

## PROBLEM OF INTOLERANCE TOWARDS CONVICTS AND WAYS OF SOLUTIONS

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**Abstract.** The article analyzes the problem of intolerance towards convicted persons, in particular, the concept, the meaningful signs and possible approaches of its minimization. The research is carried out in a comparative mode and based upon the norms of the current legislation of Ukraine and Poland. The researchers dwell upon key aspects of social adaptation of former convicts. The emphasis is made on the experience of the European Union in effective using "probation" as a way to minimize the intolerance towards former prisoners in society.

**Keywords:** crime, convicts, probation, criminal code, socialization, adaptation.

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### Introduction

The idea of criminal punishment being not only intimidation, but also a means of restorative justice and offsetting caused damage, is far from being new. At the beginning of the nineteenth century, the German criminal law school founded the theory of alleviation of harm, which included, along with others, tolerance towards the convicted person. Undoubtedly, the problem of intolerance towards convicts is acute in Ukraine. The transformations in society that have taken place in recent decades have led to an increase in its criminalization. Individuals, living in poverty, resort to unlawful actions, justifying their inability to live from hand to mouth under the conditions created for them by the state. As a result, the number of people sentenced to long term of imprisonment has been increasing. It should be borne in mind that the situation of the people who have served the sentence is critically difficult, since during the term of imprisonment, they daily obey the strict rules of the prison regime, virtually lost the ability to make independent decisions and take care of themselves. As a result, former convicts are not always psychologically ready to earn an honest livelihood. Practice shows that the process of serving a sentence involves numerous negative consequences for personality of the convict. On the one hand, the perpetrators of a crime are obliged to endure certain restrictions and prohibitions according to the court sentence and at the same time they are deprived of the opportunity to commit new unlawful actions. On the other hand, it affects negatively the moral and psychological state of the

person causing increased aggressiveness, a risk of mental illness, etc. We should not forget that the convict also has the nature of a free, independent, civilized person, endowed with an appropriate psyche and consciousness, and as a human being he is the most mysterious object of legal influence.

### **The legal nature of the expressions of intolerance towards the convicts**

Intolerance towards convicts is a dangerous phenomenon. This pathology became especially intensive after 1989, when we shifted from the so-called socialist economy to a free-market economy. The knowledge of the mistakes of the penitentiary policy of the Polish state is not in use. Article 42 (1) (3) of the Constitution of the Republic of Poland reads: "Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court." This article clearly states that a convict is the person in the case of whom a sentence of the court of second instance has been upheld. It is a significant question – what means do we use to evaluate a person, or else, who a person really is? The late lamented Józef Tischner used to say that "man, who has a strong spirit, can always embark on a path of better life, you can prove that you can defeat yourself as long as you have the spirit, the spirit which liberates and heals."

According to Voltaire, by no means can human law be based on anything other than natural law, and a great and common principle of both laws all over the world is: "Do not unto others what you would that they do not unto you." Therefore, "the supposed right of intolerance is absurd and barbaric. It is the right of the tiger; nay, it is far worse, for tigers do but tear in order to have food, while we rend each other for paragraphs." (*Voltaire, 1956*). The 18th century, known as "the Century of Light", and the French Revolution, which came with it, cautions us against savagery, and the acceptance of natural law is still current.

Therefore, in Poland, the rehabilitation of convicted persons is not conducted appropriately. These people are excluded from society deliberately. Nowadays, the way of thinking of an average Pole comes down to a dangerous premature judgement: it does not matter whether someone has been convicted in a final and binding sentence or not. They have already been judged and excluded from the nation. An example of that is the case of Roman Zajdel, an engineer and entrepreneur from Silesia (*European Court of Human Rights. Decision no. 33931/06, 2009*), who had been temporarily arrested for five years until the European Court of Human Rights in Strasbourg issued a statement in which it ascertained a breach of Article 5 of the European Convention on Human Rights. Why am I putting forward this example? This is a case of inflicting multiple punishment for acts not committed:

- temporary imprisonment for 5 years
- loss of trust from close relatives
- collapse of the company
- execution of a judgement of conviction
- loss of physical and mental health
- entry in the register of convicts, which is another punishment as it makes it impossible for the convict to find employment, among other things.

The case briefly described above calls attention to the state's wrongful attitude towards convicts, which involves depriving them of a fair trial and limiting their human rights. In order to oppose this lawlessness, we established the Legal and Medical Clinics, which aim at ensuring the wellbeing of every person, taking into account his or her legal situation, mental condition, and health.

According to the opinion of the Polish scientist Prof. Andrzej Baładynowicz (*Baładynowicz, 1996*), the basic needs of a person reintroduced to freedom within the probationary system include the following issues:

- the need to be treated as an individual human being;
- the need to be heard;
- the need to be accepted;
- the need to have a confidential conversation;
- the need to have one's problems understood by a probation officer (the need to be understood);
- the need to receive help in solving problems.

Analyzing the actual state of resocialization of convicts, one can conclude that both in Ukraine and in Poland the problems that arise after the release of such people are ignored. Despite the seemingly sufficient legal settlement of the multidisciplinary issues of this process, in particular, the Law of Ukraine "On social adaptation of persons, who are serving or have served their sentence in the form of liberty restraint or imprisonment for a certain period" and the Order of the Cabinet of Ministers of Ukraine "Approval of the Concept of Social Adaptation of Persons Serving Punishment in Form of Certain Term of Imprisonment," these acts have not received their implementation in real life. It is proved first and foremost by rate of repeated offences among former prisoners. The fact is that in Ukraine the responsibility for resocialisation relies only on people who have been punished, but ignores such an important issue as society. Thus, the social world does not always react and perceive positively former convicts, who are often inclined to new misdeeds. Former convicts do not receive any help from society, on the contrary, they are discriminated, abused and harassed. In our opinion, society in Ukraine is not ready yet to accept former convicts as people who are able to coexist normally in everyday life. It generates intolerance to convicted persons. This thesis can be confirmed by the results of a survey carried out among the students of the Faculty of Law of the Kryvy Rih Institute of Economics, KNEU named after Vadim Hetman, as well as among ordinary citizens of Ukraine. Thus, 49 respondents out of 100 indicated that they would not employ a person who had been serving a sentence even if they were successfully interviewed.

Social adaptation of former convicts is not only a task of psychologists, social workers and teachers, but also a general social issue. Solving the problems associated with this difficult stage in the life of the discharged, is to be carried out at the state level. It requires a clear definition of the priorities, principles and organizational issues of the state's policy regarding the persons who have been punished, the legislative consolidation of the system of political and legal, socio-economic and organizational conditions for the provision of social assistance for this category of citizens.

The need to be treated as an individual human being follows from the uniqueness of the human being. Each person is different from other people in physical, emotional, or intellectual terms, or in terms of their imagination (*Baładynowicz, 1996*). Each convicted person has experienced specific relationships with other people with all the implications resulting from their type of personality, sensitivity, and the way of reacting to life circumstances.

Human beings are unique in that that no one has ever experienced the exact same configuration of life events. Although some problems are common to specific groups and social circles, each person experiences and responds to them in different ways. In this sense each human being is the only one of their kind (*Baładynowicz, 1996*).

Nevertheless, the Polish society behaves towards convicted people as if it were to immediately catch leprosy. It does not understand the fact that a person released from a penitentiary or unconfined feels isolated and lost in the surrounding social reality. In the Polish legal system, the function of the probate officer is a fiction which does not have anything in common with rehabilitation. As emphasised by A. Baładynowicz, "accepting a person leaving a penitentiary facility does not mean ignoring or forgiving their wrong behaviour. It means understanding the convict's feelings and the reality that shapes them..." (*Baładynowicz, 1996*).

Obviously, confidentiality is very important. However, in the Polish reality, mass media immediately breach this principle and, for example, despite the subsequent acquittal, condemn people to social non-existence. This was the case with Andrzej Lepper; his sexual abuse case was remanded back for a second hearing. And despite that, the pressure was becoming more intense. Today we are convinced that the unjustified climate of intolerance of convicted people on the part of mass media destroyed the man, leading him to premature death. Another controversial issue is the case of Archbishop Wielgus, regarding his so-called collaboration with the Polish Security Service (SB). Commenting on this example, we can say, citing Cardinal Glemp, "What kind of court is that?" We are now getting to the definition of intolerance towards convicts as a negative, unlawful phenomenon which wrongs human health and dignity. A. Baładynowicz in his works draws special attention to the axiological principles and the rights of an individual to speak freely, pursue their own aims and life intentions as well as humanitarian ideas which have constituted the basis for the individualisation of interaction within guardianship.

Dynamics of the proportion of recidivism in Ukraine in the overall structure shows negative trends and absolute increase with percentage as much as 7.3%, indicating the extent to which the recidivism has spread, its rootedness and the lack of effective preventive measures (*Statistical data of the Department of Information and Analytical Support of the Ministry of Internal Affairs of Ukraine, 2018*).

The following statistics confirmed not only the failure of the current system to affect the correction efficiently but rather, in numerous cases, this system created the conditions for greater moral and criminal deformation of the convict. Therefore, with the need to reform the penal system of the country, which led to the adoption of the Law of Ukraine "On probation" from 05.02.2015 № 160-VIII. The term "probation" in this Act is defined as a system of supervision and social-pedagogic activities over offender, ordered by a Court and in accordance to the legislation; enforcement of certain types of a criminal penalty, not concerned the deprivation of liberty and to provide the Court with information characterizing the offender. The gained information is taken into account when making procedural decisions (*On probation: Law on Amendments to Annex 2 to the Statute of the Internal Service of the Armed Forces of Ukraine, No. 2771, 2015*). While defining the essence of the concept of "probation", it should be emphasized that this is "a method of working with persons who committed a criminal offense." Probation is not a form of punishment, an alternative to imprisonment, or a special government body. The Law of Ukraine "On Probation" differentiates probation into pre-trial, supervision and penitentiary in Article 8. The task of penitentiary probation is to prepare persons who are serving their penalties of deprivation of liberty or imprisonment for certain period until the discharging for the purpose of work and domestic adaptation of condemned persons in accordance to theirs home places. The probation body, together with state and local self-government bodies, assists prisoners preparing for jail release in defining a home place after jail release; placing into a specialized

establishments for uncharged persons; hospitalization to the medical establishments for those who need a medical assistance; job placement for persons capable of working.

The results of the survey revealed the unwillingness of the society to accept persons who served sentences in the form of imprisonment, because of contempt for the work of the "old" penitentiary system against the background of statistics of repeated crimes, so now it is extremely important for the state to help these people to return to normal life in the context of finding a house place and work, in order to fully restore the communication that have been inflicted, and help such persons feel the feedback and their positive role in life of the society.

In our opinion, implementation of the probation institute in practice gives opportunity to achieve a significant improvement in the conditions of detention of convicted persons, to improve the level of organization of social, educational and psychological work, to increase the efficiency of activities and the level of professional training of personnel of penitentiary bodies and institutions. For each person serving a sentence in the form of deprivation of liberty or imprisonment for a specified period, it is ensured that a probation officer who prepares prisoners for release, assists in a job and house place searching for them. This will provide the best social support for the discharged, since such assistance will be provided by the state on behalf of civil servants, not charitable or public organizations, whose proposals and decisions are only supportive and recommendatory ones.

The Polish society places little confidence in judges and public prosecutors. They are thought of as communicating vessels. They aim at improving the statistics instead of acting reliably in line with objective truth. In Polish criminal trials, it happens so that an indictment is a plagiarised sentence to be passed later and the trial itself is a fiction. The fact should be emphasised that we do have a decent code of criminal proceedings. But we do not use the directive on the minimisation of punishment following from judicial decisions. The significant issue of the accused person's mental health is not taken into account as much as it should be. And this is where intolerance is born and where a sentence is decided on in advance. It is worth referring to prof. Jerzy Zajadła, who often emphasises the insufficient significance of the philosophy of law (*Szyszkowskiej, Zajadło, 2009*). A certain inconsistency in the Polish legislator can be noticed. In the case of judges of administrative courts a solution emphasising the specific nature of judicial control over the legality of administrative acts has been adopted. A judge of an administrative court should, under Article 6 (1) (6) of the Act on the Administrative Court System, be a person who "is distinguished by a high level of expertise in public administration and administrative law as well as other domains of law related to the functioning of public administration authorities (*Szyszkowskiej, Zajadło, 2009*).

However, as for the judges of the Constitutional Tribunal, we decided not to highlight the character of the Constitutional Court and referred to the same criteria which are applied to either a judge of the Supreme Administrative Court or a judge of the Supreme Court. In the latter case, in accordance with Part 1 of Article (4) of the Act on the Supreme Court of Ukraine, it means a person who "is distinguished by a high level of legal expertise" (and with reference to judges of the Constitutional Tribunal, under Article 194 (1) of the Constitution of the Republic of Poland, "is distinguished by legal expertise"). By literally interpreting the provisions, one could come to a conclusion that judicial control over the constitutionality of law does not require any special legal knowledge or qualifications except for the level of legal knowledge and qualifications applied to judges of the Supreme Administrative Court and the Supreme Court; therefore, in itself, it does not demonstrate any special character in terms of applying and construing the law (*Zajadło, 2009*). One can obviously justify this with the need to know the whole legal system but, in fact, it is a euphemism which does not explain why the

legislator decided to emphasise the special character of the administrative judiciary and refrained from such a solution in the case of the Constitutional Court. In order to determine the philosophical and legal profile of a constitutional judge, we would like to suggest adopting the same methodology which John Rawls (*Rawls, 1994*) used in his theory of justice. This is primarily about dropping the notorious “veil of ignorance.” In this case it means: 1) ignoring the real creation models of a constitutional court in the constitutional solutions of other countries and what the actual practise as regards that creation is; 2) ignoring the mode of proposing candidates and their qualifications and the mode of appointing constitutional judges in Poland. The only preliminary assumption in this methodology which can be made beyond the “veil of ignorance” is the *prima facie* knowledge on issues expressed in the following questions: “What is the constitution?”, “What is judiciary control over the constitutionality of law?”, “What is an interpretation of the constitution”? (*Barber, Flemming, 2007*). In his books, A. Zajadło stresses the importance of the philosophy of law in the thought processes taking place in the mind of a judge at work. This is extremely important as it aims at assisting judges in their decision making processes. But will anyone notice and put it into practice at last?

In Ukraine, in the same way as in Poland, a number of years have been taken to reform the criminal-executive system, but it should be understood that this is a rather complicated process that takes a lot of time and effort; therefore, one should turn to the positive experience of other states in this area. In international crime-fighting practice it has long been recognized that punishment in the form of imprisonment should be used as a last resort to dangerous offenders, since isolation from society often contributes to the destruction of the individual, the loss of socially useful ties, the development of mental disorders.

The process of probation development took place differently in different countries, but the common feature for every state is the implementation of supervision, which includes social assistance, some kind of rehabilitation (assistance) to the offender, which helps to further independent life (*Betza, 2012*).

The advantage of this service is not only humanity, but also socio-economic adoptability. Thus, due to the retaining of the former offender in a society, he has chances for successful correction, the preservation of useful social connections (creation of a family), work (the economy of the country, compensation of harm to the victims), the avoidance of negative influence of the criminal environment of other prisoners in jail (the rule of law) (*Bogatyrev, 2007*). From an economic point of view, the maintenance of probation for the state is cheaper than the cost of retaining places of deprivation of liberty (infrastructure, staff, custody costs of prisoners). The results of the conducted survey showed that a fairly significant proportion of Ukrainian citizens did not agree to increase expenditures for the maintenance of criminal-executive agencies, with some respondents arguing their position by paying fairly large taxes so it is necessary for the state to dispose them properly. Foreign experience on this issue is unambiguous: in Finland, Estonia, Sweden, as well as in Romania, the cost of organizing re-socialization per person is by ten or eleven times less than the costs per inmate. The ratio of supervising staff and convicts is almost equal to each other, and the ratio of probation staff to their wards is more than one to twenty. The figures speak for themselves.

Thanks to the success of such innovations in the European Union, probation is already considered to be not an alternative to imprisonment, but ant criminal legal measure to be applied in the first place. Imprisonment is implemented only in extreme cases, when it meets the interests of the victim's and society safety, or the resocialization of the offender (*On*

*probation: Law on Amendments to Annex 2 to the Statute of the Internal Service of the Armed Forces of Ukraine, No. 2771, 2015*). In Europe, the ratio of inmates and offenders who are under probation is usually one to three. In recent years a special form of probation has been introduced in Sweden, the so-called application for a contract. It may be appointed by the court instead of imprisonment if the offender agrees to undergo special treatment under a pre-designed detailed plan. Such a plan is prepared by the probation service, it also identifies an acceptable institution for the treatment of the convict (from alcoholism, drug addiction, mental disorders, etc.). If the court agrees with the opinion of the probation service in favor of a "contract application", the convict is sent to a medical institution (or he is treated outpatient).

Offenders who are under probation fulfill a diverse social work together with a probation officer. It helps to draw conclusions about the emotional state of the offender, the ability to communicate with others, and also to assess the extent of his preparation for independent life of a law-abiding citizen. A separate aspect is the peculiarities of the status of probation officers. In this regard, the experience of Italy, where the penitentiary reform of the probation service implementation was launched in 1975, is useful. Officers of the probation service in Italy are civil servants, and the service itself is organized on three levels: national, regional and local. It is obligatory to enter into agreements with psychologists and it is popular trend to hire *Serviziocivile*, who are young people, carrying out voluntary civil service instead of compulsory military service (*Gandini, 2012*). Such measures should help the offender return to society as its fully-fledged member, encourage understanding of all the negative effects of criminal behavior, show the possibility of avoidance committing offences in future. The rehabilitation aspect of probation deserves particular attention, since when it is used, the main goal is not punishment, but social reintegration into society.

### Conclusions and suggestions

Applying for the experience of foreign countries when improving Ukrainian legislation is a prerequisite for the future effectiveness of these norms, especially when they concern the implementation of new penalties in the national criminal law. The main issue here is to avoid extremes and not to copy the experience of other countries mechanically, because one should perceive and implement what organically intertwines in the national legal traditions and culture of the Ukrainian people (*Tkacheva, 2016*). Today, there are several reasons, why the probation service is one of the world centers of the criminal justice system. They are as follows: relatively low costs, the possibility of more effective and efficient rehabilitation of criminals, and reducing the risk of recidivism. All the above mentioned suggests a significant potential for probation in the sphere of social security, which will essentially reduce the intolerance to the convicts.

Summing up, we can say that every person living in a society has the right to an individual judgment regarding a particular problem that should not be in line with the general views. The Strategy of the probation development in Ukraine to address the issue of intolerance to the convicted persons is contained in the strategy for the reform of the judicial system, justice and related legal institutes for 2015-2020, approved by the Decree of the President of Ukraine dated May 20, 2015, No. 276 (section 11.4, section 11 of the plan for the implementation of the Strategy). We believe that such measures will promote the raising of the criminal-executive policy of the state to a qualitatively new level and ensuring the observance of the rights of citizens.

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