

ЕКОНОМІКА ТА УПРАВЛІННЯ НАЦІОНАЛЬНИМ ГОСПОДАРСТВОМ

UDC 338.2:351.72:343.8

УДК 338.2:351.72:343.8

O. M. Tohochynskyi, Doctor of Pedagogy,
Associate Professor,
Honoured Worker of Education of Ukraine,
V. O. Anishchenko, Candidate of Engineering
Sciences, Associate Professor,
M. S. Puzyrov, Candidate of Juridical Sciences

O. M. Тогочинський, д. пед. н., доцент,
Заслужений працівник освіти України,
В. О. Аніщенко, к. т. н.,
доцент,
М. С. Пузирьов, к. ю. н.

ECONOMIC AND LEGAL NATURE OF PUBLIC-PRIVATE PARTNERSHIP IN THE PENITENTIARY SYSTEM

ЕКОНОМІКО-ПРАВОВА ПРИРОДА ДЕРЖАВНО-ПРИВАТНОГО ПАРТНЕРСТВА В ПЕНІТЕНЦІАРНІЙ СИСТЕМІ

Urgency of the research is in the necessity to solve a complex task for the improvement and development of new forms of economic and legal provision of the execution of punishments.

Target setting. Despite the state recognition of the concept of «public-private partnership» in the Penitentiary sphere, a lot of issues concerning economic and legal nature of this institute require in-depth interdisciplinary research.

Actual scientific researchers and issues analysis. Domestic and foreign scholars researched the issues of expediency or in expediency of creating private penal institutions, due to legal attitudes, without paying attention to economic component.

Uninvestigated parts of general matters defining. The issues as to argumentation of private sector in the field of execution of punishments using are still underdeveloped.

The research objective. Clarification of economic and legal nature of public-private partnership in the Penitentiary System with further substantiation of its perspective forms for reaching the goal of economic expediency and correction and re-socialization of convicts.

The statement of basic materials. Foreign experience studying enabled to identify such forms of public-private partnership in the Penitentiary System as: 1) provision of psychological, medical and educational spheres of activity, as well as maintenance of prison facilities; 2) economic component of prison functioning, medical and social services and partially security functions; 3) transporting, feeding and providing other services for prisoners' holding; 4) guarding and maintaining order in courts; 5) prisoners' guarding in medical institutions.

Conclusions. The following perspective forms of economic and socio-legal substantiation for public-private partnership in the Penitentiary System are offered: 1) concluding contracts regarding labor employment of convicts; 2) building of new remand prisons and penal institutions in the cities of Ukraine at the expense of redistribution of public and private funds.

Keywords: economic and legal nature; public-private partnership; Penitentiary System.

DOI: 10.25140/2410-9576-2018-3(15)-38-42

Urgency of the research. Current stage of the Penitentiary System of Ukraine reforming places on the agenda a complex task concerning the improvement and development of new forms of economic

Актуальність теми дослідження полягає у необхідності розв'язання комплексного завдання щодо вдосконалення та розроблення нових форм економіко-правового забезпечення процесу виконання покарань.

Постановка проблеми. Незважаючи на державне визнання концепту «державно-приватного партнерства» в пенітенціарній сфері, багато питань економіко-правової природи цього інституту потребують поглибленого міждисциплінарного дослідження.

Аналіз останніх досліджень і публікацій. Вітчизняні та зарубіжні вчені досліджували проблеми доцільності чи недоцільності створення приватних установ виконання покарань з юридичних позицій, не приділивши уваги економічній складовій.

Виділення недосліджених частин загальної проблеми. Недостатньо опрацьовані питання аргументації можливостей використання приватного сектора у сфері виконання покарань.

Постановка завдання. З'ясування економіко-правової природи державно-приватного партнерства в пенітенціарній системі з подальшим обґрунтуванням його перспективних форм для досягнення мети економічної доцільності та виправлення і ресоціалізації засуджених.

Виклад основного матеріалу. Вивчення зарубіжного досвіду дало можливість виявити такі форми державно-приватного партнерства в пенітенціарній системі: 1) забезпечення психологічної, медичної й освітньої сфер діяльності, а також технічне обслуговування будівель тюрми; 2) господарсько-економічна складова функціонування тюрми, медико-соціальне обслуговування і частково охоронні функції; 3) переміщення, харчування й надання інших послуг щодо утримання засуджених; 4) охорона й підтримання порядку в судах; 5) охорона засуджених у лікувальних закладах.

Висновки. Запропоновано такі перспективні форми економічного та соціально-правового обґрунтування державно-приватного партнерства в пенітенціарній системі, як: 1) укладення контрактів щодо трудової зайнятості засуджених; 2) будівництво нових слідчих ізоляторів та установ виконання покарань у великих містах України за рахунок перерозподілу державних та приватних фондів.

Ключові слова: економіко-правова природа; державно-приватне партнерство; пенітенціарна система.

ЕКОНОМІКА ТА УПРАВЛІННЯ НАЦІОНАЛЬНИМ ГОСПОДАРСТВОМ

and legal provision of the execution of punishments, taking into account positive domestic developments and progressive foreign experience.

Target setting. One of the most debatable issues from not only legal but economic points of view in the sphere of the Penitentiary System functioning is the involvement of private sector to one or another segment of its activity. Analysis of foreign experience shows that different countries have different approaches regarding volumes of private sector involvement into Penal sphere. Regardless of such volumes both in science and practice, the term «public-private partnership» is used in general as well as in the Penitentiary sphere in particular. It should be noted that this institute is new for Ukraine.

At the same time, due to the transformation processes in the 21st century the first steps in this direction have already been announced by the Ministry of Justice of Ukraine. Thus, according to the Concept regarding reform (development) of the Penitentiary System of Ukraine (approved by the Cabinet of Ministers of Ukraine dated September 13, 2017, No. 654-r) one of the main tasks of the reform is building of new remand prisons and penal institutions in the cities of Ukraine in public-private partnership [1]. It is important to note that in Ukraine since 2010 the Law «On public-private partnership» [2] is in force.

Despite the state recognition of the concept of «public-private partnership» in the Penitentiary sphere, a lot of issues concerning economic and legal nature of this institute require in-depth interdisciplinary research.

Actual scientific researchers and issues analysis. The study of foreign experience of private sector involving in the field of execution of punishments is the object of scientific papers of such scholars as L. L. Ananian, I. H. Bohatyrov, Sh. Dolovich, O. H. Krykushenko, A. A. Nykyforov, O. P. Radchenko, S. H. Rokosuiev, V. M. Trubnykov, I. S. Yakovets and others. The named scholars researched the issues of expediency or in expediency of creating private penal institutions, mostly due to legal attitudes, without paying proper attention to economic component.

Uninvestigated parts of general matters defining. Scholars have not yet dealt with the issues as to argumentation of the possibilities of private sector using in the field of execution of punishments in such an institution, as public-private partnership in the Penitentiary System. The list of forms of such partnership remains open today: to extend it only to building of new penal institutions or to other areas of vital activity of the Penitentiary System. Taking into account complex nature of raised issues, the answer to the question is not only in the field of Law, but Economics as well, that determines formulation of the subject of the study.

The research objective. The purpose of the article is to clarify economic and legal nature of public-private partnership in the Penitentiary System with further substantiation of its perspective forms for reaching the goal of economic expediency and correction and re-socialization of convicts.

The statement of basic materials. Private prisons, as an element of the Penal System, appeared in the 19th century [3, p. 145; 4, p. 34], but became widespread in foreign practice in the 80's of the 20th century [5, p. 142–144].

Taking into account the subject of the research, defining of the concept «public-private partnership» is primary as starting point for achieving the purpose of the study. This definition is currently contained in the Law of Ukraine «On public-private partnership». According to paragraph 1 part 1 Article 1 of this Law, public-private partnership is cooperation between the state of Ukraine, the Autonomous Republic of Crimea, territorial communities as relevant state bodies and bodies of local self-government (state partners) and between legal entities, except state and municipal enterprises, or individuals, who are entrepreneurs (the private partners), carried out on the basis of the contract in order, established by this Law and other legislative acts and corresponds to the features of public-private partnership, defined by this Law.

Based on the above definition and other provisions of Article 1 of the Law, we can distinguish the following features of public-private partnership in the field of execution of punishments: 1) the existence of two parties represented by such subjects as: the Ministry of Justice (that is the main body in the system of central executive authorities, which ensures the formation and implements state policy in the field of execution of criminal punishments and Probation) and bodies and institutions subordinated to it, on the one hand, and legal entities and individuals – on the other hand; 2) such cooperation is carried out on the basis of the contract; 3) private partner is determined based on the competition; 4) the winner (winners) of the competition is (are) fully responsible for the fulfillment of obligations under the contract of public-private partnership.

ЕКОНОМІКА ТА УПРАВЛІННЯ НАЦІОНАЛЬНИМ ГОСПОДАРСТВОМ

At the same time, the relevant law in Article 1 establishes special features of public-private partnership, namely: 1) giving the rights to govern (use, exploit) the object of partnership or acquisition, creating (building, reconstructing, modernizing) of public-private partnership object with further governing (using, exploiting) on condition of acceptance and fulfillment by the private partner of investment obligations in accordance with the contract, concluded in public-private partnership (paragraph 7, part 1, Article 1); 2) the long-term relationships (from 5 to 50 years) (paragraph 8 part 1, Article 1); 3) transferring a part of the risks in the process of public-private partnership implementation to the private partner (paragraph 9, part 1, Article 1); 4) making investments by the private partner into partnership objects from sources not prohibited by Law (paragraph 10, part 1, Article 1) [2]. Regarding to the specifics of the Penitentiary System functioning, the most interesting feature of public-private partnership is given in paragraph 7 part 1 Article 1. Such its formulating creates the basis for realization in Ukraine of both «nominal» and «operational (operating)» models of penal institutions privatization.

Analysis of foreign experience of these two models functioning, shows that according to the «nominal privatization» model, the private sector provides material assistance by financing building of new penal institutions, and according to the «operational privatization» model, private firms are willing to take on all everyday work, government of relevant penal institutions, spending much less money than the state which invests in such activity [3, p. 146].

Such approach, as the researches show (and ours is not an exception), does not always bring positive results. In particular, the analysis of the research by R. O. Andreiashchenko [4, p. 116–117, 125, 127] gives grounds for concluding that the reason for the privatization of a number of prisons in England and Wales in the late 1980s and early 1990s was their overcrowding, that caused a number of criminal emergencies because of decrease in the level of prisoners' provision and the restriction of their rights. At present, in these countries, the main purpose of private prisons is to reduce the state's spending on the Penitentiary System.

The privatization of penitentiary institutions in France was also caused by the problem of prisons overcrowding [5, p. 142, 143]. At the same time, it should be noted that the reform of the Penitentiary System in France in the 1980s solved the problem of prisons «overcrowding», but had no economic success.

Scholars have found out that it can also be very significant loss connected with private prisons. This is not only due to the fact that prisons themselves are built at public expense, but also because of the ultimate inefficiency and incompetence of private institutions in many spheres, such as management, office, supervision, medicine. However, the use of mixed types of prisons, in which, for example, catering and cleaning are under the responsibility of the private sector, succeeded, but it still does not save money [6, p. 12].

At the same time, the study of USA experience in the field of prisons privatization has led to the conclusion that saving in the execution of punishments is possible only in case of criminal and executive (due to which execution of the punishment means the implementation of its legal restrictions, and the essence of the execution of punishment is the implementation of retribution), but not corrective (based on the concept of a combination of punishment with corrective influence and aims at correcting and re-socializing the convicts) paradigm of the process of punishments execution.

So, according to the researchers, in the United States, private prisons receive from the state corresponding amounts per convict, regardless of the fact how much it costs. Thus, the task of the prison business is to create such a mechanism and a security mode in order to minimize guards' work. In one of the most modern prisons of the Correctional Corporation of America, 750 convicts are guarded by only 5 employees [5, p. 144].

It should be remembered that the provision of isolation and the achievement of the goal of convicts' correction are completely different things. If the first direction can be provided by reducing human resources due to the introduction of modern engineering and technical solutions, then the second direction is in the system of «human – human», and not «human – machine (technologies)». It is difficult (at least very early) to imagine the Penitentiary System, where the functions of employees of the department of social and educational and psychological work will be performed by robots (machines). This does not apply to automated systems for processing information, banks for storing personal data, etc.

ЕКОНОМІКА ТА УПРАВЛІННЯ НАЦІОНАЛЬНИМ ГОСПОДАРСТВОМ

Despite the above organization of execution of punishments in private prisons in the United States, some experts in this country point out that there is some danger that, trying to reduce labor costs, private institutions run the risk of sacrificing security.

Economic justification of functioning of private prisons can be illustrated by the following example: «If a state reduces prison expenses through contracts with the private sector, the price stipulated in the contract should be lower than the price previously charged by the state to the penitentiary institution. If a private contractor also intends to receive income from this activity, then he has to spend less money on managing the prison than the contract provides. Under such approach, in order to ensure the interests of both parties involved, private prisons must be kept at significantly lower costs than the state has done. At the same time, private contractors have no rights and can not allow the slightest decrease in the conditions of convicts' imprisonment and holding. However, in practice, private contractors are not worried about these problems. Their desire to reduce costs even at the expense of prisoners and the conditions their holding, was the only and predictable result of acting contracts» [3, p. 147].

Nowadays, taking into account detailed analysis of foreign experience in appropriate sphere, the peculiarities of national mentality and legal culture it seems unacceptable to talk about the introduction of the private sector into the Criminal and Executive System of Ukraine through functioning of the «operational (operating)» privatization model of penal institutions [7, p. 34–35].

At the same time, the rejection of the «operational (operating)» privatization model of penal institutions does not deny positive principles of public-private partnership in general and the possibilities regarding its use in the field of execution of punishments in particular. So, based on the results of foreign experience studying and national peculiarities of Ukraine, we consider the following forms of public-private partnership in the Penitentiary System to be acceptable at the present stage: 1) provision of psychological, medical and educational spheres of activity, as well as maintenance of prison facilities (Germany); 2) economic component of prison functioning, medical and social services and partially security functions (Germany, Switzerland); 3) transporting, feeding and providing other services for prisoners' holding (France); 4) prisoners' transporting, as well as guarding and maintaining order in courts (England and Wales); 5) prisoners' transportation or their guarding in medical institutions (Sweden). We consider it reasonable to reflect these forms as the subject of appropriate contract between the Ministry of Justice of Ukraine (subordinated to it bodies and institutions) and relevant private partners.

Conclusions. As a result of research we can say that now in Ukraine there are both legal and economic preconditions for the development of public-private partnership in the Penitentiary System. Despite the legally recognized possibility of implementing the «operational (operating) privatization» model (according to which private firms are willing to take on all everyday work, management of the relevant penal institutions, while spending much less money than the state which invests in such activity) as well as economic expediency of such a model for the state, its introduction in Ukraine can lead to deterioration of the conditions of prisoners' holding, violation of their rights.

According to the results of the study, perspective forms of economic and socio-legal substantiation of public-private partnership in the Penitentiary System are considered such as: 1) concluding contracts regarding labor employment (labor use) of convicts sentenced to imprisonment in conditions when labor is their right, and production capacities of the most correctional colonies are in poor condition (unable to provide all the convicts with jobs); 2) building of new remand prisons and penal institutions in the cities of Ukraine at the expense of redistribution of public and private funds.

References

1. Rozporiadzhennia Kabinetu Ministriv Ukrainy pro skhvalennia Kontseptsii reformuvannia (rozvytku) penitentsiarnoi systemy Ukrainy : vid 13.09.2017 r. № 654-r. [Order of Cabinet of Ministers of Ukraine on approval of the concept regarding reform (development) of the Penitentiary System of Ukraine from September 13, 2017 № 654-p]. Retrieved from <http://zakon2.rada.gov.ua/laws/show/654-2017-%D1%80> [in Ukrainian].

2. Zakon Ukrainy Pro derzhavno-pryvatne partnerstvo vid 01.07.2010 r. № 2404-VI [Law of Ukraine on public-private

Література

1. Про схвалення Концепції реформування (розвитку) пенітенціарної системи України: розпорядження Кабінету Міністрів України від 13.09.2017 р. № 654-р. URL: <http://zakon2.rada.gov.ua/laws/show/654-2017-%D1%80> (дата звернення: 19.12.2017).

2. Про державно-приватне партнерство: Закон України від 01.07.2010 р. № 2404-VI. *Відомості Верховної Ради України*. 2010. № 40. Ст. 524.

3. Ананиан Л. Л. Долович Ш. Наказание именем государства и частные тюрьмы (Dolovich Sh. State punishment

ЕКОНОМІКА ТА УПРАВЛІННЯ НАЦІОНАЛЬНИМ ГОСПОДАРСТВОМ

partnership from July 01, 2010 № 2404-VI]. (2010). *Vidomosti Verkhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*, 40 [in Ukrainian].

3. Ananian, L. L. (2005). Dolovich Sh. Nakazaniye imenem gosudarstva i chastnye tiurny [State punishment and private prisons]. In *Duke law journal*, 55, 3, 437-546. (2008). In *Sotsialnye i gumanitarnye nauki. Otechestvennaya i zarubezhnaya literatura. Seriya 4: Gosudarstvo i pravo. Referativnyy zhurnal – Social and human sciences. Domestic and foreign literature. Series 4: State and Law. Abstract Journal*, 140-148 [in Russian].

4. Andreyashchenko R. A. (2006). Penitentsiarnaya sistema Anglii i Uelsa v XVI-XX vv. [Penitentiary System of England and Wales in the XVI-XX centuries]. *Candidate's thesis*. Ekaterinburg [in Russian].

5. Krykushenko, O. H. (2017). Stvorennia pryvatnykh ustanov vykonannya pokarannya u vydi pozbavleniya voli: postanovka problemy [Establishment of private penal institutions for executing imprisonment: target setting]. *Visnyk Kryminolohichnoi asotsiatsii Ukrainy – Bulletin of the Criminological Association of Ukraine*, 2, 141-149 [in Ukrainian].

6. Avtukhov, K. A., et al. (2015). *Dotrymannya prav liudyny u penitentsiarnii systemi Ukrainy [Observance of human rights in the Penitentiary System of Ukraine]*. M. V. Romanov (Ed.). Kharkiv: TOV «Vydavnytstvo prava liudyny» [in Ukrainian].

7. Puzyrov M. S. (2017). Pryvatni penitentsiarni ustanovy: zarubizhnyi dosvid ta natsionalnyi pidkhid [Private penitentiary institutions: foreign experience and national approach]. *Biuleten Ministerstva yustytzii Ukrainy – Bulletin of the Ministry of Justice of Ukraine*, 7, 32-37 [in Ukrainian].

and private prisons // *Duke law j.* – Durham, 2005. – Vol. 55, N 3. – P. 437–546). *Социальные и гуманитарные науки. Отечественная и зарубежная литература. Серия 4: Государство и право. Реферативный журнал*. 2008. № 1. С. 140–148.

4. Андреященко, Р. А. Пенитенциарная система Англии и Уэльса в XVI–XX вв.: историко-юридическое исследование: дис. ... канд. юрид. наук: 12.00.01 / Р. А. Андреященко. - Екатеринбург, 2006. - 180 с.

5. Крикушенко, О. Г. Створення приватних установ виконання покарання у виді позбавлення волі: постановка проблеми / О. Г. Крикушенко. – Вісник Кримінологічної асоціації України. – 2017. № 2. – С. 141–149.

6. Дотримання прав людини у пенитенціарній системі України / К. А. Автухов та ін.; за заг. ред. М. В. Романова; ГО «Харківська правозахисна група». – Харків : ТОВ «Видавництво права людини», 2015. – 480 с.

7. Пузырьов, М. С. Приватні пенитенціарні установи: зарубіжний досвід та національний підхід / М. С. Пузырьов. – Бюлетень Міністерства юстиції України. – 2017. – № 7. – С. 32–37.

Received for publication 03.05.2018

Бібліографічний опис для цитування :

Tohochynskyi, O. M. Economic and legal nature of public-private partnership in the penitentiary system / O. M. Tohochynskyi, V. O. Anishchenko, M. S. Puzyrov // Науковий вісник Полісся. – 2018. – № 3 (15). – С. 38-42.

**Тогочинський
Олексій Михайлович**

доктор педагогічних наук, доцент, ректор Академії Державної пенитенціарної служби, професор кафедри педагогіки, Академія Державної пенитенціарної служби;
<https://orcid.org/0000-0002-8170-6237>;
E-mail: oleksiytoghochinskiy@gmail.com;

**Tohochynskyi
Oleksii Mykhailovych**

Doctor of Pedagogy, Associate Professor, Rector of Academy of the State Penitentiary Service, Professor of the Department of Pedagogy, Academy of the State Penitentiary Service;
<https://orcid.org/0000-0002-8170-6237>;
E-mail: oleksiytoghochinskiy@gmail.com;

**Аніщенко
Вікторія Олександрівна**

кандидат технічних наук, доцент, начальник науково-дослідного центру з питань діяльності органів та установ ДКВС України, кафедра адміністративного, цивільного та господарського права і процесу, Академія Державної пенитенціарної служби;
<https://orcid.org/0000-0001-7424-7688>;
E-mail: oceansoulvik111@gmail.com;

**Anishchenko
Viktoriia Oleksandrivna**

Candidate of Engineering Sciences, Associate Professor, Head of Research center for the activities of bodies and institutions of the State Criminal and Executive Service of Ukraine, Department of Administrative, Civil and Commercial Law and Process, Academy of the State Penitentiary Service;
<https://orcid.org/0000-0001-7424-7688>;
E-mail: oceansoulvik111@gmail.com;

**Пузырьов
Михайло Сергійович**

кандидат юридичних наук, головний науковий співробітник науково-дослідного центру з питань діяльності органів та установ ДКВС України, кафедра тактико-спеціальної підготовки, Академія Державної пенитенціарної служби;
<https://orcid.org/0000-0002-7814-9476>;
E-mail: mpuzyrov@gmail.com;

**Puzyrov
Mykhailo Serhiiovych**

Candidate of Juridical Sciences, Leading Researcher at the Research center for the activities of bodies and institutions of the State Criminal and Executive Service of Ukraine, Department of Tactical and Special Training, Academy of the State Penitentiary Service;
<https://orcid.org/0000-0002-7814-9476>;
E-mail: mpuzyrov@gmail.com