ISSN 2617-4162
E-ISSN 2617-4170

Соціально-правові студії

Науково-аналітичний журнал

Том 5, № 2

Львів
2022

УДК 33+34+159.9](051)

Рекомендовано до друку та поширення
через мережу Інтернет Вченою радою
Львівського державного університету внутрішніх справ
(протокол від 25 травня 2022 р. № 10)

Свідоцтво про державну реєстрацію
друкованого засобу масової інформації
Серія: КВ № 25025-14965ПР від 19.11.2021 р.

Журнал входить до переліку фахових видань України категорії «Б»:
з юридичних наук за спеціальностями 081 – Право та 262 – Правоохоронна діяльність
(наказ Міністерства освіти і науки України № 1412 від 18.12.2018 р.);
з економічних наук за спеціальностями 051 – Економіка, 072 – Фінанси, банківська справа та страхування,
073 Менеджмент (наказ Міністерства освіти і науки України № 1301 від 15.10.2019 р.);
із соціальних та поведінкових наук за спеціальністю 053 – Психологія
(наказ Міністерства освіти і науки України № 1643 від 28.12.2019 р.)

Журнал представлено у наукометричних базах даних, репозитаріях:
Національна бібліотека України ім. Вернадського, Index Copernicus International Journal Master List,
Інституційний репозитарій Львівського державного університету внутрішніх справ

Соціально-правові студії: науково-аналітичний журнал / гол. ред. О. Балинська. Львів: ЛьвДУВС, 2022. Т. 5, № 2. 87 с.

Адреса редакції:
Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна
тел.: +380 (32) 233-20-80
E-mail: info@sls-journal.com.ua
www: https://sls-journal.com.ua/uk

© Львівський державний університет внутрішніх справ, 2022
© Товариство з обмеженою відповідальністю «Наукові журнали», 2022

ISSN 2617-4162
E-ISSN 2617-4170

Social and Legal Studios

The scientific and analytical journal

Volume 5, No. 2

Lviv
2022

UDC 33+34+159.9](051)

Recommended for printing and distribution via the Internet
by the Academic Council of Lviv State University of Internal Affairs
(Minutes o May 25, 2022 No. 10)

Certificate of state registration of the print media
Series: KV No. 25025-14965PR o 19.11.2021

The journal is included in the list of professional publications of Ukraine of category "B":
legal sciences in the fields of 081 Law and 262 Law enforcement
(Order o the Ministry o Education and Science o Ukraine No. 1412 o 18.12.2018);
economic sciences in the fields of 051 Economics, 072 Finance, Banking and Insurance, 073 Management
(Order o the Ministry o Education and Science o Ukraine No. 1301 o 15.10.2019);
social and behavioral sciences in the field of 053 Psychology
(Order o the Ministry o Education and Science o Ukraine No. 1643 o 28.12.2019)

The journal is presented at scientometric databases, repositories:
Vernadsky National library o Ukraine, Index Copernicus International Journal Master List,
Institutional repository of Lviv State University of Internal Affairs

Social and Legal Studios: The scientific and analytical journal / O. Balynska (EIC). Lviv: Lviv State University of Internal Affairs, 2022. Vol. 5, No. 2. 87 p.

Publishing Address:
Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine
tel.: +380 (32) 233-20-80
E-mail: ino@sls-journal.com.ua
www: https://sls-journal.com.ua/en

© Lviv State University of Internal Affairs, 2022
© Limited liability company "Scientific journals", 2022

Соціально-правові студії

Том 5, № 2
2022

Науково-аналітичний журнал
Засновано у 2018 р.
Періодичність випуску: чотири рази на рік

Редакційна колегія

Головний редактор
Ольга Балинська — д-р юрид. наук, професор, академік Національної академії наук вищої освіти України, дійсний член Міжнародної академії інформатики, Львівський державний університет внутрішніх справ, Україна

Заступник головного редактора
Ірина Ревак — д-р екон. наук, професор, Львівський державний університет внутрішніх справ, Україна

Відповідальний секретар
Ольга Огірко — канд. техн. наук, доцент, Львівський державний університет внутрішніх справ, Україна

Члени редакційної колегії
Ольга Барабаш — д-р юрид. наук, доцент, Львівський державний університет внутрішніх справ, Україна
В'ячеслав Бліхар — д-р філософії, професор, Львівський державний університет внутрішніх справ, Україна
Марія Долинська — д-р юрид. наук, професор, Львівський державний університет внутрішніх справ, Україна
Євген Карпенко — д-р психол. наук, доцент, Львівський державний університет внутрішніх справ, Україна
Зоряна Ковальчук — д-р психол. наук, професор, Львівський державний університет внутрішніх справ, Україна
Марта Копитко-Керницька — д-р екон. наук, професор, Львівський державний університет внутрішніх справ, Україна
Анатолій Мовчан — д-р юрид. наук, професор, Львівський державний університет внутрішніх справ, Україна
Ярослав Пушак — д-р екон. наук, професор, Львівський державний університет внутрішніх справ, Україна
Ірина Сковронська — канд. філол. наук, доцент, Львівський державний університет внутрішніх справ, Україна
Ірина Шопіна — д-р юрид. наук, професор, Львівський державний університет внутрішніх справ, Україна
Юрій Юркевич — д-р юрид. наук, професор, Львівський державний університет внутрішніх справ, Україна
Олександра Хитра — д-р юрид. наук, доцент, Львівський державний університет внутрішніх справ, Україна
Назім Алієв — д-р юрид. наук, доцент, Академія поліції Міністерства внутрішніх справ Азербайджанської Республіки, Республіка Азербайджан
Ірина Ващенко — д-р психол. наук, професор, Київський національний університет ім. Тараса Шевченка, Україна
Ігор Галян — д-р психол. наук, професор, Дрогобицький державний педагогічний університет імені Івана Франка, Україна
Степан Мельник — д-р екон. наук, доцент, Львівський державний університет внутрішніх справ, Україна
Володимир Гринюк — д-р юрид. наук, доцент, Київський національний університет ім. Тараса Шевченка, Україна
Василь Лефтеров — д-р психол. наук, професор, Національний університет «Одеська юридична академія», Україна
Магдалена Пітер — д-р габілітований, доцент, Люблінський католицький університет Івана Павла II, Республіка Польща
Єлена Радович-Стоянович — д-р філософії, доцент, Академія криміналістики і поліцейської освіти, Республіка Сербія
Марек Фалдовскі — д-р габілітований, Академія поліції в Щитно, Республіка Польща
Марія Флейчук — д-р екон. наук, професор, Львівський національний університет ветеринарної медицини та біотехнологій імені С.З. Ґжицького, Україна
Марія Чепіль — д-р габілітований, професор, Університет Марії Кюрі-Склодовської, Республіка Польща

Social and Legal Studios

Volume 5, No. 2
2022

The scientific and analytical journal
Year of establishment: 2018
Publication frequency: Four times a year

Editorial Board

Editor-in-Chief

Olha Balynska — Full Doctor in Law, Professor, Academician of the National Academy of Sciences of Higher Education of Ukraine, Full Member of the International Academy of Informatics, Lviv State University of Internal Affairs, Ukrain

Deputy Editor-in-Chief

Iryna Revak — Full Doctor in Economic Sciences, Professor, Lviv State University of Internal Affairs, Ukraine

Executive Editor

Olha Ohirko — PhD in Engineering Sciences, Associate Professor, Lviv State University of Internal Affairs, Ukraine

Editorial Board Members

Olha Barabash — Full Doctor in Law, Associate Professor, Lviv State University of Internal Affairs, Ukraine
Viacheslav Blikhar — Full Doctor in Philosophy, Professor, Lviv State University of Internal Affairs, Ukraine
Maria Dolynska — Full Doctor in Law, Professor, Lviv State University of Internal Affairs, Ukraine
Yevhen Karpenko — Full Doctor in Psychological Sciences, Associate Professor, Lviv State University of Internal Affairs, Ukraine
Zoriana Kovalchuk — Full Doctor in Psychological Sciences, Professor, Lviv State University of Internal Affairs, Ukraine
Marta Kopytko-Kernytska — Full Doctor in Economic Sciences, Professor, Lviv State University of Internal Affairs, Ukraine
Anatoliy Movchan — Full Doctor in Law, Professor, Lviv State University of Internal Affairs, Ukraine
Yaroslav Pushak — Full Doctor in Economic Sciences, Professor, Lviv State University of Internal Affairs, Ukraine
Iryna Skovronska — PhD in Philological Sciences, Associate Professor, Lviv State University of Internal Affairs, Ukraine
Iryna Shopina — Full Doctor in Law, Professor, Lviv State University of Internal Affairs, Ukraine
Yurii Yurkevych — Full Doctor in Law, Professor, Lviv State University of Internal Affairs, Ukraine
Oleksandra Khytra — Full Doctor in Law, Associate Professor, Lviv State University of Internal Affairs, Ukraine
Nazim Aliyev — Full Doctor in Law, Associate Professor, The Police Academy of the Ministry of Internal Affairs of the Republic of Azerbaijan, Republic of Azerbaijan
Iryna Vashchenko — Full Doctor in Psychological Sciences, Professor, Taras Shevchenko National University of Kyiv, Ukraine
Ihor Halian — Full Doctor in Psychological Sciences, Professor, Drohobych Ivan Franko Pedagogical University, Ukraine
Stepan Melnyk — Full Doctor in Economic Sciences, Associate Professor, Lviv State University of Internal Affairs, Ukraine
Volodymyr Hryniuk — Full Doctor in Law, Associate Professor, Taras Shevchenko National University of Kyiv, Ukraine
Vasyl Lefterov — Full Doctor in Psychological Sciences, Professor, National University “Odesa Law Academy”, Ukraine
Magdalena Pyter — Habilitated Doctor, Associate Professor, The John Paul II Catholic University of Lublin, Republic of Poland
Yelena Radovych-Stoianovych — Full Doctor in Philosophy, Associate Professor, The Academy of Criminalistic and Police Studies, Republic of Serbia
Marek Faldovski — Habilitated Doctor, Police Academy in Szczytno, Republic of Poland
Mariya Fleychuk — Full Doctor in Economic Sciences, Professor, Stepan Gzhytskyi National University of Veterinary Medicine and Biotechnologies of Lviv, Ukraine
Maria Chepil — Habilitated Doctor, Professor, Maria Curie-Skłodowska University, Republic of Poland

ЗМІСТ

Л. Ю. Прогонюк
Правові аспекти регулювання юридичної відповідальності державних службовців: проблемні питання 9

В. А. Бондаренко, А. М. Герасимович
Інститут заохочення – елемент системи законодавства про державну службу...16

В. М. Синенький
Інститут мирових суддів крізь призму судової реформи 1864 року 23

З. Р. Кісіль
До питання інтеграції інститутів громадянського суспільства в процес запобігання корупції в Україні:
адміністративно-правовий вимір 31

М. С. Долинська
Особливості укладення договору щодо емфітевтичного землекористування в Україні 38

В. В. Навроцька
Примусові заходи виховного характеру, що застосовуються до неповнолітніх:
дискусійні питання правового регулювання 45

І. О. Корчинський, М. І. Щадило
Дослідження основних методів оцінювання конкурентоспроможності підприємств 54

І. О. Ревак, Р. Т. Грень
Цифрова трансформація: передумови, тенденції, ризики та загрози 61

В. С. Бліхар, М. В. Вінічук, А. А. Рижкова
Інституційні засади детінізації економіки України в системі фінансової безпеки держави..............................68

М. С. Кельман, Р. М. Кельман
Релігія – вагомий чинник правотворчого і правозастосовного процесів 77

CONTENTS

L. Yu. Progoniuk
Legal Aspects of Regulating the Legal Liability of Public Servants: Problematic Issues 9

V. A. Bondarenko, A. M. Herasymovych
The Institution of Incentives – an Element of the Civil Service Legislation System...16

V. M. Synenkyi
The Institution of Justices of the Peace Through the Lens of the Judicial Reform of 1864..23

Z. R. Kisil
On the Issue of Integration of Civil Society Institutions in Preventing Corruption in Ukraine:
Administrative and Legal Dimension..31

M. S. Dolynska
Features of Concluding an Emphyteutic Land Use Agreement in Ukraine 38

V. V. Navrotska
Compulsory Educational Measures Applied to Minors: Debatable Issues of Legal Regulation 45

I. O. Korchynskyi, M. I. Shchadylo
Research of the Main Methods for Assessing the Competitiveness of Enterprises 54

I. O. Revak, R. T. Gren
Digital Transformation: Background, Trends, Risks, and Threats...61

V. S. Blikhar, M. V. Vinichuk, A. A. Ryzhkova
Institutional Foundations of de-Shadowing the Economy of Ukraine in the National Financial Security System......68

M. S. Kelman, R. M. Kelman
Religion – a Significant Factor in Law-Making and Law Enforcement Processes...77

UDC 351
DOI: 10.32518/2617-4162-2022-5-2-9-15

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Legal Aspects of Regulating the Legal Liability of Public Servants: Problematic Issues

Liudmyla Yu. Progoniuk*

Mykolayiv National Agrarian University
54008, 9 Georgiy Gongadze Str., Mykolaiv, Ukraine

Abstract. This study investigates topical problematic issues of legislative regulation of the responsibility of public service employees because such responsibility is multifaceted if compared with the responsibility of an ordinary employee, as far as it is related to the range of powers assigned to a person to exercise administrative, legal, and managerial influence on public relations in the state. It is the image of the public service of Ukraine that is based on whether its representatives perform their official duties, and in case of non-performance or improper performance, state coercion is applied to the public servant according to the procedure established by law. The regulated procedure of applying a particular type of legal liability makes up not only the conviction of a public servant, but also an incentive for other persons to properly perform their official duties and prevent illegal actions. The purpose of this study was to identify and solve problematic aspects of the responsibility of public service employees. To fulfil this purpose, scientific positions on understanding the concept of legal responsibility in two aspects, as positive and retrospective responsibility, are considered, and the definition of legal responsibility of a public servant is given. It was established that if a public servant violates the provisions of the current legislation of Ukraine, the following types of legal liability will be applied: administrative, criminal, civil, material, and disciplinary. Using system-structural and system-functional methods, a systematised analysis of the regulatory framework of each of these types of legal liability was performed; methods of comparison and grouping distinguished the material and civil liability of public servants in Ukraine and identified groups of relevant principles of public servant responsibility in administrative law and in compliance with labour discipline according to current regulations. Ways to solve urgent and problematic legal aspects of the legal responsibility of public service employees were proposed

Keywords: financial responsibility, administrative responsibility, officials, disciplinary responsibility, regulations, improvements

Introduction

An essential role in creating a positive image of the state is given to the public service of Ukraine, which represents the government. This image is based on the observance of official duties by public servants and the organisation of their successful activities, which create and ensure the national policy of the country in the national and international arena, protecting the interests of the state and its citizens, guided by international law and national norms and laws. Admittedly, effective support of the functioning of the public service is a complex theoretical and applied task in modern legal science, the solution of which involves complex and systematic approaches.

The institution of public service is one of the key legal institutions that ensure the implementation of the management process in the state, so there is a need for the existence of clearly defined measures of responsibility of public servants. Furthermore, it is the established measures of responsibility of public servants that are the important means of ensuring law and order in the public service. Proper monitoring of the effective performance of public servants is very intricately linked to the perception that every misdemeanour committed by a public servant in the performance of their duties should cause an immediate response from the competent authorities. Traditionally, persons holding positions in state authorities may be subject to legal liability for committing a dangerous act in the form of abuse of official position, failure to perform or improper performance of the tasks assigned to them.

In the context of globalisation and the expansion of political and economic processes in Ukraine, the growing level of conflict in civil society, the problems of illegal behaviour of public servants are of great interest in the study. Thus, strengthening the control function for various types of behaviour of persons acting on behalf of the state in professional activities and establishing appropriate sanctions are necessary and urgent issues. Therefore, one of the organisational and legal ways to ensure the rule of law and discipline in the public service is the legal responsibility of public servants: administrative, disciplinary, civil, criminal.

Many scientists have investigated the general issue of statutory regulation of legal liability of public servants. M.I. Zubrytskyi, as a result of research on this issue, noted its most problematic aspect – the legal regulation of disciplinary responsibility of public servants [1], N. Dolhikh, through a comparative legal analysis of the institution of responsibility of public servants of Ukraine and EU member states, noted the shortcomings of national legislation on the procedure for bringing to justice [2], L.V. Galushkina, co-authored by researchers, noted certain inconsistencies between

Suggested Citation **Article's History**: Received: 15.03.2022 Revised: 14.04.2022 Accepted: 15.05.2022

Progoniuk, L.Yu. (2022). Legal Aspects of Regulating the Legal Liability of Public Servants: Problematic Issues. *Social and Legal Studios*, 5(2), 9-15.

***Corresponding author**

the norms of the Law of Ukraine "On Public Service" and the legal norms of other branches of law, focusing on criminal legislation in the field of combating corruption [3]. O.K. Liubymov identified several special differences in the responsibility of public servants from ordinary employees and noted responsibility as a factor that encourages the prevention of culpable behaviour in the future [4]. V.V. Skorikov focused on the characteristics of the types of legal liability of public servants, the main defined social responsibility and its structural elements [5], while A.O. Fominova saw the problem in the industry affiliation of the institution of disciplinary responsibility and in the perspective of creating an array of corresponding norms of legislation on disciplinary responsibility of public servants [6]; the need to improve legislation on the issue of disciplinary responsibility of public servants was also noted by O.D. Novak in her monograph [7]. V.I. Didach noted the need to adopt a new Law of Ukraine "On Legal Responsibility of Public Servants", clearly distinguishing its types and singling out political responsibility as a separate one [8]. A.Yu. Korotkykh identified the main theoretical and practical issues of bringing public servants to legal responsibility, formulated the optimal concept of reforming the legislation of Ukraine on public service in terms of rules and standards for the occurrence of disciplinary and material liability on the example of foreign practices [9]. At the same time, having a suitable regulatory framework, scientific and professional research, numerous theoretical discussions in the legal literature, there are still certain gaps in the institution of public service regarding the responsibility of its subjects, and this is what causes the need for its research and solving problematic issues.

The purpose of this study was to identify and discuss problematic issues from a legal and scientific standpoint, regarding the regulation of the legal responsibility of public servants, and in the future to try to find ways to resolve them. To fulfil this purpose, it was necessary to complete several tasks: firstly, to justify the definition of legal liability in ambiguous aspects and to define the responsibility of public servants; secondly, to characterise the types of legal liability prescribed by the current legislation for public servants; thirdly, to analyse the gaps in the current legislation on public servant liability, and, if possible, to offer solutions to pressing issues.

Analysis of the Regulatory Framework for the Legal Liability of Public Servants

The Law of Ukraine No. 889-VIII "On Public Service" of December 10, 2015, which came into force in May 2016, is currently in force in Ukraine. An essential innovation of this regulation is to pay special attention to the issue of legal liability of public servants, namely the type of material and disciplinary liability. The legislators devoted a separate section entitled "Disciplinary and Material Liability of Public Servants" to regulating the scope of these relations [10]. With this innovation, the legislator once again stressed the importance and relevance of the issue of responsibility of public servants for violating their official duties. This is also noted by the scientist A. Fominova in her study. Without proper definition and statutory regulation of the types of legal liability of public servants in case of improper performance of their official duties, compliance with discipline and legality, effective operation of the state administrative apparatus is impossible. Illegal behaviour, which should be externally qualified as a misdemeanour (administrative or disciplinary), is always determined by an increased level of public harm in relation to the interests of the state, the established law and order, and to the constitutional freedoms of human and citizen [6].

Notably, the last twenty years of development of national legislation have had a positive effect in the field of adoption of several regulations that relate to the responsibility of public servants. Most of them are aimed at practical application, among which the following should be noted: the Strategic Plan of the National Agency for Public Service for 2021-2023 [11], a number of special laws: first and foremost, the previously mentioned Law of Ukraine "On Public Service" [10], next, the Laws of Ukraine "On Service in Local Self-Government Bodies" [12], the Laws of Ukraine "On the Prosecutor's Office" [13] and "On the National Police" [14], and several sub-legislative acts: Resolution of the Cabinet of Ministers of Ukraine No. 500 "On Approval of the Regulation on the National Agency of Ukraine on Civil Service Issues" dated January 1, 2014 [15] and many others. However, an equally prominent place in this context is given to the Labour Code of Ukraine [16], the Criminal Code of Ukraine [17], the Code of Ukraine on Administrative Offences [18], etc. This is conditioned upon several circumstances. Firstly, the legal regulation of the legal responsibility of public servants is special, i.e.is, it is governed by the norms of special legislation. Secondly, there are certain nuances about the settlement of this issue by the current Law of Ukraine "On Public Service" [10]. The law contains norms that establish only two types of liability: disciplinary and material. But now other types of legal liability can be applied to them, including criminal, administrative, etc.

Theoretical Significance of Legal Liability of Public Servants

Before proceeding to the characteristics of the types of legal liability that apply to public servants, it is logical to analyse the ambiguity of understanding the meaning of legal liability. To date, there is a discussion about the expediency of separating its positive aspect. In general, legal science distinguishes responsibility for the past (negative aspect) and for the future (positive aspect) [4, p. 22]. Thus, some scientists who are representatives of a negative (retrospective) approach see a close connection between legal liability and the committed offence, in other words, it is like a logical sanction for violating a legal norm [19, p. 43].

In general, having analysed the theoretical aspects of the legal responsibility of a civil servant, it is a legal duty of a civil servant to observe and fulfil the official duties assigned to them in their official activity, or to suffer adverse personal, material, or organisational consequences as a result of non-performance or improper performance of official duties, which manifested themselves in the form of an offence.

Since this refers to representatives of state authorities, then, admittedly, the responsibility of this category of employees lies in a conscientious and responsible attitude towards the performance of the assigned official duties, i.e., responsibility in its positive meaning. If the obligations are not performed, responsibility in the negative sense follows – proper punishment, penalty, in other words, coercion. This leads to the conclusion that the established obligation to answer for something and to someone evenly combines positive and retrospective responsibility. In this case, V.I. Didach

correctly noted that these two aspects coincide precisely in the part where they mean for a person to analyse their behaviour, guided by the established legal prescriptions and expectations addressed to this person, considering their socio-legal status. Therewith, the author assures that the understanding of the term "to bear responsibility" in different cases is perceived differently. Sometimes there is an image of an offence and punishment, and other times – an image of activity that is not connected in any way with the violation of the law [8, p. 13].

Consequently, the legal status of a public servant is determined by a range of professional rights and obligations, failure to comply with which unquestioningly leads to legal liability. Having investigated the presented interpretations of the concept under study, the authors of this paper focus on the definition presented by M.I. Tymoshenko in co-authorship. Thus, these authors interpret the responsibility of a public servant as a certain legal obligation to observe and perform the official duties assigned to them in their official activity, and in case of non-performance or improper performance, consider such actions of an employee as an offence, and, admittedly, entail adverse consequences of various types, e.g., personal, material, or organisational [3, p. 90]. Currently, in the legal field, the following types of legal liability can be applied for violation of legislation by a public servant: criminal, administrative, civil, and material.

Administrative and Criminal Liability of Public Servants

Currently, measures of administrative and criminal liability are defined by special laws of Ukraine, namely the Law of Ukraine "On Prevention of Corruption" [20], the Code of Ukraine on Administrative Offences [18] and the Criminal Code of Ukraine [17]. The norms that establish criminal liability of public servants are contained in Section 17 of the Criminal Code of Ukraine entitled "Crimes in the Sphere of Official and Professional Activities Related to the Provision of Public Services" [17]. Criminal activity of a public servant is considered official forgery (Article 366); introduction of false information upon submitting a declaration (Article 366-1); official negligence (Article 367) and abuse of office and official position (Article 364). Criminal liability is considered abuse of power or official authority by an employee of a law enforcement agency (Article 365); abuse of powers in the provision of public services (Article 365-2); obtaining illegal benefits (Article 368); furthermore, this refers to illegal enrichment (Article 368-2) and abuse of influence (Article 369-2) [17]". What unites these types of crimes is that their object is public relations that ensure the proper functioning of the state apparatus through the professional performance of official duties of persons acting on behalf of the state. The consequences of a socially dangerous act lie in causing material, and sometimes non-material damage, mainly to the interests of the state and its citizens. M. Zubrytskyi believes that according to the object element of the crime, the listed official crimes should be classified as general official crimes. As for special official crimes, which are often associated with the professional activities of officials, their object is other social relations, as a rule, these are human and civil rights, property, economic activity [1, p. 287]. For example, this can refer to the responsibility of a public servant in case of improper performance of duties to protect the life and health of people (Article 137), or concealment, distortion of information about the environmental state or morbidity of the population (Article 238) [17]". At the same time, the only common criterion for both groups of official crimes is damage, which is recognised as damage caused to individuals, legal entities, a state body, or directly to the state.

Notably, the number of crimes based on abuse of authority is considerably higher than those that contain signs of non-performance or improper performance of powers by a public servant. Therefore, in Ukrainian science, considering the legal nature of misdemeanours, it is considered that non-performance or improper performance of powers mainly qualifies as an offence, and belongs to the sphere of regulation of administrative law norms. As for abuse of office, such offences are considered with a more dangerous degree of gravity – as crimes, and therefore fall under the qualification of criminal legislation. Therefore, the specific feature of administrative responsibility is close ties with criminal responsibility, and an administrative offence with a crime.

Thus, administrative liability is a type of legal liability of citizens and officials for the committed administrative offence (tort). As in the case of criminal liability, a public servant is brought to administrative responsibility in case of violation of the norms of administrative legislation. Thus, Article 9 of the Code of Ukraine on Administrative Offences makes provision for the occurrence of administrative responsibility for an act that does not hold signs of a crime, a socially dangerous act [18]. Article 14 of the Code of Ukraine on Administrative Offences has a norm that defines the specific features of bringing public servants to administrative responsibility [18]. The disadvantage of the norm is the use of the term "official" – it is quite unclear who should be considered an official, their speciality, type of activity, or their powers. Only one article defines the list of cases in which administrative liability occurs. A substantial drawback of the Code of Ukraine on Administrative Offences is the absence of a separate section devoted specifically to the responsibility of public servants. The legislator paid special attention to only one type of violation – corruption (Chapter 13-A "Administrative offences related to corruption") [18], but this is not a significant part of the violations that a public servant can commit in their work. It can be said that this type of violation is more the prerogative of criminal liability because the Ukrainian legislators mainly qualify such actions of a public servant as a crime. Thus, in general, one may get the wrong impression that the institution of administrative responsibility of a civil servant is built exclusively on corrupt activities.

Another type of legal liability of a public servant is constitutional liability. It makes provision for the approval by the state and society of positive behaviour of the subject of constitutional relations, and the state, its bodies, officials are those subjects that act according to the requirements of constitutional regulations (positive aspect). Otherwise, the state will experience a negative reaction to the illegal actions (offences) of these subjects, which are implemented according to the procedure established by the Constitution and laws of Ukraine.

Civil and Material Liability of Public Servants

Civil liability is another type of legal liability of public servants. Traditionally, when analysing the type of legal liability, one proceeds from two aspects of it. Thus, civil liability is considered as a negative reaction of the state to a civil violation of the relevant regulations and entails the deprivation of certain

civil rights or established obligations of a property nature. Non-performance of obligations is when the debtor either does not perform the action at all, or performs it improperly (with delay, partially, or poorly). Therefore, by analogy with the theory of law, it is possible to characterise the civil liability of a public servant as compensation for losses caused by illegal actions of an official within the limits of the competence granted to them in the field of public administration. It is interesting that the state authority is responsible for material damage caused by a public servant if the illegal actions are related to the professional activities of their official. If an official causes damage outside the performance of their official duties, then they will bear material responsibility independently (personally). But the "principle of recourse" also applies here, according to which a state authority has the right to reverse a claim against the guilty person. The norms of the Constitution of Ukraine (Article 56) make provision for the right of everyone to compensation for moral and material damage caused by illegal actions or omissions by state authorities, local self-government bodies, or their officials (servants) in the performance of their official duties at the expense of state or local budgets [21].

Thus, a type of civil liability of a civil servant – material liability – was actually separated. Subjects of this type of liability may be individuals, i.e., persons endowed with a certain competence from the state or municipal body, according to the procedure established by the current legislation. In general, the current Law of Ukraine "On Public Service" regulates the material liability of a public servant, and as previously mentioned, it is allocated in a separate independent section. Thus, Article 81 of the Law of Ukraine "On Public Service" prescribes that a public servant must compensate the state for the damage caused as a result of non-performance or improper performance of their official duties [10]. The fact of applying material responsibility for the committed act stays generally recognised in legal practice, regardless of whether a person is subject to disciplinary, administrative, or criminal responsibility [9, p. 23].

Disciplinary Responsibility Of Public Servants

The most common type of legal liability of a public servant is disciplinary liability. It lies in the obligation of a public servant who has committed a violation of the law to be held accountable for their illegal behaviour and bear responsibility in the form of disciplinary penalties prescribed by the current legislation. In the current Law of Ukraine "On Public Service", the legislator sets up an exhaustive list of types of disciplinary sanctions. The most often applied penalties are remarks and reprimands, more severe, as a rule, are warnings about incomplete official compliance and dismissal from the position [10]. The same exhaustive list, only in relation to disciplinary offences of a public servant, is provided by the legislator in Article 65 of the said Law, which contains 15 points" [10]. In general, the authors of this paper believe that a clear list of disciplinary offences is a positive work of the legislators, which allows the highest authority to assess the composition of the offence and make a legal decision on the application of a particular type of penalty to a subordinate employee more professionally and objectively.

Special attention is drawn to the disciplinary offence of a public servant in the field of violation of the rules of ethical behaviour. According to Clause 13 of the Appendix to Recommendation No. R (2000) 6 of the Committee of Ministers of the Council of Europe to the Member States of the Council of Europe on the status of public servants in Europe, it makes provision for the need for public service employees to follow ethical standards [22]. Therefore, such a legislative initiative rightly reflects the state's desire to bring the current legislation closer to European standards. And responsibility takes on a professional and moral nature [22]. Moreover, compliance with the norms of ethical behaviour by a representative of the government can affect the assessment of the results of official activities, both intermediate and final. Thus, in the case of systematic receipt (usually two in a row) of disciplinary penalties based on the results of work, such a public service employee shall be subject to dismissal under the relevant article of the current legislation. Furthermore, at the level of disciplinary penalties, public servants may be subject to disciplinary measures that have adverse consequences, in addition to the fact that no incentive measures are applied during this period, they may also lose the moment of assigning the next rank.

If an exhaustive list of disciplinary offences provided by the legislator is considered positively, then the absence in this list of indications of a misdemeanour that is associated with corruption factors is not a flaw or a gap. The authors of this study believe that due to the increased interest in the issue of preventing corruption offences, the diverse interpretation of the discretionary powers of a public servant, as well as the urgent need to suspend and eliminate corruption factors, it is desirable to review the list of acts that should be classified as disciplinary offences. Thus, this is conditioned upon the need to consider the possibility of providing an assessment of a disciplinary offence through the lens of establishing a management decision by a representative of the state authorities, within the limits of acceptable solutions by the legislator, which contributed to the emergence of a corruption factor, provided that these actions do not contain signs of a crime or administrative offence.

Insufficient attention of the legislator to the issue of publicity of the process of imposing disciplinary penalties stays another shortcoming of the legal regulation of disciplinary liability of employees. Therefore, this problem deserves a suitable review because it can be considered in two ways. On the one hand, this refers to a public servant, a public person who is endowed with a range of official duties, which is why there is a need to convey information about their activities to the population. However, on the other hand, this is certain internal information, i.e., official, not public information.

Problematic Issues of Legal Liability of Public Servants: Solutions

Analysis of scientific literature and regulations showed that currently there are still problematic issues of disciplinary liability of public servants: 1) there is no single regulation that would govern the issue of disciplinary liability of a public servant; 2) a rather limited range of disciplinary penalties, which requires its expansion at the expense of material nature (fine, reduction of wages); 3) among disciplinary offences, the law does not include those that can be directly related to corruption factors; 4) the list of disciplinary offences is exhaustive; 5) insufficient publicity of the processes of imposing disciplinary penalties.

On the first issue, Ukraine should take advantage of the practices of more developed countries. N. Dolhikh suggests paying attention to the "specific features of bringing

public servants to disciplinary responsibility" on the example of the Federal Disciplinary Charter of Germany. It thoroughly regulates the procedure for bringing a public servant to legal responsibility for official offences. The procedure for dismissal from service for misdemeanours is prescribed by the general law on the legal status of public servants and the Law on federal public servants [2, p. 104]. Therefore, it is advisable to adopt a Disciplinary Charter of a Public Servant in the future, which will regulate pressing issues. Upon developing this regulation, it is necessary to consider the provisions of Section 8 "Disciplinary and material liability of public servants" of the current Law of Ukraine "On Public Service" [10] and eliminate gaps in the current legislation on disciplinary liability of public servants. Furthermore, today disciplinary charters are quite successful in areas that are somehow related to the public service, namely Disciplinary Charter of the Internal Affairs Bodies of Ukraine No. 3460-IV of February 22, 2006 [23] and Disciplinary Charter of the Armed Forces of Ukraine No. 551-XIV of March 24, 1999 [24]. Therefore, by analogy, one can use the structure of the above-mentioned regulations to develop a Disciplinary Charter for a Public Servant.

Solving the problematic issue of determining the amount of fines is admissible by introducing the term "public servant" into the legislative circulation in the field of administrative law. Therewith, it is necessary to establish a balance of a reasonable ratio of the salary of guilty persons to possible fines for committing administrative offences, i.e., to develop a mechanism for calculating fines as a type of recovery.

As for criminal liability, it is necessary to supplement the list of articles making provision for corruption crimes and place it in Section 17 of the Criminal Code of Ukraine "Crimes in the sphere of official and professional activities related to the provision of public services" [17]; include in the list of corruption crimes the Article 366-1 "Declaration of false information" of the Criminal Code of Ukraine.

The next problem is the presence of actions, which by their legal nature do not contain signs of disciplinary misconduct, among the exhaustive list of disciplinary misconduct. In this case, the authors of this paper propose to exclude the following grounds from the content of Article 65 of the Law of Ukraine "On Public Service" and supplement Part 1 of this Article with the following clause: "16 Other misdemeanours prescribed by the norms of the current legislation" [10].

The solution of the latter issue is possible by amending Article 77 of the Law of Ukraine "On Public Service" with Clause 8 on the publication of information in the media, via the Internet (on the official website of the relevant service, department) on bringing a public servant to disciplinary responsibility [10].

A necessary point of the study is to distinguish between the concepts of "civil law" and "material responsibility" of public servants. The authors of this paper have already noted material liability as a type of civil liability, but this should be emphasised legislatively. Therefore, the authors propose to amend the title of Section VIII of the Law of Ukraine "On Public Service", setting it out in the following wording: "Disciplinary, civil, material liability of public servants". Therewith, it requires changing the name and Chapter 3 of this law, it must, apart from material liability, hold information on civil law [10]. These changes should take place in parallel with the coordination of the current labour and civil legislation. In general, to effectively ensure the functioning of state bodies, the mechanism for applying a particular type of legal responsibility to public servants, it is necessary to take care of an effective and fundamental regulatory framework with coverage of the corresponding branches of law.

Conclusions

Currently, Ukraine is actively implementing measures to improve the legal regulation of the responsibility of public servants. Recently, several regulations have been adopted that directly relate to this issue, and therefore one can confidently say that the procedure of bringing to legal responsibility is gradually becoming more regulated and detailed. Therefore, summarising the analysis of problematic issues related to the statutory regulation of the legal liability of public servants, no global comments or substantial shortcomings were identified. But still, some issues of legal regulation need to be finalised to eliminate gaps. The institution of disciplinary responsibility of public servants stays somewhat unfinished. These include the specific features of the manifestation of corruption factors in the practical activities of public servants and considering public interests within the framework of the disciplinary procedure. The problem of publicity of the procedure of reviewing disciplinary proceedings and imposing disciplinary penalties on public servants requires proper legal, organisational, and scientific support. It is also necessary to pay attention to the differentiation of the concepts of civil and material liability of public servants by introducing amendments to the relevant section of the current Law of Ukraine "On Public Service". The Criminal Code of Ukraine also needs to be supplemented in terms of qualifying corruption crimes committed by public servants.
At the same time, the elimination of some gaps in the current legislation will encourage employees to properly perform their official duties, observe professional ethics, strict labour discipline and timely application of disciplinary and other penalties to persons who have committed misdemeanours. To further improve the institution of bringing public servants to justice, it is necessary to borrow the practices of the implemented legislation of European countries, the consideration of which can become the basis for the development and quality assurance of public service in Ukraine. Therefore, the issue of bringing a public servant to legal responsibility is critical and relevant in the concept of developing public service institutions in Ukraine. And the quality of administrative services provided by state bodies to citizens and non-residents on a daily basis depends on how effective the institution of legal responsibility will be in Ukraine. The prospect of further research is to develop innovative approaches to solving the issue of bringing a public servant to legal responsibility.

References

[1] Zubrytskyi, M.I. (2016). Criminal liability of civil servants. *Scientific Bulletin of Public and Private Law*, 2(4), 284-288.
[2] Dolhikh, N. (2020). Legal responsibility of civil servants in Ukraine and member states of the European Union. *Actual Problems of Public Administration*, 1(81), 102-106.
[3] Tymoshenko, M.I., Savichuk, N.O., & Galushkina, L.V. (2021). Responsibility of civil servants: Implementation problems. *Investments: Practice and Experience*, 20, 87-93.

[4] Liubymov, O.K. (2019). Legal responsibility as an element of the legal status of a civil servant. *Social Law*, 1, 20-26.
[5] Skorikov, V.V. (2017). Types of responsibility of civil servants. *Public Administration and Local Government*, 1(32), 145-151.
[6] Fominova, A.O. (2017). Features of the institute of disciplinary responsibility of civil servants. In *Scientific potential and prospects of legal science development: Materials of scientific-practical Internet conference*. Retrieved from http://www.lex-line.com.ua/?go=full_article&id=1997.
[7] Novak, O.D. (2015). *Legal principles of disciplinary responsibility of civil servants in Ukraine*. Kharkiv: Pravo
[8] Didach, V.I. (2020). Responsibility of civil servants as a concept of legal science. *State and regions. Series: Law*, 4(70), 11-16.
[9] Korotkykh, A.Yu. (2019). *Legal responsibility of civil servants under the labor legislation of Ukraine: Theory, practice, problems*. Kharkiv: Konstanta.
[10] Law of Ukraine No. 889-VIII " On Public Service". (2015, December). Retrieved from http://zakon3.rada.gov.ua/laws/show/889-19.
[11] National Agency of Ukraine for Civil Service Affairs. (2021). *Strategic Plan of the National Agency for Public Service for 2021-2023*. URL: https://nads.gov.ua/storage/app/sites/5/nacs-new6-zmini-31052021.pdf.
[12] Law of Ukraine No. 2493-III "On Service in Local Self-Government Bodies". (2001, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2493-14#Text.
[13] Law of Ukraine No. 1697-VII "On the Prosecutor's Office". (2014, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1697-18#Text.
[14] Law of Ukraine No. 580-VIII "On the National Police". (2015, July). Retrieved from https://zakon.rada.gov.ua/laws/show/580-19#Text.
[15] Resolution of the Cabinet of Ministers of Ukraine No. 500 " On Approval of the Regulation on the National Agency of Ukraine on Civil Service Issues". (2014, January). Retrieved from https://zakon.rada.gov.ua/laws/show/500-2014-%D0%BF#Text.
[16] Labor Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text.
[17] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[18] Code of Ukraine on Administrative Offenses. (1984, December). Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10#Text.
[19] Husarev, S.D., & Tykhomyrov, O.D. (Eds.). (2017). *Theory of state and law*. Kyiv: Osvita Ukrayiny.
[20] Law of Ukraine No. 1700-VII "On Prevention of Corruption". (2014, October). Retrieved from http://zakon.rada.gov.ua/laws/show/1700-18.
[21] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[22] Appendix to Recommendation No. R (2000) 6. In *Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe*. (2000, February). Retrieved from https://rm.coe.int/native/09000016804c3142.
[23] Law of Ukraine No. 3460-IV "On the Disciplinary Charter of the Internal Affairs Bodies of Ukraine". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3460-15#Text.
[24] Law of Ukraine No. 551-XIV "Disciplinary Charter of the Armed Forces of Ukraine". (1999, March). Retrieved from https://zakon.rada.gov.ua/laws/show/551-14#Text.

Список використаних джерел

[1] Зубрицький М.І. Кримінальна відповідальність держаних службовців. *Науковий вісник публічного та приватного права*. 2016. Вип. 2. Ч. 4. С. 284–288.
[2] Долгіх Н. Юридична відповідальність державних службовців в Україні та державах-членах Європейського Союзу. *Актуальні проблеми державного управління*.2020. Т. 1, № 81. С. 102–106.
[3] Тимошенко М.І., Савичук Н.О., Галушкіна Л.В. Відповідальність державних службовців: проблеми реалізації. *Інвестиції: практика та досвід*. 2021. № 20. С. 87–93.
[4] Любимов О.К. Юридична відповідальність як елемент правового статусу державного службовця. *Соціальне право*. 2019. № 1. С. 20–26.
[5] Скоріков В.В. Види відповідальності державних службовців. *Державне управління та місцеве самоврядування*. 2017. № 1(32). С. 145–151.
[6] Фомінова А.О. Особливості інституту дисциплінарної відповідальності державних службовців. *Науковий потенціал та перспективи розвитку юридичної науки:* матеріали науково-практичної інтернет-конференції (3 берез. 2017 р.). URL: http://www.lex-line.com.ua/?go=full_article&id=1997.
[7] Новак О.Д. Правові засади дисциплінарної відповідальності державних службовців в Україні: монографія / за заг. ред. В.В. Зуй. Харків: Право, 2015. 200 с.
[8] Дідач В.І. Відповідальність державних службовців як поняття правової науки. *Держава та регіони. Серія: Право*. 2020. № 4(70). С. 11–16.
[9] Коротких А.Ю. Юридична відповідальність державних службовців за трудовим законодавством України: теорія, практика, проблеми. Харків: Константа, 2019. 420 с.
[10] Про державну службу: Закон України від 10.12.2015 р. № 889-VIII. URL: http://zakon3.rada.gov.ua/laws/show/889-19.
[11] Національне агентство України з питань державної служби. Стратегічний план діяльності на 2021–2023 роки. URL: https://nads.gov.ua/storage/app/sites/5/nacs-new6-zmini-31052021.pdf.
[12] Про службу в органах місцевого самоврядування: Закон України від 7.06.2001 р. № 2493-III. URL:https://zakon.rada.gov.ua/laws/show/2493-14#Text.
[13] Про прокуратуру: Закон України від 14.10.2014 р. № 1697-VII. URL:https://zakon.rada.gov.ua/laws/show/1697-18#Text.

[14] Про національну поліцію: Закон України від 2.07.2015 р. № 580-VIII. URL: https://zakon.rada.gov.ua/laws/show/580-19#Text.
[15] Про затвердження Положення про Національне агентство України з питань державної служби: Постанова Кабінету Міністрів України від 1.01.2014 р. № 500. URL: https://zakon.rada.gov.ua/laws/show/500-2014-%D0%BF#Text.
[16] Кодекс законів про працю України: офіц. текст від 10.12.1971 р. № 322-VIII.URL:https://zakon.rada.gov.ua/laws/show/322-08#Text.
[17] Кримінальний кодекс України: офіц. текст від 5.04.2001 р. № 2341-III. URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[18] Кодекс України про адміністративні правопорушення: офіц. текст від 7.12.1984 р. № 8073-X. URL: https://zakon.rada.gov.ua/laws/show/80731-10#Text.
[19] Теорія держави та права: навч. посіб. / Є.В. Білозьоров та ін.; за заг. ред. С.Д. Гусарєва, О.Д. Тихомирова. Київ: Освіта України, 2017. 320 с.
[20] Про запобігання корупції: Закон України від 14.10.2014 р. № 1700-VII. URL: http://zakon.rada.gov.ua/laws/show/1700-18.
[21] Конституція України: офіц. текст від 28.06.1996 р. URL: https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[22] Додаток до Рекомендації № R (2000) 6 Комітету Міністрів Ради Європи про статус публічних службовців у Європі. *Міністерство юстиції України*. URL: https://minjust.gov.ua/m/rekomendatsii-parlamentskoi-asamblei-ta-komitetu-ministriv-radi-evropi.
[23] Про Дисциплінарний статут органів внутрішніх справ України: Закон України від 22.02.2006 р. № 3460-IV. URL: https://zakon.rada.gov.ua/laws/show/3460-15#Text(дата звернення: 30.09.2021).
[24] Про Дисциплінарний статут Збройних Сил України: Закон України від 24.03.1999 р. № 551-XIV. URL: https://zakon.rada.gov.ua/laws/show/551-14#Text.

Правові аспекти регулювання юридичної відповідальності державних службовців: проблемні питання

Людмила Юріївна Прогонюк

Миколаївський національний аграрний університет
54008, вул. Георгія Гонгадзе, 9, Миколаїв, Україна

Анотація. Стаття присвячена аналізу проблематики історико-правових умов становлення Центральної Ради та її діяльності У статті розглянуто актуальні проблемні питання законодавчого врегулювання відповідальності працівників державної служби, адже така відповідальність – досить багатогранна, якщо порівнювати її з відповідальністю звичайного найманого працівника, постільки пов'язана з колом повноважень, які покладаються на особу для здійснення адміністративно-правового та управлінського впливу на суспільні відносини в державі. Саме імідж державної служби України базується на тому, чи виконують її представники посадові обов'язки, а в разі невиконання чи неналежного їх виконання до державного службовця застосовується державний примус у чітко встановленому законом порядку. Урегульований процес застосування того чи того виду юридичної відповідальності – не лише засудження державного службовця, а й стимул для інших осіб належно виконувати свої посадові обов'язки та не допускати протиправних дій. Мета дослідження – виявити та вирішити проблемні аспекти відповідальності працівників державної служби. Для її досягнення розглянуто наукові позиції щодо розуміння поняття юридичної відповідальності в двох аспектах, як позитивну та ретроспективну відповідальність, та надано визначення юридичної відповідальності саме державного службовця. Встановлено, що, у разі якщо державний службовець порушує положення чинного законодавства України, до нього будуть застосовані такі види юридичної відповідальності: адміністративна, кримінальна, цивільно-правова, матеріальна та дисциплінарна. За допомогою системно-структурного та системно-функціонального методів проведено систематизований аналіз нормативно-правової бази кожного із цих видів юридичної відповідальності; методами порівняння та групування проведено розмежування матеріальної та цивільно-правової відповідальності держслужбовців в Україні й виокремлено групи актуальних засад відповідальності державного службовця в галузі адміністративного права та у сфері дотримання дисципліни праці за чинними нормативно-правовими актами. Запропоновано шляхи вирішення нагальних проблемних правових аспектів юридичної відповідальності працівників держслужби

Ключові слова: матеріальна відповідальність, адміністративна відповідальність, посадові особи, дисциплінарна відповідальність, нормативно-правові акти, удосконалення

UDC 342.95.351/354(477)
DOI: 10.32518/2617-4162-2022-5-2-16-22

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

The Institution of Incentives – an Element of the Civil Service Legislation System

Viktoriia A. Bondarenko*, Andrii M. Herasymovych

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. The substantial differentiation of doctrinal definitions of encouraging a civil servant in the absence of statutory regulation of such a concept complicates the understanding of the meaning and purpose of this legal tool. The research topic is relevant because the problem of finding such means of influence on subjects authorised to perform the tasks of the state and local self-government, which would encourage civil servants not only to fulfil their professional duties, but also to increase the efficiency and effectiveness of their activities, is of great importance for the improvement and further development of the civil service in Ukraine. The purpose of this study was to investigate the institution of promotion as an element of the system of legislation on civil service, based on a comprehensive system analysis of legal phenomena in the context of current legislation and theoretical legal approaches adopted in the countries of the European Union. Upon authoring this paper, the following methods of scientific cognition were used: dialectical method of legal knowledge, thanks to which the institution of incentives was considered as a phenomenon of legal reality and its essence and qualitative changes in its formulation were investigated; the method of logical-semantic and logical-legal analysis allowed formulating the terminology for incentive legislation, the legal institution of incentives for civil servants; methods of modelling, analysis and synthesis allowed developing proposals for improving legislation on the legal regulation of incentives for civil servants. It was proved that the pluralism of the wording of this concept determines the need for regulatory consolidation of the concept of incentivisation as an element of improving the efficiency of public service. The study clarified the specific features of the institution of incentives in the system of public service legislation, which cover incentive legal relations, the implementation of which takes place in the system of public service, the grounds for applying incentives to civil servants. The authors considered the idea of adopting the Award Code of Ukraine, which would systematise and streamline many regulations that govern incentives, with the purpose of eliminating obsolete legal material, discrepancies in incentive norms, ensuring their logic and consistency, introducing new legal rules. The legal institution of incentives for civil servants is defined as a set of norms of official and administrative legislation that regulate a group of public service legal relations aimed at directly supporting the activities of public servants and related to the implementation of proceedings within the apparatus of the state authority in cases of public servants' incentives. This paper will be useful not only for employers, but also for the Ukrainian legislator, since the solution of problems related to the improvement of the institution of encouragement of public servants, stimulation of their effective activity should be recognised as one of the priority tasks of the state according to the standards of the European Union

Keywords: service law, public servant, legal regulation, incentives in the public service, improving the efficiency of the public service

Introduction

The dynamic nature of the organisational structure and activity of the state administration apparatus, conditioned upon the European integration vector of Ukraine's development, and the need to strengthen sovereignty determine the formulation of the issue of supporting a balance of the interests of the state and the public servant. One of the most effective means of achieving balance is the possibility of applying incentive measures in the public service system. Understanding the problems of legal regulation and practical implementation of the mechanism for encouraging civil servants is the subject of interest of scientists and practitioners. The relevance of the subject under study is evidenced by the dynamics of legislation, namely the introduction of amendments to the current legislation governing the administrative legal institution of incentives for public servants [1-3] and the development of new drafts of corresponding laws [4; 5], which determined the search for innovative approaches to solving the doctrinal and practical tasks of the functioning of the institution of incentives in the public service system.

The problem of incentives in the public service in general and the award in particular attracted the attention of legal scholars, which contributed to studies covering the generalised characteristics of all incentives [6-8], individual groups of incentives [9-11], their use in relation to certain types of public service [12-14]. Furthermore, some studies directly investigate the awards for public servants [15; 16].

T. Kolomoyets [6], paying attention to the resource of the individual bonus, determined that its size should be limited and in no case form the "main body" of the salary of

Suggested Citation

Article's History: Received: 09.03.2021 Revised: 11.04.2022 Accepted: 10.05.2022

Bondarenko, V.A., & Herasymovych, A.M. (2022). The institution of incentives – an element of the civil service legislation system. *Social and Legal Studios*, 5(2), 16-22.

*Corresponding author

a civil servant because the meaning of the bonus as a reward for "excessive efforts", for "special contribution", "for excellent results" of official activity is lost.

M. Tytarenko [8], investigating the incentives for public servants in foreign countries, namely the legislation of New Zealand, concluded that purely material incentives for public servants are prescribed by the laws of New Zealand "by adjusting their remuneration", as well as bonuses for "special achievements". However, it is interesting that all issues of stimulating public servants are the prerogative of an independent body – the Public Service Commission. The scientist, having proposed the author's definition of "incentives in service law", formulated a proposal to group them in a separate section of the Administrative Procedure Code of Ukraine [4] or the Law of Ukraine "On Administrative Procedure" [5] (Section "Incentivisation as a Type of Administrative Procedure").

Regarding the role and necessity of using incentives, O. Abramova emphasised that among the legal means contributing to the development of human capital, the importance of incentive measures is to stimulate the disciplined behaviour of employees in performing their duties, as well as the growth of professional skills [17].

K. Mishchenko noted that the motivational policy of the state in relation to public servants is a significant factor in improving the efficiency of public administration. One of the components of this policy is material incentives. Developed countries of the world have considerably improved the quality of public administration due to the material support of their managers. Therewith, Mishchenko adds that the specific features of motivating the work of public servants are related to the features of their work and the imperativeness of the institution of public service. Presently, the motivation mechanism in public service structures is still based on administrative and command incentives related to the clear regulation of the work of civil servants and constitutes a complex system of socio-economic relations between public servants and the state and society [18].

According to V. Lovina, an incentive should be interpreted as a positive stimulating influence of subjects (an official, body, etc.) on the needs, interests, consciousness, will, behaviour of employees, and, consequently, on the result of their work. The application of incentives is based on legal principles, should be prompt, significant, and weighty [19].

H. Koryttsev pointed out that an incentive is a material or non-material (moral) reward defined by regulations or not contradicting them for conscientious work of an employee to further motivate them to support the existing professional level and to improve it in the future. Therewith, Koryttsev emphasises that the incentives that stimulate employees, established in the organisation within the framework of the labour remuneration system, are legal incentives [20].

However, unfortunately, scientists have not studied the institution of incentives as an element of the public service system in general, which is a prerequisite for authoring this paper.

The purpose of this study was to find out the essence and features of the legal institution of incentivising public servants based on the study of scientific works in the field of law and public administration, the analysis of the current legislation of Ukraine, the analysis of the foreign practices, and to provide scientifically sound proposals for its optimisation.

Promotion of Public Servants in the Service Law System

The Strategy of Public Administration Reform for 2022-2025 indicates that the administrative legal institution of public service in the system of administrative legal regulation plays the role of a "locomotive" to ensure effective public administration [21]. According to the current legislation, namely the Constitution of Ukraine [1], the Law of Ukraine "On Civil Service" [2], the Law of Ukraine "On Service in Local Self-Government Bodies" [3], as well as corresponding decrees of the President of Ukraine, resolutions of the Cabinet of Ministers of Ukraine, regulations of executive authorities, regulations of local authorities, public service is carried out in bodies of all branches of state power. The concept of service law should be based on the principle of combining the interests of the state and public servants, since they are the main link in the state mechanism. In this regard, the concept of development of legislation on public service should cover provisions aimed at creating real opportunities for official growth for highly motivated initiative employees by developing and prescribing in the service contract at the stage of entering the public service an individual trajectory of professional development.

Considering the institution of incentive as an element of the system of legislation on public service, its categorical features indicate internal, external relations, coordination, and subordination ties. The orderliness of the norms that form the institution of encouraging public servants is expressed in internal relations and is conditioned upon the presence of incentive norms. In the Law of Ukraine "On Civil Service" [2], the provisions on official incentives and awards are prescribed in the Section VI "Remuneration, incentives and social guarantees". Proceedings on the application of incentive measures prescribed in Article 53 detail the regulations of executive authorities issued on the implementation of incentives in the public service system.

The unity of public service incentive norms is ensured by the use of general concepts and terms. The correlation of the institution of incentives for public servants with various branches of legislation characterises external relations, which is a necessary part of the structure. Legal norms governing the legal status of a public servant can be constitutional, administrative legal, or public service. The various structural entities included in this institution of legislation represent its links. They can be links of coordination, which are manifested in the unification of concepts, categories, and regulatory material of related branches of legislation; subordination, expressed by the hierarchy of sources of legislation and norms on the promotion of public servants.

Issues of improving the legal technique of state and service legislation, which form an integral part of the process of reforming the current model of public service, should be investigated within the framework of service law. Service law constitutes a system of legal norms governing public relations in the sphere of internal organisation of the public service, the establishment of the legal status of public servants, the practical functioning of the public service to ensure the activities of public servants and employees of local self-government bodies (hereinafter – public servants), performing the tasks and functions of public power and state administration [22, p. 50].

Legal relations formed in connection with the entry, passage, and dismissal of a citizen from public service are

also regulated by the norms of other branches of law – constitutional, administrative, and labour. The degree of independence is determined by the frequency of practical application of the norms of industry affiliation to the regulation of the range of legal relations that form the specific features of the subject of legal regulation. Improving the public service and its regulatory framework is the task of reforming the official legislation, their positive qualitative changes that meet the requirements of the current legal and political situation in the country.

The scale and importance of the institution of public service encourage thinking about the need to create and support a balance between biased public attitudes, restrictions, prohibitions, and the system of motivation of employees to improve the effectiveness of professional activities. Such ideas are relevant in the light of the development of legislation on public service because the constant change and improvement of official legislation is conditioned upon the dynamic nature of the state's management activities.

The Constitutional Court of Ukraine notes that the professional official activity of citizens in public service positions is carried out in the public interest and is associated with the exercise of special, public-legal functions by public servants, which determines a special professional status [23]. This legal provision covers the rights and obligations of employees, as well as restrictions and prohibitions related to public service, the existence of which is compensated by guarantees and benefits. The specifics of public service of this type are determined by the right of the legislator in the implementation of legal regulation of relations in the field of public service, based on the tasks, principles of organisation and functioning, the need to support a high level, to provide special rules for entering the service, passing it, special grounds for termination of official relations and dismissal. A distinctive feature of the method of legal influence of service law is the advantage of realising public interest.

The share of private interest in official legal relations is small. The public service makes provision for the priority of the interests of the state and functions to solve the problems of ensuring public welfare, exercising public interests based on the principles and provisions established in the Constitution of Ukraine [1] and in the relevant legislation on public service [2; 3]. Therefore, individual legal institutions that form part of the branch of service law require more detailed statutory regulation.

O. Evsyukova and T. Mykhailova note that the public service at the present stage of development of society appears as a complex institutional complex, in modernisation of which it is necessary to actively use network organisational structures, cooperate with civil society through its institutions, comprehensively support the dialogue of state authorities with the population and involve in management decisions, using multi-level coordination of problematic issues with public organisations, political parties, intellectual elites [24].

The legal institution of promotion gradually acts as an effective incentive for positive changes in the individual, society, and the state. The study "Civil service system at the European level" points to the creation of an incentive system in the countries of the European Union [25]. Notably, when incentives are used in activities and there is no strict control, a person is given freedom to show initiative and creative activity. Positive motivation as the driving force of the desired behaviour is external orders and interest of the subject.

According to M. Tytarenko, the official legislation in terms of incentives, namely its urgent aspect, is generalised, fragmented, and makes provision for wide opportunities for subjective discretion by the subject of incentives [26]. The authors of this paper believe that incentive, as opposed to punishment, is more effective. However, considering the issue of improving the efficiency of the public service, specifically from the standpoint of improving competitiveness as the latest criterion in the framework of public administration reform, the legislator has established dozens of restrictions and prohibitions for public servants, created many ways to overcome and prevent corruption in the public service, adopted several regulations establishing procedures for professional behaviour of officials and procedures for reducing professional risks during public service.

The public service has unique features – being under scrutiny of Ukrainian society and, in this regard, a very noticeable vulnerability of employees to criticism, rare cases of their public praise rather than condemnation. Criticism of professional public service should have reasonable limits because it is necessary to criticise actions performed by employees and officials in violation of the law, unnecessary practical decisions, bureaucracy, and the lack of considerable and expected results of managerial work.

Attention to such aspects of the functioning of the mechanism of the public service of Ukraine determines the need to develop provisions on the statutory regulation of official legal relations. As for the public service system, attention should be paid to the type of public service legal relations, the purpose of which is to directly support the activities of public servants. In a set of measures to improve the efficiency of the public service, the institution of incentives is an essential tool for stimulating development.

Professional activity, especially in the field of public service, places high demands on existing entities. Therefore, providing complex functions of managerial and other social activities requires a special incentive mechanism. The study "Pay-for-performance in the public service of the EU" pays great attention to promotion as the main incentive for effective performance [27]. The authors of this study focus on the specific features of the method used within the framework of proceedings on cases of incentivising civil servants. Considering incentives as a type of official legal relations, they are formed during the practical implementation of public service, in the sphere of official activities; they are aimed at ensuring the activities of civil servants.

Improving the Efficiency of Public Servants' Activities in The Context of Improving the Legal Regulation of Incentives

In theory and legislation, there is no single concept of the legal category "incentive". Thus, the implementation of incentive legal relations is based on interest, which is manifested in the employee's will directed towards improving the efficiency of their activities. The content of interest, which forms the basis of the concept "encouraging a public servant", characterises the combination of private and public foundations with the predominance of the latter, which is dictated by the purpose and objectives of the public service.

According to C. Bason and R. Austin, the emergence of human-centred models of public administration that offer new opportunities for creative influence is a constructive counterweight to more bureaucratic and analytical traditions [28]. In

the fields of science, where the imperative method of influence previously prevailed, the role of dispositive regulation can now be observed. V. Voorn, in his study "Professional managers, public values? The delicate balance between corporatization and stewardship to society", notes that the strengthening of the influence of contractual principles on the practice of public administration, the growing need to apply measures of stimulating influence to public servants, which indirectly contribute to increasing the effectiveness of professional activity, are objective factors dictating the necessity and timeliness of the changes mentioned above [29].

Considering the specific features of the method of legal regulation of civil service relations, the general rule of dispositivity is transformed into a limited dispositivity. This feature is related to the property of centralisation in the method of legal regulation of official relations. It is necessary to increase the social significance of incentive norms by strengthening legal guarantees. In this regard, it is necessary to develop, within the framework of administrative and service-legal studies, the provisions on guarantees of incentives in the field of public service, legislatively consolidated at the state level. In the administrative-theoretical sense, in fact, after its legal assessment, the legal basis for applying incentives in a certain form is merit.

The study of achievement as an official-legal category should serve as the basis of consideration and detailed clarification of the properties of its individual models. Such steps will contribute to the creation and strengthening of guarantees for the exercise of the employee's subjective right to incentives, which is no less important for curbing the manager's almost unlimited discretion when applying incentives in the public service. The manifestation of the dispositive method of legal regulation of official relations in the application of incentive measures to public servants is manifested in the implementation of actions and decision-making at the initiative of the head of the public service, based on a subjective analysis of the merits and identity of the subordinate subject. Achieving elevated performance indicators of the public service is possible with a combination of activity and deterrence in the public service sphere, supplemented by intensive legal regulation and a high degree of social activity of employees.

Professional performance is more likely to meet the requirements of efficiency and effectiveness in regulating behaviour, when, if necessary, the activity can be activated by external incentives or, in some cases, restrained. Analysing incentives in the field of public service, it is necessary to determine its position in the structure of official legislation. According to O. Stets, the structure should be determined according to the types of public service: legislation on administrative service; legislation on specialised service; legislation on militarised service. In this context, it is a set of laws, sub-legislative acts, international regulations governing public relations related to the functioning of the public service [30, p. 416].

The set of legal norms regulating the application of incentives in the civil service system, for full and comprehensive research as a legal category, should have the status of a complex legal institution of civil service legislation. At the same time, among the risks of public service reforms, there is a risk of blocking the functioning of the state; the risk of weakening the positions of other public authorities; inclusion in the text of the constitution of principles and legal constructions that are not inherent in the state [31, p. 54]. In this context, S. Solotkyi, deputy head of the Legal Department of the Secretariat of the Constitutional Court of Ukraine, aptly pointed out the excessive burdensome nature of the Law of Ukraine "On Civil Service" [2], the lack of differentiated approaches to the settlement of an entire range of legal relations [32, p. 131].

In every legal branch (constitutional, administrative, labour, criminal, civil law), incentive norms play an essential role in regulating public relations, but the key impact is manifested in achieving the tasks and goals of the functioning of the executive branch. The authors of this paper are convinced that the intersectoral nature of the legal institution of incentives indicates the need to grant a set of incentive norms a separate status in the legislative system. Similarly, the current state of the institution of public service incentives can be described, where the leading role of regulating the procedure, grounds, implementation in general and individual procedures belongs to departmental legal acts and orders (commands) issued according to them.

The authors of this study propose to adopt the Award Code of Ukraine, designed to systematise, and streamline numerous regulations governing incentives, to eliminate obsolete legal material, discrepancies in incentive norms, ensuring their logic and consistency, introducing new legal rules. I. Kovbas notes the idea of codifying the corresponding array of legislation, which is expressed in the adoption of the above-mentioned code, for a combination of material and procedural norms regulating incentives [33, p. 7]. Furthermore, the scientist argues for the need to implement such an idea by the fact that the establishment of award (incentive) law and the improvement of the corresponding body of legislation will allow the incentive to become an effective means of preventing corruption, as it will prevent abuses associated with obtaining benefits and privileges through unjustified receiving and giving.

It is impossible to define incentives as a sub-branch of any branch of law, since a specific set of incentive norms that hold a material and procedural component applies to a particular type of legal relationship (e.g., administrative, criminal). Within each branch of law that includes the legal institution of promotion, the relevant procedures will be different in terms of legislation and application practices. Incentive norms should be considered as a complex (intersectoral) legal institution, since it combines similar norms related to different branches of law. The complex interrelation of public relations objectively determines the presence of such normative entities in the legal system.

From the perspective of the system-legal approach, incentives must be considered as a complex legal institution that governs social relations related to the presentation for encouragement of persons who committed an eligible act, which covers the issue of the application of diverse types of incentives and the determining status of the encouraged. Incentive legislation constitutes a set of regulations that differ in legal force, which contain norms of a material and procedural nature that reveal the subject of incentive law. The institution of incentivising civil servants is a set of legal norms (of constitutional and administrative law) governing the grounds and procedure for applying incentive measures to civil servants, which is based on the incentive method of legal regulation, certain legal relations, coordination, and subordination links.

Conclusions

Promotion of public servants is one of the key institutions in the structure of the public service, along with the institutions of certification, contract, and disciplinary responsibility of public servants. The complex nature of the institution of incentives in the general legal sense necessitates the determination of specific characteristics for each branch of legislation where it exists. Features of the institution of incentives in the system of state and service legislation are as follows:

– incentive legal relations implemented in the public service system are public service relations aimed at the direct support of the employee's activities;

– the grounds for applying incentives to a public servant are legal facts: actionsx – achievements embodied in proper models of behaviour: impeccable and effective public service, special distinctions in public service; events – the onset of certain periods of time with which the legislator connects the emergence of public service incentive legal relations.

The legal institution of incentivising civil servants constitutes a set of norms of official and administrative legislation governing a group of state service legal relations aimed at directly securing the activities of civil servants and related to the implementation of proceedings on cases of encouragement of civil servants within the apparatus of a state authority.

References

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[2] Law of Ukraine No. 889-VIII "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19#Text.
[3] Law of Ukraine No. 2493- III "On Service in Local Self-Government Bodies". (2001, June). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19#Text.
[4] Draft of the Administrative Procedure Code of Ukraine No. 11472. (2012, December). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=44893.
[5] Draft of the Law of Ukraine No. 3475 "On Administrative Procedure". (2020, May). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68834.
[6] Kolomoiets, T.O., & Tytarenko, M.V. (2018). *Incentives as a means of improving the effectiveness of the activities of public servants: Legal aspect: Scientific and practical essay*. Zaporizhzhia: Publishing House "Helvetyca".
[7] Kolomoyets, T.O., & Kolpakov, V.K. (Eds.). (2017). *Promotion in service law* / N.O. Armash, Y.A. Berlach, I.V. Bolokan. Kyiv: In Jure.
[8] Tytarenko, M. (2018). Incentives for public servants in foreign countries: Legal consolidation of types, application. *Entrepreneurship, Economy and Law*, 8, 116-122.
[9] Sheshulyuk, Yu. (2017). Get an estimate. The procedure for assessing the results of the activities of civil servants has been determined. *Legal Practice*, 36(1029).
[10] Bekkuzhin, R., & Ibraeva, M. (2015). Actual issues of motivation and career planning of civil servants in the Republic of Kazakhstan. *Actual Problems of Economics*, 12(174), 258-265.
[11] Danylenko, Yu.S. (2016). Methods of evaluation of the results of official activity of civil servants. *Scientific Bulletin of Kherson State University,* 6(2), 68-71.
[12] Kryvoruchko, V.V. (2015). *Peculiarities of Legal Regulation of Wages and Social Guaranteeing of the Officials of the Security Service of Ukraine* (Doctoral thesis, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine).
[13] Korovaiko, A.O. (2013). Encouragement as a method of public administration in the field of foreign affairs. *Scientific Bulletin of the International Humanitarian University*, 3(1), 65-67.
[14] Seletskyi, O.V. (2013). Theoretical and legal research of certain aspects of encouragement of diplomatic workers. *Comparative and Analytical Law*, 2, 208-210.
[15] Zavhorodnii, V.A. (2016). Grounds for establishing bonuses as a component of the salary of a civil servant in Ukraine. In *Topical issues of implementation of the new Law of Ukraine "On Civil Service* (pp. 189-192). Zaporizhzhia: Proceedings of the All-Ukrainian Forum of Administrative Scientists.
[16] Rudenko, V.H. (2011). *Legal regulation of remuneration of civil servants in Ukraine* (Doctoral thesis, Volodymyr Dahl East Ukrainian National University, Luhansk, Ukraine).
[17] Abramova, O.V. (2006). Improvement of legislation on encouragement. *Labor Law*, 4, 16-22.
[18] Mishchenko, K.S. (2018). The motivation of work of civil servants in foreign countries: Experience for Ukraine. *Public administration studios*, 6(8). Retrieved from http://studio.ipk.edu.ua/motyvatsiya-pratsi-derzhavnykh-sluzhbovtsiv-u-zarubizhnykh-krayinakh-dosvid-dlya-ukrayiny/
[19] Lovina, V.O. (2009). Promotion and procedure for their application. *Juridical Journal*, 1, 102-104.
[20] Koryttsev, H.I. (2012). Concept and meaning of incentives in labor law. *European Perspectives*, 3(3), 114-119.
[21] Order of the Cabinet of Ministers of Ukraine No. 831-r "Some Issues of Public Administration Reform in Ukraine". (2021, July). Retrieved from https://zakon.rada.gov.ua/laws/show/831-2021-%D1%80#Text.
[22] Kivalov, S.V., & Bila-Tiunova, L.R. (2011). *Public service in Ukraine*. Odessa: Veniks.
[23] The right of access to the civil service (2022). Retrieved from https://ccu.gov.ua/storinka-knygy/434-pravo-dostupu-do-derzhavnoyi-sluzhby.
[24] Evsyukova, O.V., & Mykhailova, T.M. (2021). State service of Ukraine: Specificity of complexities of the modernization process. *Public Administration: Improvement and Development*, 4. doi: 10.32702/2307-2156-2021.4.1.
[25] The civil service system at European level. (2020). Retrieved from https://www.eupan.eu/wp-content/uploads/2020/05/Report-The-Civil-Service-System-at-European-Level.pdf.

[26] Tytarenko, M.V. (2019). Stimulation in service law: General and special principles. *Juridical Scientific and Electronic Journal*, 2, 154-159.
[27] Tubb, N. (2021). *Pay-for-performance in the civil service of the EU*. Luxembourg: Publications Office of the European Union.
[28] Bason, C., & Austin, R.D. (2021). Design in the public sector: Toward a human centered model of public governance. *Public Management Review*. doi: 10.1080/14719037.2021.1919186.
[29] Voorn, V. (2022). Professional managers, public values? The delicate balance between corporatization and stewardship to society. *Public Management Review*. doi: 10.1080/14719037.2022.2026691.
[30] Stets, O.M. (2021). *Public service legal relations: Essence-conceptual characteristics and branch-legal identification* (Doctoral thesis, National University "Odesa Law Academy", Odesa, Ukraine).
[31] Yesimov, S.S. (2019). Implementation of constitutionalization of law and order in terms of constitutional risks. *Social and Legal Studios*, 3(5), 52-57.
[32] Solotkyi, S.A. (2021). Conceptual principles of the civil service in Ukraine: Problematic issues. *Philosophical and Methodological Problems of Law*, 1(21), 127-134.
[33] Kovbas, I.V. (2020). *Administrative regulation of award affairs in Ukraine: Theory, experience and effectiveness* (Doctoral thesis, Zaporizhzhia National University, Zaporizhzhia, Ukraine).

Список використаних джерел

[1] Конституція України: офіц. текст від 28.05.1996. URL: https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.
[2] Про державну службу: Закон України від 10.12.2015 р. № 889-VIII. URL: https://zakon.rada.gov.ua/laws/show/889-19#Text.
[3] Про службу в органах місцевого самоврядування: Закон України від 07.06.2001 р. № 2493-III. URL: https://zakon.rada.gov.ua/laws/show/2493-14#Text.
[4] Проект Адміністративно-процедурного кодексу України від 03.12.2012 № 11472. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=44893.
[5] Про адміністративну процедуру: проект Закону України від 14.05.2020 № 3475. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68834.
[6] Коломоєць Т.О., Титаренко М.В. Стимули як засіб підвищення результативності діяльності публічних службовців: правовий аспект: науково-практичний нарис. Запоріжжя: Видавничий дім «Гельветика». 2018. 76 с.
[7] Заохочення у службовому праві: навч. посібник / Н.О. Армаш, Ю.А. Берлач, І.В. Болокан; за заг. ред. Т.О. Коломоєць, В.К. Колпакова. Київ: Ін Юре. 2017. 360 с.
[8] Титаренко М. Стимули для публічних службовців у зарубіжних країнах: правове закріплення видів, застосування. *Підприємництво, господарство і право*. 2018. № 8. С. 116–122.
[9] Шешулюк Ю. Получить оценку. Определен порядок оценивания результатов деятельности государственных служащих. *Юридическая практика*. 2017. № 36(1029).
[10] Беккужин Р., Ибраева М. Актуальные вопросы мотивации и карьерного планирования государственных служащих в Республике Казахстан. *Actual Problems of Economics*. 2015. № 12(174). С. 258–265.
[11] Даниленко Ю.С. Методи оцінювання результатів службової діяльності державних службовців. *Науковий вісник Херсонського державного університету*. 2016. Вип. 6. Том 2. С. 68–71.
[12] Криворучко В.В. Особливості правового регулювання оплати праці та соціального забезпечення службовців Служби безпеки України: автореф. дис. … канд.юрид.наук: 12.00.05 / Харківський національний університет внутрішніх справ. Харків. 2015. 20 с.
[13] Коровайко А.О. Заохочення як метод державного управління у галузі закордонних справ. *Науковий вісник Міжнародного гуманітарного університету*. 2013. № 3(1). С. 65–67.
[14] Селецький О.В. Теоретико-правове дослідження окремих аспектів заохочення дипломатичних працівників. *Порівняльно-аналітичне право*. 2013. № 2. С. 208–210.
[15] Завгородній В.А. Підстави встановлення премій як складової заробітної плати державного службовця в Україні. *Актуальні питання реалізації нового Закону України «Про державну службу»*: матеріали Всеукраїнського форуму вчених-адміністративістів (м. Запоріжжя, 21 квітня 2016 року). Запоріжжя. 2016. С. 189–192.
[16] Руденко В.Г. Правове регулювання оплати праці державних службовців в Україні: автореф. дис. … канд. юрид. наук: 12.00.05 / Східноукраїнський національний університет імені Володимира Даля. Луганськ, 2011. 19 с.
[17] Абрамова О.В. Совершенствование законодательства о поощрении. *Трудовое право*. 2006. № 4. С. 16–22.
[18] Міщенко К.С. Мотивація праці державних службовців у зарубіжних країнах: досвід для України. *Державно-управлінські студії*. 2018. № 6(8). URL: http://studio.ipk.edu.ua/motyvatsiya-pratsi-derzhavnykh-sluzhbovtsiv-u-zarubizhnykh-krayinakh-dosvid-dlya-ukrayiny/
[19] Льовіна В.О. Заохочення та порядок їхнього застосування. *Юридичний журнал*. 2009. № 1. С. 102–104.
[20] Корицев Г.І. Поняття і значення заохочень в трудовому праві. *Європейські перспективи*. 2012. № 3(3). С. 114–119.
[21] Деякі питання реформування державного управління України: Розпорядження Кабінету Міністрів України від 21.07.2021 р. № 831-р. URL: https://zakon.rada.gov.ua/laws/show/831-2021-%D1%80#Text.
[22] Ківалов С.В. Публічна служба в Україні: підручник / за ред. С.В. Ківалов, Л.Р. Біла-Тіунова. Одеса: Венікс, 2011. 688 с.
[23] Право доступу до державної служби. URL: https://ccu.gov.ua/storinka-knygy/434-pravo-dostupu-do-derzhavnoyi-sluzhby.
[24] Євсюкова О.В., Михайлова Т.М. Державна служба України: специфіка складнощів модернізаційного процесу. *Державне управління: удосконалення і розвиток*. 2021. Вип. 4. doi: 10.32702/2307-2156-2021.4.1.

[25] The civil service system at European level. URL: https://www.eupan.eu/wp-content/uploads/2020/05/Report-The-Civil-Service-System-at-European-Level.pdf (accessed date: 11.02.2022).
[26] Титаренко М.В. Стимулювання в службовому праві: загальні та спеціальні принципи. *Юридичний науковий електронний журнал*. 2019. Вип. 2. С. 154–159.
[27] Tubb H. Pay-for-performance in the civil service of the EU. Luxembourg: Publications Office of the European Union, 2021. 34 p.
[28] Bason C., Austin R.D. Design in the public sector: Toward a human centered model of public governance. *Public Management Review*. 2021. doi: 10.1080/14719037.2021.1919186.
[29] Voorn B. Professional managers, public values? The delicate balance between corporatization and stewardship to society. *Public Management Review*. 2022. doi: 10.1080/14719037.2022.2026691.
[30] Стець О.М. Державно-службові відносини: сутнісно-понятійна характеристика та галузево-правова ідентифікація: дис. … д-ра юрид. наук: 12.00.07 / Національний університет «Одеська юридична академія». Одеса, 2021. 428 с.
[31] Єсімов С.С. Реалізація конституційного оформлення правопорядку в умовах наявності конституційних ризиків. *Соціально-правові студії*. 2019. № 3(5). С. 52–57.
[32] Солоткий С.А. Концептуальні засади державної служби в Україні: проблемні питання. *Філософські та методологічні проблеми права*. 2021. № 1(21). С. 127–134.
[33] Ковбас І.В. Адміністративно-правове регулювання нагородної справи в Україні: теорія, досвід та ефективність: автореф. дис. … д-ра юрид. наук: 12.00.07 / Запорізький національний університет. Запоріжжя, 2020. 40 с.

Інститут заохочення – елемент системи законодавства про державну службу

Вікторія Анатоліївна Бондаренко, Андрій Михайлович Герасимович

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Істотна диференціація доктринальних визначень заохочення державного службовця за відсутності нормативно-правової регламентації такого поняття робить складним з'ясування сенсу та призначення цього юридичного засобу. Досліджувана тема є актуальною, бо проблема пошуку таких засобів впливу на суб'єктів, уповноважених на виконання завдань держави та місцевого самоврядування, які б спонукали державних службовців не лише до виконання своїх професійний обов'язків, а й до підвищення ефективності та результативності своєї діяльності, має велике значення для вдосконалення та подальшого розвитку державної служби в Україні. Метою статті є дослідження інституту заохочення як елементу системи законодавства про державну службу на підставі комплексного системного аналізу правових явищ, у контексті чинного законодавства та теоретико-правових підходів, прийнятих у країнах Європейського Союзу. Під час підготовки цієї статті були використані такі методи наукового пізнання: діалектичний метод правового пізнання, завдяки якому інститут заохочення розглянуто як явище правової дійсності та досліджено його сутність, якісні зміни у його формулюванні; метод логіко-семантичного та логіко-юридичного аналізу дозволили сформулювати понятійний апарат щодо заохочувального законодавства, правового інституту заохочення державних службовців; методи моделювання, аналізу та синтезу – для розробки пропозицій щодо вдосконалення законодавства з питань правової регламентації заохочень державних службовців. Встановлено, що плюралізм формулювань цього поняття зумовлює необхідність нормативного закріплення поняття заохочення як елементу підвищення ефективності державної служби. З'ясовано особливості інституту заохочення у системі державно-службового законодавства, що охоплюють заохочувальні правовідносини, реалізація яких відбувається у системі державної служби, підстави застосування заохочення до державного службовця. Розглянуто ідею прийняття Нагородного кодексу України, який б систематизував та впорядкував численні правові акти, що регламентують заохочення, з метою ліквідації застарілого правового матеріалу, протиріч у заохочувальних нормах, забезпечення їхньої логічності та узгодженості, запровадження нових юридичних правил. Визначено правовий інститут заохочення державних службовців як сукупність норм службового та адміністративного законодавства, що регламентують групу державно-службових правовідносин, спрямованих на безпосереднє забезпечення діяльності державних службовців і пов'язаних із здійсненням усередині апарату органу державної влади провадження у справах про заохочення державних службовців. Стаття буде корисною не тільки для роботодавців, а й для українського законодавця, оскільки вирішення проблем, пов'язаних із вдосконаленням інституту заохочення державних службовців, стимулюванням їхньої ефективної діяльності має бути визнано одним із пріоритетних завдань держави відповідно до стандартів Європейського Союзу

Ключові слова: службове право, державний службовець, правове регулювання, стимулювання в державній службі, підвищення ефективності державної служби

UDC 34.08.001.73:34(09)(470+571) "1864"
DOI: 10.32518/2617-4162-2022-5-2-23-30

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

The Institution of Justices of the Peace Through the Lens of the Judicial Reform of 1864

Volodymyr M. Synenkyi*

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. In continuation of the judicial reform that has been taking place in Ukraine since 2014, the issue of introducing magistrates' institutions stays relevant. Investigation of the history of the introduction and genesis of magistrates' courts after the reform of 1864 in Ukrainian territory allow decisively saying "yes" to the institution of justices of the peace in Ukraine and improving the time-tested models of magistrate justice. The purpose of this study was to identify and generalise positive steps and conclusions from the mistakes of the past, including the need to unify the structure of magistrates' courts, improve the mechanisms of their effective work and strengthen confidence in the judiciary to implement them in the modern legislative procedure. To fulfil this purpose, historical, historical-comparative, historical-system, comparative-legal research methods were used. The paper analysed the prerequisites, creation, and development of peace institutions on Ukrainian lands after the introduction of the reform of 1864. The structure of the newly formed world institutions and the category of cases under their jurisdiction were outlined. The features of the formation of the judicial corps of justices of the peace (features of appointment and dismissal, requirements for candidates, rights, duties, and responsibilities of justices of the peace) were clarified. Attention is focused on the impact that the world justice system experienced after the reform of 1864. The expected consequences of the work of peace institutions, positive results and real shortcomings of their activities were highlighted. The necessity of creating magistrates' institutions in Ukraine is justified, since they will contribute to the further introduction of direct democracy, reduce the burden on courts of general jurisdiction, improve legal awareness of citizens and strengthen the effectiveness of judicial proceedings through the widespread introduction of the institution of reconciliation (mediation). It was noted that further legislative, administrative-organisational, and modern electronic support is needed for the issue of jurisdiction of the magistrates' courts, selection, qualification, application of management methods, and a clear definition of the responsibility of judges. A partial solution to these issues was proposed. These results of this study can be used in the development of the Draft Law of Ukraine "On Magistrates' Courts"

Keywords: magistrates' courts, historical experience, development strategy, mediation

Introduction

The war in Ukraine has become an obstacle to the continuation of judicial reform to improve access to justice, develop alternative (out-of-court) and pre-trial dispute resolution through the introduction of the institution of justices of the peace [1]. The positive practices of many European and other countries, such as Belgium, Italy, Great Britain, USA, Australia, Canada, India, Israel, Singapore, etc., where the institution of justices of the peace works effectively is remarkably diverse. It can be reduced to three models of magistrates' courts, depending on the legal system (classical, continental, and mixed) [2]. What is common in all models is that justices of the peace are elements of the general judicial system [3, p. 16].

The study of the expediency of introducing the institution of justices of the peace in Ukraine and choosing a possible model of its functioning received its further official development (previous attempts: the concept of the Draft Law "On Justices of the Peace" [2], the Draft Law "On Justices of the Peace of Territorial Communities" [4], etc.) in December 2021. The Ministry of Justice prepared and submitted to the President of Ukraine and the Cabinet of Ministers of Ukraine an analytical document on the results of the study and relevant proposals on the feasibility of introducing this institution [5]. The course announced by Ukraine to accelerate the introduction of elements of direct democracy in the sphere of justice [6], as of today, has not led to a result, the final decision has not been made. At the same time, public interest in this issue persists and discussions by scientists, practitioners, and ordinary citizens continue. In the past, peace institutions have often been subjected to unfair and biased criticism that has not recognised their advantages and important legal and cultural purpose. There are still criticisms. Some of them lie in the fact that the development of legislation on justices of the peace should be preceded by changes in the existing legislation on mediation [7] in economic, civil, and criminal cases to avoid further duplication of norms [2]. At the same time, whatever transformations await world institutions in the future, it is important to realise and note their outstanding purpose in the past, both considering historical justice to them, and given the practical necessity to correctly orient themselves in the phenomena of modern public life.

Suggested Citation

Article's History: Received: 13.03.2022 Revised: 14.04.2022 Accepted: 12.05.2022

Synenkyi, V.M. (2022). The institution of justices of the peace through the lens of the judicial reform of 1864. *Social and Legal Studios*, 5(2), 23-30.

*Corresponding author

Given the relevance of unloading local general courts, increasing the availability of justice for the population, speeding up the resolution of minor cases and strengthening confidence in the courts, training personnel to work in courts of general jurisdiction [8, p. 60], it is informative to consider the development and functioning of the institution of justices of the peace through the lens of the judicial reform of 1864. It is necessary to consider the negative and positive practices of the past, taking into account the differences in the social and legal structure of the 1860s-1870s, which can be partially used at the present stage of development of the Ukrainian legal system.

Lawyers and scientists of the late 19th – early 20th century made a considerable contribution to the study of the preparation, organisational implementation, and content of judicial reform. They considered the mechanism of development of the institution of justices of the peace in a narrow (staffing, legal mechanisms for acquiring and terminating powers) and broad sense (which was based on a long procedure divided into stages, considering the awareness of the necessary changes, which prompted the development of legal theories, projects, regulations, their public discussion, further implementation in the judicial statutes of 1864 and analysis of the practical application of these norms).

At the same time, the analysis of the American model of public participation in the administration of justice [9, p. 89], Bulgarian, Russian [10, p. 113] and Polish [11, p. 458-461; 12, p. 123] models of magistrates' courts, does not allow choosing one of them to achieve one hundred percent positive effectiveness and requires further improvement, considering discussions about the introduction of the institution of justices of the peace as an important manifestation of civil culture, proper selection of world judges and the regulation of organisational, normative, economic, social, psychological, and other aspects of their activities. The question of the correlation between positive and customary in the activities of the magistrates' court also stays problematic [13, p. 68; 14, p. 1251]. The authors of this study consider it promising to create a modern hybrid symbiotic model of justice of the peace, considering the historical experience of its establishment on Ukrainian lands in the 1860s-1870s.

The purpose of this study was the development of recommendations on the implementation of positive and avoiding negative aspects that influenced the activities of justices of the peace through the lens of the judicial reform of 1864 in modern Ukrainian legislation.

Reasons and Prerequisites for the Judicial Reform Of 1864

The most consistent bourgeois reform in the 1860s-1870s was generally recognised as the judicial reform of 1864, which was the beginning of the history of judicial self-government [15, p. 34]. At the time of the reform, Ukraine was part of the Russian Empire, and it was subject to the norms of imperial legislation. Magistrates' court on Ukrainian lands operated in stages (comprising stages of regulation of public relations, the emergence of subjective rights and legal obligations, their real implementation [16, p. 5]), contained rudimentary norms and formed numerous deviations from the general legal order. An example was the further functioning of the peasant volost court, "which by the very fact of its existence violated the proclaimed principle of equality of states before the law" [17, p. 83]. At the same time, it was a consistent procedure in the context of a complete modification of the judiciary, since for the overwhelming majority of the population, legal equality in court was not available, as well as the right to protect their honour, dignity, have physical integrity, the right to privacy, peasants were granted the rights of citizens and the right to a fair trial [18, p. 166-167]. In the South-Western Region (on Ukrainian lands), judicial reform, considering the growth of the Polish national and Ukrainian peasant movements, had specific problems, features, and dragged on for decades, "coinciding in its active phase with the advent of the implementation of an alternative course for counter-reforms" [17, p. 85]. Thus, due to the authorities' fear of the likely strengthening of the national liberation movement after the Polish uprising of 1963, on these lands, precinct and honorary judges were appointed by the minister of justice on the proposal of the governor for three years, and were not elected, as established by Judicial statutes. They were not subject to the principle of immutability, and therefore could be dismissed at any time without explanation.

The reform was preceded by a high degree of dissatisfaction among the layers of the bureaucracy and the intelligentsia with the judiciary and the judicial proceedings, or as put by lawyer A.F. Koni in his work dedicated to the 50th anniversary of the Judicial Statutes, who condemned the punitive policy of the tsarist regime, advocated the principles of independence of judges from the authorities, called for respect for human dignity in court proceedings, "judicial arbitrariness" [19, p. 25-26]. I.V. Hesse focused on the problem of unsatisfactory state of government funding of judicial institutions, which required adjustment and an element of independence [20, p. 9]. In this regard, R.S. Wortman concluded on the presence of a conflict between the proclaimed principles of the rule of law and the judicial system, which was based on the estate and instance principles, continuous control by higher courts over lower ones, an unordered personnel policy in the courts and led to a delay in the consideration of court cases [21, p. 54]. Consequently, the reform was caused by non-compliance of the norms of the old legislation with the new conditions [22, p. 16-17]. That is why the presence of many educated legal officials in the administration, who objectively assessed the current situation, became a determining factor and led to the reform and the emergence of a new type of judge – fair, impartial, authoritative [21, p. 445]. Judicial reform contributed to the development of a new progressive type of legal perception of ordinary citizens, was liberal-democratic in nature and opposed the then absolutist nature of the legal system [18, p. 167].

In 1863, drafts of the Code of Judicial Institutions, the Charter of Criminal Proceedings, the Charter of Civil Proceedings, and the Charter on Punishments Imposed by Justices of the Peace were prepared [23] (common name – Judicial Statutes). These projects were previously considered in the Second Department of the Emperor's Office by the Minister of Justice D.M. Zamyatin, and then there was a meticulous debate in the State Council [24, p. 76]. The judicial statutes of 1864 were approved on November 20, 1864, by Alexander II, by which the state authorised a new form of representation of citizens. To prevent decentralisation and preserve the balance between civil society and the interests of the state, along with the institution of crown courts, the Statutes made provision for the formation of the institution of magistrates' courts in cities and counties and legislatively provided approval to the legal basis of the institution of the

magistrate. These included definitions of legal status, rights, obligations (organisational and functional, procedural nature, and as an official), elective competencies and criteria, selection procedure, and procedural [8, p. 58].

Magistrates' Courts: Composition, Requirements for Candidates, Powers of Judges

As for the composition of the magistrates' institutions, they comprised two instances: the first – the lower one, which constituted a one-person court of the district magistrate (as a rule, each of the several districts of the magistrates in the county united several volosts), or an honorary magistrate, who had the full rights of a justice of the peace, but did not have a separate precinct; the second – higher one, which comprised the capital or district congress of district justices of the peace. The Congress of Judges had the right to re-examine the case and make its decision as an appellate instance. The role of the third judicial instance, which checked the legality and reasonableness of judgments and decisions that entered into force, was performed by the Senate as a cassation instance. Therefore, the judicial corps of the magistrates' court comprised district justices of the peace and honorary justices of the peace [16, p. 4], who could temporarily perform the duties of a district judge in case of their absence (on holiday, illness, or dismissal from service). Proposals were received for the establishment of substitute positions, and corresponding decisions were made based on the results of their consideration [25, p. 442-443].

Justice in the magistrate's court was administered solely by a professional justice of the peace, with the voluntary consent of both parties. The justice received remuneration for their work, which helped increase the objectivity of their decision on the announced comments, reprimands, and imposed monetary penalties (no more than 300 roubles), assigned arrests (up to 3 months) and imprisonment (up to 1 year).

The Congress of Justices of the Peace rarely annulled the verdicts of justices of the peace [26, p. 50], which became an expected trend and contributed to the improvement of compliance with legality, efficiency, and therefore fairness of court decisions. This occurred despite the increase in the number of appeals, which was explained by the increase in the share of peasants with little knowledge of the law in the courts.

In the 1830s, decisions in minor criminal and civil cases were made by the police, performing a judicial function, which delayed their final decision for two-thirds of cases for years [27, p. 499]. After the reform, the specifics of the jurisdiction of the magistrate's court with simplified proceedings included minor criminal cases with a term of imprisonment of no more than one year and civil claims that did not exceed 500 roubles. At the same time, the justice of the peace had no right to resolve disputes concerning personal non-property rights. The magistrate's court considered cases on claims concerning obligations; claims concerning real law; claims not subject to appraisal; patrimonial and proprietary claims; claims for the restoration of violated or lost property, claims for the restoration of "private participation", as well as those claims that fall under the specifics of cases considered by magistrates. This helped strengthen the protection of the population from bureaucracy. Justices of the peace were elected for three years by volons (county) zemstvo assemblies or city dumas, with subsequent approval by the Senate. In Right-Bank Ukraine, they were appointed by the Minister of Justice (162 precincts of magistrates' courts were formed) [28]. A special legal education was not mandatory for them (common sense, life experience and honesty were sufficient [29, p. 16]), but property, educational, age, residency, criminal record or being under investigation or guardianship for extravagance, moral, religious, and national criteria were set. "In terms of gender sampling, only men had the right to be a judge" [18, p. 167].

"The candidate, or his wife or parents, had to have a land allotment or other immovable property worth twice as much as was required from the public district zemstvo assembly at a price of at least 15,000 roubles in rural areas, at least 6,000 roubles in capital cities, no less than 3 thousand roubles – in other cities. Furthermore, the candidate for justice of the peace had to be a local resident, have at least 25 years of age, a secondary or higher education, or at least three years of experience in a position where practical information on the conduct of court cases could be obtained" [30, p. 210; 20, p. 19]. As for justices of the peace in the Ukrainian provinces, the indicators of judges with higher education were as follows: Katerinoslav – 61.5%, Poltava – 63.5%, Kharkiv – 56.8%, Chernihiv – 68.6% [20, p. 124; 21, p. 441]. At the same time, the implementation of judicial reform required a proper number of individuals capable of introducing new judicial principles, and therefore the Code of Judicial Institutions (Article 34) made provision for the election of persons who did not meet the above conditions as justices of the peace, which was widely used in the Ukrainian provinces and contributed to the possibility of electing highly educated and well-known public figures who brought personal positive practices to the case of justice of the peace [21, p. 442; 23, p. 34].

According to the Code [23, p. 246] the duties of justices of the peace were to administer justice only within the limits of the peace district or the peace district, to prepare annual reports according to the established form on the progress of cases for the previous year. The position of a justice of the peace was honourable and highly paid, and based on the results of his service, "a justice could receive permanent ownership of a land allotment or real estate worth 1,500 roubles (from 3 to 6 thousand in the city)", which stimulated a responsible attitude towards the performance of the duties entrusted to the justice of the peace

The clearly defined grounds for the legal dismissal of a justice of the peace according to the Statute of the Establishment of Judicial Institutions of 1864 were as follows: failure to appear within a month from the day of appointment to the service without valid reasons; absenteeism during the year from service caused by a serious illness; removal of penalty or punishment for a crime or concession not related to service; detention for debts or declaring insolvent according to the procedure established by law [23, p. 216].

Sentences handed down by a magistrate in the absence of jurors were considered non-final and could be appealed in the appeal procedure, this also applied to any inconsistency in the conduct of the case or the verdict. Therewith, the sentences handed down by the district court with the obligatory presence of jurors, the trial chamber (with standing representatives), as well as the trial chamber and the assembly of justices of the peace as courts of the second echelon "were considered final and could be appealed only in the cassation procedure" [25, p. 444-445].

Impact of the 1864 Reform on the Institution of a Justice of The Peace

Researcher of the judiciary in Ukraine V.S. Shandra [31, p. 176] noted the insatiable interest of scientists in the study of judicial bodies, which also applies to peace institutions, since they arise as a response to the challenge of time, change, carrying elements of the legal era and continuing in the next ones. Business documentation that appeared in the judicial procedure is a source of information about people's real life, everyday life, interests, and aspirations. The Ukrainian population, despite being part of various states at that time, enriched the judicial system of the Russian Empire with some elements (e.g., Magistrates' Courts resembled arbitration courts in their activities) [31, p. 7]. However, the non-simultaneity and heterogeneity of implementation, as well as the lack of a unified practice of magistrates within Ukrainian territories, had a negative impact on the introduction of a new judicial system [21, p. 441].

A considerable achievement of the reform was the protection of justices of the peace from arbitrary replacements and transfers because of the illegal influence of administrative authorities, as a guarantee of the independence of judges. If before the judicial reform, the Ministry of Justice managed the courts, then after the reform, the Magistrate's Court became an independent body that could independently implement the judicial procedure, consider the case, and issue a verdict. An essential element of independence was also the system of encouragements (rewards and promotions).

The vocation of the institution of magistrates' courts was the implementation of the first elements of orderly coexistence in the field of domestic civil relations – citizens' awareness of their rights and responsibilities [17, p. 84]. Furthermore, participants in the legal procedure, who before the reform were objects, became full-fledged subjects of the procedure and could defend their rights in court both independently and with the help of a lawyer. In several cases (e.g., in disputes between peasants), the participants in the procedure, who previously agreed on the consideration of the case, had the opportunity to choose for themselves in which court it would be considered. And often the subjects of the procedure, having an alternative, voluntarily chose a judge of the peace to resolve a controversial situation, which testified to an elevated level of trust in judges. It was noted that the magistrate's court places law in such a sphere of social relations, where there was not even a hint of the concept of the possibility of the existence of law. Therefore, peace institutions, despite all legislative cassation discrepancies, managed to gain great popularity in society and become the most valuable and productive guide of the humane and enlightening ideas of the judicial reform of 1864 [17, p. 81].

At the same time, apart from their rights, the subjects of the procedure had to follow certain obligations. Thus, according to the Statute of Criminal Procedure [23], the non-appearance of a witness at the appointed time without valid reasons, depending on the condition of the witness and the importance of the case, entailed the issuing of a decision by the magistrate with the appointment of a fine (no more than 25 roubles). If the accuser did not appear, the magistrate had the right to reject the complaint or impose a fine [23, p. 127, 139]. The Code of Judicial Institutions, in turn, made provision for the obligation of all those present during the hearing of the case to observe the rules of decency, order, and silence, fulfilling the orders of the magistrate [23, p. 39].

The implemented judicial reform also affected numerous cases of bribery and graft, which resulted in a decrease in the number of complaints about corruption but did not eradicate it. Many archival documents refer to corruption in magistrates, and hence the passing of illegal sentences and decisions by justices of the peace. The impunity of judges in case of their violation of the law (applying local customs or following a direct order of the administrative authority) was strengthened by the fact that even in the case of bringing a judge to justice, it was only an administrative penalty.

Society at that time actively opposed the administration's interference in court affairs. As a result, as an exception, only when the case had a political connotation did the crown administration interfere in the judicial process.

Abolition of clerical secrecy and formal evidence, ensuring independence from the executive power, accessibility, equality of participants (comprehensibility), publicity with the involvement of lawyers and parties, orality, abolition of the institution of leaving under suspicion, adversarial nature of the judicial procedure and, most importantly, the possibility of reconciliation of the parties, also belong to positive changes in the judicial reform.

The expansion of the list of civil rights of the population, the approval and maintenance of the idea of legality, the possibility of obtaining judicial protection against the background of the destruction of urban corporations and peasant communities, the reduction of public control, changes in the consciousness of the majority of the population contributed to an increase in the number of detected crimes and their detection. The term of consideration of cases has been reduced by a total of half. The staffing of magistrates' courts with highly qualified personnel and the application of a number of other organisational changes led to an increase in such an indicator of the effectiveness of the judiciary as the fairness of court verdicts, which is based on the ratio of the number of appeals in cassation and appellate instances to the number of rejected ones. The further increase in the number of appeals is explained by the increase in the share of peasants in the total number of defendants, who are not yet accustomed to the requirements of the law and rely on customary law in their judgments [26, p. 50].

An inherent feature of the implementation of the reform was that it was later closely intertwined with the counter-reform of 1883-1885, which threw the democratic principle of elective judges on the sidelines of history [31, p. 131].

In 1889, the magistrates' courts were abolished (except for Odesa and Kharkiv). Their cases were handed over to city judges, the county member of the district court, and zemstvo chiefs, who most often interacted with magistrates' courts at the local level. However, in the Volyn, Podil, and Kyiv provinces, the justices of the peace appointed by the administration were preserved, since in fact they did not contradict the counter-reform in their content. In 1912, the magistrates' courts were restored. The institution of justices of the peace in Ukraine was finally liquidated in 1918 by the Resolution of the People's Secretariat "On the Introduction of a People's Court" [32, p. 466]. In the future, there were also cases of using elements of magistrates' justice. Thus, in the Soviet period, following the example of earlier congresses of magistrates, "a second (cassational and revisional) instance was established in the form of a council (convention) of people's judges."

Possible Ways to Introduce the Past Practices into Ukrainian Legislation

Considering the differences of social life and legal institutions of the period under study from modern ones, it is possible to draw historical parallels and single out the following conclusions and proposals:

1) creation of magistrates' courts in modern Ukraine is urgent and necessary. This will relieve the judicial system by taking away minor cases and reducing the time required for their consideration, and will help increase access to justice, provided that there are justices of the peace in each united territorial community;

2) historical experience testifies to the negative impact of exceptions in the general judicial system on the work of magistrates' institutions. This should be considered in the future when creating and reforming magistrates' institutions;

3) magistrates' institutions need an adequate number of people capable of performing the prescribed functions. As additional training, the authors of this paper propose to introduce legal courses and further certification for candidates for justices of the peace who do not have a legal education but have the support and trust of the community. This will contribute to the awareness of justices of the peace and will enable them to legally and effectively separate and redirect to the courts of general jurisdiction cases that are not under their jurisdiction. The selection of candidates for the position of justice of the peace must be preceded by a large amount of preparatory work (compilation of lists, creation of commissions for accreditation, search for assistants and premises, provision of computer equipment and software, etc.). Undoubtedly, it is important to outline at the legislative level a clear list of a group of cases subject to justice of the peace;

4) an essential factor in the effective work of magistrates' institutions is proper funding, material independence of judges with the possibility to receive, in addition to a stable high salary, incentives, awards, promotions, considering the financial capacity of the community budget;

5) at the same time, it is necessary to develop a clear mechanism for the responsibility of justices of the peace for the improper performance of their duties and the adoption of decisions of inadequate quality (along with an effective system of public control and the system of election of judges, and therefore the possibility of recall or re-election, the authors of this paper propose to equate justices of the peace with civil servants with all corresponding consequences. This is justified by the fact that justices of the peace must make decisions on behalf of the state, and their future implementation is entrusted to state executive bodies);

6) special attention should be paid to the procedures and mechanisms of filing and subsequent documentation and movement of case materials considered by magistrates, which should not become bureaucratic obstacles, burden or delay the litigation, but at the same time should comply with current legislation. The introduction of the so-called electronic justice can be helpful in this matter;

7) the magistrate's court, performing its functional duties with an emphasis on the most important function – reconciliation, should contribute to the strengthening of trust in the judiciary and perform an educational mission. This will contribute to the accumulation of practical experience by judges and can become a starting step for training personnel to work in courts of general jurisdiction.

Conclusions

Having investigated the historical path of the creation and development of magistrates' courts on the territory of Ukrainian lands, it is possible to consider this process as a progressive liberal step. The judicial reform of 1864 fundamentally changed the entire judicial system of that time. Having analysed the sources of the time, it can be concluded that regardless of the perspective from which the changes in the legal system were considered (sometimes opposite), the institution of the justice of the peace established itself and proved itself successfully. The retrospective analysis of legislation, scientific, periodical, and journalistic works of the end of the 19th – beginning of the 20th century about the establishment of the institution of magistrates' courts allows drawing the following conclusions:

1) the genesis and improvement of the conceptual model of bodies authorised to implement magistrates' justice took place under the influence of many social, political, and economic processes that took place in the state. These processes were interdependent and contributed to a lively discussion in the scientific community, consisted of contradictory and ambiguous assessments of contemporaries of those events because along with progressive approaches, conservative tendencies, vestiges, and deviations from the general judicial system were preserved, which adversely affected the effectiveness of magistrates' institutions;

2) the separation of the judicial branch from the administrative apparatus had a positive effect on the quality of the work of justice bodies. The limitation of the administration's intervention in disputes between individuals was based on the courts receiving the right to decide civil and minor criminal cases at their discretion. Thus, judicial reform contributed to the strengthening of justice in general;

3) consolidation of the legal framework for the creation of two instances: lower and appellate, significantly increased the objectivity, independence, and fairness of the sentences handed down;

4) the positive impact on the judiciary and the court of the above-mentioned reform was outlined by the observance of legality and objectivity, speeding up the pace of consideration of cases, reduction of manifestations of corruption with a simultaneous increase in the number of protests and appeals.

5) due to the proximity of their physical location and the relatively small cases that were subject to them, magistrates' courts dealt with citizens much more often than general judicial institutions;

6) magistrates' courts were provided not so much by professional lawyers as by educated community representatives who were authorized to resolve minor disputes.

The analytical conclusions proposed in this paper can be used to improve the provisions of the existing drafts of the Law of Ukraine "On Justices of the Peace", "On Justices of the Peace of Territorial Communities" or in the creation of a project of the new Law of Ukraine "On Magistrates' Courts", which has become relevant.

References

[1] Decree of the President of Ukraine No. 231/2021 “Strategy for the Development of the Justice System and Constitutional Justice for 2021-2023”. (2021, June). Retrieved from https://zakon.rada.gov.ua/laws/show/231/2021#Text.

[2] Havronyuk, M.I., & Mironenko, S.F. (n.d.). Does Ukraine need justices of the peace? Retrieved from https://www.viaduk.net/clients/vs.nsf/0/605949BF98DAD31FC22575C8004FD3FE.

[3] Tsibulyak-Kustevich, A.S. (2016). *World Justice* (Doctoral thesis, Yaroslav Mudryi National Law University, Kharkiv, Ukraine).

[4] Draft Law of Ukraine No. 3291 “On Justices of the Peace of Territorial Communities”. (2008, October). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=3291&skl=7.

[5] Order of the Cabinet of Ministers No. 276-r “On Approval of the Government’s Priority Action Plan for 2021”. (2021, March). Retrieved from https://www.kmu.gov.ua/npas/pro-zatverdzhennya-planu-prioritetnih-dij-uryadu-na-2021-s24032.

[6] Analyze the implementation of the presidential program: The institute of justice of the peace. (2021). Retrieved from https://www.slovoidilo.ua/2021/11/11/stattja/polityka/analizuyemo-vykonannya-prezydentskoyi-prohramy-instytut-myrovoho-suddi.

[7] Law of Ukraine No. 1875-IX “On Mediation”. (2021, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1875-20#Text.

[8] Getmantsev, O.V. (2004). Historical and procedural aspects of the establishment and operation of justices of the peace in Ukraine. *Scientific Bulletin of Chernivtsi University*, 236, 58-62.

[9] Króliczek, P. (2020). Juries and justice of the peace in the United States of America. *Krytyka Prawa*, 12(4), 87-104.

[10] Mateev M. (2021). Justice of the peace in Bulgaria and in Russia (Historical and legal research). *State and Law*, 1, 111-120.

[11] Maziarz, J. (2021). Zagadnienie sądów pokoju w pracach Sejmu II Rzeczypospolitej w świetle wniosków i interpelacji poselskich. *Krakowskie Studia z Historii Panstwa I Prawa*, 14(4), 453-472.

[12] Kuzelewski, D. (2020). The non-professional judge as a component of civic culture in Poland. *Studies in Logic, Grammar and Rhetoric*, 65(1), 121-132.

[13] Popp, I.A. (2022). “One must live among the people to see the horror of horse stealing”: On the problem of horse theft in the post-reform period. *Questions of History*, 2(2), 67-80.

[14] Verniaev, I.I. (2019). Adaptation of imperial jurisdiction of magistrates’ courts in Transcaucasia. *Bulletin of St. Petersburg University. History*, 64(4), 1240-1256. doi: 10.21638/11701/spbu02.2019.405.

[15] Zhdanov, Yu.N., & Khmelin, A.S. (1998). *Judicial statutes of Russia in 1964. Experience of history and modernity*. Moscow: Moscow University of the Ministry of Internal Affairs of Russia.

[16] Obrusna, S.Yu. (2012). Formation of the corps of judges under the judicial reform of 1864. *Law and Society*, 4, 3-8.

[17] Obrusna, S.Yu. (2010). Administrative and legal principles of judicial reform in 1864. *Our Right*, 2(1), 81-87.

[18] Byrkovych, O. (2020). Features of the implementation of judicial reform in 1864 in the Dnieper region. *Knowledge, Education, Law, Management*, 4(32), 163-168.

[19] Koni, A.F. (1914). *Fathers and children of judicial reform*. Moscow: I.D. Sytin Partnership publication.

[20] Gessen, I.V. (1905). *Great reforms of the 60s. in the past and present. Judicial reform*. St. Petersburg: Publishing house of P.P. Gerkushin and K.

[21] Wortman, R.S. (1976). *The development of a Russian legal consciousness*. Chicago: University of Chicago Press.

[22] Leskiv, S.R. (2016). *Legal status of judicial self-government of Ukraine in the context of ensuring the professional rights of judges* (Doctoral thesis, Lviv University of Business and Law, Lviv, Ukraine).

[23] Chistyakov, O.I., & Vilensky, B.V. (Eds.). (1991). *Russian legislation of the X-XX centuries* (Vol. 8: Judicial reform). Moscow: Juridicheskaya literatura.

[24] Samoilenko, O.O. (2018). Judicial statutes of 1864 and the completion of their legislation. *Legal Regulation of the Economy*, 17, 70-79.

[25] Pavelko, V.O. (2012). Judicial system in the Ukrainian lands as part of the Russian Empire under the judicial reform of 1864. *Actual Problems of Politics*, 46, 439-446.

[26] Lypytchuk, O.V., & Leshkovych, N.O. (2014). Judiciary and justice in Russia after the judicial reform of 1864. *Scientific Bulletin of Lviv State Department of Internal Affairs*, 1, 44-54.

[27] Latkin, V.N. (1912). *Lectures on the history of Russian law delivered at the Imperial School of Law by Professor V. Latkin*. St. Petersburg: Single Prison Printing House.

[28] Lazanska, T.I. (2009). Magistrate’s court. In *Encyclopedia of the History of Ukraine* (Vol. 6; pp. 664-665). Kyiv: Naukova Dumka.

[29] Kravchuk, V.M. (2016). Constitutional and legal bases of the status of judges under the judicial reform of 1864. *Law and Society*, 5, 14-19.

[30] Okunev, N. (1898). To the question of the educational qualification and the duration of the service of justices of the peace. *Journal of the Department of Justice*, 2, 207-212.

[31] Shandra, V.S. (2011). *Conscience courts in Ukraine (last quarter of the 18th – middle of the 19th century)*. Kyiv: Institute of History of Ukraine, National Academy of Sciences of Ukraine.

[32] Shemshuchenko, Yu.S. (Ed.). (2022). *Legal Encyclopedia* (Vol. 4). Kyiv: Ukrayinska entsyklopediya.

Список використаних джерел

[1] Про Стратегію розвитку системи правосуддя та конституційного судочинства на 2021–2023 роки: Указ Президента України від 11.07.2021 р. № 231/2021. URL: https://zakon.rada.gov.ua/laws/show/231/2021#Text.

[2] Хавронюк М.І., Мироненко С.Ф. Чи потрібні Україні мирові суди? URL: https://www.viaduk.net/clients/vs.nsf/0/605949BF98DAD31FC22575C8004FD3FE.
[3] Цибуляк-Кустевич А.С. Мирова юстиція: дис. … канд. юрид. наук. Харків: Національний юридичний університет імені Ярослава Мудрого, 2016. 275 с.
[4] Про мирових суддів територіальних громад: проєкт Закону України від 10.10.2008 № 3291. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id = &pf3516 = 3291&skl = 7 (дата звернення: 03.04.2022).
[5] Про затвердження плану пріоритетних дій Уряду на 2021 рік: Розпорядження КМУ від 24.03.2021 р. № 276-р. URL: https://www.kmu.gov.ua/npas/pro-zatverdzhennya-planu-prioritetnih-dij-uryadu-na-2021-s240321.
[6] Аналізуємо виконання президентської програми: інститут мирового судді. URL: https://www.slovoidilo.ua/2021/11/11/stattja/polityka/analizuyemo-vykonannya-prezydentskoyi-prohramy-instytut-myrovoho-suddi.
[7] Про медіацію: Закон України від 16.11.2021 р. № 1875-IX. URL: https://zakon.rada.gov.ua/laws/show/1875-20#Text.
[8] Гетманцев О.В. Історичні та процесуальні аспекти створення і діяльності мирових судів в Україні. *Науковий вісник Чернівецького університету*. 2004. Вип. 236. С. 58–62.
[9] Króliczek P. Juries and justice of the peace in the United States of America. *Krytyka Prawa*. 2020. Vol. 12, No. 4. P. 87–104.
[10] Матеев М. Мировая юстиция в Болгарии и в России (историко-правовое исследование). *Государство и право*. 2021. №. 1. С. 111–120.
[11] Maziarz J. Zagadnienie sądów pokoju w pracach Sejmu II Rzeczypospolitej w świetle wniosków i interpelacji poselskich. *Krakowskie Studia z Historii Panstwa i Prawa*. 2021. T. 14, z. 4. S. 453–472.
[12] Kuzelewski D. The non-professional judge as a component of civic culture in Poland. *Studies in Logic, Grammar and Rhetoric*. 2020. Vol. 65, No. 1. P. 121–132.
[13] Попп И.А. «Надо жить среди народа, чтобы видеть весь ужас конокрадства»: к проблеме воровства лошадей в пореформенный период. *Вопросы истории*. 2022. Т. 2, № 2. Р. 67–80.
[14] Верняев И.И. Адаптация мировой юстиции Российской империи на Южном Кавказе. *Вестник Санкт-Петербургского университета. История*. 2019. Т. 64, № 4. С. 1240–1256. doi: 10.21638/11701/spbu02.2019.405.
[15] Жданов Ю.Н., Хмелин А.С. Судебные уставы России 1964 г. Опыт истории и современность: учеб. пособ. Москва: МЮИ МВД России, 1998. 127 с.
[16] Обрусна С.Ю. Формування корпусу суддів за судовою реформою 1864 року. *Право і суспільство*. 2012. № 4. С. 3–8.
[17] Обрусна С.Ю. Адміністративно-правові засади судової реформи 1864 року. *Наше право*. 2010. № 2(1). С. 81–87.
[18] Биркович О. Особливості впровадження судової реформи 1864 р. на Наддніпрянщині. *Knowledge, Education, Law, Management*. 2020. № 4(32).С. 163–168.
[19] Кони А.Ф. Отцы и дети судебной реформы. Москва: Издание Товарищества И.Д. Сытина, 1914. 319 с.
[20] Гессен И.В. Великие реформы 60-х гг. в прошлом и настоящем. Судебная реформа. Санкт-Петербург: Книжное издательство П. П. Геркушина и К., 1905. 267 с.
[21] Wortman R.S. The development of a Russian legal consciousness. Chicago: University of Chicago Press, 1976. 360 p.
[22] Леськів С.Р. Правовий статус суддівського самоврядування України в контексті забезпечення професійних прав суддів: дис. … канд. юрид. наук: 12.00.10 / ПВНЗ «Львівський університет бізнесу та права». Львів, 2016. 196 с.
[23] Российское законодательство X–XX веков: в 9 т. / под общ. ред. О.И. Чистякова. Москва: Юридическая литература, 1984–1994. Том 8: Судебная реформа, 1991. 495 с.
[24] Самойленко О.О. (2018). Судові статути 1864 року і досвід їх законотворення. *Правове регулювання економіки*. № 17. С. 70–79.
[25] Павелко В.О. Судова система на українських землях в складі Російської імперії за судовою реформою 1864 року. *Актуальні проблеми політики*. 2012. Вип. 46. С. 439–446.
[26] Липитчук О.В., Лешкович Н.О. Суд і судочинство в Росії після судової реформи 1864 року. *Науковий вісник ЛьвДУВС. Серія юридична*. 2014. № 1. С. 44–54.
[27] Латкин В.Н. Лекции по истории русского права. Санкт-Петербург: Типография Санкт-Петербургской одиночной тюрьмы, 1912. 500 с.
[28] Лазанська Т.І. Мировий суд. Енциклопедія історії України / Редкол.: В.А. Смолій (голова) та ін. Київ: Наукова думка, 2009. Т. 6. С. 664–665.
[29] Кравчук В.М. Конституційно-правові основи статусу суддів за судовою реформою 1864 року. *Право і суспільство*. 2016. № 5. С. 14–19.
[30] Окунев Н. К вопросу об образовательном цензе и продолжительность службы мировых судей. *Журнал Министерства юстиции*. 1898. № 2. С. 207–212.
[31] Шандра В.С. Совісні суди в Україні (остання чверть XVIII – середина XIX ст.). Київ: Інститут історії України НАН України, 2011. 266 с.
[32] Юридична енциклопедія: у 6 т. / редкол.: Ю.С. Шемшученко (відп. ред.) та ін. Київ: Українська енциклопедія, 2002. Т. 4. 720 с.

Інститут мирових суддів крізь призму судової реформи 1864 року

Володимир Михайлович Синенький

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. У продовження судової реформи, яка відбувається в Україні з 2014 року, актуальним залишається питання запровадження мирових інституцій. Вивчення історії запровадження та ґенези мирових інстанцій після реформи 1864 року на українських землях дасть змогу сказати рішуче «так» інституту мирових судів в Україні та вдосконалити вже перевірені часом моделі мирового правосуддя. Метою дослідження є виокремлення та узагальнення позитивних кроків та висновків з помилок минулого, серед яких: необхідність уніфікації структури мирових судів, вдосконалення механізмів їх ефективної роботи та зміцнення довіри до судової влади, з метою можливої їх імплементації в сучасний законотворчий процес. Для досягнення поставленої мети використовувались історичний, історико-порівняльний, історико-системний, порівняльно-правовий методи дослідження. У статті проаналізовано передумови, створення та розвиток мирових інституцій на українських землях після запровадження реформи 1864 року. Окреслено структуру новоутворених мирових установ та категорію підсудних їм справ. З'ясовано особливості формування суддівського корпусу мирових суддів (особливості призначення на посаду та звільнення, вимоги до кандидатів, права, обов'язки та відповідальність мирових суддів). Акцентовано увагу на впливі, який зазнала мирова юстиція після реформи 1864 року. Виокремлено очікувані наслідки роботи мирових установ, позитивні результати та фактичні недоліки їхньої діяльності. Обґрунтовано необхідність утворення мирових інституцій в Україні, оскільки вони сприятимуть подальшому впровадженню механізму прямої демократії, зменшенню навантаження на суди загальної юрисдикції, покращенню правової обізнаності громадян та посиленню ефективності судочинства за рахунок широкого впровадження інституту примирення (медіації). Зазначено, що потребують подальшого законодавчого, адміністративно-організаційного та сучасного електронного супроводу питання підсудності справ мировим судам, вибору, кваліфікації, застосування методів управління та чітке визначення відповідальності суддів. Запропоновано часткове вирішення цих питань. Зазначені результати дослідження можуть бути використані в розробці проєкту закону України «Про мирове правосуддя»

Ключові слова: мирова юстиція, історичний досвід, стратегія розвитку, медіація

UDC 342.951:351.82
DOI: 10.32518/2617-4162-2022-5-2-31-37

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

On the Issue of Integration of Civil Society Institutions in Preventing Corruption in Ukraine: Administrative and Legal Dimension

Zoryana R. Kisil*

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. The relevance of the subject under study is based on the exponential growth of corruption threats to the effective activities of state and local government bodies, which are the centre of consolidation of the democratic foundations of the social system. The purpose of this study was to position the main existing gaps in the modern administrative and legal dimension of streamlining the mechanisms for involving civil society institutions in preventing corruption torts in Ukraine and methods of their elimination, considering the available practices. To implement the tasks of scientific intelligence, the following methods were used: system analysis, comparative implementation, forecasting, statistical. It was found that changes in Ukraine, both in the economy and in politics, actively affect the production of new relationships, the development of modern relations between public administration bodies and public institutions (associations). It was noted that the constant relationship between state authorities and society is evidence and a guarantee of the socio-legal constancy and evolution of any state since the existing problematic issues of escalation in Ukraine cannot be solved without the full aid of society. At the same time, this also applies to civil society institutions. An integrative study of the function of civil society institutions to prevent corruption torts in public authorities was conducted. Practical proposals were given in terms of solving an entire range of theoretical and practical tasks that will prevent the commission of corruption offences by civil servants. To improve the norms of Chapter 13-A "Administrative offences related to corruption" of the Code of Ukraine of Administrative Offences, proposals were made to amend the following articles: Art. 172[4] of the Code of Administrative Offences "Violation of restrictions on co-operation and combination with other types of activities", Art. 172[6] "Violation of requirements of financial control", Art. 172[8] "Illegal use of information that became known to a person in connection with the performance of official or other legally defined powers". To ensure the effectiveness of anti-corruption institutions, it was proposed to develop and adopt the "Regulation on public anti-corruption associations (institutions) and their powers". This paper can be useful for a wide range of readers: scientists, law enforcement officials, public anti-corruption institutions, and anyone interested in preventing corruption offences

Keywords: illegality, prevention, corruption offences, administrative and legal mechanism

Introduction

The axiomatic nature of consolidating the efforts of law enforcement agencies and civil society institutions to prevent corruption challenges necessitates the detailed doctrinal regulation of the actual mechanism, forms, and essence of this co-operation, and also requires a comprehensive analysis of the current legislation regarding the identification of existing gaps and casuistic factors, the presence of which only reduces the effectiveness of prevention corruption torts in strategic quintessence. A comprehensive approach to the implementation of certain anti-corruption measures is undoubtedly the dominant guarantee of the effectiveness and quality of the prevention of corruption offences at all levels of its existence and is a key determinant of the factual lowering of the level of the corruption element in the activity of the Ukrainian state in its strategic quintessence. The success of integrity as a guideline of anti-corruption policy lies in the systematic constructive adjustment of all components of the system of current national legislation [1-3], which considerably impact the effectiveness and quality of the algorithm of the corruption tort prevention process. Currently, the dominant issue is one that requires a priority solution – introducing changes to the current Ukrainian anti-corruption legislation [1-3], since its inefficiency is conditioned upon the archaic, anaemic, or casuistic nature of its certain prescriptions.

Problematic aspects of improving the legal mechanism and the current legislation in terms of preventing corruption torts, among which studies of many foreign authors are essential. Thus, O.L Valencia Casallas, N.E. Ojeda Gómez, and W.A. Hernández Díaz point out that corruption should be understood as a cyclical phenomenon in which its motive and consequences content from each other. The prevention of this negative phenomenon is fundamental because it performs a double function – it acts as a mechanism of modernisation, at the same time it becomes an effective tool that prevents the recurrence of corruption offences. The authors are correct to believe that prevention as a strategy involves a series of actions and measures to be taken in advance, which

Suggested Citation

Article's History: Received: 20.03.2022 Revised: 19.04.2022 Accepted: 20.05.2022

Kisil, Z.R. (2022). On the issue of integration of civil society institutions in preventing corruption in Ukraine: Administrative and legal dimension. *Social and Legal Studios*, 5(2), 31-37.

*Corresponding author

will further reduce the risk and damage caused by corrupt actions. The author's team proposed several measures to prevent corruption, namely: 1) raising awareness in promoting the anti-corruption strategy in educational institutions of all levels; 2) introducing modern methods of preventing corruption and fraud in companies; 3) introducing ethical codes in all institutions; 4) developing and implementing the national policy on the prevention and counteraction of corruption [4].

Investigating corruption in Ukrainian society, T. Bogolib notes that corruption in Ukraine is one of the determinants of political and economic instability. The author emphasises that corruption is inherently destructive in all areas of Ukrainian society and poses serious obstacles to the implementation of economic reforms, hinders the development of market institutions, and threatens the national security of the state. The author concludes that the national anti-corruption policy should be improved and proposed an algorithm to prevent corruption [5].

In their studies, I.M. Kopotun, L.V. Herasymenko, O.V. Tykhonova, M.I. Leonenko, K.V. Shurupova thoroughly analysed the role of public control and countering corruption offences through social communication networks. The author team researched the international experience and activities of foreign non-governmental organisations in terms of preventing corruption crimes. In the context of scientific intelligence, the authors confirmed the hypothesis – the level of corruption is much lower in those countries whose population has a higher degree of anti-corruption activity in social networks, and there is also a much higher degree of development of anti-corruption public organisations. The authors' position on the need to create anti-corruption social networks in Ukraine is valid [6].

S.-T. Maxim notes that in the conditions of a society that is constantly changing, "…the prospect of corruption affecting the top of politics and public service is not inevitable, or at least this phenomenon can be counteracted and reduced so that it does not become a massive phenomenon. For this, political reformation must be accompanied by moral renewal". According to the author, the social standard of living within normative limits can be achieved only towards strengthening political involvement and activation of political organisation. The scientist's opinion that the implementation of certain educational anti-corruption measures will contribute to the development of political consciousness and responsibility among citizens [7].

N. Parisi, researching international and European models of institutionalisation of corruption strategies, notes that this adverse phenomenon should be overcome using a holistic strategy that combines prevention and prosecution, mobilising all segments of the national community, and improving the activities of all bodies called to prevent manifestations of corruption offences [8].

Carrying out a comparative legal analysis of anti-corruption policy in Ukraine and Poland, O. Zakharova, O. Harasymiv, O. Sosnina, O. Soroka, I. Zaiets conclude that manifestations of corruption are a real obstacle to the exercise of human and citizen rights, the level of social justice, economic development and endangers the effective functioning of the market economy. In the context of scientific intelligence, scientists note that "…the key to successful anti-corruption efforts can be the availability of modern national anti-corruption legislation, which most closely meets the requirements and recommendations that the state relies on in relevant international relations" [9].

The scientific intelligence of these scientists serves as an indicative basis for the creation of a single and functional algorithm for improving the national administrative anti-corruption legislation.

The Role and Importance of Civil Society Institutions in the Implementation of Administrative Measures in the Prevention of Corruption Offences in Executive Power Bodies and Local Self-Government Bodies in Ukraine

To optimise the positioning of proposals for improving the administrative and legal components of the mechanism for the prevention and prevention of corruption offences in relation to the issue under study, namely the involvement of public society institutions (hereinafter – PSI) in anti-corruption activities, as well as the desire to formulate a complex and strategically correct process of the specified modernisation, the analysis and additions to the basic propositions emphasised by administrative law scientists were positioned, which allowed consolidating them into the following blocks, namely:

A. The exceptional dispositive nature of the norms of the current Ukrainian legislation [3] regarding administrative responsibility for offences that are correlated with corruption offences.

A thorough analysis of Chapter 13-A of the Code of Ukraine on Administrative Offences [3] (hereinafter – the CUAO) is the basis for the need to improve the current legal prescriptions:

1) Article 172^4 of the CUAO establishes the illegality of "…combination of professional activity with entrepreneurial or other paid activity by persons subject to anti-corruption legislation". However, the legislators did not consider the generally accepted international practices, according to which this restriction concerns not only the direct implementation of economic activities, but also the beneficial position of the management entity. Thus, O. Syniavska and V. Ivantsov draw attention to the existing positive practice of governing these aspects in the regulations of the Federal Republic of Germany "… the key threat to the civil service is the emergence of a conflict of interests of an official in which their management decision may be based not on the priorities of the service, but on personal commercial aspirations. For these purposes, German federal legislation makes provision for the obligation of a person to transfer to the state for trust management all corporate assets that such a person owns at the time of appointment or election to a position" [10, p. 111]. O. Syniavska and V. Ivantsov note that the legislation of Ukraine does not declare as a tort the departure of a person appointed to a public service position from the composition of management bodies while maintaining the position of the ultimate beneficial owner, which completely contradicts the existing prescription regarding "… preventing the coexistence of professional and entrepreneurial activities" [3].

The authors of this paper believe that it is appropriate to add a paragraph to the prescription of the disposition of Parts 1 and 2 of Article 172^4 of the CUAO [3], namely:

"…as well as the preservation of the status of the beneficiary from such activity" because the main determinant of the occurrence of a conflict of interests is not the process of performing entrepreneurial activity itself, but the inherent reception of profit from actions. Therefore, the introduction of the proposed amendment to Article 172^4 of the CUAO [3] will contribute to the neutralisation of the phenomenon of opposing professional, official, and personal corporate interests of a person endowed with powers in public servant's performance of managerial functions. Clarification of Article 172^4 of the CUAO [3] will enable civil society institutions, which constantly monitor the corrupt activity of individuals endowed with power, to reveal hidden facts of the existing commercial interest of officials, which will increase the effectiveness and efficiency of the anti-corruption practice of PSI, along with the quality and the effectiveness of their interaction with law enforcement agencies in the context of reporting corruption-delict behaviour.

B. Incorrect definition of the tort prescribed in Article 172^6 of the CUAO [3].

The main problematic issue regarding the formation of an effective anti-corruption system is to recognise the abstractness of positioning this phenomenon in the current legislation of Ukraine, since without a clear specification of the meaning of the phenomenon, it is very difficult to identify certain measures, the implementation of which is necessary to prevent its manifestations. A. Bukhtiarova and K. Kramarenko note that: "… one should not draw an analogy between the effectiveness of combating corruption and the unjustified expansion of the content of this phenomenon. The law enforcement practices show that the unjustified attribution of a general tort to corruption offences blurs the boundaries of such an institution, which leads to the impossibility of effective further procedural support for litigation at the stage of Investigation and judicial consideration. The clarity of the criteria of corrupt illegal behaviour serves as the basis for the effectiveness of preventive influence on potential offenders, as it creates guarantees for the effectiveness of the law enforcement system" [11, p. 32].

Fully agreeing with A. Bukhtiarov's opinion, it is worth paying attention to the undoubted analogy of the positioning of the generality of consolidation in the dispositions of corruption torts in the CUAO [3]. The requirements declared in Article 172^6 of the CUAO [3], as the quintessence of a corruption offence, are conditioned by "…untimely submission without valid reasons of the declaration of a person authorised to perform the functions of the state or local self-government". The specific feature of a corrupt action must be the fact that the act really has a selfish reason and intention – obtaining an illegal profit from the performance of official functions. The existing interpretation of the disposition of Article 172^6 of the CUAO [3] makes it impossible to unambiguously identify an action as an offence related to corruption. The mentioned circumstance fairly regularly leads to the automatic inclusion in the proceedings of administrative torts in the field of public service in the category of corruption offence at the same time with cursory results: recording data about the offender in the "Unified state register of persons who committed corrupt or corruption-related offences (Register of corrupt persons)" [12]; taking measures of disciplinary influence – dismissal from the position held; changing the liability of the tort with its attribution to the jurisdiction of National Anti-Corruption Bureau of Ukraine, etc.

The specified gap in the current legislation of Ukraine [3] determines as a set of possible negative consequences for a person authorised to implement the functions of the state or local self-government, who did not commit a corruption-related offence in the context of the components and content of the composition of the corruption offence. Therewith, the existing legal confusion should be subjected to the listed legal restrictions, as it creates an added unnecessary burden on specialised anti-corruption institutions. Based on the above, it is right to propose changes to the disposition of Part 1 of Article 172^6 of the CUAO [3], in terms of supplementing it with a part of the hypothesis, namely: "… committed with the purpose of concealing a substantial change in the property status of the declarant." The proposed amendment of Article 176^6 of the CUAO [3] would contribute to a considerable improvement in the effectiveness and efficiency of its application in the field of prevention of corruption offences, in contrast to the general range of offences inherent in the specified legal norm, thereby laying the foundations for the synergistic integration of the existing information regarding the illegal enrichment of civil servants obtained in public investigations into the field of evidence base in judicial review of the case.

C. Absence of clearly established criteria for distinguishing between criminal and administrative corruption offences.

The main problematic factors in the implementation of the algorithm of administrative and legal response to corruption offences are not a painstaking method for the accumulation of evidence, problems with the effective implementation of investigative actions and covert intelligence – this determinant is the existing imperfection, and occasionally a contradictory nature of the norms of the current legislation. Presently, scientists [13; 15] discuss the delimitation of the composition of a criminal offence, namely: "Abuse of power or official position" (Article 364 of the Criminal Code of Ukraine [16]), "Official negligence" (Article 367 of the Criminal Code of Ukraine [16]) with the composition of an administrative offence, which are positioned precisely in the provisions of Article 172^8 "Illegal use of information that has become known to a person in connection with the performance of official or other legally defined powers" [3] and Article 172^7 "Failure to take measures to combat corruption" of the CUAO [3].

V. Ivantsov claims that "… distinguishing the specified elements of offences only by the signs of the objective party can lead to the potential evasion of the delinquent from legal responsibility for the formal presence of all elements of the offence in the absence of signs of harm" [17, p. 50]. Positioning the V. Ivantsov's opinion regarding the specific norms of the current legislative acts, one can conclude that the subject of the legislative initiative in terms of the one and only criterion regarding the distinction between administrative and criminal offences is the fact of substantial damage, which can be detected under the condition of the fact of material damage caused by the action or inaction of the subject of responsibility. Therewith, under circumstances that make it impossible to assess the amount of material damage caused during the proceedings, a legal case arises, for which the pre-trial investigation body or the court must reclassify

the actions taken and use the norms of the CUAO [3] instead of the norms of the Criminal Code of Ukraine [16], which is a positioning of the inadequate degree of preventive optimality and effectiveness of the current situation of the above-mentioned norms of the CUAO [3].

A further "inhibitor" of the effective and optimal activity of the PSI is certain incompatibility of the position of the mechanism of regulatory support of the mechanism of their specialised professional activity to the current public needs, which are positioned by the current state of dynamic development of society, considering the inadequate effectiveness of existing anti-corruption legal protection measures. Paradoxical is the situation when public anti-corruption associations (institutions) (hereinafter – PAA(I)), upon adopting prescriptions regarding functioning procedures, which are legally subordinated to current legislation [1-3], obviously count on absolute transparency and complete interaction with state authorities.

To eliminate the positioned gap of the current national anti-corruption legislation [1; 2; 18], the author of this study proposes to prepare and adopt the Cabinet of Ministers of Ukraine's resolution "Regulations on public anti-corruption associations (institutions) and their powers", in which several main points will be highlighted that would contribute to ensuring the legality, quality, and complexity of the functioning of the PSI in the context of the declared programme goal and purpose.

There is a need to adjust not only the regulatory aspects of PAA(I) activity, but also the organisational and functional aspects. A thorough investigation of the scientific output of administrative scientists and statistical sampling of facts allows the author to conclude on the current state of involvement of the PSI in the prevention of corruption offences in Ukraine:

a) adverse effect of exponential growth of quantitative indicators of public associations that only declare the rank of anti-corruption institutions.

As of December 1, 2020, 92,150 public organisations are officially registered in Ukraine, including 1,860 with the rank of anti-corruption [19]. At the same time, "…the real number of anti-corruption institutes that perform a practical function in preventing corruption offences does not exceed 2% of the declared number" [20]. The given statistical data casts great doubt on the concept of the interrelation between the number of anti-corruption public organisations and the quality and effectiveness of the public anti-corruption effect, which provides every reason to review the current situation of this component of public organisations.

b) optional involvement of anti-corruption public institutions in anti-corruption initiatives.

Considering the prescriptions of national legislation [2; 18; 21], public associations, having positioned their programme purpose and goals, independently outline procedural issues and the vector of their achievement, since they have complete autonomy regarding the coordination of their programme activities. Current legislation [1; 2; 18], unfortunately, does not make provision for any obligations or methods and means of intensification of programmatic and anti-corruption activities. To eliminate the existing gaps in national legislation [1-3] it is proposed to make provision for a norm in the Regulation on public anti-corruption associations (institutions) and their powers as follows: "…A public association that has received the status of anti-corruption and does not carry out some independent measures aimed at revealing and informing law enforcement authorities about corruption determinants, risks, or torts for two consecutive calendar years, gets rid of the given status with the obligation to further change the statutory documents and information placed in state registers", which will contribute to the requirement to confirm the "threshold" involvement of a public association or its acting members in the practical implementation of anti-corruption measures".

c) lack of an effective algorithm for improving the level of practical skills and abilities of members of public institutions in the field of prevention of corruption offences.

Priority Vectors for the Further Improvement of the Mechanisms of Involvement of Igs in the Prevention of Corruption Offences in Ukraine

Considering the fundamental programmatic goal of the PAA(I), namely the disclosure of the existing corruption risk, the monitoring of possible corrupt actions of civil servants, the summarisation of data that testify to the tendentious and corruption-determined nature of state administration prescriptions, and the incorporation of facts that can presumably be used as evidence, the request regarding the acquisition and continuous improvement of specialised skills and knowledge of all members of public institutions of the anti-corruption branch acquires an essential meaning.

The authors of this paper believe that the inclusion of the following norms in the project "Regulations on public anti-corruption associations (institutions) and their powers" should serve as a preventive measure that would prevent the possibility of public anti-corruption institutions neglecting their duty to systematically improve the qualifications of their members: "Professional members of public anti-corruption associations (institutions) who have not been sent for advanced training or internship to specialised anti-corruption bodies of state authorities for two consecutive calendar years are recognised as associate members from the next calendar day after the two-year period from the moment of the previous completed advanced training or internship, and if the previous qualification improvement or internship was not implemented, from the next calendar day after the end of the two-year period from the time of joining the public anti-corruption association (institution). In the case of an insufficient number of qualified members in the contingent of a public anti-corruption association (institution) for two consecutive months, such an association (institution) is obliged to introduce changes to the statutory prescriptions and in the relevant state registers, transforming the purpose and organisational and legal form of association by positioning according to the general, non-specialised requirements declared in the Law of Ukraine "On Public Associations" [2].

At the same time, it is impossible to overlook the administrative legal component of regulating the involvement of anti-corruption public institutions as a legal anomie in terms of the regulation of their involvement during the staffing of public administration institutions according to the criterion of "honesty". It is appropriate to pay attention to the fact that currently in the national legislation [1; 2; 18] there are no criteria and stages of checking for "honesty", which negatively affects the conclusions made during all stages of checking and making the final decision by the competition commission. To eliminate the mentioned gap in the national legislation, the authors of this paper propose to outline the algorithm and quintessence of all stages of checking the

integrity of candidates for the substitution of vacant positions in public service bodies in the project "Regulations on public anti-corruption associations (institutions) and their powers".

Conclusions

The strategy of involving civil society institutions should be based on the consolidation of two approaches, namely: 1) improvement of the procedure for the creation and activity of anti-corruption civil society institutions; 2) further improvement of the general system of involvement of civil society institutions in the prevention of corruption offences.

The effectiveness and quality of the implementation of several anti-corruption measures of the PSI equally depends on the degree of interpretation of their legal status not at the local, but at the general national level, which obliges to adopt the "Regulations on public anti-corruption associations (institutions) and their powers"

The specified legal structure will contribute to a substantial increase in the role of civil society as an autonomous and extremely fruitful entity in the prevention of corruption offences, strengthening the Ukrainian prescriptions of anti-corruption practice, forming the foundations of a new constructive escalation of the Ukrainian legal system and the public apparatus without the harmful interference of corruption in their functioning.

Cooperation between the state and institutions of civil society should be ensured through: 1) adoption of modern anti-corruption legislation that meets world standards and considers GRECO's recommendations; 2) certain measures involving the PSI and state and local self-government bodies regarding existing corruption risks that occur or may arise in their activities; 3) certain joint actions designed to form the psychology of negative attitudes towards corruption in the citizens of Ukraine, to strengthen the culture of integrity, respect for the rule of law.

References

[1] Law of Ukraine No. 1700-VII "On the Prevention of Corruption". (2014, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1700-18.

[2] Law of Ukraine No. 4572-VI "On Public Associations". (2012, March). Retrieved from https://zakon.rada.gov.ua/laws/show/4572-17.

[3] Code of Ukraine on Administrative Offenses. (1984, December). Retrieved from http://zakon.rada.gov.ua/laws/show/80731-10.

[4] Valencia Casallas, O.L., Ojeda Gómez, N.E., & Hernández Díaz, W.A. (2020). Prácticas para prevenir la corrupción en las entidades públicas y privadas. *Logos Ciencia & Tecnologia*, 12(2), 131-146. doi: 10.22335/rlct.v12i2.1142.

[5] Bogolib, T.M. (2015). Corruption in Ukrainian society: Problem of counteraction to effective development of economy. *East European Scientific Journal*, 4(1), 16-21.

[6] Kopotun, I.M., Herasymenko, L.V., Tykhonova, O.V., Leonenko, M.I., & Shurupova, K.V. (2020). Public control and counteraction to corruption offences by means of social communications and networks. *Revista San Gregorio*, 42, 20-27.

[7] Maxim, S.-T. (2017). Is corruption an inevitable social phenomenon in a changing society? *Postmodern Openings*, 8(1), 33-39. doi: 0.18662/po/2017.0801.03.

[8] Parisi, N. (2019). The institutionalisation of strategies to prevent corruption: The international and European model. *Revista Brasileira de Estudos Politicos*, 119, 397-447. doi: 10.9732/P.0034-7191.2019V119P397.

[9] Zakharova, O., Harasymiv, O., Sosnina, O., Soroka, O., & Zaiets, I. (2021). Comparative legal analysis of the anti-corruption policy in Ukraine and Poland. *Cuestiones Políticas*, 39(69), 91-114. doi: 10.46398/cuestpol.3969.05.

[10] Syniavska, O.Y., & Ivantsov, V.O. (2019). Persons authorized to perform state or local self-government functions: Categorical and species characteristics as basis for determining boundaries of the subject dissemination of the norms anti-corruption legislation. In S. Kunikowski, D. Bielov, & O. Mykolenko (Eds.), *Challenges and prospects for the development of legal systems in Ukraine and EU countries: A comparative analysis* (Vol. 2; pp. 109-128). Riga: Baltija Publishing.

[11] Bukhtiarova, A.G., & Kramarenko, K.I. (2018). Features of cooperation between the National Anti-Corruption Bureau and the State Financial Monitoring Service of Ukraine. *Scientific Notes of Lviv University of Business and Law*, 19, 31-35.

[12] Register of corrupt persons. (n.d.). *Officcial site of National agency for the prevention of corruption*. Retrieved from https://nazk.gov.ua/uk/reyestr-koruptsioneriv/.

[13] Movchan, A., Babjak, A., & Movchan, M. (2021). Issues of the improvement of anti-corruption system in Ukraine. In O. Korystin, Zh. Hu, Q. Zhang (Eds.), *Proceedings of the international conference on business, accounting, management, banking, economic security and legal regulation research (BAMBEL 2021)* (Series: Advances in Economics, Business and Management Research, Vol. 188; pp. 132-137). Atlantis Press International B.V. doi: 10.2991/aebmr.k.210826.023.

[14] Nazar, Y.S., Nazar, T.Ya., Prots, I.M., Yosyfovych, D.I., & Ilyushyk, O.M. (2020). Application of administrative and financial and legal responsibility for budget offenses under the laws of Ukraine and other countries of Eastern Europe. *Journal of Advanced Research in Law and Economics*, 11(4), 1246-1252.

[15] Shopina, I.M. (2021). Legal support of financial control in the field of public procurement: Vectors of improvement. *Legal Scientific Electronic Journal*, 11, 541-543. doi: 10.32782/2524-0374/2021-11/140.

[16] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14.

[17] Ivantsov, V.O. (2018). Principles of administrative law as the basis of the formation of the foundations of preventing and combating corruption in Ukraine. *East European Scientific Journal*, 11(39), 48-53.

[18] Resolution of the Cabinet of Ministers of Ukraine No. 996 "On Ensuring Public Participation in the Formation and Implementation of Public Policy". (2010, November). Retrieved from https://www.kmu.gov.ua/npas/pro-istopada-2010-r-996.

[19] Number of legal entities by organizational and legal forms of management. (2020). *State Statistics Service of Ukraine*. Retrieved from http://www.ukrstat.gov.ua/edrpoy/ukr/EDRPU_2020/ks_opfg/ks_opfg_1220.htm.

[20] Blikhar, V.S., & Kisil, Z.R. (2021). On the issue of integration of civil society institutions in the process of preventing corruption in public apparatus and local government bodies in Ukraine. In *Development vectors in public management and administration* (pp. 1-19). Riga: Baltija Publishing. doi: 10.30525/978-9934-26-082-7-1.

[21] Resolution of the Cabinet of Ministers of Ukraine No. 140 "On Approval of the Procedure for Organizing and Conducting a Competition for the Formation of the Public Council at the National Agency for Prevention of Corruption". (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/140-2015-п.

Список використаних джерел

[1] Про запобігання корупції: Закон України від 14.10.2014 р. № 1700-VII. URL: https://zakon.rada.gov.ua/laws/show/1700-18.

[2] Про громадські об'єднання: Закон України від 22.03.2012 р. №4572-VI. URL: https://zakon.rada.gov.ua/laws/show/4572-17.

[3] Кодекс України про адміністративні правопорушення від 07.12.1984 № 8073-10. URL: http://zakon.rada.gov.ua/laws/show/80731-10.

[4] Valencia Casallas O.L., Ojeda Gómez N.E., Hernández Díaz W.A. Prácticas para prevenir la corrupción en las entidades públicas y privadas. *Logos Ciencia & Tecnologia*. 2020. Vol. 12, No. 2. P. 131–146. doi: 10.22335/rlct.v12i2.1142.

[5] Bogolib T.M. Corruption in Ukrainian society: Problem of counteraction to effective development of economy. *East European Scientific Journal*. 2015. No. 4, part 1. P. 16–21.

[6] Public control and counteraction to corruption offences by means of social communications and networks. I.M. Kopotun et al. *Revista San Gregorio*. 2020. No. 42. P. 20–27.

[7] Maxim S.-T. Is corruption an inevitable social phenomenon in a changing society? *Postmodern Openings*. 2017. Vol. 8, No. 1. P. 33–39. doi: 0.18662/po/2017.0801.03.

[8] Parisi N. The institutionalisation of strategies to prevent corruption: The international and European model. *Revista Brasileira de Estudos Politicos*. 2019. No. 119. P. 397–447. doi: 10.9732/P.0034-7191.2019V119P397.

[9] Comparative legal analysis of the anti-corruption policy in Ukraine and Poland / O. Zakharova et al. *Cuestiones Políticas*. 2021. Vol. 39, No. 69. P. 91–114. doi: 10.46398/cuestpol.3969.05.

[10] Syniavska O.Y., Ivantsov V.O. Persons authorized to perform state or local self-government functions: Categorical and species characteristics as basis for determining boundaries of the subject dissemination of the norms anti-corruption legislation. *Challenges and prospects for the development of legal systems in Ukraine and EU countries: A comparative analysis* / Ed. by S. Kunikowski, D. Bielov, O. Mykolenko. Riga: Baltija Publishing, 2019. Vol. 2. P. 109–128.

[11] Бухтіарова А.Г., Крамаренко К.І. Особливості взаємодії Національного антикорупційного бюро і Державної служби фінансового моніторингу України. *Наукові записки Львівського університету бізнесу та права*. 2018. № 19. С. 31–35.

[12] Реєстр корупціонерів. *Офіційний сайт Національного агентства з питань запобігання корупції*. URL: https://nazk.gov.ua/uk/reyestr-koruptsioneriv/.

[13] Movchan A., Babjak A., Movchan M. Issues of the improvement of anti-corruption system in Ukraine. *Proceedings of the international conference on business, accounting, management, banking, economic security and legal regulation research (BAMBEL 2021)* / Ed. by O. Korystin, Zh. Hu, Q. Zhang. (Kyiv, August 26–27, 2021). Atlantis Pres International B.V., 2021. Series: Advances in Economics, Business and Management Research. Vol. 188. P. 132–137. doi: 10.2991/aebmr.k.210826.023.

[14] Application of administrative and financial and legal responsibility for budget offenses under the laws of Ukraine and other countries of Eastern Europe / Y.S. Nazar et al. *Journal of Advanced Research in Law and Economics*. 2020. Vol. 11, No. 4. P. 1246–1252.

[15] Шопіна І.М. Правове забезпечення фінансового контролю у сфері публічних закупівель: вектори удосконалення. *Юридичний науковий електронний журнал*. 2021. № 11. С. 541–543. doi: 10.32782/2524-0374/2021-11/140.

[16] Кримінальний кодекс України: офіц. текст від 05.04.2001 № 2341-III. URL: https://zakon.rada.gov.ua/laws/show/2341-14.

[17] Ivantsov V.O. Principles of administrative law as the basis of the formation of the foundations of preventing and combating corruption in Ukraine. *East European Scientific Journal*. 2018. Vol. 11, No. 39. P. 48–53.

[18] Про забезпечення участі громадськості у формуванні та реалізації державної політики: Постанова Кабінету Міністрів України від 03.11.2010 р. № 996. URL: https://www.kmu.gov.ua/npas/pro-istopada-2010-r-996.

[19] Кількість юридичних осіб за організаційно-правовими формами господарювання. *Держстат України*. URL: http://www.ukrstat.gov.ua/edrpoy/ukr/EDRPU_2020/ks_opfg/ks_opfg_1220.htm.

[20] Blikhar V.S., Kisil Z.R. On the issue of integration of civil society institutions in the process of preventing corruption in public apparatus and local government bodies in Ukraine. *Development vectors in public management and administration*. Riga: Baltija Publishing, 2021. P. 1–19. doi: 10.30525/978-9934-26-082-7-1.

[21] Про затвердження Порядку організації та проведення конкурсу з формування Громадської ради при Національному агентстві з питань запобігання корупції: Постанова Кабінету Міністрів України від 25.03.2015 р. № 140. URL: https://zakon.rada.gov.ua/laws/show/140-2015-п.

До питання інтеграції інститутів громадянського суспільства в процес запобігання корупції в Україні: адміністративно-правовий вимір

Зоряна Романівна Кісіль

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Актуальність тематики наукової розвідки ґрунтується на експонентному зростанні корупційних загроз для результативної діяльності органів державної влади та місцевого самоврядування, котрі є осередком консолідації демократичних засад соціального ладу. Метою статті є позиціонування основних наявних прогалин у сучасному адміністративно-правовому вимірі впорядкування механізмів долучення інститутів громадянського суспільства власне до процесу превенції корупційних деліктів в Україні та методам їх елімінування з урахуванням наявного досвіду. З метою реалізації завдань нашої наукової розвідки застосовано наступні методи: системний аналіз, компаративно-імплементаційний, прогнозування, статистичний. З'ясовано, що зміни в Україні, як у економіці, так і в політиці, активно впливають на процес продукування нових взаємовідносин, на хід утворення сучасних стосунків органів державного управління з громадськими інститутами (об'єднаннями). Наголошено, що постійний взаємозв'язок органів державної влади й соціуму є свідченням і гарантією громадсько-правової сталості й еволюції будь-якої держави, тому що існуючі проблемні питання ескалації в Україні немислимо розв'язати без цілковитого сприяння соціуму. Водночас це стосується й інститутів громадянського соціуму. Проведено інтегративну розвідку функції інститутів громадянського суспільства щодо превенції корупційних деліктів в органах державної влади. Надано практичні пропозиції в частині вирішення цілого спектру теоретичних, практичних завдань, які запобігатимуть вчиненню корупційних правопорушень державними службовцями. З метою удосконалення норм Глави 13-А «Адміністративні правопорушення, пов'язані з корупцією» Кодексу України про адміністративну відповідальність надано пропозиції щодо внесення змін до статей: 1724 КУпАП «Порушення обмежень щодо сумісництва та суміщення з іншими видами діяльності», 1726 «Порушення вимог фінансового контролю», 1728 «Незаконне використання інформації, що стала відома особі у зв'язку з виконанням службових або інших визначених законом повноважень». З метою забезпечення ефективності діяльності антикорупційних інститутів запропоновано розробити та прийняти «Положення про громадські антикорупційні об'єднання (інститути) та їх повноваження». Стаття може бути корисною для широкого загалу читачів: науковців, працівників правоохоронних органів, громадських антикорупційних інститутів, усіх, хто цікавиться питаннями запобігання корупційним правопорушенням

Ключові слова: протиправність, превенція, корупційні правопорушення, адміністративно-правовий механізм

UDC 349.2
DOI: 10.32518/2617-4162-2022-5-2-38-44

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Features of Concluding an Emphyteutic Land Use Agreement in Ukraine

Mariia S. Dolynska*

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. The relevance of this study is conditioned upon the fact that in Ukraine, emphyteutic land use has recently become one of the main ways of using agricultural land. This was facilitated by the introduction of substantial changes in the legal regulation of emphyteutic land use in the state, which was based on the best traditions of foreign practices in the use of agricultural land. The absence of mandatory details of the emphyteusis agreement in the legislation, which may become one of the reasons for declaring such transactions invalid in the future, also encourages this study. The subject of this study is regulatory and legislative acts on the regulation of emphyteutic legal relations in Ukraine. The purpose of this paper was to characterise the main provisions of emphyteusis contracts (the right to use other people's land plots for agricultural needs), with special attention paid to the terms and conditions of such transactions. The paper considers the innovations of legal regulation of the right to use other people's land plots for agricultural needs and the main essential conditions for concluding emphyteusis (land use) contracts in Ukraine. During the research, the following methods of cognition were used: historical, comparative legal, logical-normative, system-structural. During the study, a historical legal analysis of the development of legal regulation of the right to use someone else's agricultural land plot in independent Ukraine was performed. Special attention was paid to the characteristics of the legal regulation of the right to use someone else's land plot for agricultural needs (emphyteusis) in the Civil Code and Land Code of Ukraine. The terms and conditions of the emphyteusis agreement and the specific features of the implementation of the right to emphyteutic land use were clarified. The study thoroughly analysed the procedure for concluding and notarising emphyteutic transactions. The main and auxiliary terms and conditions for concluding contracts for emphyteutic land use were highlighted. To protect the rights and interests of the parties to emphyteutic land use, the emphyteusis agreement must be notarised. The texts of emphyteusis agreements should reflect the main mandatory conditions for concluding a contract listed in the study, and at the request of the parties – other terms and conditions. The practical value of this study lies in a list of substantial and supplementary terms and conditions of the emphyteusis agreement, which should be prescribed by the parties in the text of the transaction to protect their rights and interests

Keywords: emphyteusis agreement, agricultural land use, notarisation of emphyteutic land use transactions

Introduction

It is well known that the origin of the institution of emphyteusis occurred in Ancient Greece (in the 4th – 3rd centuries BC) and it was borrowed by other countries, including the Roman state, as it contributed to the efficient conduct of agricultural production.

The question arises among scientists whether to consider the emphyteusis of that time (late 4th century – 5th century): firstly, the "Roman "hereditary lease", secondly, a kind of "(long-term) land lease", and thirdly, a mixed concept of emphyteusis, i.e., both lease and a real right (real right with the obligation to pay rent).

A group of scientists, including S.V. Reznichenko, L.V. Herasymchuk and V. Shemonayev, believe that the above-mentioned emphyteusis agreement is an "imitation of an indefinite lease" [1, p. 458]. Scientists, including A. Podoprygora, D. Dozhdiev, claim that the unification of the legal regime of the land – emphyteusis was carried out by the Constitution of Emperor Zeno, according to which emphyteusis was considered a separate third type of contract [2, p. 160].

Over time, the institution of emphyteusis was improved and found implementation in the regulations of that time (late 4th century – 5th century), namely the fixed-term hereditary lease of land was reflected in public law, e.g., in the institutions of Gaius (160 AD) and the Digests of Justinian (530-533 AD) (for example, D. 6:3), and later received its legal consolidation in significant acts of that time: the Codex Theodosianus (438), as well as the Code of Justinian (529-533 AD). Further spread of the institution of emphyteusis occurred both in European countries and outside of Europe, e.g., in Canada, where this issue is governed in the Civil Code of Quebec [3]. According to V.V. Gutieva's dissertation research during the time of Austria-Hungary, the norms on the legal regulation of the institution of emphyteusis were also in effect on western Ukrainian lands, namely emphyteusis land use was considered as a "long-term hereditary right "to use someone else's land" [4].

Only in 2004, in independent Ukraine, the genesis of regulation of a new real right took place, namely: the use of someone else's agricultural land plot (emphyteusis), in connection with the entry into force of the Civil Code of Ukraine

Suggested Citation

Article's History: Received: 05.03.2022 Revised: 05.04.2022 Accepted: 06.05.2022

Dolynska, M.S. (2022). Features of concluding an emphyteutic land use agreement in Ukraine. *Social and Legal Studios*, 5(2), 38-44.

*Corresponding author

in 2003 [5]. The civil legislative act was the beginning of the implementation process for the introduction of a new real right in the state – the use of land for agricultural needs. This is evidenced by the adoption of the respective amendments to the Land Code of Ukraine in 2007 by the Law of Ukraine No. 997-V "On Amendments and Repeal of Certain Legislative Acts of Ukraine in Connection with the Adoption of the Civil Code of Ukraine" [6]. Considerable changes to improve the legal regulation of emphyteutic legal relations in the state were introduced in the main legislative acts of civil and land legislation.

Many scientists and practitioners, including not only historians, civilists, practitioners, but also scientists who investigate land legal relations, have devoted their research to the study of the new legal institution of emphyteusis, which lies in the legal regulation of the right to use someone else's land plot for agricultural needs. From the standpoint of this study, it is also worth highlighting the research by S. Reznichenko and L. Herasymchuk, as well as V. Shemonayev [1], I. Ignatenko and D. Fedchyshyn [7; 8], and V. Shvydka [7], as well as M. Shulga [8], E. Yurchenko [9]. However, the analysed studies do not consider changes in Ukrainian legislation that related to emphyteutic legal relations during 2019-2021 (since they were published before the updated emphyteutic legislation came into force), and do not pay due attention to the content of relevant transactions. In the Law of Ukraine No. 340-IX "On Amendments to Certain Legislative Acts of Ukraine on Combating Raiding" of December 5, 2019 [16], the legislators substantially changed the list of essential conditions of the emphyteusis agreement, which creates certain issues in the direct conclusion of emphyteusis agreements and requires scientific research.

The purpose of this study: to find the specific features of the agreement regarding the right to use someone else's land plot (agricultural), to clarify the essential and supplementary terms and conditions of the emphyteusis agreement, as well as the grounds for notarising said agreements.

Legal Regulation of the Right to Use Someone Else's Land Plot for Agricultural Needs (Emphyteusis)

The Law of Ukraine "On Amendments and Invalidation of Certain Legislative Acts of Ukraine in Connection with the Adoption of the Civil Code of Ukraine" adopted only on April 27, 2007 [6], the institution of emphyteusis was legislatively governed by Chapter 16-1 "The right to use someone else's land plot for agricultural needs or for development" of the Land Code of Ukraine. Thus, in 2007, a new civil law and land law institution was legislated – the right to use a land plot for agricultural needs (emphyteusis). It should be emphasised that in the following years, the Civil Code of Ukraine [5] and the Land Code of Ukraine [10] were substantially amended several times both regarding the legal regulation of the real right to use someone else's agricultural land only for agricultural needs (emphyteusis), and directly regarding the procedure for concluding and certifying emphyteusis agreements.

In particular, the Law of Ukraine No. 5070-VI "On Amendments to Certain Legislative Acts of Ukraine Concerning the Termination of the Right to Use Land Plots upon Allocation for Public Needs" of July 5, 2012, added two new grounds for termination of emphyteusis agreements [11]. And the Law of Ukraine No. 2498-VIII "On Amendments to Certain Legislative Acts of Ukraine on Resolving Collective Land Ownership, Improving Land Use Rules in Agricultural Land, Preventing Raids and Promoting Irrigation in Ukraine" of July 10, 2018 [12] established that the term of use of a land plot of state, municipal, and private property for agricultural needs cannot exceed 50 years.

From the standpoint of this study, it is necessary to highlight the Law of Ukraine No. 1423-IX "On Amendments to Certain Legislative Acts of Ukraine on Improving the System of Management and Deregulation in the Sphere of Land Relations" adopted on April 28, 2021 [13]. This Law introduced changes to the rules for using someone else's land plot for agricultural use (emphyteusis), both to the Land Code [10] and Civil Code [5] of Ukraine.

A more detailed description of changes in legislative regulation on the right of emphyteutic land use is highlighted in the study of the author of this paper "The evolution of the formation of the right to use someone else's land for agricultural purposes (emphyteusis), as a legal institution in independent Ukraine" [14].

Analysing the evolution of legal and legislative regulation regarding the right to use someone else's land plot for agricultural use in independent Ukraine, i.e., emphyteusis, the authors of this paper are inclined to allocate four main stages of its development [14, p. 46]. Namely:

- Stage I – 2004-2009;
- Stage II – 2010-2018;
- Stage III – 2019-2020;
- Stage IV – 2021-2022.

Since there is a certain discrepancy between the norms regarding the legal regulation of emphyteusis, namely in the Civil Code [5] and the Land Code [10] of Ukraine, it is considered necessary to introduce appropriate changes, specifically in terms of coordination and compliance of civil with land legislative norms.

General Principles of Concluding Emphyteusis Agreements

Notably, the conclusion of emphyteusis agreements in Ukraine during 2004-2006 took place according to the norms of civil legislation only, i.e., Chapter 33 of the Civil Code of Ukraine [5], which governed emphyteutic land use. The parties to such an agreement, when entering into an agreement on emphyteutic land use, were guided exclusively by the norms of the Civil Code of Ukraine [5], and since 2007, they also had to consider the norms of Chapter 16-1 of the Land Code of Ukraine [10].

The above-mentioned norms (civil and land law) emphasise that the sole basis for using someone else's agricultural land for agricultural use is an agreement concluded between its parties. V. Urkevych [13] is right that the emphyteusis agreement "is concluded according to the Civil Code of Ukraine" [5] and should also "consider the norms of the Land Code of Ukraine" [10]. V. Urkevych notes that the Civil Code of Ukraine [5] does not hold any special requirements concerning the content and terms and conditions of the agreement for the establishment of emphyteusis. According to the researcher, since in practice there are certain difficulties with the conclusion of such agreements (including in terms of establishing mandatory essential terms and conditions of the emphyteusis agreement, conducting land and environmental protection measures to preserve the object of the agreement), they usually include conditions inherent in the land lease agreement [15].

Starting to consider the issue of concluding an emphyteusis agreement, it is necessary to pay attention to the Law of Ukraine No. 340-IX "On Amendments to Certain Legislative Acts of Ukraine on Combating Raids" of December 5, 2019 [16]. The legislator makes provision for the possibility of certifying emphyteusis agreements in a notarised manner: from private or public notaries. These rules regarding the notarisation of emphyteusis transactions should be interpreted as follows: "must be notarised". Furthermore, the notary, together with the participants of such a transaction, will take part in the preparation of the emphyteusis agreement, and will take all necessary measures to verify all the circumstances of the agreement for compliance with the current legislation, including the Civil Code [5] and the Lad Code of Ukraine [10], the Law of Ukraine "On Notary" [17], other regulations and laws of Ukraine to protect civil and land rights, as well as the legitimate interests of the parties to such a transaction.

If an emphyteusis agreement is to be concluded with the involvement of public or private notaries, the latter, apart from the relevant chapters of the Civil Code [5] and the Land Code [10] of Ukraine, must also follow notarial norms. First, this applies to the Law of Ukraine "On Notary" [17], the Family Code of Ukraine [18], the Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances" [19], as well as other sub-legislative acts, namely the Procedure for Performing Notarial Acts by Notaries of Ukraine [20]. D. Fedchyshyn, I. Ignatenko, M. Shulga believe that an important "advantage" of the emphyteusis agreement is "the absence of strictly regulated requirements for the content of such an agreement", unlike other land agreements [8, p. 110].

Conditions and Grounds for Concluding Emphyteusis Agreements

As follows from the analysis of regulations, and as noted by researchers of the legal institution of emphyteusis, including D. Fedchyshyn, I. Ignatenko, M. Shulga [8, p. 153], the legislators did not make provision for "essential provisions" regarding the conclusion of the above-mentioned agreement. When entering into an emphyteusis agreement, it is worth remembering that there are essential and supplementary terms and conditions of agreements. Considering the question of the essential terms and conditions of the above-mentioned agreement, they should also follow from Article 132 of the Land Code of Ukraine [10], which sets requirements for the content of transactions where the object is land plots. Such information about the land plots themselves or essential terms and conditions includes:

– firstly, information (or documents) confirming the landowner's right to this object;

– secondly, such a transaction is not possible if a ban has been imposed on the land plot, i.e., information about its absence is required;

– thirdly, such a transaction is not possible if the notary does not have information on the agricultural plot regarding the restriction (available or absent) of its use for its intended purpose

– fourthly, this is the moment of transfer of the right of use to the land plot [21].

The initial essential condition of an emphyteusis agreement is a special object of such a transaction, i.e., an agricultural land plot. The main legal features of agricultural lands are their provision for the needs of agriculture, as well as for use in the field of agricultural production. The specific features of agricultural land plots are as follows: firstly, this is a limited area and location; secondly, these lands simultaneously act as a real estate object and the main method (means) of production in agriculture.

It is worth recalling that the Order No. 548 of the State Land Committee of July 23, 2010, approved the classification of types of intended use of land [22], which should guide the parties to the emphyteusis agreement when accepting agricultural land for use. Noteworthy are the statements of researchers, namely E. Yurchenko [9], that not all agricultural land is the object of emphyteutic relations.

As for the study of emphyteutic legal relations, it is worth highlighting the dissertation thesis of E. Yurchenko [9]. The author concludes that guided by the norms of Part 2 of Article 56 and Part 2 of Article 59 of the Land Code of Ukraine [10], the right of emphyteusis can be established on the land of the water fund, as well as on forestry lands. E. Yurchenko is also correct in that only in the case of receiving a land share in kind, their owners can conclude the above-mentioned emphyteusis agreement [9].

It is worth identifying three groups of agricultural land that can be objects of emphyteutic legal relations, namely: 1) land of commercial agricultural production; 2) land of private farms; 3) farmland. It should be remembered that under the emphyteusis agreement, the owner of such agricultural land remains its owner in the future. Thus, the text of the emphyteusis agreement must specify as follows: the land plot with the location determination and especially its cadastral number; the area, purpose, including the composition of the land, etc.

The analysis of the norms of Part 1 of Article 102-1 of the Land Code of Ukraine [10] suggests that the conclusion of an emphyteusis agreement should occur according to the norms of the Civil Code of Ukraine [5]. The parties to such an agreement are two persons: 1) the owner of such an agricultural plot, and in some cases – their representative, who has duly executed powers. Notably, if the tenant wishes to transfer the leased agricultural plot to emphyteusis, then the land legislation (Article 4 of the Law of Ukraine "On Land Lease" [23] prohibits this, since such person is not the owner of such agricultural land, the same rule applies to persons who have a land plot on the right of permanent use; 2) emphyteusis user (i.e., the future land user), which can be either one person or several (individuals), as well as legal entities.

P. Kulynych claims that land users under the emphyteusis agreement can only be persons who, according to the Land Code of Ukraine [10], have the right to become owners of Ukrainian agricultural land. According to Kulinich, both foreigners and stateless persons cannot acquire emphyteusis, except in cases of its inheritance [24]. Equally important is the following condition of the emphyteusis agreement – the validity period of such a transaction. It is worth remembering that in the original wording, emphyteusis as a long-term right, according to Article 408 of the Civil Code of Ukraine of 2003 [5] could be concluded for a "certain period", and it was also not forbidden to set an "indefinite period". However, a specified article regarding the term of the emphyteusis agreement was amended twice, including by the Law of Ukraine No. 1423-IX "On Amendments to Certain Legislative Acts of Ukraine on Improving the System of Management and Deregulation in the Sphere of Land Relations" of April 28, 2021 [13].

Notably, the corresponding amendments to the norm regarding the term of the emphyteusis agreement were introduced by the Law of Ukraine No. 2498-VIII "On Amendments to Certain Legislative Acts of Ukraine on Resolving Collective Land Ownership, Improving Land Use Rules in Agricultural Land, Preventing Raids and Promoting Irrigation in Ukraine" on July 10, 2018 [12], but they concerned only the norms of Part 4 of Article 102-1 of the Land Code of Ukraine, having established that the term of use of a land plot of state, municipal, and private ownership for agricultural needs (emphyteusis) may not exceed 50 years [10].

That is, the legislators introduced changes regarding the term of validity of emphyteusis in the Land Code of Ukraine [10] earlier than in the Civil Code of Ukraine [5]. Guided by the norms of Part 2 of Article 408 of the Civil Code of Ukraine [5], as a conclusion, in an emphyteusis agreement (in the text itself), the term of validity of such a transaction cannot be set for more than fifty years. Furthermore, a mandatory condition of the emphyteusis agreement is the amount of payment for the use of such a land plot, which, as a rule, is established by the parties themselves (by mutual agreement between them).

However, there are certain exceptions to this rule. They relate to cases when the object of such a transaction is agricultural land belonging to two categories of owners: firstly, this is state-owned land, and secondly, this is the land of territorial communities (i.e., communal property). This is established in the Law of Ukraine No. 340-IX "On Amendments to Certain Legislative Acts of Ukraine on Combating Raids" of December 5, 2019 [16]. The legislator prohibits reducing the amount of payment under an emphyteusis agreement (during its validity period), if the conclusion of such a transaction was preceded by a certain procedure for conducting land auctions. A similar rule also applies to cases of renewal of emphyteusis agreements.

The next necessary condition of the emphyteusis agreement is the rights and obligations of the parties to such a transaction. Notably, the legislators left the above-mentioned norms in the Civil Code of Ukraine [5] in its original wording. The basic rights of the owner of agricultural land include the reception of a proper payment for use from the user, and the right of the owner to claim the intended use of the land transferred to them by the land user. However, the owner of the emphyteusis object has certain obligations. The main one is the non-interference or obstruction of the emphyteusis by the owner in the use of the agricultural land transferred to them. If disputes arise between the parties to the emphyteusis agreement, they can resolve them peacefully (through negotiations and consensus) or in court.

When drafting the text of the above-mentioned agreement, it is necessary to make provision (legislatively prescribed) for a "pre-emptive right" of the owner to acquire emphyteusis, in case of its sale by the emphyteusis user (i.e., the owner of property (agricultural land), as an alienator, has the right to acquire the alienated real right). It is also worth recalling that the owner, in some cases, has the right to receive laudemia (according to the norms of the Civil Code of Ukraine) [5]. From the standpoint of this study, it is worth highlighting the Law of Ukraine No. 1423-IX "On Amendments to Certain Legislative Acts of Ukraine on Improving the System of Management and Deregulation in the Sphere of Land Relations" of April 28, 2021 [13]. The legislative act grants the right to choose two circumstances in the text of the emphyteusis agreement: the right of the emphyteusis user to transfer the land plot received by them for rent in the future, or the owner has the right to establish a ban on the transfer of such land (for rent).

It is advisable in the above-mentioned transaction to make provision for the obligations of the emphyteusis user, which are established in Article 410 of the main civil legislative act – the Civil Code of Ukraine [5]. One of these obligations is payments, including for the use of the transaction object. Guided by the specified act [5] (as well as the land legislation of Ukraine [10]), it is advisable to specify (in the text of the agreement) the use of the object of the transaction for the "intended purpose" (according to the established classification of types of intended purpose of state land) [13].

In the text of the emphyteusis agreement, it is also necessary to specify the obligation for the emphyteusis user to properly handle the agricultural land transferred to them, to prevent "deterioration of the environmental situation" in the future.

There is a need to establish a condition in the text of the emphyteusis agreement for preserving the transaction object. The land user, using the land, must properly handle the land transferred to them for use to prevent deterioration of the environmental situation.

If the land user (emphyteusis user) violates the conditions for exercising the right of land use, the owner of such a land plot must apply to the court for protection of their rights to use the specified land plot for its intended purpose, since all disputes regarding the exercise of the parties' powers are resolved only in court. Furthermore, the parties to the emphyteusis agreement can use the services of a mediator to resolve this dispute out of court.

The next essential condition of such an agreement is the right to alienate the use of agricultural land. Notably, considerable changes regarding the procedure for alienation by an emphyteusis user in the next object of the emphyteusis agreement were made by the above-mentioned Law of Ukraine No. 1423-IX of April 28, 2021 [13]. Therefore, the text of the agreement should emphasise that the object of the agreement may be alienated by the emphyteusis user and the next land user.

It should be emphasised that when an emphyteusis user uses communal or state-owned agricultural land, the land user is limited in relation to a certain disposal of it. Namely:

1) the emphyteusis user cannot alienate the object of the transaction;
2) the emphyteusis user cannot transfer the above-mentioned object to the authorised capital;
3) the emphyteusis user cannot pledge the object.

The same occurs in case of acquiring emphyteutic land use at auction. If the parties wish to specify the procedure for its implementation in the content of the transaction, they must be guided by the norms of Article 411 "Alienation of the right to use a land plot" of the Civil Code of Ukraine [5].

The next essential condition of an emphyteusis transaction is the mandatory determination of the amount of interest and the procedure for their payment, from the sale price of the real right that the owner of an agricultural land plot will receive, in case of later sale of the right to use this land plot by the emphyteusis user. This is emphasised in Part 5 of Article 411 of the Civil Code of Ukraine [5]. In addition, a substantial condition of the emphyteusis agreement is the

grounds for termination of the emphyteusis agreement. Article 102-1 of the Land Code of Ukraine [10] (to which changes and amendments were introduced), established more grounds for termination of the emphyteusis agreement than in Article 412 of the Civil Code of Ukraine [5], which remained in the original wording [12, p. 46].

When summarising the norms of civil and land legislation regarding emphyteusis legal relations, the emphyteusis agreement should provide as much as possible for the grounds for termination of such a transaction. Guided by the norms of the specified Law of Ukraine No. 340-IX of December 5, 2019 [14] regarding amendments to the Land Code of Ukraine [10] the text of the emphyteusis agreement can establish a condition for the renewal of such an agreement.

Minor terms and conditions of emphyteusis include other conditions of such a transaction, which are also important for the parties. For instance, such terms and conditions may make provision for cases and cases of return of a land plot to its owner. The authors of this study agree with T. Kharitonova that as added supplementary terms and conditions, the text of the emphyteusis agreement should make provision for the risks of accidental damage or destruction of the emphyteusis object [25, p. 171]. It is advisable to establish in the emphyteusis agreement that the land tax payer, by agreement of the parties, is an emphyteusis user. D. Serheyeva and H. Zhaldak are right that emphyteusis agreements are remarkably similar to the "act of purchase and sale", but unlike the latter, it "limits the term of use" of a land plot [26].

Conclusions

The conducted research shows that the main advantages of emphyteusis land use both in Ukraine and in other countries include the fact that the emphyteusis receives not only a long-term, alienable, but also an inherited real right to agricultural land plots. The significance of emphyteusis agreements lies in the fact that emphyteutic land use will contribute to the production of high-quality agricultural products to meet the population and enterprises of Ukraine with food and agricultural raw materials. Before entering into an agreement on the right to use someone else's land plot for agricultural needs, the parties must be properly aware of all the nuances of legal regulation of emphyteutic land use. Notarisation of emphyteutic land use occurs by entering into and notarising emphyteusis agreements. Notarial proceedings for concluding emphyteutic land use transactions comprise several components. A significant role in the notarial procedure for certifying emphyteutic land use transactions is played by identifying the state of familiarisation of the parties to the transaction with the novelties of legal regulation regarding the right to use land plots for agricultural needs. Guided by the norms of the Civil Code and Land Code of Ukraine, the Family Code of Ukraine, the Laws of Ukraine: "On Notary", "On State Registration of Real Rights to Immovable Property and Their Encumbrances", other laws and regulations, the authors of this paper described the main requirements for the procedure for concluding and notarising emphyteusis agreements.

The texts of agreements for the right to use someone else's land plot for agricultural needs must specify mandatory or basic conditions that follow from the legal regulation of emphyteutic land use. Supplementary or non-essential terms and conditions are specified in the texts of emphyteusis agreements only by mutual consent and at the request of the parties to such a transaction.

References

[1] Reznichenko, S.V., Herasymchuk, L.V., & Shemonayev, V. (2019). General characteristics and types of proprietary rights on another's property in civil legislation of Ukraine. *Amazonia Investiga*, 8(22), 453-458.
[2] Podoprygora, A.A. (1994). *Fundamentals of Roman civil law* (2nd ed.). Kyiv: Venturi.
[3] Code civil du Québec. (1991, January). Retrieved from https://www.legisquebec.gouv.qc.ca/fr/document/lc/ccq-1991.
[4] Gutieva, V.V. (2003). *Emphyteusis in Roman law and its reception in the law of Ukraine* (Doctoral thesis, Ivan Franko National University of Lviv, Lviv, Ukraine).
[5] Civil Code of Ukraine. (2003, January). Retrieved from Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.
[6] Law of Ukraine No. 997 "On Amendments and Repeal of Certain Legislative Acts of Ukraine in Connection with the Adoption of the Civil Code of Ukraine". (2007, April). Retrieved from https://zakon.rada.gov.ua/laws/show/997-16#Text.
[7] Fedchyshyn, D., Ignatenko, I., & Shvydka, V. (2019). Economic and legal differences in patterns of land use in Ukraine. *Amazonia Investig*, 8(18), 103-110.
[8] Fedchyshyn, D., Ignatenko, I., & Shulga, M. (2018). Legal principles of organic production in Ukraine: Realities and prospects. *Ekonomika Poljoprivreda-Economics of Agriculture*, 65(4), 1513-1528.
[9] Yurchenko, E.I. (2019). *The right of agricultural land use in Ukraine* (Doctoral thesis, Taras Shevchenko National University of Kyiv, V.M.Koretsky Institute of state and law of National Academy of Sciences of Ukraine, Kyiv, Ukraine).
[10] Land Code of Ukraine. (2001, October). Retrieved from http://zakon.rada.gov.ua/go/2768-14.
[11] Law of Ukraine No. 5070-VI "On Amendments to Certain Legislative Acts of Ukraine Concerning the Termination of the Right to Use Land Plots When Allocating for Public Needs". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/5070-17#Text
[12] Law of Ukraine No. 2498-VIII "On Amendments to Certain Legislative Acts of Ukraine on Resolving Collective Land Ownership, Improving Land Use Rules in Agricultural Land, Preventing Raids and Promoting Irrigation in Ukraine". (2018, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2498-19#.
[13] Law of Ukraine No. 1423-IX "On Amendments to Certain Legislative Acts of Ukraine on Improving the System of Management and Deregulation in the Sphere of Land Relations". (2021, April). Retrieved from https://zakon.rada.gov.ua/laws/show/ 1423-20 # n159.
[14] Dolynska, M. (2021). The evolution of the formation of the right to use someone else's land for agricultural purposes (emphyteusis), as a legal institution in independent Ukraine. *Analytical and Comparative Jurisprudence*, 3, 43-46.
[15] Urkevych, V. (2009). On the legal regulation of the use of another's land for agricultural purposes. *Legal Adviser*, 2(28), 2-9.

[16] Law of Ukraine No. 340-IX “On Amendments to Certain Legislative Acts of Ukraine on Combating Raids”. (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-20#Text.
[17] Law of Ukraine No. 3425-ХП “On Notary”. (1993, September). Retrieved from http://zakon3.rada.gov.ua/laws/show/3425-12.
[18] Family Code of Ukraine. (2002, January). Retrieved from http://zakon5.rada.gov.ua/laws/show/2947-14.
[19] Law of Ukraine No. 1952-IV “On State Registration of Real Rights to Immovable Property and Their Encumbrances”. (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1952-15.
[20] Order of the Ministry of Justice of Ukraine “The Procedure for Performing Notarial Acts by Notaries of Ukraine”. (2012, February). Retrieved from http://zakon5.rada.gov.ua/laws/show/z0282-12.
[21] Dolynska, M.S (2012). Emphyteusis agreement: History, order of conclusion, notarization. *Customs: Scientific and Analytical Journal*, 3(81), 251-256.
[22] Order of the State Committee of Ukraine for Land Resources No. 548 “On Approval of the Classification of Types of Land Use”. (2010, July). Retrieved from https://zakon.rada.gov.ua/laws/show/z1011-10#Te.
[23] Law of Ukraine No. 161-XIV “On Land Lease”. (1998, October). Retrieved from https://zakon.rada.gov.ua/laws/show/161-14#Text
[24] Kulinich, P. (2007). Personal land easements under the legislation of Ukraine. *Legal Journal*, 10, 17-21.
[25] Kharitonova, T.Ye. (2014). On the question of determining the essential terms of the emphyteusis agreement. *Scientific Bulletin of the International Humanities University*, 8, 169-172.
[26] Serheyeva, D.O, & Zhaldak, H.P. (2021). Features of the market of land resources of Ukraine. *Economy and Society*, 32. doi: 10.32782/2524-0072/2021-32-98.

Список використаних джерел

[1] Reznichenko S.V., Herasymchuk L.V., Shemonayev V. General characteristics and types of proprietary rights on another’s property (iura in re aliena) in civil legislation of Ukraine. *Amazonia Investiga*. 2019. Vol. 8, No. 22. P. 453–458.
[2] Подопригора А.А. Основы римского гражданского права: учеб. пособ. для студентов юрид. вузов и факультетов. 2-е изд. перераб. Киев: Вентури. 1994, 288 с.
[3] Code civil du Québec: texte officiel du 18.01.1991. URL: https://www.legisquebec.gouv.qc.ca/fr/document/lc/ccq-1991.
[4] Гутьєва В.В. Емфітевзис у римському праві та його рецепція у праві України: автореф. дис. … канд. юрид. наук: 12.00.01 / Львівський національний університет ім. Івана Франка. Львів, 2003. 21 с.
[5] Цивільний кодекс України: офіц. текст від 16.01.2003 р. № 435-IV. URL: https://zakon.rada.gov.ua/laws/show/435-15#Text.
[6] Про внесення змін та визнання такими, що втратили чинність деяких законодавчих актів України у зв’язку з прийняттям Цивільного кодексу України: Закон України від 27.04.2007 р. № 997. URL: https://zakon.rada.gov.ua/laws/show/997-16#Text.
[7] Fedchyshyn D., Ignatenko I., Shvydka V. Economic and legal differences in patterns of land use in Ukraine. *Amazonia Investiga*. 2019. Vol. 8, No. 18. P. 103–110.
[8] Fedchyshyn D., Ignatenko I., Shulga M. Legal principles of organic production in Ukraine: realities and prospects. *Ekonomika Poljoprivreda-Economics of Agriculture*. 2018. Vol. 65, No. 4. P. 1513–1528.
[9] Юрченко Е.І. Право сільськогосподарського землекористування в Україні: дис. … канд юрид. наук: 12.00.06 / Київський національний університет імені Тараса Шевченка. Інститут держави і права ім. В. М. Корецького Національної. академії наук України. Київ, 2019. 239 с.
[10] Земельний кодекс України: офіц. текст від 25.10.2001 р. № 2768-III. URL: http://zakon.rada.gov.ua/go/2768-14.
[11] Про внесення змін до деяких законодавчих актів України щодо припинення права користування земельними ділянками при відведенні їх для суспільних потреб: Закон України від 5.07.2012 р. № 5070-VI. URL: https://zakon.rada.gov.ua/laws/show/5070-17#Text.
[12] Про внесення змін до деяких законодавчих актів України щодо вирішення питання колективної власності на землю, удосконалення правил землекористування у масивах земель сільськогосподарського призначення, запобігання рейдерству та стимулювання зрошення в Україні: Закон України 10.07.2018 р. № 2498–VIII. URL: https://zakon.rada.gov.ua/laws/show/2498-19#Text.
[13] Про внесення змін до деяких законодавчих актів України щодо вдосконалення системи управління та дерегуляції у сфері земельних відносин: Закон України від 28.04.2021 року за № 1423-IX. URL: https://zakon.rada.gov.ua/laws/show/1423-20#n159.
[14] Долинська М. Еволюція становлення права користування чужою земельною ділянкою для сільськогосподарських потреб (емфітевзису), як правового інституту, в незалежній Україні. *Аналітично- порівняльне правознавство*. 2021. № 3. С. 43–46.
[15] Уркевич В. Про правове регулювання користування чужою земельною ділянкою для сільськогосподарських потреб. *Юридичний радник*. 2009. № 2(28). С. 2–9.
[16] Про внесення змін до деяких законодавчих актів України щодо протидії рейдерству: Закон України від 05.12.2019 р. № 340-IX. URL: https://zakon.rada.gov.ua/laws/show/340-20#Text.
[17] Про нотаріат: Закон України від 02.09.1993 р. № 3425-ХП. URL: http://zakon3.rada.gov.ua/laws/show/3425-12.
[18] Сімейний кодекс України: офіц. текст від 10.01.2002 р. № 2947-III. URL: http://zakon5.rada.gov.ua/laws/show/2947-14.
[19] Про державну реєстрацію речових прав на нерухоме майно та їх обмежень: Закон України від 01.07.2004 р. № 1952-IV. URL: https://zakon.rada.gov.ua/laws/show/1952-15.

[20] Порядок вчинення нотаріальних дій нотаріусами України: Наказ Міністерства юстиції України від 22.02.2012 р. № 296/5. URL: http://zakon5.rada.gov.ua/laws/show/z0282-12.
[21] Долинська М.С. Договір емфітевзису: історія, порядок укладення, нотаріальне посвідчення. *Митна справа: науково-аналітичний журнал*. 2012. № 3(81). С. 251–256.
[22] Про затвердження Класифікації видів цільового призначення земель: Наказ Державного комітету України із земельних ресурсів від 23 липня 2010 року за № 548. URL: https://zakon.rada.gov.ua/laws/show/z1011-10#Te.
[23] Про оренду землі: Закон України від 06.10.1998 р. № 161-XIV. URL: https://zakon.rada.gov.ua/laws/show/161-14#Text.
[24] Кулініч П. Особисті земельні сервітути за законодавством України. *Юридичний журнал*. 2007. № 10. С. 17–21.
[25] Харитонова Т.Є. До питання визначення суттєвих умов договору емфітевзису. *Науковий вісник Міжнародного гуманітарного університету*. 2014. Вип. 8. С. 169–172.
[26] Сергеєва Д.О., Жалдак Г.П. Особливості функціонування ринку земельних ресурсів України. *Економіка і суспільство*. 2021. Вип. 32. doi: 10.32782/2524-0072/2021-32-98.

Особливості укладення договору щодо емфітевтичного землекористування в Україні

Марія Степанівна Долинська

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Актуальність статті зумовлено тим, що в Україні емфітевтичне землекористування в останні роки виступає одним з основних способів використання земель сільськогосподарського призначення. Цьому сприяло запровадження суттєвих змін до правового регулювання в державі емфітевтичного землекористування, яке ґрунтувалося на кращих традиціях закордонного досвіду використання сільськогосподарських земель. Відсутність у законодавстві обов'язкових реквізитів договору емфітевзису, які можуть у майбутньому стати однією з причин визнання таких правочинів недійсними, також спонукає до проведення цього дослідження. Предметом вивчення виступають нормативні та законодавчі акти щодо регулювання емфітевтичних правовідносин в Україні. Мета роботи полягає в характеристиці основних положень договорів емфітевзису (права користування чужими земельними ділянками для сільськогосподарських потреб), особлива увага приділена автором умовам таких правочинів. У статті розглядаються новели правового регулювання права користування чужими земельними ділянками для сільськогосподарських потреб та основні істотні умови укладення договорів емфітевзису (землекористування) в Україні. Під час проведення дослідження використовувалися такі методи пізнання: історичний, порівняльно-правовий, логіко-нормативний, системно-структурний. У процесі дослідження здійснено історико-правовий аналіз становлення правового регулювання права на користування чужою сільськогосподарською земельною ділянкою в незалежній Україні. Особливу увагу приділено характеристиці правого регулювання права щодо користування чужою земельною ділянкою для сільськогосподарських потреб (емфітевзису) у Цивільному та Земельному кодексах України. З'ясовано умови договору емфітевзису та особливості реалізації права емфітевтичного землекористування. У дослідженні детально проаналізовано порядок укладення та вимоги до нотаріального посвідчення правочинів емфітевзису. Виокремлено основні та додаткові умови укладення договорів на емфітевтичне землекористування. Із ціллю захисту прав та інтересів сторін емфітевтичного землекористування договір емфітевзису повинен бути нотаріально посвідченим. У текстах договорів емфітевзису повинно було відображено перелічені у дослідженні основні обов'язкові умови укладення договору, та за бажанням сторін – інші умови. Практичну цінність дослідження складає перелік істотних та додаткових умов договору емфітевзису, які повинні бути передбачені сторонами в тексті правочину, з метою захисту своїх прав та інтересів

Ключові слова: договір емфітевзису, сільськогосподарське землекористування, нотаріальне посвідчення правочинів щодо емфітевтичного землекористування

UDC 343.123.61
DOI: 10.32518/2617-4162-2022-5-2-45-53

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Compulsory Educational Measures Applied to Minors: Debatable Issues of Legal Regulation

Vira V. Navrotska*

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. The need to find and develop humane and adequate measures to combat juvenile delinquency, to ensure strict individualisation in the choice of means of influencing children-offenders in combination with maximum respect for their legitimate interests, is indisputable, which is the relevance of this paper. The purpose of this study was to identify the shortcomings in the construction of norms regulating the closure of criminal proceedings against minors in connection with the application of compulsory educational measures to them, to provide recommendations for improving the relevant norms of criminal and criminal procedural legislation and the practice of their application. During the study, various methods of cognition were applied: dialectical, comparative, modelling, system-structural analysis, and dogmatic. It was proved that when applying compulsory educational measures, it is necessary to find out the attitude of a minor towards what they have done. It was noted that the effectiveness and efficiency of transferring a minor under supervision depends entirely on the capabilities and responsibility of the person assigned to supervise the minor. Therefore, even though the law does not require the consent of a legal representative to such a transfer, such consent is factually crucial. The legislators' approach was criticised, which, instead of clearly defining the lower and upper limits of the duration of such measures, is limited to indicating that the duration of compulsory educational measures prescribed in clauses 2 and 3 of Part 2 of Article 105 of the Criminal Code of Ukraine is established by the court that appoints them. It was stated that the optimal period for these measures is one, maximum two years. Therefore, it was proposed to amend Article 105 of the Criminal Code of Ukraine aimed at establishing the period for which compulsory educational measures can be imposed, as well as at determining the circumstances that the court must consider as the basis for choosing one of these measures. It was proposed that the performance of a minor's obligation to compensate for the damage caused should make provision for the following forms: 1) monetary, 2) in-kind – transfer of property, 3) labour. Furthermore, it was proposed that with these methods it is possible to compensate not only for property, but also for moral damage

Keywords: warning, transfer under supervision, assignment of the obligation of compensation for damage, restriction of leisure, special requirements for behaviour, referral to a special educational institution

Introduction

Juvenile delinquency is one of the key problems of any society (Ukrainian in particular). Therefore, the prevention of illegal activities of persons under the age of 18 is a priority task of the state. The Criminal Procedural Code [1], which governs the procedure for criminal proceedings against minors, pursues the purpose of creating favourable conditions for establishing the reasons for committing a criminal offence (or other socially dangerous act), searching for optimally effective measures of influence, considering information about the minor's personality and achieving their social rehabilitation.

The basis of international standards for the rights of minors is the principle of the best interests of the child. It means abandoning the conventional goals of criminal proceedings: prevention and punishment in favour of rehabilitation and restorative justice. International instruments for the protection of children involved in criminal procedural relations are also aimed at observing the principle of proportionality. This basis means that any measures of influence against a minor should be applied considering their identity and the nature of the illegal act committed by them [2, p. 213; 3, p. 159-161].

A.S. Habuda, V.R. Isakova [4, p.140-141], V.O. Merkulova [5, p. 127-128], A.M. Yashchenko [6, p.182-186], not without reason state that upon conducting criminal proceedings against minors, opportunities to ensure their rights and legitimate interests are not fully used. That is why improving the efficiency of judicial proceedings in the implementation of criminal proceedings against this category of individuals is important. These circumstances indicate the need for further development of both a theoretical concept for the implementation of criminal proceedings against minors, and specific recommendations for their use by law enforcement officers in practice.

Various issues related to criminal proceedings against minors on the use of compulsory educational measures were considered in scientific publications and studies by V.M. Burdin [7], O.V. Kuzmenko [8], L.M. Paliukh [9], A.I. Tergulova [10], P.V. Khriapinskyi [11], A.M. Yashchenko [6] and others. The studies of these researchers made a substantial contribution to the development of the science of criminal procedure. At the same time, they are devoted to certain aspects of legal proceedings against minors (including the subject

Suggested Citation

Article's History: Received: 18.03.2022 Revised: 15.04.2022 Accepted: 17.05.2022

Navrotska, V.V. (2022). Compulsory educational measures applied to minors: Debatable issues of legal regulation. *Social and Legal Studios*, 5(2), 45-53.

*Corresponding author

matter of evidence in these criminal proceedings, the legal regulation of the closure of criminal proceedings against minors with the use of compulsory educational measures, socio-psychological aspects of criminal procedural proceedings against minors). Therewith, some studies are based on the norms of the previously existing national criminal procedural legislation [7; 9].

With the adoption of the new Criminal Procedural Code of Ukraine [1], many issues arise in criminal proceedings that were not previously the subject of comprehensive research. It is necessary to state that in the publications of scientists who are most involved in the investigation of the problems of the use of compulsory measures of an educational nature, namely V.M. Burdin [7], V.O. Merkulova [5], L.M. Paliukh [9], P.V. Khryapinskyi [11], insufficient attention is paid to: a) inconsistencies between the provisions of the Criminal Code and the Criminal Procedural Code of Ukraine regulating the grounds and procedure for applying these measures; b) discrepancies between the relevant norms of the Criminal Code of Ukraine and the Civil Code of Ukraine in terms of determining the age of a minor, who may be charged with the obligation to compensate for the damage caused to them; c) the need to legislatively consolidate a provision aimed at establishing the time frame for which these measures can be assigned; d) the need to expand the existing list of compulsory educational measures, considering the provisions of international acts ratified by the Verkhovna Rada (which, at the same time, was done by the author of this paper).

The purpose of this study was to investigate the problems of applying coercive measures of an educational nature to minors, as well as to develop a proposal for their solution.

Possibility of Correcting a Minor Without Applying Punishment. Recognition of Guilt By a Minor as a Condition for Closing Proceedings Using Compulsory Educational Measures

Compulsory measures of an educational nature can be applied by the court: a) in relation to a child who committed a socially dangerous act before reaching the age from which criminal liability may arise (Part 2 of Article 97 of the Criminal Code of Ukraine); b) when deciding on release from criminal liability (Part 1 of Article 97 of the Criminal Code of Ukraine); c) when releasing a minor from punishment (Part 1 of Article 105 of the Criminal Code of Ukraine) [12].

When deciding to apply compulsory educational measures to a minor, both with their release from criminal liability and with their release from punishment, it is necessary to make sure that the correction of such a child is possible without applying punishment. As for the fact that a minor can be corrected without criminal punishment, this circumstance is of an evaluative nature. It is subjective and depends not only on the real facts indicating the possibility of correction. This circumstance also depends on the discretion of the judge who decides to close (or, conversely, not close) the criminal proceedings. The absence of any legal regulation of the criteria for establishing such a possibility turns this condition into a subjective assessment category. Therefore, it is not surprising that this circumstance causes the greatest controversy among theorists and difficulties among law enforcement officers [9, p. 89, 127; 10, p. 157]. Determining the possibility of correcting a person is associated with a certain element of risk.

Making the right decision on the application of compulsory educational measures is possible only as a result of studying the identity of a minor, the conditions of their upbringing and life, identifying the causes and conditions that contributed to the commission of a criminal offence, and the possibilities of eliminating such. These circumstances allow concluding on the minor's pedagogical neglect and decide on the possibility of their re-education and correction by public influence or administrative penalties. The importance of identifying these circumstances in juvenile proceedings is no less important than collecting and consolidating evidence of children's guilt. An essential role in determining the probability of correcting a child without applying punishment is played by the identity of a minor, namely their psycho-emotional state, the motives that guided them during the commission of a criminal offence (or other socially dangerous act), the purpose of illegal behaviour [9, p. 91-94, 127]. When deciding on the possibility of correcting a teenager, one should also focus on their environment. The actions and decisions of a child largely depend on the microenvironment that formed it. Information about the people around the teenager and their possible adverse impact on the minor will be important for deciding on the possibility of applying compulsory educational measures that can lead to its correction. Thus, when deciding on the possibility of correcting a minor, data that characterise their personality and the act committed by them, the presence of an adequate and healthy household and family environment, an educational and/or labour collective, awareness of the act committed, and sincere remorse are important.

When finding out the living conditions and upbringing of a child in a family, it is worth paying attention to who was factually engaged in the upbringing of a teenager, what is the influence of the family and other relatives on the development of the child's aspirations, life attitudes and views. When studying the conditions of study (and/or work) of a teenager, it is necessary to find out whether the child studied; if so, in what institution, what is their behaviour and academic performance, what subjects they like, with whom they are friends. To get acquainted with the interests of a minor, one should answer the following questions: how a teenager spends their leisure time, what they like to do the most (whether they are fond of sports, what literature they are interested in), whether they have friends (if any – whether they know what the child in question is doing, whether they know about the violation committed by a teenager, how they react to it; what is the influence of friends on the teenager). It is also necessary to establish the following circumstances regarding the negative behaviour of a minor in the past: whether they had previously committed criminal offences, if so, when and how many, whether they were convicted and at what age and for what criminal offences, where they served their sentence, whether they were not subjected to non-custodial sentences, whether they were sent for re-education to a collective, whether they were in a special institution for minors (if so, for what and how long they were there). In addition, when closing criminal proceedings using compulsory educational measures, it is necessary to analyse the post-criminal behaviour of a minor, their attitude towards the committed criminal offence [3, p. 172].

The following may indicate in favour of the child:

1) the presence of several unfavourable circumstances at the same time. Often there are situations when a minor commits a criminal offence due to the occurrence of unfavourable

circumstances. This can be a difficult financial situation, in which a child from a dysfunctional family was deprived of attention and control from adults, and sometimes even malnourished or, in general, starving. Unfavourable circumstances can manifest themselves in a situation where the child has an acute conflict with the immediate environment, which can push them to commit a criminal offence);

2) *the fact that the illegal act was committed under the influence of adults.* It is sometimes beneficial for adult criminals to involve children as direct executors of the act prohibited by the Criminal Code of Ukraine [12], considering the fact that the latter will bear lighter responsibility (compared to adults) or they will not be held criminally liable at all);

3) *the fact that the child has not previously committed illegal acts.* Violation of the provisions of the Criminal Code of Ukraine committed by a minor [12] may be their only and first violation of the law. In this case, the use of compulsory educational measures is aimed at enabling the minor to develop in normal, familiar conditions);

4) *the presence of a positive characteristic at the place of study, work, or residence.* This circumstance should be considered next to the above. It is the characteristic of a minor that allows drawing up their final "portrait"; it helps determine whether compulsory educational measures can contribute to such correction and exact the necessary correctional influence on the minor. Sometimes the characteristic of a minor is negative. But it can also be concluded from it that despite the illegal actions of the victim, their cynicism, there are still activities and people interesting to such a person, capable of distracting them from negative company);

5) *sincere remorse and assistance in solving a criminal offence.* Sincere remorse and active assistance in solving a criminal offence may lie in appearing with a confession, exposing other participants in a criminal offence, providing assistance to law enforcement officers in exposing accomplices, searching for evidence in criminal proceedings);

6) *voluntary compensation for losses caused and compensation for damage caused by a criminal offence.* This circumstance can manifest itself in the return of stolen items by minors, restoration of damaged property or restoration of destroyed items, reimbursement of its value, etc.).

Some researchers note that it is impossible to close criminal proceedings against a minor if they plead not guilty [13, p. 103]. Indeed, if a person does not consider themselves guilty of committing the acts incriminated to them, then, obviously, they have nothing to correct in such behaviour. Failure to admit guilt calls into question the expediency of applying compulsory educational measures. Remorse implies a full admission of guilt on all points of suspicion (accusation) and sincere regret for what they did. The entire procedure of correction and re-education is based on a critical attitude towards the committed offence and a sincere confession. Neither the norms of criminal legislation nor the norms of criminal procedural law contain a direct indication that a guilty plea indicates the possibility of correction. However, this circumstance, undoubtedly, must be considered as one that describes a person. The degree of remorse of a minor determines the possibility of correction. At the same time, the child's admission of guilt should be considered as part of the proven possibility of correction by applying compulsory educational measures, and not as the main proof of their guilt. However, some researchers confuse such concepts as "non-admission of guilt by minors" and "their disagreement to close proceedings on this basis" [9, p. 143], factually identifying them. This is incorrect: it is possible that a teenager fully and sincerely repents, but at the same time categorically objects to the closure of proceedings against them on the grounds under consideration.

Problematic Issues of Applying Compulsory Educational Measures in the Form of a Warning and in the form of Restriction of Leisure and Establishment of Special Requirements for the Behaviour of a Minor

A warning (prescribed in Clause 1, Part 2 of Article 105 of the Criminal Code of Ukraine) [12] is the mildest coercive measure of an educational nature and is reduced to explaining to the juvenile offender the essence of the damage caused by them and the consequences of the committed act. This measure is usually applied in practice simultaneously with some other compulsory measure of an educational nature. Experts perceive it as low-performance, ineffective, such that it is incapable of exacting the proper influence on the violator, suggesting not to apply it independently [7, p. 81; 8, p. 12].

The reservation is not related to the performance of any duties by the minor (rather than the obligation to make amends for the damage caused or comply with certain requirements for restricting leisure time). Therefore, it would be advisable to exclude the reservation altogether from the number of compulsory educational measures applied by the court to minors and preserve the significance of this measure as a preventive measure. Given this, the authors of this study advises excluding Clause 1 of Part 2 of Article 105 of the Criminal Code of Ukraine [12].

Limiting leisure time and establishing special requirements for the behaviour of a minor offender (Clause 2, Part 2, Article 105 of the Criminal Code of Ukraine) [12] is, on the one hand, one of the strict coercive measures of an educational nature, and on the other hand, it provides great opportunities for differentiated influence on the child This measure is obviously one of the most effective, and it should be prescribed in the vast majority of cases.

Restriction of leisure activities and the establishment of special requirements for the behaviour of a minor may include a ban on visiting certain places, using certain forms of leisure (including those related to driving a vehicle), limiting staying out of the house after a certain time of day, travelling to a certain area, etc. The child may also be required to return to an educational institution or find a job. This list is not exhaustive. The court decision should indicate what specific requirements are established for the behaviour of a minor and for how long. This measure is related to the impact that is most real for the minor. Restriction of the child's freedom of action is a prevention of repeated commission of criminal offences.

Requirements for the behaviour of a minor violator should not be abstract, but, on the contrary, as clear and specific as possible. For instance, it is impossible to demand from the child the "respect for adults", "ideal behaviour" [13, p. 106]. The list of such requirements and restrictions is not exhaustive. This allows the court to apply the most effective measures, considering the identity of the minor and their living conditions, and set specific requirements. Any requirement for the behaviour of a minor offender within the framework of such a measure of influence as the restriction of

leisure time and the establishment of special requirements for their behaviour must be conditioned by the prevention of committing an offence.

Problematic Issues of Transferring a Minor Under Supervision as One of the Compulsory Measures of an Educational Nature

When *placing a minor under supervision* (prescribed in Clause 3, Part 2, Article 105 of the Criminal Code of Ukraine) [12], the legislator does not require obtaining the consent of legal representatives as a condition for the application of this measure. However, the application of the relevant measure without such consent is impractical, in this case it will definitely not give a positive result [13, p. 107]. The procedural form of such consent should be a request from a person or organisation to assume obligations to exercise supervision over a minor. Furthermore, it is necessary to verify the living conditions and social trustworthiness of the persons to whom the minor is transferred under supervision (for the possibility of entrusting them with responsibility for such a minor). When transferring a minor to supervision, the judge must ensure that the individuals concerned have a positive influence on the teenager, can ensure that they are monitored daily and that they behave appropriately. For this, it is necessary to request characteristics for them.

The efficiency and effectiveness of this measure depends entirely on the capabilities and responsibilities of the person assigned to supervise the minor. Therefore, even though the law does not require *the consent of a legal representative* to such a transfer, such consent is factually crucial. In the legal literature, the position is expressed, according to which the existence in the list of coercive measures of an educational nature of transfer under the supervision of *parents or persons who replace them* is ineffective. As for the transfer under supervision to other individuals, teachers or labour collectives, supporters of this approach generally have no objections. They explain this position by the fact that the content of the event under consideration repeats the requirements of family legislation. Assigning duties to the legal representatives of a minor to exercise educational influence in relation to them is, in their opinion, a formal norm, since the upbringing of children is already the responsibility of parents or other legal representatives [7, p. 86; 8, p. 13].

Furthermore, according to adherents of the corresponding approach, it turns out that legal representatives during the entire period of growing up of a teenager did not bother to instil in the latter the norms and traditions of cohabitation, law-abiding behaviour and morality, which is why the minor committed a criminal offence (or other socially dangerous act), but at the same time the legislator admits that the alternative to bringing to justice may be to leave the child among the same individuals without any special changes in the conditions of everyday life of the child. They ask questions about how seriously it will affect the worldview of the minor and their attitude towards the crime. And they themselves give the answer to it: it will not have a real impact. Therefore, it is proposed to formulate the relevant provision of the criminal law in such a way as to exclude the transfer of a minor violator under the supervision of legal representatives as a compulsory measure of an educational nature.

This approach seems too categorical. It is possible that the minor committed a violation of the requirements of the Criminal Code of Ukraine [12] for the first time, due to a combination of certain unfavourable circumstances, by negligence, by its nature this act does not pose a considerable public danger. Therefore, in such situations, it is probably not worth unequivocally asserting that legal representatives do not cope with their duties of exercising educational influence. At the same time, in any case, children who are married should not be placed under the supervision of parents or individuals who replace them. This is conditioned upon the fact that according to the norms of the Family Code [14], when minors enter into marriage, parental rights and obligations are terminated.

Problematic Issues of Obliging a Minor to Compensate for The Damage Caused as a Type of Compulsory Educational Measures

Another effective and efficient coercive measure of an educational nature is *imposing on a minor, who has reached the age of 15 and has earnings, property, or funds, the obligation to compensate for property damage caused* (Clause 4, Part 2, Article 115 of the Criminal Code of Ukraine) [12]. According to the current legislation of Ukraine [12], there are no restrictions on the appointment of this measure depending on the amount of damage. This obligation of the minor should not duplicate the civil claim and should not be too much for the child. When applying this measure, the judge must pursue the purpose of educational influence (i.e.is, the minor must compensate for the damage caused using their own funds). This measure is indefinite in nature; however, when applied, the judge can set (considering the capabilities of the minor) real deadlines for execution. By agreement with the victim and the minor violator, the judge can set the term and form of compensation for damage. When considering the content of this coercive measure of an educational nature, this refers to the priority of educational influence (parents and guardians should not bear material responsibility in this case; the property situation of the minor must be considered here).

Notably, according to the provisions of the Civil Code of Ukraine (namely, Parts 1 and 2 of Article 1179 of the Civil Code [15]), a minor aged 14 to 18 years is responsible for the damage caused to them independently on general grounds. And only if such a minor does not have sufficient property to compensate for the damage, it is compensated (either in the missing share, or in full) by their legal representatives. The approach reflected in Clause 4 of Part 2 of Article 115 of the Criminal Code of Ukraine [12] (which mentions the assignment of the analysed duty to a child over 15 years of age) corresponded to the provisions of previously existing civil legislation [16] but does not consider the provisions of the current Civil Code of Ukraine [15]. Considering the provision prescribed in Part 1 of Article 1179 of the Civil Code of Ukraine [15], it is recommended to amend the norm defined in Clause 3 of Part 2 of Article 105 of the Criminal Code of Ukraine [12], agreeing on the provisions of both codes [15; 16], and apply a compulsory measure of an educational nature in the form of imposing on a minor who has property, funds or earnings, the obligation to compensate for property losses, from the age of 14, and not 15 years.

Sometimes researchers claim that a necessary condition for applying this measure is to cause substantial property losses to the victim [10, p. 127]. This statement, admittedly, does not follow Ukrainian legislation. The amount

of damage that can be compensated for by a minor violator is not limited. Furthermore, this term ("substantial losses") requires criteria for its establishment because it is subjective. Some experts suggest imposing such an obligation on the violator-child, provided that the minor has independent earnings and the amount of losses does not exceed their average monthly earnings (income). Otherwise, compensation for damage should occur according to civil procedure [10, p. 128]. A similar approach is reflected in Clause 3 of Part 2 of Article 117 of the Criminal Code of the Republic of Belarus [17]. However, this approach seems unfounded. The corresponding funds can be given to the child, inherited by them, won, found, etc. This recommendation obviously does not consider the fact that receiving wages is not the only way to acquire property rights. Moreover, a minor may not have an income that would be defined as "average monthly". It can be one-time, random, or determined by a certain opportunity to earn money. In the end, a teenager could save and accumulate certain funds for a long time, and therefore the amount available to a minor may well exceed the amount of their average monthly earnings (if they have one) – salary, scholarships, etc.

If for a reservation (prescribed in Clause 1 of Part 2 of Article 105 of the Criminal Code of Ukraine) [12] the law absolutely justifies not setting a certain time limit (since its implementation takes place immediately in a court session), then the Criminal Code of Ukraine [12] unreasonably does not define the duration of the application of compulsory educational measures prescribed in Clauses 2, 3 and 4 of Part 2 of Article 105 of this Code [12]. This does not allow the court to properly monitor the implementation and prove the child's failure to comply with the analysed enforcement measures and does not contribute to the effective application of norms. Therewith, certain difficulties arise in establishing whether the child is trying to evade the use of compulsory educational measures and the possibility of bringing them to criminal responsibility under such conditions [13, p. 108; 18, p. 14].

The legislator, instead of clearly defining the lower and upper limits of the duration of these measures, is limited only to indicating that the duration of compulsory educational measures prescribed in Clauses 2 and 3 of Part 2 of Article 105 of the Criminal Code of Ukraine [12] (there is not even a mention of the measure prescribed in Clause 4 of Part 2 of this Article!) is established by the court that appoints them. It appears that the most optimal period for their application is a year, with a maximum of two years. During this time, it is probably possible to reach a relatively reliable conclusion either about the correction of the minor (or, conversely, about their attempt to evade the implementation of the compulsory measure of an educational nature applied).

Considering the above, it is necessary to amend Article 105 of the Criminal Code of Ukraine [12], aimed at establishing the period for which compulsory educational measures can be imposed, as well as at determining the circumstances that the court must consider as the basis for choosing one of these measures. Taking this into account, the author of this paper proposes the following wording of Part 3 of Article 105 of the Criminal Code of Ukraine [12]:

"3. A minor may be subject to several coercive measures of an educational nature, prescribed in Part 2 of this Article. The duration of compulsory educational measures prescribed in Clauses 2-4 of Part 2 of this Article is established by the court that appoints them, within up to two years. When assigning compulsory measures of an educational nature, the court must consider the nature and degree of public danger of the criminal offence, the identity of the minor, the circumstances mitigating and aggravating the punishment, the impact of the imposed measure on the correction of the minor".

As for the compulsory measure of an educational nature prescribed in Clause 4 of Part 2 of Article 105 of the Criminal Code of Ukraine [12], there are comments that bring up two more questions. First, it is surprising why the legislator prescribes the possibility of compensation only for property losses caused but is silent about the possibility of compensation to minors for physical, moral (non-property) damage caused. Furthermore, it appears quite acceptable to compensate for the damage caused not only with money or property, but also with personal efforts and work. Other researchers share these considerations [5; 7].

Therefore, the forms of performing the obligation to compensate for property damage, compensation for moral (non-property) damage should be (*de lege ferenda*): 1) monetary – compensation for the damage caused by money; 2) in-kind – the transfer of property of similar, equal value (and possibly more valuable) to the damaged or destroyed, 3) labour – compensation for the damage caused by personal labour, one's own efforts. Using these methods, it is possible to compensate not only for property, but also for physical and moral (non-property) damage.

Considering the above, it is recommended to state the provisions of Clause 4 of Part 2 of Article 105 of the Criminal Code of Ukraine [12] in the following wording: "imposing on a minor who has reached the age of fourteen the obligation to compensate for property damage, compensation for physical, moral (non-property) damage at the expense of their property, funds, or earnings or their labour". Furthermore, for the most full establishment of the information on the property status of a minor to ensure compensation for damage caused by a criminal offence, it is necessary to supplement the list of circumstances that must be proven in cases of criminal offences by minors (Article 485 of the Criminal Procedural Code of Ukraine of 2012) [1] with Clause 5: "*the presence of property, funds, or earnings of a minor or their ability to compensate for the damage caused by their labour*".

Problematic Issues of Applying the Placement of a Minor Violator in a Special Educational Institution for Children and Adolescents

Another coercive measure of an educational nature is *placing a minor in a special educational institution for children and adolescents* (Clause 5, Part 2, Article 105 of the Criminal Code of Ukraine) [12]. The ECHR in the decision "Blokhin v. Russia" [19] recognised that the procedure of placing a minor in a special educational institution has signs of criminal prosecution and must be accompanied by proper guarantees.

Analysis of the provisions of international documents regulating certain issues of protection of children's rights indicates that the stay of a minor in a special educational institution can be regarded as a type of deprivation of liberty. The UN Rules for the Protection of Minors Deprived of Liberty (adopted by the UN General Assembly on December 14, 1990), interpret the deprivation of liberty as "any form of detention or imprisonment of any person, or their placement in a state, or a private correctional institution, which the minor

is not allowed to leave at their will, based on the decision of any judicial, administrative, or other state body" [20]. It is obvious that the referral of a minor to a special educational institution is compulsory, and the child does not have the right to leave this institution. Therefore, the placement of a minor violator in a special educational institution is the strictest compulsory measure of an educational nature.

According to the requirements formulated in Clause 19 of the UN Standard Minimum Rules for Juvenile Justice (Beijing Rules), "the placement of minors in a correctional institution should always be a measure of last resort, applied within the "minimum possible period" [21]. Part 1 of Article 502 of the Criminal Procedural Code [1] covers the possibility of early release of a child whose behaviour indicates their re-education, from the compulsory educational measure applied to them. Incentive measures in the presence of socially approved behaviour, admittedly, are important and necessary. However, this model provision is not of a procedural but of a substantive nature. The Criminal Code of Ukraine (Part 3 of Article 3) directly, unambiguously, and absolutely reasonably states that "other criminal consequences" (along with crime and punishment of an act) can be defined in it, and not in any other regulation. There is no doubt that the advance release from the use of such measures of the violator-child, is nothing more than that "other consequence" of a criminal law nature. Therefore, the relevant provision must be reflected in the Criminal Code of Ukraine [12].

At the same time, all other provisions of Article 502 of the Criminal Procedural Code [1] (namely that: a) this decision can be made by a court at the location of the relevant educational institution; b) that such a request can be made by the minor themselves, their legal representative by law or the prosecutor; c) and that when considering it, it is necessary to find out the position of the council of this institution) are procedural issues. It is also necessary to pay attention to other shortcomings of the legal regulation of advance release from the application of these measures. First, the discrepancy between the text of Article 502 of the Criminal Procedural Code [1] (which refers to early release from any of the measures listed in Part 2 of Article 105 of the Criminal Code of Ukraine [12] –except a warning) and its name (which refers exclusively to the early release of a child from compulsory educational measures prescribed in Clause 5 of Part 2 of Article 105 of the Criminal Code of Ukraine) [12].

Furthermore, for some reason, the analysed article is placed in Clause 2 of Chapter 38 of the Criminal Procedural Code of Ukraine [1] under the title "Application of compulsory educational measures to minors who have not reached the age of criminal responsibility". Here the comments are raised by three nuances:

a) incorrect use of the term "age of criminal liability" – since criminal liability, admittedly, has no age, and cannot have it. The correct phrase is "the age at which criminal liability begins";

b) the term "*application*" used in the title of this clause is also noteworthy, as it denotes *only the final stage of the proceedings* in cases of this category and does not cover the procedural activities of the investigation of these proceedings;

c) attention is also drawn to the fact that the norm, which provides the grounds for the application of coercive measures of an educational nature to children who, before reaching the age from which *criminal responsibility may arise*, have committed a socially dangerous act that falls under the characteristics of the act, prescribed in the Special Part of the Criminal Code (Part 2 of Article 97 of the Criminal Code of Ukraine) is contained in the Article of this Code entitled: "Exemption from criminal liability with the use of coercive measures of an educational nature" [12]. But this category of children is not exempt from criminal liability, while the latter is excluded. The difference between "exemption from criminal responsibility" and "exclusion of criminal responsibility" (which is well-known and indisputable in the theory of criminal law) is that only a person whose act contains all the elements of a criminal offence can be exempted from criminal responsibility. Considering the above, it is recommended:

– to amend the title of §2 of Chapter 38 of the Criminal Procedural Code [1] as follows: "*Proceedings regarding the application* of coercive measures of an educational nature to persons who have committed socially dangerous acts before reaching *the age from which criminal responsibility may arise*";

– to exclude Part 2 from Article 97 of the Criminal Code of Ukraine [12];

– to supplement the Criminal Code of Ukraine [12] with a new Article 97^1 "Application of compulsory educational measures against a person who has committed a socially dangerous act before reaching the age from which criminal liability may begin" of the following content:

– "The court has the right to apply coercive measures of an educational nature, prescribed in Part 2 of Article 105 of the Criminal Code of Ukraine [12], to a minor who, before reaching the age from which criminal responsibility can be imposed, has committed a socially dangerous act that falls under the characteristics of an act prescribed in the Special Part of this Code";

– to supplement Article 105 of the Criminal Code of Ukraine [12] in Part 3^1 in the following wording: "A minor whose behaviour during their stay in a special educational institution for children and adolescents indicates their re-education may be prematurely released from this coercive measure of an educational nature in the manner prescribed by the Criminal Procedural Code of Ukraine" [1];

– to remove Article 502 from Section 2 of Chapter 38 of the Criminal Procedure Code [1];

– to supplement section 1 of Chapter 38 of the Criminal Procedural Code [1] with Article 497^1 of the following content:

"Article 497^1. Advance release of a minor from a special educational institution.

"A minor whose behaviour during their stay in a special educational institution indicates re-education may be released early from such a compulsory measure of an educational nature. A decision of a court within the territorial jurisdiction of which the relevant institution is located may be made based on the results of a request from a minor, their legal representative, defence lawyer, or prosecutor. Upon considering the application, the opinion of the council of the special educational institution where the minor is located must be clarified."

Expansion of The List of Compulsory Educational Measures

The list of compulsory educational measures is closed. At the same time, international legal norms make provision for

a broader list of measures of influence. Article 18 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) singles out a provision on work for the benefit of the public; resolution on participation in group psychotherapy and other similar measures [21]. Obviously, there is a need to expand the list of relevant measures, which is consistent with the principle of individualisation of influence. At the same time, their open list is unacceptable – an expansive interpretation of the norms of criminal law is an extremely undesirable phenomenon.

Considering the above, it is recommended to supplement Part 2 of Article 115 of the Criminal Code of Ukraine [1] with Clause 6, which would prescribe a new compulsory measure of an educational nature – "non-paid labour of an educational nature", and in a separate section of this Code (where the definition of the terms used in it would be specified) to indicate what the legislator implies (such labour could include cleaning parks, squares, feasible care for patients in state healthcare institutions, assistance in organising leisure activities for children in preschool educational institutions, etc.).

Conclusions

The above gives grounds for the following conclusions:

1. When deciding to apply coercive measures of an educational nature to a minor (both with their release from criminal responsibility and with their release from punishment), the court must make sure that his correction is possible without the use of punishment.

2. Neither the norms of criminal legislation nor the norms of the criminal procedural law contain a direct indication that the admission of guilt by a minor indicates the possibility of correction. However, the process of correction and re-education is based on a critical attitude towards the committed offence and its sincere recognition. And therefore, the non-recognition of guilt by minors calls into question the expediency of applying coercive measures of an educational nature.

3. The recognition of a minor violator's guilt should be considered as part of the proven possibility of correction by applying compulsory educational measures, and not as the main proof of their guilt.

4. The concepts of "non-admission of guilt by a minor" and "their disagreement to close the proceedings on this basis" are not identical. It is possible that the teenager fully and sincerely repents, while categorically objecting to the closure of proceedings against them with the use of compulsory educational measures.

5. The warning is not related to the performance of any duties by the minor. Therefore, it would be advisable to exclude it from the list of compulsory educational measures altogether and preserve the importance of this measure as a preventive measure. Taking this into account, it is recommended to remove Clause 1 of Part 2 of Article 105 of the Criminal Code of Ukraine.

6. Restriction of leisure time and establishment of special requirements for the behaviour of a minor violator is one of the most effective and efficient compulsory measures of an educational nature. Any requirement for the conduct of a minor offender within the framework of such a measure of influence must be conditioned by the prevention of the commission of an offence. Therewith, the requirements for the behaviour of a minor violator should be as clear as possible.

7. Even though the law does not require the consent of legal representatives to transfer a minor under their supervision, such consent is crucial.

8. The position, according to which it should be impossible to transfer a minor offender under the supervision of legal representatives as a coercive measure of an educational nature, has been criticised.

9. It was justified that children who are married should not be placed under the supervision of parents or persons who replace them.

10. Considering the provisions of Part 1 of Article 1179 of the Civil Code of Ukraine, it is necessary to change the norm specified in Clause 3, Part 2 of Article 105 of the Criminal Code of Ukraine, harmonising the provisions of both codes and applying a coercive measure of an educational nature in the form of imposing on a minor, who has property, funds or earnings, the obligation to compensate for property damage, from the age of 14, not 15.

11. The statement that a necessary condition for the application of a coercive measure of an educational nature, prescribed in Clause 3, Part 2 of Article 105 of the Criminal Code of Ukraine, is significant property damage to the victim, has been criticised. It was indicated that the amount of damage that can be compensated for by a minor violator is not limited.

12. Arguments were given regarding the proposal made in the legal literature to impose on the violator-child the obligation to compensate for the damage caused, provided that the minor has independent earnings and the amount of losses does not exceed their average monthly earnings (income).

13. It was proposed to amend Article 105 of the Criminal Code of Ukraine aimed at establishing the period for which compulsory educational measures can be imposed, as well as at determining the circumstances that the court must consider as the basis for choosing any of these measures.

14. It was established that with regard to the coercive measure of an educational nature, prescribed in Clause 4, Part 2, Article 105 of the Criminal Code of Ukraine, the legislator unjustifiably foresees the possibility of compensating minors only for property damage, but is silent about the possibility of compensation for physical, moral (non-property) damage caused by them. Furthermore, it would be acceptable to compensate for the damage caused not only with money or property, but also with personal efforts and work.

15. To fully clarify the data on the property status of a minor to ensure compensation for damage caused by a criminal offence, it is necessary to expand the list of circumstances to be proved in cases of criminal offences of minors (Article 485 of the Criminal Procedural Code of Ukraine 2012) with Clause 5: "Availability of property, funds, or earnings of a minor or their ability to compensate for the damage caused by their labour".

16. To improve the legal regulation of the application of compulsory educational measures prescribed in Clause 5 of Part 2 of Article 105 of the Criminal Code of Ukraine, it is recommended to introduce some changes and amendments to the Criminal Code and the Criminal Procedural Code of Ukraine.

17. The position on establishing an open list of compulsory educational measures has been criticised.

18. It was proposed to expand the existing list of compulsory educational measures by including "free educational work" in it.

References

[1] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.

[2] Reznik, O., Bondarenko, O., Utkina, M., Yanishevska, K., & Ilchenko, O. (2022). Mediation in the case of a criminal offence or a felony. *Amazonia Investiga*, 11(49), 210-217.

[3] Vorobey, P., Vorobey, O., Matviichuk, V., Niebytov, A., & Khar, I. (2022). Criminal law principles in the fight against crime. *Amazonia Investiga*, 11(49), 156-164.

[4] Habuda, A.S., & Isakova, V.R. (2019). The system of coercive measures of an educational nature needs to be improved. *Scientific Legal Journal*, 9, 140-145.

[5] Merkulova, V.O. (2017). Features of criminal liability and punishment of minors: Problems of current legislation. *Criminal Law and Criminological Aspects of Combating Crime*, 127-130.

[6] Yashchenko, A.M. (2014). Application of coercive measures of an educational nature: Theoretical aspect. *Law and Society*, 1, 182-188.

[7] Burdin, V.M. (2004). *Peculiarities of juvenile criminal responsibility in Ukraine*. Kyiv: Atika.

[8] Kuzmenko, O.V. (2018). Coercive measures of an educational nature as an institution of criminal law of Ukraine. *Bulletin of the National Technical University "KhPI"*, 4, 7-22.

[9] Paliukh, L.M. (2009). *Proceedings in cases of coercive measures of an educational nature*. Lviv: PAIS Publishing House.

[10] Tergulova A. I. (2019). Ensuring the rights and legitimate interests of juvenile suspects accused in the context of streamlining the preliminary investigation stage.

[11] Khriapinskyi, P.V. (2020). Exemption of minors from criminal liability: Theoretical and sociological aspect. In O.V. Kozachenko, & O.M. Musychenko (Eds.), *The latest criminal law research-2020* (pp. 62-70). Mykolayiv: Mykolayiv Institute of Law of the National University "Odesa Law Academy".

[12] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.

[13] Navrotska, V.V. (2021). *Special procedures of criminal proceedings*. Lviv: Lviv State University of Internal Affairs.

[14] Family Code of Ukraine. (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text.

[15] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.

[16] Civil Code of Ukrainian SSR. (1966, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1540-06#Text.

[17] Criminal Code of the Republic of Belarus. (1999, June). Retrieved from https://pravo.by/document/?guid=3871&p0=hk9900275.

[18] Navrotska, V.V. (2020). Closure of proceedings against minors with the use of coercive measures of an educational nature. In *Principles of functioning of criminal justice: Collection of abstracts of the All-Ukrainian correspondence scientific-practical conference* (pp. 13-15). Khmelnytsky: Leonid Yuzkov Khmelnytsky University of Management and Law.

[19] Judgment of the European Court of Human Rights in the Case Blokhin v. Russia (Application no. 47152/06). (Murch, 2016). Retrieved from https://hudoc.echr.coe.int/fre?i=001-161822.

[20] UN General Assembly Resolution "UN Rules Concerning the Protection of Juveniles Deprived of Their Liberty (Havana Rules)". (December, 1990). Retrieved from https://zakon.rada.gov.ua/laws/show/995_205#Text.

[21] United Nations General Assembly Resolution "United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules")". (November, 1985). Retrieved from https://zakon.rada.gov.ua/laws/show/995_211#Text.

Список використаних джерел

[1] Кримінальний процесуальний кодекс України: офіц. текст від 13.04.2012 р. № 4651-VI. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text.

[2] Mediation in the case of a criminal offence or a felony / O. Reznik et al. *Amazonia Investiga*. 2022. No. 11(49). P. 210–217.

[3] Criminal law principles in the fight against crime / P. Vorobey et al. *Amazonia Investiga*. 2022. No. 11(49). P. 156–164.

[4] Габуда А.С., Ісакова В.Р. Система примусових заходів виховного характеру потребує вдосконалення. *Науковий юридичний журнал*. 2019. № 9. С.140–145.

[5] Меркулова В.О. Особливості кримінальної відповідальності та покарання неповнолітніх: проблеми чинного законодавства. Кримінально-правові та кримінологічні аспекти протидії злочинності: матеріали Всеукр. наук.-практ. конф. (м. Одеса, 24 лист. 2017 р.). Одеса: ОДУВС, 2017. С.127–130.

[6] Ященко А.М. Застосування примусових заходів виховного характеру: теоретичний аспект. *Право і суспільство*. 2014. № 1. С.182–188.

[7] Бурдін В.М. Особливості кримінальної відповідальності неповнолітніх в Україні: монографія. Київ: Атіка, 2004. 240с.

[8] Кузьменко О.В. Примусові заходи виховного характеру як інститут кримінального права України. *Вісник Національного технічного університету «ХПІ». Серія: Актуальні проблеми розвитку українського суспільства*. 2018. №4. С. 7–22.

[9] Палюх Л.М. Провадження у справах про застосування примусових заходів виховного характеру: монографія. Львів: ПАІС, 2009. 196 с.

[10] Тергулова А.И. Обеспечение прав и законных интересов несовершеннолетних подозреваемых, обвиняемых в контексте рационализации стадии предварительного расследования: дис. … канд. юрид. наук: 12.00.09 / Саратовская государственная юридическая академия. Саратов, 2019. 221 с.

[11] Хряпінський П.В. Звільнення неповнолітніх від кримінальної відповідальності: теоретико-соціологічний аспект. Новітні кримінально-правові дослідження-2020: альманах наукових праць / за ред. О.В. Козаченка, О.М. Мусиченка. Миколаїв: Миколаївський інститут права Національного університету «Одеська юридична академія», 2020. С.62–70.

[12] Кримінальний кодекс України: офіц. текст від 5.04.2001 р. № 2341-III. URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[13] Навроцька В.В. Особливі порядки кримінального провадження: монографія. Львів: Львівський державний університет внутрішніх справ, 2021. 177 с.
[14] Сімейний кодекс: офіц. текст від 10.01.2002 р. № 2947-III. URL: https://zakon.rada.gov.ua/laws/show/2947-14#Text.
[15] Цивільний кодекс України: офіц. текст від 16.01.2003 р. № 435-IV. URL: https://zakon.rada.gov.ua/laws/show/435-15#Text.
[16] Цивільний кодекс Української РСР: офіц. текст від 23.11.1966 р. URL: https://zakon.rada.gov.ua/laws/show/1540-06#Text.
[17] Уголовный кодекс Республики Беларусь: офиц. текст от 9.06.1999 г. № 275–З. URL: https://pravo.by/document/?guid=3871&p0=hk9900275.
[18] Навроцька В.В. Закриття провадження щодо неповнолітніх із застосуванням примусових заходів виховного характеру. Засади функціонування кримінальної юстиції: збірник тез Всеукраїнської заочної науково-практичної конференції (м. Хмельницький, 15 трав. 2020 р.). Хмельницький: Хмельницький університет управління та права ім. Леоніда Юзькова. С.13–15.
[19] Case of Blokhin v. Russia (Application no. 47152/06): Judgment of the European Court of Human Rights of 23 March 2016. URL: https://63.xn--b1aew.xn--p1ai/document/9250898. https://hudoc.echr.coe.int/fre?i=001-161822.
[20] Правила ООН, які стосуються захисту неповнолітніх, позбавлених свободи (Гаванські правила): Резолюція Генеральної Асамблеї ООН від 14.12.1990 р. URL: https://zakon.rada.gov.ua/laws/show/995_205#Text.
[21] Мінімальні стандартні правила Організації Об'єднаних Націй, які стосуються відправлення правосуддя щодо неповнолітніх («Пекінські правила»): Резолюція Генеральної Асамблеї Організації Об'єднаних Націй від 29.11.1985 року. URL: https://zakon.rada.gov.ua/laws/show/995_211#Text.

Примусові заходи виховного характеру, що застосовуються до неповнолітніх: дискусійні питання правового регулювання

Віра Вячеславівна Навроцька

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Необхідність пошуку та напрацювання гуманних й адекватних заходів боротьби зі злочинністю неповнолітніх, забезпечення суворої індивідуалізації у виборі засобів впливу на дітей-правопорушників у поєднанні з максимальним дотриманням їхніх законних інтересів є беззаперечною, що й становить актуальність статті. Мета статті – виявити недоліки в конструкції норм, що регламентують закриття кримінальних проваджень щодо неповнолітніх у зв'язку із застосуванням до них примусових заходів виховного характеру, надання рекомендацій з удосконалення відповідних норм кримінального та кримінального процесуального законодавства та практики їх застосування. У процесі дослідження використано різноманітні методи пізнання: діалектичний, компаративістський, моделювання, системно-структурний аналіз та догматичний. Обґрунтовано, що під час застосування примусових заходів виховного характеру потрібно з'ясувати ставлення неповнолітнього до скоєного. Зазначено, що дієвість та ефективність передання неповнолітнього під нагляд повністю залежить від можливостей та відповідальності особи, котрій доручено наглядати за неповнолітнім. А тому, незважаючи на те, що закон не вимагає згоди законного представника на таке передання, фактично така згода має важливе значення. Піддано критиці підхід законодавця, який замість чіткого визначення нижньої та верхньої меж тривалості таких заходів обмежується вказівкою на те, що тривалість примусових заходів виховного характеру, передбачених у п.п. 2 та 3 ч. 2 ст.105 КК України, встановлюється тим судом, котрий їх призначає. Стверджується, що оптимальний строк для зазначених заходів – один, а максимум два роки. Тому запропоновано внесення змін до ст. 105 КК України, спрямованих на встановлення строку, на який можуть бути призначені примусові заходи виховного характеру, а також на визначення обставин, які суд зобов'язаний враховувати як підставу вибору якогось із зазначених заходів. Запропоновано, аби неповнолітній виконував обов'язок компенсувати заподіяну шкоду в таких формах: 1) грошовій, 2) натуральній – передання майна, 3) трудовій. Окрім того, пропонується, щоб за допомогою цих способів можливою була компенсація не лише майнової, але й моральної шкоди

Ключові слова: застереження, передання під нагляд, покладення обов'язку відшкодування шкоди, обмеження дозвілля, особливі вимоги до поведінки, направлення до спеціальної навчально-виховної установи

UDC 338.24
DOI: 10.32518/2617-4162-2022-5-2-54-60

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Research of the Main Methods for Assessing the Competitiveness of Enterprises

Ivan O. Korchynskyi[1*], Maksym I. Shchadylo[2]

[1]Andrei Krupynskyi Lviv Medical Academy
79000, 70 Doroshenko Str., Lviv, Ukraine

[2]Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. Any socio-economic system cannot develop in an environment without competition. Competition drives progress, but to function and develop optimally, an enterprise must have an elevated level of competitiveness. Thus, the chosen topic is relevant. The purpose of this study was to analyse the main methods for assessing the level of competitiveness of an enterprise. The main advantages and disadvantages of the main methods of assessing the level of competitiveness of an enterprise were highlighted. Examples of using SWOT and PEST analysis were presented. It was found that the level of competitiveness of the enterprise should be understood as such a state in which the quality of competitive advantages on the market allows demonstrating a high, medium, or low level of competition. It was also noted that the state of security substantially affects the competitiveness of the enterprise and without effective security mechanisms, high indicators will be problematic to achieve. It was found that competitiveness should be considered as such a level of functional and structural organisation of the enterprise, at which one can discuss the ability to ensure production and sale of products and services at a level sufficient to meet demand and ensure high positions in the market relative to competing producers. The results obtained can be used in the activities of Ukrainian enterprises

Keywords: competition, level of competitiveness, business entity, assessment methods, analysis methods

Introduction

If one considers the issue of preserving and improving the level of competitiveness of enterprises, then the industrial sphere is a particularly critical branch for Ukraine, since it is the key for the modern Ukrainian economy, preserving its vitality in post-pandemic and military conditions.

Several Ukrainian and foreign scientists investigated the major features of assessing the level of competitiveness of an enterprise.

For instance, as most scientists have noted [1-3], the competitive advantage of any company is service, which creates the image of the company, increases profitability and competitive influence in the field of production. To be the first among competitors, one needs to start with themselves, with their company and their production.

Another group of scientists [4-5] also noted that in present-day market, every manufacturer should have a competitive advantage, competitive products, and company activities. Unfortunately, no one is immune from market changes, and any entrepreneur should be prepared to adjust the company's plans, change tactics and new developments. The external environment changes daily, and therefore businesses must have a sustainable operation.

Of interest is the study by L.M. Gitelman, L.D. Gitelman, A.V. Denisov [6], who considered the features of the competitiveness of enterprises and what indicators should be considered. M. Kopytko at al. [7] considered competition through the lens of innovation. Noting that without innovation, it is impossible to discuss competitiveness. The given study has differences, and they lie in the analysis of methods for assessing the competitiveness of enterprises.

However, the importance of analysing the main methods for assessing the competitiveness of an enterprise, highlighting their positive and negative aspects, stays an unresolved problem.

The purpose of this study was an analysis of the main methods for assessing the level of competitiveness of an enterprise.

The issue of organising a competitive policy of industrial management both at the theoretical level and at the level of practical implementation is a topical issue in all countries of the world. Given the existence of the global crisis, the industrial sector also suffered considerable negative consequences, which forced the world's leading countries to seek ways to overcome these crisis phenomena. The governments of most countries have long realised the fact that the sphere and specifics of the functioning of industrial enterprises have undergone radical changes under the influence of globalisation, the manifestation of the influence of Industry 4.0, the internationalisation of sales markets and local crisis phenomena that have somehow arisen in any economy

Suggested Citation **Article's History**: Received: 27.03.2021 Revised: 25.04.2022 Accepted: 23.05.2022

Korchynskyi, I.O., & Shchadylo, M.I. (2022). Research of the main methods for as-sessing the competitiveness of enterprises. *Social and Legal Studios*, 5(2), 54-60.

*Corresponding author

of the world over all these years. Industrial enterprises could no longer effectively fulfil their production potential and develop competitive advantages in the obsolete and static environment of directive management and the unified power of the state regulator. In this regard, in most countries, the issue of analysing and creating a new paradigm of cooperation and management of industrial enterprises has arisen. Thus, most governments of the world have already formed effective strategies for the development and functioning of the industrial sector, which have made it possible to significantly develop the network of industrial enterprises of diverse types of ownership, increase their productivity and competitiveness.

In Ukraine, the issue of industrial development is also an urgent and relevant issue, both in the conceptual and practical sense. To date, Ukrainian industrial enterprises have faced considerable internal and external pressure, which could not but affect their efficiency and competitiveness. The most critical problem faced by Ukrainian enterprises, admittedly, is the impact of active military operations throughout Ukraine.

This paper presents a matrix of SWOT analysis of the Ukrainian industry for 2019-2021, considering the impact of COVID-19, and a matrix of PEST analysis of the Ukrainian industry for 2019-2021, taking into account the impact of COVID-19.

The Essence of Increasing the Level of Competitiveness of the Enterprise

The entire evolutionary development of the phenomenon of competition is usually divided into four stages [1]:

1. The stage of pre-capitalist competition. This stage begins with the end of the primitive communal structure of the world, which was dominated by barter relations and classless society, and the transition to commodity-market relations. The main sign of competition at this stage is its sporadicity, irregularity, and variability.

2. The stage of perfect (free) competition began with the predominance of capitalist relations on the world market and lasted until the 1870s. During this stage, competition extends not only to goods and services, but also to all factors of entrepreneurial activity: employees, real estate, land resources, methods and means of production.

3. The stage of the monopolistic revolution, which dates to the 1870s and ended with the outbreak of World War II. This stage is characterised by the development of competition between production and capital in the context of powerful and revolutionary shifts in production capacity and the invention of new methods to speed up the production.

4. The stage of innovation competition began with the end of World War II and continues until now. The main difference between the competition of this period is its considerable social orientation and susceptibility to public regulation, with the purpose of supporting antimonopoly policy. After comprehending the importance of preventing the formation of monopolies in the market, given that they constitute a significant factor in destabilising the state and global economy, as well as a factor in inhibiting the development of small businesses, most states have created powerful antimonopoly legislation that largely supported the development of "healthy" competition both within the country and around the world [2-5].

An essential element of the enterprise's competitiveness management system is the level of competitiveness. According to scientists [6-7], it is now customary to distinguish between the following levels of enterprise competitiveness:

Level 1 – the main policy of the enterprise is only to produce products, despite the existing trends in the market, the needs and consumer interests of customers.

Level 2 – the main policy of the enterprise is that the products and services produced by the enterprise must fully correspond to the products and services produced by competing producers.

Level 3 – the company's policy in the field of production and sale of products is no longer based on the trends and views of competing producers since the company itself and its products become "reference" in the market and the company itself dictates the conditions for qualitative and quantitative characteristics of products.

Level 4 – the company's policy is more based not on improving the elements of production, given that it has reached its maximum efficiency, but on the quality of the competitiveness management system and the level of competitiveness, which includes both operational changes in the production system and improvements in sales and marketing policies.

Analysis of the Main Methods for Assessing the Level of Competitiveness of an Enterprise

When managing the competitiveness of an enterprise, an essential place is occupied by determining, evaluating and controlling the level of competitiveness. To assess the level of competitiveness of an enterprise today, there are many general scientific assessment methods, each of which has a number of advantages and disadvantages (Table 1).

Table 1. Advantages and disadvantages of the main methods for assessing the level of competitiveness of an enterprise

Methods and models	Advantages	Disadvantages
PIMS method	The ability to measure the relative quality characteristics of goods and services, as well as attempts to measure the compliance of the production structure at the enterprise with the structure of consumer needs	This model covers only a period of three years. Lack of indicators in the structure of the PIMS model that describe the structures of the enterprise competitiveness management system, management methods and style
McKinsey method (model)	This method is distinguished by its detail and breadth of use, which allows most accurately assessing the level of competitiveness The structure of this method makes provision for variable models of enterprise competitiveness development	A considerable level of subjectivity of the assessment. To conduct this type of assessment, one needs to analyse many indicators

Table 1, Continued

Methods and models	Advantages	Disadvantages
Company model Shell (Shell/DPM model)	The use of qualitative and quantitative indicators in the model structure allows more accurately justifying the chosen competitiveness management strategy. It does not have such a substantial dependence on the statistical relationship between the market share and the level of profit of the enterprise	The indicators used for analysis are conditional and subjective. The structure of this model does not contain criteria for determining the number of indicators that are necessary for a particular enterprise It is difficult to assess the level of importance of each of the indicators
Method of the Boston Consulting Group	Ease of construction, speed in collecting and analysing a small number of indicators, visibility Use of only objective evaluation criteria, which minimises the level of subjectivity in assessing the level of competitiveness	The focus is solely on financial flows and the distribution of investment between products, goods and services provided by the enterprise. The presence of only an approximate estimate of each product, which is conditioned upon the small number of indicators involved in the evaluation. Excessive simplification of the model leads to a deterioration in its accuracy
Point method	The method is clear and implemented without the need for added knowledge of evaluation methods. Determination of the most influential factors in assessing the competitiveness of an enterprise allows finding the strengths and weaknesses of the enterprise	Assessment of the level of competitiveness is subjective. Indicators of the external environment of the enterprise are not considered. The level of competitiveness is assessed using an extremely limited number of indicators
M. Porter's matrix	The assessment considers both external and internal impacts on competitiveness	Preference is given exclusively to one type of strategy, which considerably restricts the enterprise

Source: compiled by the author based on [4]

The PIMS method is a type of competitive advantage assessment method. The PIMS method is used to evaluate all variables that affect the long-term prospects of making a profit for an enterprise. The method itself is based on the use of an empirical model that covers a wide scope of strategic (qualitative and quantitative characteristics of products, market share occupied by the enterprise) and situational (market growth rate, stage of development of the industry in which the enterprise operates) variables. The main purpose of conducting PIMS analysis in the result, after studying the level of competitiveness of the enterprise, is to choose the best strategy for the functioning of the enterprise in the market [8].

Another popular method for assessing the level of competitiveness of an enterprise is the McKinsey model, which includes a matrix with nine divisions to display the most accurate analysis of the functional and organisational activities of the enterprise. The main difference between using this method of assessing competitiveness is that in its structure it includes not only objective indicators of the enterprise's performance, such as sales volumes, profit levels, but also subjective ones, such as human resources, changes in the market structure, etc. The entire structure of the matrix is formed according to two factors: the attractiveness of the market and the competitiveness of the functional division of the enterprise. After entering all the indicators in the matrix, it becomes possible to determine the status of the enterprise in relation to two fundamental factors and the strategy of further activity, which, according to the developers of the McKinsey model, is the most acceptable [9].

The Shell/DPM model is based on a basic two-factor uniformity matrix with nine parts. When using this model, there is a step-by-step assessment of the qualitative and quantitative parameters of the enterprise's activities in the context of ensuring a prominent level of competitiveness in the market. When using this model, after assessing the level of competitiveness in the matrix of quantitative and qualitative indicators, competitiveness management strategies are formed at three levels: corporate, business, and basic-functional [10].

The method of the Boston Consulting Group is currently one of the most simplified methods for assessing the level of competitiveness of an enterprise. This method includes a matrix of four elements and only two variables: relative market share and market growth dynamics. This model allows assessing the level of competitiveness of an individual product or service of an enterprise in relation to the above indicators, and the entire business as a whole. After assessing the level of competitiveness, the model suggests choosing the best strategy for the enterprise [11]. A popular type of assessment of the level of competitiveness is the point method, during which each of the indicators is evaluated according to a certain system of points. Usually, this method is divided into three stages: preparatory, when indicators are selected to assess the level of competitiveness; calculation, at which each indicator is given a certain number of points, and in the next one, the essential (those who received the highest number of points) indicators are determined to ensure a prominent level of competitiveness; recommendation, on which a system of measures is formed to improve the level of competitiveness of the enterprise.

The M. Porter matrix allows assessing the level of competitiveness based on existing competitive advantages and choose the most acceptable competitive strategy according to competitive advantages. According to this model, there are three main strategies for improving the competitiveness of an enterprise: cost leadership, differentiation, and specialisation [12].

Today, the most common method is to assess the level of competitiveness of an enterprise using SWOT and PEST analysis. Considering SWOT analysis in its most general sense, it is a certain tool for strategic planning at the enterprise, which allows describing the real state of the object under study in the most detailed way. The abbreviation “SWOT “stands for four terms: strengths, weaknesses, opportunities, and threats. The use of SWOT analysis allows, during the conduct of such study, comprehensively investigating the enterprise, its weaknesses, and strengths, competing product manufacturers, and the entire market as a whole.

When conducting SWOT analysis, all factors of the external and internal environment are evaluated, after which the responsible individuals receive a detailed map of the strengths, weaknesses, opportunities, and threats to the competitiveness of the enterprise. This allows assessing the level of competitiveness of the enterprise in the most convenient and visual way, which later allows interpreting the results in the shortest possible time and make operational adjustments using the competitiveness management system.

Table 2 is presented to clearly demonstrate the operation of the SWOT analysis of the Ukrainian industry as a method for assessing the competitiveness of the Ukrainian industry under the influence of COVID-19.

Table 2. SWOT analysis of the Ukrainian industry for 2019-2021, considering the impact of COVID-19

Strengths	1. Low workforce price. 2. Uniqueness of industrial sector products 3. Robotisation of the production in a pandemic. 4. Pricing policy of Ukrainian industrial enterprises. 5. Large volumes of raw materials.	Opportunities available in the external environment	1. Mass vaccination and border opening. 2. Large demand for industrial products on the international market. 3. High purchasing power abroad. 4. Opportunities to attract large investors.
Weaknesses	1. Lack of interest in innovative development. 2. Low investment attractiveness of many industrial enterprises. 3. Inefficient HR management system. 4. Outdated infrastructure. 5. Low demand due to the impact of COVID-19. 6. Low level of competitiveness of Ukrainian industrial enterprises in the external market.	Threats in the external market	1. Consequences of COVID-19 exposure. 2. Military conflict in the east of the country. 3. Reduction of export-import operations with the Russian Federation. 4. Rising inflation. 5. High competition in the international market. 6. Low national support for industry in Ukraine.

Source: compiled by the author

The next step is PEST analysis, which is the most understandable and detailed way to understand the types of main forces and factors affecting the level of competitiveness of an enterprise. Most often, PEST analysis is used in conjunction with SWOT analysis, as it is an integral element of the risk management system and the formation of competitiveness management strategies. The abbreviation of the term “PEST” stands for four concepts: Political environment, Economic environment, Socio-cultural environment, Technological environment. PEST analysis involves analysing the main factors for each environment [13-15].

Considering the PEST analysis method as one of the types of competitiveness assessment, it is worth giving an example of its application (Table 3).

Table 3. PEST analysis of the Ukrainian industry for 2019-2021, considering the impact of COVID-19

Political factors	1. Activation of inflationary development. 2. Lack of a stable exchange rate. 3. Investment unattractiveness of individual industries. 4. Quarantine obstacle to export-import operations for industrial enterprises. 5. Lack of real competition in the internal market	Economic factors	1. Military-political conflict with the Russian Federation. 2. Constant decline in political confidence of the population. 3. Introduction of regulations on quarantine restrictions in the activities of enterprises. 4. Political pressure on the privatisation of industrial enterprises

Table 3, Continued

Socio-cultural factors	1. Inefficient motivation system for industrial enterprises. 2. Lack of a stable exchange rate. 3. Large gap between wages and consumer needs. 4. Low population of professions in industry. 5. Low information support of the industrial sector.	Technological factors	1. Low development of science in the field of industry. 2. Obsolescence of technical means. 3. Low level of application of foreign practices in technological development under the influence of COVID-19. 4. Lack of real competition in the internal market.

Source: compiled by the author

Notably, over the past period, the impact of COVID-19 has substantially changed the state of activity of industrial enterprises and industry as one of the leading sectors of the economy. That is why PEST analysis is relevant in modern development conditions. Currently, the factors associated with COVID-19 and the consequences of its impact are coming to the fore. This only confirms the thesis about the relevance and necessity of conducting a thorough analysis of the state of competitiveness of industrial enterprises in Ukraine.

Conclusions

In summary, improving the financial stability and competitiveness of enterprises is a priority task of the state, especially in the context of the coronavirus pandemic. Effective functioning of enterprises is aimed at ensuring sustainable development of the region. Solving the problems of enterprise development is impossible without applying innovative approaches to management, its further professionalisation, i.e., in such a construction of a management organisation that is focused on management professionalism.

The key aspect of increasing the level of competitiveness of an enterprise using security mechanisms should be an effective methodological approach that should consider modern development conditions. A matrix of SWOT analysis of the Ukrainian industry for 2019-2021 was formed, considering the impact of COVID-19. It was established that one of the weaknesses is the low level of competitiveness of Ukrainian industrial enterprises in the external market.

The authors of this study formed a PEST analysis matrix of the Ukrainian industry for 2019-2021, considering the impact of COVID-19. As a result, it was found that in the context of a pandemic, the top priority should be to respond to the factors associated with COVID-19 and the consequences of its impact. The conducted research of the main methods for assessing the level of competitiveness of an enterprise has shown that each of the methods has several disadvantages and cannot be effectively implemented in Ukrainian practice. Therefore, further research requires the development of a proper methodological approach to improving the level of competitiveness of the enterprise using security mechanisms.

References

[1] Abbas, A.J. (2000). Rethinking competitiveness. *Advances in Competitiveness Research*, 8(1), 1-3.

[2] Bondarenko, A.F., Zakharkina, L.S., Syhyda, L.O., & Saher, L.Y. (2020). The economic and marketing attractiveness of countries: Measurement and positioning in terms of economic security. *International Journal of Sustainable Development and Planning*, 15(4), 439-449. doi: 10.18280/ijsdp.150404.

[3] Cui, L., Hou, Y., Gao, M., & Yang, Y. (2019). Exploring the influencing factors of sharing economy sustainability based on a two-mode social network analysis. In *2019 16th International conference on service systems and service management (ICSSSM)* (pp. 1-5). Shenzhen: IEEE. doi: 10.1109/ICSSSM.2019.8887647.

[4] Decyk, K. (2020). Competitiveness factors in the innovative enterprises in the North-East voivodeships in Poland. *Business: Theory and Practice*, 21(2), 503-518. doi: 10.3846/btp.2020.12114.

[5] Deng, Q.Z., & Liu, T. (2020). Research on comprehensive competitive evaluation of P2P network lending platforms based on BP neural network model. *Review of Computer Engineering Studies*, 7(1), 13-19. doi: 10.18280/rces.070103.

[6] Gitelman, L.M., Gitelman, L.D., & Denisov, A.V. (2017). Comparison of competitiveness of grid companies and industrial companies' own generating units. *International Journal of Design & Nature and Ecodynamics*, 12(1), 113-123. doi: 10.2495/DNE-V12-N1-113-123.

[7] Kopytko, M., Fleychuk, M., Veresklia, M., Petryshyn, N., & Kalynovskyy, A. (2021). Management of security activities at innovative-active enterprises. *Business: Theory & Practice*, 22(2), 299-309. doi: 10.3846/btp.2021.13431.

[8] Navickas, V., & Malakauskaitė, A. (2010). Methodological problems and limitations of competitiveness evaluation. *Business: Theory and Practice*, 11(1), 5-11. doi: 10.3846/btp.2010.01.

[9] Lescovar-Spacapan, G., & Bastic, M. (2007). Differences in organizations' innovation capability in transition economy: Internal aspects of the organizations' strategic orientation. Technovation, 27(9), 533–546. doi: 10.1016/j.technovation.2007.05.012.

[10] Lou, B.N., Chen, N., & Ma, L. (2020). Competitiveness evaluation of tourist attractions based on artificial neural network. *Revue d'Intelligence Artificielle*, 34(5), 623-630. doi: 10.18280/ria.340513.

[11] Mihus, I., Koval, Ya., Laptev, S., Bala, O., & Kopytko, M. (2020). Monitoring in the system of state anti-crisis management of economic security of the banking institution of Ukraine. *Business: Theory & Practice*, 21(2), 804-812. doi: 10.3846/btp.2020.12985.

[12] Nikonenko, U., Khalina, O., Kazyuk, Y., Paliukh, V., & Shevchenko, S. (2021). Influence of internal and external factors on the structural changes of national economy: An example of Ukraine. *Business, Management and Economics Engineering*, 19(2), 244-271. doi: 10.3846/bmee.2021.14472.
[13] Podra, O., Litvin, N., Zhyvko, Z., Kopytko, M., & Kukharska, L. (2020). Innovative development and human capital as determinants of knowledge economy. *Business: Theory & Practice*, 21(1), 252-260. doi: 10.3846/btp.2020.11305.
[14] Žvirblis, A. (2007). The major principles of evaluating total value and competitiveness of services. *Business: Theory and Practice*, 8(2), 82-86. doi: 10.3846/btp.2007.13.
[15] Zhang, Q., Mu, R.Y., Zhang, Z., Hu, Y., Liu, C.J., Zhang, L., & Yu, X. (2020). Competitiveness evaluation of high-quality manufacturing development in the Yangtze River Economic Belt. *International Journal of Sustainable Development and Planning*, 15(6), 875-883. doi: 10.18280/ijsdp.150611.

Список використаних джерел

[1] Abbas A.J. Rethinking competitiveness. *Advances in Competitiveness Research*. 2000. Vol. 8, No. 1. P. 1–3.
[2] Bondarenko A.F., Zakharkina L.S., Syhyda L.O., Saher L.Y. The economic and marketing attractiveness of countries: Measurement and positioning in terms of economic security. *International Journal of Sustainable Development and Planning*. 2020. Vol. 15, No. 4. P. 439–449. doi: 10.18280/ijsdp.150404.
[3] Cui L., Hou Y., Gao M., Yang Y. Exploring the influencing factors of sharing economy sustainability based on a two-mode social network analysis. *2019 16th International conference on service systems and service management (ICSSSM)*. Shenzhen: IEEE, 2019. P. 1–5. doi: 10.1109/ICSSSM.2019.8887647.
[4] Decyk K. Competitiveness factors in the innovative enterprises in the North-East voivodeships in Poland. *Business: Theory and Practice*. 2020. Vol. 21, No. 2. P. 503–518. doi: 10.3846/btp.2020.12114.
[5] Deng Q.Z., Liu, T. Research on comprehensive competitive evaluation of P2P network lending platforms based on BP neural network model. *Review of Computer Engineering Studies*. 2020. Vol. 7, No. 1. P. 13–19. doi: 10.18280/rces.070103.
[6] Gitelman L.M., Gitelman L.D., Denisov A.V. Comparison of competitiveness of grid companies and industrial companies' own generating units. *International Journal of Design & Nature and Ecodynamics*. 2017. Vol. 12, No. 1. P. 113–123. doi: 10.2495/DNE-V12-N1-113-123.
[7] Management of security activities at innovative-active enterprises / M. Kopytko et al. *Business: Theory & Practice*. 2021. Vol. 22, No. 2. P. 299–309. doi: 10.3846/btp.2021.13431.
[8] Navickas V., Malakauskaitė A. Methodological problems and limitations of competitiveness evaluation. *Business: Theory and Practice*. 2010. Vol. 11, No. 1. P. 5–11. doi: 10.3846/btp.2010.01.
[9] Lescovar-Spacapan G., Bastic M. Differences in organizations' innovation capability in transition economy: Internal aspects of the organizations' strategic orientation. *Technovation*, Vol. 27, No. 9. 2007. P. 533–546. doi: 10.1016/j.technovation.2007.05.012.
[10] Lou B.N., Chen N., Ma L. Competitiveness evaluation of tourist attractions based on artificial neural network. *Revue d'Intelligence Artificielle*. 2020. Vol. 34, No. 5. P. 623–630. doi: 10.18280/ria.340513.
[11] Monitoring in the system of state anti-crisis management of economic security of the banking institution of Ukraine / I. Mihus et al. *Business: Theory & Practice*. 2020. Vol. 21, No. 2. P. 804–812. doi: 10.3846/btp.2020.12985.
[12] Influence of internal and external factors on the structural changes of national economy: An example of Ukraine / U. Nikonenko et al. *Business, Management and Economics Engineering*. 2021. Vol. 19, No. 2. P. 244–271. doi: 10.3846/bmee.2021.14472.
[13] Innovative development and human capital as determinants of knowledge economy / O. Podra et al. *Business: Theory & Practice*. 2020. Vol. 21, No. 1. P. 252–260. doi: 10.3846/btp.2020.11305.
[14] Žvirblis A. The major principles of evaluating total value and competitiveness of services. *Business: Theory and Practice*. 2007. Vol. 8, No. 2. P. 82–86. doi: 10.3846/btp.2007.13.
[15] Competitiveness evaluation of high-quality manufacturing development in the Yangtze River Economic Belt / Q. Zhang et al. *International Journal of Sustainable Development and Planning*. 2020. Vol. 15, No. 6. P. 875–883. doi: 10.18280/ijsdp.150611.

Дослідження основних методів оцінювання конкурентоспроможності підприємств

Іван Осипович Корчинський[1], Максим Ігорович Щадило[2]

[1]Львівська медична академія імені А. Крупинського
79000, вул. Дорошенка, 70, м. Львів, Україна

[2]Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Будь-яка соціально-економічна система не може розвиватись в середовищі без конкуренції. Конкуренція рухає прогрес, але для того, щоб оптимально функціонувати та розвиватись, підприємство повинно мати високий рівень конкурентоспроможності. Таким чином обрана тематика є актуальною. З огляду на це, метою дослідження є аналіз основних методів оцінювання рівня конкурентоспроможності підприємства. Виділено основні переваги та недоліки основних методів оцінювання рівня конкурентоспроможності підприємства. Представлено приклади застосування SWOT- і PEST-аналізу. Визначено, що під рівнем конкурентоспроможності підприємства слід розуміти такий стан, за якого якість конкурентних переваг на ринку дозволяє демонструвати високий, середній або ж низький рівень конкуренції. Також наголошено, що стан безпеки суттєво впливає на рівень конкурентоспроможності підприємства і без дієвих безпекових механізмів високі показники буде досягнути проблематично. Визначено, що конкурентоспроможність варто розглядати як такий рівень функціональної та структурної організації підприємства, за якого можна говорити про можливість забезпечити процес виробництва та реалізації продукції та послуг на рівні, достатньому для задоволення попиту й забезпечення високих позицій на ринку щодо конкуруючих товаровиробників. Отримані результати можуть бути використані в діяльності українських підприємств

Ключові слова: конкуренція, рівень конкурентоспроможності, суб’єкт господарювання, методи оцінювання, методи аналізу

UDC 65.011.56: 330.342
DOI: 10.32518/2617-4162-2022-5-2-61-67

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Digital Transformation: Background, Trends, Risks, and Threats

Iryna O. Revak*, **Roman T. Gren**

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. The modern world economy is characterised by the use of digital technologies as one of the factors of economic growth. Digital transformation creates new opportunities for development, but at the same time there are risks and threats to conventional economies. Therefore, the study of digital transformation is becoming particularly relevant. The purpose of this study was to reveal the essence of the term "digital transformation", highlight its advantages and disadvantages, and analyse the process of digitalisation of the economy of Ukraine. During theoretical exploration, the following methods of scientific cognition were used: analysis, synthesis, observation, generalisation, classification. Theoretical assumptions were tested using analytical materials. Based on the analysis, conclusions were drawn, and practical recommendations were developed. In theoretical research, the differences between the terms "digitalisation" and "digitisation" were investigated. The main prerequisites for the spread of digital technologies are highlighted: the development of the physical infrastructure of internet access in the world, the growth of the number of internet users; the development of e-commerce; the development of the country's IT industry; the improvement of the national e-government system. It was established that the main obstacles to the digital transformation of Ukrainian society are factors formed in the political, economic, technological, and psychological spheres. The dynamics of indices used to assess the spread of digital technologies is analysed: the e-Participation Index and the e-Governance Development Index. It was established that recently there has been a positive trend in them. The main advantages of implementing digital technologies were systematised. At the state level, the positive impact is manifested in improving the quality of life of the population; the level of productivity of public labour; reducing the share of hard work; preserving health and extending human life expectancy; simplifying access to information. The positive impact of digital technologies on the business environment is manifested in reducing the cost of selling products, searching and processing information, making transactions, launching and promoting goods to the market, the duration of the business cycle; inventing innovative technologies and switching to the production of innovative products. The advantages for individuals are to reduce the cost of internet services and transactions, simplify access to educational, entertainment and information resources. The main risks and threats created by the digital transformation of society are described: technological, economic, political, social, legal, and personal. The practical significance of the results obtained lies in the possibility of identifying and neutralising risks and threats of digitalisation

Keywords: digital economy, digitalisation, risks of the economy digitalisation, e-Participation Index, e-Governance Development Index

Introduction

The development of the country's economy, its place in the global economic space, and its competitiveness depend on its technological development. Today, neither the availability of natural or financial resources, nor location or other advantages are the main factors of development. It is the ability to generate the latest technologies and access to them that determine the country's place in the global economic space. The countries that are capable of generating the latest technologies (industrialised countries) are the richest and most influential. The ability to develop, introduce, and implement high-tech products is the basis for stimulating economic growth, the basis for ensuring the country's economic independence and innovative security.

Modern society is increasingly dependent on technology. New technologies create opportunities in the economic, social, energy, medical, and other areas. The dependence of society on technology is also manifested in the fact that the main changes in the socio-political life of individual countries are associated with changes in technological ways and their consequences. This state of affairs creates new opportunities and challenges for Ukraine.

The beginning of the 21st century was marked by the formation of a new model of social relations based on the use of digital technologies. If the right vector of further development is chosen promptly, the country will benefit – as a result of the introduction of technological and digital innovations, which will gradually develop, improve, and spread to all sectors of the economy. Under such conditions, the transition to a new model of economic development based on the use of digital technologies and intellectual human potential is almost the only opportunity for Ukraine to take its rightful place in the world economy. The specific feature of the modern transition to a new technological way is the rapid increase in digital gaps. This creates the danger of further falling behind the leading technologically and economically developed countries of the world.

Suggested Citation

Article's History: Received: 25.03.2021 Revised: 23.04.2022 Accepted: 24.05.2022

Revak, I.O., & Gren, R.T. (2022). Digital transformation: Background, trends, risks, and threats. *Social and Legal Studios*, 5(2), 61-67.

*Corresponding author

For Ukraine, supporting its technological level is a strategic purpose, since it is the basis for economic development, income growth, and ensuring economic independence and security. Therefore, to prevent social, economic, and political crises, it is critical to ensure digital transformation of the economy. For this, it is necessary to ensure the internal development of information and communication technologies and create a need for digital technologies among consumers. The issue of digital transformation is quite widely discussed at the state and regional levels, and at the levels of individual business entities, but there is still no unified approach to the essence of the term "digital transformation". Bolton notes that "digital transformation marks a radical reinterpretation of how an organisation uses technology, people, and processes to fundamentally change business performance. Digital transformation is usually considered a set of state-of-the-art tools and processes used to solve business problems and satisfy customers" [1]. Digital transformation concerns not only the economic sphere. Digital technologies have penetrated into various spheres of society's life: education, medicine, science, art, and governance. Digital transformation has covered all spheres of public life, changing existing business models, the way products are produced and sold, knowledge and training, communication and information transmission. The scale of "digital change" gives grounds to assert the digital transformation of society.

Digital transformation, like any transformation, poses many dangers. Firstly, the low level of innovation potential of the economy of Ukraine is concerning, along with the lack of need for Ukrainian enterprises to develop and implement digital technologies. Secondly, like any transformation, the digital transformation of society is associated with changes in established ties and the natural rejection of changes by certain segments of the population. Thirdly, the transition to a new technological way of life is associated with the "death" of existing business models, a decrease in the level of profitability of conventional industries and areas of activity.

The purpose of this study was to substantiate the essence of the term "digital transformation" and the prerequisites for digitalisation of society, to identify the risks and threats arising as a result of the introduction of digital technologies in various spheres of society.

Literature Review

The spread of digital technologies and their impact on certain aspects of public life have been the subject of research by many scientists. Certain aspects of the spread of digital technologies, their introduction into various spheres of society's life, and the formation of the "digital economy" were the subject of research by both Ukrainian and foreign scientists. S. Brennen and D. Kreiss [2] conducted a theoretical study of the term "digitalisation", identified the features and formulated the differences between "digitisation" (the process of digitising analogue data into digital format) and "digitalisation" (the process of introducing digital technologies by various institutions, enterprises, the use of computer technologies). The authors noted that "digitalisation" is impossible without preliminary implementation of "digitisation". Dividing digital transformation into two consecutive stages simplifies the understanding of digital transformation.

Based on the research of S. Brenen and D. Kreiss, R. Bukh and R. Heeks developed a model of the digital economy, which consists of three levels: digital sector (telecommunications, software, computer technology production, information and telecommunications technologies); digital economy (IT sector, digital services, etc.); digitalised economy (network business, e-commerce, digital economy) [3].

V.P. Vyshnevskyi and S.I. Kniaziev [4] investigated the digital economy and potential opportunities for its development in Ukraine. The authors conducted a thorough investigation of digitalisation processes, their impact on economic development and assessed the transformational potential of digital transformation of the economy. Vyshnevskyi and Kniaziev define the properties of the information and communication technologies sector, legal and economic prerequisites for their development. The researchers revealed the problems of transition from traditional to digital business, identified the factors of influence of digitalisation processes on the final results of economic activity, and proposed principles for assessing the transformational potential of the digital economy.

O. Brechko justified the determinants of digital transformation of the national economy in the context of its balanced, competitive development. The author identified the prerequisites for digital transformation, including the following: development of the physical infrastructure of internet access; growth in the number of internet users; development of e-commerce; development of the country's IT industry; improvement of the national e-government system [5]. Furthermore, Brechko outlined the main obstacles to digitalisation and highlighted the challenges and threats to the development of transformation processes.

In her research, O.I. Pizhuk revealed the conceptual foundations of Industry 4.0, which are implemented based on digital technologies. The author identified digital technologies as a determinant of economic transformation, developed a methodology for assessing the level of digital transformation and carried out a rating assessment of Ukraine using international indices of digital transformation of the economy. An essential achievement of the author is the formation of a vision for the successful implementation of the "breakthrough" strategy in the context of digital transformation of the economy of Ukraine, built using the tools of Goldratt's constraint theory [6].

As for foreign researchers, their research is applied in nature. Thus, G.N. Kutsuri, S.S. Kamberdieva, V.K.H. Dedegkaev et al. investigate the influence of digital technologies on the standard of living of people [7]. O. Fokina, S. Barinov consider digital technologies as a specific factor of economic growth [8]. The impact of digital technologies on business and innovation implementation, as well as the new opportunities they create for business, was the subject of research by P. Davies [9]. Agreeing with the opinion of A. Purnomo, T. Susanti, E. Rosyidah et al., the authors of this paper note that the positive impact of the economy digitalisation is obvious, but on the other hand, the risks and challenges of using the digital economy, threats to the development of a novel model of the economic sector are also inevitable [10].

Therefore, there is a relevant problem of investigating the key factors of digital transformation of society, its positive consequences and advantages arising as a result of digitalisation for the state, business entities, and each person, as well as identifying and systematising the risks and threats that digital transformation generates in various spheres – political, technological, economic, legal, and social. The problem of assessing the spread of digital technologies needs to be solved.

Materials and Methods

Upon authoring this paper, general and special methods of scientific cognition were used to solve the tasks set. To cover the essence of the term "digital transformation", the following methods of scientific cognition were used: analysis and synthesis, induction and deduction, abstraction, generalisation, modelling, analogy. The use of the observation method allowed highlighting the advantages of digitalisation of society, identifying risks and threats to economic security. Classification and systematisation methods were also used to identify threats to economic security. Upon evaluating the factual material, economic statistics methods were used, namely statistical observation, the grouping method, and the method of summarising indicators. Using the above methods, the collection of primary statistical material was organised, all the facts collected as a result of mass statistical observation were systematised, the interrelations and scales of the phenomena under study were revealed, and the regularities of their development were found. To summarise the obtained statistical data and visualise them, the graphical method was used to build diagrams and graphs.

Results and Discussion

Results of theoretical intelligence

Digital transformation is discussed by government officials at various levels and is the subject of research by scientists. Despite the relevance of digitalisation, there is still no unified approach to understanding the term "digital transformation". Research on existing approaches has shown that with the evolution of digital technologies, the understanding of the term "digital transformation" has also changed. If at the initial stages "digital transformation" was identified with digitisation of data (transformation of data in conventional forms into digital ones), then with the spread of digital technologies, the meaning of this concept has considerably expanded. There are two approaches to understanding the essence of the term "digital transformation".

According to the first approach, the digital transformation involves three stages:

– digitisation – the process of transition from analogue to digital waveform;

– digitalisation – the process of digitising economic relations and processes using digital technologies that provide innovative opportunities for creating value and generating income;

– digital transformation – an in-depth transformation of business processes, competencies, business models to fully use the capabilities of digital technologies and their impact on the activities of enterprises, their customers, and the state of markets [4, p. 37].

The second approach considers digital transformation as the implementation of two consecutive stages: digitisation and digitalisation. Notably, in some English-language scientific publications, the term "digitisation" and "digitalisation" are used interchangeably. However, the conducted etymological study showed that there is a fundamental difference between them. Digitisation – the process of conversion of analogue data (images, video, and text materials) into digital form; while digitalisation – introduction or increase in the use of digital and computer technologies by organisations in a particular industry, country, etc. [2].

Having considered both approaches, the authors of this study disagree with the proponents of the first approach regarding the use of the term "digital transformation". The authors believe that the use of this term in this sense is erroneous. The term "transformation" means a change, transformation of the type, form, essential properties, etc. of something [11]. Therefore, it is inappropriate to single out a separate stage – digital transformation – in the transformation process.

Presently, digital transformation is spreading to various sectors of the economy, social sphere, education, etc. The pace of the spread of digital technologies and their penetration into various spheres of human life are influenced by various factors, among which it is necessary to single out the growth in demand for innovative "digital products", the transformation of the value system in society, the change in conventional business models and consumer service models; development of legislative support for the development of the digital economy.

The prerequisites for the spread of digital technologies include the development of the physical infrastructure of Internet access in the world, the growth of the number of Internet users; the development of e-commerce; the development of the country's IT industry; the improvement of the national e-government system [5].

The main obstacles to the digital transformation of Ukrainian society are factors that have formed in its various spheres – political, economic, technological, psychological, etc. Digital transformation took place simultaneously with the formation of Ukrainian statehood, and therefore the digitisation took place in the absence of standards for the use of digital technologies, incomplete regulatory support for relations in this area, programmes to encourage the creation and use of digital technologies, and a lack of funds for national financial support for digitisation. A substantial obstacle to the spread of digital technologies is their high cost. In such a situation, the country is forced to buy foreign technologies and developments or encourage its own domestic scientific research. Both the first and second options require substantial financial investments and time to implement them.

Technological factors also hinder the introduction of digital technologies in the production sector, namely: underdevelopment of digital infrastructure, slow pace of spread of high-quality Internet coverage, low level of protection of digital technologies from external interference, lack of developments that would consider the technological features of each industry, dependence on developments of foreign countries. An important tool for the spread of digital technologies is the Internet network. To assess a country's readiness for digital transformation, the Network Readiness Index is used – a comprehensive indicator that characterises the level of development of information and communication technologies and the network economy in countries around the world. Based on the results of the assessment of this indicator in 2020, Ukraine ranked 64th in the world with a value of 49.43 [12].

Personal and psychological obstacles also arise on the way to digitalisation: unwillingness to change the form of work, study, constantly improve skills, lack of understanding of the digital transformation and their advantages.

Analysis of the digital economy development

The development of the digital economy in Ukraine is proceeding at a slow pace, as evidenced by the low share of GDP produced in this area. The share of the digital economy

in Ukraine is only 3% (only 2.6 billion USD). In the IMF's digital competitiveness rating based on the results of 2019, Ukraine ranked 60th among 63 countries in Europe, the Middle East, and Africa [13]. At the international level, two indicators are used to characterise the level of digital technology spread – the e-Participation Index and the e-Governance Development Index. The e-Governance Development Index (EGDI) is used to assess the readiness and capacity of the national administration to use information and communication technologies. The EGDI index is a complex indicator that combines three sub-indices – online services, telecommunications infrastructure, and human capital. It is used to measure the readiness of governments to use information and communication technologies to provide high-quality information and public services to the population, businesses and apply them in the work of the authorities themselves [14].

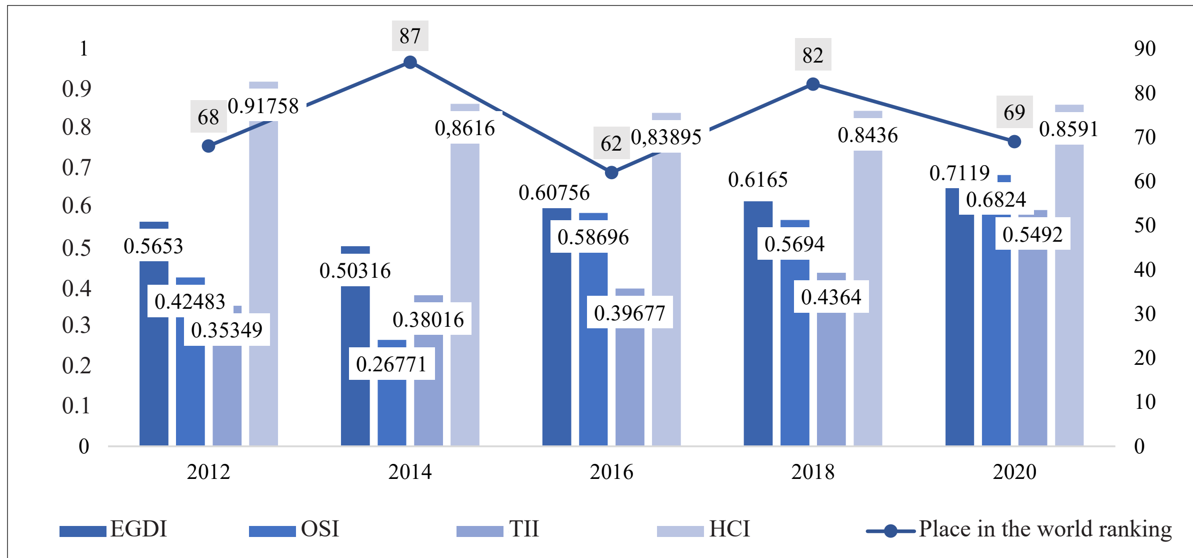

Figure 1. The EDGI of Ukraine and place in the world ranking during 2012-2020

Source: compiled by the author based on [15]

The EGDI is based on three sub-indices:

– OSI (*Online Service Index*) – calculated by UNDESA;

– TII (*Telecommunication Infrastructure Index*) – calculated by the ITU;

– HCI (*Human Capital Index*) – calculated by UNESCO together with UNDP [16].

Even though the value of the EDGI is growing annually, Ukraine's place in the world ranking is low. According to the results of 2020, Germany is the leader in the introduction of information and communication technologies in administrative activities, with an index value of 0.9758. Among Ukraine's closest neighbours, the Republic of Poland has the highest index value – 0.8531.

Unlike the EDGI, the e-Participation Index (EPI) focuses on expanding the provision of interactive electronic services to the population, which is used by the UN to better review the problem. The EPI includes three components that reflect the completeness of the implementation of individual factors of electronic participation:

– electronic (e-)information – a component that makes provision for the involvement of citizens by providing them with government information with or without the right of access to information;

– electronic (e-)consulting – involvement of citizens in the form of their contributions to the discussion of national policy and services;

– electronic (e-)decision-making – expanding the rights and opportunities of citizens by jointly designing options for political decisions, products, services, and conditions for their provision [14].

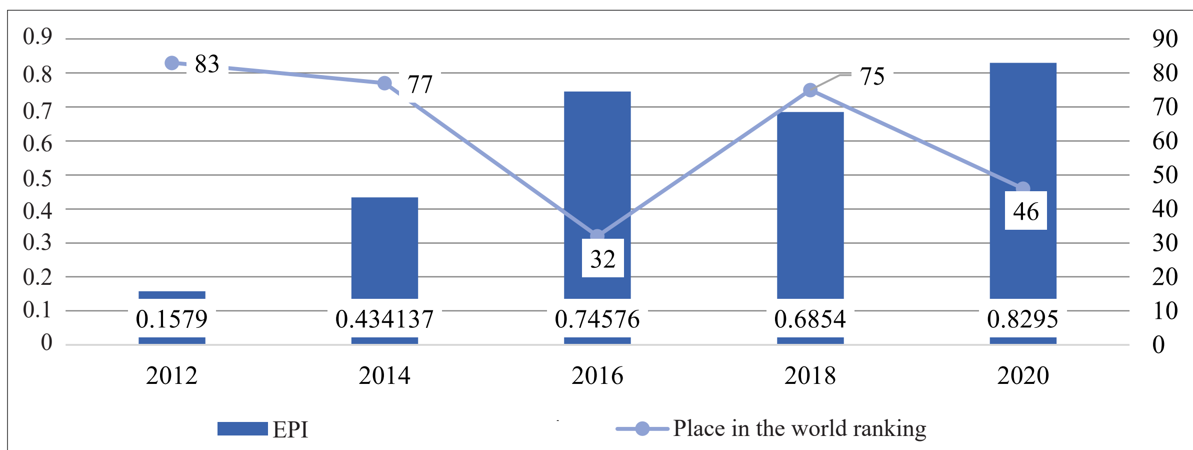

Figure 2. The EPI and Ukraine's place in the world ranking during 2012-2020

Source: compiled by the authors based on [15; 17]

There is substantial progress towards digitalisation of the public sphere and the provision of public services to the population. Thus, in 2020, Ukraine took 46th place in the world ranking, which is 29 positions higher than in 2018. The leaders of this rating are Estonia, South Korea, the United States, Japan, and New Zealand. The outlined trends in changes in the EPI allow hoping for Ukraine's ascent to the top 20 countries of the rating in 2022.

Advantages and disadvantages of society digitalisation

The spread of digital technologies creates substantial benefits for the state, the business environment, and the population. At the state level, a positive impact is manifested in improving the quality of life of the population; the level of productivity of public labour [18]. Robotisation and automation of production processes reduce the share of hard work of a person, which contributes to the preservation of their health and increases life expectancy. The prevalence of information technologies simplifies access to information, increases people's awareness, and ensures the availability of goods and services.

Digital technologies have also positively affected the business environment. As the "Global Digital IQ 2020" study showed, 5% of the surveyed leading enterprises noted that their position is primarily related to the implementation of digital technologies. 76% of the leading companies receive a considerable benefit from the implementation of digital technologies, and another 17% of respondents expect a prominent increase in profits in the next 3 years [14]. Digitalisation of business helps reduce the cost of selling products, the cost of searching and processing information, making transactions, launching and promoting goods to the market, etc., the duration of the business cycle; the invention of novel technologies and the transition to the production of innovative products aimed at developing technological intelligence.

Everyone also gets tangible benefits from digitalisation. The spread of digital technologies reduces the cost of internet services and transactions, simplifies access to educational, entertainment, and information resources, reduces barriers between consumers and producers of products, creates new areas of employment and new types of professions [19].

However, apart from the obvious advantages, digital transformation (like any transformation) creates risks and threats. Given the nature of the arising risks and threats, they can be divided into two groups – technological threats (related to digital technology itself) and threats arising from the institutional transformation of society.

The essence of technological risks lies in the very nature of digital technologies, which are based on fundamentally novel approaches and resources. Digitalisation involves the introduction of digital technologies into the economic process, radically changing the way products are produced, promoted, and sold. In the "age of digital technologies", Internet of Things technologies, *Big Data* technology, artificial intelligence, brain networks, 3D printing, and augmented reality come to the fore.

Digital technologies are at the stage of active development, and therefore errors, failures, and unauthorised interventions often occur. However, it is not these mistakes that create the main risks. At the same time, Ukrainian enterprises do not have the technological and financial capacity to develop and implement their own digital technologies, while the lion's share of digital technologies is borrowed. The use of borrowed technologies creates many risks for the Ukrainian economy, and considering the specifics of digital technologies, for the country as a whole:

– dependence on the policies of leading companies in the field of information and communication technologies;

– constant development of technologies contributes to the occurrence of a significant number of errors and shortcomings;

– ability to monitor the activities and data of clients by development companies;

– access to information databases, which contributes to the commission of "industrial espionage", cybercrime, fraudulent attacks, penetration into state information systems.

Another group of risks that digital transformation creates is the risks that arise in any transformation of society:

– destruction of established business models, lack of qualified personnel capable of working according to new algorithms;

– monopolisation of markets by multinational corporations that capable of financing the introduction of the latest digital technologies;

– automation and robotisation of production processes contribute to the release of jobs and an increase in the unemployment rate, which increases the burden on the state;

– digital technologies penetrate a human's personal space, use data, and analyse behaviour that violates established norms of identity protection;

– existing regulations do not govern the entire range of relations arising in a digital society. This contributes to an increase in the number of abuses and scams using digital technologies.

Conclusions

The research conducted in this paper is aimed at identifying the positive and negative consequences of digital transformation of society. While the vast majority of researchers focus on the benefits of digitalisation and its impact on economic development, the authors of this paper identified the risks and threats to economic security arising as a result of digital transformation. Such identification of risks and threats allows not only reducing the adverse impact on the economy, but also improving digital technologies themselves and preparing society for their implementation. The study allowed formulating the following conclusions:

– the spread of digital technologies has become a defining feature of the 21st century. Digital technologies have penetrated into various spheres of society's life, which allowed introducing the phrase "digital transformation of society" into discourse;

– the digitalisation is characterised by its global scale. To retain competitiveness and relevance, the state should support the spread of digital technologies. The main obstacles to digital transformation are the lack of domestic developments, underdevelopment of digital infrastructure, low level of protection of digital technologies from external interference, lack of state support;

– the spread of digital technologies creates many advantages for the state, business, and every individual. The main advantages include cheaper transactions, the ability to bring the buyer and seller closer together, free access to educational and cultural services, and reduction of hard human labour;

– digital transformation (like any other transformation) creates many risks and threats in various spheres of society, which can be grouped into two groups: technological threats and threats arising as a result of the institutional transformation

of society. To demonstrate all the benefits of developing the digital economy and minimise the risks created by it, it is necessary to ensure a balanced development of digital technologies, which will be the subject of further research.

References

[1] Boulton, C. (2020). *What is digital transformation? A necessary disruption.* Retrieved from https://www.cio.com/article/3211428/what-is-digital-transformation-a-necessary-disruption.html.
[2] Brennen, S., & Kreiss, D. (2014). Digitalization and Digitization. *Culture Digitally*. Retrieved from https://culturedigitally.org/2014/09/digitalization-and-digitization/.
[3] Bukh, R., & Heeks, R. (2017). Defining, conceptualising and measuring the digital economy. *Development Informatics working paper series*, 68. Retrieved from https://diodeweb.files.wordpress.com/2017/08/diwkppr68-diode.pdf.
[4] Vyshnevskyi, V.P., & Kniazev, S.I. (Eds.). (2020). *Digitalization of the country's economy: transnational potential*. Kyiv: Akademperiodyka.
[5] Brechko, O. (2020). Determinants of digital transformation of the national economy. *Bulletin of the Ternopil National Economic University*, 4, 7-24.
[6] Pizhuk, O.I. (2020). *Digital transformation of Ukraine: Limitations and possibilities*. Irpin: State Fiscal Service University of Ukraine.
[7] Kutsuri, G.N., Kamberdieva, S.S., Dedegkaev, V.K.H., Sopoeva, I.A., & Shelkunova, T.G. (2019). Impact of digitalization on improvement of economy, IT and Internet of business. *Journal of Physics: Conference Series,* 1399(3). doi: 10.1088/1742-6596/1399/3/033008.
[8] Fokina, O., & Barinov, S. (2019). Marketing concepts of customer experience in digital economy. *E3S Web of Conferences,* 135, article number 04048. doi: 10.1051/e3sconf/201913504048.
[9] Davies, P., & Ng, I. (2015). Moving towards the incomplete: A research agenda for the development of future products in the digital economy. *Procedia Manufacturing,* 3, 3368-3374. doi: 10.1016/j.promfg.2015.07.498.
[10] Purnomo, A., Susanti, T., Rosyidah, E., Firdausi, N., & Idhom, M. (2022). Digital economy research: Thirty-five years insights of retrospective review. *Procedia Computer Science,* 197, 68-75. doi: 10.1016/j.procs.2021.12.119.
[11] Dictionary of foreign words. (n.d.). Retrieved from https://www.jnsm.com.ua/cgi-bin/u/book/sis.pl.
[12] Network Readiness Index. (n.d.). Retrieved from https://networkreadinessindex.org/.
[13] Pyshchulina, O. (2019). Two aspects of digital technology: digital dictatorship or maintaining stability. In *The sphere of employment and income in the digital economy conditions: Mechanisms of regulation, challenges and development dominants: Book of participants' abstracts of the International scientific and practical conference* (pp. 115-117). Kyiv: Kyiv National Economic University named after Vadym Hetman.
[14] E-Governance for Accountability and Participation (EGAP). (n.d.). Retrieved from https://egap.in.ua/en/.
[15] E-government development index and e-participation index. Ukraine. (n.d.). Retrieved from https://publicadministration.un.org/egovkb/en-us/Data/Country-Information/id/180-Ukraine.
[16] Semenchenko, A.I., & Dreshpak, V.M. (Eds.). (2017). *E-government and e-democracy* (Part 6: Monitoring, evaluation and forecasting of the development of the electronic government system). Kyiv: FOP Moskalenko O.M., 2017.
[17] 2022 Global Digital IQ. (2022). *How business leaders can raise their Digital IQ.* Retrieved from https://www.pwc.com/us/en/library/digital-iq.html.
[18] Pomaza-Ponomarenko, A., Hren, L., Durman, O., Bondarchuk, N., & Vozniuk, E. (2020). Problematic aspects of state policy modernization in the conditions of digitalization. *International Journal of Management*, 11(6), 508-515.
[19] Luhovyi, V.I., Reheilo, I.Iu., Bazeliuk, N.V., & Bazeliuk, O.V. (2019). Global digitalization of educational and scientific space and challenges of modernization of scientific periodicals of the National Academy of Pedagogical Sciences of Ukraine. *Information Technologies and Learning Tools*, 73(5), 264-283.
[20] Pomaza-Ponomarenko, A.L., Hren, L.M., Durman, O.L., Bondarchuk, N.V., & Vorobets, V. (2020). Management mechanisms in the context of digitization of all spheres of society. *Revista San Gregorio*, 42, 1-9.

Список використаних джерел

[1] Boulton C. What is digital transformation? A necessary disruption. 2020. URL: https://www.cio.com/article/3211428/what-is-digital-transformation-a-necessary-disruption.html.
[2] Brennen S., Kreiss D. Digitalization and Digitization. *Culture Digitally*. 2014. URL: https://culturedigitally.org/2014/09/digitalization-and-digitization/.
[3] Bukh R., Heeks R. Defining, conceptualising and measuring the digital economy. *Development Informatics working paper series*. No. 68. URL: https://diodeweb.files.wordpress.com/2017/08/diwkppr68-diode.pdf.
[4] Цифровізація економіки країни: транснаціональний потенціал: монографія / за ред. В.П. Вишневського та С.І. Князєва. Київ: Академперіодика, 2020. 188 с.
[5] Бречко О. Детермінанти цифрової трансформації національної економіки. *Вісник Тернопільського національного економічного університету.* 2020. № 4. С. 7–24.
[6] Піжук О.І. Цифрова трансформація України: обмеження та можливості: монографія. Ірпінь: УДФСУ, 2020. 504 с.
[7] Impact of digitalization on improvement of economy, IT and Internet of business / G.N. Kutsuri et al. *Journal of Physics: Conference Series.* 2019. Vol. 1399, No. 3. Article number 033008. doi: 10.1088/1742-6596/1399/3/033008.
[8] Fokina O., Barinov S. Marketing concepts of customer experience in digital economy. *E3S Web of Conferences.* 2019. Vol. 135. Article number 04048. doi: 10.1051/e3sconf/201913504048.

[9] Davies P. Moving towards the incomplete: A research agenda for the development of future products in the digital economy. *Procedia Manufacturing.* 2015. Vol. 3. P. 3368-3374. doi: 10.1016/j.promfg.2015.07.498.
[10] Digital economy research: Thirty-five years insights of retrospective review / A. Purnomo et al. *Procedia Computer Science.* 2022. Vol. 197. P. 68-75. doi: 10.1016/j.procs.2021.12.119.
[11] Словник іншомовних слів. URL: https://www.jnsm.com.ua/cgi-bin/u/book/sis.pl (дата звернення: 01.06.2022).
[12] Рейтинг країн світу по індексу мережевої готовності. URL: https://networkreadinessindex.org.
[13] Пищулина О. Две стороны цифровых технологий: цифровая диктатура или сохранение устойчивости. *Сфера зайнятості і доходів в умовах цифрової економіки: механізми регулювання, виклики та домінанти розвитку*: зб. тез доповідей учасників Міжнар. наук.-практ. конф. (м. Київ, 23–24 жовт. 2019 р.). Київ: КНЕУ, 2019. С. 115–117.
[14] Електронне врядування для підзвітності влади та участі громади (EGAP). URL: https://egap.in.ua/.
[15] Електронне урядування та електронна демократія*:* навч. посіб. у 15 ч. / за заг. ред. А.І. Семенченка, В.М. Дрешпака. Київ: ФОП Москаленко О.М., 2017. Ч. 6: Моніторинг, оцінювання та прогнозування розвитку системи електронного урядування. 66 с.
[16] Індекс розвитку електронного уряду та індекс електронної участі. Україна. URL:https://publicadministration.un.org/egovkb/en-us/Data/Country-Information/id/180-Ukraine.
[17] 2022 Digital IQ. How business leaders can raise their Digital IQ. URL: https://www.pwc.com/us/en/library/digital-iq.html.
[18] Problematic aspects of state policy modernization in the conditions of digitalization / A. Pomaza-Ponomarenko et al. *International Journal of Management*. 2020. Vol. 11, No. 6. P. 508–515.
[19] Луговий В.І., Регейло І.Ю., Базелюк Н.В., Базелюк О.В. Глобальна цифровізація освітньо-наукового простору і виклики модернізації наукової періодики НАПН України. *Інформаційні технології і засоби навчання*. 2019. Т. 73, № 5. С. 264–283.
[20] Management mechanisms in the context of digitization of all spheres of society / Pomaza-Ponomarenko A.L. et al. *Revista San Gregorio*. 2020. No. 42. P. 1–9.

Цифрова трансформація: передумови, тенденції, ризики та загрози

Ірина Олександрівна Ревак, Роман Тарасович Грень

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Сучасна світова економіка характеризується використанням цифрових технологій як одного із чинників економічного зростання. Цифрова трансформація створює нові можливості для розвитку, але водночас виникають ризики та загрози для традиційних економік. Тому дослідження цифрової трансформації набуває особливої актуальності. Метою статті є розкриття сутності поняття «цифрова трансформація», виокремлення її переваг та недоліків, проведення аналізу процесу цифровізації української економіки. У процесі здійснення теоретичної розвідки використано такі методи наукового пізнання: аналіз, синтез, спостереження, узагальнення, класифікацію. Теоретичні припущення перевірялись із використанням аналітичних матеріалів. На основі проведеного аналізу зроблено висновки та розроблено практичні рекомендації. Проведено дослідження відмінностей між поняттями «диджиталізація» та «диджитизація». Виокремлено основні передумови поширення цифрових технологій: розвиток фізичної інфраструктури доступу до інтернету у світі, зростання кількості користувачів мережі «Інтернет»; розвиток електронної комерції; розвиток IT-галузі країни; вдосконалення національної системи електронного уряду. Встановлено, що основними перепонами на шляху цифрової трансформації українського суспільства є чинники, сформовані у політичній, економічній, технологічній, психологічній сферах. Проаналізовано динаміку індексів, за допомогою яких оцінюють поширення цифрових технологій: Індекс електронної участі та Індекс розвитку електронного урядування. Встановлено, що упродовж останніх років спостерігається їхня позитивна динаміка. Систематизовано основні переваги впровадження цифрових технологій. На державному рівні позитивний вплив проявляється у підвищенні якості життя населення; рівня продуктивності суспільної праці; зменшені частки важкої праці; збереженню здоров’я та подовження тривалості життя людини; спрощенню доступу до інформації. Позитивний вплив цифрових технологій на бізнес-середовище проявляється у скороченні витрат на реалізацію продукції, на пошук та обробку інформації, здійснення трансакцій, виведення та просування на ринок товарів, тривалості бізнес-циклу; винайденню нових технологій та переходу до виробництва нових інноваційних продуктів. Перевагами для особи є зниження вартості інтернет-послуг та трансакцій, спрощення доступу до освітніх, розважальних та інформаційних ресурсів. Охарактеризовано основні ризики та загрози, які створює цифрова трансформація суспільства: технологічні, економічні, політичні, соціальні, правові, особистісні. Практичне значення отриманих результатів полягає в можливості виявлення, нейтралізації ризиків та загроз цифровізації

Ключові слова: цифрова економіка, диджиталізація, ризики цифровізації економіки, індекс електронної участі, індекс розвитку електронного урядування

UDC [351.863 (477):351.84] (043.3)
DOI: 10.32518/2617-4162-2022-5-2-68-76

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Institutional Foundations of de-Shadowing the Economy of Ukraine in the National Financial Security System

Vyacheslav S. Blikhar*, **Mariia V. Vinichuk**, **Angela A. Ryzhkova**

Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine

Abstract. The growth of the shadow sector of the economy of Ukraine has a considerable destabilising impact on the country's financial sector, as a result of which increase threats, risks, challenges, and dangers to the financial security of the state, which intensify the macroeconomic and socio-political crisis. Under such conditions, the problems of justifying the institutional foundations and determining the vectors of de-shadowing the Ukrainian economy are being updated, the solution of which will ensure an optimal level of financial security of the state. The purpose of this study was to expand research on the theoretical foundations and practical recommendations on the institutional foundations of de-shadowing the Ukrainian economy in the national financial security system. The theoretical and methodological framework of this study included methods of analysis and synthesis, analogy and comparison, generalisation and systematisation, and a graphical method. The essence of the shadow economy, financial security, de-shadowing of the economy was determined and the place of the shadow economy in the system of national financial security was outlined, the influence of the shadow economy on the level of financial security of Ukraine and the dynamics of the level of the shadow economy, changes in the volume of real GDP of Ukraine, the dynamics of the level of the shadow economy of Ukraine in the context of economic activities, and the dynamics of the volume and level of official GDP created by shadow wages was analysed. The main risks, threats, challenges, and dangers of the national financial security were investigated, and it was proved that one of its biggest threats is shadow economic activity. The main vectors of economy de-shadowing were considered and improvement of methodological tools for assessing the level of the shadow economy of Ukraine was proposed. Strategic priorities of de-shadowing the Ukrainian economy in the system of ensuring financial security of the state were defined, namely the development of legal conditions for de-shadowing wages and improving the quality and efficiency of public finance management. The obtained results of the study can be used by state authorities, forming financial policy, and determining the main vectors of de-shadowing the economy of Ukraine

Keywords: shadow economy, components of financial security, indicators of financial security, threats, risks, challenges

Introduction

At the present stage of socio-economic development of Ukraine, considerable structural changes are observed caused by the incompleteness of the development and imperfection of the global financial and economic system. Imbalances in the development of the national economy and economic security led to the intensification of economic activities outside the official sector, which actualised the issue of the economy de-shadowing, which, supported by globalisation factors, slowed down the pace of Ukraine, building civil society, and integration into the world economic community. The processes of instability have intensified the pace of development of economic crime and the development of the shadow sector of the economy, which has led to significant imbalances and structural changes in the national economy. Destructive threats to the national economy and economic security of the country adversely affect macroeconomic stability, reduce economic dynamics, stability of the national currency, and affect the effective performance of functions by the national financial system, which together leads to a decrease in the level of national financial security. Under such conditions, the need to develop and implement a set of purposeful measures to counteract shadow economic activity and de-shadow the economy of Ukraine is being updated.

The problems of ensuring the national financial security are becoming increasingly relevant, especially in the conditions of stable financial, economic, and socio-political instability, intensification of crisis processes and phenomena in the financial sector, slowing down socio-economic development and the emergence of imbalances upon the formation of capital and distribution of financial resources. The current state of the financial, currency, monetary, and banking systems shows the inability of Ukraine to effectively counter challenges, threats, dangers, and destabilising factors. As a result, there is a weakening of the protection of national interests in the financial sphere, a decrease in the level of financial security and an intensification of economic activities outside the official sector of the economy. It is the de-shadowing of the economy that constitutes one of the key threats to the national financial security, since it causes macroeconomic imbalances, an increase in the state budget

Suggested Citation

Article's History: Received: 10.03.2022 Revised: 09.04.2022 Accepted: 10.05.2022

Blikhar, V.S., Vinichuk, M.V., & Ryzhkova, A.A. (2022). Institutional foundations of de-shadowing the economy of Ukraine in the national inancial security system. *Social and Legal Studios*, 5(2), 68-76.

*Corresponding author

deficit and external debt, an increase in the level of poverty, unemployment, social inequality, and a decrease in the purchasing power of the population against the background of increasing influence of inflationary factors. These trends indicate the presence of serious deformations in the implementation of structural reforms in the state and the inability of Ukraine to achieve high indicators of economic stability, ensure the well-being of the population and its social security.

These issues substantially affect the level of national financial security and require in-depth research towards developing effective mechanisms for countering threats, risks, challenges, and dangers of financial security and achieving an appropriate level of protection of national interests in the financial sphere.

Problematic aspects of the national financial security for a long time have been in the centre of attention of such well-known economists as Z. Varnaliy [1], who interprets it as a state of protection of the interests of economic agents in the financial sphere, M. Yermoshenko [2], whose works focus on the developed set of measures to prevent and counteract risks and threats, O. Hudzovata [3], which attaches foremost importance to the investigation of the monetary system as part of the national financial security, O. Baranovsky [4], who considers financial security as a component of the national economic security, A. Sukhorukov, Yu. Kharazishvili [5], who investigated the possibilities of guaranteeing the ability of the national financial system to carry out rational distribution and use of financial resources.

A significant contribution to the investigation of the interrelation and mutual influence of national financial security with the de-shadowing of the economy was made by Ya. Honcharuk and M. Fleichuk [6], justifying the need to identify the main problems of de-shadowing the economy, Ya. Zhalilo [7; 8], linking the growing trends of de-shadowing the national economy with the problems of destabilisation of the financial system, E. Libanova and M. Khvesyk [9], studying regional features of the development of the shadow sector of the economy.

At the international level, L. Medina and F. Schneider considered the problems of investigating the de-shadowing of the economy [10-13], noting a decrease in the average size of the shadow economy among European countries from 16.48% of GDP in 2020 to 16.07% in 2021. However, in 2022, scientists predict an increase in the level of the shadow economy in European countries to an average of 15.96% of GDP, which indicates a considerable scale of de-shadowing of the economy not only in Ukraine. Therewith, A. Sauka and T.J. Putniņš [14] prove that the key part of the shadow economy of individual European countries is the shadow salary paid in envelopes. At the same time, J. Glassman and G. Shambless [15] associate the problems of de-shadowing the financial sector of the economy of the world's leading countries with the destabilisation of the military-political situation in Eastern Europe caused by the full-scale invasion of the Russian Federation on the territory of sovereign Ukraine.

Notably, a single unified and comprehensive solution to the problems of de-shadowing the economy of Ukraine in the system of ensuring national financial security has not yet been found, which requires expanding developments in this area. Furthermore, the mutual influence and interdependence of the shadow economy with the national financial security is still understudied and requires an in-depth investigation in present-day context. Under such conditions, it is particularly relevant to find the interdependence of the country's GDP volumes on the growth of the shadow economy and the aggravation of the impact of risks, threats, and dangers accumulated in the financial sector, as well as to identify the main vectors of de-shadowing the economy of Ukraine, which the authors of this paper propose to reflect in this study.

The purpose of this study was to expand research on the theoretical foundations and practical recommendations on the institutional foundations of de-shadowing the Ukrainian economy in the national financial security system.

Issues of the Study of De-Shadowing the Economy of Ukraine in the System of National Financial Security

The results of the comparative analysis of the main approaches to determining the essence of the economic category "national financial security" indicate the lack of consensus and the existence of individual scientific opinions. Z. Varnaliy [1, p. 42] interprets the national financial security as a state of security of the financial interests of business entities operating at different levels of financial relations, and as the state of security of economic sectors, regions, enterprises, and other economic agents with sufficient amounts of state financial resources, which allows them to meet their needs and perform their obligations.

M. Yermoshenko [2] believes that the national financial security is a state of the financial and credit sphere, where a balance of its development is achieved, along with resistance to external and internal risks and threats, and the ability to ensure the effective performance of the national financial and economic system. Therewith, O. Hudzovata [3] claims that the key role in the system of ensuring national financial security is played by the monetary sphere, which creates conditions for the sustainable development of the country's economy.

O. Baranovsky [4] adheres to the opinion that the national financial security is an essential system-forming component of the economic security of Ukraine, which is based on the competitiveness, stability, and independence of the national financial system and is expressed through a system of indicators, criteria, and parameters of the state of financial flows in the economy.

A. Sukhorukov and Yu. Kharazishvili [5] detail their research on the essence of national financial security, as a result of which financial security is positioned as the protection of the interests of the state in the financial and credit sphere, where it is possible to guarantee the ability of monetary, budget, and tax systems to effectively form, store, and efficiently use the financial resources of the state.

The presented opinions of scientists on the content of national financial security are systematised in the definition presented in the "On Approval of Methodical Recommendations for Calculating the Level of Economic Security of Ukraine" [16], according to which financial security characterises such a state of the financial system of Ukraine, which allows providing the necessary financial conditions for sustainable socio-economic development of the country, resistance to the impact of financial shocks and imbalances, as well as maintaining the integrity and unity of the financial system. Furthermore, legislatively, this regulation defines the main components of the national financial security, which are systematised in Figure 1, and provides a list of

indicators that allow assessing the level of financial security of Ukraine. The destabilising factors of the external and internal environment, socio-economic and socio-political risks and threats [17, p. 91], as well as such factors as the level of financial independence, the nature of national monetary policy, the political climate and legislative support for the functioning of the financial sphere [18, p. 24-25] substantially affect the state of financial security components.

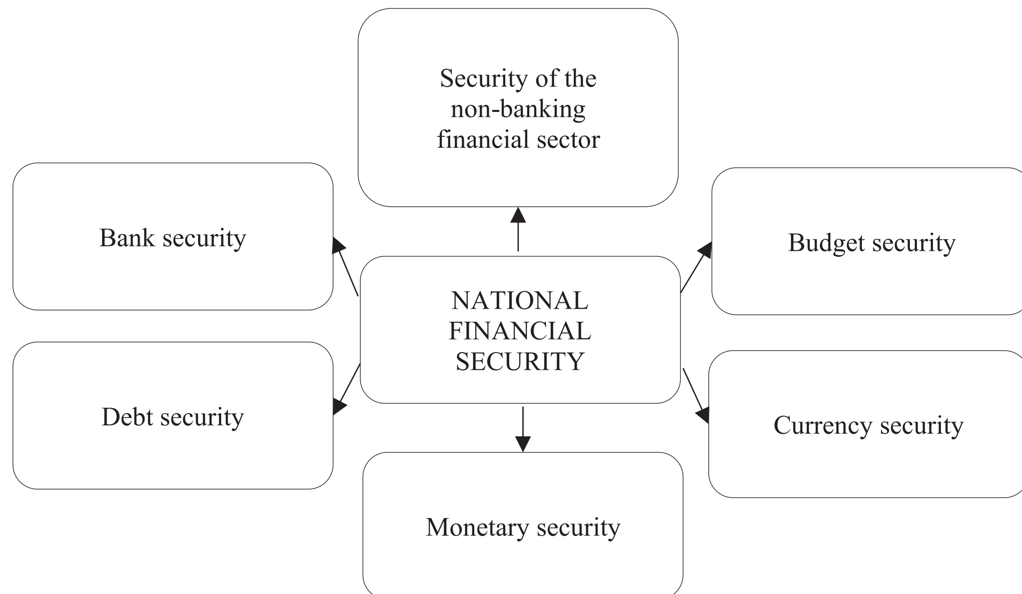

Figure 1. Components of financial security of Ukraine

Source: developed by the author of this study

According to the basic principles of the National Security Strategy of Ukraine [19], the strategic course of the state determines the country's acquisition of full membership in the European Union and in the North Atlantic Treaty Organisation, which makes provision for the guarantee of prosperity and security of the population, the implementation of which requires resources that would ensure sustainable and dynamic socio-economic development. However, achieving the desired result requires increased development of competition, de-monopolisation of the economy and its de-shadowing in the face of new challenges and opportunities for Ukraine. Ukraine has considerable strategic advantages in the implementation of this area of development, which is confirmed by the provisions of the National Economic Strategy for the period up to 2030 [20] and the creation of a special central executive authority – the Bureau of Economic Security [21], designed to perform tasks to counteract offences that threaten the interests of the national economy.

In this context, the comments of L. Shemayeva, Ya. Zhalilo and N. Yurkiv [7; 8, p. 70], who emphasise the need to counteract the trends of expanding institutional crisis, which results in the development of the shadow sector of the economy and destructive changes, and the stabilisation of the financial system of Ukraine, are appropriate. A similar opinion is expressed by M. Blikhar, L. Savchenko, I. Komarnytska and M. Vinichuk [22], who, investigating the impact of economic de-shadowing and socio-economic development of the country, proved that the growth of the shadow sector reduces the level of security of the financial sector.

Yu. Kharazishvili [23] claims that the shadow economy is a potential reserve of its official sector since he considers it impossible to assess the parameters of the state of the national economy without considering the shadow segment. Therewith, the scientist is inclined to consider shadow economic activity a threatening socio-economic phenomenon that generates imbalances and structural changes in the financial and economic system.

Prerequisites for the Formation, Current State and Trends in the Development of the Shadow Sector of the Economy of Ukraine

The instability of the development of socio-economic processes in Ukraine indicates the existence of problems related to the intensification of shadow economic activity. Among the most common, I. Mazur and A. Shyshak [24] distinguish a sharp differentiation of income of the population against the background of a decrease in its level of quality of life, shadow employment, institutional instability, legalisation, offshoring, etc. Admittedly, socio-economic transformations have modified the conditions of regional and sectoral development and caused destructive changes in the economy, the impact of which A. Sukhorukov and Yu. Kharazishvili [5] associate with the problems of development of the shadow sector of the economy, characterised by specific regional geopolitical features. At the same time, scientists insist on the validity of calculating the level of the shadow economy, considering the level of the shadow gross regional product, the volume of shadow wages and shadow employment, which factually proves the need to investigate the shadow economy in the regional dimension.

Complementing the scientific research of A. Sukhorukov and Yu. Kharazishvili, E. Libanova and M. Khvesyk [9] concluded that the definition of regional features of the development of the shadow sector of the economy is insufficient and propose to expand scientific thought towards investigating the shadowing of sectors of the national economy.

Admittedly, the problems of de-shadowing the economy of Ukraine in present-day conditions are present and are being updated in the context of a full-scale military invasion of

the Russian Federation on the territory of sovereign Ukraine. The study of the state and trends of the shadow economy (Fig. 2), performed based on "Methodological Recommendations for Calculating the Level of the Shadow Economy" [25], indicates the absence of a stable trend in the development of the shadow sector in Ukraine during 2010-2021.

As the results show, the level of the shadow economy in Ukraine is growing during the period of aggravation of financial, economic, and socio-political crises, as evidenced by the growth of the value of the level of the shadow economy in 2014-2015 (40-43% of official GDP) – the period of the socio-political crisis caused by the Revolution of Dignity, and the growing trend in 2019-2021 (27-31% of official GDP) – the period of the coronavirus crisis and the spread of the COVID-19 pandemic. The crisis periods are characterised by a drop in real GDP, namely to -9.8% in 2015 and -4% in 2020, and a decrease in the level of national financial security. This is confirmed by empirical calculations on the de-shadowing of the economy in European countries, conducted by the Austrian scientist F. Schneider [10-13].

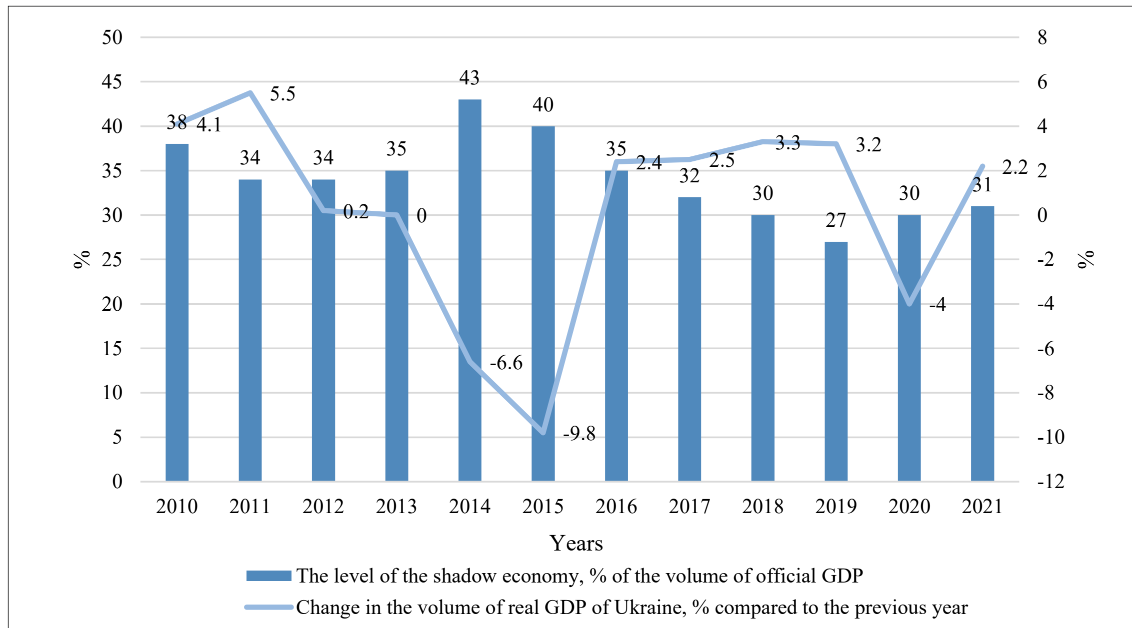

Figure 2. Dynamics of the level of the shadow economy and changes in the volume of real GDP of Ukraine in 2010-2021
Source: calculated from the following data: [26, p. 2; 27, p. 4]

Expansion of the studies of the level of the shadow economy in Ukraine in the sectoral dimension (Fig. 3) suggest that its highest level is observed in transport, agriculture, postal and courier activities (44-54%) and in the field of real estate transactions (30-44%).

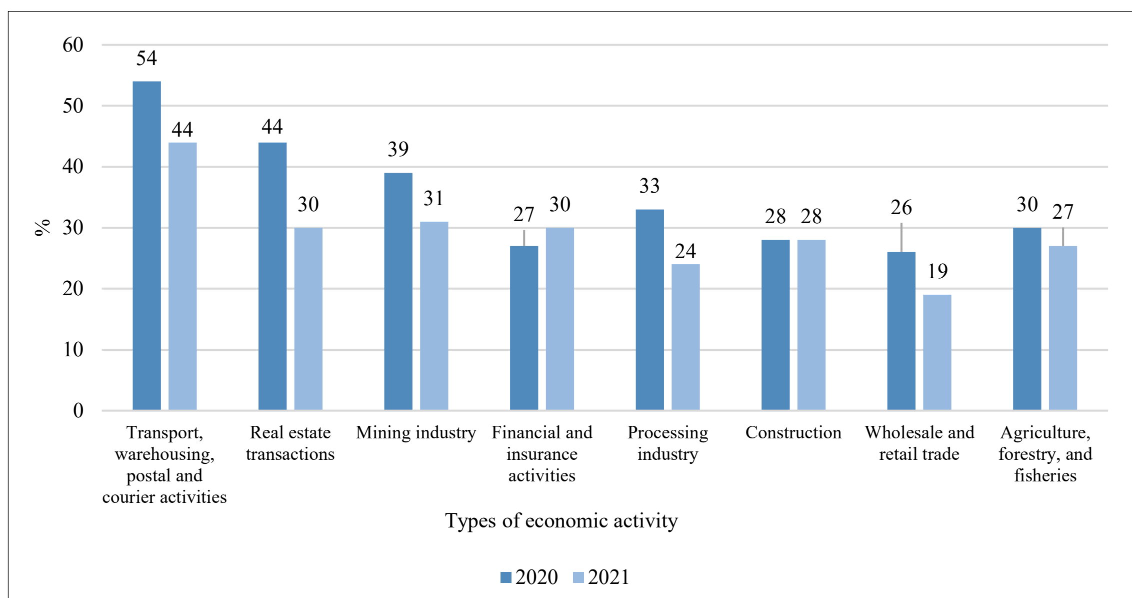

Figure 3. Dynamics of the level of the shadow economy of Ukraine according to types of economic activity in 2020-2021
Source: calculated from the following data: [26, p. 9; 27, p. 9]

Evidently, the development of the shadow sector of the economy of Ukraine is characterised by upward trends, which indicates the intensification of destructive changes in the structure of the national economy, the aggravation of which was noted by Ya. Honcharuk and M. Fleichuk [6, p. 7] upon investigating the features of the shadow sector in Ukraine. They concluded that the dual structure of the country's economy and the modern system of economic relations implies the existence of legal and illegal economic operations that require immediate counteraction, since they qualify as economic crimes. The shadow economy substantially threatens the socio-economic development of the country, which requires strengthening the national policy of de-shadowing the economy [28], as evidenced by estimates of the volume and level of official GDP created by shadow wages in Ukraine in 2013-2020 (Fig. 4), which show growing trends in 2013-2018 from UAH 329.9 billion to UAH 1,393.5 billion (by 322.4%). The subsequent period is characterised by a downtrend from UAH 1,393.5 billion in 2018 to UAH 860 billion in 2020 (by 38.3%).

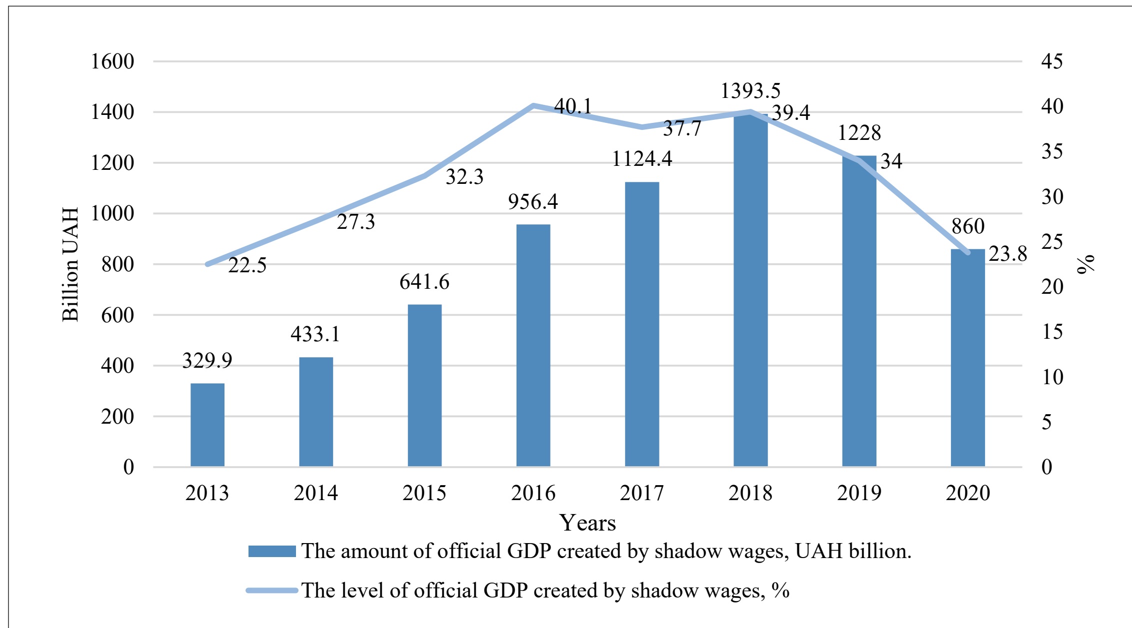

Figure 4. Dynamics of the volume and level of official GDP created by shadow wages in Ukraine in 2013-2020
Source: calculated by the author based on data from [23]

Notably, both the growth of the level of the shadow economy and the official GDP created by shadow wages have a small short-term positive effect, since they partially reduce the level of social tension in society due to an increase in the level of quality of life of the population and its purchasing power. However, from the strategic perspective, this situation leads to the development of threatening processes and phenomena and poses risks to the functioning of the financial sector and ultimately reduces the national financial security, which requires immediate decision-making on the development and implementation of measures to de-shadow the economy. In this context, J. Glassman and G. Shambless [15] rightly note that the main measures to de-shadow the economy of Ukraine should consider the state and development trends of the shadow sector in the conditions of the complex military and political situation in Ukraine, and A. Sauka and T.J. Putniņš [14] emphasise the importance of priority measures to de-shadow wages paid in envelopes.

Strategic Priorities of De-Shadowing the Economy of Ukraine in the National Financial Security System

Considering the proven threatening trends in the state and intensification of the development of the shadow economy in Ukraine, as well as the problems, challenges, and dangers that it causes in the financial, economic, and social spheres, the difficult and extraordinary task of developing effective measures to counteract shadow economic activity in the country requires an immediate solution. The authors of this paper consider it appropriate to suggest the main vectors of de-shadowing the economy of Ukraine, which are systematised in Figure 5.

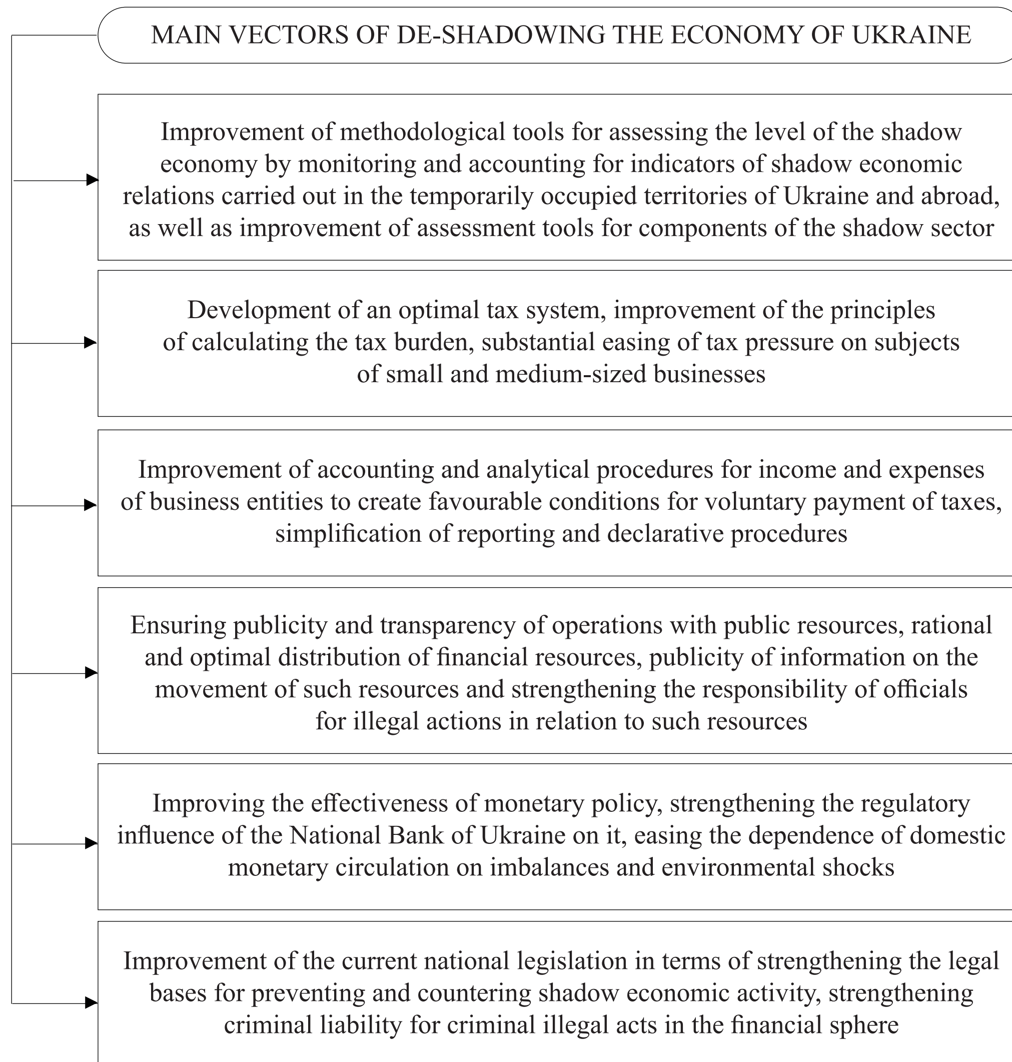

Figure 5. Main vectors of de-shadowing the economy of Ukraine

Source: developed by the author of this study

However, the process of de-shadowing the economy of Ukraine requires proper preparation, namely the development of legal conditions starting from de-shadowing wages and ending with transparency in the management of public financial resources. Despite considerable positive developments in this area, manifested in the introduction of the electronic ProZorro public procurement system and the E-data module, the volume of the shadow sector of the economy is reaching a critical value.

Conclusions

Thus, the conducted research on the theoretical foundations and practical recommendations on the institutional foundations of de-shadowing the economy of Ukraine in the national financial security system gives grounds to assert that the shadow economy is one of the biggest threats to the national financial security, and the problem of its de-shadowing requires immediate consideration and solution. It was established that the level of de-shadowing of the economy of Ukraine has reached a critical value, which in 2021 was estimated at 31% of the country's GDP, and during the socio-political crisis of 2014 it reached 43% of GDP, which requires the development of effective measures to de-shadow the economy. Transport, warehousing, postal and courier activities were recognised as the most shadowed sector of the economy during 2020-2021 (44-54%). It was found that shadow wages have a small positive economic effect, since they partially reduce social tensions in society and in the short term contribute to improving the standard of living of the population. The results of the conducted research indicate that the concept of de-shadowing the economy of Ukraine is based on the application of national special incentive measures that would effectively counter global imbalances and ensure the sustainable development of the economy, the creation of a reliable institutional environment where shadow economic activity would not bring a positive effect, would be unprofitable and inefficient. It was established that the strategic priorities of de-shadowing the economy of Ukraine in the system of ensuring national financial security should make provision for a set of measures to manage shadow economic activities and implement constant control measures, which can be achieved by improving the current national legislation of Ukraine. The prospects for further scientific research may be to find the possibilities of international cooperation in preventing illegal activities in the financial sector.

References

[1] Varnaliy, Z.S. (2020). *Economic and financial security of Ukraine in the context of globalization*. Kyiv: Znannya Ukrayiny.
[2] Yermoshenko, M.M., & Goryacheva, K.S. (2010). *The financial component of economic security: The state and entrepreneurship*. Kyiv: National Aviation University.
[3] Hudzovata, O.O. (2017). Factors and functional features of the development of money credit sphere in the context of the formation of system characteristics of the state financial safety. *Scientific Bulletin of the International Humanities University*, 26(2), 83-87.
[4] Baranovsky, O.I. (2004). *Financial security in Ukraine (assessment methodology and support mechanisms)*. Kyiv: Kyiv National University of Trade and Economics.
[5] Sukhorukov, A.I., & Kharazishvili, Yu.M. (2012). *Modeling and forecasting of socio-economic development of the regions of Ukraine*. Kyiv: National Institute for Strategic Studies.
[6] Honcharuk, Ya.A., & Fleichuk, M.I. (2011). The scale and consequences of the spread of the shadow economy and corruption in the context of globalization. *Scientific Bulletin of Lviv State University of Internal Affairs. Economical series*, 1, 3-18.
[7] Shemayeva, L.H., Zhalilo, Ya.A., & Yurkiv, N.Ya. (2021). *Problems and prospects of strengthening the stability of the financial system of Ukraine*. Kyiv: National Institute for Strategic Studies.
[8] Zhalilo, Ya.A. (2019). Decentralization of power as an institutional factor in the systemic transformation of the economy. *Bulletin of socio-economic research*, 1(69), 69-82.
[9] Libanova, E.M., & Khvesyk, M.A. (Eds.). (2014). *Socio-economic potential of sustainable development of Ukraine and its regions: Vectors of real progress*. Kyiv: Institute for Economics and Forecasting of the National Academy of Sciences of Ukraine.
[10] Medina, L., & Schneider, F. (2018). Shadow economies around the world: What did we learn over the last 20 years? *International Monetary Fund*. Retrieved from https://www.imf.org/en/Publications/WP/Issues/2018/01/25/Shadow-Economies-Around-the-World-What-Did-We-Learn-Over-the-Last-20-Years-45583.
[11] Medina, L., & Schneider, F. (2019). Shedding light on the shadow economy: A global database and the interaction with the official one. *CESifo Working Paper*, 7981. doi: 10.2139/ssrn.3502028.
[12] Schneider, F. (2022). New COVID–related results for estimating the shadow economy in the global economy in 2021 and 2022. *International Economics and Economic Policy*. doi: 10.1007/s10368-022-00537-6.
[13] Schneider, F. (2021). Development of the shadow economy of 36 OECD countries over 2003–2021: Due to the corona pandemic a strong increase in 2020 and a modest Decline in 2021. *International Scholars Journals*, 15(2). Retrieved from https://www.internationalscholarsjournals.com/articles/development-of-the-shadow-economy-of-36-oecd-countries-over2003--2021-due-to-the-corona-pandemic-a-strong-increase-in-20.pdf.
[14] Sauka, A., & Putniņš, T.J. (2022). Shadow economy index for the Baltic Countries. *Stockholm School of Economics*. Retrieved from https://www.sseriga.edu/shadow-economy-index-baltic-countries#:~:text=An%20increase%20in%20the%20shadow%20economy%20in%202021,when%20the%20shadow%20economy%20reached%2019.2%25%20of%20GDP.
[15] Glassman, J., & Chambless, G. (2022). Economic trends to watch in the second half of 2022. *J.P. Morgan.* Retrieved from https://www.jpmorgan.com/commercial-banking/insights/economic-trends.
[16] Order of the Ministry of Economic Development and Trade of Ukraine No. 1277 “On Approval of Methodical Recommendations for Calculating the Level of Economic Security of Ukraine”. (2013, October). Retrieved from https://zakon.rada.gov.ua/rada/show/v1277731-13#Text.
[17] Vinichuk, M.V., Veresklya, M.R., & Mikhalitska, N.Ya. (2019). Debt security in the system of strengthening the financial security of Ukraine. In *Current trends in the financial and credit system: theory and practice* (pp. 90-98). Poltava: PC “Astraya”.
[18] Vinichuk, M.V., & Nakonechna, N.V. (2017). *Economic security of the state: Socio-economic dimension*. Lviv: Liga-Press.
[19] Decree of the President of Ukraine No. 392/2020 “On the Decision of the National Security Strategy of Ukraine”. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/392/2020#n7.
[20] Resolution of the Cabinet of Ministers of Ukraine No. 179 “On Approval of the National Economic Strategy for the Period up to 2030”. (2021, March). Retrieved from https://zakon.rada.gov.ua/laws/show/179-2021-п#Text.
[21] Law of Ukraine No. 1150–IX “On the Bureau of Economic Security of Ukraine”. (2021, January). Retrieved from https://zakon.rada.gov.ua/laws/show/1150-20#Text.
[22] Blikhar, M.M., Savchenko, L.A., Komarnytska, I.I., & Vinichuk, M.V. (2019). Strategic guidelines for the legalization of Ukraine’s economy: Economic and legal aspects. *Financial and Credit Activities: Problems of Theory and Practice*, 2(29), 101-112. doi: 10.18371/fcaptp.v2i29.171850.
[23] Kharazishvili, Yu.M. (2019). *System security of sustainable development: assessment tools, reserves and scenarios of strategic implementation*. Kyiv: NAS of Ukraine, Institute of Industrial Economics.
[24] Mazur, I., & Shyshak, A. (2017). Socio-economic nature of the shadow economy and the reasons for its development in entrepreneurship. *Bulletin of the Taras Shevchenko National University of Kyiv. Economy*, 1(190), 13-20. doi: 10.17721/1728-2667.2017/190-1/2.
[25] Order of the Ministry of Economic Development, Trade and Agriculture of Ukraine No. 104 “Methodological Recommendations for Calculating the Level of the Shadow Economy”. (2021, January). Retrieved from https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=dce6fa7f-5a76-4112-8740-a8e24533a24f&title=NakazMinekonomikiVid20-01-2021-104-proVnesenniaZminDoMetodichnikhRekomendatsiiSchodoRozrakhunkuRivniaTinovoiEkonomiki.
[26] Ministry of Economy of Ukraine. (2021). *Shadow economy. General trends in 2020: An analytical note.* Retrieved from https://me.gov.ua/Documents/Download?id=ea52ab12-e08a-418f-8e80-7cdee5d1fddc.

[27] Ministry of Economy of Ukraine. (2021). *General trends of the shadow economy in January-September 2021: An analytical note.* Retrieved from https://me.gov.ua/Documents/List?lang=uk-UA&tag=TendentsiiTinovoiEkonomiki&showArchive=true&showAllArchive=True.

[28] Vinichuk, M.V., & Ryzhkova, A.A. (2021). Problem-based programming of de-shadowing of Ukraine's economy in the context of balanced socio-economic development. *Socio and Legal Studies*, 2(12), 122-129.

Список використаних джерел

[1] Варналій З.С. Економічна та фінансова безпека України в умовах глобалізації: монографія. Київ: Знання України, 2020. 423 с.

[2] Єрмошенко М.М., Горячева К.С. Фінансова складова економічної безпеки: держава і підприємництво: монографія. Київ: НАУ, 2010. 232 с.

[3] Гудзовата О.О. Чинники та функціональні особливості розвитку грошово-кредитної сфери в контексті формування системних характеристик фінансової безпеки держави. *Науковий вісник Міжнародного гуманітарного університету*. 2017. Вип. 26. Т. 2. С. 83–87.

[4] Барановський О.І. Фінансова безпека в Україні (методологія оцінки та механізми забезпечення): монографія. Київ: КНТЕУ, 2004. 759 с.

[5] Сухоруков А.І., Харазішвілі Ю.М. Моделювання та прогнозування соціально-економічного розвитку регіонів України: монографія. Київ: НІСД, 2012. 368 с.

[6] Гончарук Я.А., Флейчук М.І. Масштаби та наслідки поширення тіньової економіки та корупції в умовах глобалізації. *Науковий вісник Львівського державного університету внутрішніх справ. Серія економічна*. 2011. Вип. 1. С. 3–18.

[7] Шемаєва Л.Г., Жаліло Я.А., Юрків Н.Я. Проблеми та перспективи зміцнення стабільності фінансової системи України: аналітична доповідь. Київ: НІСД, 2021. 104 с.

[8] Жаліло Я.А. Децентралізація влади як інституційний чинник системної трансформації економіки. *Вісник соціально-економічних досліджень*. 2019. Вип. 1, № 69. С. 69–82. doi: 10.33987/vsed.1(69).2019.69-82.

[9] Соціально-економічний потенціал сталого розвитку України та її регіонів: вектори реального поступу: національна доповідь / за ред. Е.М. Лібанової, М.А. Хвесика. Київ: ДУ ІЄПР НАН України, 2014. 776 с.

[10] Medina L., Schneider F. Shadow economies around the world: What did we learn over the last 20 years? *International Monetary Fund*. 2018. URL: https://www.imf.org/en/Publications/WP/Issues/2018/01/25/Shadow-Economies-Around-the-World-What-Did-We-Learn-Over-the-Last-20-Years-45583.

[11] Medina L., Schneider F. Shedding light on the shadow economy: A global database and the interaction with the official one. *CESifo Working Paper*. 2019. No. 7981. doi: 10.2139/ssrn.3502028.

[12] Schneider F. New COVID–related results for estimating the shadow economy in the global economy in 2021 and 2022. *International Economics and Economic Policy*. 2022. doi: 10.1007/s10368-022-00537-6.

[13] Schneider F. Development of the shadow economy of 36 OECD countries over 2003–2021: Due to the corona pandemic a strong increase in 2020 and a modest decline in 2021. *International Scholars Journals*. 2021. Vol. 15, No. 2. URL: https://www.internationalscholarsjournals.com/articles/development-of-the-shadow-economy-of-36-oecd-countries-over2003--2021-due-to-the-corona-pandemic-a-strong-increase-in-20.pdf.

[14] Sauka A., Putniņš T.J. Shadow Economy Index for the Baltic Countries. *Stockholm School of Economics*. 2022. URL: https://www.sseriga.edu/shadow-economy-index-baltic-countries#:~:text=An%20increase%20in%20the%20shadow%20economy%20in%202021,when%20the%20shadow%20economy%20reached%2019.2%25%20of%20GDP.

[15] Glassman J., Chambless G. Economic trends to watch in the second half of 2022. *J.P. Morgan.* 2022. URL: https://www.jpmorgan.com/commercial-banking/insights/economic-trends.

[16] Про затвердження Методичних рекомендацій щодо розрахунку рівня економічної безпеки України: Наказ Міністерства економічного розвитку і торгівлі України від 29.10.2013 р. №1277. URL: https://zakon.rada.gov.ua/rada/show/v1277731-13#Text (дата звернення: 03.05.2022).

[17] Вінічук М.В., Верескля М.Р., Михаліцька Н.Я. Боргова безпека в системі зміцнення фінансової безпеки України. *Сучасні тенденції розвитку фінансово-кредитної системи: теорія та практика:* колективна монографія. Полтава: ПП «Астрая», 2019. С. 90–98.

[18] Вінічук М.В., Наконечна Н.В. Економічна безпека держави: соціально-економічний вимір: навчальний посібник. Львів: Ліга-Прес, 2017. 322 с.

[19] Про рішення Ради національної безпеки і оборони України «Про Стратегію національної безпеки України»: Указ Президента України від 14.09.2020 р. № 392/2020. URL: https://zakon.rada.gov.ua/laws/show/392/2020#n7.

[20] Про затвердження Національної економічної стратегії на період до 2030 року: Постанова Кабінету Міністрів України від 03.03.2021 р. № 179. URL: https://zakon.rada.gov.ua/laws/show/179-2021-п#Text.

[21] Про Бюро економічної безпеки України: Закон України від 28.01.2021 № 1150–IX. URL: https://zakon.rada.gov.ua/laws/show/1150-20#Text (дата звернення 07.05.2022).

[22] Blikhar M.M., Savchenko L.A., Komarnytska I.I., Vinichuk M.V. Strategic guidelines for the legalization of Ukraine's economy: Economic and legal aspects. *Financial and Credit Activities: Problems of Theory and Practice*. 2019. Vol. 2, No. 29. P. 101–112. doi: 10.18371/fcaptp.v2i29.171850.

[23] Харазішвілі Ю.М. Системна безпека сталого розвитку: інструменти оцінки, резерви та сценарії стратегічної реалізації: монографія. Київ: НАН України, Інститут економіки промисловості, 2019. 304 с.

[24] Мазур І., Шишак А. Соціально-економічна природа тіньової економіки та причини її розвитку в підприємництві. *Вісник Київського національного університету імені Тараса Шевченка. Економіка.* 2017. № 1(190). С. 13–20. doi: 10.17721/1728-2667.2017/190-1/2.
[25] Методичні рекомендації щодо розрахунку рівня тіньової економіки: Наказ Міністерства розвитку економіки, торгівлі та сільського господарства України від 20.01.2021 р. № 104. URL: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=dce6fa7f-5a76-4112-8740-a8e24533a24f&title=NakazMinekonomikiVid20-01-2021-104-proVnesenniaZminDoMetodichnikhRekomendatsiiSchodoRozrakhunkuRivniaTinovoiEkonomiki.
[26] Міністерство економіки України. Тіньова економіка. Загальні тенденції 2020 року: аналітична записка. Київ, 2021. 14 с. URL: https://me.gov.ua/Documents/Download?id=ea52ab12-e08a-418f-8e80-7cdee5d1fddc.
[27] Міністерство економіки України. Загальні тенденції тіньової економіки у січні – вересні 2021 року: аналітична записка. Київ, 2021. 14 с. URL: https://me.gov.ua/Documents/List?lang=uk-UA&tag=TendentsiiTinovoiEkonomiki&showArchive=true&showAllArchive=True.
[28] Вінічук М.В., Рижкова А.А. Проблемно-цільове програмування детінізації економіки України в контексті збалансованого соціально-економічного розвитку. *Соціально-правові студії.* 2021. № 2(12). С. 122–129.

Інституційні засади детінізації економіки України в системі фінансової безпеки держави

В'ячеслав Степанович Бліхар, Марія Володимирівна Вінічук, Анжела Андріївна Рижкова

Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна

Анотація. Зростання обсягів тіньового сектора економіки України чинить значний дестабілізуючий вплив на фінансову сферу країни, унаслідок чого інтенсифікуються процеси виникнення загроз, ризиків, викликів та небезпек фінансовій безпеці держави, які спричинюють поглиблення макроекономічної та суспільно-політичної кризи. За таких умов актуалізуються проблеми обґрунтування інституційних засад та визначення напрямів детінізації економіки України, вирішення яких дасть змогу забезпечити оптимальний рівень фінансової безпеки держави. Метою статті є поглиблення досліджень теоретичних основ та практичних рекомендацій щодо інституційних засад детінізації економіки України в системі фінансової безпеки держави. Теоретико-методологічну основу дослідження становить методи аналізу та синтезу, аналогії та порівняння, узагальнення та систематизації, графічний метод. Визначено сутність тіньової економіки, фінансової безпеки, детінізації економіки та окреслено місце тіньової економіки в системі фінансової безпеки держави, проаналізовано вплив тіньової економіки на рівень фінансової безпеки України та динаміку рівня тіньової економіки, зміни обсягу реального ВВП України, динаміку рівня тіньової економіки України в розрізі видів економічної діяльності та динаміку обсягів і рівня офіційного ВВП, створеного тіньовою оплатою праці. Досліджено основні ризики, загрози, виклики та небезпеки фінансовій безпеці держави та доведено, що однією із найбільших її загроз є тіньова економічна діяльність. Розглянуто основні напрями детінізації економіки та запропоновано удосконалення методичного інструментарію оцінювання рівня тіньової економіки України. Визначено стратегічні пріоритети детінізації економіки України в системі забезпечення фінансової безпеки держави, зокрема: формування правових умов детінізації заробітних плат та підвищення якості й ефективності управління державними фінансами. Одержані результати дослідження можуть використати органи державної влади, формуючи фінансову політику та визначаючи основні напрями детінізації економіки України

Ключові слова: тіньова економіка, складники фінансової безпеки, індикатори фінансової безпеки, загрози, ризики, виклики

UDC 348.02
DOI: 10.32518/2617-4162-2022-5-2-77-85

Соціально-правові студії. 2022. Т. 5, № 2
Social and Legal Studios. 2022. Vol. 5, No. 2

Religion – a Significant Factor in Law-Making and Law Enforcement Processes

Mykhailo S. Kelman*, **Rostyslav M. Kelman**

Lviv Polytechnic National University
79000, 12 Stepan Bandera Str., Lviv, Ukraine

Abstract. The relevance of this study is conditioned upon the fact that scientific papers have almost no attempts to theoretically develop the correlation between religion and law. Legal scholars ignore the forms of influence of religion on law-making and law enforcement activities. Available research in this area is often fragmentary. The purpose of this study was to prove the relationship between religion and law based on modern legal understanding of the main principles, to clarify the role of religion in the legal sphere. The philosophical and methodological framework of this study involved the principle of pluralism in the choice of methodological approaches, methods, and techniques because they form the foundation of the scientific and cognitive process, ensure unity and purposefulness in the study of common features of religion and law in the law-making and law enforcement procedure, such as ritualism, tradition, authority, and universality. It is argued that in modern society, religious values, albeit losing their former meaning of the"sacred image" of the world, and even if Christian principles do not have a direct impact on the legal system, still play a considerable role in legal life because European legal culture was created under the influence of Christianity, a Christian view of the world. Modern European legal systems operate in a social system that has absorbed Christian religious values. This study is aimed at further development of the general theory of law, expanding the knowledge about the correlation between religion and law in the system of social regulation, improvement of legislation. The results obtained can be used in the field of law-making and law enforcement, for the preparation of textbooks, manuals, for lawyers, philosophers, sociologists, and all those who are not indifferent to the development of legal awareness

Keywords: God, law, human, norm, society, reason, justice, law, politics, state

Introduction

An attempt is made to draw attention to the historical, legal, and socio-political discourse that has existed for several decades to clarify the essential grounds for the correlation between law and religion in the context of existing mutual influences, interdependencies, and interrelations between these social phenomena.

Noting that the purpose of her research "is to determine the influence of the religious factor on state-building processes", H. Yermakova, the author of the respective publication, quite rightly states: "Religious norms in many ways influence the behaviour of individuals, their inner convictions, and therefore, the system of principles and values, which determines their existence as a whole" [1, p. 19]. Emphasising the importance of the "religious dimension and view of the development of the state", the scientist limits themselves only to the need to guarantee religious rights".

Thematically and problematically, the article of H. Yermakova "echoes" the work of O. Lvova, presented in a solid collective monograph and covering the problems of implementing human and civil rights and freedoms in Ukraine, the general revision of which was carried out by well-known scientists, professors N. Onishchenko and O. Zaichuk. Analysing the fundamental interaction of law and religion, the author, among other things, emphasises several fundamentally important points, namely the fact that in ancient prehistoric times religious beliefs gave rise to law, later religion was in close contact with jurisprudence, and had a beneficial effect on it. It is appropriate to state in general both the emergence and the stages of development, flourishing, rise, decline, and the general direction from the corresponding strict forms and procedures to more humane and soft ones, all this was inherent in that correlation [2, p. 313-320]. Consideration of this problem, as Yu. Payda notes, is associated with understanding many processes of not only domestic, but also world history, as well as the history of religion. This refers to a purely scientific interest, since in the context of methodological pluralisation of modern legal science, overcoming ideological monism and attracting the experience of foreign legal scientists, the task arises to review the key issues of the place of law in the system of social regulation. This is especially true for the influence of religion on the establishment and development of law, since the last Soviet science, which was based on Marxist philosophy and the sociology of religion, assigned the religion a conservative, negative role in the complex of normative regulation of society [3, p. 11].

In this context, one should also mention the article by N. Arabadji, which is small in volume but pretentious in title. It is difficult to even imagine how the author, despite the "conditions of transformation of state-religious relations"

Suggested Citation **Article's History**: Received: 13.03.2022 Revised: 14.04.2022 Accepted: 15.05.2022

Kelman M.S., & Kelman R.M. (2022). Religion – a Significant Factor in Law-Making and Law Enforcement Processes. *Social and Legal Studios*, 5(2), 77-85.

*Corresponding author

(this refers to year 2021) and what is meant is a mystery), could solve the task set for himself – to cover "the influence of Christianity on the legal system of Ukraine" [4, p. 102].

In his study, M. Kelman notes that having given way to the so-called secular written law, religious norms in many countries continue to be applied on an equal basis with other social norms to regulate public relations and even resist legal norms formulated by the state [5, p. 108-109].

The purpose of this study was to attract the scientific interest of legal scholars to the problems of clarifying the influences on law-making and law enforcement processes, on the multidimensional interrelations and interdependencies of two prominent social phenomena (religion and law) in the context of the formation of modern foundations of legal understanding.

Therefore, there is now a need for a conceptual, based on modern methodology, interdisciplinary study of the mutual influence of religion and law in the legal genesis as specific factors of social-normative regulation in human society.

Religion is the Spiritual Cradle of Law

For many decades, there were beliefs in the vital sphere that the economic component is at the heart of everything, and most people against their will tried to consider the conflict of industrial forces and industrial relations, the interests of classes and their antagonistic struggle. It is difficult for a modern person living in conditions of secularised societies and a monopoly of materialistic views to imagine the existence of other social atmospheres, to perceive the obvious fact of the determining influences of religion on the establishment and development of law.

The examples of ancient culture convincingly show that religion is the spiritual cradle of law. For credibility, it is enough to ask a few simple questions and answer them impartially. Thus:

Who were the first lawyers? – Priests.

Where did the law originate? – In sanctuary temples.

From whom did the law get its generic name? "From the Supreme God of the Romans.

What does the sanction mean? – The sacred punishment of the gods.

Where do legal procedures come from? – From worship, from religious rites.

What is the most shameful crime? – Blasphemy.

What is a court oath essentially? – An oath to the deity.

What is the meaning of punishment? – A spiritual and moral purification [5, p. 108].

The principles and ethical categories formed in the bosom of faith, after a certain time, became in demand in public communities, or even in societies. Only those who did not want to admit it remained on the sidelines, and such, as the ancients noted, had a disappointing fate; to see in the basis of law a common one for all peoples is the highest religious principle. Not only the birth, but also the rise of law in antiquity, its decline and oblivion of institutions and state structure, as historically recorded, was intricately connected with the flourishing or crisis of religious polytheism. The destruction of ancient political and state-legal forms of life, the materialistic tradition is caused exclusively by the labour of slaves, which is why labour has become considered shameful for a free person [5, p. 109].

Here it is appropriate to note: firstly, it is not clear why it took hundreds of years for this to happen; secondly, "shameful labour" is no longer an economic category, but an evaluative, psychological one; thirdly, the change of government, the structure of the state, positive legislation, and legal ideology invariably occurred under the same slave-owning mode of production. In this context, several circumstances should be pointed out, that, in Livy's words, are "as old as they are well known", which led to the fall of Rome. This refers to the moral degeneration, degradation of the patrician, whose hearts were taken over by idols of adored personas, material savings. The decline of the spiritual origins of human existence, God-given moral foundations ensured the triumph of destructive forces and the decline of ancient legal culture [5, p. 109].

Although Roman law formed in the ancient era was traditionally considered as the most perfect type of law, which was based on private property, this belief acquired axiomatic recognition in the epochs to follow. However, this shows at least that it was closely investigated by those who devoted themselves to law for more than a millennium. If one uses Descartes' advice and considers the problem in a natural sense, then they can easily see ancient religion in the real foundations of Roman law, which to a certain extent guaranteed the generally recognised perfection. One can mention more than one legal system – Sumerians, Hindus, Egyptians, who built institutions of private property, and left Roman law far behind. However, the civilisational choice was for other systems, where the power of a new religion – Christianity – was established and gained power.

The original Italian philosopher Giambattista Vico, who studied the genealogy of legal concepts, directly connects law with natural phenomena. Thus, he derives the legal term "lex" (law) from the word "ilex" (holly, stone oak). Even before the advent of writing, "lex" corresponded to the assembly of citizens, i.e., the public parliament, since the presence of the people, i.e., the "assembly", the agreed will and gave force to the contract, the will, was law. "Lex" was used to select letters and compose words and phrases from them (Legeze – to read) [2, p. 315].

The integrating influence of religion, its cementing influence on society, does not mean that everything freezes into a certain monolith. One way or another, the Roman Pantheon grew. Titus Livy indicated the existence of heavenly, earthly, underground gods [6, p. 18].

Established relations with the gods are good, but they were established not at the expense of relatives. For instance, a respectful father becomes a god to his sons. Every Roman citizen was immensely proud of the realisation of their indissoluble connection (religion in Latin – connection) with their family, kin, whose life was in continuous service to the state. There was a general belief that the dead influence the affairs of the living, avenge their disregard for established rules and customs. Therewith, a certain "sound" aspect, an echo, is obvious. The intensity of the dialogue, the prominent degree of tension that was inherent in the ancient language environment, did not decrease either in the conversations of living people, or in conversations with the gods, or with the souls of the dead, regardless of any external circumstances [6, p. 21].

It is worth mentioning another invention of the Ancients – the epitaph (translated from Greek – tombstone). The type of epitaph inherent in European culture was borrowed and developed in antiquity. In this way, not only the connection with the cult of the dead and care for posthumous glory,

as is usually thought, was recorded, but a visual-acoustic dialogue [6, p. 22]. Prolonged inertia, which considered only centred forces in the form of class antagonisms, does not answer the question of why Rome – the world's hope – surprised and delighted all peoples for more than a thousand years, despite the pressure of external and internal factors! This means that both real (and not far-fetched) and powerful centripetal forces were involved, which united society. These forces are religious ("relegire" means "to bind"). This refers to the unity of each believer with a higher being. At the same time, religion unites all believers among themselves.

Society was permeated by religious ties both horizontally and vertically (up to the Olympians, and down to the realm of Shadows). The social part was so firmly permeated by these connections that it successfully resisted external and internal disturbances. The cementing influence of religion was felt not only at the top, but also in particular, individual cases. In his monograph "Establishment and functioning of state institutions and Vatican law", B.I. Gutiv emphasises the term "cult", and this is no accident. It reflects the essential necessary practice of worship, the historical ancient religion of "cult" as an external expression of religious worship, the sacrament, as the existing and conscious side of deity worship. No matter how ironic people are about this phenomenon, it is impossible not to recognise that it hides a crucial process of cultural formation [7, p. 77].

The Russian Orthodox theologian Father Pavlo Florensky built the corresponding value series: "cult" – "culture" – "civilization", emphasising the importance of religious worship as the foundation of culture, one of the manifestations of which is technical civilisation. It is apparent that a cult generates a culture, both material and spiritual. And in turn causes civilisation – not only in the sense of everyday, home comfort, but also, which is very influential in this case, the unwritten state-legal sphere of knowledge [3, p. 68].

Civilisation is such a stage of human development, when one's own social ties begin to dominate over natural ones, and when society begins to develop and function on its soil. The term "civilisation" (from the Latin civilis – public, social, state, civil) was introduced into the scientific dictionary by the French educator Honore Gabriel Mirabeau in 1756. By this definition, the French enlighteners meant a society based on the principles of reason and justice [8, p. 19]. Naturally, from the cult comes the significant jus civile – civil law, political rights, the entire legal culture, including legal practice and legal consciousness. A single faith and God, their common cult, an understandable language and customs prepared the ground for economy and trade, and not vice versa. The high image of religion also supported the impeccable state and social legal order and ensured victories in the wars of Rome. Regardless of the universal penetration into the everyday life and activities of the state, religion did not become, relatively speaking, a factor in totalitarian "tightening the nuts".

The ancient religion, as it were, having worked up its resources, did not abuse people's trust, actively passed the baton on to future generations. Several factors contributed to this. For centuries of existence, there has not been a politically powerful caste of priests. The economic potential did not become significant, as churches were forbidden to donate and bequeath land. 276 pontiffs combined the development of theology and only a part (a small part) were engaged in law. Practical Romans believed that it was necessary to do business. The general opinion was expressed by Fabius Quintilian: "Practice without theory is more valuable than theory without practice". Behind all this, as we can see, a well-thought-out, well-coordinated dogma did not work out. Cicero, who was an augur himself, expressed great doubts about the existence of gods in his treatises "On the Nature of the Gods" and "On Divination". This position of Cicero the Philosopher is denied by Cicero the Politician and Lawyer in the dialogue "On the Laws", considering faith in the gods and all religious instructions of the ancestors mandatory. And this is quite demonstrative [4, p. 54].

The ethical virtues that the Romans deified in ancient times "passed away" to the world of people, to their social relations, to a considerable extent to legal communication. Ethics were dictated not by religion, but by law, regulations, the needs of serving the state, the needs of the entire people. The people, society, and state awarded the worthy with well-deserved honours, punished and branded with contempt those who forgot their duty, sinned, and broke the law. The priority of the social, public over the religious is stated by Varro: "At the end of the Republic, the weak generation of the "spear-bearing" Quirin – Romulus" [9, p. 234].

The people, therewith, remain loyal to the gods, but not to the official ones, but to the gods of the earth, crafts: Hercules, Sylvan, Feronia, and others. They were expected to intercede for life and reward after death. The belief in the immortality of the soul and its grave fate as a result of virtuous behaviour during life becomes common. Immediately before the advent of Christianity, against the background of the decline of the official cult, the attraction to the only almighty God, who has not been seen so far and who stands above the earthly rulers, but is closer to the "little man" – is no longer a member of some community, but acts individually as an attraction, as an example for human imitation and at the same time as God, who made a sacrifice for the salvation of people. This prepared a victory for Christianity.

Undoubtedly, radical ideologues, no matter how authoritative, cannot cross out religion in one fell swoop. Ironically, Marxism itself turned into a false theory and pseudocult (the crusade – demonstration of freedom, cathedrals – congresses, icons – portraits of leaders, the Red Corner – Lenin's room, etc.). The catechetical method without evidence and discussion became dominant: "Marx's teaching is all-powerful because it is correct", "Matter is primary, consciousness is secondary", "The Party is the mind, honour, and conscience of our era", etc. At the end of the first section, the author of this paper notes that the specific features of religious life, which accompanied the historical life of people, determine all the moral searches of the individual associated with a certain type of culture, all the differences of the national nature, and even more so the principles, connections, relations, states, established by law. This was the gracious influence of religion on the genesis of "sounding jurisprudence" of nascent law in ancient Rome [10, p. 66].

Archetypes of Religion as a Way to Influence the Economy, Politics, Morality, and Law

Thus, the author tried to substantiate that religion not only gave the name to law, but also in the beginning supported its existence in every conceivable way. It received the name jus from Jupiter. The highest deity in the pantheon of the Romans was called right, sanctified by his authority, and predicted a long and glorious destiny. Respect for the right of the "child" of Jupiter comes from respect for the "father" [11, p. 115].

Religion had its own right fos as the command of heaven, the gods. Being an obvious right, fos existed apart from human rights.

At first, fos acted as a regulator of life relations in that sphere, which the gods left to the discretion of people. Subsequently, fos acquires a complex understanding and is used in the sense of a system of religious norms about what the gods allow people to do, rather than the prescriptions of legal norms. In Cicero, one can also find the interpretation of fos as a natural law, a higher convention. Notably, legally significant actions took place in solemn circumstances in front of the crowd. The religious cult inculcated and educated people to respect the law, respectful attitude towards it [12, p. 31-108].

Sacred law is an entire complex of legal principles and institutions related to Roman law. All this taught people to value law, strengthened legal culture, and raised legal awareness. Religion trained people not only to appropriate actions, but also to the place of performance of legal actions, which was to be consecrated – a temple, and not just some place devoid of holiness.

Religion, even the most primitive, performed a vital task – it united the scattered tribes, provided an opportunity to form a legal space, meet the prerequisites of a single market and economic sphere, and gave impetus to the development of national culture. Religion is the psychological and spiritual basis of procedures, actions, rules, and norms that regulate these sacred actions. Religion was understood as virtue in the performance of assigned duties, as conscience, even doubts, corresponding mental trepidation, i.e., inner work, moral struggle, which is inherent in humans. As noted by Prof. Yu. Oborotov, not relaxation, but the tension of the soul, moral efforts – without which one cannot engage in socially significant matters in the field of law, turn to the gods [10, p. 78].

Considering the influence of religion on the genesis and development of law, the religious cult fits clearly into the general topic of research. The entire ritual side of religion is an entirely oral procedure, it is linguistic communication. Without any irony, the authors of this study states that the ancient law was also a song. Then, being still oral, it followed the path of prosaism and formalisation. And oral creativity degenerated into pasquil, incantation, conjuration, into magic, which was punished as a crime already according to the Laws of the XII Tables [13, p. 317].

In antiquity, the slave-owning method of production, private ownership of its means, including the slave, remained unchanged, which was established by law, although the processes of its creation and improvement led to rapid changes. The connection between law and politics begins and expands.

Politics was also born in the era of antiquity and preceded law, but, despite the proximity, the internal rejection turned out to be stronger. The incompatibility of law and politics manifested itself in the destinies of people (Socrates, Cicero), states (Ancient polis). It is also obvious in theory [14, p. 208, 300].

Plato and Aristotle wrote about politics, but, despite much in common, law could not arise from politics. However, politics affects the law. It is already clear from the example of antiquity that the sphere of politics and political interests is much wider, it was established under the influence of several factors, goes beyond national borders, and becomes foreign policy. The sphere of law is narrower, law itself establishes the limits of its activity, national law does not go beyond the territory of its state.

The goal of politics is state power, the establishment of relations of domination and subordination. The purpose of law is to regulate normal life relations. In politics, the end justifies the means, in politics there are agreements and innuendos, secrets, intrigues, and games. It has its own scenes, clans and leaders, symbols, its own dictionary and lexicon, which is not completely understandable for the uninitiated. Politics loves spectacle, advertising, pomp. Law allows only legal means, law is open, understandable to people, with clarity and unequivocal understanding, law is its principle, law deals with an individual case, a particular person. Politics points to political values, unattainable ideals, having neither opportunities, nor forces, nor means to implement them. It tries to achieve unimaginable goals that can never be achieved [15, p. 215-226].

Over time, the differences that characterised each of these social phenomena became increasingly clear. One of these differences was that politics is characterised by pluralism of ideologies, changes in party programmes, etc. The right exists in a single copy, it is unique and unrepeatable, one at a particular time and in a particular country. Even in the period of its formation, "oral law" made attempts to unify and unanimity. A political image, opinion, statement, and mood are important for politics. It interprets political priorities, mass participation, legitimacy. In law, from the very beginning, only actions are important, their compliance or non-compliance with legal norms, it reflects on legality.

For politics, general principles are important, not norms, i.e., general quantitative and qualitative guidelines that universally regulate political life. Law, on a level with principles, operates with specific and mandatory norms that regulate typical life situations, including those inherent in politics – norms of electoral law, norms of representation, etc. Organisations that are not registered by the state, illegal, and shadow structures that have a substantial influence on politics than the parties represented in the parliament can take part in political activity.

Law does not know and should not know anything illegal, anything unlawful. Various participants are involved in political relations: chiefs, leaders, managers, power holders, performers of various levels, party masses, dissidents, migrants, etc.

Democratic law: everyone is equal before the law – both the highest head of state and the average citizen. Political activity is fundamentally less formal, but also less guaranteed. The law is formalised much more, but to the same extent and more guaranteed. Instead, politics divides society, distinguishing in it parties, factions, elites, pressure groups, etc., as well as the political centre and periphery.

Again, law unites society, subjecting all its members to the same requirements because a single law applies throughout the entire territory of the state. Non-compliance with political norms requires (although not always) an undefined reaction of the party leadership (organisations, moral condemnation, etc.). In law, there is a clear reaction (sanction) to illegal behaviour, to violation of legal norms. The most difficult cases and stages of political activity are regulated by law, have a legal assessment, legal guarantees, etc. There are attempts to free the sphere of law from the influence of politics, party ideological programmes, and class positions. The law is the same for all parties [16, p. 21-51].

Entirely distinct factors and arguments paint a picture of the correlation between religion and law. The author of this paper repeatedly emphasises that ancient law – and this is the uniqueness of the situation – was influenced by the benevolent influences of both primitive pagan and Christian religions. The first gave it concrete legal material, the second strengthened it conceptually and spiritually, instead the "light of law" appeared as a reflection of the light of Christ. Thus, Christianity itself as a new religion, born during the heyday of the early Roman Empire more than two millennia ago: having endured incredibly difficult trials at the beginning of its establishment in the first three centuries, influenced the law with its religious-mystical, philosophical, and emotional-ethical visions. This interaction of this religion with the law acquired a particularly decisive influence after the epoch-making historical events of 313, when Emperor Constantine passed the so-called The "Edict of Milan", according to which Christianity was legalised in the majority of the Roman Empire, and in 321, according to the decree of the same ruler, the Christian Church factually became (according to our modern concept) a legal entity, got the opportunity to own property and dispose of it. Thus, the church began to actively solve not only its own, but also a certain part of social problems legally, and this was done democratically, by holding special meetings of a wide representation of believers – Councils. The first such was the ecumenical one in 325 in Nicaea.

In the early Middle Ages (from 387 to 787), seven Ecumenical Councils were held, at each of which not only documents related primarily to internal church matters, dogmatics, and ritualism, but also acts that dealt with legal issues were developed and adopted [17, p. 34-35]. It was these acts that became the source base for the formation of canon law, which O. Voloshchenko quite justifiably considers a separate system of law [18, p. 52-56]. Thus, with this fact, there is another confirmation of the religious order in law-making processes. And this is a reason for further thinking.

Any evil, committed by free people out of necessity, is a parasite living on the body of good, and it needs to find justification for itself, to appear dressed in the clothes of good, and often – the greatest good. It is no accident that the most authoritative scientific thinkers of antiquity – Socrates, Plato, Aristotle – take ethical positions, studying power, politics, the state, and law from the standpoint of integrity. Both religion and law are aimed at correcting injustice and social evil. But the law focuses more on the external conditions of existence, dictated by various socio-political institutions, concerned with the intersection of the activity of a particular bearer of evil. Religion turns more to the middle, believing that without Christ, without his Truth, any moral search is meaningless. This is also the limitation of law, namely criminology, forensic science, criminal prosecution in the fight against crime, including its most dangerous forms – organised, international, economic, etc. because the fight is waged against particular carriers of evil, and not against evil as a phenomenon [19, p. 21-35].

The Christian religion is based on the fact that the destruction of evil (namely crime) is possible only by overcoming sin in one's soul with love. Perhaps it is possible to achieve this in the earthly world, but religion accepts this Truth as an ideal. The ideal connects humanity with the Kingdom of Christ, and it is not of this world. The ideal is necessary because it indicates the purpose of human life, which does not lie in a happy settlement in the material world. The benevolent role of the Christian religion is manifested in the fact that it leads legal science to a greater purpose, promotes growth, and the search for answers to "eternal" questions. The magistrate, the court, and the investigator establish the truth in a particular case. It is often relative. Religion calls to go further – to the truth of the Absolute. Law, juridical practice, civil law relations specify the answer to the great question of humanity: "What is truth?", but at the same time they lower it to the level of earthly everyday life, deprive it of pride [13, p. 340-368].

Law deals with earthly, concrete truth, limited by questions traditional for a lawyer: "who?", "what?", "where?", "when?". Law tries to make sense of the purely human, mundane. It is forced to give distorted assessments, dealing with the unearthly, with the crucible of Truth, helps legal science to get rid of its chronic disease – legal relativism. In the case of a lack of need for the Truth, which can only be joined, the soul of a lawyer – "creator" can develop an active beginning of indifference to the Truth, which cannot be invented, created by the efforts of a creative personality. The demiurges of their own legal world could not help but feel proud of the legal material developed. But various principles, norms, legal institutions, entire spheres of legal regulation give rise to the multiplicity and oppositeness of the criteria of truth and the relativity of the truths themselves. This should be constantly thought about when contemplating the essential purpose of such universal social phenomena as law and religion [20, p. 1-8].

Without turning to God, without religion, without the spiritual energy that connects the human soul with the Absolute, there can be no real culture. Everyone is given their own charismatic gift. Creativity by its nature, by its spiritual essence, is a deeply religious act. The maker of law should be aware of this. Culture in its highest manifestations (literature and art, philosophy, theological thought, law) is intricately connected with religion; spirituality and culture are directly dependent on the degree of its religiosity. The bond of true humanity, the "umbilical cord of culture", in the words of P. Florenskyi, grows from the seed of cult, i.e., from the liturgical and ritual essence of religion [21, p. 156]. This is precisely the spiritual leaven that stimulates legal creativity.

Spirituality is often confused with ethical positive qualities and the intensity of the emotional state. The concept of grace does not exist for such a limited intellectual consciousness, without Grace any talk about spirituality makes no sense. Sober and pragmatic jurists of antiquity, regardless of their status as priests, did not pretend to testify about the world of holiness, but they convincingly mastered a language capable of showing such testimony. Where law is idolised, God is forgotten. The law-making creates the illusion of belonging to the eternity of omnipotence, immortality, the maker in their own creation. Thus, freedom of creativity leads to rejection of the highest Truth [21, p. 158-159].

Ancient lawyers, legislators, those who set norms – each of them considered themselves not only the creator of their world, but also a servant of the Gods who fulfils what was sent from above. From the position of the highest Truth, humanity will not be able to find a new, "original" in any of the genuinely great lawyers. But the legal scientists cannot be confused by this since this "secondary" is such in relation to the Word of God. Roman law is considered the pinnacle of spiritual creativity of the legal elite. Official science gives

it a high rating, emphasising its technical and instrumental excellence. The authority of legal scientists was at a height unattainable compared to all past and even modern states of the world. During the period of the Roman Republic, the career of a lawyer opened the widest opportunities for ambitious people from all levels of society, and for people who did not belong to the senatorial class, it was generally the only possible way to the highest public positions. However, the opinion that Roman private law is "the most perfect type of law" should be understood in a limited way, in a certain sense valid only for the civil law sphere. It is perfect in the sphere of everyday life, in the sphere of mundane individual, selfish interests. In religion, another level is a sacred and spiritual understanding of being (life). Faith, relatively speaking, from the very beginning pulled the right to the top, set a high bar, did not let a person get stuck right away (at the same moment) [22, p. 90-97].

It would not be a mistake to believe that the law was born in the environment of prayer and ascetic understanding, and in the conditions of primitive religion. Lawyers are called creators, initiators of norm- and law-making. But there is also a religious understanding of the Maker. In the world created by creative imagination, it is easy for a lawyer to confuse concepts and realise themselves as a god. Evil begins where a person encloses themselves in their own pride, compares themselves to a deity, and the legislator acts without purifying themselves, does not seek to change the spiritual instruction. The creative gift is a great gift of God, with which a person is endowed according to the intent for the world. This gift of man, like many other benefits, tries to use for self-impersonation, self-aggrandisement, juxtaposition to the Maker. True human creativity can only be manifested in co-creation with God, in energy, the union of two manifestations of will – the Maker and his creation. Out of touch with the Maker, human creativity is hopeless, or even harmful for the world [23, p. 97-99].

There is a danger of becoming a single Maker or a closed caste: legalists cultivate the idea from which Christianity emerged in its time, which accepted the great idea of the Holy Trinity, which is given by the Gospel. The closed nature of creativity hides the danger of tyrannical self-assertion. Christianity realised this danger at once. The lawgiver, who succumbed to the temptation of self-limitation, behaves tyrannically towards his creations: self-asserted in general despotically towards the environment because he needs someone's broken will because it is doubly tempting to overcome the will with an objective regularity. Even primitive religion (mythology) provided a symbolic example of overcoming backward inertia, the heaviness of earthly life, called on a person to rise in spirit

Man was created in the image, in the likeness of God, called to become a guide of Divine actions, to unite the entire world with God. Both religion and law are united in asserting the need for a certain support, especially when the corresponding difficulties arise, trouble comes. People should feel a point of support over the abyss. People need to feel this immovable peace of the shrine over their sufferings and sorrows. This support can be the law [24, p. 122-126].

There are many points of connection, for example: in law – sanction, and in religion – fear of God, trembling before the gaze that sees everything from the height of heaven. But this is not an ordinary human fear, but a painful feeling of one's insignificant compliance with the requirements and expectations of the Lord. It is not by chance that the Holy Scriptures state: "The fear of the Lord is the beginning of wisdom" [24, Proverbs 1:4]. Here is the prevention of illegal actions, and the best one.

The superhuman content of religion is understood as inviolable, since peace in the Christian tradition is a self-present property of the Creator's super-perfection, as well as the perfection of holiness. Law is inherently conservative, stable. It is "perfect" to the extent that it does not change over an extended period. Universal legislation considers all details and options that satisfy everyone. Religion helps law. Law is a norm of behaviour, everyday life, that which can fulfil, use, accomplish everything.

Religion protects its canon by pointing to an ideal. In religion, the ideal of holiness cannot be embodied in everyone at once, but it happens that a person appears – the bearer of the ideal of holiness, the beacon of Truth, its spiritual fire and helps the desperate to understand that not everything is lost. Common law guarantees us safety, salvation from attacks, all kinds of damage. Faith gives salvation in eternal life. Religions, like law, are characterised by massiveness, universality, and obvious social purposefulness. It does not proceed from a certain presumption that everyone will follow the instructions. Both are against separation and separation, the feeling of enmity between those who make up the national unity, fighting against the "hateful difference of the world." The idea of the superiority of the common over the individual was a pillar of both religious and legal consciousness. Ancient human culture was aimed at nurturing and supporting the harmonious unity of the surrounding space with the inner space of the person [25, pp. 27-38]. In summary, the author of this paper recognises the undoubted existence of the similarity of the visual-acoustic form of religion and ancient law, their oral culture.

Conclusions

Religion and law are interconnected by the mutual influence of their elements: religious ideology and legal awareness, religious and secular courts, law-making and law-enforcing bodies, religious and legal norms. For instance, religion and the right to moral and ethical ideas, mutual regulation of social relations by legal and religious norms; direct mutual influence of heterogeneous elements of religious and legal systems.

In considering the nature of religion, a "broad" approach is used, which in legal research allows (a) evaluating the Ukrainian legal tradition in the Soviet period in a new way, which cannot be considered devoid of attempts to legitimise law thanks to religious means; (b) reconsidering the role of the religious factor in law-making and law-enforcement processes.

As normative regulators, law and religion arise because of the disintegration of original mononorms, are normative, mostly formalised, have a hierarchical system of sources, organisational and institutional formations, provided with responsibility for violations of their prescriptions (common features). Differences are observed in the spheres of regulation, ways of legitimising norms (heteronomy of law and autonomy of religion), in the structure of norms, linguistic features of sources, subject composition, degree of conflict between subjects, nature of responsibility and functional load.

The influence of religion (or its elements) on law, their interaction is manifested in the religious determination of law-making, the support of legal prescriptions and law

and order in general by religious means, the influence of the church on public-authority institutions, the contradictions that arise between the norms of law and religion. The mechanism for overcoming these contradictions should be based on the primacy of legal prescriptions, which is combined with the legislative creation of conditions for subjects to exercise their religious rights and the prevention of violence against the religious feelings and convictions of believers (while not violating the rights of other persons). The influence of the right to religion is quite limited and is manifested in the reduction of the authoritarianism of the religious worldview, the impossibility of absorption by different creeds of each other, in the regulation of the mechanism and forms of implementation, the limits of the exercise of religious rights, in the preservation and development of legal forms of activity by individual religions.

Forms of religious influence on law-making include (a) sanctioning of religious norms by the state (direct form); (b) promotion of the genesis of new legal norms or inhibition of this process; (c) determination of the evolutionary movement of the legal system as a whole and the development of legal science (mediated forms). The sanctioning of religious norms takes place in two vectors: the transfer into legal reality of norms that directly regulate social relations, and the sanctioning of general principles, bases, and principles that unite separate norms into a single system. With the development of secularisation of law and politics, the amount of sanctioning of religious norms decreases, religious influence acquires mainly indirect forms.

A common element of the entire typology of legal systems are values and principles that are supported by all major religions and protected in most legal systems of the world (life, property, traditional marital relations, established social order, fair public procedures).

To improve the legal regulation of religious relations, it is proposed to introduce changes to the current legislation of Ukraine regarding granting the church the status of a legal entity, detailing the mechanisms for ensuring the exercise of freedom of conscience by military personnel, refugees; as well as ways to improve law-enforcement practices regarding the fulfilment of religious duties by believers (e.g., pilgrimages), ensuring non-interference of churches in political processes.

Therefore, a true real understanding, an understanding of the essence of law, spiritualised and nurtured by religious holiness, can be the general recognition in all legal systems of the countries of the world of the principle of the rule of law.

References

[1] Yermakova, H.S. (2016). The religious factor and its influence on the consolidation of human rights and freedoms in the legal field of the European Union. *Scientific Bulletin of the International Humanities University. Series: Jurisprudence*, 22, 19-23.
[2] Lvova, O.L. (2007). Functional interaction of law and religion in the aspect of realization of human rights and freedoms. In N.M. Onishchenko, O.V. Zaychuk (Eds.), *Problems of realization of human and civil rights and freedoms in Ukraine* (pp. 313-320). Kyiv: Yurydychna Dymka.
[3] Payda, Yu.Yu. (2012). Role of law and religion in the improvement of the mechanism of realization of rights of a person. *Legal Bulletin "Air and Space Law"*, 1, 65-70.
[4] Arabadji, N. (2021). The influence of Christianity on the legal system of Ukraine in the conditions of transformations of state-religious relations. *Public Law*, 2, 130-136. doi: 10.32782/2306-9082/2021-42-13.
[5] Kelman, M.S., & Stratonov, V.M. (2020). *General theory of law*. Kherson: OLDI-PLUS.
[6] Lutskyi, I.M. (2012). Implementation of moral, ethical and religious norms in the basic provisions of the Constitution of Ukraine. *Scientific and Information Bulletin of the Ivano-Frankivsk University of Law named after King Danylo Halytsky*, 6, 17-22.
[7] Gutiv, B.I. (2021). *Formation and functioning of state institutions and the law of the Vatican*. Lviv: HALYCH-PRESS.
[8] Vovk, D.O. (2008). *Law and religion* (Doctoral thesis, Yaroslav Mudryi National Law University, Kharkiv, Ukraine).
[9] The Bible, or the Book of Scripture of the Old and New Testaments. (1993). Kyiv: Ukrainian Bible Society.
[10] Oborotov, Yu.M. (2003). *Church law in the domestic legal tradition*. Odesa: Jurydychna literatura.
[11] Golfner, J. (2002). *Cardinal. Christian social teaching*. Lviv: Svichado.
[12] Fuller, L.L. (1999). *Anatomy of law*. Kyiv: Sfera.
[13] Pavlenko, O. (2011). Civilization. In Yu. Levenets, Yu. Shapoval et al. (Eds.), *Political Encyclopedia* (p. 770). Kyiv: Parliamentary Publishing House.
[14] Samokhvalov, V.V. (2000). Legality and justice in antiquity and the Middle Ages. *Constitutional State*, 11, 510-519.
[15] Quintus Horace Flaccus. (1982). *Works*. Kyiv: Dnipro.
[16] Turnover, I.G. (2021). Postmodernism and globalization: The religious aspect. In *Private law in the context of globalization: Theoretical and practical aspects* (pp. 22-26). Mykolaiv: Ilion.
[17] Cicero, M.T. (2020). *About laws. About the state. About the nature of the gods*. Lviv: Apriori.
[18] Voloshchenko, O.M. (2006). Canon law as a separate system of law. *Journal of Kyiv University of Law*, 2, 52-56.
[19] Kolodny, A.M. (1999). *The phenomenon of religion*. Kyiv: Svit Znan.
[20] Kelman, M., Nesprava, M., Tokarska, A., Vovk, V., & Skrypa, Ye. (2020). Ontology of good and evil in the understanding of the great Christian teachers and saints. *Journal of legal, ethical and regulatory issues*, 23(5). Retrieved from https://www.abacademies.org/articles/ontology-of-good-and-evil-in-the-understanding-of-great-christian-teachers-and-saints-9668.html.
[21] Sunegin, S.O. (2017). Law, morality and religion as social regulators: Objective and subjective dimensions. *Constitutional State*, 28, 145-163.
[22] Kelman, M., Kristinyak, M., Andrusiak, I., Panchenko, S., & Kelman, R. (2021). The influence of the ruling elite on political activity in the conditions of destructuring the essence of the philosophy of law. *WISDOM*, 1(1), 91-97. doi: 10.24234 / wisdom.v1i1.603.
[23] Kalinin, Y.A., & Kharkovshchenko, E.A. (1994). *Religious studies*. Kyiv: Naukova dumka.
[24] The Holy Scriptures. (2021). Lviv: Svichado.
[25] Rechytsky, V.V. (2007). *Symbolic reality and law*. Lviv: VNTL-Classics.

Список використаних джерел

[1] Єрмакова Г.С. Релігійний фактор і його вплив на закріплення прав і свобод людини в правовому полі Європейського Союзу. *Науковий вісник Міжнародного гуманітарного Університету. Серія: Юриспруденція*. 2016. № 22. С. 19–23.
[2] Львова О.Л. Функціональна взаємодія права і релігії в аспекті реалізації прав і свобод людини. *Проблеми реалізації прав і свобод людини та громадянина в Україні*: монографія / за ред. Н.М. Оніщенко, О.В. Зайчука. Київ: Юридична думка, 2007. С. 313–320.
[3] Пайда Ю.Ю. Роль права та релігії в удосконаленнях механізму реалізації прав людини. *Юридичний вісник «Повітряне і космічне право»*. 2012. № 1. С. 65–70.
[4] Арабаджи Н. Вплив християнства на правову системуУкраїни в умовах трансформацій державно-релігійних відносин. *Публічне право*. 2021. № 2(42). С. 130–136. doi: 10.32782/2306-9082/2021-42-13.
[5] Кельман М.С., Стратонов В.М. Загальна теорія права: підручник. Херсон: ОЛДІ-ПЛЮС, 2020. 742 с.
[6] Луцький І.М. Втілення морально-етичних і релігійних норм у засадничих положеннях Конституції України. *Науково-інформаційний вісник Івано-Франківського університету права імені Короля Данила Галицького*. 2012. Вип. 6. С. 17–22.
[7] Гутів Б.І. Становлення та функціонування державних інститутів і права Ватикану: монографія. Львів: ГАЛИЧ-ПРЕС, 2021. 540 с.
[8] Вовк Д.О. Право і релігія: автореф. дис. … канд. юрид. наук: 12.00.01 / Національна юридична академія України імені Ярослава Мудрого. Харків, 2008. 20 с.
[9] Біблія, або Книга Святого Письма Старого й Нового Заповіту. Київ: Українське Біблійне Товариство, 1993. 296 с.
[10] Оборотов Ю.М. Церковне право у вітчизняній правовій традиції. Одеса: Юридична література, 2003. 82 с.
[11] Гольфнер Й. Кардинал. Християнське суспільне вчення. Львів: Свічадо, 2002. 304 с.
[12] Фуллер Л.Л. Анатомія права: наук. вид. / пер. з англ. Н. Комарова. Київ: Сфера, 1999. 144 с.
[13] Павленко О. Цивілізація. *Політична енциклопедія* / Редкол.: Ю. Левенець, Ю. Шаповал та ін. Київ: Парламентське видавництво, 2011. С. 770.
[14] Самохвалов В.В. Законність і справедливість в епоху античності і середньовіччя. *Правова держава*. 2000. Вип. 11. С. 510–519.
[15] Квінт Горацій Флакк. Твори / пер. з лат. А. Содомори. Київ: Дніпро, 1982. 254 с.
[16] Оборотов І.Г. Постмодерн и глобализация: религиозный аспект. *Приватне право в умовах глобалізації: теоретичні та практичні аспекти*: збірник наукових праць. Миколаїв: Іліон, 2021. С. 22–26.
[17] Ціцерон М.Т. Про закони. Про державу. Про природу богів. Львів: Апріорі, 2020. 392 с.
[18] Волощенко О.М. Канонічне право як окрема система права. *Часопис Київського університету права*. 2006. № 2. С. 52–56.
[19] Колодний А.М. Феномен релігії. Київ: Світ знань, 1999. 52 с.
[20] Ontology of good and evil in the understanding of great christian teachers and saints / M. Kelman et al. *Journal of Legal, Ethical and Regulatory Issues*. 2020. Vol. 23, No. 5. URL: https://www.abacademies.org/articles/ontology-of-good-and-evil-in-the-understanding-of-great-christian-teachers-and-saints-9668.html.
[21] Сунєгін С.О. Право, мораль і релігія як соціальні регулятори: об'єктивний та суб'єктивний виміри. *Правова держава*. 2017. Вип.28. 2017. С. 145–163.
[22] The influence of the ruling elite on political activity in the conditions of destructuring the essence of the philosophy of law / M. Kelman et al. *WISDOM*. 2021. Vol. 1, No. 1. P. 90–97. doi: 10.24234/wisdom.v1i1.603.
[23] Калінін Ю.А., Харьковщенко Є.А. Релігієзнавство: підручник. Київ: Наукова думка, 1994. 168 с.
[24] Святе письмо / пер. І. Хоменка. Львів: Свічадо, 2021. 1504 с.
[25] Речицький В.В. Символічна реальність і право. Львів: ВНТЛ-Класика, 2007. 732 с.

Релігія – вагомий чинник правотворчого і правозастосовного процесів

Михайло Степанович Кельман, Ростислав Михайлович Кельман

Національний університет «Львівська політехніка»
79000, вул. Степана Бандери, 12, м. Львів, Україна

Анотація. Актуальність дослідження зумовлено тим, що в наукових працях майже немає спроб теоретичної розробки співвідношення релігії і права. Поза увагою вчених-правників залишаються форми впливу релігії на правотворчу і правозастосовну діяльність. Наявні дослідження в цій царині досить часто характеризуються фрагментарністю. Метою статті є встановлення на підставі сучасного праворозуміння основних засад співвідношення релігії і права, з'ясування ролі релігії саме в юридичній площині. Філософсько-методологічною основа роботи – використання принципу плюралізму у виборі методологічних підходів, методів та прийомів, бо саме вони становлять фундамент науково-пізнавального процесу, забезпечують єдність та цілеспрямованість під час дослідження спільних рис релігії і права у правотворчому та правозастосовному процесі, як-от: ритуальність, традиційність, авторитетність та універсальність. Стверджується, що в сучасному суспільстві релігійні цінності хоча і втрачають своє минуле значення «священного образу» світу, і навіть якщо християнські засади не мають прямого впливу на правову систему, вони все одно відіграють вагому роль у правовому житті, тому що європейська правова культура створювалася під впливом християнства, християнського погляду на світ. Сучасні європейські правові системи функціонують у соціальній системі, яка увібрала християнські релігійні цінності. Дослідження спрямоване на подальший розвиток загальної теорії права, поглиблення знань про співвідношення релігії і права в системі суспільного регулювання, вдосконалення законодавства. Отримані результати можуть бути використані у сфері правотворення та правозастосування, для підготовки підручників, навчальних посібників, для правників, філософів, соціологів та всіх небайдужих до справи розвою правосвідомості

Ключові слова: Бог, право, людина, норма, суспільство, розум, справедливість, закон, політика, держава

Науково-аналітичний журнал
«СОЦІАЛЬНО-ПРАВОВІ СТУДІЇ»

Том 5, № 2
2022

(Англійською мовою)

Літературний редактор:
М. Ковінько

Редагування бібліографічних списків:
К. Сосєдко

Комп'ютерна верстка:
К. Сосєдко

Підписано до друку з оригінал-макета 29.06.2022
Ум. друк. арк. 11,6

Видавництво: Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна
тел.: +380 (32) 233-20-80
E-mail: info@sls-journal.com.ua
www: https://sls-journal.com.ua/uk

The scienti ic and analytical journal
“SOCIAL AND LEGAL STUDIOS”

Volume 5, No. 2
2022

Literary editor:
M. Kovinko

Editing bibliographic lists:
K. Sosiedko

Desktop publishing:
K. Sosiedko

Signed to the print with the original layout 06/29/2022.
Conventional Printed Sheet 11.6

Publisher: Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine
tel.: +380 (32) 233-20-80
E-mail: info@sls-journal.com.ua
www: https://sls-journal.com.ua/en