

# Medical and social justification of regulatory and legal framework to fight HIV/AIDS in the Penal System of Ukraine

## Medyczne i społeczne uzasadnienie ram regulacyjnych i prawnych w walce z HIV/AIDS w systemie karnym Ukrainy

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**Wstęp.** System regulacji normatywno-prawnego wpływu państwa, który ukierunkowany jest na zabezpieczenie indywidualnych praw i swobód obywatelskich oraz publicznych interesów społeczeństwa, najbardziej organicznie jednoczą te dwa samodzielne pojęcia właśnie w Kodeksie karno-wykonawczym, który nie zapewnia korzyści z określonych zjawisk. Obecnie trwa transformacja Naprawczego prawa pracy w kierunku Kodeksu karno-wykonawczego. W związku z powyższym należy wspomnieć czołowych uczonych Ukrainy i Rosji, którzy pracowali nad tymi problemami i są twórcami nauki o prawie kryminalno-wykonawczym i wydzielonych z niego kierunków: Bagriy-Shakhmatov, Belyaev, Zubkov, Melentyev, Mihlin, Natashev, Remenson, Struchkov, Tkachevskyy, Trubnikov, Shmarov i inni. Analizowane w artykule przekształcenia rozpatruje się jako stopniowy, demokratyczny rozwój ustawodawstwa kryminalno-wykonawczego Ukrainy. Od 1996 r. ramy prawne, które regulują wykonywanie kar w państwie, określa się jako „kodeks karny”; historyczne określenie to „naprawcze prawo pracy”.

**Cel pracy.** Zbadanie medyczno-społecznych i historycznych aspektów rozwoju i współczesnego stanu czynnej normatywno-prawnej bazy kryminalno-wykonawczego systemu Ukrainy w kontekście epidemii HIV.

**Materiał.** Badaniami objęto aktualnie obowiązujące i inne normatywno-prawne akty Ukrainy, międzynarodowe akta prawodawcze, które zostały ratyfikowane przez Radę Najwyższą Ukrainy do stosowania w państwie, naukowe źródła analityczne oraz własne archiwalia.

**Metoda.** Ogólna analiza prawna porównawcza i bibliograficzna obejmuje następujące poziomy teoretyczne: historyczny, dialektyczny, abstrahowanie, uogólnianie. Empiryczny poziom – to obserwacja dynamiczna.

**Słowa kluczowe:** *epidemia HIV, baza normatywno-prawna, Ministerstwo Spraw Wewnętrznych Ukrainy, system kryminalno-wykonawczy, więźniowie*

**Introduction.** Regulatory system of the legal influence of the state is aimed at ensuring individual rights and freedoms and public interests of society, it combines the two separate concepts in the penal law without providing the benefits of certain phenomena. Today, the transformation of the Corrective Labor Law into Penal Law continues. In connection with the above mentioned, we should recall the leading scientists of Ukraine and Russia, who worked on these issues and are the founders of the science of Penal Law and its components: Bagriy-Shakhmatov, Belyaev, Zubkov, Melentyev, Mihlin, Natashev, Remenson, Struchkov, Tkachevskyy, Trubnikov, Shmarov and others. The article analyzes gradual transformation of the democratic development of the penal sphere of legislation of Ukraine. Since 1996, the legal framework that provides regulatory function the enforcement of criminal penalties in the state, is called “Penal Law”, which was historically preceded by the term “Corrective Labor Law”.

**Aim of the article.** To explore the medical, social and historical development and current status of the current regulatory and legal framework of the penitentiary system in Ukraine in relation with HIV/AIDS.

**Materials.** The research covers valid and other legal acts of Ukraine, international legal acts ratified by the Parliament of Ukraine for use in the state, scientific analytical sources.

**Methods.** General logical (general scientific) – comparative, bibliographic, legal analysis. Theoretical level – historical, dialectical, abstraction, generalization. Empirical level (perpetuation activity) – dynamic observation, sociological, medical and statistical.

**Key words:** *HIV/AIDS epidemic, regulatory framework, the Ministry of Internal Affairs of Ukraine, prison system, prisoners*

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The Constitution of Ukraine as the highest social value proclaimed human rights, with their observance as the primary responsibility of the state. And it definitely applies to the penal system. Therefore, the main direction of this function of the state should be a radical change in the social and legal relationships that are focused on the reintegration of prisoners into society.

Ukraine is an authorized member of the principal and subsidiary Bodies of the UN, such as: Council for Human Rights of the UN, Commission on Social Development, Commission on Crime Prevention and Criminal Justice, Commission on Narcotic Drugs, Commission on Population and Development, Executive Board of the UN Children's Fund (UNICEF), Executive Board of the UN Development Programme (UNDP), UN Fund in Population (UNFPA) and the Council of Europe, which it thrice elected non-permanent member (1948-1949, 1984-1985, 2000-2001) [1].

Especially for legislative regulation enforcement the supreme legislative body of Ukraine ratified a number of international legal acts on human rights and on the handling of prisoners.

For the first time the definition of "Correctional Labor Law" was used in 1925, and later on 23<sup>rd</sup> December 1970 with the implementation of the Correctional Labor Code of Ukraine, which came into force on 1st June 1971 and the introduction of the practice of application of the rules, this term has been included in the concept "Penal or Correctional Labor Policy" as a set of measures for correction. This Act of Law with relevant amendments is valid until today.

In 2001 the new edition of the Criminal Code of Ukraine was adopted. Among the differences, it should be noted that it introduced some new penalties (such as arrest, confinement, community service, life imprisonment) [2]. Some rules are contained in the Statute of the disciplinary battalion of the Armed Forces of Ukraine in 1994 [3], the laws of Ukraine "On the State Enforcement Service" 1998 [4] and "On Enforcement Proceedings" in 1999 [5].

In accordance with the following international standards and regulations some of the chapters of the Correctional Labour Law were amended and a new section (IX) was implemented: Universal Declaration of Human Rights [6], Minimum Standard Rules for the Treatment of Prisoners [7], Recommendations of the First United Nations Congress on the Prevention of Crime and the Treatment of Criminals.

Economic and Social Councils decreed these rules approved by the first Congress of the United Nations, and recommend their adoption to the application of penal and correctional institutions, to publicize them widely, not only among the relevant government agencies, but also non-governmental organizations interested

in social security [8] and the implementation of other international legal requirements of Human Rights.

According to the Concept of the system development of the Ministry of Internal Affairs of Ukraine [10] and on the basis of the Decree of the President of Ukraine in 1998 [11] the State Department of Ukraine for Execution of Sentences was established. The provision of this department put into effect by the Decree of the President of Ukraine in 1998 [12], was further developed by the Cabinet of Ministers of Ukraine of 2007 [13]. Later on the Decree of the President of Ukraine in 1999 [14] adopted the Law of Ukraine "On withdrawal of State Department of the Execution of Punishments from the subordination of the Ministry of Interior of Ukraine" [15].

The development and implementation of current national policy in the penal system is based on appropriate scientifically grounded and practically proved international instruments that define the operational purpose of the system, which primarily protects the legal rights and legitimate interests of citizens, legal persons and the State from criminal offenses and ensures law and justice in the enforcement of sentences.

The primary tasks of the state penal policy are: In-depth control over compliance staff of penal canons of applicable law, Decisions of the Parliament and the Government, Involvement of courts, prosecutors, public authorities, local governments, NGOs, some individuals within the scope of their statutory powers.

In carrying out its enforcement functions the penal system implements the goals and objectives by producing effective practice in the government policy, which is based on the principles of penal law divided into three groups: Generally Legal (rule of law, democracy, humanism), Intersectoral (social justice, the inevitability of punishment), Sectoral (equality of prisoners against the law, legal regulation for correction, subordination, differentiation and individualization of punishment, combining punishment with corrective measures to influence public participation in the implementation of punishment and correction).

These principles complement each other because their implementation is complex.

The Constitution of Ukraine as the main source of Ukrainian legislation, including Penal Law determines the foundations of social order and political principles of their rights, freedoms and duties of citizens of Ukraine, including those sentenced to punishment.

The Penal Law as the direct source of the system includes: Corrective Labor Code of Ukraine [16] replaced by the Penal Code of Ukraine [17], other legislative acts of Ukraine: the Criminal Code of Ukraine [18], Labor Code of Ukraine [19], Code of Ukraine Marriage and Family [20], The laws of Ukraine "Bodies and

Services for Minors and Special Facilities for Minors” [21], “Enforcement Proceedings” [22] and others, The Resolutions of the Parliament of Ukraine and the Decrees of the Presidium of the Parliament of Ukraine (for example, the Regulation on the procedure and subject to the Ukrainian SSR criminal penalties not associated with measures of corrective labor impact on prisoners, approved by the Decree of the Presidium of the Parliament of the Ukrainian SSR, and others.) [23], Decrees of the President of Ukraine (“Provisions of the disciplinary battalion of the Armed forces of Ukraine” [5] “Establishment of the State Department of Ukraine for Execution of Punishment” (SDUEP) [11] etc.), Regulations and orders of the Cabinet Ministers of Ukraine (“Main Directions of the Reform of the Penal System in the Ukrainian Soviet Socialist Republic” [24], “Measures to Strengthen the Material Basis of the Organs and Institutions of the Penal System 2000-2004” [25] and others), Interagency and industry regulations, orders, rules, regulations and instructions of the State Department of Ukraine for Execution of Punishments (Order of the State Department of Ukraine for Execution of Sentences and the Ministry of Health of Ukraine “Regulation on Health and Work Commission” [26], the order SDUEP “Approval and Enactment of the Internal Regulations of Such Institutions” [27] and others.), International legal acts ratified by the Parliament of Ukraine (Vienna Agreement [28]), Intergovernmental agreement on the Transfer of Sentenced etc.).

Thus, the national database of the Penal Law sources is an systematized dynamic system that undergoes constant changes, the elements of which are a number of separate but related organic synergy of legal acts, where each of them, depending on the legal effect, takes appropriate place and they complement each other.

HIV infection is a typical infectious disease of penitentiary institutions in almost all countries. Despite the isolation of a contingent of these institutions, the problem goes far beyond them. Prison’s condition is an ideal environment for the spread of HIV. Drug use and sexual contact between prisoners is the main source for transmission of infection.

In 1987 Ukraine recorded two cases of HIV infection, and over the next five years – only one. In 1992 their number increased to five. By 1995 there were already 455 infected people, and at the beginning of 1996, the number of confirmed cases in the definition of positive blood antibodies to HIV increased to 1.292 people, or nearly 184% in 12 months. In 1996 there were 1241 persons infected with HIV, including adult men/women respectively 1021/167, underaged – 53, who were in custody. The problem of HIV/AIDS in the penal system of the Russian Federation emerged

in 1996, with the first cases of prisoners and persons under investigation. In a years and a half their number increased by 30%.

In 1997 and 2000 the relevant regulations were issued in the MOI of Russia for mandatory HIV testing of offenders and to draw isolated areas for maintenance of infected men and women. Between 1999-2002 the number of HIV-infected inmates increased 10.6-fold [29].

Mandatory HIV testing in correctional facilities Ukraine was introduced in early 1993, however a slight prevalence in the general population led to the fact that from April 1, 1997 mandatory HIV testing was performed only in addicts. The HIV-infected prisoners reported that after the announcement of positive results of analysis they were not provided with any clarification or assistance, and indicated that information on AIDS was very limited, brochures were sparse and material was poorly presented [30]. This leads to lack of safe conduct, adequate specialized medical care, presence of sexually transmitted diseases, lack of effective preventive measures, stress load, ignoring safety etc. Due to these factors the likelihood of infection dramatically increased.

The rights and organization of medical care for imprisoned persons suffering from AIDS is based on Correctional Labor Law of Ukraine, legislation on health care, regulations of the Cabinet of Ministers of Ukraine, the State Department of Ukraine for Execution of Sentences, Ministry of Internal Affairs of Ukraine and other applicable legal documents. The health care monitoring of prisoners is done by the Health Department of the Ministry of Internal Affairs of Ukraine, which defines a set of measures for HIV-infected persons by the laws of Ukraine “Prevention of AIDS and Social Protection” in 1991 and “Amending the Law of Ukraine – Prevention of AIDS and Social Protection” in 1998 based on the provisions of this Law Programme on Internal Affairs of Ukraine to reduce the risk of HIV/AIDS among personnel and people who are in prison. A joint decree of the Ministry of Internal Affairs, Ministry of Health of Ukraine and the National Committee for the prevention of drug addiction and AIDS on May 18, 1997 № 312/165/46 approved the procedure of medical examination for HIV-infected persons in pretrial HC’ detention and correctional labor institutions and conditions of HIV-infected among these individuals.

In 2007 on the initiative of the Government of Ukraine a comprehensive external evaluation of the national response to HIV/AIDS was conducted. It investigated the real situation regarding HIV/AIDS in Ukraine and participation in actions to fight the epidemic of the State, non-governmental and public sector. The experts cooperating on this project believed

that human rights depended on prioritizing programs for those related to the epidemic, and resource allocation that would provide an opportunity for all political actors in the field of HIV/AIDS to properly perform their functions.

The Government of Ukraine and the National Coordinating Council for the Prevention of the Spread of HIV was entrusted to ensure a calculation of required funds, the implementation of tangible funding and control functions of task execution for the prevention of disease and the effectiveness and efficiency of universal access to highly active antiretroviral therapy, medical and social support to people living with HIV/AIDS, focusing on issues of human rights, progress in health care and law. The experts stressed that although the opposition challenges of HIV/AIDS are an intersectoral generally national business, the ultimate responsibility for achieving results lies with the government of the country [31].

The Ukrainian and international experts have concluded a satisfactory level of content of the Ukrainian legislation, which is regulated by legal relations in the field of fight against HIV [30]. Meanwhile the report of a two-month mission of the Council of Europe to Ukraine in 1996 on the assessment of the prison system of Ukraine indicated that the visits to penal institutions revealed that members of the medical prison service had no real opportunity to meet with their European colleagues working in other prison systems, thus the lack of experience and the feeling of isolation within their profession [32].

There are some discrepancies in the national legal framework. In medical units of remand prisons there are no conditions provided for the provision of specialized medical care for HIV-infected individuals for obvious reasons related to the specific work carried out to perform an investigation. Non-compliance with the article 150 of the Criminal Procedure Code of Ukraine regulations (a preventive measure for the suspect or the accused in view of his health condition) is a violation of human rights as defined in article 3 of the Constitution of Ukraine and the threat to the health or life of the detained citizen. Moreover, patients with severe diseases and end-stage of HIV infection have to be dismissed by the court decision, however the clinical features of the disease and determination of its markers cause a delayed implementation of the legal norm.

The situation in preparation for the release of HIV-infected inmates and their subsequent employment, social inclusion of medical care, providing care and psychological support, requires more progressive developments. In 1998 a joint project of UN and Ministry of Internal Affairs of Ukraine was launched on a training module for "HIV/AIDS and sexually transmitted diseases in prisons". High social respon-

sibility are taken by the commercial organizations, various religious denominations, mutual aid groups, community projects "Peer-to-Peer" substitution maintenance therapy, initiative groups of citizens.

A significant role in this intersectoral complex is played by international agencies and NGOs, which are subject to state registration in accordance with the Regulations on the legalization of associations [33], Regulation on the Procedure of state registration of charities [34]. Registration of NGOs is performed by the Ministry of Justice of Ukraine [35, 36]. Thus, Ukraine established an effective legal and regulatory framework for the activities of HIV-service NGOs, including those in the penitentiary system, and the synthesis and dissemination of experience has provided an opportunity to expand the range of services to the HIV-infected and AIDS patients, and therefore achieve high performance and increase the efficiency of HIV/AIDS programs implemented by the state.

Under current law, the Interior Ministry together with the Ministry of Health of Ukraine developed the Regulations on the procedure giving ranks and officers of the police and special troops for the detection of HIV infection, registration, medical examination and preventive supervision of infected individuals. Under the Regulations, a compulsory medical examination is mandatory for prisoners and suspects if drugs were administered by injection at least twice a year throughout the term of penal institution. The examination has to be applied to the person in reception centers, defendants in pretrial detention, prisoners (annually). The HIV-infected are hospitalized for further diagnosis and treatment prescription. If necessary, the consultants from relevant agencies of the Ministry of Health have to be invited. All prisoners with HIV infection (AIDS) are sent to a special hospital department of interregional penitentiary.

The HIV-infected and AIDS patients are subjected to compulsory screening to monitor their physical and mental health treatment on a regular basis, conduct highly active antiretroviral therapy, ensure psychological support and counseling.

Summing up, we can draw the following conclusions:

1. National penal law – is comprehensive in scope, arranged in a system, responsive to the present and organizational changes and time-dynamics for legal acts;
2. The legal framework of Ukraine in its content and substance meets the basic requirements of international law in the state penal system in the context of HIV/AIDS;
3. Further progressive development of regulatory and legal framework is in constant dynamics according to the modern international standards and challenges of HIV/AIDS in Ukraine.

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