OBSERVANCE OF THE RULE OF LAW IN RELEASE FROM PUNISHMENT

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Abstract: *The principle of the rule of law is one of the comprehensive principles of law, which means it is in particular found in the field of criminal law. The specifics of the rule of law in this field is that it shapes the systems of principles of different criminal law institutes (in particular, the institute of criminal offence, the institute of punishment, the institute of the release from punishment). It should be admitted that the institute of the release from punishment has not been given sufficient attention in the research papers. The paper defines principles of the institute of the release from punishment based on the principle of the rule of law. The research is focused on the analysis of the observance of the rule of law in law-making and law enforcement in regards of the core elements of the rule of law within the release from punishment. The case study of law-making and court decisions of different countries demonstrated the aspects that do not ensure: the access to law of the convicted and the victim when the release from punishment is considered; legal uncertainty in formulating legal acts about parole; human rights for those on parole for life-sentenced prisoners; the rights of victims when the release from punishment with probation is applied, in case of amnesty or severe disease. The result of the research is the basic 'checklist' for law-makers and law enforcers to observe the rule of law applying the release from punishment.*

Keywords: *observance of the rule of law, human rights, release from punishment, observance of the rule of law in release from punishment, European Court's case law*

INTRODUCTION

The principle of the rule of law is admitted and applied in a lot of European states. Despite the fact that a great number of research papers define the notion of the rule of law, an extreme complexity and multi-sidedness of the notion and law in general, make it almost impossible to give a universal definition of the principle of the rule of law that could be applied to any situation.[1] Still, the Venice Commission formulated the "rule of law" based on the analysis of multiple definitions suggested by different researchers and lawyers from various law systems and states, and law cultures. According to the Venice Commission, the notion of the rule of law includes a system of accurate and understandable law regulations which imply that each person has a right for the decisions to be made on the basis of dignity, equality, reasonableness, and according to the rules of law; and a right to make an appeal for independent and unbiased courts for a fair court procedures. The core elements of the rule of law named by the Venice Commission are the following: 1) legality; 2) legal certainty; 3) prohibition of arbitrariness; 4) access to justice in independent and unbiased courts; 5) respect for human rights; 6) non-discrimination and equality in front of law.[2]

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[1] KOZUBRA, M. and other. *General Theory of Law*. Kyiv: Vait, 2015, p. 360.

[2] Rule of Law Checklist, pp. 6–7. In: *Council of Europe* [online]. [2021-11-03]. Available at: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

Lawyers may find it useful to study the Rule of Law Checklist for determining how the rule of law functions in a certain legal field.[3] The document may by useful both for law making and law enforcement, in particular for national and international experts to assess the effectiveness of legislation.

The findings of Paul Gauder,[4] Serhiy Holovaty[5] and other Ukrainian experts[6] can be used by lawyers to understand the principle of the rule of law. Ukrainian researchers study how the rule of law is implemented in the criminal law, in particular in criminal law regulation.[7]

In Ukraine, the principle of the rule of law is set forth in the Constitution of Ukraine, and in the special legislation. In particular, Article 8 of the Constitution states that the principle of the rule of law is recognized and applied.[8] Some of the elements of the rule of law are established in the Criminal Procedure Code of Ukraine. Article 8 thereof states that the criminal proceedings shall be conducted with the observance of the rule of law which recognizes human beings, their rights and freedoms to be the highest values, and determines the content and roadmap of the state policy. The principle of the rule of law in criminal proceedings is applied with the consideration of the case law of the European Court of Human Rights.[9]

In Europe, observance the rule of law and human rights and rights of citizens set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) is ensured by the European Court of Human Rights.

The Convention is a direct source of law. For instance, the Constitutional Court of Lithuania took a decision that the "European Court of Human Rights is an inseparable part of the Lithuanian legislation and has the equal force with the laws of Lithuania; the provisions of the Convention shall be effectively applied by courts, and the state shall not violate any provisions of the Convention in the national legal regulation".[10] A. Chervitsova had a point assuming that "the European Court makes judgements based on the European Convention, which is helpful for keeping the national legislation under control".[11]

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[3] Ibid., pp. 11–34.

[4] GAUDER, P. *The Rule of Law in the Real World*. Kharkov: Law, 2018.

[5] GOLOVATY, S. (English translation). *The Measure of the Rule of Law. Comment. Glossary*. Rule of Law Checklist Council of Europe, Wait, 2017.

[6] WENGER, V., ZAYATS, A., ZVEREV, E., KOZUBRA, M., MATVEEVA, Y. U., TSELYEV, A. The Measure of the Rule of Law (legal authority) at the National Level: the Practice of Ukraine (Rule of law Checklist at national level: case of Ukraine). Kyiv: Center for Research on the Rule of Law and its implementation into the national practice of Ukraine of the National University Kyiv-Mohyla Academy, 2020.

[7] MYZUKA, A. *Rule of Law Checklist: a worldview practical idea of the rule of law. Criminal law in the context of globalization: materials of conferences Odessa*. Odessa: NU Odessa Law Academy, 2018, pp. 43–45; PANOV, M. The principle of the rule of law and its implementation in criminal regulation. *Legal Gazette of Ukraine*. 2018, No. 39, pp. 6–7.

[8] Constitution of Ukraine. In: *zakon.rada.gov.ua* [online]. [2021-11-03]. Available at: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

[9] Criminal Procedure Code of Ukraine. In: *zakon.rada.gov.ua* [online]. [2021-11-03]. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

[10] CAPE, E., NAMORADZE, Z. *Effectiveness of Defence in Crimina Proceedings in Eastern European Countries (Bulgaria, Georgia, Lithuania, Moldova, Ukraine)*. Kyiv: Legal Aid Performersę Network , 2012, p. 204.

[11] CHERVIATSOVA, A. The European Court of Human Rights: Bringing Together Legal Systems. *Baltic Journal of Law & Politics*. 2012, Vol. 5, No. 1, p. 114.

Applying release from punishment is regulated by the national criminal and criminal-procedural legislation. Obviously, law-makers and judges are to follow the key elements of the rule of law in law-making and law enforcement in the release from punishment.

It is worth mentioning that the first impression from the Convention may be erroneous, as it may seem it has no provisions covering the release from punishment. The main categories of the criminal law, such as "criminal offence" (Articles 2, 3, 4, 6, 7, Article 2 of Protocol No. 7, Articles 3, 4 Article 2 of Protocol No. 7 of the Convention) and "punishment" (Articles 2, 3, 4, 7 Article 1 of Protocol No. 1, Article 1 of Protocol No. 6, Article 1 of Protocol No. 13 of the Convention) are defined in the Convention directly. To some extent, the European Court of Human Rights has a practice of applying these articles of the Convention, which is analysed in academic publications, etc.[12]

However, the "release from punishment" is not highlighted by the European Convention of Human Rights. The European Court of Human Rights has stressed that court procedures of the release from punishment are not covered by the Convention from the criminal perspective. In particular, the Court expressed the same opinion concerning the parole (A. v. Austria) (dec.)) and amnesty ((*Montcornet de Caumont v. France* (dec.)) within the criminal-procedural application of the article 6 of the Convention.[13] The European Court of Human Rights also pointed out that the measures of "punishment" and measures of "enforcement" or "applying" punishment should be differentiated stating, "if the character and aim of the law enforcement activity concern the release from punishment or a change in the parole system, such an activity is not a part of "punishment" as it is defined in the article 7".[14]

However, in its other decisions the Court stressed that "the term "imposed", used in the second sentence of Article 7 § 1, cannot be interpreted as excluding from the scope of that provision all measures introduced after the pronouncement of the sentence (Del Río Prada v. Spain [GC], § 88). <...> In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, also affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was (ibid., § 90)".[15]

So, the European Court of Human Rights considers the assessment of law-making and court decisions in terms of their compliance with the European Convention of Human Rights.

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[12] BASTIAAN VAN BOCKLE, W. *The non bis in idem principle in EU law. A conceptual and jurisprudential analysis*. Amsterdam: Ipskamp Drukkers, 2009; NINA, K., SARAH, K. Towards a More Lenient Law: Trends in Sentencing from the European Court of Human Rights. *Human Rights Brief*. 2014, No. 21, pp. 9–15; KHILIUK, S. Crime and punishment in the convention on the protection of human rights and fundamental freedoms. *Chasopis of the Academy of Law of Ukraine*. 2015, No. 8, pp. 109–125.

[13] Guide to the application of Article 6 of the European Convention on Human Rights. The right to a fair trial (criminal law aspect). *European Court of Human Rights*. 2019, p. 16, [online]. [2021-11-03]. Available at: <https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf>.

[14] Guide to the application of Article 7 of the European Convention on Human Rights. No punishment without law. *European Court of Human Rights*. 2017, pp. 9–10, [online]. [2021-11-03]. Available at: <https://www.echr.coe.int/Documents/Guide_Art_7_UKR.pdf>.

[15] Guide to the application of Article 7 of the European Convention on Human Rights. No punishment without law. *European Court of Human Rights*. 2017, p. 10, [online]. [2021-11-03]. Available at: <https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf>.

Beside the consideration of internal legislation of the states regarding the content (volume) of the punishment for criminal offence in terms of the article 7 of the Convention, attention should be paid to the assessment of the compliance of the internal legislation on the release from punishment with the human rights and freedoms of a citizen set forth in other articles of the Convention.

The above-mentioned is hard to define because of scare research in this field highlighting the category of the "release from punishment" in the Convention and the practices of the European Court of Human Rights. Ukrainian researchers of law studying the principle of the rule of law in the criminal legislation mostly do not focus on the compliance of the release from punishment as a law institute[16] with the key elements of the rule of law.[17] The same is true for the studies conducted by criminal law researchers of other countries.[18]

The findings of Ukrainian lawyers V. Antypov,[19] V. S. Buniak,[20] O. P. Horpyniuk[21] quote some decisions of the ECHR concerning certain types of the release from punishment (without interpretation).

It can be stated that the issue of the observance of the rule of law in the release from punishment has not been profoundly studied in the criminal law science.

With regard to the above-mentioned, I consider that the purpose of this research should be as follows: to define the standards of the internal legislation of any state regarding the release from punishment for it to comply with the principle of the rule of law.

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[16] The institute of law is a set of rules of law governing homogeneous social relations. The institute of law is the first (basic) level of combination of legal norms. Norms of law, institutes of law and sub-branches of law formulate a branch of law as a system (for example, criminal law, criminal procedural law, civil law). In: KOZUBRA, M. and other. *General Theory of Law. p.* 149.

[17] *Interpretation and Application of the Convention on the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights and the Courts of Ukraine.* MAZUR, S., TAGIE, S., BENITSKY, V., KOSTITSKY, V. Lugansk, 2006; SHEVCHUK, S. *Judicial Protection of Human Rights: Jurisprudence of the European Court of Human Rights in the context of Western legal tradition.* Kyiv: Abstract, 2007; KHIMYAK, Y. *Harmonization of criminal law of Ukraine with the practice of the European Court of Human Rights. (Ph.D. thesis).* Kyiv, 2011; TOKAREV, G. *Practice of criminal protection in illegal traffic in narcotic drugs, psychotropic substances and their analogues or precursors.* Kharkov: Human Rights, 2012; KULCHINSKAYA, A., FULEY, T., BARANNIK, R. *Principles of criminal proceedings in the light of the practice of the European Court of Human Rights.* Nezhin: Aspect-Polygraph, 2013; UVAROV, V. *International legal standards in the criminal process of Ukraine.* Kharkov: NikanNova, 2014; BUSHENKO, A., SAPOZHNIKOVA, O., SHINKARENKO, O. *Precedent UA – 2015.* Kyiv, 2015; SOROKA, A. *Implementation of the practice of the European Court of Human Rights in criminal law of Ukraine. (PhD thesis).* Kyiv, 2015; YAGUNOV, D. *Practice of the European Court of Human Rights (criminal procedure).* Odessa: Phoenix, 2015; DROZDOV, A., DROZDOVA, A. *Legal positions of the European Court of Human Rights: analytical review.* Kharkov: Factor, 2018.

[18] See, for example: BOWMAN, H., CHILD, T., BOHLKE, B. (eds.). *Rule of law handbook. A practitioner's guide for judge advocates.* Center for Law and Military Operations: Charlottesville, 2011; McCBRIDE, D. *European Convention on Human Rights and Criminal Procedure.* Kyiv: K.I.S., 2014.

[19] ANTIPOV, V. *Criminal Code of Ukraine in the Context of International Law and Practice of the European Court of Human Rights: legal norms, case law, scientific and practical commentary.* Kharkiv: Law, 2019, pp. 207–219.

[20] BUNYAK, V. *European Convention on Human Rights and Criminal Law: scientific and practical manual.* Kyiv: Yurinkom Inter, 2020, pp. 105, 122–133.

[21] GORPYNIUK, O. *Application of the Standards of the Convention for the Protection of Human Rights and Fundamental Freedoms in Criminal Proceedings in Ukraine: a textbook.* Lviv: LvDUVS, 2020, pp. 90, 93–94.

1. THE RULE OF LAW AS THE PRINCIPLE OF THE INSTITUTE OF THE RELEASE FROM PUNISHMENT

The principle of the rule of law, being a basic principle of common law, at the same time is a criminal law principle. It should be noted that in the Criminal Codes of Ukraine (as distinct from the Criminal Codes of Germany, France, Poland, Russia, and Moldova),[22] the principles of criminal legislation (law) have not been established as a clearly defined system.

I support the scientific thought that the criminal law principles include conceptual ideas and basic legal provisions that accumulate fundamental achievements of criminal lawmaking and law enforcement in their generalized form and are the "quintessence" of knowledge in the scientific and practical fields of criminal law. I would also follow the scholars who differentiate between the principles of common law (rule of law and legality, equality of all before the law, justice, humanism, democratism), the precise meaning of which is further designated by means of criminal law regulations and their methods of application; and principles of special law (a person's criminal liability for the crime only; liability only in presence of guilt; personal nature of criminal liability; limitation of criminal liability; differentiation of criminal liability and individualization of punishment).[23]

It is worth mentioning Ukrainian experts (who are members of the working group on the development of the new Criminal Code of Ukraine)[24] propose incorporating the following principles into the new Criminal Code of Ukraine: legality; legal certainty; equality before the Criminal Code of Ukraine; proportionality; individuality; humanism; uniqueness; conscientious fulfillment of international obligations; application of the Criminal Code of Ukraine according to its principles; assuring compliance of amendments to the principles of the Criminal Code of Ukraine).[25]

It would also be reasonable to consent with the researchers distinguishing the principles not just of criminal law (sectoral principles) as a whole, but also the principles of individual institutions of criminal law (institute of crime; institute of guilt; institute of participation in crime; institute of punishment; institute of the sentencing).[26]

Differentiating institutional principles does not conflict with the generally accepted theoretical point about the division of principles into those of common law, intersectoral, sectoral, and principles of legal institutions.[27] It is agreed that the principles of criminal

[22] KHAVRONYUK, M. *Criminal Legislation of Ukraine and Other States of Continental Europe: Comparative Analysis, Problems of Harmonization: Monograph.* Kyiv: Juriskonsult, 2006, pp. 484–495.

[23] *Great Ukrainian Encyclopedia of Law: in 20 Volumes. Vol. 17: Criminal law.* 2017, pp. 823–826.

[24] The author of this article is also a member of this working group on the development of criminal law of the Working Group on Legal Reform under the President of Ukraine.

[25] Draft new Criminal Code of Ukraine (Section 1.3). In: *EUAM Ukraine* [online]. [2021-11-03]. Available at: <https://newcriminalcode.org.ua/criminal-code>.

[26] BAZHANOV, M. *Sentencing under Soviet criminal law.* Kyiv: Graduate school, 1980, pp. 10–11; GATSELYUK, V. *Implementation of the principles of criminal law of Ukraine: problems and prospects.* Lugansk: RIO LAVD, 2003, pp. 28; MALTSEV, V. *Principles of criminal law and their implementation in law enforcement activities.* St. Petersburg: View "Legal Center Press", 2004, p. 124; CHEREDNICHENKO, E. *Principles of criminal legislation: understanding, system, problems problems of legislative regulation.* Moscow: Walters Clover, 2007, pp. 54–56.

[27] ALEKSEEV, S. *Collected Works. In 10 volumes. Vol. 3: Problems of the theory of law: A course of lectures.* Moscow: Statute, 2010, pp. 103–104.

law institutions exercise more detailed and concrete influence on the relatively independent set of public relations, which are regulated by the legal doctrine; these are the main ideas and demands according to which it is created and applied.[28] Institutional principles do not exist separately from common law, intersectoral and sectoral principles, but rather complement and concretize them, depending on the features of the particular legal doctrine.[29] These principles are local in nature and do not cover the whole legal system in its entirety or one of its branches.[30]

Despite the fact that there are no special difficulties in distinguishing institutional principles, until now they have remained little-studied in criminal law science. One exception, without doubt, is the research done by lawyers on the principles of the institute of the criminal law, and the institute of prescribing a punishment.

Having studied the research papers in law, I have not found a definition of the notion, characteristics and system of the release from punishment. I consider that *the principles of release from punishment* are the primary, most important provisions that determine all the work of legislators, courts, and heads of state regarding the release from punishment for those who have been convicted of a crime.

The principles of release from punishment have certain inherent characteristics. They are the fundamental, mandatory, guiding principles not just for legislators but also for law enforcers; they reflect the essence of release from punishment and its purpose; they lay the foundation for forming legal rules on release from punishment; they are consistent with the principles of criminal law. For this very reason, the approach to the principles of release from punishment should be the same as to institutional principles, which have their own subject of legal regulation, a specific purpose, tasks, and functions. Still, I understand that the principles of the release from punishment are not isolated from the system of the general principles of law, and criminal law in particular, but are the expression of them.

Taking into consideration the specified features, I consider that the system of the principles of release from punishment consists of the *general principles* of criminal law which have a specific manifestation in release from punishment (the rule of law, humanism, justice, and the individualization of release from punishment), as well as strictly *institutional principles* of release from punishment (the validity and soundness of release from punishment by court order; taking into account the interests of the victim of the crime in release from punishment, the necessity of punishment in case the conditions of release from punishment are violated).

What is the nature of the principle of the rule of law as a principle of the institute of the release from punishment? Given that the institutional principles have their own subject of legal regulation, objectives and functions, the legal nature of the rule of law in the perspective of this research should reflect the observance of the core elements of the rule of law within the release from punishment.

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[28] ZHUK, M. *Institutes of Russian Criminal Law: History of Development and Modern Understanding*. Krasnodar: Kuban state un-t; Education-South, 2010, p. 99.

[29] POLTAVETS, V. *General Foundations of Sentencing under the Criminal Law of Ukraine: Monograph*. Lugansk, 2005, p. 10.

[30] VASILIEV, N. *Principles of Soviet Criminal Law: a tutorial*. Moscow, 1983, p. 11.

This study is not aimed at finding an overall solution of this problem, but at highlighting it, which makes me consider that to observe the rule of law as the principle of the release from punishment means to include in the national legislation and follow in law enforcement activity the standards ensuring fair court decisions based on the principles of dignity, equality, reasonableness, fair law-making and law enforcement decisions.

Based on the above-mentioned reasons, I would like to focus in this research on the analysis of the internal law of individual European states to observe core elements of the rule of law within the issues of the release from punishment.

I would like to point out that criminal legislations of the European countries have different types and number of release from punishment. However, regulatory comparison[31] makes it possible to make a conclusion that criminal legislation of most European states contain probation (delayed service of the punishment), parole, release from punishment for severe illness, release from punishment for expiry of the statute of limitation of the sentence, amnesty.[32]

I would like to start with analyzing the key elements of the rule of law in the legislation.

2. ACCESS TO JUSTICE IN RELEASE FROM PUNISHMENT

Access to justice is one of the elements of the rule of law. According to the article 6 (1) of the Convention each person has a right for fair and public consideration of their case in court. To provide the access to justice a state is to keep to a lot of guarantees.

Ukraine, executing its positive obligations, is making consistent legislative steps regarding the observance of the rule of law, in particular the access to justice in solving the problems of the release from punishment. Thus, in 2012 Ukrainian convicts and their defenders got an opportunity to make petitions to court on the replacement of the unserved sentence by a mitigated punishment or parole (Article 539 of the Criminal Procedural Code of Ukraine).

Previously, the issue of the replacement of the unserved sentence by a mitigated punishment or parole was possible only upon a collaborate petition of the authority in charge of the sentence service, and a supervisory commission or the juvenile service (Article 407 of the Criminal Procedure Code of Ukraine, 1960). I believe that the Soviet legislative principles remaining in the Ukrainian legislation have a negative effect on the access to justice of a convicted person, but also cause considerable abuse of power and corruption in the penitential system.

It is worth mentioning that this inappropriate law-making practice limiting the right to the access to justice has been found in some European states up to now. In particular, pursuant to article 360 of the Criminal Procedure Code of Lithuania[33] a prisoner may not appeal

[31] Comparison may be regulatory and functional. Subjects of regulatory comparison are criminal legal acts of foreign countries and other regulations. Functional comparison is focused, in particular, criminal law doctrine, trends of criminal law policies of different states, cases of legal practice. In RYABCHYNSKA, O. *The value of the comparative legal method in criminal law research.* The science of criminal law in the system of interdisciplinary relations: materials of the international scientific-practical conference., Oct. 9.-10. 2014. Kharkiv: Law, 2014, p. 246.

[32] GOROKH, A. *Modern Criminal Legal Problems of Release from Punishment and Service of Sentence*: *monograph*. Kyiv: Dakor, 2019, pp. 33–49.

[33] Criminal Procedure Code of Lithuania. In: *Lietuvos Respublikos baudžiamojo proceso kodeksas.* [online]. [2021-11-03]. Available at: <https://www.e-tar.lt/portal/en/legalAct/TAR.EC588C321777/asr>.

directly to court to get a parole. He/she may only appeal the decision about the rejection from parole issued by a correctional facility. Such an approach to legislation should be reconsidered forthwith.

Does the victim as an equal participant of the criminal procedure have access to justice by Ukrainian law? I assume that the potential of providing a victim with the access to justice has not been fully realised in the Ukrainian law.

It sets forth a number of a victim's rights during the criminal procedure (article 56 of the Criminal Procedure Code), making a special stress on the rights of a victim during the pretrial investigation (article 56 (2) of the Criminal Procedure Code) and court proceedings of all instances (article 56 (3) of the Criminal Procedure Code). However, the Ukrainian legislation ignores the rights of victims during the execution of the judgement (article 537 of the Criminal Procedure Code). In particular, for some reason the victim is not summoned to court hearings on the petition for the release from punishment (applied during the execution of judgement) (article 539 (4) of the Criminal Procedure Code of Ukraine). The victim is actually deprived of the opportunity to express their thought if the convict deserves parole or amnesty. It is obvious that it does not enhance the protection of the victim's interests when the regulation on the release from punishment is applied during the execution of judgement.

I this connection, I think that the national law-makers should provide the access to justice in the release from punishment not only to the convict, but also to the victim of the crime.

3. ENSURING LEGAL CERTAINTY IN RELEASE FROM PUNISHMENT

Legal certainty is one of the principles of the rule of law. Legal certainty requires that legal norms were accessible, precise and accurate, aimed at ensuring the foreseeability of legal relations.[34]

The Constitutional Court of Ukraine in the Decision No.5-rp/2005 dated 22 September, 2005, states, "… the constitutional principles of equality and fairness cause the requirement of certainty, clearness and unambiguity of the law, as otherwise it cannot be equally applied, does not eliminate multiple interpretations in law practice and inevitably results in arbitrariness".[35] The lack of precision and unambiguity in the national legislation causes possibility of different interpretation and violates the requirement of "the quality of law" (§ 56), according to the European Court of Human Rights (*Shchokin v. Ukraine* (Applications nos 23759/03, 37943/06).[36]

The analysed context, I cannot establish the features of accessibility, clarity and unambiguity of these regulations in Ukrainian and foreign legislation which determine a possi-

[34] VENICE COMMISSION. Report on the Rule of Law. In: *Council of Europe* [online]. [2021-11-03]. Available at: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-rus>.

[35] The decision of the Constitutional Court of Ukraine in the case of the constitutional submission of 51 people's deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the provisions of article 92, paragraph 6 of section X "Transitional provisions" of the Land Code of Ukraine (case of permanent use of land plots). In: *zakon.rada.gov.ua* [online]. [2021-11-03]. Available at: <http://zakon.rada.gov.ua/laws/show/v005p710-05>.

[36] ase of "Shchokin v. Ukraine". In: *European Court of Human Rights* [online]. 14. 1. 2011 [2021-11-03]. Available at: <http://hudoc.echr.coe.int/eng?i=001-100944>.

bility of parole. It contradicts the Recommendation On Parole No. Rec (2003) 22(18) of the Committee of Ministers of the Council of Europe to the Member States, stating that for a convict to be paroled the parameters should be obvious and clear.[37]

Pursuant the legislation of Ukraine and majority of the member states of the Commonwealth of Independent States, parole is granted according to the term of serving the sentence and the correction level. However, the legislative parameters of a convict's correction lack certainty and clarity. The Criminal Code of Ukraine the correction of the convict is determined by his/her "proper behaviour" and "diligent labour". In practice, uncertainty of these parameters cause unequal application of law and frequently, to corruption. Criminologists assume that the convict's progress from the perspective of the reduced risk of a new crime, is estimated differently by judges and members of parole commissions.[38]

To make the rules of parole officially formulated may help solve the above-mentioned problem. These rules include the subordination of parole to the system of parameters that restrict the possibility of arbitrary release from punishment. I consider this system should comprise the indicators of the correction estimation in scores by the following criteria: the attitude of the convict to the committed crime; social life; the routine of serving the sentence; future life; labour. The combination of these criteria in terms of the convict's behaviour and attitude to labour should be considered by the court while making a decision on parole. The maximal score that a convict can get depends on the behaviour and labour of the convict, the number of awards and fines, etc. The parole should be granted to those convicts who get at least 90 points.[39]

I hope that the implementation of the suggested approach in legislation will ensure the legal certainty of parole issues.

4. HUMAN RIGHTS IN THE PAROLE FROM LIFE IMPRISONMENT

Enshrining in law the possibility of parole from life imprisonment is another important problem regarding the respect for human rights and equality before the law. Unlike the criminal law of many European countries, the Ukrainian Criminal Code does not explicitly provide for such a possibility. Under Ukrainian law, parole for persons sentenced to life imprisonment is possible only after their prior pardon. Ukrainian lawyers suggest that the lack of direct regulations of this issue in Ukrainian legislation is accounted for by the fact that in foreign law the life imprisonment has been enshrined for decades and even hundreds of years, while in Ukrainian it has existed since 2000.[40]

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[37] Recommendations N Rec (2003) 22 of the Committee of Ministers of the Council of Europe to member States on parole. In: *zakon.rada.gov.ua* [online]. [2021-11-03]. Available at: <https://zakon.rada.gov.ua/laws/show/994_665#Text>.

[38] MICHAILOVIC, I., JARUTIENE, L. Factors that Influence Parole Boards' and Judges' Decisions on Parole Application in Lithuania. *Baltic Journal of Law & Politics*. 2017, Vol. 10, No. 1, pp. 232, 257.

[39] GOROKH, A. *Release from Punishment and from the Service of Sentence under the Criminal Code of Ukraine*. Dr. of science thesis. Kiev, 2019, pp. 324–328.

[40] CHOVGAN, V. Serving a Life Sentence, or Life after Death in Ukraine. In: *Kharkiv Human Rights Protection Group* [online]. [2021-11-03]. Available at: <http://khpg.org/1392728858>.

The right to parole from life imprisonment has already been studied by lawyers in a comparative perspective.[41] However, the academic papers have not covered all aspects of this problem, in particular, with regard to the recent case law of the European Court of Human Rights.

The parole from life imprisonment only after prior pardon of convicts does not meet the standards of the European human rights. Such legislation is inconsistent with Recommendation On Parole Rec (2003) 22 (4a) of the Committee of Ministers of the Council of Europe which states that Member States should make parole available to all convicts, including those who are serving a life sentence. The European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also been made recommendations to the Member States of the Council of Europe.

The experience of Switzerland is a positive example of how European countries are responding to the recommendations of the Committee of Ministers of the Council of Europe on parole from life imprisonment. In 2004, the provision on the life imprisonment for sexual and violent criminals was introduced to the Swiss Federal Constitution.[42] On August 1, 2008, the Swiss Federal Law as of December 21, 2007 on *Lifetime Detention of Particularly Dangerous Criminals* entered into force.[43]

Following the visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to Switzerland in 2011, the report emphasized that the law should provide for the parole from life imprisonment, as it is "inhumane to imprison a person without real hope of release" (paragraphs 3, 4 § 118).[44] The Swiss Federal Council responded that the Federal Council and Parliament ensured that the new constitutional provision was in line with international law. Life imprisonment may be lifted after the convict has served 15 years of the sentence (Article 62c of the Swiss Criminal Code).[45]

The lack of provisions allowing parole from life imprisonment in national legislations has been repeatedly assessed by the European Court of Human Rights in terms of Article 3 of the Convention (Prohibition of torture).

In particular, the case of "Vinter and Others v. The United Kingdom" (Applications nos. 66069/09, 130/10 and 3896/10) of the European Court of Human Rights stated that "…a person sentenced to life imprisonment has the right to know at the time of sentencing what to do for the possibility of his release to be considered, including all conditions and

[41] DDAMULIRA MUJUZI, J. Prisoners' Rights to be Released or Paroled: a Comment on Ocalan v Turkey. *Baltic Journal of Law & Politics*. 2016, Vol. 9, No. 1, pp. 64–92.

[42] Federal Constitution of the Swiss Confederation of April 18, 1999 (status as of September 27, 2009). In: *wipolex.wipo.int* [online]. [2021-11-03]. Available at: <https://wipolex.wipo.int/ru/text/179791>.

[43] Schweizerisches Strafgesetzbuch. Vom 21. Dezember 1937 (stand am 1. Juli 2020). In: *wipolex.wipo.int* [online]. [2021-11-03]. Available at: <https://wipolex.wipo.int/ru/text/577506>.

[44] Rapport au Conseil fédéral suisse relatif à la visite effectuée en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 10 au 20 octobre 2011. In: *refworld.org* [online]. [2021-11-03]. Available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5088f0f82>.

[45] Réponse du Conseil fédéral suisse au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à sa visite effectuée en Suisse du 10 au 20 octobre 2011. In: *refworld.org* [online]. [2021-11-03]. Available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5088f07d2>.

period served after which the sentence will be reviewed or when they may apply for a review of the sentence. Accordingly, if a national law does not provide for any mechanism or possibility of reviewing life imprisonment, the compliance with Article 3 of the Convention can be questioned at the moment when life imprisonment is prescribed, rather than during the imprisonment" (§ 122).[46]

In the case of "László Magyar v. Hungary" (Application no. 73593/10) the European Court of Human Rights stated, "… if national law allows for the possibility of reviewing life imprisonment in order to reduce, mitigate, terminate or parole a convicted person, this will be sufficient to comply with Article 3 of the Convention" (§ 50).[47]

In the case of "Kafkaris v. Cyprus"[48] (Application no. 21906/04) the European Court of Human Rights emphasized, "…matters relating to the policy of parole, in particular the methods of its implementation, are relevant to the powers of Member States in the field of criminal justice and criminal policy" (§ 104). Although in this case the European Court of Human Rights acknowledged that the procedure for reducing the term of life imprisonment through pardon does not contradict Article 3 of the Convention, the Court at the same time "… was aware of the shortcomings of the current procedure ... and determined the steps to be taken to carry out the reforms" (§ 105).

In 2016, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, summarizing the case law of the ECHR on this issue, recommended the following to the member states: 1) national law should determine a time period when a convict sentenced to life imprisonment will get an opportunity to have his/her sentence reviewed; 2) there should be a procedure for reviewing the sentence; 3) the life in detention should be organized in such a way that convicts sentenced to life imprisonment to would seek rehabilitation".[49]

In the case of "Petukhov v. Ukraine (No. 2)" (Application no. 41216/13)[50] the European Court of Human Rights stated that the current parole mechanism for life sentenced in Ukraine based on pardon does not comply with Article 3 of the Convention "… due to the fact that the applicant's life sentence cannot not be reduced" (§ 187). At the same time, the European Court of Human Rights found that the defendant State would be required to "… reform the system of the review of life sentence. The mechanism for such a review should ensure that, on a case-by-case basis, continued detention is justified on legitimate grounds and life prisoners are given a chance to know with some precision what they need to do to have their release considered, and under what conditions this may be possible, in accordance with the standards developed by the case law of the Court" (§ 194).

[46] Case of "Vinter and Others v. The United Kingdom". In: *European Court of Human Rights* [online]. 9. 7. 2013 [2021-11-03]. Available at: <http://hudoc.echr.coe.int/eng?i=001-122664>.

[47] Case of "László Magyar v. Hungary". In: *European Court of Human Rights* [online]. [2021-11-03]. Available at: <http://hudoc.echr.coe.int/fre?i=001-144109>.

[48] Case of "Kafkaris v. Cyprus". In: *European Court of Human Rights* [online]. [2021-11-03]. Available at: <http://hudoc.echr.coe.int/eng?i=001-85019>.

[49] Situation of Life-sentenced Prisoners. Extract from the 25th General Report of the CPT, published in 2016. In: *Council of Europe* [online]. [2021-11-03]. Available at: <https://rm.coe.int/16806cc447>.

[50] Case of "Petukhov v. Ukraine No. 2". In: *European Court of Human Rights* [online]. 9. 9. 2019 [2021-11-03]. Available at: <http://hudoc.echr.coe.int/eng?i=001-191703>.

In order to implement the decision of the European Court of Human Rights in the case of Petukhov v. Ukraine (No. 2), the Government of Ukraine prepared draft laws to amend the criminal part of the national legislation (No. 4048,[51] No. 4049[52]), assessed positively by the Council of Europe.[53]

It should be noted that the Constitutional Court of Ukraine has recently declared the provisions of the Criminal Code of Ukraine to be inconsistent with the Constitution of Ukraine (unconstitutional), making it impossible to apply them to persons sentenced to life imprisonment.[54]

Taking into consideration the European standards, the case law of the European Court of Human Rights, the decision of the Constitutional Court of Ukraine in the analyzed issue I and other authors of the new draft Criminal Code of Ukraine made appropriate amendments to resolve the issue of parole from life imprisonment (Article 3.3.12 of the draft Code).[55]

Thus, for the laws of European states to observe human rights regarding parole from life imprisonment, it is necessary to make sure the laws provide for a straight possibility of parole from life imprisonment.

5. RIGHTS OF VICTIMS AND PUBLIC INTERESTS IN THE APPLICATION OF AMNESTY

Amnesty is one of the types of release from punishment. Amnesty is granted by a national legal act regarding a certain category of persons and means full of partial release from serving the sentence. A list of crimes subject (or not subject) to amnesty is determined by the parliament. Amnesty is usually not granted to convicts having committed international and military offenses, crimes against the state, drug offenses, etc. In order to ensure the rights of victims and society, lawmakers of any state, making a list of offenses subject to amnesty, should take into account international and European standards of the law enforcement practice.

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[51] Draft Act amending certain legislation on the implementation of decisions of the European Court of Human Rights. In: *rada.gov.ua* [online]. [2021-09-02]. Available at: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69826>.

[52] Draft Act amending the Code of Administrative Offences, the Criminal Code and the Criminal Procedure Code enforcement of decisions of the European Court of Human Rights. In: *rada.gov.ua* [online]. [2021-09-02]. Available at: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69827>.

[53] Expert evaluation of certain provisions of the draft Law of Ukraine No. 4048 and the draft Law of Ukraine No. 4049 regarding amendments to the Criminal Code, the Criminal Executive Code and the Criminal Procedure Code, which were developed in order to implement the decision of the ECHR in the case of Petukhov v. Ukraine (No. 2). In: *Council of Europe* [online]. [2021-09-02]. Available at: <https://rm.coe.int/expert-assessment-4048-4049/1680a137dc>.

[54] The decision of the Constitutional Court of Ukraine in the case of constitutional submission of Dmytro Volodymyrovych Krupko regarding the compliance with the Constitution of Ukraine (constitutionality) with Article 81 (1), part one of Article 82 of the Criminal Code of Ukraine, Kostin Volodymyr Volodymyrovych, Melnychenko Oleksandr Stepanovych on the compliance of the Constitution of Ukraine (constitutionality) with the Article 82 (1) of the Criminal Code of Ukraine and on the constitutional complaint of Gohin Viktor Ivanovych regarding the compliance with the Constitution of Ukraine (constitutionality) with the Article 81 (1) of the Criminal Code for life imprisonment) of September 16, 2021 No. 6-r (II) / 2021. In: *ccu.gov.ua* [online]. [2021-11-02]. Available at: <https://ccu.gov.ua/sites/default/files/docs/6-p2-2021.pdf>.

[55] Draft new Criminal Code of Ukraine. In: *EUAM Ukraine* [2022-03-03]. Available at: <https://newcriminalcode.org.ua/criminal-code>.

The UN Committee of Human Rights regularly makes recommendations about a general procedure of the implementation of the Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment in national laws.

In particular, the Committee emphasized in the comment No 20 to Article 7 (on the implementation of Article 7 of the Convention), that "…amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible" (cl. 15).[56]

Developing these provisions, the UN Human Rights Committee on, in the Resolutions 2002/79 dated 25 April, 2002,[57] and 2003/72 dated 25 April, 2003,[58] stresses for the importance of necessary and possible measures to be taken to put to justice responsible persons and their accomplices, guilty in the violation of human rights and international humanitarian law; admits that amnesty is not to be granted to those who violate humanitarian law and human rights, it calls upon the states to take measures according to their obligations pursuant to the international law.

In the Resolution 2005/81 dated April 21, 2005,[59] the UN Human Rights Committee recognized that amnesties should not be granted to those who violate human rights and international humanitarian law; calls upon states to take action in accordance with their obligations under international law and welcomes the abolition, lifting or revocation of amnesties and other immunities, and recognizes the Secretary-General's conclusion that peace agreements approved by the United Nations can never promise amnesty for genocide, crimes against humanity, war crimes or gross human rights violations.

In other General comments No. 2 (concerning the implementation of the Article 2), the Committee noted that amnesties or other legal impediments which preclude and demonstrate a reluctance to ensure the timely and fair prosecution and punishment of perpetrators of torture and ill-treatment, violate the principle of inadmissibility of the deviation from the established standards (cl. 5).[60]

In turn, the European Court of Human Rights has expressed its standpoint as of the application of amnesty for certain crimes.

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[56] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). In: *umn.edu* [online]. [2021-09-02]. Available at: <http://hrlibrary.umn.edu/gencomm/hrcom20.htm>.

[57] Commission on Human Rights. Report on the Fifty-Eighth Session (18 march-26 April 2002). Supplement No. 3. United Nations. New York and Geneva, 2002, p. 329. In: *United Nations* [online]. [2021-09-02]. Available at: <https://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/2002/200>.

[58] Commission on Human Rights. Report on the Fifty-Ninth Session (17 march-24 April 2003). Supplement No. 3. United Nations. New York and Geneva, 2003, p. 264. In: *United Nations* [online]. [2021-09-02]. Available at: <https://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/2003/135>.

[59] Commission on Human Rights. Report on the Sixty-First Session (14 March-22 April 2005). Supplement No. 3. United Nations. New York and Geneva, 2005, p. 312. In: *United Nations* [online]. [2021-09-02]. Available at: <https://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/2005/135>.

[60] Human Rights Committee, General Comment 2, Article 2 (Thirty-ninth session, 2007), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI / GEN / 1 / Rev.9, vol. II) 27 May 2008. In: *United Nations International Human Rights Instruments* [online]. 15. 8. 1997 [2021-09-02]. Available at: <https: // digitallibrary.un.org ›record› files › HRI_GEN_1_Rev.9 (Vol.II) -RU (1) 39, 162>.

In particular, in the case of "Laurence Dujardin and others v. France" (Application no. 16734/90), the European Court of Human Rights emphasized that the State is eligible to adopt, within the framework of its criminal legislation, any amnesty laws it may deem necessary, ensuring a balance struck between the legitimate interests of the State and the interests of individual members of the public in order to ensure the life is protected by law.[61]

The European Court of Human Rights developed the conclusions about an unjust application of amnesty in the case of "Marguš v. Croatia" (Application no. 4455/10).[62] In June 1997, the applicant was amnestied by the Osijek District Court for acts that constituted severe violations of fundamental human rights, namely the premeditated murder of civilians and the infliction of grievous bodily harm on a child, under the General Amnesty Act which applied to all crimes committed in the war in Croatia from 17 August 1990 to 23 August 1996, except for those acts which constituted the most severe violations of humanitarian law or war crimes, including the crime of genocide. In doing that, the district court in its motivating part referred to the merits of the applicant as a military officer.

The Croatian Supreme Court subsequently found in June 2007 that the above-mentioned judgment of the Osijek District Court dated 24 June 1997 violated Article 3 (2) of the General Amnesty Law and sentenced him to fourteen years' imprisonment for war crimes against civilians.

In this case, the European Court of Human Rights noted, in particular, the following: "The possibility for a state to grant amnesty for serious violations of human rights may be limited by international treaties to which such a state is a party" (§ 132). Various international authorities have issued resolutions, recommendations and comments on impunity and amnesty for serious violations of human rights. As a rule, they agree that amnesties should not apply to persons who have committed such violations of human rights and international humanitarian law (§ 134). In their judgments, several international courts have stated that amnesties are inadmissible if they are aimed at obstructing the crime investigation and punishment of persons responsible for serious violations of human rights or acts that constitute crimes under international law of human rights (§ 135). Such amnesties tend to be reflected by international law, as they are incompatible with the universally recognized obligation of states to prosecute and punish severe violations of fundamental human rights. Even if it could be assumed that amnesties were permissible in certain specific circumstances, such as conciliation and/or a compensation for the injured parties, the amnesty granted to the applicant in the above-mentioned case would still not be admissible because there is no indication that such circumstances existed in the case (§ 139). The obligation of states to prosecute torture and premeditated murder is well-established in the Court's case law. The case law of the Court confirms that the application of an amnesty for murder or ill-treatment of civilians would be contrary to the State's obligations under Articles 2 and 3 of the Convention, as it would impede the

[61] Case of "Laurence Dujardin and others v. France". In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-85292>.

[62] Case of "Marguš v. Croatia". In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-144276>.

investigation of such acts and create impunity. Such an outcome would reduce the weight of protection guaranteed by Articles 2 and 3 of the Convention and would make illusory the guarantees of the individual's right to life and the right not to be ill-treated (§ 127).

In view of the above-said, the European Court of Human Rights concludes that in issuing a new indictment against the applicant and convicting him/her of war crimes against civilians, the Croatian authorities acted in accordance with Articles 2 and 3 of the Convention and in a manner consistent with the requirements and recommendations of the above-mentioned international mechanisms and instruments.

Therefore, when adopting amnesty laws, national legislators must take into account the provisions of international law and case law of the European Court of Human Rights to ensure a fair balance between the legitimate interests of the state and the interests of individuals and make it inadmissible to apply amnesty for genocide, crimes against humanity, war crimes or gross violations of human rights.

The above-mentioned provisions clearly demonstrate how the rule of law can have a positive impact on the reform of national legislation in the field of release from punishment.

At the same time, the principle of the rule of law must be unconditionally observed by the courts during law enforcement.

6. RIGHTS OF VICTIMS IN RELEASE FROM PUNISHMENT WITH PROBATION

The most common type of release from punishment applied by national courts in Ukraine is release from punishment with probation (Article 75 of the Criminal Code of Ukraine). In the criminal law of foreign states, this type of release is set forth in law as a suspended sentence or probation.

Applying this type of release from punishment, court also takes into account the individual severity of the crime. The individual severity of the crime, according to courts[63] (we have studied 4,372 court decisions adopted by the courts of Ukraine during 2006–2018) includes the following circumstances: the object and the subject of offence; the victim of the crime (often his/her deviant behavior); the circumstances of the crime; the role of the offender in a crime committed in complicity; the number of criminal deeds; the absence of severe consequences of the crime; the medical assistance, provided to the victim by the offender; a voluntary compensation for damages; the form of guilt and types of intent or negligence; the emotional state of a person at the moment of committing crime.[64]

At the same time, the European Court of Human Rights has recommended national courts to take into consideration circumstances characterizing the individual severity of

[63] I came to this conclusion in 2019 based on the results of the study and statistical generalization of 4.372 court decisions on probation, adopted by the courts of Ukraine during 2006-2018 in cases of the following crimes: against a human (murder, infliction of bodily harm, kidnapping, human trafficking); mercenary crimes against property (theft; robbery; robbery; fraud); crimes related to the use of socially dangerous objects (illegal actions with weapons, drugs); crimes against traffic safety and driving a vehicle. During the analysis, the circumstances characterizing the gravity of the crime, the identity of the perpetrator, other circumstances of the case, which were considered by the courts in deciding on probation, as well as systemic problems of law enforcement were identified.

[64] GOROKH, A. *Release from Punishment and from the Service of Sentence under the Criminal Code of Ukraine: Dr. of Science thesis.* pp. 185–227.

a crime. In particular, in the case of "Aleksakhin v. Ukraine" (Application no. 31939/06) considering the applicant's complaint of ill-treatment by police officers and the lack of an effective legal protection against such ill-treatment, the European Court of Human Rights stated: "Although a police officer was convicted in this case, the Court reiterates that the final judgment of 3 July 2006 is almost identical to the sentence of 23 August 2001 (by which X. was sentenced to five years' imprisonment, which should be regarded as probation), overturned by a higher court as too lenient. By punishing a police officer with a lenient non-custodial sentence more than eight years after he committed the wrongful act, the state has in fact encouraged the police officer to have a "sense of impunity" instead of showing him (as it should have) that such actions are not tolerated in any way. <...> In these circumstances, the Court is not satisfied that the punishment of the police officer was adequate" (§ 58).[65]

The Court expressed the same opinion that the application of the minimum suspended sentence for perpetrators of ill-treatment of a juvenile detainee is doubtful, which is found in the case "Okkali v. Turkey" (Application no. 52067/99). In this case, the European Court of Human Rights stated that the trial indicated no particular concern of Turkish judges regarding the protection of a minor. The Turkish criminal justice system proved to be far from strict and did not have a sufficient deterrent effect capable of preventing unlawful acts similar to those complained of by the applicant.[66]

In the case of "Gäfgen v. Germany" (Application no. 22978/05), the European Court of Human Rights expressed doubts the punishment with probation in the form of a small fine for threatening to use violence on a suspect in order to find an abducted child was an adequate decision. In the circumstances of this case, Gefgen was detained and taken into custody while he was receiving a ransom for the abduction of an 11-year-old boy. After being questioned by the police, he gave false testimony about the whereabouts of the child and the abductors. The police assumed that the child was in danger of death because of the cold and the lack of food, and threatened the suspect with significant sufferings that would be inflicted on him by specially trained people to make him reveal the child's whereabouts. The Court stated that the criminal proceedings against the police officers who had committed inhuman treatment while interviewing Gefgen were immediate and the police officers were placed to probation. In the opinion of the Strasbourg Court, this decision cannot be considered as an adequate judgement of the German Court concerning the violation of the Article 3 of the Convention, and probation as an adequate response to the violation of key human rights.[67]

Thus, the European Court of Human Rights still expresses its opinion on the expediency of taking into account the evidence of offense when deciding on the possibility

[65] Case of "Aleksakhin v. Ukraine". In: *zakon.rada.gov.ua* [online]. [2021-09-02]. Available at: <http://zakon5.rada.gov.ua/laws/show/974_925>.

[66] Press release issued by the Registrar Okkali v. Turkey. In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1813191-1907543&filename=003-1813191-1907543.pdf>.

[67] Case of "Gäfgen v. Germany". In: *policehumanrightsresources.org* [online]. [2021-09-02]. Available at: <https://policehumanrightsresources.org/gafgen-v-germany-application-no-22978-05>.

of probation. In the analyzed context, courts should properly assess whether there will be positive changes in the convict's personality and whether they will create in him a readiness for law-abiding behavior. Is it possible to expect, in connection with the release of a convict from punishment, that he/she will not commit new crimes in the future?[68]

At the same time, considering other cases, the European Court of Human Rights, on the contrary, drew attention to reasonable fair and balanced approach in resolving the issue of interference with individual rights. In particular, in cases "Frizen v. Russia" (Application no. 58254/00)[69] and "Baklanov v. Russiav (Application no. 68443/01),[70] the Court stressed the need to achieve a fair balance between the general interests of society and the requirements of protecting the fundamental rights of the individual. In the case of "Sadocha v. Ukraine" (Application no. 77508/11), the Court emphasizes that "The court must decide whether the interference provided the necessary fair balance between the protection of property rights and the requirements of the general interest in view of the discretion conferred on the State in this area. The required balance will not be achieved if the respective property owner is burdened with "individual and excessive burdens" (§ 27).[71] In the case of "Ismayilov v. Russia" (Application no. 30352/03), the Court clarified that "in order to be considered proportionate, the interference must be proportionate to the gravity of the offense", "not to be disproportionate in being a "personal excessive burden" for the person (§ 38).[72]

Although these decisions are more about protecting property rights (Article 1 of the First Protocol to the Convention), Ukrainian higher instance courts often refer to these cases assessing the fairness of the judgements of lower instance courts about the actual punishment to the convict.[73]

7. HUMAN RIGHTS IN RELEASE FROM PUNISHMENT FOR A SEVERE ILLNESS

Criminal law of many European countries provides for the possibility of release from punishment for a person suffering from a serious (not mental) illness.

The medical criterion of release from punishment for illness means that a severe disease is to be officially diagnosed. In Ukraine, to determine that a disease is severe, lawyers consult with the List of Diseases as a basis for submitting materials to the court with the

[68] Case of "Böhmer v. Germany" (Application No. 37568/97). In: *European Court of Human Rights* [online]. 21. 5. 2003 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-60668>.
[69] Case of "Frizen v. Russia". In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-68614>.
[70] Case of "Baklanov v. Russia". In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-69317>.
[71] Case of "Sadocha v. Ukraine". In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-194296>.
[72] Case of "Ismayilov v. Russia". In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-89412>.
[73] See, for example: Supreme Court (Case No. 716/1224/19). In: *reyestr.court.gov.ua* [online]. [2021-09-02]. Available at: <https://reyestr.court.gov.ua/Review/91063744>.

petition of the release from further imprisonment.[74] Still, the Ukrainian jurisprudence has developed in such a way that if a person's illness (even a severe one) is not included in the List of Diseases, the courts refuse to satisfy requests for release from punishment due to a severe illness.[75]

In the context of this positivist approach of national courts in applying the medical criterion for release from punishment due to the illness, it is worth studying the case law of the European Court of Human Rights on the assessment of untimely and low quality medical care provided to persons under state control.

The European Court of Human Rights has repeatedly stated in its numerous rulings that states are responsible for an appropriate medical care for persons in custody.[76]

In determining whether public authorities have fulfilled their obligations to provide medical care to a person in custody and under their control, the Court in the case of "Mouisel v. France" (Application No. 67263/01) indicated three components that need to be assessed in this respect: 1) the applicant's health condition; 2) the adequacy of medical assistance and care in detention; 3) the reasonableness of detention in view of health condition of the person.[77] If the applicant was deprived of adequate medical care, it must be ascertained whether this constituted inhuman and degrading treatment in violation of Article 3 of the Convention. Analyzing these standards in the case of "Melnik v. Ukraine" (Application no. 72286/01) the European Court of Human Rights stated that a failure to provide a person with emergency and comprehensive medical care in custody is inhuman and degrading treatment in violation of Article 3 of the Convention (§ 106-112).[78]

According to Article 3 of the Constitution of Ukraine, an individual, his/her life and health, honor and dignity, inviolability and security shall be recognized in Ukraine as the highest social value. To establish and ensure human rights and freedoms are the main responsibilities of the state. No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment (Article 28 of the Constitution of Ukraine). Everyone has the right to health care and medical assistance (Article 49 of the Constitution of Ukraine).

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[74] Annex 12 to the Procedure for the Organization of Medical Care for Convicted Prisoners, approved by Order No. 1348/5/572 of the Ministry of Internal Affairs and the Ministry of Health of 15 August 2014. In: *zakon.rada.gov.ua* [online]. 15. 8. 2014[2021-09-02]. Available at: <https://zakon.rada.gov.ua/laws/show/z0990-14#Text>.

[75] Appeal Court of the Zhytomyr region (Case No. 274/450/15-k.). In: *reyestr.court.gov.ua* [online]. [2021-09-02]. Available at: <http://www.reyestr.court.gov.ua/Review/50216019>; Appeal Court of the Rivne region (Case No. 1701/2466/12). In: *reyestr.court.gov.ua* [online]. [2021-09-02]. Available at: <http://www.reyestr.court.gov.ua/Review/34487877>.

[76] ase of "Ilaşcu and Others v. Moldova and Russia" (Application No. 48787/99). In: *European Court of Human Rights* [online]. 8. 7. 2004 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-61886>; ase of "Kaverzin v. Ukraine" (Application No. 23893/03). In: *European Court of Human Rights* [online]. 15. 8. 2012 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-110895>; ase of "Ukhan v. Ukraine" (Application No. 30628/02). In: *European Court of Human Rights* [online]. 18. 3. 2009 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-90345>; ase of "Sergey Antonov v. Ukraine" (Application No. 40512/13). In: *European Court of Human Rights* [online]. 22. 1. 2016 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-157970>; ase of "Oshurko v. Ukraine" (Application No. 33108/05). In: *European Court of Human Rights* [online]. 8. 12. 2011 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/fre?i=001-106150>.

[77] Case of "Melnik v. Ukraine" (Application No. 72286/01). In: *European Court of Human Rights* [online]. 28. 6. 2006 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-72886>.

[78] Ibid.

Punishment is not intended to cause physical suffering or degrade human dignity (Part 3 of Article 50 of the Criminal Code of Ukraine).

From this we can conclude that in cases where the state is unable to provide an adequate medical care to a convict in custody, if he/she suffers from a severe illness, even though it is not included in the List of Diseases that are the grounds for applying for the release from further serving of the sentence, the court, in deciding on the possibility of releasing the convict from punishment due to the illness, should assess properly, whether the further imprisonment of such convicts complies with the rule of law and will not violate Article3 of the European Convention on Human Rights.

It is such a reasonable application of law that the European Court of Human Rights emphasized in the case of "Yermolenko v. Ukraine" (Application no. 49218/10). In particular, the court stated that "the compatibility of the applicant's health condition with detention should not be assessed solely on the basis of an exhaustive List of Diseases (which may be grounds for release) without any consideration by the national courts" (§ 61).[79]

I agree with researchers who believe that in exceptional situations, when the law itself, due to distorted interpretation or widespread practice, results in a clear injustice in a particular situation, which is incompatible with basic universal principles and values of international law (international treaties, acts of international organizations and customary international law), such a law should either not be applied at all or should be interpreted in a way that allows its content to be reconciled with the adopted principles and values.[80]

I assume that if the court concludes that the disease suffered by the convict is severe and prevents the convict from serving the sentence, the court should decide to release the convict from punishment due to the severe disease also in the cases when the disease suffered by the person is not included in the specified List of Diseases which are the basis for submission to court of materials on release from further service of punishment. Such a court decision will comply with the rule of law. Other Ukrainian researchers have reached similar conclusions on this issue.[81]

In case the national authorities delay the release of a severely ill convict, despite medical contraindications for his/her further detention, such treatment of the convict degrades his personal dignity (violation of Article 3 of the Convention).[82]

CONCLUSIONS

This paper studies the observance of the rule of law by national law-makers and courts in resolving certain issues regarding the release from punishment. It is obvious that I have studied a limited number issues of the within this general problem and it is the initial stage of research of the observance of the rule of law in various criminal law institutions.

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[79] Case of "Yermolenko v. Ukraine" (Application No. 49218/10). In: *European Court of Human Rights* [online]. 4. 9. 2015 [2021-09-02]. Available at: <http://hudoc.echr.coe.int/fre?i=001-154978>.

[80] DUDOROV, A., MAZUR, M. Implementation of the rule of law in cases of application of the law on criminal liability: problem setting, international and foreign experience. *Legal scientific electronic journal*. 2017, No. 5, p. 138.

[81] ANTIPOV, V. *Criminal Code of Ukraine in the context of international law and practice of the European Court of Human Rights: legal norms, case law, scientific and practical commentary*. Kharkiv: Law, 2019, pp. 218–219.

[82] ase of "Farbtuhs v. Latvia" (Application No. 4672/02). In: *European Court of Human Rights* [online]. [2021-09-02]. Available at: <http://hudoc.echr.coe.int/fre?i=001-185649>.

I have no doubt that this problem deserves a more thorough research in the form of a monograph and thesis.

So, my conclusions are based on this initial study of the impact of various elements of the rule of law on the functioning of the institute of the release from punishment. These findings, I believe, can be important both in law-making and in the enforcement of the release from punishment in any state.

The first conclusion is that governments should ensure that a person has access to justice by introducing these provisions to the procedural law for a convicted person to have a right to submit a petition about the release from punishment directly to the court (rather than a commission or committee on early release). Meanwhile, in order to ensure equality of all participants of criminal proceedings regarding the access to justice, states should ensure the observance of the right of victims of crime to participate in the proceedings on early release of a convict from punishment.

The second conclusion concerns the provision of legal certainty in the legislation while building up the regulations on parole. I consider it urgent that the rules of parole should be introduced in the legislation and law enforcement procedures.

The third conclusion consists in the need to enshrine a direct parole procedure for life-sentenced convicts (and not after the pardon of the convict) in the legislation.

The next conclusion concerns the observance of the rights of victims and the interests of society when applying amnesty. Amnesty legislation should prohibit the use of this type of release from punishment for perpetrators of international and war crimes, crimes against humanity, or other gross violations of human rights (premeditated murder, torture, ill-treatment).

In addition to the observance of various elements of the rule of law in law-making on the release from punishment, they must be unconditionally observed in the application of law.

Having studied the case law of the European Court of Human Rights, I have come to the conclusion that applying the release from punishment by probation to those guilty of gross violations of human rights (premeditated murder, torture, ill-treatment) violates the rights of victims of crime and public interests.

Still, when considering the issue of the release from punishment, the court must ensure a fair, proportionate and balanced approach in resolving the issue of interference with a person's rights by applying a real punishment instead of probation.

Equally important is the protection of human rights while applying the release from punishment for serious illness. Judicial practice that allows the application of this type of the release from punishment in cases where the state is unable to provide adequate medical care to the convict in custody, and the convict's serious illness is not included in the List of Diseases, should be recognized as consistent with the rule of law. In this case the convict may submit the documents to the court for the consideration of his/her release from punishment.

The conclusions made in this study can be regarded as the beginning of the formation of the concept "checklist" of the observance of the law-makers and courts of the rule of law in the release from punishment in the criminal law doctrine.