ultrapassar o formalismo na aplicação do controlo público, especialmente por parte dos conselhos de supervisão. É igualmente necessário introduzir alterações pertinentes na legislação. Em primeiro lugar, deve ser criada uma secção separada para regular o “controlo público sobre a esfera da execução das penas e da liberdade condicional”, onde devem ser definidos a essência e as formas deste tipo de controlo. As conclusões indicam que o próximo passo obrigatório consiste em modernizar o controlo público sobre o respeito dos direitos e interesses legítimos das pessoas que cumprem penas ou liberdade condicional, em conformidade com as normas internacionais e as melhores práticas neste domínio.

Palavras-chave: Ucrânia. Controlo público. Observância dos direitos dos condenados. Humanidade. Legislação. Transformações.

1. Introduction

The current paradigms of reforming the penal system in Ukraine emphasise the need for harmonisation with the current level of development of society and humanistic principles. It also means focusing on respect for individual rights and freedoms, guarantees of a balanced balance between the interests of citizens, suspects, convicts, and the state, and the specifics of organising compliance with the procedures for detention and treatment in isolation in accordance with international and European standards. This is an important and strategic area of work to harmonise Ukrainian legislation, transform the entire system of bodies and institutions for the implementation and monitoring of sentences, including changes in the functioning of state power, which leads to the need to update the theoretical and methodological foundations.

In such circumstances, the problem of effective public control over the observance of the rights of convicts in Ukraine becomes particularly relevant. This problem lies primarily in the direct involvement of the public, taking into account its opinions and suggestions in the face of difficulties in improving the work on ensuring the legality and transparent functioning of the justice system in the relevant areas. For this reason, the existence of this type of control can reduce the manifestations of arbitrariness and the use of unlawful, illegal methods in the work of

the penitentiary system. To organise proper objective supervision over the implementation by the state authorities of functional mechanisms for the social security of persons in places of deprivation of liberty and detention.

Research problem

Therefore, public control over the performance of functions by state authorities is an important component of observance of the rights of convicts, which in modern realities are not without certain shortcomings in their organisation and implementation. In particular, based on information from open sources and statistical data, it is known that during the course of penal activities every year there are cases of suicides among convicts, attempts at self-mutilation, an increase in injuries, etc., which is also a manifestation of formal or even absent public control in the field of penal enforcement in Ukraine. The view of this process will also need to be updated through the prism of harmonisation with the current requirements of European legislation, which is extremely important in terms of Ukraine's European integration plans.

Research focus

The latest legislative decisions adopted by the Ukrainian authorities in this area indicate the beginning of active work on the practical implementation of methods of public control over the rights of convicts, which have been controversial until now and have been repeatedly criticised by NGOs, academics, detainees and prisoners, etc. Among the main reasons for this situation are the imperfection of modern Ukrainian legislation, the lagging behind of existing international standards in this area, as well as the extremely low implementation of practical mechanisms. Therefore, against the background of the reorientation of government policy in the field of penal enforcement towards the observance of the rights and legitimate interests of convicted persons, the following issues need to be clarified at the doctrinal and legislative level: the nature and content of public control over the observance of the fundamental rights of convicts in the area of execution or serving of sentences, the legal basis for its implementation in Ukraine, strengthening of preventive activities and the level of public activity in this process.

Research aim and questions

The purpose of the article is to analyse the organisational and legal aspects of ensuring public control over the observance of the rights of convicts in Ukraine. The realisation of this goal involves addressing the following issues:

1. analysis of the existing Ukrainian legislative framework for conducting public oversight
2. characterisation of the existing definitions of public control

3. comparison with the principles established in the world practice.

2. Theoretical framework and literature review

This issue has repeatedly attracted the attention of researchers. In particular, Igratenko (2020) focused on the limited public control in Ukraine. Similar conclusions were also reached by other experts who analysed the problem of supervision over penitentiary institutions in Ukraine (ZAKHAROV, 2009). In fact, the adoption of the European experience and harmonisation with the latest paradigms of legislative activity has changed the perception of the role of the public in controlling the conditions of detention of persons serving sentences. A similar issue was addressed by Garasim (2023), who identified the importance of public control over the activities of penitentiary institutions in the Ukrainian reality, pointing to the legislative aspects of regulating their activities by the public. At the same time, this researcher identified and analysed modern legislative instruments for regulating social control. The work of YEDNAK et al. (2021) made it possible to trace the evolution of Ukrainian legislators' views on the expansion of public control over the penitentiary system. The researchers also focused on the gender aspects of observing the rights of prisoners (REZNICHENKO, 2022). Pogrebna (2021) also identified public control as a generally important tool for preventing and overcoming crimes in the field of detention of persons serving sentences, while other works emphasised the problems that this process encounters in practice (KOLB and MAKHNITSKY, 2022; KAPLINA, 2022), and additionally, identified rights and ways to protect them in the Ukrainian reality (SHEVCHUK, 2021). At the same time, due to the new phase of Russian aggression against Ukraine, studies related to martial law and, accordingly, the peculiarities of applying legal norms during its operation have also become relevant (GORINOV and MERENIUK, 2022; BURIAK et al., 2023). In general, researchers note that many legislative provisions on public control have limited effect during martial law. However, along with a certain halt, an important vector was the work on harmonisation with the legislative field of the European Union (given Ukraine's European aspirations).

The problems of observance of the rights of people serving sentences were investigated by Kuzmichova-Kyslenko et al. (2021). A lot of attention was also paid to legal conflicts that arose as a result of the adaptation of national legislation to the norms of EU member states (JURKA and ZAJANČ, 2015). In general, many European researchers have drawn attention to the importance of public control over the penitentiary system (OLAYA; GOMEZ-

QUINTERO; NAVARRETE, 2018; REDONDO et al., 2020). Their generalisations make it possible to compare the understanding of the essence of public control activities and relevant organisations in developed democratic countries and Ukraine, which still has a long way to go in terms of social and legal development. In particular, the general humanistic orientation of the modern penitentiary system was noted by Feeley (2019). The researcher's conclusions were also supported by other scholars who identified the role of reintegration into society of persons serving sentences as an important factor in the modern rule of law (SKARSTAD, 2018; PARYZKYI, 2021). Equally important aspects are the public influence on mitigating the fate of prisoners (ROSS and GROSS, 2017) and the importance of legislative regulation of this area (SYMON, 2007; NASTYUK et al., 2020). At the same time, the accumulated theoretical, legislative, and law enforcement experience in this area at the national and international levels needs to be generalised and rethought in terms of developing effective mechanisms for public control over the observance of the rights of convicts in places of execution or serving sentences and formulating appropriate proposals to improve the effectiveness of this institution.

3. Research design and methods

The article is based primarily on the use of theoretical research methods. In particular, using the content analysis method, the author examined other scientific publications on the issues of criminal executive law, criminology, penitentiary, administrative law, and procedure. The use of the methods of analysis and synthesis made it possible to organise the methodological basis of the study based on the provisions and conclusions of the general theory of knowledge and to comprehensively cover the use of general philosophical and special methods.

In particular, the dialectical method made it possible to trace the evolution of the essence and content of such definitions as “state control”, “public control over the observance of the fundamental rights of convicts in the field of sentencing and probation”, etc. The use of the historical method contributed to the analysis of scientific opinion on the essence of public control over the activities of the penitentiary and probation bodies. The hermeneutic method helped to carry out a thorough scientific analysis of the provisions of national legislation in terms of the use of public influence on the observance of the rule of law in penitentiary institutions. The formal logical method was used as the basis for the scientific study of legal acts, as well as for the interpretation of the control function of the public over the legality of the rights of prisoners. The logical-semantic and comparative legal methods helped to clarify the peculiarities

of regulating the provisions on public control over the observance of the rights of prisoners, outline the powers of supervisory commissions, study the best international practices of public control in this area, and determine the possibilities of implementing certain provisions into Ukrainian legislation. The use of the sociological method made it possible to form a general and objective view of the possibilities of legislative regulation to ensure public control over the observance of the rights of prisoners in Ukraine.

The research was conducted in several stages. At the first stage, using the methods of analysis and content analysis, the scientific literature on this issue was studied, attention was paid to the peculiarities of legal definitions and practices of their application. Based on the synthesis, preliminary conclusions were drawn regarding trends in the development of the rights of detainees and prisoners in international practice. The second stage involved a comparison of existing international practice and solutions available in Ukraine, which made it possible to make certain generalisations and draw conclusions. The third stage is the conclusions and further research prospects, which are extremely important in the light of Ukraine's further European integration and adaptation of Ukrainian legislation to new requirements.

4. Results

When studying the Ukrainian legal literature, it should be noted that there is no established, unambiguous understanding of the term “public control” in the doctrine and regulatory documents, which prompts a scientific analysis of this category. In Ukrainian legal dictionaries, the term “control” is interpreted as verification of the implementation of laws, decisions, etc. In the scientific literature, “control” is considered as a kind of verification of compliance of controlled objects with the established requirements (YEROSHENKO, 2012, p. 307), observation to check for counteracting undesirable manifestations, preventing and stopping illegal behaviour on the part of any person (IGRATENKO, 2020). Thus, in a broad sense, the word “control” should be interpreted as an activity aimed at verifying the object of observation, detecting, preventing, and stopping illegal behaviour.

At the same time, there are considerable difficulties in interpreting the term “public control” in Ukrainian legal science. Pogrebna (2021) interprets public control in the field of execution of sentences as an activity defined at the legislative level of associations of individual citizens, which is aimed at checking the content of the execution process - serving certain sentences - and is carried out within the powers and in compliance with the requirements on

issues governing information support in our country in order to establish its compliance with the goals set out in the law; tasks and principles for this type of social relations, as well as to protect the rights and legitimate interests of all participants in the criminal justice system. Zakharov (2009) defines public control as a public inspection by civil society of the activities of the state authorities in terms of compliance with their declared goals, adjusting them in accordance with the main tasks, subordination of policy to the interests of the state, activities, its bodies and administration to the interests of society. It also refers to the supervision by civil society of the functions of governmental bodies and local self-government bodies aimed at protecting human rights and fundamental freedoms.

Thus, public control over the observance of the rights of convicted persons in the field of punishment and probation is the legally regulated work of public associations to verify compliance with the process of implementation (serving) of sentences through the prism of respect for the rights and legitimate interests of convicted persons. We believe that the legislative consolidation of the concept of “public control over the observance of the rights of convicted persons in the field of execution of sentences and probation” in the Criminal Executive Code of Ukraine will help to avoid inconsistencies in the application of this type of public control in practice.

In order to formulate definitions of the relevant concepts, it is also important to use the achievements of European and world legal thought, which define public control as a process by which citizens and civil society organisations have the right to monitor, evaluate and influence the activities of state bodies, legislative bodies, the judiciary, and other government institutions. Researchers determine that public oversight, in general, is an important component of a democratic society that promotes openness, accountability and enables citizens to influence decision-making and control government actions (KUTSEVYCH, 2022). It also plays an extremely important role in ensuring the rights of prisoners. In particular, public control in this area helps to ensure that the existing penal system complies with modern principles of humanity, justice, and respect for human rights (KARSKA and KARSKI, 2019). The aspect of humanity is important when convicts have the opportunity to restore their dignity after their sentence. A schematic assessment of the main principles of public control in the area of ensuring the rights of convicts is presented in Table 1.

Table 1. Schematic assessment of the principles of public control in the field of ensuring the rights of convicts

Principle	Characteristics
Continuous monitoring of the conditions of detention and treatment of prisoners	In practice, this principle means that representatives of civil society organisations and activists have the right to visit penitentiary institutions, organise inspections and assess the conditions of detention and services for prisoners.
Prevention of violence and ill-treatment, aggression by both prison staff and other prisoners; the possibility to openly complain about violations	Civil society organisations have the right and opportunity to monitor the use of violence against prisoners, ensure that prison staff adhere to their duties, and monitor discipline in the institution and proper conditions of detention. Similarly, public control allows prisoners to file complaints about alleged violations of their rights, as well as to draw attention to the facts of abuse or shortcomings in the work of the penitentiary system.
Guaranteeing proper access to quality medical care, rehabilitation opportunities, including new integration into society after serving a sentence	Access to adequate medical care is an important element of the humane treatment of persons serving a sentence. Civil society organisations or activists can control the access of convicts to proper medical care and monitor their health. At the same time, psychological rehabilitation is an important stage, which can have positive consequences after serving a sentence. Public control can help implement rehabilitation programmes and prepare convicts for reintegration into society.
Overseeing compliance with international standards for the detention of prisoners	The public has the right to demand that the state authorities comply with international human rights standards and to emphasise the

	need to treat prisoners in accordance with these standards.
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Source: compiled by the authors based on the analysis Soo (2016), Lara (2022).

Therefore, it is obvious that public control in the area of ensuring the rights of prisoners means monitoring, supervision, and enforcement of the rights of persons under the authority of state executive bodies, in particular in prisons, penitentiaries, and other places of detention. This type of public control is aimed at preventing violations of the rights of prisoners, improving their conditions of detention, and ensuring their decent treatment in accordance with international standards and the laws of the country (SOO, 2018). In the Ukrainian reality, the practical implementation of the principles of public control will require additional consideration, as even the available legislative solutions have significant gaps in the formation of proper treatment of persons serving sentences.

Certain steps have been taken to harmonise Ukrainian legal realities with international practice in the area of observance of the rights of convicts. In order to improve the functioning of public control over the observance of the rights of convicts and persons released from places of detention, on 25 November 2022, the Cabinet of Ministers of Ukraine approved Resolution No. 1314 “On Amendments to the Regulation on Supervisory Commissions”.

The Regulation on Supervisory Commissions defines important main tasks of supervisory commissions (See Table 2).

Table 2. Functions and importance of supervisory boards

Function	Meaning
Controlling	<ol style="list-style-type: none"> 1. Implementation of public control over the rights, fundamental freedoms, and interests of convicts during the execution of criminal sentences in the relevant institutions. 2. Regular visits to penitentiary institutions to exercise control functions.
Social	<ol style="list-style-type: none"> 1. Assistance in social adaptation for people who have served their sentences and those who have been legally released from serving certain types of sentences. 2. Assistance to social care providers in the implementation of a range of economic, legal, organisational, psychological, social, and other types of work, for example, the provision of services aimed at the social adaptation of released persons.
Rehabilitative	<ol style="list-style-type: none"> 1. Assist penal authorities and institutions in creating appropriate conditions for the detention of persons serving sentences. Implementation of material and healthcare support, implementation of health and preventive measures, etc. 2. Preparation of convicted persons for release, as well as assistance in reintegration into modern society.

Source: Authors' own development based on the analysis of Resolution No. 1314

If we compare the international experience with the new rules proposed by the Cabinet of Ministers of Ukraine, there are many features in common. Humanity in the treatment of prisoners is a common feature in the global practice of democratic countries. For the Ukrainian penitentiary system, harmonisation with these practices has become an important step that still needs to be implemented (GARASIM, 2023). In particular, it is noticeable that the new initiatives

of the Ukrainian authorities are focused on meeting the rehabilitation needs of convicts, including social rehabilitation and integration into society after serving their sentence. Another significant achievement was the possibility of establishing control by the Ukrainian public over the observance of the rights, fundamental freedoms and interests of convicts, organising control visits to penal institutions, etc.

Due to the military operations on the territory of Ukraine, the work of the observation commissions as a subject of public control, although relegated to the background (GORINOV and MERENIUK, 2022), human rights and civil society organisations have repeatedly expressed their criticism of the formalism in their actions, the inability to influence state penitentiary and probation authorities in cases of violation of the rights of convicts.

As some scholars rightly point out, the lack of clear legal frameworks and the lack of content of the elements of public control in the field of penitentiary execution do not allow for the full realisation of the potential of Resolution No. 1314 (GARASIM, 2023). Among the main reasons cited by lawyers and representatives of civil society organisations, we can, first of all, identify problems with establishing interaction and responsibility of government agencies and penitentiary authorities through the prism of the implementation of state policy in the field of strengthening the rule of law and public control in general (KOLB and MAKHNITSKY, 2019). Similarly, control over expenditures on the maintenance of penitentiary bodies and institutions, openness to the public of information about the activities of the State Criminal Executive Service of Ukraine that is not a state secret, etc. is also non-transparent. The implementation of these aspects will require clear legal decisions and definitions of certain aspects, as well as mechanisms for their implementation in practice.

5. Discussion

Researchers rightly emphasise the constant need to monitor the functions of public control over the observance of the rights of prisoners (KAHAN, 2019). The implementation of this process requires the introduction of various legal norms and practical mechanisms that promote optimal effective oversight and public influence on the activities of government agencies and other institutions, including the penitentiary system.

First and foremost, legislative transformations are important, enabling the adoption of new laws or amendments to existing ones. According to Rakhmatillaevich (2020), the main focus of such transformational changes is to ensure greater transparency, openness, and citizen

participation in decision-making on control. Researchers have long highlighted the importance of adopting laws on access to information, consultations with experts, public hearings, etc. (TANK, 1983). The latter, for example, include public debates on ensuring the rights of prisoners, the organisation of scientific conferences and roundtables to discuss topical issues and attract different points of view, discussions, and speeches in the media, etc.

Today, there are certain legislative initiatives and developments in Ukraine that in one way or another relate to the content of public control. In particular, Article 10 of the Law of Ukraine “On National Security” states that citizens of Ukraine exercise civilian control through participation in public associations, appeals to local council members, personal appeals to the Ukrainian Parliament Commissioner for Human Rights or to state controlling bodies in the manner prescribed by the Constitution of Ukraine, the Law of Ukraine “On Public Associations” and other legislative documents of Ukraine (GARASIM, 2023). At the same time, the scope of public oversight, in accordance with Part 1 of Article 10 of the said Law, may be limited exclusively by the Law of Ukraine “On State Secrets. As a result, when exercising public control, the society has the opportunity to receive relevant information from public authorities in accordance with the established procedure, except for those with limited access, to conduct scientific work, publicly present its results, form public funds, teams of experts, etc”.

At the same time, the biggest problems in the implementation of the public control functions arise in the course of practical implementation. Yednak et al. (2021) emphasises the constant need to strengthen monitoring, form independent organisations or commissions to organise control functions, monitor the work of government agencies and systems subject to public control. First of all, Symon (2007) and Karska and Karski (2019) highlight the role of civil society organisations that can conduct inspections, verify data, analyse the implementation of laws, etc. According to Ross and Gross (2017), support and development of civic organisations that exercise public control in the area of prisoners' rights, providing them with financial, informational, and organisational support are among the main functions of the public in this area. The situation in Ukraine differs from the global practices of rule-of-law states. In particular, the Law of Ukraine “On Public Associations” and the draft Law of Ukraine “On the Penitentiary System” only state in part 1 of Article 65 that public control over the activities of bodies and institutions of the penitentiary system is implemented in accordance with the Criminal Executive Code of Ukraine. Under such circumstances, it is hardly possible to speak of the existence of proper legal mechanisms to ensure the rights and legitimate interests of such a specific category of citizens as convicts.

Unfortunately, the 2017 Concept for Reforming (Developing) the Penitentiary System of Ukraine does not include the “reformatting” of public control over the observance of the rights and legitimate interests of individuals in the field of penitentiary services among its main tasks. Instead, section I “General Provisions” of the Concept states only that one of the main tasks of the reform is to develop legislation on the work of pre-trial detention centres and penitentiary institutions in accordance with the current legislative norms of the European Union, although in practice, this principle, as well as the establishment of public control over funding and procurement, is still too far away from being implemented.

Skarstad (2018) also highlighted the importance of using modern information technologies to ensure openness and accessibility of data, publishing reports, using electronic platforms to collect public opinion, creating mechanisms for appeals and complaints about possible violations or shortcomings. Similarly, Redondo et al. (2020) emphasise the need to organise educational events, trainings, seminars for citizens and activists on civic oversight, legal literacy, etc. These trends have not been implemented in Ukraine, and their implementation is difficult under martial law, although the digitalisation of administrative services generally shows positive developments. Researchers also highlight the importance of media control: promoting the media, supporting journalists and media that act as watchdogs and tell the public about events and violations are recognised as extremely important elements of civil society (OLAYA; GOMEZ-QUINTERO; NAVARRETE, 2018). In the Ukrainian reality, the media have limited access to the functioning of the penitentiary system, their access to covering the observance of prisoners' rights is often difficult and is perceived ambiguously by the administration of the relevant institutions. Therefore, against this background, the integration of the media into public control over the rights of prisoners looks more like a prospect than a reality, especially as the following functions of the media are not defined in the legislative field.

6. Conclusion

Therefore, public control over the observance of the rights of convicts in the area of sentencing and probation is defined as the legally regulated work of public associations with the aim of organising verification of the observance of the rights and legitimate interests of convicts during the execution or serving of sentences. The analysis of legislative initiatives aimed at regulating legal relations in the area of ensuring public control over the observance of the rights and legitimate interests of convicts in Ukraine has led to the conclusion that the improvement of the situation in this area will be facilitated by overcoming the formalism of the implementation

of public control by the supervisory board over the observance of the rights of convicts, as well as by introducing appropriate amendments to the legislation. First of all, it is necessary to provide for a separate chapter “Public control over the sphere of execution of sentences and probation”, which should define the content and forms of this type of state control, reflect the author's definition of “public control over the observance of the rights of convicts in the sphere of execution of sentences and probation”.

It is obvious and necessary to modify the public control over the observance of the rights and legitimate interests of a person in the area of execution or serving of sentences and probation in Ukraine in accordance with the effective international standards and world practices in this area. In particular, observance of the principle of independence and a clear separation of functions of controlling entities, entrusting society with educational work, placement of released prisoners, moral and educational influence, support by penitentiary administrations of the maximum possible contacts of prisoners with civil society by governmental and non-governmental organizations, direct participation of public associations in planning and implementation of individual programmes for reintegration of released prisoners into society, public reporting of observers, and other measures to ensure that the rights and interests of the released prisoners are respected.

The integration of digital technologies, new functions of the media, development, and regulation of certain concepts can be considered as promising areas for further research, which will contribute to the improvement of practices of public control over the observance of the rights of convicts in Ukraine.

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