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Policy issues and legal support for the activity of the State Bureau of Investigation in Ukraine

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Abstract

Using dialectics and cognition method the purpose of this work was to analyze the appropriate level of legal support for the activities of the State Bureau of Investigation, to determine its effectiveness and to identify problematic aspects. A number of statutes, reports, online meetings and speeches delivered in the media and in the specialized committee of the Verkhovna Rada of Ukraine were investigated. It is concluded that among the shortcomings of the State Bureau of Investigation regulation, the following stand out: 1) Absence of a system of internal law enforcement agencies and clear delimitation of their role; 2) Uncertainty about the status of the State Investigation Bureau as an anti-corruption body; 3) Changes in the status compared to the principal established in the first edition of the Basic Law of Ukraine; 4) Inadequacy of regulatory consolidation of social and pension provision of employees of the State Bank of Ukraine; 5) Questions about the need to create expert services in the SBI system and include them among the state institutions entitled to conduct forensic examinations in Ukraine.

Keywords: normative and legal support; law enforcement agencies; State Bureau of Investigation; National Anti-Corruption Bureau of Ukraine; wartime crimes against children.

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Cuestiones de política y apoyo jurídico a la actividad de la Oficina Estatal de Investigación en Ucrania

Resumen

Mediante el uso de la dialéctica y el método de cognición el propósito de este trabajo fue analizar el nivel adecuado de respaldo legal para las actividades de la Oficina Estatal de Investigación, para determinar su eficacia e identificar aspectos problemáticos. Se investigaron una serie de estatutos, informes, reuniones en línea y discursos pronunciados en los medios de comunicación y en el comité especializado de la Rada Suprema de Ucrania. Se concluye que entre las deficiencias de la regulación de la Oficina Estatal de Investigaciones, se destacan las siguientes: 1) Ausencia de un sistema de agencias de aplicación de la ley internas y una delimitación clara de su rol; 2) Incertidumbre sobre la condición del Negociado Estatal de Investigaciones como órgano anticorrupción; 3) Cambios en el estado en comparación con el principal establecido en la primera edición de la Ley Básica de Ucrania; 4) Inadecuación de la consolidación reglamentaria de la provisión social y de pensiones de los empleados del Banco Estatal de Ucrania; 5) Preguntas sobre la necesidad de crear servicios de expertos en el sistema SBI e incluirlos entre las instituciones estatales que tienen derecho a realizar exámenes forenses en Ucrania.

Palabras clave: soporte normativo y legal; organismos encargados de hacer cumplir la ley; Oficina Estatal de Investigaciones; Oficina Nacional Anticorrupción de Ucrania; crímenes contra los niños en tiempos de guerra.

Introduction

The State Bureau of Investigation (after this - SBI) is a Ukrainian state law enforcement agency tasked with the prevention, detection, termination, disclosure, and investigation of criminal offenses primarily against high-ranking officials, heads of anti-corruption agencies, the judicial corps, law enforcement officers and against the established order of wearing military uniform service, which, in fact, concentrates in itself perhaps the most significant powers in terms of the system of currently operating domestic law enforcement agencies as a whole.

At the same time, the legal regime of martial law has a significant impact on the organization of the work of law enforcement agencies that conduct pre-trial investigations. Currently, on the territory of Ukraine, the most resonant, in addition to directly military ones, are crimes against children in the occupied territories, and therefore, the issue of legal responsibility

for sexual and other violence against children committed during wartime is gaining special relevance.

The changes introduced following Laws of Ukraine No. 305-IX dated 03.12.2019 and No. 720-IX dated 17.06.2020 add particular importance and update the status of the body, according to which the SDB from the status of “central body of executive power carrying out law enforcement activities” was transformed into a “state law enforcement body,” which is entrusted with the tasks as mentioned above, which, strengthened the independence of this body and gave it considerable governmental weight (Gulak *et al.*, 2023).

1. Objectives

This work aims to analyze the appropriate level of legal support for the State Bureau of Investigation activities, analyze its effectiveness, and identify problematic aspects.

2. Materials and methods

General scientific and unique scientific methods of cognition were used to achieve the goal, particularly dialectical, formal-logical, analysis, synthesis, systemic-structural, comparative-legal, formal-legal, and prognostic.

The theoretical basis for the research was provided by the scientific output of scientists who dealt with issues of legal support for the system of newly created Ukrainian state law enforcement agencies in general, as well as the legal basis for the formation and operation of the State Bureau of Investigation.

The problems of the functioning and activity of the system of new law enforcement agencies, whose activities are aimed primarily at combating and preventing corruption, were investigated in the work of Gulak O., Kurylo V., Dubchak L., Golovko L., Holovii L., Yara O. (Golovko *et al.*, 2022; Gulak *et al.*, 2015; Gulak *et al.*, 2021; Dubchak *et al.*, 2021; Gulak *et al.*, 2022; Yara *et al.*, 2021). Furthermore, public control over the activities of the State Bureau of Investigation was studied in a recent work by the co-authors of the same scientific publication (Gulak *et al.*, 2023). In the context of writing the article, the work of Ladychenko V., Danyliuk Yu., Golovko L., Kidalov S., Kutsevych M. who studied public participation in ensuring security and law and order at the level of local self-government bodies, was used (Ladychenko *et al.*, 2021; Golovko, 2017; Kidalov *et al.*, 2020; Kutsevych *et al.*, 2020).

A comparative analysis of the legal support of the formation and activity of the newly created state law enforcement bodies of the anti-corruption direction became important in the scope of the research. In addition, several by-laws, reports, online meetings and speeches in the mass media, the specialized committee of the Verkhovna Rada of Ukraine were examined, and a critical look was made at the personal participation of the co-authors of the study in the election of the Council of Public Control at the SBI of the new term.

3. Results and discussion

Among several legal conflicts and imperfections in the normative regulation of the legal foundations of the formation and activity of the State Bureau of Investigation, we singled out the following blocks, which we aim to investigate in the course of writing this scientific article:

1. Absence of a system (clearly defined by a single normative legal act of such a list) of domestic law enforcement agencies and a clear delineation of the place of the SBI itself in it;
2. Uncertainty of the status of the State Bureau of Investigation as an anti-corruption body and a body in the system of ensuring domestic national security, in particular, the presence of gaps and conflicting positions in the Basic Law of Ukraine on establishing the foundations of the SBI's activities, as well as in the corresponding profile main legislative acts of Ukraine;
3. Changes in the status of the DBR in comparison with the primary one established in the first edition of the Basic Law of Ukraine, which, by analogy with the status of the National Anti-Corruption Bureau of Ukraine, are such that they contradict the norms of the Constitution of Ukraine and are the subject of consideration in the Constitutional Court of Ukraine;
4. Inadequacy of regulatory consolidation of social and pension provision of employees of the State Bank of Ukraine;
5. Questions regarding the need to create expert services in the SBI system and include them among the state institutions with the right to conduct a forensic examination in Ukraine.

The current legislation of Ukraine needs to contain a clear list of Ukrainian state bodies that are law enforcement. The Law of Ukraine "On State Protection of Court Employees and Law Enforcement Bodies" (Law of Ukraine, 1993) provides an incomplete list of bodies considered law enforcement for this Law. The Law of Ukraine "On the National Security

of Ukraine” (Law of Ukraine, 2018) discloses only the main characteristics of law enforcement agencies. Several subordinate legal acts contain non-exhaustive lists of such bodies. In particular, some founding documents of state bodies directly indicate their law enforcement status (Resolution of the Cabinet of Ministers of Ukraine, 2009).

So, to the list of law enforcement agencies, which are defined in Article 2, “Basic Concepts” of the Law of Ukraine “On State Protection of Court Employees and Law Enforcement Agencies” following the latest amendments introduced under the norms of Law of Ukraine No. 1150-IX dated 28.01.2021 (Law of Ukraine, 2021a), include the following: “bodies of the prosecutor’s office, the National Police, the security service, the Military Law and Order Service of the Armed Forces of Ukraine, the National Anti-Corruption Bureau of Ukraine, the state border protection bodies, the Bureau of Economic Security of Ukraine, bodies and institutions for the execution of punishments, pretrial detention centers, bodies of state financial control, fish protection, state of forest protection, other bodies that perform law enforcement or law enforcement functions” (Law of Ukraine, 1993).

At the same time, the content of Article 1 of the Law of Ukraine “On the State Bureau of Investigation” indicates the opposite: “The State Bureau of Investigation is a state law enforcement body entrusted with the tasks of prevention, detection, termination, disclosure, and investigation of criminal offenses assigned to its competence” (Law of Ukraine, 2015).

Therefore, the absence of both a comprehensive normative and legal action regarding the unified definition of the system of “law enforcement agencies” and the absence of the “State Bureau of Investigation” among the list of such, in particular, in Article 2 “Basic Concepts” of the Law of Ukraine “On State Protection of Court Employees and law enforcement agencies” gives rise to many legal differences, collisions, and procedural contradictions.

The same legal conflicts concern the uncertainty of the status of the State Bureau of Investigation as an anti-corruption body and a body in the system of ensuring domestic national security. In particular, the very status of the SBI, enshrined in Article 1 of the Law of Ukraine “On the State Bureau of Investigation” (Law of Ukraine, 2015), mentions the relationship of this body neither to anti-corruption nor that which is part of the Ukrainian security and defense sector does not have.

At the same time, the norms of the Law of Ukraine, “On Prevention of Corruption,” are contradictory, even within the same law. In particular, Article 1, “Definition of Terms” of the Law of Ukraine “On Prevention of Corruption” operates in entirely different interpretations regarding the place and role of the law enforcement body under investigation, defining:

1. among the list of specially authorized entities in the field of anti-corruption - the prosecutor's office, the National Police, the National Anti-Corruption Bureau of Ukraine, and the National Agency for the Prevention of Corruption;
2. and at the same time, including, following the latest changes stipulated by the provisions of the Law of Ukraine No. 1502-IX dated 01.06.2021 (Law of Ukraine, 2021b), among the regular channels of reporting on possible facts of corruption or corruption-related offenses – methods of protected (including anonymous) reporting of information by the whistleblower to the prosecutor's office, the National Police, the National Anti-Corruption Bureau of Ukraine, the National Agency for the Prevention of Corruption, and the State Bureau of Investigation (Law of Ukraine, 2014).

Part 2 of Article 12, "Composition of the Security and Defense Sector" of the Law of Ukraine "On National Security of Ukraine" refers to the security and defense sector: "Ministry of Defense of Ukraine, Armed Forces of Ukraine, State Special Transport Service, Ministry of Internal Affairs of Ukraine, National Guard of Ukraine, National Police of Ukraine, State Border Service of Ukraine, State Migration Service of Ukraine, State Emergency Service of Ukraine, Security Service of Ukraine, The Anti-Terrorist Center under the Security Service of Ukraine, the Judicial Security Service, the State Security Office of Ukraine, the State Service for Special Communications and Information Protection of Ukraine, the Apparatus of the National Security and Defense Council of Ukraine, the intelligence agencies of Ukraine, the central body of executive power that ensures the formation and implementation of state military-industrial policy" (Law of Ukraine, 2018), without including the body under study.

Therefore, regardless of the lack of a classification of the State Bureau of Investigation both in the main and in the relevant legislation as an anti-corruption body and a body in the system of ensuring domestic national security, we see the need for such a legal step, since de facto. Accordingly, intermediate norms of the current legislation, the SBI performs these functions directly.

At one time, special anti-corruption laws were adopted (in particular, Laws of Ukraine: "On the Anti-Corruption Bureau of Ukraine" and "On the State Bureau of Investigation"). However, they were not harmonized with the Constitution of Ukraine. This incompleteness of the previous parliament gave rise to many legal conflicts.

Thus, the director of the National Anti-corruption Bureau of Ukraine was appointed in April 2015 by issuing a corresponding Decree of the President of Ukraine, which the Constitution of Ukraine does not provide as the exclusive authority of the highest official of the Ukrainian state.

In December 2019, the Constitutional Court of Ukraine did not agree to the changes to the Constitution of Ukraine, which allowed the President to appoint the directors of the SBI and NABU. On August 28, 2020, the Constitutional Court of Ukraine recognized as unconstitutional the Decree of the President of Ukraine on the appointment of Artem Sytnyk to the position of Director of the National Anti-Corruption Bureau (which took place in April 2015) and the provisions of the Law of Ukraine “On NABU” regarding the participation of the President in the selection and appointment of the Director of the Bureau (Komisarov, 2021).

In order to resolve such significant regulatory discrepancies in the system of anti-corruption legislation, several draft Laws of Ukraine were submitted to the Verkhovna Rada of Ukraine. In particular, on February 15, 2021, the Verkhovna Rada registered the government draft law No. 5070 on bringing the status of NABU into compliance with the requirements of the Constitution (Draft Law of Ukraine, 2021a). And on February 22 of the same year - draft Law No. 5133 of February 22, 2021, “On Amendments to Articles 85 and 106 of the Constitution of Ukraine (Regarding the Procedure for Appointment and Dismissal of the Director of the National Anti-Corruption Bureau of Ukraine and the Director of the State Bureau of Investigation)” (Draft Law of Ukraine, 2021b).

The rationale behind the latest legislative initiative was that those anti-corruption law enforcement agencies that investigate and uncover corruption crimes by top officials, judges, and law enforcement officers, namely NABU and SBI, should be as independent as possible from the legislative (Verkhovna Rada) and executive (Cabinet of Ministers) authorities. On March 16, 2021, following the review of the latest legislative initiative, draft Law No. 5133 was sent to the Constitutional Court for its opinion (Draft Law of Ukraine, 2021b).

The proposed constitutional changes are necessary for the legislative recognition of NABU and DBR as state authorities with a special status. From a constitutional and legal point of view, amendments to the Basic Law of our country will make it possible to distinguish the legal status of the State Security Bureau and NABU from the status of other state authorities.

Similar constitutional and legal transformations are due primarily to the specific tasks that the SBI and NABU must carry out within the limits of their powers. At the same time, following the provisions of draft law No. 5133, the improvement of work in the anti-corruption sphere will be based on parity and competitive principles of the procedure for appointing and dismissing directors of these state law enforcement agencies. Similar proposals were repeatedly expressed by Ukraine’s international partners (Shevchuk, 2021).

Note that the current status of NABU in the relevant Law of Ukraine has been changed from a different law enforcement body, whose director is appointed by the President of Ukraine, to a “central body of executive power with a special status,” following the requirements of Law of Ukraine No. 1810-IX dated 19.10.2021 “On Introduction amendments to some laws of Ukraine regarding bringing the status of the National Anti-Corruption Bureau of Ukraine into compliance with the requirements of the Constitution of Ukraine” (Law of Ukraine, 2021c).

Instead, at the same time, the SBI acquires the status of a state law enforcement agency instead of the previous version: “a central body of executive power that carries out law enforcement activities,” following the norms of the Law of Ukraine “On Amendments to Certain Laws of Ukraine on Improving the Activities of the State Bureau of Investigations.” adopted at the end of 2019 (Law of Ukraine, 2019).

In addition, according to the complete order of norms defined for him by the Constitution of Ukraine, the President of Ukraine does not have such powers concerning the newly created body - the State Bureau of Investigation. Therefore, the norm established in Part 2 of Art. 28 of the Law of Ukraine “On the State Bureau of Investigations,” regarding the fact that the Regulations on the Council of Public Control and the procedure for its formation are approved by the President of Ukraine at the request of the Director of the State Bureau of Investigations, do not correspond, in our opinion, to the central Law of our state (Gulak *et al.*, 2023).

Among the essential problematic issues in the activity of the SBI are the following: the issue of social and pension security for SBI employees and the need to create expert services in the SBI system and include them among the state institutions that have the right to conduct forensic examinations in Ukraine.

In particular, a draft of the Law of Ukraine “On Amendments to the Law of Ukraine “On the State Bureau of Investigation” and other legislative acts on social protection of rank-and-file and senior members of the SBI and particular issues of service in the SBI was prepared for the SBI, which, following the procedure established by law, along with accompanying documents, was sent to the Committee of the Verkhovna Rada of Ukraine on Law Enforcement Activities (Letter dated May 11, 2022, No. 10-11-01-6163). However, the subjects of the legislative initiative still need to introduce the specified draft law for consideration by the Verkhovna Rada of Ukraine.

In addition, the Cabinet of Ministers of Ukraine, as a subject of the right of a legislative initiative to eliminate legislative gaps and regulate legal relations in the field of pension provision for employees of the State Bureau of Investigation, submitted to the Verkhovna Rada of Ukraine on

22.07.2021 the draft Law of Ukraine “On making changes to some laws of Ukraine regarding the regulation of certain issues of pension provision and insurance of employees of the State Bureau of Investigation” (reg. No. 5818). According to the results of voting at the plenary session of the VRU, which took place on December 1, 2022, the mentioned draft law was rejected in connection with the issue of pension provision for members of the rank and file of the SBI still needs to be solved.

Currently, the Verkhovna Rada of Ukraine is considering draft law No. 5305, “On Amendments to Certain Laws of Ukraine on Improving the Legal Basis of the State Bureau of Investigation,” registered on March 26, 2021.

The Verkhovna Rada of Ukraine adopted the said draft law on 01.07.2021 as a basis. However, during its preparation for the second reading, the norms regarding the creation of expert services in the SBI system and their classification as state institutions entitled to perform forensic examination were removed from it in Ukraine, even though the Opinion of the VRU Committee on Law Enforcement Activities dated November 24, 2021, recommended its adoption in the second reading and as a whole as a law with the necessary technical and legal amendments.

Conclusions

Our analysis of the regulatory and legal foundations of the formation and operation of the State Bureau of Investigation, which, according to its status, is currently, the law enforcement body with the most potent powers, showed several conflicting norms and contradictions.

Among the imperfections of the normative regulation of the legal foundations of the formation and activity of the State Bureau of Investigation, we singled out the following blocks, which were investigated in the course of writing this scientific article:

1. Absence of a system (clearly defined by a single normative legal act of such a list) of domestic law enforcement agencies and a clear delineation of the place of the SBI itself in it;
2. Uncertainty of the status of the State Bureau of Investigation as an anti-corruption body and a body in the system of ensuring domestic national security, in particular, the presence of gaps and conflicting positions in the Basic Law of Ukraine on establishing the foundations of the SBI’s activities, as well as in the corresponding profile main legislative acts of Ukraine;
3. Changes in the status of the DBR in comparison with the primary one established in the first edition of the Basic Law of Ukraine,

which, by analogy with the status of the National Anti-Corruption Bureau of Ukraine, are such that they contradict the norms of the Constitution of Ukraine and are the subject of consideration in the Constitutional Court of Ukraine;

4. Inadequacy of regulatory consolidation of social and pension provision of employees of the State Bank of Ukraine;
5. Questions regarding the need to create expert services in the SBI system and include them among the state institutions with the right to conduct a forensic examination in Ukraine.

It was concluded that the absence of both a comprehensive legal act regarding the unified definition of the system of “law enforcement agencies” and the absence of the “State Bureau of Investigation” among the list of such, in particular, in Article 2 “Basic Concepts” of the Law of Ukraine “On State Protection of Court Employees and law enforcement agencies” gives rise to many legal differences, collisions, and procedural contradictions.

In addition, regardless of the lack of a classification of the State Bureau of Investigation as an anti-corruption body and a body in the system of ensuring domestic national security in both the primary and specialized legislation, we see the need for such a legal step, since de facto. Accordingly, intermediate norms of current legislation, the SBI performs these functions directly.

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