

## ЮРИДИЧЕСКИЕ НАУКИ

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### PRIVATE PENITENTIARY INSTITUTIONS: PRO ET CONTRA

**Abstract.** The article addresses to formation, development and current state of private prisons in foreign countries. The authors describe mechanisms for transferring prisoners from the state to the private sector. The analysis are given with the arguments on the issue of validity and expediency of introducing private penitentiary institutions in the territory of Ukraine. The conclusion is made about the need for further scientific research and more detailed development and substantiation of the issue of the feasibility or the introduction of private penitentiary institutions in Ukraine.

*Keywords: foreign penitentiary systems, penitentiary system, private prison, state prison, prisoner.*

**Target setting.** On September 16, 2014, the Verkhovna Rada of Ukraine and the European Parliament simultaneously ratified the EU-Ukraine Association Agreement. Section III of the EU-Ukraine Association Agreement "Justice, Freedom and Security" provides for cooperation between Ukraine and the EU in this field, including the fight against crime and corruption (Art. 22), the fight against terrorism (Art. 23) in the implementation of legal cooperation (Art. 24), etc. European choice of Ukraine causes restructuring and modernization of all spheres of legal regulation in country, including criminal and executive one. The reform of the penitentiary system should be carried out using the experience of the leading countries of Europe and the world, including on the issue of involving the private sector in imprisonment. The main widespread argument in society in favor of such a practice in the field of punishment is the ability to more effectively use the state's financial resources to hold prisoners. At the same time, given that the use of private prisons in Ukraine is a new activity, one should refer to the history and current state of private prisons in foreign countries to determine the feasibility of introducing such practices.

**State of the problem research.** The issues of establishing of private prisons in Ukraine, as well as the analysis of foreign experience for involving the private sector in the sphere of unconditional punishment execution sentence of imprisonment are devoted to the works of scientists: Ananian L., Bohatyriov O., Radchenko O., Poltavets T., Puzyriov M., Starenkiy S., Trubnykov V., Yahunov D., Yakovets I., and others.

**Purpose setting.** The aim of the article is the research into the history and current practice of using private prisons in the leading countries of Europe and

the USA, and the possibility of such experience taking by Ukraine.

**Statement of basic material of the research.** Grant, Alexander, and Company. For the first time, the practice of "leasing" prisoners appeared in the United States after the Civil War, when the number of prisoners was very high and there was not enough cheap labor on the plantations. In 1868, Georgia Governor Thomas Roger leased 100 prisoners to several local businesses. In 1869, all prisoners serving sentences (393 persons) participated in the construction of the railway by the private company Grant, Alexander, and Company.

Due to the fact that companies forced prisoners to work to the last forces and used physical violence in 1908, such "lease" was banned.

In the 1980s, the number of persons sentenced to imprisonment increased dramatically due to the implementation of the drug program. Tom Beasley, Robert Krantz and Don Hutto have decided that a private initiative could solve the problem of overcrowding in prisons. They assured that the company services of a prisoner detention could save significant amounts of money. In addition, in the absence of unnecessary bureaucracy, private companies will be able to build new prisons faster. In 1984, entrepreneurs gained control of the county jail and the Tennessee juvenile detention center. By 1988, the company had already functioned nine prisons, labor camps, and juvenile detention centers in four states.

Over the next 20 years, the number of private prisons was more than 100. These prisons were already managed by 18 private corporations, which until 2008 held about 62,000 persons. In 2016, after a series of scandals related to conditions of private prisons

functioning, the US Department of Justice issued an order for the gradual closure of private prisons.

Companies that own and function prisons, camps, detention centers, or restitution centers (restoration of violated property rights, bringing them to the state that existed at the time of the act that caused the damage, that is, the return or restoration of property such as: the same one, or similar, or things of the same value), sign a contract with the federal, state, or county governments. They undertake to maintain a certain number of prisoners in accordance with the national standards, providing a specified level of security [1, p. 32-37]. Private prisons in the United States are guaranteed monetary compensation for receiving one prisoner, regardless of cost. Thus, profitability is achieved by the number of persons in prison. One of the innovative means of cost-effectiveness of penitentiary institutions is the reduction in the number of staff supervising prisoners.

Companies also earn on prisoners' working who are constantly encouraged to work. For good work, they can promise to reduce a sentence. In private prisons, there is also a system of punishment and fines that can make life imprisonment a life sentence. Prisoners in private prisons can work and earn money. However, the practice of hospital and vacation in these institutions is absent.

Labor in private prisons is used in two ways:

- direct exploitation;

- indirect exploitation - products manufactured by prisoners are delivered to private companies on a contractual basis, with the price of such products being much lower than market prices.

The first European country to borrow the practice of private prisons was Britain. The first private men's prison for 400 people was opened there in 1992 and was considered as an experimental alternative to state prisons. According to the results of the experiment, 80% of the respondents said that this prison is better than the one in which the respondents had previously served their sentences. The essence of state-private partnerships in the UK is that private investors are contractually assigned to design, build, function, and fund a 25-year sentence. After the expiration of such term, an institution shall become the property of the state. Instead, the state authorities are obliged to pay the detainees the money to keep the prisoners. Nowadays, there are 133 prisons in England and Wales, 14 of which are private.

In France, there have been several state-private prisons since 1990. Criminal penalties of imprisonment carry out 188 penitentiary institutions. In 54 of them, the program of delegated management is implemented: the construction and maintenance of prisons are private persons, but the control over the prisoners and their livelihood is the prerogative of the state. In addition, private prisons are allowed in France. They belong, as a rule, to charitable or religious organizations [2, p. 59].

In 2005, German company Serco Group won the tender and signed the first five-year contract with the Hessen Ministry of Justice to manage the Hessen Prison Service. This company is responsible for providing

psychological, medical and educational spheres of activity, as well as for the maintenance of prison buildings [1, p. 32-37].

In Brazil, there is a system in-between the US and France models: External prison protection is provided by state units, and privately owned by a private company.

In Japan, the first private prison opened in 2007. It is designed for 2000 people. It provides training for those involved in certain professions and owns land for the organization of manual labor.

All prisons and detention centers are state-controlled in Sweden, but in 1998 Parliament approved the decision of private security companies to perform functions such as escorting or guarding hospitalized prisoners. In addition, the Prison and Probation Service may involve companies, associations, teams, or foundations to support so-called "transitional prisons". Companies that privately provide the activities of these institutions or special rehabilitation centers should: keep the Prison and Probation Service informed of the course of prisoners' social adaptation; advise the Prison and Probation Service on social adaptation; immediately report of non-compliance cases of convicts' staying in these institutions, etc. [1, p. 32-37].

The term "private prison" implies a contract between a private company and prison management, and under the terms of the contract, the company is delegated all or a part of the functions of prison management. No prison is completely independent of state control [3, p. 411].

There are several forms of private investors involvement in the penitentiary system:

- private entrepreneurs provide services in the field of nutrition, education, medicine;

- construction of a prison by a private company and the administration of state penitentiary authorities;

- management of a prison is transferred entirely to the individual;

- a private investor designs, builds, and manages a prison on leasing terms. Once the contract is made, the prison becomes a state property [4].

The issue of establishing private prisons in Ukraine remains controversial. ***In Ukraine, private prisons have never been established in historical terms.***

Private prisons function in many countries: the USA, Australia, the United Kingdom, Japan, Denmark, Brazil, Korea, Iran, New Zealand, etc., but their types and forms of work differ. There are common reasons for all the grounds on which the "denationalization" of prisons has taken place (and Ukraine is no exception):

- 1) lack of sufficient level of funding for the penitentiary system activity, limitation of available resources (obsolescence prisoners' of equipment and buildings, numerous cases of violations of prisoners' rights);

- 2) low morale among penitentiary staff;

- 3) fragmentation of correctional work with prisoners;

- 4) formalism in the work of penitentiary staff;

5) insufficient level of education and unprofessional staff of penitentiary institutions;

6) overcrowding of detention cells of prisoners;

7) the unreliability of a preventive mechanism of debarment the physical and moral abuse of some prisoners over others;

8) restrictions on access to justice due to postponement or deliberate delays in sending correspondence;

9) limited application of alternative measures of criminal-legal regulation to criminals not related to the imprisonment;

10) problems with the prisoners' classification;

11) lack of objectivity of the system of "privileges" application to convicts, provided for by section XII of the Criminal Code of Ukraine "Exemption from punishment and its serving";

12) insufficient social security staff of the bodies and penitentiary institution and their families;

13) fragmentation and lack of funding for scientific research in the field of punishment execution;

14) lack of understanding that the system should be humane by the majority of society, including the staff of penitentiary institutions [5, p. 15].

Most specialists in the field of criminal law criticize the activities of

privatized or contracted private prisons.

Their arguments are:

1) the state should not transfer the main function to execute punishment to private prisons, along with buildings and financial property because sentence of imprisonment is a very severe measure of state coercion. Since punishment is assigned by state authorities on behalf of the state, it must continue to carry out this type of punishment, despite all the difficulties;

2) in the field of penitentiary activity private companies are guided by their own ideas. Most often, they use commercial approaches (dismissing old specialists and hiring new ones without special training, experience and knowledge; without increasing wages they increase the amount of work that causes psychological stress of workers, etc.);

3) state, dynamics and structure of crime among prisoners in private prisons is more alarming than in similar state institutions, etc. [6, p. 10].

Many European and other countries are reluctant to replace state institutions with private ones. A very strong argument against their establishing was expressed by the participants of the International Conference on the Reform of Punishment Execution "New Approaches to the Reform of the Punishment Execution System in the Next Century", held April 13-17, 1999 in Egham, Surrey, England. Ministers, parliamentarians, judges, representatives of international, regional and national correctional organizations and other officials from 50 countries and five continents participated in the conference. They expressed deep concern about the reform of the Criminal and Executive System and the human rights situation, discussed the role of the Criminal Justice System, including prisons in a civil democratic society,

and developed a new program of execution of punishments in the 21st century. Regarding to private prisons, the program provides private prisons that are likely to be profitable and to contribute to the spread of sentence of imprisonment, so it is needed to counteract their spread [6, p. 10-11].

In addition, as Professor Trubnikov V. M. points out in the mentioned program of the Penitentiary System Reform, that Criminal Justice should have a clearly defined and limited role in any democratic civil society. It should not be used to address issues outside its scope, such as social issues. In addition, a reduction in the amount of punitive sanctions should be supported whenever it is possible. Sentence of imprisonment should be used by the courts as an exclusive and not the main punishment. Particularly for use of preventive measure of pre-trial detention. The Criminal Justice System does not have to be elitist (such as construction of Pablo Escobar's self-built prison in Mexico), it must provide for an equal treatment of all [6, p. 11].

A good example of the economic functioning of private prisons is cited by Togochnyskyi O. M., Anischenko V.O. and Puzyriov M. S.: "If the state reduces the costs of prisons through contracts with the private sector, then the price stipulated by the contract should be lower than the price the state had previously invested in holding a penitentiary institution. However, if a private counterparty is also going to receive income from this activity, then it must spend less money on prison management than it is stipulated in the contract. In such an approach, private prisons should be kept at significantly less cost than they were kept to secure the interests of both parties. At present, private counterparties has no right and cannot allow the slightest reduction to happen in conditions of imprisonment and detention of prisoners. Even the most staunch, unwavering proponents of private prisons believe that the desire for income in no way should be reflected in the conditions of detention. However, in practice, private contractors are little concerned about these issues. Their desire to reduce costs, even at the expense of prisoners, the conditions of their maintenance was the only and foreseeable result of the existing contracts» [7, p. 42; 8, p. 147]. For example, in the USA, private prisons are guaranteed with compensation for keeping one prisoner, regardless of costs. Thus, profitability is achieved by the number of people in prison [4].

Private corporations position their activities as economically profitable, reducing state expenditure, but according to the research of the US Bureau of Justice Statistics, economy is achieved through artificially understatement costs for servicing (poor nutrition, poor health care, breach of the residence terms of prisoners, unqualified staff and security).

Forced labor is forbidden in Ukraine. The work of convicts in Ukraine is voluntary, so contracts for the convicts' transfer to serve sentences in private prisons and use them as labor must necessarily be tripartite.

Amending the legislation and granting the state permission to establish private prisons in Ukraine, like any resonant event in society, should provoke many

discussions both in the highest state levels and in ordinary citizens [5, p. 18]:

1) how does the state's delegation of the right to punish its citizens to private prisons compare?

2) how can conflicts of state and private interests be resolved?

3) is it possible to compare the efficiency of punishment execution by state and private prisons on

the basis of their activities cost rather than the number of recidivism cases?

4) what is the interdependence between the level of service provided and the form of prison ownership?

5) etc.

In the table. 1 there are arguments of “pros” and “cons” of private prisons introduction in Ukraine.

Table 1

#### Arguments for private prisons introduction

№	Arguments for private prisons introduction	
	«pros» for private prisons introduction	«cons» for private prisons introduction
1.	reducing the burden on the state budget	high level of corruption
2.	reducing the costs of a private institution to meet economic needs	lack of the control mechanism of compliance of the contract terms for the prisoners` transfer to serving sentences in private prisons
3.	improvement of the re-socialization process of convicts (obtaining a profession, obtaining identification documents, etc.)	lack of the mechanism for activities assessing of private prisons
4.		the need to adapt existing legislation for introduction of a the private sector into the penitentiary system
5.		reducing the number of state prisons, reducing the staff of the State Criminal and Executive Service and, as a result, increasing the burden on the state budget, due to the need of paying former staff of state prisons, prisons of compensation payments related to dismissal
6.		the state should not transfer to private prisons along with buildings and financial values its primary function to execute punishment because imprisonment is a very severe measure of state coercion
7.		private companies in the field of penitentiary activities, guided by their own ideas, have the main purpose-to make a profit
8.		state, dynamics and structure of crime among prisoners in private prisons is more alarming than in similar state institutions

**Conclusions.** Based on the above mentioned, it can be concluded that:

– introduction of private prisons for a long term can reduce the burden on the state budget of Ukraine, but only by violating of justice principles;

– to usage of criminal justice to address socio-economic issues is inappropriate way;

– obvious disadvantages of introducing private prisons in Ukraine are: 1) high level of corruption in Ukraine; 2) lack of mechanism for activities assessing of private prisons; 3) lack of mechanism for activities assessing of private prisons; 4) the need to adapt existing legislation for introducing the private sector into the penitentiary system; 5) reducing the number of state prisons, reducing the staff of the State Criminal and Executive Service and, as a result, increasing the burden on the state budget, due to the need of paying former staff of state prisons, prisons of compensation payments related to dismissal.

In our opinion, at present time the introduction of private prisons in Ukraine requires further study.

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