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ПРОЦЕС ПОМИЛУВАННЯ ЗАСУДЖЕНИХ ДО ДОВІЧНОГО ПОЗБАВЛЕННЯ ВОЛІ ТА ТРИВАЛИХ ТЕРМІНІВ ПОЗБАВЛЕННЯ ВОЛІ ЯК КРИТЕРІЙ ПІДВИЩЕННЯ ЛІБЕРАЛЬНОСТІ СУДОВОЇ СИСТЕМИ

Анотація. *Розвиток демократії, забезпечення прав і свобод громадян нерозривно пов'язаний із підвищенням якості та ефективності роботи установ виконання покарань, під час яких виникають, змінюються та припиняються різні види кримінально-виконавчих правовідносин. Спроби впровадження ліберальних європейських цінностей у повсякденне життя суспільства викликали необхідність модернізувати діяльність пенітенціарної системи відповідно до міжнародних стандартів. Відзначалась необхідність запровадження гуманних підходів і поваги людської гідності в інших спеціальних стандартах, які стосуються конкретно сфери виконання кримінальних покарань. Новизна дослідження визначається тим, що пріоритетним напрямом цієї діяльності має бути процес подальшого вдосконалення кримінального законодавства та практики його застосування, неухильне дотримання прав і свобод людини. Одним із напрямів цих змін має стати вдосконалення механізмів реалізації права засуджених на позбавлення волі на гуманне ставлення та повагу до їхньої людської гідності на основі прогресивних форм її забезпечення відповідно до міжнародних стандартів та існуючої передової практики. Практичне значення визначається тим, що країна, виконуючи норми про помилування, бере на себе зобов'язання послідовніше впроваджувати в законодавство та практику загальновизнані міжнародні норми, насамперед ті, які мають забезпечити реалізацію прав і свобод людини та громадянина*

Ключові слова: *судова законотворчість, право засуджених, пенітенціарна система, ліберальні цінності, виконання вироків*

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THE PROCESS OF PARDONING THOSE SENTENCED TO LIFE SENTENCES AND LONG TERMS OF IMPRISONMENT AS A CRITERION FOR INCREASING THE LIBERALITY OF THE JUDICIAL SYSTEM

Abstract. *The development of democracy, ensuring the rights and freedoms of citizens are inextricably linked with an increase in the quality and efficiency of the work of penal institutions, during which various types of criminal-executive legal relations arise, change and terminate. Attempts to introduce liberal European values into the everyday life of society made it necessary to modernise the activities of the penitentiary system in accordance with international standards. The need to introduce humane approaches and respect for human dignity in other special standards, which relate specifically to the sphere of the execution of criminal punishments, was noted. The novelty of the research is determined by the fact that the priority direction of this activity should be the process of further improvement of the penal legislation and the practice of its application, the strict observance of human rights and freedoms. One of the directions of these changes should be to improve the mechanisms for realising the right of convicts to imprisonment to a humane attitude and respect for their human dignity, based on progressive forms of ensuring it in accordance with international standards and existing best practices. Practical significance is determined by the fact that a country, when implementing the norms of pardon, assumes the obligation of more consistent implementation in legislation and practice of generally recognised international norms, primarily those that should ensure the implementation of human and civil rights and freedoms*

Keywords: *judicial law-making, the law of convicts, the penitentiary system, liberal values, the execution of sentences*

INTRODUCTION

The investigated right of convicts is recognised by the international community as fundamental, such that it is inherent in all human beings from birth [1]. This is enshrined in article 10 of the International Covenant on Civil and Political Rights (ICCPR)¹: “all persons deprived of their liberty shall

be treated with humanity and with respect for the inherent dignity of the human person”. The UN Human Rights Committee has indicated that respect for human dignity is a rule of general international law, and there is no exception [2]. As emphasised by the Inter-American Commission on Human

1. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

Rights, imprisonment establishes a regime of absolute control, loss of confidentiality, restriction of living space and, above all, a radical reduction in the capabilities of the means of personal self-defence. The Commission concluded that, as a consequence, the act of deprivation of liberty carries specific and substantive obligations to protect the human dignity of a prisoner [3]. Although the most fundamental element of this right is the absolute prohibition of torture, the right to respect for human dignity includes the provision of adequate material conditions [4]. Including adequate food, water and access to health care. And although they do not duplicate the need for the strict observance of the right of convicts in question, the provisions of these acts indicate the main components of the right of convicts to imprisonment to be humanely treated and respect their human dignity [5].

For example, the UN General Assembly approved in December of 2015 the UN Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules¹. These Rules² are the result of 5 years of intergovernmental consultations and represent a significant harmonisation of the original 1957 version, taking into account international law and best prison management practices [6]. In approving the document, the General Assembly noted that, in adopting them, it was guided by the desire to reaffirm faith in fundamental human rights, in the dignity and worth of the human person without distinction, and took note, in particular, of the general comment on the humane treatment of persons deprived of their liberty, which was adopted by the Human Rights Committee [7]. These Rules³ enshrine the following provisions concerning various aspects of the right of those sentenced to humane treatment and respect for their human dignity (both in the context of actions aimed at ensuring the realisation of this right, and actions that constitute a violation):

“Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings [8]. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification”;

“Rule 5: 1. The prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings”;

“Rule 18: 2. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly”;

“Rule 43: 1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

- a) indefinite solitary confinement;
- b) prolonged solitary confinement;
- c) placement of a prisoner in a dark or constantly lit cell;
- d) corporal punishment or the reduction of a prisoner’s diet or drinking water;
- e) collective punishment.”

“Rule 47: 1. The use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited”;

“Rule 50: Searches shall be conducted in a manner that is respectful of the inherent human dignity and privacy of the individual being searched, as well as the principles of proportionality, legality and necessity”;

“Rule 74: The prison administration shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of prisons depends”;

“Rule 76: Training referred to in paragraph 2 of rule 75 shall include, at a minimum, training on rights and duties of prison staff in the exercise of their functions, including respecting the human dignity of all prisoners and the prohibition of certain conduct, in particular torture and other cruel, inhuman or degrading treatment or punishment”;

“Rule 91: The treatment (of convicted) shall be such as will encourage their self-respect and develop their sense of responsibility”;

“Rule 92: To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his or her social and criminal history, physical and mental capacities and aptitudes, personal temperament, the length of his or her sentence and prospects after release”.

In fact, in the previous edition of the Rules⁴, humanism and respect for human dignity were mentioned only in four points:

“46. 1) Prison authorities should carefully select personnel of all categories, since the good performance of prisons depends on the integrity, humanity, competence and personal qualities of these employees”;

“Procedure 10: within its technical cooperation and development programs, the United Nations: (a) assists Governments, at their request, to establish and strengthen comprehensive and humane correctional systems”;

“41. 3) prisoners should not be denied access to qualified representatives of any denomination. On the other hand, if a prisoner protests against being visited by worshippers, his wishes should be treated with full respect”;

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-book.pdf.

2. *Ibidem*, 2015.

3. *Ibidem*, 2015.

4. *Ibidem*, 2015.

“48. All prison staff must behave in such a way and carry out their duties in order to serve as an example to prisoners and win their respect.” All this testifies to an increase in the weight of these categories for the process of execution of punishments associated with isolation from society.

But constant emphasis on these aspects is hardly necessary, because the Rules¹ are not intended to describe in detail an exemplary system of penitentiary institutions, but are intended only to, on the basis of generally recognised achievements of modern thought and taking into account the most important systems of the present, to state what is usually considered correct and principled and practical views on the treatment of prisoners and in the management of institutions. Given the diversity of legal, social, economic and geographic settings, it is clear that not all rules can be applied universally and simultaneously. They must, however, call to life a constant desire to overcome the practical difficulties that stand in the way of their implementation, since they generally reflect those minimum conditions that the UN considers acceptable. On the other hand, they cover a field where public opinion is constantly moving forward [9]. They are not intended to discourage experimentation and the introduction of new practices that are consistent with the principles set forth in them and aimed at achieving the stated goal.

1. LITERATURE REVIEW

This issue is defined in a similar way in the European Penitentiary Rules², which also mention the right to humane treatment and respect for human dignity only in certain norms:

“18.1. The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation”;

“72.1. Prisons shall be managed within an ethical context which recognises the obligation to treat all prisoners with humanity and with respect for the inherent dignity of the human person”;

“75. Staff shall at all times conduct themselves and perform their duties in such a manner as to influence the prisoners by a good example and to command their respect”;

“77. When selecting new staff the prison authorities shall place great emphasis on the need for integrity, humanity, professional capacity and personal suitability for the complex work that they will be required to do”.

Thus, the provisions of both rules, by and large, reflect the main boundaries of such treatment of prisoners, which is based on respect for their human dignity and

humanity [10]. They provide guidelines for a humane system of punishment execution, and since humanity in international approaches is inextricably linked with respect for human dignity, the implementation of the rules will serve as a means of ensuring this right as well [11]. And since the rules apply to all aspects of a person’s stay in places of deprivation of liberty, this serves as an additional argument in favour of the conclusion about the creation of a certain model of what behaviour of personnel will be recognised as such that ensures that the right of convicts to imprisonment to a humane attitude and respect for human dignity is observed [12].

It should be noted that, in contrast to national practice, international experts are more concerned about the issues of not securing as such the right of convicts to imprisonment to a humane attitude and respect for their human dignity (because its presence has long been recognised as a well-known axiom in foreign countries), but consider various challenges in implementing it and establishing compliance mechanisms [13].

Quite often, in the foreign scientific literature (by the way, as in national sources), the right of convicts to imprisonment to a humane attitude and respect for their human dignity is interpreted through the prism of decisions of the European Court of Human Rights (ECHR), which ultimately makes it possible to reduce its content to abstinence from certain actions. Indeed, if to analyse these documents, the correctness of this approach can allegedly be confirmed [14].

However, what has been said cannot be taken as an indication of the possibility or expediency of narrowing the content of the right of convicts to imprisonment to a humane attitude and respect for their human dignity purely to restrain the personnel of penal institutions from certain actions. The ECtHR in its decisions ascertains a violation of certain provisions of the Convention³, which occurred due to the actions or inaction of prison officers, as a result of which the necessity or the fact of taking certain actions, or refraining from them, occurs [15]. None of the ECtHR’s decisions indicates that the law under study should be interpreted exclusively to the extent specified in the decisions of this court. Moreover, the ECtHR adheres to the position that states should not only refrain from inhuman and degrading treatment but also ensure that persons who find themselves under their jurisdiction do not fall into situations as a result of their decisions and expose them to an imminent threat of such behaviour [16; 17]. On this basis, the authors can assert that the international community is interested not only and not so much in the normative consolidation of guarantees of protection against cruel treatment, as in the practical situation in the sphere of the treatment of convicts.

Moreover, the ECtHR considers cases in accordance

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

2. European Prison Rules. (2006, January). Retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d8d25.

3. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.

with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms¹, which does not directly enshrine the right to humane treatment and respect for human dignity [18]. The Convention² guarantees only individual human rights, and since the named right is fundamental, such that it determines all other rights, it does not make sense to additionally secure it. Therefore, in Art. 3 of the Convention³ deals exclusively with the prohibition of a certain type of behaviour – torture: “no one may be subjected to torture or inhuman or degrading treatment or punishment”. That is, all cases considered by the ECtHR and recognised as examples of violation of the right to humane treatment and respect for human dignity are studied through the prism of the prohibition of torture or a certain type of behaviour provided for in Art. 3, and therefore cannot serve as an illustration of the violation of the named right as such. The ECtHR states only certain types of violations of this right, but does not indicate mechanisms for ensuring its implementation in general.

To control the real situation, mechanisms of international control over the practice of detention of suspects and accused, provided for by international acts, can be used [19]. In particular, the UN Committee against Torture, established in accordance with the Convention⁴ against Torture, plays a certain role in identifying the relevant negative facts, which, among other things, carries out expert functions and possesses information that, in its opinion, contains reasonable data on the systematic use of torture in the territory of those or other states, as well as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, established in accordance with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁵ of November 26, 1987.

The European Committee on Human Rights (ECHR), which is charged with monitoring the implementation of the provisions of the ICCPR by the contracting parties, approaches this issue in a similar way. The ECHR may also consider complaints (or communications) from individuals alleging a violation of their rights under this Covenant. Analysis of a number of decisions of the ECHR suggests that the provisions of Art. 10 ICCPR should be interpreted broadly and in conjunction with the Standard Minimum Rules for the Treatment of Prisoners⁶.

2. MATERIALS AND METHODS

“Cabal and Bertran v Australia”⁷ (2003) found violations of Art. 10 of the ICCPR, with regard to humane treatment and respect for the dignity of the human person, was that they were kept in a cage that looked like a prison cell, given that the applicants were forced to take turns in it. In “Brough v Australia”⁸ (2006), the ECHR found the following acts to be a violation: prolonged confinement in an isolation cell without any opportunity for communication, combined with exposure to artificial light for an extended period of time, absence of clothes and blankets.

An analysis of other decisions of the ECHR allows stating that the committee usually establishes a violation of the right of prisoners to humane treatment and respect for their human dignity when the persons:

- are kept in solitary confinement;
- are subjected to physical, psychological and verbal attacks by prison staff or inmates;
- face a refusal to provide the necessary medical (including mental health) care and dental care;
- are in unsanitary conditions, without water, food, proper living conditions;
- are exposed to long periods of isolation or overcrowding;
- are undernourished, hold on without sufficient natural light;
- are not provided with a bed, the possibility of physical exercise;
- cannot realise opportunities for obtaining education, do not have access to information and documents.

That is, the violation of the named right is determined through a very wide and heterogeneous range of actions or inaction, which indicates the volume of the content of the law itself. In addition, its definition depends on the industry in which this right is interpreted. For example, commenting on the norms of the International Covenant on Economic, Social and Cultural Rights⁹, the Committee on Economic, Social and Cultural Rights (CESCR) notes: “respect for a person and his dignity is expressed in the freedom of a person to choose the type of work, and also indicates the importance of work for personal development and for his social and economic integration.” The Norwegian court, considering the appeal of the convicted Anders Breivik, concluded that the violation of his right to humane treatment

1. Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.

2. *Ibidem*, 1950.

3. *Ibidem*, 1950.

4. *Ibidem*, 1950.

5. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. (1987, November). Retrieved from <https://rm.coe.int/16806dbaa3>.

6. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

7. Communication of the Human Rights Committee No. 1020/2001 “Carlos Cabal and Marco Pasini Bertran v. Australia. (2003, August). Retrieved from http://www.worldcourts.com/hrc/eng/decisions/2003.08.07_Cabal_v_Australia.htm.

8. Communication of the Human Rights Committee No. 1184/2003 “Corey Brough v. Australia”. (2006, March). Retrieved from <https://archive.crin.org/en/library/legal-database/corey-brough-v-australia.html>.

9. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

and respect for human dignity was expressed in keeping him in isolation and banning the publication of books. In China, an example of a humanistic approach and respect for human rights is the granting of permission to say goodbye to relatives of those sentenced to death before the execution of this punishment.

As a result, all this becomes the basis for the assertion that international experts usually interpret in broader terms the content of the right of convicts to imprisonment to be humanely treated and respect their human dignity, while humanism and respect are perceived as integral and paired categories. In connection with the latter circumstance, foreign literature does not always talk about humanism and respect in isolation: referring to the necessity to ensure the observance of the prisoners' right to respect for human dignity, at the same time it means that such behaviour is humane. That is, while ensuring respect for human dignity, the right of the convicted person to a humane attitude is also implemented.

Experts note that prison procedures that depersonalise or humiliate can also infringe on the human dignity of prisoners, such as inconvenient prison uniforms. For example, in Texas and Rwanda, male prisoners were forced to wear pink prison uniforms, deliberately humiliating them. Mandating female prisoners to wear jumpsuit as prison uniforms can have the same effect as it forces them to undress when using the toilet. Some countries use dubious procedures that are not justified for security reasons, such as forcing prisoners to march and singing patriotic songs or requiring them to walk in a certain way. The right to dignity also includes the application of fair and equitable non-discriminatory rules and procedures and the promotion of respectful relations between staff and prisoners. Attitude towards a person, behaviour with this person, disclosure of information about him to society or abusive treatment of him – all this can infringe on human dignity, given the fact what exactly this particular person perceives as humiliating or shameful.

3. RESULTS AND DISCUSSION

The responsibility of the state goes beyond preventing active harassment of prisoners: it includes refraining from humiliating procedures that infringe on human dignity and do not serve security or any other purpose, and ensuring that the suffering of prisoners in places of detention does not exceed the level inherent in deprivation of liberty. Human dignity and security in prisons are interdependent. Prisons and human dignity are not just compatible, they must be compatible.

Security and control are best ensured in an environment where there is respect for the inherent human

dignity of prisoners. As the International Centre for Prison Research has pointed out, it is completely wrong to assume that humane and fair treatment of prisoners will lead to reduced security or control. In fact, fairness and legality are not only decisive factors for well-being in prisons, but also have an obvious impact on the observance of the rule of law in the process of executing criminal sentences. If prisoners' rights are respected, they are more likely to recognise the legitimacy of the authority of prison staff, which in turn reduces the risk of tensions and unrest. Research from UK prisons shows that prisoners consider order and safety, along with fairness, respect and humanity, to be the most important aspects of prison life. At the same time, some types of practices and security measures can be intrusive and prohibitive in nature, limiting the rights of prisoners. Security concerns can be overestimated to the detriment of the human dignity of prisoners; the measures taken to ensure safety may be inappropriate or even excessive; the way they are implemented can be harsh and overwhelming / or applied systematically, regardless of whether a person is a real danger or not. The challenge facing the prison administration is to simultaneously ensure the safety and protection of the human rights and dignity of persons deprived of their liberty. There should be a methodology, for example in the format of a code of conduct, to authoritatively guide prison administration and staff in implementing security measures. In addition, planning should be undertaken to establish appropriate procedures and staff behaviour in different situations, and appropriate training should be provided.

American researchers also agree that all human rights are based on the inherent dignity of human beings, which was confirmed in 1948 by the adoption of the Universal Declaration of Human Rights¹. Recognising the temptation to disregard the human dignity of prisoners, Article 10 of the ICCPR², to which the United States acceded as a party, requires prison officials to, among other things, create conditions for providing mental health treatment for prisoners with mental health problems, as well as humane conditions. The inability to provide adequate mental health services in prison cannot be attributed to a lack of funds to staff these institutions with an adequate supply of qualified personnel or to meet mental health needs. The Human Rights Committee has confirmed that article 10 of the ICCPR³, which provides for the right to humane treatment, cannot be dependent on material resources. At the same time, respect for the human dignity of prisoners requires that the prison be managed in a manner that will increase the likelihood of their successful return to society upon release.

Article 10 of the ICCPR⁴ attaches correction and social rehabilitation to the essential goal of respect for

1. Universal Declaration of Human Rights. (1948, December). Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

2. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

3. *Ibidem*, 1966.

4. *Ibidem*, 1966.

dignity and humane treatment. Thus, the aforementioned norm creates a positive target for correction so that the punishment is something more than an ordinary punishment. As stated in the UN-approved Standard Minimum Rules for the Treatment of Prisoners¹ (SMR), the purpose and justification of a sentence of imprisonment or deprivation of liberty in general is ultimately to protect society and prevent crimes that threaten it. This goal can be achieved only when, after serving a sentence and returning to normal life in society, the offender is not only ready, but also able to obey the law and ensure his existence. Thus, rehabilitation is the ultimate goal of deprivation of liberty, which is simultaneously included in the content and rights of convicts to a humane attitude and respect for human dignity.

Psychiatric treatment also plays an important role in the rehabilitation of prisoners who have or are at risk of developing mental disorders. As stated in the named Rules², the institution's medical services should aim to identify and treat any physical or mental illness or defect that may interfere with the prisoner's rehabilitation. All necessary medical, surgical and mental health services must be provided for this purpose. The HES also establishes different regimens suitable for each person, depending on the severity of the mental illness.

A human rights-based approach to mental health treatment for prisoners further recognises the importance of continuity of care to ensure that individuals have access to treatment upon release. Standard Minimum Rules for the Treatment of Prisoners³ stipulate that medical institutions must identify all physical and mental illnesses or defects that could interfere with the re-education of a prisoner, and take care of their cure. To do this, institutions must be able to provide the necessary medical, surgical and mental health services.

In the foreign literature of a number of countries, opposite opinions are expressed, according to which humanism refers to the negative phenomena of mass culture. For example, they point to the extreme harmfulness of humanism precisely in the legal plane on the grounds that in this way a law-abiding citizen is at a disadvantage in relation to a criminal, whom he must treat humanely and with respect for his human dignity. In the opinion of the named representative of religious circles, humanism is a technology of weakening a people for its most unspent destruction or comfortable parasitism on it. The author points out: "Humanists cry for leniency to rapists, murderers, maniacs, believing that they need to be treated, weaving Biblical dogmas, interpreting them in their own way, call for mercy and compassion, as well as forgiveness of criminals and enemies."

However, it seems that such a position only underlines the prevailing considerations in certain societies regarding the relatively low value of each individual, and indicates the correctness of progressive, humane European approaches to this problem. This is especially emphasised by the general situation with human rights in countries that are inclined towards the totalitarian path of their development. In addition, the above approach has not been reflected in any regulatory or strategic document.

Thus, international documents establish that humane treatment and respect for human dignity is one of the fundamental rights of convicts and plays a decisive role in working with them and ensuring their rehabilitation. That is why it is quite natural that this approach is typical for many European countries. For example, German practice shows that the establishment of the right to human dignity as a legal concept can lead to the right to rehabilitation. This country vigorously proclaims the importance of dignity, reinforcing this approach at the level of Art. 1 of the Basic Law⁴: human dignity is inviolable. To respect and protect it is the duty of all government authorities. The German people, therefore, recognise the inviolable and inalienable human rights as the basis of any community, peace and justice in the world. The fact that it is in the first articles of the German Constitution⁵ that the emphasis is placed on dignity, according to scientists, is evidence of its fundamental place, at least in theory, in modern German law. The Constitution is also important for the rights of convicts, although it does not directly distinguish them.

The German judiciary has emphasised in its practice the importance of preserving the dignity of convicts. In its well-known decision on life imprisonment, the Federal Constitutional Court noted that if a person is convicted to this punishment, he will seek to escape, because otherwise her human dignity will suffer. Having reached this conclusion, the Court has noted the historical development of punishments that have become more human and individual. The decision also noted that correctional institutions are obliged, even in the case of a sentence of life imprisonment, to assist convicts in maintaining all abilities and readiness to perform their usual functions inherent in human beings, to compensate for the destructive consequences caused by the loss of freedom, and to eliminate all changes that deform a person. It is this approach that serves as the basis for creating conditions for rehabilitation while working with a convict, ensuring the prevention of degradation and respect for the dignity of convicts.

To further substantiate the idea of the necessity to ensure respect for the dignity of convicts by creating

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). (2015, December). Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-book.pdf.

2. *Ibidem*, 2015.

3. *Ibidem*, 2015.

4. Basic Law for the Federal Republic of Germany. (1949, May). Retrieved from <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

5. *Ibidem*, 1949.

conditions for their rehabilitation, the Lebach case is usually cited in Germany, the essence of which was that a television station tried to use the external image of a convict in combination with a film about a robbery, and against this background, present a report on the clash of the rights of convicts to respect for dignity and rehabilitation with the rights of free citizens. Here, the Constitutional Court noted that prisoners really have the right to rehabilitation, which is based on the constitutional right to human dignity, personality development and certainty. Indeed, the Constitution¹ proclaims that every person has such a right, and it is limited only by the requirement not to violate the rights of other citizens, constitutional or moral laws. Moreover, the Court stated that as bearers of the fundamental right to human dignity convicted persons should be able to re-establish themselves in society after serving their sentence. This case is an illustration of the penitentiary theory of “socialisation” existing in Germany, according to which society should have the goal of re-socialisation of all convicts in accordance with the norms of the Constitution, and the state and the community should help such persons in their self-development and rehabilitation, because exactly on this the right to respect for human dignity is based.

In general, the interpretation of constitutional provisions on human dignity takes place in more than 50 decisions of the Federal Constitutional Court of Germany (FCC), which cover a wide range of issues: from a general understanding of the philosophical and legal nature of this phenomenon to specific situations related to the issue of dignity (for example, the collection of statistical information, job loss, deprivation or restriction of property). However, most often the need to interpret the first paragraph of Article 1 of the Basic Law of the Federal Republic of Germany² is associated with ensuring the human right to dignity in the process of carrying out criminal proceedings. The FCC considers the dignity of an individual as the objective value of a person who cannot be lost: a criminal cannot be turned into a simple object of combating crime with violation of his socialised his right to dignity and respect, which is protected by the Constitution³. In the development of this legal position, the FCC’s view on coercion of a person to self-incrimination is more specific: compulsion to self-incrimination affects the dignity of a person, whose confessions are used against him. Coercion to create, on account of one’s own testimony, the prerequisites for a criminal judicial assessment or the establishment of retaliatory sanctions would also be unacceptable and violating human dignity.

The basis for the interpretation of this phenomenon is the philosophical and legal views of I. Kant regarding the nature of the human as a transcendental subject. Considering natural freedom as the only original right belonging to every person, taking into account his human nature, and arguing

that natural law comes from the mind and is limited by the mind, he returned to understanding this concept as “value-in-itself.” Such views of the German philosopher were embodied not only in the constitutional proceedings of the FCC, they became the deep basis for international legal acts in the field of human rights protection and the recognition of human dignity as one of the fundamental human values. It can be argued that this understanding of human dignity is universal, since similar views are contained in the decisions of the courts of states belonging to the Anglo-Saxon system of law.

Along with the experience of advanced European countries, the situation in other developed countries such as Canada is interesting. When deciding disputes over human dignity, the Supreme Court of Canada interprets the provisions of the 1982 Canadian Charter of Rights and Freedoms⁴. In the case law of this institution, two competing approaches to understanding the nature of dignity have developed: as freedom and as coercion. The first approach is very close to the modern view of the nature of human rights and corresponds to the Kantian concept of human dignity, in particular, as a value and moral duty. In accordance with this approach, dignity is a fundamental, inalienable value and is perceived as an objective norm. It finds its expression in almost every right and freedom guaranteed by the said charter. In addition, it is often viewed in a systemic connection with such categories as freedom and equality, defining dignity as a certain personal autonomy of a person. According to the second approach (dignity as coercion), this phenomenon is associated with the rules of civilised human life, that is, those behavioural norms that are established and perceived in society. In the same context, dignity is understood as a reputation (the Ukrainian analogue is “honour”), which is defined as an intrinsic inalienable value that has external manifestations. According to the second approach, an infringement on human dignity can take place, regardless of his wishes, in such areas as trafficking in human organs, prostitution, commercial surrogacy, and so on. Using the first point of view at this phenomenon, the Supreme Court of Canada is guided by the understanding of dignity as an inalienable value of a person, a moral manifestation of human autonomy, a fundamental right, which is fundamental to natural human rights. According to another, competing with the first view, the phenomenon of human dignity is already understood in a narrower sense – everything is considered unworthy that does not correspond to certain rules or denigrates the dignity of a particular person.

The judicial law-making of the Constitutional Court of the Republic of South Africa in this area is more unambiguous. It recognises human dignity as the basic, fundamental value of the constitutional order, thanks to

1. Basic Law for the Federal Republic of Germany. (1949, May). Retrieved from <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

2. *Ibidem*, 1949.

3. *Ibidem*, 1949.

4. The Canadian Charter of Rights and Freedoms. (1982, April). Retrieved from <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/>.

which the rule of law and constitutionalism in South Africa develop. According to the legal position of the Constitutional Court of South Africa, recognition of human dignity is a confirmation of the intrinsic value of a human being, which has the right to be treated with dignity, based on respect and importance. The essence of this concept is also revealed through the linkage to the categories of freedom and equality, more precisely – equal access to certain social benefits. In general, the South African Constitutional Court analyses the observance (preservation) of human dignity by disclosing the legal content of such naturalistic needs’ as the right to food, drinking water, clothing, housing, medical care and the like. Thus, by its nature, this concept is recognised as the natural significance of a person and at the same time as a requirement for the state to ensure a decent standard of living.

The recognition of respect for the dignity (or simply – for the dignity) of a prisoner and the humanity in the treatment is also approached in a similar way in other countries, in particular Norway. So, the activity of the penal service in this country is based on five basic principles:

- 1) the purpose of punishment is “in the word of the law”, in changing a convicted person;
- 2) humanity;
- 3) legality;
- 4) equality before the law;
- 5) has served a sentence – paid off with society.

The principle of normalising stay in prison is also respected, that is, bringing conditions of stay closer to normal life. At the same time, the government promotes and implements the principle of guaranteeing a return to normal life in every possible way and recognises the existence of a close connection between the views on the causes of a crime and the attitude towards a prisoner. The prison administration strives to ensure that security measures do not restrict social work and humane treatment of prisoners.

In Switzerland, the procedure for the execution of sentences is based on two basic constitutional principles: respect for human dignity and ensuring the rights of offenders, since these can be significantly limited due to the need to stay in prison. In these basic principles, criminal legislation provides general principles for the execution of sentences: prevention of the commission of reoffending after release; organising, if possible, normal conditions for prisoners; support of persons who are released from places of deprivation of liberty in overcoming the consequences of imprisonment; ensuring adequate conditions of imprisonment; taking the necessary measures to prevent the commission of crimes during their stay in places of deprivation of liberty. The unwritten, but commonly used principle in working with convicts is the principle: “It is not our friends who are condemned, but not our enemies either.” It is with this that both the education of the personnel and the first days of work in prisons and other institutions for the execution of sentences begin. The main thing is to treat convicts with respect for their human dignity. That is why people who have a negative attitude towards criminals, want to rule over others, are prone to manifestations of anger and

the like are not accepted for work in places of deprivation of liberty (this is determined with the help of relevant specialists and various surveys). Choleric people, aggressive, conflicted personalities, imitators of various dogmas, convinced exclusively of their own righteousness, and the like are not hired in any way. From the same motives, people who already have a certain life experience (at the age of 28-30) are recruited. Moreover, preference is given to those who have a family and children.

That is, despite the somewhat distinctive approaches in the definitions, the activities of the systems for the execution of criminal sentences in foreign countries are aimed at maximizing the observance of the right of convicts to a humane attitude and respect for their human dignity. As for the definitions in relation to them, there are constant discussions in scientific circles. At the same time, one of the main problems is the dispute about the possibility of classifying humanism and respect for human dignity as the category of prisoners’ rights.

For example, it is mentioned that the idea of dignity is undoubtedly closely related to rights, but no specific “right to dignity” is specified in either international or national (United Kingdom) documents. Therefore, it is proposed to consider dignity as a fundamental category, as a “source of rights”, noting at the same time that dignity is not a substantive right in itself, because it is much more fundamental than all other rights based on it. Without entering into a discussion, the authors note that in international instruments, indeed, the right to dignity, as such, does not exist. Standards indicate respect for human dignity, that is, they imply certain actions from the state and other persons. And it is the respect for dignity that should act as the fundamental right of a convicted person, for it is characterised by material characteristics. At the same time, in order to ensure an appropriate mechanism for its implementation, it is advisable to carry out work to determine the content of the right to respect for dignity, at least in general terms.

CONCLUSIONS

As a result, completing the analysis of international approaches to the problem of the exercise of rights by convicts, it can be asserted that:

1. International standards recognise the right of convicts to imprisonment to humane treatment and respect for their human dignity as a fundamental right, which creates the basis for the implementation of all other rights, primarily the right to rehabilitation (social adaptation) after serving a sentence.

2. Humanism and respect for human dignity, despite certain scientific discussions, are understood in international standards and practice as inalienable categories that condition each other.

3. International standards do not provide a clear list of the content of the right of convicts to imprisonment to a humane attitude and respect for their human dignity, which allows constantly expanding its interpretation in the creation of judicial practice and the execution and serving of a sentence of imprisonment.

4. Likewise, the practice of international judicial and convention bodies does not establish clear limits for the implementation of this right, limiting itself solely to indicating actions that may violate it, and from which states should introduce certain guarantees. At the same time, the main components of the right of convicts to a humane attitude and respect for human dignity include: conditions of detention, communication, behaviour, means of ensuring the regime, mechanisms for the implementation of other rights, medical assistance, the creation of opportunities for rehabilitation after release and other circumstances arising when serving a sentence in form of imprisonment.

REFERENCES

- [1] Arsenault, E.G., & Chiang, C. (2020). The U.S. department of defense and its torture program. *Armed Forces & Society*, 46(2), 191-213.
- [2] Barnes, J. (2019). Force-feeding and the legacy of torture in the 'war on terror.' *International Journal of Human Rights*, 23(7), 1074-1097.
- [3] May, J.P., Joseph, P., Pape, J.W., & Binswanger, I.A. (2010). Health care for prisoners in Haiti. *Annals of Internal Medicine*, 153(6), 407-410.
- [4] Petrovec, D., & Muršič, M. (2011). Science fiction or reality: Opening prison institutions (the Slovenian penological heritage). *Prison Journal*, 91(4), 425-447.
- [5] Wong, S.C.P., Vander Veen, S., Leis, T.A., Parrish, H., Gu, D., Liber, E.U., & Middleton, H.L. (2005). Reintegrating seriously violent and personality-disordered offenders from a supermaximum security institution into the general offender population. *International Journal of Offender Therapy and Comparative Criminology*, 49(4), 362-375.
- [6] French, S.A., & Gendreau, P. (2006). Reducing prison misconducts: What works! *Criminal Justice and Behavior*, 33(2), 185-218.
- [7] Terwiel, A. (2018). What is the problem with high prison temperatures? From the threat to health to the right to comfort. *New Political Science*, 40(1), 70-83.
- [8] Miklósi, M. (2020). The importance of social organizations in law enforcement for promoting the reintegration of inmates. *Journal of Psychological and Educational Research*, 28(1), 125-138.
- [9] Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46(1), 441-504.
- [10] Beijersbergen, K.A., Dirkzwager, A.J.E., Molleman, T., Van Der Laan, P.H., & Nieuwebeerta, P. (2015). Procedural justice in prison: The importance of staff characteristics. *International Journal of Offender Therapy and Comparative Criminology*, 59(4), 337-358.
- [11] Stibbe, M. (2006). The internment of civilians by belligerent states during the first world war and the response of the International Committee of the Red Cross. *Journal of Contemporary History*, 41(1), 5-19.
- [12] Ismail, N. (2019). Contextualising the pervasive impact of macroeconomic austerity on prison health in England: A qualitative study among international policymakers. *BMC Public Health*, 19(1), article number 1043.
- [13] Mulgrew, R. (2013). *Towards the development of the international penal system*. Cambridge: Cambridge University Press.
- [14] Byock, I. (2002). Dying well in corrections: Why should we care? *Journal of Correctional Health Care*, 9(2), 107-117.
- [15] Richmond, S. (2016). Transferring responsibility? The influence and interpretation of international law in Australia's approach to Afghan detainees. *Asia Pacific Journal on Human Rights and the Law*, 17(2), 240-256.
- [16] Walker, N. (1991). Dangerous mistakes. *British Journal of Psychiatry*, 158(6), 752-757.
- [17] Gillispie, J.M. (2008). *Andersonvilles of the North: The myths and realities of Northern treatment of civil war confederate prisoners*. Denton: University of North Texas Press.
- [18] Harris, A., & Stanley, E. (2018). Exacerbating risks and diminishing rights for 'at-risk' prisoners. *Criminology & Criminal Justice*, 18(5), 515-532.
- [19] Linton, S. (2017). Towards a global understanding of the humane treatment of captured enemy fighters. *Frontiers of Law in China*, 12(2), 217-277.

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