



# The Eye of a Needle: Temporary Prison Leave in Ukraine

Anton Symkovych<sup>1,2</sup> 

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## Abstract

Although temporary prison leave humanises custodial punishment, offsets its negative effects, and prepares prisoners for (re)integration into wider society, its use proves to be controversial and uneven across jurisdictions. Since the collapse of the USSR, the former Soviet countries have been pursuing different criminal justice policies, liberalising some penal practices whilst retaining many punitive Soviet legacies. Through analysis of the legal provisions regulating temporary prison leave and official statistics in Ukraine, I demonstrate the apparent strain between the official policies and practice. Whilst legally available, temporary leave for prisoners in closed prisons is almost never granted in this Eastern European country. I argue that for Ukraine to reconcile the official rhetoric of rehabilitation and social reintegration of offenders and actual implementation of penal policies, the country must reverse the underlying requirements governing temporary prison leave and expand its use.

**Keywords** Prison leave · Temporary leave · Ukraine · Furlough · Leave of absence

## Introduction

Since restoring its independence in 1991, Ukraine has been on the path of democratisation. Embarking on the ‘Europeanisation’ project has meant that the country attempts to adopt, emulate, and follow the policies and practices established in the European Union (Ladrech 1994).<sup>1</sup> To break with its Gulag past, and in order to receive financial, technical, and political support from the ‘West’, Ukraine has acceded to the Council of Europe and all major human rights instruments. It has abolished the death penalty, outlawed torture, recognised the case law of the European Court of Human Rights (ECtHR) as a part of its national legislation, and opened its custodial institutions to inspections by national and supranational human rights monitoring bodies (see Symkovych, 2018c). The country has liberalised its penal policies, decriminalising some offences, reducing sentences, or allowing non-custodial punishment for

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<sup>1</sup>See Canton (2006) for an example of such policy and practice transfers.

✉ Anton Symkovych  
anton.symkovych@unimelb.edu.au

Extended author information available on the last page of the article

others, and expanding prisoner rights and entitlements. These reforms not only unloaded its cramped prisons, but also lent some legitimacy to the political regime—for policy transfers ‘from Europe’ are presented in Ukraine, often uncritically, as modern and progressive (Canton 2006).<sup>2</sup>

As in some European countries where the number of prisoners has recently decreased (Dünkel 2017), Ukraine has reduced its prison population threefold over the last 20 years, from 208,000 to 56,000. Since 2000, its incarceration rate went from 443 to 157 prisoners per 100,000 population<sup>3</sup>—compared with Poland’s 194 and Russia’s 402 in 2018 (Institute for Crime and Justice Policy Research 2019). Furthermore, many prisoners are now released before serving their entire sentences: 15.3% of all released in 2017 were released early on parole (Prison Portal of Donetsk Memorial 2018). Notwithstanding these major changes, many vestiges of repressive Soviet penal policies and prison practices persist or even return (see Foglesong and Solomon 2001; Piacentini and Slade 2015; Solomon and Gadowska 2018; Symkovych 2018a). Legal safeguards for prisoners and their entitlements do not always translate into practice. The regular reports of the UN’s Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) continuously highlight unnecessary restrictive penal policies in addition to many serious problems that plague Ukrainian prisons. Ukrainian prisoners often live in dilapidated accommodation and do not have access to adequate medical testing and treatment; reports of abuse are not unusual, and, like in the Soviet times, the prisoner underworld still plays an important role in keeping order in Ukraine’s understaffed prisons (CPT 2015, 2017, 2018; SPT 2014, 2017; Symkovych 2018d, 2018e). Security categorisation in Ukraine is devoid of individual risk assessment. The nature of the crime, rather than escape risk or control problems, determines the security level of a prison to which an offender is assigned and where he or she normally serves the entire sentence.

Despite the major transformations in the post-Soviet countries following the collapse of the USSR, we know little about the interplay of penal policies and practices in this part of the world (although see Slade 2016; Symkovych 2018c, 2018d, 2018e). Through the analysis of the legal provisions regulating temporary prison leave and official statistics in Ukraine, my objective is to highlight the apparent disjuncture between the official policies and practice. By temporary prison leave (henceforth temporary leave), I mean a brief release of prisoners during their custodial sentence in closed prisons. I demonstrate that whilst legally available, temporary leave is almost never granted in this Eastern European country.

I begin by highlighting the empirical evidence of the benefits of temporary leave whilst acknowledging the attendant risks. I then present the national policies governing temporary leave in Ukraine. These policies are public and accessible via the unified Internet portal of the Ukrainian legislature.<sup>4</sup> I go on to discuss national statistics on temporary leave in order to highlight the discrepancy between the official discourse and policy in action. I conclude by arguing that Ukraine must reverse the underlying requirements governing temporary leave and

<sup>2</sup> Even so, some policies and attitudes that are seen as being coerced onto Ukraine are resisted for ‘being against (allegedly uniform and static) Ukrainian values’ (Symkovych 2017, 2019).

<sup>3</sup> Ukraine’s general population also decreased dramatically due to increased mortality and immigration following the collapse of the USSR in 1991, as well as the annexation of a part of Ukraine by the Russian Federation in 2014.

<sup>4</sup> <https://zakon.rada.gov.ua/laws>.

expand its use if it is to reconcile the official rhetoric of rehabilitation and social reintegration of offenders and actual implementation of penal policies.

## What is Temporary Prison Leave About?

Many countries systematise some form of temporary leave either on humanitarian (compassionate) grounds or as part of offender (re)habilitation and preparation for ultimate release. The former is usually to allow prisoners to attend (escorted or without direct supervision) gravely ill close relatives or their funerals (see European Prison Rules 2006: Rule 24.7). The latter is in line with the progressive model of incarceration that Alexander Maconochie once championed in Norfolk penal colony (Australia) in the 1840s. According to this model, prison serves not only to punish and incapacitate offenders, but also to ‘rehabilitate’ them, i.e. to change people so they can lead law-abiding lives upon ultimate release (see Grupp 1970; Nelson Mandela Rules 2015: Rules 4 and 87; van Zyl Smit 1988). Thus, as prisoners start demonstrating signs of being ‘rehabilitated’ (‘corrected’), they receive more incentives and rights, ultimately progressing towards release (Barry 1958). In fact, in some countries, temporary leave constitutes testing of prisoner readiness for parole (Larrauri 2019; Toch 1967). Temporary leave also serves to humanise sentences and offset the adverse effects of incarceration, not least what Goffman (1961) terms mortification, i.e. destruction of prisoner’s personhood (see Cheliotis 2008; European Parliament 1999; Fox 1971; Markley 1973; Shichor and Allen 1978). It breaks the monotony of incarceration and reignites hope that is central to survival of imprisonment (Toch 1967). As a result, the ECtHR declares that temporary leave can in effect constitute a civil right even when the national law explicitly frames it as a privilege to be earned and granted (*Boulois v. Luxembourg* 2012).

Usually, the authorities grant temporary leave for prisoners to engage in a range of ‘purposeful’ activities outside prison (rarely, if ever, *in lieu* of a holiday), whereby prisoners must return to custody in the evening or after several days. Amongst the most common grounds for temporary release from custody are family visits, work, education, medical, including substance abuse, treatment, as well as arrangement of housing, employment, and other matters important for ultimate release (Cheliotis 2009; Shichor and Allen 1978; Toch 1967; Turner and Petersilia 1996). The power to grant temporary leave depends on the jurisdiction and is usually vested in prison authorities or judges (Cheliotis 2009; Larrauri 2019). Whereas in some countries, temporary leave constitutes a logical step in sentence progression and thus operates in a semi-automatic fashion once the required conditions are satisfied, in others, it involves concerted decision-making and (inevitably flawed) risk assessment (see Shammas 2014; Turner 2011). In the case of discretionary judgement, those in charge seem to prefer to err on the side of lower risk, granting temporary leave to the prisoners who have ‘proved’ their trustworthiness by behaving well in prison and complying with licence conditions during previous temporary leave (Cheliotis 2005; Knox and Humphrey 1981; Moran and Keinänen 2012; Toch 1967). This tendency to play safe by denying a great many prisoners temporary leave has prompted the ECtHR to rule that rejection of prison leave should be convincingly necessary and persuasively justifiable (e.g. *Ploski v. Poland* 2003).

Despite authorities’ reluctance to grant temporary leave, research highlights its role in prisoner (re)establishment in society-at-large in general, and desistance from crime in particular (Cheliotis 2008, 2009; LeClair 1978; LeClair and Guarino-Ghezzi 1991). In fact, some commentators argue that being released without making prior arrangements and adaptation

may contribute to recidivism (Symkovych forthcoming; Wright and Rosky 2011). A number of studies have found that prison leave correlates with both lower unemployment upon release and less frequent return to custody (Cheliotis 2008; Helmus and Ternes 2017). Other studies, however, question some of the taken-for-granted assumptions regarding the benefits of temporary leave as they do not find support for the claim that temporary leave inevitably decreases recidivism (Turner and Petersilia 1996; Waldo and Chiricos 1977). Furthermore, those studies that demonstrate the positive effect of temporary leave do not always fully acknowledge the selection bias, including prisoner self-selection, given how risk-averse and conservative the decision-makers are in authorising temporary leave (although see Cheliotis 2005, 2008; Markley 1973; Shichor and Allen 1978). Nonetheless, prison leave still allows prisoners to counterbalance the Goffmanian mortification, as well as preserve or develop family ties and other social contacts on the outside that prison tends to sever (see European Prison Rules 2006: Rules 24.4 and 24.5).<sup>5</sup> Although returning to incarceration after temporary leave is a daunting experience for many prisoners (Grupp 1970; Toch 1967), many view it as a positive option (Holt 1971). Even so, one Norwegian study reported some prisoners feeling apprehensive and lonely whilst on temporary leave, perhaps because they were not properly prepared and later debriefed (Toch 1967; see Shammas 2014 on ‘the pains of freedom’).

By facilitating, amongst other things, family and work-force (re)integration, temporary leave may be instrumental in crime reduction and victim compensation, thus creating a more harmonious society (*Boulois v. Luxembourg* 2012; European Parliament 1999). Nonetheless, the public, habitually mistrustful of offenders, rarely supports early or temporary release of prisoners, especially those convicted of sex offences (Cheliotis 2005; Suhling and Rehder 2009). The media and politicians capitalise on and fuel moral panic, public punitiveness, and sometimes genuine indignation (see O’Donnell and Jewkes 2011; van Zyl Smit 1988; Wright and Rosky 2011; cf. Moran and Keinänen 2012). In this climate, prison leave schemes tend to be underused and often benefit only prisoners perceived as being at low risk of violating the conditions of temporary leave, whereas these prisoners are not necessarily in the greatest need of this measure (Cheliotis 2005, 2014). Public and administrators’ concerns are not groundless. The ECtHR case law presents examples of prisoners committing crimes, including murders, whilst on temporary leave (*Maiorano and Others v. Italy* 2009; *Mastromatteo v. Italy* 2002; also Markley 1973; O’Donnell and Jewkes 2011). However, given that the administrators and judges authorising temporary leave seem to be (over) risk-averse, whilst prisoners are cognisant of severe consequences for violating the conditions of temporary leave, those granted temporary leave generally comply with its conditions (Holt 1971; Shichor and Allen 1978; Tadić 2018; Turner and Petersilia 1996; van Zyl Smit 1988). For example, drawing on the study in a large men’s prison in Greece, Cheliotis (2005) reports an average 6.06% failure to return to prison<sup>6</sup> amongst almost a thousand prisoners released annually on a temporary leave in 2000–2001. Other studies also report a low level of breaches: less than 5% in Finland; 0.04% of failures to return in Spain; and 2.1% and 4.7% of revocation of education-related and

<sup>5</sup> Prison affects people differently, and some men find that prison has encouraged them to re-evaluate and re-establish family ties (McCarthy and Adams 2019; Symkovych 2018b). Furthermore, in some countries, availability of guarantors on the outside, such as family, is required for a temporary leave to be granted, thus potentially discriminating against foreign nationals and those without family support (Cheliotis 2005; also Markley 1973; O’Donnell and Jewkes 2011).

<sup>6</sup> Cheliotis (2005) found that the authorities normally overlooked short delays, attributing them to transportation problems. The threshold at considering non-return as a breach of licence seemed to be around 24–48 h after the scheduled time.

work-related temporary leave respectively in the Canadian province of Ontario (Fox 1971; Larrauri 2019; Moran and Keinänen 2012).

Despite its postulated importance in offender rehabilitation ('correction'), in practice, and often in law, temporary leave usually constitutes an incentive that must be earned—with the attendant moral, behavioural, and managerial consequences (see Cheliotis 2014; Larrauri 2019). As with other incentive schemes, temporary leave may work as a soft coercive tool to control prisoners (Cheliotis 2008; Moran and Keinänen 2012). However, when a line between a right and a privilege blurs, whatever constitutes a privilege automatically elevates to a sought resource that breeds competition amongst prisoners, dilutes their solidarity, and instigates docile self-control that often results in the legitimacy deficit of the regime (Bottoms 2003; Crewe 2009; Mathiesen 1965; Toch 1967). It may also strain relationships between prisoners and the prison personnel dispensing incentives (Crewe 2009; Larrauri 2019; Liebling 2004). Even so, research links the availability of temporary leave to less violence and better control in prison (Düinkel and van Zyl Smit 2001; also, see Suhling and Rehder 2009).

In sum, notwithstanding its coercive potential and some scepticism regarding its effect on decreasing or delaying reoffending, temporary leave is widely recognised as a positive measure. However, availability and conditions of temporary leave, its prevalence, and forms vary greatly across jurisdictions. The nature of offence may disqualify some prisoners, whilst others usually must serve a minimum tariff before qualifying or there is a maximum annual cap on the number of periods of leave (Larrauri 2019; Moran and Keinänen 2012; Shichor and Allen 1978; Toch 1967; van Zyl Smit 1988; cf. Fox 1971). Temporary leave may be escorted or unescorted. It can be almost automatic or require assessment and authorisation by prison authorities and external agents. However, as most of the Anglophone research on temporary leave comes from the 'global North', the question follows: what is the state of temporary leave beyond the collective 'West'? In what follows, I explain who authorises temporary leave in Ukraine, the criteria for a prisoner to be allowed temporary leave, and how the law and practice interact in this post-Soviet country. Answers to these questions allow us to see the institution of temporary leave in a more global perspective. They also highlight the tension between, on the one hand, the salience of risk and blame evasion and, on the other hand, rehabilitative ambition.

## Temporary Leave in Ukrainian Law

Ukrainian law designates criminal punishment as a means of retribution (*kapa* in Ukrainian), individual and general deterrence, along with 'correction' (rehabilitation) and resocialisation of offenders (Criminal Code of Ukraine 2001: Article 50).<sup>7</sup> The official website of the Ukrainian Penitentiary Service<sup>8</sup> is imbued with rhetoric about the Service's commitment to rehabilitation

<sup>7</sup> See Canton and Padfield (2019) on moral rehabilitation, reconciliation, and a philosophy of responding to wrongdoing; Moran and Keinänen (2012) on the Finnish case of criminal punishment as moral shaping; and van Zyl Smit (1988) on the relationship between prison leave and, *inter alia*, general deterrence.

<sup>8</sup> <https://www.kvs.gov.ua>. I use the title Ukrainian Penitentiary Service although this government agency responsible for execution of both custodial and non-custodial criminal punishments regularly undergoes reorganisation and name changes. Currently, it constitutes a branch of the Ministry of Justice under the name State Criminal-Executive Service of Ukraine, the most common title since the prison system was formally separated from the Ministry of the Interior in 1998.

of offenders. The law stipulates that the execution of criminal punishments, including imprisonment, should rest on the principles of, *inter alia*, fairness, humanism, respect for human rights and liberties, differentiation and personalisation (i.e. a fit-for-person approach), and on a balance between coercion and encouragement, punishment and correction (Criminal-Executive Code of Ukraine [CECU] 2003: Article 1). Ukrainian law presents temporary leave as a reward for prisoners' good behaviour, a means of 'correction',<sup>9</sup> and as preparation for ultimate release. It is also intended as an expression of the state's alleged humanity. However, even in theory, temporary leave is available to a very limited segment of Ukrainian prisoners.

Whereas most prisoners (except lifers) have, at least legally, the chance of early conditional release,<sup>10</sup> the law provides for short-term leave on compassionate grounds only for those in 'open' prisons (so-called 'correctional centres'), juvenile prisons, minimum-security prisons with relaxed regimes, the pre-release sections of minimum-security prisons with general conditions, and the pre-release sections of medium-security prisons (CECU 2003: Article 111). Although the Council of Europe (1982) recommends expansion of prison leave, Ukrainian law emphasises that reasons for temporary leave of up to 10 days, including up to 3 days for commuting, must be exceptional. These reasons include the death or life-threatening illness of a close relative, a natural disaster that has caused considerable material loss to the offender or their family, and medical treatment if unavailable in a prison facility *and* when authorised by a prison doctor (Ministry of Justice of Ukraine 2011). Additionally, women prisoners whose children are in prison kindergartens (if born in prison, a child can stay with their mother up to the age of three) can request 10 days leave, plus three extra days for commuting, to put a child with their relatives, guardians, or into an orphanage (CECU 2003: Article 111).

Prisoners in 'open' prisons ('correctional centres') can also apply for temporary leave to sit exams, attend investigative procedures or court proceedings if required, for the birth of a child, to apply for a state pension,<sup>11</sup> and to arrange housing and work before release. The policy is unclear about the duration of leave in these circumstances. Although policy allows for court or investigation-related leave to last for the duration of the proceedings, arranging housing or employment can warrant up to 7 days (Ministry of Justice of Ukraine 2011: Article 3). As a reward for good behaviour and diligent work, the administration of 'open' prisons can authorise once-a-month leave for a weekend or national holiday (CECU 2003: Article 67.1).

As a reward for good behaviour and diligent study, juvenile prisoners may leave prison during the day for up to 8 h (returning before 8 pm), if accompanied by prison staff, parents (guardians), or close relatives. This can be to attend cultural, sport, or entertainment activities or *in lieu* of a short visit (CECU 2003: Article 144; Prison Bylaws 2018). Juvenile prisoners and accompanying adults must sign a declaration acknowledging that they have been told the conditions of day leave and the consequences in case of any breaches. During such leave, juvenile prisoners are prohibited from smoking, consuming alcohol or illicit substances, leaving the designated area (town), being unsupervised, or bringing contraband into prison

<sup>9</sup> Prison law and policies are replete with the phrase 'prisoners who have entered the path of correction' (see Supreme Court of Ukraine 1997). In the Soviet-era Corrective-Labour Code (1970), the phrase was 'a solid path of correction'.

<sup>10</sup> The CPT constantly calls on the Ukrainian authorities to humanise the regime for prisoners serving life sentences and guarantee them realistic prospects for conditional release (parole) (CPT 2018: Para 81).

<sup>11</sup> Prisoners can apply for a national identification card, arrange pension, and conduct other legal deeds from the prison.

upon return. As with other instances of temporary leave, prisoners are strip searched on leaving and re-entering prisons (Prison Bylaws 2018: Rule XVI: 1; 3; see Fox 1971).

Since 2012, apart from these humanitarian reasons, Ukraine allows 14 days annual leave for prisoners in minimum-security establishments with relaxed regime. There is a caveat emphasising that only those working in prison qualify. Additionally, as a reward for complying with Prison Bylaws and health and safety industrial production requirements, prisoners in pre-release sectors of medium-security prisons can be granted up to 7 days leave (CECU 2003: Article 130). As prison labour in Ukraine serves as a semi-official proxy for ‘correction’ (see Symkovych 2018a), this provision squarely makes temporary leave an incentive. Ukraine employs an incremental system of punishment meaning that restrictions can be relaxed and privileges granted, including temporary leave, provided a prisoner demonstrates good behaviour and diligence in work or education (CECU 2003: Article 100). However, as we know, law-in-action differs from law-on-the-books. Availability of resources, legacies of policies and practices, institutional cultures and inter-agency synergy, or competition or a lack of understanding of the frontline realities by policy-developers, all affect how laws and policies work on the ground. In addition, policy complexity, as well as number and training of practitioners, their understanding, support, or, conversely, moral rejection of the law and policies<sup>12</sup> mediate how written law translates into practice (Canton 2006; Nelken 2010). Next, I explain the decision-making in the administration of temporary leave, followed by statistics that show how legal provisions (do not) translate into practice.

## Decision-making

In some jurisdictions, temporary leave becomes automatic once certain criteria are satisfied. However, in most penal systems, it entails discretionary decisions that manage clashing interests, concerns, and rights. Most notably, decision-makers must find a balance between threats to public safety or the caprices of public opinion and the merits of progressive social reintegration through temporary leave, also taking into account any humanitarian aspects (see O’Donnell and Jewkes 2011; van Zyl Smit 1988).

Ukrainian law invests prison commanders (or those temporarily in charge) with the power to decide individual applications for temporary prison leave. A decision regarding temporary leave should take into account the personality and behaviour of a prisoner, although neither the law, nor the Ministry of Justice’s policy specifies exactly what may disqualify a prisoner (CECU 2003; Ministry of Justice of Ukraine 2011). The decision should be taken within 24 h of receiving the application and supporting documents such as a death certificate or a local authority’s letter confirming a natural disaster. This blanket urgency suggests that temporary leave is envisioned as an extraordinary emergency rather than a sentence plan. The leave duration should take account of the basis of the request and the distances involved. When refused, the authorities must list the grounds for refusal (Ministry of Justice of Ukraine 2011: Article 10). If granted, a prison commander must *personally* [emphasis added] brief the prisoner about the conduct required and warn them about their criminal responsibility regarding late return or absconding. A prisoner must sign an acknowledgement that becomes a part of their file. Conditions during temporary leave include prohibition of consuming illegal drugs

<sup>12</sup> See Symkovych (2018a, 2019) on prison officers’ views of the legitimacy of penal policies and practices, as well as of their own authority.



or alcohol and leaving the authorised location (Ministry of Justice of Ukraine 2011: Article 16).

The prison authorities then issue prisoners with a temporary identity card/letter and their civilian clothes. Transport to the destination becomes a prisoner's or their family's responsibility. A prisoner under the age of 16 must be accompanied by relatives or, if authorised by a prison commander, guardians, although the circle of eligible relatives is not specified (Ministry of Justice of Ukraine 2011: Article 5). If prisoners do not have enough money to return, the prison provides this but the policy mentions neither the method nor the consequences of such a situation (Ministry of Justice of Ukraine 2011: Article 23). The prisoner must register with the local probation service upon arrival and before departure, as well as give reasons (and later substantiate them) for any inability to return on time, including admission to hospital. The chief-officer-on-duty (*ChPNK*) has to inform the UkrPS regional office about each temporary leave (and return) (see Ministry of Justice of Ukraine 2011: Article 26). That prisons must report each case of temporary leave to one of the six regional centres and that prison commanders are required to personally brief prisoners before temporary leave points to high sensitivity of the institution of temporary leave in Ukraine and its extraordinary nature. Next, I argue that numbers also show that temporary leave is rarely, if ever, granted even to the small circle of prisoners who legally qualify.

## National Statistics

In the wake of the 2014 political crisis, the Ukrainian Penitentiary Service (UkrPS) stopped updating its website whilst the Service was undergoing another reorganisation. Although the website resumed its work in 2018, most of the previously available statistics are no longer accessible. I filed several freedom-of-information (FOI) inquiries concerning the number of applications for temporary leave and those approved, along with other relevant information, such as licence breaches or appeals refusal. However, the Penitentiary Service failed to supply these statistics despite repeated requests in 2018–2019 and complaints to the Ministry of Justice, under which the UkrPS operates. *In lieu* of response, the UkrPS sent me long excerpts of the law concerning FOI and extracts of the policies regulating temporary leave—despite them being publicly accessible and me quoting them in my FOI inquiries. Finally, in April 2019, the UkrPS claimed that it does not have information about temporary leave in Ukraine, suggesting individual prisons might have it.

I followed the UkrPS suggestion and requested the numbers in question from all six prison regions, given that according to the policy, the chief-officer-on-duty (*ChPNK*) in individual prisons must report to the relevant regional centre each case of temporary leave. Whilst two of the regions responded with some of the requested data, the other three initially claimed that my FOI requests were not filed in the correct format. Although this was not the case, I refiled them and eventually also had to send reminders, electronically and by registered mail, as well as make complaints to the UkrPS Headquarters, as the regions missed (some by months) all legal deadlines. Tellingly, the central region claimed that the requested data concerning temporary leave were for internal use only, thus refusing to release this 'classified' information.

The South-Eastern management region (10 closed prisons) responded that in 2017–2019, no prisoners in its closed prisons requested temporary leave on exceptional (compassionate) grounds, nor was any granted as a reward. This was despite 4.7% prisoners living in pre-release sectors, thus



qualifying for temporary leave.<sup>13</sup> Even so, in 2018–2019, two juvenile prisoners were allowed to attend events outside their prisons under staff supervision. The North-Eastern region (10 closed prisons), reported 144 cases of temporary leave in its closed prisons in 2018, including 127 cases of those lasting 14 days, i.e. granted to prisoners in minimum-security establishments with relaxed regime.<sup>14</sup> One prisoner did not return due to their death and 9 returned late due to extended medical treatment. This suggests that strict selection and potential sanctions result in minimal breaches of licence condition. As some regional authorities refused to supply the data I had requested, I contacted prisons directly. The data from prisons' positive responses<sup>15</sup> and the statistics supplied by the two regions suggest that temporary leave remains an exceptional measure available to a limited number of prisoners: mostly to those in 'open' prisons and sometimes to those living in minimum-security closed prisons with relaxed conditions.

One study reported national statistics of temporary leave in Ukraine, citing the UkrPS website as a source.<sup>16</sup> According to this PhD thesis from the Academy of the Internal Affairs of Ukraine, in 2011, 232 prisoners, or 0.2% of all prisoners, were allowed temporary leave. This extremely low number persisted for the following years (245 in 2012; 207 in 2013) until, in 2014, dropping to 36 prisoners, i.e. 0.04% of the prison population (Kruk 2015). In comparison, in Spain, with a similar size of prisoner population, more than 150,000 prisoners were granted temporary leave in 2016 (Larrauri 2019).<sup>17</sup> The two out of six regions, by definition, cannot be representative. However, the

<sup>13</sup> In October 2019, in this region, there were 159 qualifying male prisoners in pre-release centres of medium-security prisons (housing 6,712 male prisoners in total), 14 male and 21 female prisoners in pre-release centres of minimum-security prisons (housing 347 male and 399 female prisoners in total), and 4 female prisoners housed in a minimum-security prison with relaxed conditions. Unlike in closed prisons, in 'open' prisons, 398 prisoners received 497 temporary leave authorisations in 2018. The most common grounds were medical reasons (58.1%), attending court and investigation proceedings (32.4%), arranging post-release housing and employment (5.2%), or for some other purposes (4.2%). In addition, as an incentive, 31 prisoners in 'open' prisons (housing 432 prisoners) received 50 authorisations of temporary leave to visit close relatives.

<sup>14</sup> In 'open' prisons in this region, there were 453 authorisations of temporary leave, mostly for medical purposes (56.7%), attending court proceedings (15%), arranging post-release accommodation (5%) or because of 'other important circumstances' (11.4%). Additionally, 101 authorisations were granted as a reward for good behaviour. One prisoner from an 'open' prison did not return from temporary leave and was prosecuted.

<sup>15</sup> Amongst the fourteen operational minimum- and medium-security establishments that responded with statistics, two were minimum-security prisons for women. They reported no cases of temporary leave despite housing 29 prisoners in their pre-release centres. A minimum-security prison with relaxed conditions that housed 111 first-time male offenders convicted of non-premeditated crimes reported 76 cases of leave for 14 days, together with 4 cases of temporary leave on medical grounds and 4 cases of temporary leave granted to attend funerals. One medium-security prison housing 260 first-time male offenders, with 27 in its pre-release sector, reported 10 cases of temporary leave, including 4 granted as an incentive. Another medium-security prison for first-time male offenders, unofficially specialising in former law-enforcement prisoners, reported two cases in 2017 and 2018 of prisoners authorised to attend funerals (5 days in each case) and one case in 2019 of a prisoner authorised to get external hospital treatment (initially for 7 days, prolonged to 21 days). Two medium-security prisons housing 199 and 752 first-time male offenders convicted of grave and especially grave offences, including 4 and 28 in their pre-release sectors, reported respectively zero and one case of temporary leave. Five medium-security prisons housing 401, 511, 595, 635, and 746 previously convicted male prisoners, including respectively 21, 17, 53, 8, and 24 in their pre-release sectors, granted no cases of temporary leave, citing as a reason the absence of prisoner requests. All the listed numbers are for 2018, although they closely depict the situation in 2017 and 2019. In addition, two medium-security prisons housing 639 and 625 men, including respectively 13 and 12 in its pre-release sector, each reported granting one prisoner leave for 7 days to visit an ill relative and one to attend a funeral for one day in 2019 (but no cases of temporary leave in 2017 or 2018). Finally, a juvenile prison housing 40 young male offenders reported authorising one prisoner to attend an outside event under staff escort.

<sup>16</sup> Although I have been monitoring the UkrPS website for the last decade, I have not seen this statistic. I could not reach the author of that PhD thesis to clarify the source of these data.

<sup>17</sup> For comparison, in Finland, where the prison population is much smaller (3,526) and penal policies and practices are more liberal, 11,312 instances of temporary leave, an average of three per prisoner, were authorised in 2008 (Moran and Keinänen 2012).

apparent reluctance to supply data and the available numbers suggest that prison leave is an extraordinary measure in Ukraine to which the vast majority of prisoners have no recourse, either on humanitarian grounds, or as a part of a sentence plan.

## Discussion

That so many former prisoners around the world reoffend points to the problems of both in-prison intervention and post-prison (re)integration into society-at-large (Alahdadi 2016; Cheliotis 2008, 2009; Cullen et al. 2011; Gaum et al. 2006; Wright and Rosky 2011). Temporary leave intends to address these two areas by bridging them. It reduces the negative effects of incarceration, including the classical ‘pains of imprisonment’ (Sykes 1958), prepares prisoners for post-prison civilian life, and in some cases for repayment of dues to victims and the wider community (Fox 1971; Grupp 1970; Shichor and Allen 1978; van Zyl Smit 1988).

As I have demonstrated, Ukraine, at least in theory, recognises the value of temporary leave by institutionalising it in its national law. However, although provision for prison leave has been legislated for decades (see Supreme Court of Ukraine 1997), its actual use seems low. First, by restricting the use of temporary leave to mostly ‘open’ prisons, juvenile prisons, and pre-release sectors of minimum-security prisons with general conditions and those of medium-security prisons, the law effectively denies temporary leave to most prisoners. This means that of 55,900 prisoners, only 1,643 men and 1,532 women in minimum-security prisons, 1,092 men and 102 women in pre-release sections of medium-security prisons, 1,569 prisoners in ‘open’ prisons, and 136 juvenile prisoners can, at least in theory, apply for temporary leave. In other words, Ukraine *a priori* denies 85% of sentenced prisoners and 90% of all prisoners the possibility of temporary leave, even on compassionate grounds, regardless of the actual risk they may pose or the date of their release.

Although the Council of Europe recommends making temporary leave an integral part of a custodial sentence (Council of Europe 1982; European Prison Rules 2006: Rule 103.6), the position in Ukraine suggests that temporary leave constitutes a legal privilege available to a tiny fraction of prisoners. This effectively excludes the majority of Ukrainian prisoners, even if only months or days before their release, because most of them are held in medium-security prisons and rarely get transferred to a lower security category or pre-release sectors even when these are available (see Symkovych forthcoming).

Ukraine also denies temporary leave to prisoners serving short custodial sentences (below 6 months) in detention houses as well as those held in prison hospitals. This really defies the objectives of temporary leave such as release-preparation or seeking medical treatment unavailable inside prisons, as well as precluding attendance at funerals or childbirth even when prisoners are at the end of their custodial sentences (see *Ploski v. Poland* 2003; European Prison Rules 2006: Rules 24.5; 24.7; 40.3; 40.5; 103.6). Thus, whilst in some jurisdictions, temporary leave implies a progression towards an open custodial regime, or a test for parole, in Ukraine rather than being a right it constitutes a rare privilege available only to a small minority of prisoners housed in juvenile prisons and semi-open conditions.

Second, the year-long quest to get official statistics and the failure of the UkrPS to supply all the data requested, including regional data, suggests that temporary leave is a sensitive issue in Ukraine. However, even those national numbers available underscore that Ukraine rarely grants temporary leave to its still significant prison population: 242 instances of temporary leave, the highest known number for the entire country, from more than 6,000 prisoners who are legally qualified by virtue of not being in remand prisons, maximum-security prisons, or the main sectors of medium-security prisons.

Third, although the UkrPS issues policies to clarify all major legal provisions and explain their implementation, its policy on prison leave was issued 8 years after the main law regulating execution of punishment was enacted.<sup>18</sup> Even so, whereas other prison policies are replete with details, such as how to address officials or where to hold hands during movement around the prison (e.g. Prison Bylaws 2018), the policy on temporary leave reveals major grey areas and exceptional vagueness. For example, it does not mention the rights of victims nor the appeals procedure—despite the constitutional right of all citizens to appeal any decision or authorities' inaction. The policy fails to clarify which relatives and in what number must accompany a juvenile prisoner during temporary leave. Whereas the policy allows leave to men in 'open' prisons in the event of the birth of a child, it requires a birth certificate as a proof. This means a prisoner cannot be present during the delivery, and most likely in the first days after birth. Cumulatively, this suggests that temporary prison leave for prisoners in closed prisons has not yet been institutionalised and exists mostly on paper.

Fourth, the policy clearly links temporary leave to prisoners' conduct. To qualify, prisoners have, *inter alia*, to prove their 'correction' by demonstrating exemplary performance at school or in prison industry. In other words, temporary leave in Ukraine is a privilege to be earned and never a right. Even in the case of prisoners seeking external medical diagnosis or treatment, the prison doctor must pre-authorise it. However, as the CPT (2018) regularly highlights, although *de jure* independent, prison medical personnel often seem to collude with the prison authorities, thus potentially leaving such decisions to the discretion of prison commanders.

## Conclusion

The law cannot be sequestered from its implementation. I have demonstrated that despite Ukraine's claims of 'Europeanisation' and its legal and rhetorical commitment to rehabilitation and resocialisation of prisoners, the penal system continues to be over-repressive and rigid. My analysis shows that temporary prison leave in Ukraine remains mostly unused, despite having been legislated for some time. It constitutes a legal privilege available to a miniscule segment of prisoners, excluding those in the deep end who may be in the greatest need of it. Temporary leave in Ukraine seems to be an extraordinary emergency, as well as a reward for good behaviour, rather than a constituent of sentence aimed at preparing prisoners for civilian life.

Given the international evidence of the value of temporary leave in preserving prisoners' humanity, (re)integrating offenders in the community, and ultimately creating a more harmonious society, I argue for reversing the logic concerning temporary leave by specifying circumstances in which prisoners could be denied temporary leave. This also entails abandoning blanket prohibitions, e.g., to all prisoners in detention houses, maximum-security prisons or main sections of medium-security prisons—in other words: to the vast majority of Ukrainian prisoners. As a party to the ECtHR, Ukraine should respect the court's ruling designating temporary leave as contextual and thus potentially a civil right even if the national law frames it as a privilege. Notwithstanding the elevated risks that many prisoners housed there pose, the mechanical risk categorisation in Ukraine, as well as the diversity of the population and situations that may necessitate temporary leave should be recognised and the possibility of temporary leave, perhaps under escort (currently

<sup>18</sup> The old law, Corrective-Labour Code (1970: Article 92), mentioned temporary leave for exiled prisoners (i.e. they could re-enter the territory from which they were banished). The replacement Criminal-Executive Code of Ukraine (2003) applied most of those regulations concerning temporary leave of exiled prisoners to prisoners held in prisons.

absent), should not be denied *a priori*. Practically, by making temporary leave more available, Ukraine can help its understaffed prisons maintain control and decrease reliance on the under-world prisoner organisation (see Symkovych 2018a, 2018b, 2018d, 2018f on the effect that early release and other liberalisation measures have had on power relations in a Ukrainian prison; also Cheliotis 2008). However, the clear criteria of the factors that may result in denial of temporary leave must be codified and explained to prisoners and relatives because the vague policy on temporary leave may contribute to the already problematic situation with legitimacy in Ukraine (see Larrauri 2019; Symkovych 2018a; Toch 1967).

To fully understand the local penal philosophy and policies we have to study how they work in practice, what those directly affected make of them—offenders and victims, but also prison and probation staff, as well as the public, media, and politicians. Given the evident limitations of this article, much will be gained from more focused research on the decision-making of powerholders, as well as prisoners. More specifically, what are the major concerns and considerations of those who have discretion in the authorisation of temporary leave? How do prisoners, victims, and the wider public view temporary leave? Empirical, moral, and theoretical questions about the role of the penal culture, public sentiments, personal punitiveness, relationships with superiors, and perhaps even the sex of an applicant (e.g. potential pregnancy) in such decision-making. Once temporary leave ceases to be an exception in Ukraine, its role in prisoner rehabilitation, social restoration, and in the control and maintenance of prison order would require exploration, as well as the merits of decisions and appeals where prisoners are denied temporary leave.<sup>19</sup>

Ukraine is a country of substantial public mistrust in the criminal justice system, whose shortcomings are abundant (Symkovych 2018a, 2018c). Despite relatively low victimisation, Ukrainians report considerable levels of fear of crime and rank security concerns as high (Bova 2012). Surveys reveal significant levels of punitiveness amongst Ukrainians, for example, supporting the death penalty (GESIS 2013). Thus, if the government were to really embrace temporary leave, some public outcry would follow, not least because breaches of temporary leave conditions are inevitable. There seems to be no shortage of politicians and media who are eager to capitalise on people's insecurities and punitiveness (also O'Donnell and Jewkes 2011; van Zyl Smit 1988). Educating politicians, street-level bureaucrats, and the public is important (European Parliament 1999; Fox 1971; Grupp 1970), especially in a country where the saying 'a thief belongs in prison' elevates to a fundamentalist orthodoxy that neglects the complexity of human nature or the possibility of offender redemption. However, despite popular calls to reinstate the death penalty, expand life imprisonment (which in Ukraine already effectively means life in prison), and harden punishment, the state continues gradual, sometimes erratic, liberalisation as a part of its 'Europeanisation'. The public seems relatively oblivious or indifferent to major changes in penal policies or judicial and prison practices.<sup>20</sup> Perhaps not

<sup>19</sup> The two regions that supplied statistics mentioned only one prisoner's appeal that was nonetheless rejected because the prisoner submitted incorrect documentation to justify the request for temporary leave to sit exams. Similarly, the individual prisons that responded to my FOI requests reported no cases of refusals or appeals in relation to temporary leave, while two women's prisons and four men's prisons stated that none of the qualified prisoners there requested temporary leave.

<sup>20</sup> The only exception is perhaps the so-called Savchenko law passed in December 2015. According to this law, imprisonment on remand counted as double time. As a result, 8,500 prisoners who spent a long time on remand during investigation and trial were released before their original date. This law triggered indignation and criticism from some segments of society, as well as the prison, police and investigative services, for 'setting dangerous criminals free', 'instigating criminality', and 'endangering' society. The parliament repealed this law in May 2017.

surprisingly, in a country at war with a plethora of pressing concerns, where many people struggle to just live ‘normal’ lives, the public and the media seem to be mostly unaware of the recent threefold decrease in Ukraine’s prison population. Thus, rolling out the temporary leave scheme concurrently with substantive measures to educate the public on its benefits may not prove too politically costly. However, and with due respect to the vibrant Ukrainian civil society, in my view, the initiative and, more importantly, pressure to expand temporary prison leave is likely to come from outside.

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## Affiliations

Anton Symkovych<sup>1,2</sup>

<sup>1</sup> School of Social and Political Sciences, The University of Melbourne, Melbourne, Australia

<sup>2</sup> Department of Sociology, University of Johannesburg, Johannesburg, South Africa



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